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

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The Templeton Debates

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The Constitutionality of the Patient Protection and Affordable Care Act

University of California, Berkeley, Boalt Hall School of Law, March 10, 2011

Richard A. Epstein*: The topic of the discussion between Professor Jesse Choper and myself is the Commerce Clause and how it relates to the constitutionality of ObamaCare, or, more dispassionately, the Patient Protection and Affordable Care Act. I approach this topic with much ambivalence. As a matter of first principle, I do not have much faith in all the individual mandate arguments that have been raised with great effectiveness and imagination by Professor Randy Barnett of Georgetown University Law Center. Randy is one of the few people who can mesmerize you with his low-key approach. What he says in measured tones may seem at first to be outrageous, only to become more persuasive to audiences as he continues to talk.

But for these purposes, I do not want to begin on the assumption that *Wickard v. Filburn*[1] and *NLRB v. Jones & Laughlin Steel*[2] are good law, much as if these controversial New Deal decisions had been handed down from Mount Sinai. In a sense, my objection to these decisions stems from my deep conviction that, on this issue at least, I count as a naïve constitutional originalist. I do not think, therefore, that the appropriate place to start this debate is by looking for an exception to the broad readings of *Wickard v. Filburn* and *Jones & Laughlin*, insisting that these cases do not touch the individual mandate on the ground that ObamaCare seeks to tax and regulate individuals who have done, quite literally, nothing at all. I see no reason in principle to start a constitutional debate on the assumption that the baseline for discussion is, or has to be, *Wickard* and *Jones & Laughlin.*

Instead of working within the framework set by these cases, it is better to begin with the original incarnation of the Commerce Clause, which, when properly understood, makes the rejection of ObamaCare on constitutional grounds one of the easiest tasks on the face of the Earth. But that negative judgment holds, almost without exception, to virtually all the signal legislation of the New Deal, which should disappear down the tubes, never to be seen again. I might add that this approach is not likely to strike a responsive chord on the current Supreme Court, where (with the possible exception of Justice Thomas) everyone has more or less bought into the status quo on the strength of Justice Rehnquist's decision in *United States v. Lopez,*[3] which started from the ingenious assumption that even if *Wickard v. Filburn* was on sacred ground, it was still possible to strike down Texas's gun control law regulating the possession of firearms within 1000 feet of a school.

What Justice Rehnquist said, in effect, was that carrying a gun within a hundred yards or a thousand feet of a school does not alter the price of goods or the quantity of guns shipped in interstate commerce. Therefore, that activity does not have a substantial effect on interstate commerce. But everything else that happened since that decision seems, with one or two exceptions, to have that forbidden type of effect. Certainly, running a comprehensive health care scheme would pass muster under the standard reading of *Wickard v. Filburn*. So, I suggest that it is likely that Justice Rehnquist would have voted to uphold the Obama Care legislation—at least before hearing the discourse prompted by Professor Barnett.

But let us go back to the beginning and examine what the Commerce Clause actually says. My naïve view of constitutional interpretation begins with treading a text in full, carefully, before entering into any lofty discourse about its function and purpose. However radical this approach is in an age of deep constitutional reflection, it proves instructive in this case: "Congress shall have power . . . to regulate commerce with foreign nations, among the several states, and with the Indian tribes." That is all it says. The question is, what do we mean by "commerce" when it's used in that particular three-part sequence?

It was clear in the early days, starting with Chief Justice John Marshall's decision in *Gibbons v. Ogden*,[4] that "commerce" meant "intercourse"—that is, trade across state lines. This reading would cover interstate sales or contracts having to do with things like navigation, including, after some hesitation, transport involving both goods and passengers.[5] Note that commerce with foreign nations and Indian tribes could cover both these categories.

What commerce did not cover was the manufacture, production, or use of goods and services within any particular state. Indeed, if Chief Justice Marshall had the temerity to decide that question in the opposite way in *Gibbons v. Ogden*, the entire nation would have come apart at the seams, because it would have allowed the national government to regulate (indeed to forbid) slavery inside each individual southern state. Yet at the time, everyone agreed that Congress had an immense amount of power to deal with the importation of slaves from overseas (after 1808) and with the movement of slaves across state lines but that power stopped once the slaves reached the plantations. To stress this point is not, obviously, to defend slavery. It is only to point out how the huge controversy over slavery shaped the scope and limits of congressional power in the antebellum years.

But if we put the slavery question aside, there is indeed much to say to defend this version of the commerce power as a matter of first principle, even today. Let us assume that one sensible objective of government is to establish, generally speaking, competitive economies that cross state lines. On that point, the activities that are of greatest concern deal with the ability of states to blockade the shipment of goods and

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services across their own boundaries in ways that necessarily fragment the national market so that production in any one of the thirteen (now fifty) states could not be shipped across state lines. That Balkanization would have produced the same dangerous situation that existed in Europe, where petty duchies along the Rhine blocked navigation along that great river. Indeed, the 1648 Treaty of Westphalia actually counts as one of the great acts of liberalization in Europe. Given the extensive discussion of "navigation" in *Gibbon*s, it surely counts as one of the models that the Founders considered when they drafted their own Commerce Clause to deal with the great rivers of North America.

Their somewhat optimistic view—it turned out to be a gross miscalculation—was that, armed with the Commerce Clause, Congress would undertake the job of removing these destructive state barriers. On this version the Commerce Clause works in tandem with the prohibition against the taxation of imports and exports among the various states.[6] It is not a bad attempt to solve the trade problem, because if it worked, competition across state lines would have created a national market within which each of the states could locally regulate goods and services from other states and from overseas, along with their own.

Indeed, to push the European example, a European free trade zone makes more sense than a European Union, with its endless central directives from Brussels. For this system to work one has to adopt the same basic principle that is found in international trade contexts, which is a general nondiscrimination provision such that the states cannot tax more heavily or regulate more severely those goods and services coming in from outside than those which are produced locally. That outcome, in fact, represents a stable solution to a vexing problem, for it produces a vigorous domestic economy that avoids huge amounts of national cartelization, which is the sad fate whenever one government is empowered to craft a single rule for all producers or all shippers within the entire nation.

It turned out that this system at best had only partial success in practice. The reason it did not work as intended was because, for the most part, Congress rarely stepped in to prevent states from acting in petty anticompetitive ways. So in one of the major developments of constitutional law, *Gibbons v. Ogden*—especially with the concurrence of Justice Johnson—slowly led to the emergence of the "dormant" commerce clause jurisprudence, which put the Court in the position of knocking down various state restrictions on interstate trade unless Congress dictated otherwise. Indeed, the Supreme Court has discharged this task rather elegantly, even though the textual authority for this bold initiative is weak at best.

But what happens then on the affirmative side, when Congress does choose to regulate? *Gibbons*, for all its claim of breadth, was in hindsight a fairly narrow decision. Fast-forward to the 1895 decision of *United States v. E.C. Knight*,[7] and we come across a situation that could not easily be analyzed within the framework of *Gibbons. Knight* did not involve the manufacture of goods. Rather, the question in that case was how the Commerce Clause applied to the Sherman Act prohibition against combinations in restraint of trade as it applied to the acquisition of smaller sugar companies, located in different states, by the American Sugar Refining Company. The case did not involve the shipment of goods back and forth across state lines. Originally, the Supreme Court said that the Commerce Clause did not reach these efforts to coordinate sales across state lines, which in principle would have allowed the states to attack those acquisitions of companies located within their boundaries under their admitted police power. But within three years, in *Addyston Pipe v. United States,*[8] the Supreme Court essentially gutted the narrow holding in *E.C. Knight,* so that by degrees the full set of antitrust sanctions applied to most business practices, including mergers, exclusive dealing contracts, tie-ins, predation and the like. But the manufacture and production of goods proper did not fall within the scope of the power.

In this regard, it is worth noting that my reading of the Commerce Clause was well accepted at the time. For many years I wondered how the 1906 Food and Drug Act was consistent with this reading of the Commerce Clause. I found out this past winter when I taught a course on the FDA, the Food and Drug Administration, at NYU Law School. Much to my amazement, I discovered that the 1906 Act made it clear that Congress could only regulate the manufacture of drugs within the territories, in accordance with the constitutional provision that provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States,"[9] but not within the states proper.[10] Rather, it only covered the shipment of drugs across state lines, just as *E.C. Knight* would have it.[11] Even the power to regulate the movement of goods in interstate commerce was, to my mind, a very broad reading of the Commerce Clause. Indeed that authority was barely sustained by a five-to-four vote in the 1903 decision of *Champion v. Ames*,[12] which decided—wrongly in my view—that Congress could regulate the shipment of lottery tickets in interstate commerce, even when their production was legal in the state in which they were made and the sales were legal in the state to which they were sent. It was never explained why Congress could nonetheless prohibit their shipment, even though these goods did no harm while in interstate commerce. Just think of what would have happened if before 1865 Congress had sought to prohibit the shipment in interstate or international commerce of goods made with cotton produced by slave labor.

Clearly, it was a bold move to allow the stoppage of goods made in individual states, and when the issue moved from lottery tickets (which were long considered to be immoral)[13] to ordinary goods (such as clothing), the Supreme Court balked, holding in *Hammer v. Dagenhart*[14] and the *Child Labor Cases*[15] that the control over interstate affairs could not be used to leverage complete control over local production. Anybody who looks seriously at the jurisprudence between 1900, say, and 1935, when the early synthesis starts to unravel, will be impressed, not with its intellectual incoherence, but with exactly the opposite. Every relevant player, both in the courts and in Congress, understood the basic rules of the game, and only passed laws that were in perfect conformity to the dominant rules. Indeed, as a matter of historical aside, the irony is that the FDA only received power to regulate manufacturing within the

states in 1938, usually by requiring nominally some connection with interstate commerce.[16] That expanded power was in part driven by some real failures in manufacturing. But before 1937 those failures would have led to a call for state regulation. By 1938, however, *Jones & Laughlin* was on the books, and an alert New Deal Congress was quick to exercise its extensive new powers.

Historically, it is easy to measure the enormity of the shift by noting that in *Jones & Laughlin* the Supreme Court had to overrule decisions of three lower circuit courts,[17] including the Second Circuit with Learned Hand, all of which held—rightly, in my view—that the National Labor Relations Act was unconstitutional because it sought to regulate manufacture rather than the shipment of goods in interstate commerce. If *Jones & Laughlin* had been correctly decided, *Wickard v. Filburn* (which, in order to cartelize nationwide grain production, regulated wholly local agricultural markets) would have come out the other way. Congress would have had no power to regulate wheat grown on one's own farm and fed to one's own cows. So understood, neither *Jones & Laughlin* nor *Wickard* are the humorous cases they are often made out to be. Rather, both catered to the deepest and most dangerous progressive impulse: the only way to create an effective system of labor unions is to confer upon them gobs of monopoly power. The moment state legislatures seek to achieve that goal, businesses will migrate to other states, and workers and jobs will follow. So to stop what many unionists misleadingly call the "race to the bottom," either regulation takes place at the federal level or it does not work at all. In this instance, the narrower view of the Commerce Clause thus discharges a high social function by thwarting the passage of the National Labor Relations Act.

A similar story can be told about *Wickard v. Filburn*, which upheld the Agricultural Adjustment Act. The regulation of feeding your grains to your own cows was simply the tag end of a very comprehensive Act with its own cartelization arrangement that bears the distinctive imprimatur of the New Deal. What these provisions did was authorize farmers, by national vote, to establish quotas for the production of various crops, after which the Department of Agriculture had the power to allocate to each farmer a production quota, which allowed for the maintenance of the cartel price.

It is important to understand the progression of events that led to the statutory reforms that were challenged in *Wickard v. Filburn.* The easiest case for federal regulation under the Commerce Clause is the prohibition of the shipment of goods across state lines, which I regard as problematic for the same reason that *Champion v. Ames* is problematic. But the blunt truth is that no prohibition solely on interstate sales can keep prices artificially high. Instead, farmers will redirect their "excess" (over quota, that is) supplies to the *intrastate* market, even if those lines of transportation are somewhat more costly. So it becomes necessary to block intrastate sales of excess crops to keep the price of grain from falling below cartel levels, which was done in *United States v. Wrightwood Dairy*[18] in the case of milk. But once this step is taken, farmers will adopt a new strategy to produce grain in excess of the allowable amounts: vertical integration. One producer of grain would acquire—or be acquired—by a cattle farmer, so that there need be no sale, interstate or intrastate, to use that excess grain. This evasion was no small matter, but constituted about twenty percent of the grain produced in the United States, enough to destabilize a cartel.

Sensible people should regard these evasions as welcome countermeasures to state-imposed cartels. Franklin Roosevelt and his New Deal advisors had a different world view. They were strongly opposed to monopoly, but strongly supportive of cartels on the ground that those within a given market sector knew what was best for its members. So the essence of New Deal policy was to prop up private cartels with federal power, the major function of which was to curtail production by current farmers and prevent entry by new ones. It is as though every impediment to competition was sustained by government power on the ground that what the farmers wanted is what mattered, and the consequences to others were systematically ignored. It was a complete repudiation of sound antitrust principles. What the New Deal sought was to create some model of a corporatist state that would oversee sweetheart deals with farmers, unions, and large corporations to divide up monopoly rents among the privileged insiders. It was, to my mind, the worst of the possible visions for running a country. Roosevelt, however, thought it was just fine to rail against monopolies while supporting cartels. He did not want one person to own all the dairy industry. Instead, he wanted all the farmers to get together and decide their total output and let the Department of Agriculture do the rest. The Supreme Court in *Wickard* twisted the Commerce Clause to allow it to implement that indefensible use of government power. The older system served this nation far better than the newer one.

The Current Debate Over Health Care. Against this background it is possible to put the debate over the Patient Protection and Affordable Care Act in perspective. I start with what is a common assumption. The hodge-podge health care arrangements in the United States are the source of massive dislocation because of the peculiar effort to combine the various public and private systems of health care provision. The public systems are inept, and the private system is overregulated. In this context, it is odd to hear people ask me how I could defend the market in health care, seeing the way in which it operates today. My response is that most of the odd market behaviors are in response to unwise government regulation on a full range of issues, which lead to all sorts of dubious practices. Firms that are given bad incentives will behave in bad ways, and take whatever options are available to exclude rivals and gain subsidies for themselves. It is therefore critical to control the public incentive structure to reform the private sector.

If you go back to late 2008 and early 2009, the President and his Democratic allies had to make threshold decisions about the way in which to use their huge congressional majorities in reforming the health care system. They could have taken one of two paths, the first of which is congenial to about ninety percent of the political spectrum and the other to the remainder. That dominant position was that reform should stress a direct improvement of access to health care in ways that brought all people into the system, *without* making structural reforms that would allow the overall system to work in a more coherent fashion.

The few lonely voices on the other side, which included myself and David Hyman, held that this approach got everything exactly backwards.[19] What government officials should do is first look at every single aspect of the health care system in order to determine what current regulations could be stripped away. The one constitutional point that is clear is that major deregulation at the federal level is consistent with any vision of the Commerce Clause. In effect, this approach means that even in the charmed rooms of Boalt Hall Law School, the question of redistribution is always approached *last,* once the allocative issues are handled. To state this position is to risk the charge of being completely asocial: Does this man not care about the poor and downtrodden? No, it is exactly the opposite. The proper approach is to first figure out how to release the productive capabilities of the people in order to expand the pie and lower costs such that access is increased without government regulations here and massive subsidies there. Once the efforts toward market liberalization have been completed, what is left by way of redistribution can (a) usually be done by the private sector more effectively than by the government, and (b) if done by the government, can be done working with a larger pie which now needs to help a smaller fraction of the population.

The worst approach is to embrace the status quo in delivery systems. What is needed is to figure out the most expeditious line of reform. On this matter, it should not take a genius at the federal level to realize that it is a mistake to have all these mandates. Nor does it take much imagination to say that it is wiser to let physicians move from state to state to practice their craft than to require extensive relicensing that is required largely for anticompetitive reasons. Nor does it take much imagination to remove barriers that prevent insurance companies from competing with each other across state lines. Nor do we want to create a legal regime in which only doctors can practice medicine. If Wal-Mart knows how to assemble the right teams for providing health care, let them do it. If people do not like their services, they can move to CVS. Right now the party that does not like government health care has no place to go at all.

These are not small changes. The amount of improvement in the total productive capacity of the American medical system that you could get by cutting regulation is probably two- to threefold, without putting a single dime of extra revenues into the system, all the while saving the millions—soon to be billions—spent on direct regulation by the government.

Let me refer to a piece that Atul Gawande wrote two years ago in *The New Yorker*: "The Cost Conundrum—What a Texas town can teach us about health care."[20] Atul is an inspired stylist, a great surgeon, a wonderful descriptive reporter, but a weak economist. He manages to describe conditions perfectly accurately, only to miss the proper response to the errors that he observes on the ground. It turns out that the huge disparities in health care costs arise under Medicare, which indicates that the system suffers from weak cost controls. But the variations are far smaller in the private health care market where there is someone looking after the shop. At this point, the argument should be to reduce the size of government actions, and not to pretend that an increase in government activity under Medicare, Medicaid, or both, will somehow make all the problems go away. And what government needs for its own activities is a way to make hospitals richer when they find ways to improve care at a lower cost. Yet the current Medicare system only has rigid reimbursement formulas so that global results at given facilities make little or no difference as to how these institutions are rewarded. If you can find a way to increase access by lowering costs, you do not have the problem you have now, in which massive taxes on other sectors are going to have to subsidize the health care system, distorting everything including other government programs that compete for the same dollars.

Any look at the global situation makes it clear that the individual mandate is not the centerpiece of a health care regulation that already has so many other demerits that it is hard to know where to begin. It is therefore an irony that the most visible portion of the system attracts the greatest wrath. But for our purposes the question is whether under the current rules the mandate is ripe for constitutional invalidation in ways that could bring down the rest of this complex system with it.

At one level, the Court could just treat the mandate as part of a larger constitutional system so that it is constitutional as well. But the argument gets much closer when one looks at the strained rationales that the government offers to keep this program alive. The government position begins with the half-truth that the mandate is needed to make sure that individuals do not free-ride on the health care system. Of course, they do not believe that any more than you do. The best way to stop free-riding is to tell people that if they do not get health care insurance, society is not going to give it to them for free out of the public coffer. And at that particular point, most people will buy at market prices, at least if the insurance costs them an actuarially fair price, i.e. does not have built-in payments that subsidize other individuals.

But, of course, the designers of the PPACA do not want to stop free-riding. What they really want to do is to create cross-subsidies by asking the supposed free-rider to contribute, say, $2,000 into a system from which he or she will derive in expected value terms only $200 worth of benefits. So the new definition of a free-rider is somebody who, in fact, is reluctant to subsidize other individuals through a system of social insurance that has as its raison d'être the transfer of funds from one individual to another.

One reason why some judges are skeptical of the entire PPACA is because its defenders talk out of both sides of their mouths by offering two inconsistent rationales for the legislation: the prevention of free-riding and the need for cross-subsidies for those same people. They do not seem to realize that the two messages are totally discordant with one another. Even in the low-scrutiny rational basis world that dominates the interpretation of the Commerce Clause, it is rather difficult to claim that two separate reasons support the same outcome when the two reasons are manifestly at war with each other. At this point, the inactivity of those who want to stay out of the system looks a bit more credible than it appeared at first blush. These individuals are not trying to game the system. They are trying to make sure that the system does not take advantage of them. Reading the Commerce Clause to cover activities only helps

to advance this sensible view of the world, precisely because it is intended to limit the level of redistribution that the federal government could achieve by massive regulation.

In dealing with this constitutional question, my friend Professor Jesse Choper has introduced a different justification for defending the PPACA, which is that the law responds to a collective action problem which the individual states, acting separately, cannot solve. As Choper sees health care, it is a version of a prisoner's dilemma game. But there is a catch to this commonly made argument, because we cannot tell whether the PD game is good or bad outside of context. Competition is a collective action problem for all the parties who are engaged in it, and the solution to their collective action problem is a cartel. The reason most analysts reject this particular solution to a collective action problem is that the systematic externalities on third parties outweigh the gains to the parties who are determined to cartelize the market. So just because it is possible to show a PD game does not show whether the game helps or blocks overall social welfare.

To see why the PD game argument is a constitutional nonstarter, it is useful to recall that this argument was, in fact, made very ably by none other than John W. Davis when he was an assistant attorney general for the United States in *Hammer v. Dagenhart*.[21] In that case, the question was whether Congress could prohibit the shipment of goods in interstate commerce that were made by firms that used the labor of children under the age of fourteen. At the time, North Carolina only barred children under twelve years of age from employment.

What Davis said was exactly what Professor Choper said: to allow each state to set its own standard will lead to a race to the bottom because each state will lower the age to attract more business, so that all states will settle on twelve years individually, when collectively they prefer fourteen years. The federal statute thus set the correct minimum.

Davis's argument is antithetical on structural grounds to the Commerce Clause, which by design leaves these decisions over employment relations to state governments. Quite simply, the entire scheme is an effort to regulate local manufacture in a way that was not permissible under *E.C. Knight*. Here the argument relies on the same kind of game theoretical consideration on which Professor Choper relies. Any firm recognizes that the ability to employ child labor in its business is certainly worth something. But by the same token, the ability of any firm to reach national markets is worth a great deal more. Anybody and everybody will surrender the one right in order to gain the other. And so, essentially, you would have the forbidden kind of regulation.

But the other point is, who are we to say that fourteen years is better than twelve years with respect to child labor? Indeed, there is much to be said for the lower age limit if parents have the best interests of their children at heart in making decisions on letting them work, and if so, where. As that is the case, we cannot be sure whether the federal decision honors state preferences or shatters them.

I think Justice Day hit the nail on its head. Predictably, Holmes was in dissent. He was almost always wrong on the great progressive challenges of the time, and *Hammer* is no exception. In this context, it is instructive to look at the history of child labor in the United States, both before the decision and after. That practice was consistently decreasing, just as the number of hours that were being worked by adults was consistently going down, and this at a time when maximum hours laws were unconstitutional.

The simple truth is that collective action solutions that make competition across state lines impossible should not be encouraged. Collective action problems that facilitate competition ought to be encouraged. The whole point of a federal system is to keep open arteries for commerce going back and forth across states, and then allowing competition to attract and hold workers in markets where both firms and individuals have exit options. So what I think, in effect, is that what Davis and Choper describe as the cure for labor markets is in fact the problem. We would be much better off having states constantly trying to figure out ways in which they could make themselves more attractive to business, such that others feel necessary to follow. By the time you are done, higher productivity will translate into higher wages, which will have as one of its consequences improved health, more medical innovation, and a smaller set of health problems. Every time the government engages in forced redistribution, every time it imposes federal mandates, it also engages in the destruction of wealth. When there is less to go around, somebody is going to be hurt. There has never been a good, long, sustained argument for shrinking pies on the ground that anyone inside or outside Congress actually knows how to cut the slices in the ideal fashion that ties individual utilities to individual wealth so as to generate in practice that theoretical ideal of getting more utility out of a smaller pie. Talk about a mug's game, and this is the bipartisan affair that Congress has been engaged in for years. This criticism is not directed only to Democrats. The Republican positions on farm subsidies for ethanol show that they have no purity either.

Once again, Professor Choper's response allows factions to dominate. The New Deal, summarized in a single sentence, takes the view that the choice between competition and monopolies is foremost a political matter to be decided first by the central government and then by the states. In contrast, the classical liberal tradition of which I am a part rejects that form of Holmesian indifference. It sets a firm presumption in favor of competition and never lets the government use coercive force to convert well-functioning competitive markets into monopoly markets. In all cases the government has to make a very powerful showing to explain why it is going to regulate competitive markets, which it cannot do with virtually all the common government programs. So understood, the one key point about well-designed constitutions is that they are meant to stop degenerative democratic processes—not cater to them—on economic matters just as on matters of religion, speech and social equality. If a constitution sets the right political constraints, legislatures at the state and federal level will perform better, and even do useful activities like revising the UCC, or improving the recordation system, or running a decent highway system. A narrow focus will lead to a higher level of political performance, which would block statutes like the PPACA.

In all discussions of PD games, no one should take the position that allows political factions to dominate. The New Deal, summarized in a single sentence, takes the view that the

choice between competition and monopolies is foremost a political matter to be decided first by the central government and then by the states. In contrast, the classical liberal tradition of which I am a part rejects that form of Holmesian indifference. It sets a firm presumption in favor of competition and never lets the government use coercive force to convert well-functioning competitive markets into monopoly markets. In all cases the government has to make a very powerful showing to explain why it is going to regulate competitive markets, which it cannot do with virtually all the common government programs. So understood, the one key point about well-designed constitutions is that they are meant to stop degenerative democratic processes—not cater to them—on economic matters just as on matters of religion, speech and social equality. If a constitution sets the right political constraints, legislatures at the state and federal level will perform better, and even do useful activities like revising the UCC, or improving the recordation system, or running a decent highway system. A narrow focus will lead to a higher level of political performance, which would block statutes like the PPACA.

It is also the case that the government has fared very badly with its tax argument in favor of the PPACA. The reason is that that it did a bad thing: it started to lie about the program by insisting that if the Commerce Clause did not cover the situation, the power to tax and spend did. But in doing that, the Administration representatives had to acknowledge that the only way they could get this legislation through Congress was not as a tax, but as a penalty for bad behavior. It did so, moreover, to avoid going through budgetary hoops that could have easily doomed the entire enterprise as it wound its way through congressional committees. It does not sound credible to then reverse course and say that this mandate was really a tax, not just a penalty. At this point, no court has accepted the taxation rationale, which suggests that it does not have much of a future at the Supreme Court, either.

In addition, it is worth noting that this supposed tax is antithetical to any sound tax theory. What is the sense of imposing a tax on a group of individuals who has done nothing wrong in order to supply a subsidy for others who want to spend more than they can afford? The argument at this point, quite simply, is that selective taxes are a terrible way to organize redistribution, *even if* redistribution is itself a legitimate end. The last thing that any democratic process should be allowed to do is to fasten huge costs on small groups for the benefit of other such groups. A basic rule of redistribution is that it should always be funded out of general revenues, to make sure that the majority of the population has to bear some fraction of the cost of subsidizing various transfer systems. It is political dynamite to let those parties who are dictating the transfer payments to pay no fraction of the bill. It leads to a massive form of political irresponsibility and systematically to over-taxation. So, when you start looking at the PPACA, no matter how one slices the details, every single sound principle of economic accounting and of medical rationality is violated up and down the line, over and over again. That danger, if brought home to the Court, is likely to have some impact on the constitutional resolution of these issues.

So how, then, does this particular constitutional debate turn out? Well, surrealistically, the supporters of the legislation have a one sentence winner: if *Wickard v. Filburn* is good law, then the biggest industry in the United States is subject to comprehensive constitutional regulation—end of story. Hence the one imperfection among many—the individual mandate—has no particular constitutional salience, so the spirited complaints about the wisdom of this legislation are just directed to the wrong forum. The courts cannot pick particular threads from the tapestry, pull them out, and watch the rest of the structure come tumbling down. Justices of the Supreme Court are not mad. They do not look at the wisdom of the overall bill, or of any of its pieces. They see and hear no evil, and do their best to distance themselves from policy debates better conducted in Congress. On this view, they have to uphold the legislation. My attitude toward this position is that, after a fashion, it is right.

But the other side is right as well. If the government has the admitted power to run this program through a legitimate broad-based taxing system, it should be told that it cannot contrive to get this program through Congress. To use its commerce and taxing powers, it should meet with the minimum requirements of sensible legislation and sensible taxation, which it has failed to do. So strike down the PPACA and let Congress start over, which is exactly what won't happen because this legislation will not make it through Congress when all the procedural niceties are observed.

So once we have started off down the illicit road of *Jones & Laughlin* and *Wickard,* we face the question of which set of hypocrisies, which set of mistakes, which set of intellectual blunders should succeed? Do you want to seriously question the foundations of the creaky constitutional edifice of *Wickard v. Filburn*? My guess is that the answer in the current Supreme Court is no, if only because I have heard Justice Scalia say multiple times off the Court that he is a fainthearted originalist who knows that too much water has gone over the dam for him to overturn *Wickard*.

But it hardly follows that he cannot follow the line that Professor Barnett has proposed as a damage control argument. The response, therefore, is that the current expansion of federal powers under the Commerce Clause has generated a federal government whose large size is its own greatest enemy. It has made, or is making, blunders out of its use of the broader commerce power. Now that it is trying to push the envelope one step further, the Supreme Court may have to live with *Wickard v. Filburn*, but it need not treat that dubious decision as the last word in constitutional wisdom. A constitutional decision that is this suspect should not be used as the springboard for the greater exercise of federal power. On that note, I would strike down the legislation. In the world of the second-best we cannot expect ideal decisions. The defenders of the PPACA have no ground to uphold this sprawling statute if the Commence Clause is taken at its word. They have gone one step too far in this case. Invalidation of the legislation is, on balance, the proper response for any Justice who tries to make sense of the disparate threads of our constitutional order.

Jesse H. Choper*: Thank you. It's always a treat for me to "spar"—Richard used the word—with Richard Epstein on constitutional issues. But when it was announced I had ten to fifteen minutes, I thought that they ought to measure the time not by the minutes, but by the word. That at least gives me a fighting chance under the circumstances.

I was surprised by Richard's presentation because I came expecting two major arguments. One is that the "individual mandate"—that the government requires someone to do something—is unconstitutional. That's the major argument that has been used in the lower courts that have struck it down, at least by those who were challenging it. And I thought that Richard would argue the substantive due process right not to have to purchase something. That was what I planned to talk about.

I want to be clear. The last thing I want to do is to debate what is the best policy to handle the health care problem. That is, I do not want to say it is a wonderful statute. I do not think that the people who voted for it thought it was a wonderful statute. It is, by virtually unanimous agreement, a flawed statute. The notion was to get it on the books and then fix it up. Get it there while you still have the votes.

So let me discuss the major constitutional issues. Interestingly, Richard does not want to dispute that under existing doctrine, the individual mandate, which is what is principally under challenge in the courts, is okay. I fully agree with Richard's conclusion, and that disposes of a lot of what I was going to say. But he goes on to say that this is not part of the original understanding. One thing on which I would differ with Richard is that there *is* someone on the Supreme Court who takes his view, and that is Justice Thomas, who wrote a long opinion in the Gun-Free Schools Zone Act case, saying that the purpose of the Commerce Clause was to grant only the power to regulate interstate matters, i.e., things traveling from one state to another, or transactions and the actual transfer of goods between states. Justice Thomas contends that the clause does not apply to agriculture, mining and manufacturing, and therefore it certainly does not cover one person buying health care. Richard quite candidly, and Justice Thomas clearly, concede that they would invalidate, if not the whole New Deal, a great chunk of it. That is truly a dramatic position.

Let me add this. I do not pretend to be someone who has carefully studied the history of any of the grants of national power. Of course, like anybody else in the field, I have read of it. I come to the conclusion that not very much can be proven specifically about the history in most instances. And even when you can do so, this approach to constitutional interpretation may interfere with certain other judicial values considered at the time of the Founding. Let me just leave it that vague for the time being.

I don't think that you can simply say, as Justice Thomas argues, that the original intent does not apply to matters that occur wholly within the borders of a single state, but rather that the activity must cross state lines. Interestingly, Richard argues that one of the major purposes of the Commerce Clause was to give Congress the power to remove state-erected impediments to a national economy. I agree, and I think the originalist understanding was that there was more to it, and that the provisions of the Virginia Plan were part of the Constitution.

Even this generation of distinguished constitutional historians—Jack Rackove at Stanford is one—take the view that original understanding was that the power of Congress was to extend to matters of national import in respect to which the states were incompetent to deal. Economists have a name for that now: collective action problems. I have always believed that if there were an effective judicial criterion to enforce the limitation on congressional power versus states rights, it would be that. But my long-held position has been that there should be no judicial review of the consitutionality of the scope of national power versus states rights because, for a number of reasons, states are well represented in Congress, and they do not need the Supreme Court to come to their defense.

But put that theory aside. It seems to me, for example, that the Court could well have ruled that the Gun-Free School Zones Act did not regulate a subject on which the states are incompetent to deal—i.e., the problem of guns in schools. I forget how many states, I think well over twenty, had laws very much like that which Congress passed in the Federal Act. I would have said: it is nonjusticiable. Nonetheless, if there had to be a judicially manageable criterion, I would have agreed on that one.

But the health care problem is one over which the states plainly are separately incompetent to deal. It presents a collective action issue for a number of reasons. The most obvious is that, if a state were to undertake the expense of enacting one of these statutes, it would be costly economically and would usually make the state less economically competitive. Anyone who lives in California knows that that this sort of situation is one of the great political issues in the state, that is, whether California, through its various systems of regulations and taxes, has become inhospitable to businesses, and that we are attracting and retaining fewer businesses than we would otherwise. I am confident that there is some truth to that.

But how true it is does not make a real difference. The fact is that there is a perception that a state that on its own undertakes an individual mandate will economically disadvantage itself. As everyone knows, Governor Romney proposed a plan similar to the national health care law in Massachusetts. They are living with it, although how well no one knows. But Kentucky enacted one and abandoned it after a very short time. Why? Several insurance companies left the state, and it became very unpopular. Kentucky did not want to be there by itself. This is very much like minimum wage laws in the first third of the 1900s. There is a substantial deterrent to enacting a minimum wage law because it raises the cost of goods, it raises the cost of doing business, and makes the state's goods less competitive.

Indeed, not only is it more difficult to sell the goods across state lines, there is greater difficulty selling them in the home state because more cheaply produced goods will come from someplace else. It is a pretty simple proposition, which we see all the time at a national level—the low cost of doing business abroad takes business away from this country.

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Another reason that this directly involves commerce between the states—one that I am usually not a big believer in, but I am so far as health care is concerned—is that people are going to have a powerful incentive to move to those states that will give them health care of one sort or another if other states do not do it. And most other states are not going to do it. Virtually none have done it on their own because they are hesitant to do so.

For these reasons, it seems to me that even under the original understanding, this is plainly within the Commerce Power. It is a classic illustration of a situation of transportation across state boundaries. And beyond that, no one disputes the fact that this matter has a substantial effect on interstate commerce. If you take seriously—it need not even be very seriously—the notion that something that goes on within the borders of a single state may have ramifications in other states, this is one. Forget *Wickard v. Filburn*. For me, health care is powerful in respect to that particular principle, and I would not be surprised if there were as many as seven or more votes to uphold this provision when it gets to the Supreme Court.

Finally, there is an argument that a state could not have an individual mandate because it violates the Due Process Clause. But this is certainly quite a stretch under existing doctrine. Moreover, it seems to me to be more than that. I believe that this view is antithetical to the basic position of judicial modesty and restraining the power of judges that its proponents especially adhere to. This is the other constitutional issue that I was prepared to spend some time on.

I can answer Richard's points about what he says are the policy problems related to the health care law very simply. It may well be true that the better policy way of approaching this is by stopping federal regulation. I am no great fan of federal regulation. I do not want you to misunderstand that. Indeed, I am no fan of state regulation, but that is not the issue.

The issue is what is constitutional. In my judgment, whether or not Congress chooses the right way or the wrong way to deal with a matter that it believes the states are separately incompetent to deal with, is up to Congress and not the Court. To me, that is true as a matter of original intent. Economists could debate the best way to deal with problems like this for a long time. But that is why we have the democratic process.

Endnotes

1 317 U.S. 111 (1942).

2 301 U.S. 1 (1937).

3 514 U.S. 549 (1995).

4 22 U.S. 1 (1824).

5 The Passenger Cases, 48 U.S. 283 (1848).

6 U.S. Const. art. I, § 10.

7 156 U.S. 1 (1895).

8 175 U.S. 211 (1899).

9 U.S. Const. art. IV, § 3, cl. 2.

10 Pure Food and Drug Act, 34 Stat. 768 (Section 1): "It shall be unlawful for any person to manufacture within any Territory or the District of Columbia any article of food or drug which is adulterated or misbranded, within the meaning of this Act"; for discussion, see Arthur P. Greeley, The Food and Drugs Act, June 30, 1906 (1907) (on Google books). Section 2 dealt with the shipment of adulterated or misbranded drugs across national and state lines.

11 34 Stat. 768 (Section 2).

12 188 U.S. 321 (1903).

13 Stone v. Mississippi, 101 U.S. 814 (1879).

14 247 U.S. 251 (1918).

15 Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922).

16 Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (Section 301).

17 NLRB v. Jones & Laughlin Steel Corporation, 83 F.2d 998 (5th Cir. 1936); Fruehauf Trailer Co. v. NLRB, 85 F.2d 391 (6th Cir. 1936); NLRB v. Friedman-Harry Marks Clothing Co., 85 F.2d 1 (2d Cir. 1936).

18 315 U.S. 110 (1942).

19 Richard A. Epstein & David A. Hyman, Controlling the Costs of Medical Care: A Dose of Deregulation, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1158547.

20 Atul Gawande, *The Cost Conundrum: What a Texas Town Can Teach Us About Health Care*, New Yorker, June 1, 2009, *available at* http://www.newyorker.com/reporting/2009/06/01/090601fa_fact_gawande.

21 247 U.S. 251 (1918) ("The health of children in competing States was injuriously affected by the interstate transportation of child-made goods. Thus, if one State desired to limit the employment of children, it was met with the objection that its manufacturers could not compete with manufacturers of a neighboring State which imposed no such limitation. The shipment of goods in interstate commerce by the latter, therefore, operates to deter the former from enacting laws it would otherwise enact for the protection of its own children.") (unpaginated).

Robin Fretwell Wilson*: It is wonderful to be here again. I forgot how beautiful the Law School and Baltimore are.

First, let me thank the Federalist Society and the LGBT Law Student Alliance for co-sponsoring this discussion and to thank my friends and former colleagues, Professor Richard Boldt for moderating and Professor Jana Singer for taking up this important conversation. I will talk today about reconciling same-sex marriage with religious liberty, values that I will argue need not be in tension if legislatures enact nuanced, thoughtful legislation recognizing same-sex marriage.

Certainly, the outcome this spring of Maryland's proposed same-sex marriage legislation,[1] which passed the Maryland Senate only to die in the House, surprised many observers who saw its enactment as assured. I believe the bill's demise could have been avoided by balancing more robust religious liberty protections with the broadened definition of marriage.

Elsewhere across the country we have witnessed moral clashes over same-sex marriage and same-sex relationships, but it does not have to be this way.[2] Instead, specific legislative exemptions can provide individuals who cannot, for religious reasons, facilitate a same-sex marriage with a way to live together in peace with same-sex couples despite deep divisions over the nature of marriage.

As you know, Maryland's proposed law evolved over the course of its consideration by the Maryland legislature. Before the bill's amendment in the Senate, the bill offered only what I called "faux," or fake, protections. It limited its protections to clergy, who already receive protection in the U.S. and the Maryland Constitutions.[3] Clearly, such a protection gives nothing because those protections are already secured by the state and federal constitutions.

Every other state that had then authorized same-sex marriage by statute[4] provided more protection than Maryland's original Senate bill. New Hampshire, Connecticut, Vermont, and even the District of Columbia all recognized that merely exempting the clergy from having to preside over a same-sex marriage was not enough.[5]

So what was missing from Maryland's initial bill? As the country has stumbled forward with same-sex marriage, we have witnessed a number of moral clashes over it and other same-sex relationships. These have ranged from lawsuits over refusals to serve same-sex couples to canceled social services contracts to firings and resignations.[6] A couple of specific examples are useful because they identify what religious liberty protections may be needed and what those protections might address.

On the heels of Massachusetts' same-sex marriage decision (the first in the U.S.), *Goodridge*,[7] the state's justices of the peace were told by the then-Governor's chief counsel that they had to "follow the law whether you agree with it or not."[8] Anyone who turned away a same-sex couple, even if for religious reasons, even if someone else was immediately available to do the service for that couple, could be personally held liable for up to $50,000.[9] I don't know about you, but I cannot write a $50,000 check.

New Jersey provides a second example. There, a tax-exempt church-affiliated group associated with the Methodist Church was approached by two couples who wanted to hold their commitment ceremonies on the group's boardwalk pavilion. When the group refused, New Jersey revoked the group's tax exemption under a public lands program.[10] I do not have a particular problem with the state revoking the exemption because the state conditioned it on public access. For me, the word "public" means public; that is everybody. The difficulty came, however, when local taxing authorities, on the heels of the state's decision, yanked the group's exemption from property tax on the pavilion. Exemptions from *ad valorem* taxes can be big money exemptions. Go look at any church in downtown Baltimore. They are sitting on a ton of very valuable real estate, and their exemption from having pay tax on that real estate may be thousands or hundreds of thousands of dollars. In the New Jersey case, the local authorities ultimately billed the group for $20,000 in taxes on the specific piece of property, the pavilion alone, although I understand that the group paid less than that.[11] Now, it may be that New Jersey is unique in how it approaches exemptions from local taxes, but the specter of other state and local taxing authorities following suit after a religiously based refusal has spooked many religious organizations.

Outside those states that recognize same-sex marriage or same-sex civil unions, clashes have also occurred. Consider New Mexico. The New Mexico Human Rights Commission fined a small photography shop, Elane Photography, for refusing on religious grounds to photograph a same-sex commitment ceremony.[12] New Mexico neither recognizes same-sex marriage nor same-sex civil unions. The ceremony at issues was a commitment ceremony between the two women. Elane Photography was fined over $6,000 for refusing on religious grounds to photograph the ceremony, a decision that is still being appealed to the New Mexico Court of Appeals.

Without specific protections, religious organizations and individuals who step aside from celebrating same-sex marriages can be subject not only to private lawsuit under laws prohibiting discrimination on the basis of sexual orientation, but also suit under laws that prohibit discrimination on the basis of marital status—a ground on which these groups may have legitimately refused before the enactment of a broadened definition of marriage. Consequently, the source of possible tension between same-sex marriage and religious liberty comes not only from sexual orientation nondiscrimination bans but from marital status nondiscrimination bans too.

Organizations that step aside from facilitating same-sex marriage for religious reasons face stiff penalties from the government, not just private citizens. Maryland, for example, requires all public contractors from discriminating on the grounds of both marital status and sexual orientation in order to do contracts with the state,[13] raising the possibility of the denial of access to government contracts or grants because

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a group, for religious reasons, cannot recognize a same-sex marriage. This happened in San Francisco, which withdrew $3.5 million in social services contracts from the Salvation Army because the Salvation Army refused on religious grounds to provide benefits to its employees' same-sex partners.[14] $3.5 million is a big hammer.

For me, the clashes I have sketched differ in one important way: The justices of the peace actually involve access to the status of marriage so that, if the refusing Justice of the Peace says, "No, I'm not going to marry you," he or she could potentially act as a choke point on the path to marriage. This result would not be acceptable to me because the state has just said that these couples are entitled to the status of marriage. But with religious groups and vendors, we may have entities in the stream of commerce, but they cannot block access to the legal status of marriage. I believe this different impact should matter how we think about whether there is a duty to assist all who present or a right to refrain when another provider can assist the couple.

We have seen these kinds of deep divisions over social change before, and I believe that those prior experiences can help guide us here. I came to this issue as a family law and health care person. These clashes have followed a familiar pattern charted over the nearly forty years since *Roe v. Wade*[15] with abortion.

In 1973, when the Supreme Court's decision in *Roe* came down, it precipitated a significant demand for abortion. Almost immediately, the question arose: do health care providers have a duty to provide the abortion that a patient now seeks and to which, in fact, she has a constitutional right? Or can the provider simply say, "No, thank you, not me"?

Not surprisingly, family-planning advocates stepped in with litigation and strenuously pushed to broaden the right established in *Roe*, namely, the right of government to stay out of one's reproductive business. The suits sought to extend this negative right into an affirmative entitlement to another person's assistance. This occurred with both private lawsuits brought against individuals and against facilities. In the case of the facilities, the suits urged that the facility's receipt of public benefits or its free ride on taxes as a not-for-profit meant that when a facility refused to perform an abortion, it acted under color of state law in violation of 42 USC Section 1983.[16]

These suits were successful until Congress stepped in with the first health care conscience clause, the Church Amendment. That legislation prohibits a court from using the receipt of certain federal monies as a basis for making a private individual or an institution perform an abortion or sterilization that is contrary to "their religious beliefs or moral convictions."[17] Today, nearly every state in the nation—forty-seven states—have carved out a space for medical providers to continue in their professional roles without participating in acts that they consider immoral or which would violate their religious beliefs.[18]

These statutes give people who disagree on a profound moral issue the elbow room to live together in the same society in peace. Many of these statutes, at least at the state level, balance both the legitimate access concerns of women with the religious concerns of providers. Some, for example, say that the moral objections of physicians must ultimately yield to a patient's need for an emergency abortion.[19] But when it comes to an elective abortion, one that can happen any time, these statutes allow providers to step aside in that case.

These statutes provide a roadmap to finding live-and-let-live solutions to the moral clashes over same-sex marriage too. How would that work? First, I believe we can get in front of these collisions and tackle them proactively, like we do with objections to abortion. We can make potential objectors disclose their objections *ex ante* and make them public (in other words, objectors have to own the objections—no surprises), which would give state authorities and private employers time to react to the objection and perhaps staff around it. For example, a state's clerk's office could put in place procedures that allow an objector to object when other employees would gladly serve the couple—without same-sex couples even knowing that it happened.

Now, in rare instances, it is possible that permitting a religiously-based refusal may create a hardship for same-sex couples seeking a marriage license or, for that matter, even a reception hall or a photographer. When would that occur? It would occur if every clerk in the register's office or every reception hall or every photographer in town objects. That might occur, for example, in really remote areas.

So imagine that a same-sex couple resides in Nowhere, Montana, in the middle of nowhere. (You also have to imagine that Montana has same-sex marriage.) Now imagine that there is only one town clerk that can help the couple complete their application for a marriage license. By refusing to assist that couple, the clerk is acting as a choke point on the path to marriage, effectively barring them from the institution to which the state has just said they are entitled.

In this instance, because a real and palpable hardship would occur, I have argued that the religious liberty of the objector must yield.[20] Put another way, in a straight contest between marriage equality and religious liberty, religious liberty has to stand down. But outside this rare case of a hardship, where there are other clerks who would gladly serve the couple and no one otherwise loses by honoring the religious convictions of the objector, I believe this conviction should be honored.

With other commercial actors like the baker, the photographer, the reception hall owner, the wedding advisor, or others, I have a harder time saying that every vendor must serve every person who presents, just as I have a hard time saying that every doctor must be an abortion provider when Planned Parenthood had something like 850 clinics across the U.S. When access is assured in the marketplace, I have a hard time with forcing individuals to provide the service nonetheless.

In part, I am less willing to trample on religious beliefs here because I believe the hardships are likely to be fewer. Look at most phone books—they list dozens of photographers. Moreover, the service that is being denied, a photograph, is not nearly as important as denying a person's access to the legal status of marriage. The core right being given through same-sex marriage laws, as with *Roe*, is the right for the government to stay out of your relationships, but it is not necessarily the right to assistance from others to facilitate your relationship. The right of access to commercial services comes from anti-discrimination statutes, which were passed long before anyone ever imagined same-sex marriage. Because same-sex marriage laws add to this existing substrate of law, it is incumbent upon legislators

to think through how those laws fit together. In other words, the question in front of the legislature is not only whether to recognize same-sex marriage but whether the recognition of same-sex marriage also means that there will be a duty to facilitate those relationships by others in society.

As a practical matter—and this is less intuitive for many people—when push comes to shove, many providers will exit the market rather than provide for what is, to them, a religiously-objectionable service. This sometimes will be a loss for the community. I will give you one example. Catholic Charities of Boston, a religiously-affiliated adoption placement agency, had placed children for adoption in Boston for 103 years until a few years ago. Prior to the closure, Massachusetts prohibited sexual orientation discrimination in the placement of children for adoption. It appears that Catholic Charities placed children with gay individuals or couples, but when the bishop found out, the practice was stopped. Catholic Charities then started conversations with the Governor's office and legislature about whether they would support an exemption. When the answer that came back was "probably not," Catholic Charities shut their doors after 103 years.[21] Now, as a society we might be fine with that, but we have to realize that when we do not give exemptions, some groups will exit rather than violate their religious beliefs. The question for legislators is whether this is a loss that we can afford or are willing to absorb.

I have been working with a group of scholars that has urged the Maryland legislature and other legislatures to allow religious objections to same-sex marriage laws in certain instances.[22] For individuals in commerce and for government employees, our proposed text would allow individuals who cannot, for religious reasons, celebrate a same-sex marriage to step aside—but only if there is no substantial hardship to same-sex couples. If there is substantial hardship to same-sex couples in those cases, religious liberty in fact has to yield.

Even though I believe a hardship rule protects the interests of both sides, I also believe that the same-sex marriage advocates advantage themselves by putting exemptions on the table. Exemptions avoid a winner-take-all outcome. By doing that, they turn down the temperature on what has become an incredibly contentious issue. Exemptions take a powerful argument away from same-sex marriage opponents.

The experience of Maine's same-sex marriage legislation, which included a clergy-only exemption, provides a cautionary tale. Maine legislators stubbornly refused to include anything besides a clergy exemption in their law despite repeated urgings to do otherwise.[23] What happened? Maine voters repealed the Maine statute in a referendum by a narrow 53-47 percent margin.[24] This means if that 3.1 percent of the voters could have been swung on the question of religious exemptions—in other words, swung by the idea that exemptions can let people who are deeply divided on a social issue to live together in society in peace—Maine would still have same-sex marriage.

I want to come back to Maryland. What the Maryland Senate ultimately did with its initial bill was take the woefully inadequate clergy-only exemption, which is not an exemption at all, and added more robust exemptions. For example, they allowed religious organizations, including not-for-profits, to step away from providing "services, accommodations, advantages, facilities, goods, or privileges to an individual if the request is related to the solemnization of marriage" or the celebration of it, if doing so would violate the entity's religious beliefs.[25]

The amended Senate bill also exempted religious groups from "the promotion of marriage through religious counseling programs, education courses, summer camps, and retreats in violation of that entity's religious beliefs."[26] This provision would allow a religious organization to offer marriage retreats only for heterosexual marriages that jive with their religious beliefs. The Senate bill also allowed religiously-affiliated fraternal organizations (think the Knights of Columbus) to limit membership or insurance coverage to individuals if doing otherwise would violate the society's religious beliefs."[27] Crucially, the Senate bill specified that a refusal under these protective provisions could not create either a civil claim or cause of action nor constitute the basis for withholding government benefits or services from the entity. So that is where Maryland wound up, and yet it was not enough for the members of the House.

As I understand it, members of the House lacked the flexibility to amend this further. As I understand it, they were told that if they made further amendments, the Senate would not reconsider it, and so it died on the vine. But I believe if they had had the flexibility to make further exemptions, Maryland would in fact have a same-sex marriage law now.

Jana Singer*: I am delighted to have been asked to participate in this co-sponsored student event. As Professor Wilson suggested, this is exactly the sort of dialogue on important issues that the Law School ought to be promoting, and I am particularly delighted to share the table with my former colleague Robin Wilson. We miss Robin here, and it is nice to have her back at Maryland, if only briefly.

Let me start by identifying points on which Professor Wilson and I agree. I think we agree that the interests of both same-sex couples who wish to marry and religious individuals are worthy of respect. I think we also agree that states should seek solutions that attempt to accommodate both sets of interests where such accommodation is possible and consistent with other important societal and constitutionally-protected interests, such as equality and the separation of church and state.

Where we disagree, I think, is whether the broad-based exemption scheme that Professor Wilson has proposed—both here in Maryland and in her excellent book that I also commend to you[1]—meets these criteria. I believe it does not. In particular, I believe that her proposal raises serious constitutional concerns under both the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. I also believe that it represents undesirable public policy and that it sets a dangerous precedent for other potentially even broader claims for religious-based exemptions from generally-applicable laws, particularly civil rights laws. Finally, I believe that the abortion/health care conscience example that Professor

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Wilson invokes in support of her proposal does not provide an apt or a persuasive analogy.

Let me start with my constitutional concerns. I think it is fair to say that the Court's current Religion Clause jurisprudence is confused, to put it politely. Nonetheless, I think that several important principles emerge. First, as Professor Wilson has acknowledged in her writing, the Constitution does not require that the legislature provide religiously-based exemptions from generally-applicable laws even where the operation of those laws imposes burdens on religion or on religious individuals. That is the teaching of *Employment Division v. Smith*.[2] Laws that recognize same-sex marriage are generally applicable and not targeted at religion. That means that the legislators are not constitutionally compelled to create the sort of exemption scheme that Professor Wilson advocates. And I think we both agree on that.

Second, where the legislature does provide accommodations, it must do so in a way that survives Establishment Clause scrutiny. Here, the jurisprudence gets even murkier, but I think that there are a number of important criteria that emerge and that various members of the Court agree on:

1. In order to survive Establishment Clause scrutiny, an accommodation must have a secular as opposed to a religious purpose. While removing a special burden that the government imposes on religion may count as an acceptable secular purpose, simply favoring religion over non-religion does not.

2. Government action cannot have the primary effect of advancing or inhibiting religion.

3. It should not promote excessive government entanglement with religion.

4. Recent cases, in particular, have expressed concern about government actions that somehow communicate or suggest an endorsement of religion (the "endorsement" test).

I think that the exemption scheme that Professor Wilson proposes creates problems on all of these criteria. The purpose of the exemption scheme, I think, is explicitly religious. It is available only for religiously-motivated actions and objections, not for other moral objections or for individuals who have strong moral but not religiously-based objections to same-sex marriage.

Similarly, because it is available only for religiously-based objections and the actions of religious institutions, I think it has a primary effect of advancing religion, and this privileging of religious faith objections over non-religious ones, even strong moral objections, arguably violates the neutrality principle that has been central to recent Establishment Clause cases, particularly cases that have rejected challenges to government programs that benefit both religious and non-religious institutions. The Court has upheld those, emphasizing that the government aid is neutral with respect to religion and that it does not designate beneficiaries based on religious criteria, which is exactly what the exemption scheme that Professor Wilson is advocating does.

Third, I think that a broad-based exemption scheme, applicable to individuals, risks excessive government entanglement. In the proposal that Professor Wilson presented to the Maryland legislature, the criteria for an exemption for individuals and small business owners is that facilitating or assisting in a same-sex marriage must violate their "sincerely-held religious beliefs." In her writing, Professor Wilson has distinguished such a "sincerely-held" belief from any anti-gay animus or a bare desire not to support same-sex marriage. I question whether the government, a court, or an administrative agency can differentiate between those two types of objections without getting entangled in religious doctrine. Avoiding such entanglement is a core Establishment Clause concern.

Finally, I think that a number of the exemptions that Professor Wilson advocates risk communicating government endorsement of religion. This is especially problematic with respect to actions by government employees, such as the town clerks or justices of the peace, who would be covered by the proposed exemption scheme. In performing—or refusing to perform—their public functions, these officials literally speak for the government. So I fear that if the Maryland legislature were to adopt the broad exemption scheme that Professor Wilson has endorsed, this would, at the very least, create significant Establishment Clause problems and that, too, is a religious value. So, in many respects, a scheme that would purport to help religious individuals might end up hurting the religious pluralism and the separation between church and state that lies at the core of the First Amendment.

I also think that an exemption scheme like the one Professor Wilson advocates raises serious equal protection concerns, in that it would treat some state-recognized marriages differently from others. Such disparate treatment is likely to be subject to equal protection heightened scrutiny because the Court has recognized marriage as a fundamental right. Even though some courts have suggested that the state may adopt a traditional definition of marriage that excludes same-sex couples, once the state decides to define marriage to include same-sex as well as opposite-sex couples, I think it may be in real trouble if it then tries to differentiate between same-sex and opposite-sex marriages. At the very least, the state would have to show that the distinction is closely related to an important state interest other than benefiting religion. Imposing special burdens on same-sex marriages also distinguishes among marriages based on the gender of their participants, and that raises the possibility that the exemption scheme violates antidiscrimination norms embodied in the Court's gender equality jurisprudence.

It is not just the constitutional concerns that make me wary of a broad exemption scheme. I think the scheme represents bad public policy for a number of reasons. First, I think that it creates significant administrative and enforcement burdens. Not only do the courts have to decide what constitutes a sincerely-held religious belief as opposed to anti-gay animus, but some religions, including my own, Judaism, are conflicted about same-sex marriage, with some branches and congregations endorsing same-sex marriage and others objecting vehemently on religious grounds. Suppose that somebody who identifies as a reform Jew—whose official denomination supports same-sex marriage—claims that she has a personal religious belief against it—how does the government determine whether that qualifies as a "sincerely-held religious belief"? In addition, the exemption

is defined to allow individuals to refuse to engage in actions "that assist or promote . . . the celebration of any marriage" or that "directly facilitate the perpetuation of any marriage." Would that include providing flowers for a pre-wedding rehearsal dinner? What about food for a post-wedding brunch? Would lodging for out-of-town wedding guests qualify? Or how about a small business that sells bridal gowns or rents tuxedoes? Could they refuse to provide services for a same-sex celebration? Would the facilitation language extend to providing accommodations for a honeymoon? What about a five-year anniversary party?

I have to concede that I have some particular knowledge here, because I recently got married, so I know very well just how many services and business may be connected to a marriage. But I do not want to task courts or agencies with the job of determining which services qualify for the exemption and which do not, nor do I think it is fair that vendors may not know in advance whether they are entitled to an exemption or whether they are not.

That raises an additional objection, which is that vendors' efforts to access the exemptions may raise significant privacy concerns. That is, how are all these vendors to know whether the marriage for which they are being asked to provide services involves an opposite-sex or a same-sex couple? As I am sure students know better than I do, negotiations for goods and services today are often done over the Internet, or the telephone. You do not have to be high-tech. And a couple or an individual may not meet face-to-face with a vendor until a contract has been signed. Similarly, where prospective spouses live in separate cities, or live in the same city but have busy work lives, only one member of the prospective couple may be communicating with a vendor prior to the wedding. Will such vendors have to ask the gender or sexual orientation of the customer's intended partner? Do we want to encourage vendors to ask such questions? Similarly, when a person books a double room at a small bed and breakfast, will the establishment ask whether the couple who will be using the room consists of two people of the same gender, and if so, whether they are on their honeymoon or simply taking a vacation?

Some of these examples may seem silly, but I think they illustrate the difficulties of administering the scheme that Professor Wilson endorses, and since one of the arguments that she and her colleagues make in favor of a broad exemption scheme is that it will reduce litigation, it is certainly appropriate to consider whether administering the proposed scheme may, in fact, increase litigation.

Third, I think that Professor Wilson underestimates—and perhaps mischaracterizes—the kinds of burdens that these exemptions are likely to impose. Take, for example, the county office that issues marriage licenses and employs two clerks; a small office, but not single-clerk. One has a sincerely-held religious objection to same-sex marriage, but the other does not. So they decide to put up signs to tell potential registrants where they need to stand. Two lines—one says "Heterosexual Couples Only." The other says, "Homosexual Couples May Apply Here."

Having to stand in one line rather than the other probably does not constitute "substantial hardship" under Professor Wilson's proposal nor, since there are two clerks, does this become a choke point that would override an exemption. Yet the harm that is created by this separate-but-equal setup is not just the small inconvenience to the individuals and couples who seek to marry. It is also the undermining of the norms of equality and inclusion that underlie the extension of marriage to same-sex couples. A focus on individual inconvenience and chokepoints ignores these important harms.

Finally, although the accommodations that Professor Wilson proposes are specific to same-sex marriage, I think their logic extends much further, to other religious-based objections to general laws. Many religious individuals sincerely object not only to same-sex marriage but also to same-sex relationships more generally, or even to all homosexual conduct. Indeed, these individuals often cite scripture in support of their broader, religious-based objections.

Under Professor Wilson's logic, should these individuals be permitted to refuse to serve all lesbian and gay couples—or even all lesbian and gay individuals—on the grounds that providing such service facilitates or assists the conduct that they find religiously objectionable? Or perhaps the religiously-based objection is to same-sex couples raising children. Should a teacher be permitted to refuse to teach a child of a same-sex couple, on the grounds that teaching that child constitutes an endorsement of the parenting relationship, or, if simply teaching the child would not qualify, what about refusing to hold a parent-teacher conference with the child's same-sex parents? I think Professor Wilson's discussion of adoption and Catholic Charities shows that these are not hypothetical concerns.

Of course, religious objections are not necessarily limited to same-sex intimacy. Many religious individuals disapprove of non-marital sex more generally. Should such objectors be exempted from serving unmarried couples or unmarried individuals who engage in non-marital sex on the ground that doing so promotes or facilitates the religiously objectionable behavior?

And what about interracial marriage? Not all that long ago, many religions objected to interracial marriage. Indeed, as many of you know from your constitutional law classes, the trial judge in *Loving v. Virginia* offered an explicitly religious rationale for his decision to uphold Virginia's anti-miscegenation statute. Similarly, in the congressional debate over the 1964 Civil Rights Act, several senators who opposed the legislation read Bible passages into the *Congressional Record* to explain their opposition. Nor has such opposition to interracial marriage entirely disappeared. Just over a year ago, a Louisiana justice of the peace refused to marry an interracial couple in part because he believed that their children would end up suffering. That justice of the peace eventually resigned after a public inquiry, but I fear that the logic behind Professor Wilson's proposal might well have protected his conduct.

Although Professor Wilson does not mention the analogy to interracial marriage, other advocates of broad religious-based exemptions do. For example, Professor Doug Laycock has written in support of Professor Wilson's proposal that, "In more traditional communities, same-sex couples planning a wedding might be forced to pick their merchants carefully, like black

families driving across the South half a century ago."[3] Professor Laycock seems relatively unconcerned about the analogy, but I think many of us might feel differently.

Finally, let me just say two words about why I think that the abortion and other health care conscience clauses that Professor Wilson cites in support of her exemption proposal are not a good analogy. First, virtually all of the federal and state conscience clauses apply to health care providers and professionals who object to covered procedures on non-religious, as well as religious grounds. For example, the Federal Church Amendment protects individuals or institutions who refuse to perform an abortion or sterilization contrary to their "religious beliefs or moral convictions." Most state conscience clause statutes contain similar language. These statutes therefore avoid the very troubling Establishment Clause concerns that I noted earlier.

Second, these health-related conscience clauses are generally limited to shielding providers from having to participate directly in a procedure they find religiously or morally objectionable. They do not extend protection to conduct that merely facilitates the disfavored procedure or treats the disfavored procedure as valid, as I think Professor Wilson's proposal would. Conscience clauses that were as broad as Professor Wilson's proposed exemptions would allow, for example, a manufacturer of surgical equipment to stipulate that its instruments not be used to perform abortions or a florist to refuse to deliver flowers to hospital patients who had undergone sterilization. In that context, I think many of us would be more troubled by health care conscience clauses.

Third, the competing patient rights at issue in the health care context are primarily negative rights—e.g., the right to be free of "undue" government interference with respect to reproductive and contraceptive decision-making. As Professor Wilson has pointed out, these are not positive rights to government endorsement or assistance. Civil marriage, by contrast, is a positive right—a status created and privileged by the state. One of its primary purposes is to confer state recognition and endorsement on a relationship—indeed, that is largely why the issue of same sex marriage is so fraught on both sides. This difference suggests that religious-based exemptions to same sex marriage recognition—particularly exemptions that apply not only to religious institutions, but also to individuals and businesses—cut deeply into the underlying right, and the equality norms that support it, in a way that conscience clause protections do not, regardless of whether the exemptions create tangible hardship for individual same sex couples. Thus, the emphasis of many exemption proponents on "insubstantial burdens" misses an important point. This damage done by broad-based exemptions to same-sex marriage goes well beyond the tangible burdens that such exemptions impose on individuals and same-sex couples. They also exact a heavy price on the norms of equality and inclusion that same-sex marriage recognition entails.

Professor Wilson Response: Thank you, Jana for the thoughtful reactions. I want to clarify only a couple points.

First, our proposed exemption is limited to religious objections for a reason. I think personally that if we allow exemptions to the celebration of same-sex marriage for moral reasons, that would encompass people having moral objections to homosexuality, which is not something I can support.

The marriage conscience protection we propose extends to objections to celebrating same-sex marriage itself, not to objections to homosexuality. Now, to avoid the constitutional problems in the past, the U.S. Supreme Court has read a statute to include moral objections, too, precisely to avoid the Establishment Clause problem. It has done this, for example, in the military objector context. So when federal law allowed conscientious objectors to step aside from fighting only for reasons of one's religious training and belief, the Supreme Court broadened the interpretation of that protection to include non-religious, moral objections.[28]

In my view, a legislative exemption that deliberately encompasses moral objections would encompass objectors whose real problem with same-sex marriage is with homosexuality. This treads too closely to anti-gay animus. But as I have often said, I do not believe that all objections to facilitating a same-sex marriage stem from anti-gay animus. Quite the contrary. For many people, marriage itself is a religious sacrament and the assistance of it may well be a religious act in their minds. It is true that not all of us would agree with that, but that is what these individuals believe. By limiting the marriage conscience protection only to objections to same-sex marriage on religious grounds, and not to all moral objections, we reduce the chance that people opposed simply to homosexuality will claim the protection.

I think that some of the concerns Professor Singer raises are really profound. But the law already does a lot of what Professor Singer thinks we ought not be doing, and let me give you specific examples. Maryland's non-discrimination on sexual orientation statute has what is called a Mrs. Murphy exemption. It simply exempts from the scope of the statute,

> [w]ith respect to discrimination on the basis of sex, sexual orientation or marital status, the renting of rooms in any dwelling, if the owner maintains a dwelling as the owner's principal residence, or the rental of any apartment in the dwelling that contains not more than five rental units, if the owner maintains a dwelling . . . ."[29]

The choice not to rent in this case just does not count as illegal discrimination.

Who are these people who have a room to rent and receive protection here? I suspect they are religious ladies who do not want people having sex outside of marriage (any sex) in the room next door. If I am right, this is, in fact, a religious exemption, and it is already in Maryland law.

Maryland offers a second, clearer example. Maryland's employment discrimination ban, prohibiting discrimination on the basis of race and other grounds, including sexual orientation and marital status, exempts a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion or sexual orientation, to perform work connected with their activities or of the religious entity,[30] much as Title VII and other non-discrimination statutes do.

Statutes that are designed to protect people from discrimination include these carve-outs because there are two interests at play: the nondiscrimination norm we are trying to establish in that statute and the interests of other people in society who are asked to navigate that new norm.

Jana brings up an equally compelling point about dignitary losses, and I do not want to minimize them. In later pieces, I have suggested that we can avoid separate-but-equal treatment, or more concretely the problem of two lines for applying for marriage licenses as a way to handle objections. For example, we can use a Division of Motor Vehicles-style intake system in which customers approach a single window or clerk, who gives the customer a number and sends them to the correct window.

In a recent piece, "Insubstantial Burdens," which explores the idea of government clerk objections,[31] I talked to Massachusetts clerk's offices and asked them how many clerks work in a given office and how many same-sex applications it receives, to gauge how many religious objectors we are likely to have, and how often this is going to come up. In other words, would it be easy and fairly costless to exempt somebody? In those cases, the answer seemed to be yes.

A DMV system makes it not only easy to staff around an objector, it also makes it invisible to the public. So say you have an office with four clerks—Faith, Hope, Charity, and Efficiency—and only Faith has a problem with same-sex marriage. Adam and Steve walk up. Obviously we do not want to assign Faith to the central intake desk because she has a religious objection. But we can stick her on other tasks, and let Efficiency or another clerk perform the intake role of assigning the public to the right window—in this case, Efficiency will direct Adam and Steve to a window staffed by someone other than Faith. Even with Faith stepping aside, Adam and Steve receive their necessary license from Hope or Charity or Efficiency, and they never even need to know that Faith had a religious objection.

My research with the Massachusetts clerks offices revealed another interesting point: Faith is not out back eating bonbons or getting an extra smoking break because she objects. Instead, she moves onto the next piece of work. This is so because the clerk's offices are working at almost top capacity, no surprise in this economy and with shrinking government budgets.

Allowing Faith to step aside is also consonant with what we do under Title VII. Title VII gives religious employees the right in some instances to receive accommodation of their religious beliefs, just as it provides protections against discrimination on other grounds. Now, Jana is worried that the message sent by society with exemptions somehow undercuts the norms established in those statutes. But I suspect that if Congress had not provided protections for religious organizations and religious employees in Title VII, we likely would not have Title VII.

The real question on the table is this: are same-sex marriage advocates willing to accept ninety-five percent of a loaf? If advocates want to establish the marriage equality norm, I believe they, and we, need to find a way in a plural, liberal, democratic society for both religious objectors and same-sex couples to live together.

One last point about the abortion statutes. They are often broad and provide protection to anybody who somehow touches the abortion process and has a moral or religious objection. For example, the Pennsylvania statute says, and I am paraphrasing, that except for facilities like Planned Parenthood that are exclusively devoted to the performance of abortion, no medical personnel or employee or agent or even a student shall be required against their conscience to aid, abet, or facilitate the performance of an abortion.[32] This is incredibly broad.

Now, Professor Singer worries that exemptions will violate the Establishment Clause. In a recent piece in a Northwestern journal,[33] I list a number of U.S. Supreme Court cases that have touched on this question. They give some indication that exemptions are not per se a violation.

In a case called *Caldor* (1985),[34] a Connecticut statute allowed Sabbath observers to take off on whatever is that observer's Sabbath day, a completely unqualified right to step aside if your Sabbath practice says you cannot, for example, work on Friday. In concluding that the statute did violate the Establishment Clause, Justice O'Connor in her concurrence contrasted this statute with Title VII, which has a qualified exemption (not unlike the qualified exemption we propose in the marriage conscience protection, although the two are not identical). She said in particular that Title VII calls for, in her view, reasonable rather than absolute accommodation, and it extends protection to all religious beliefs and practices rather than protecting only the Sabbath observance.

Subsequent cases like *Amos* involved a direct challenge to Title VII as violating the Establishment Clause.[35] There the Court emphasized that an exemption need not come packaged with secular benefits. In other words, you can give a religious exemption without the moral exemption, and that does not by itself make the whole thing fall, which was the model that my group of scholars was working off of.

More recently in *Cutter* (2005),[36] the Court upheld the Religious Land Use and Institutionalized Persons Act's[37] accommodation of religious practices for people who are institutionalized or put in prison. They said in particular that RLUIPA conferred no privileged status on any particular sect, and it did not single out any bona fide faith for disadvantageous treatment.

I think these cases give us a lot of food for thought in what is, as Jana noted, a confused area of the law. At the least, they show that not all accommodations slip over into the unconstitutional establishment of religion. As a matter of public policy, I do not want to authorize people to do something that masks anti-gay animus. By narrowly focusing only on the marriage relationship, my goal was to respect religious beliefs as to the nature of marriage, without, in fact, authorizing objections to homosexuality.

Endnotes

1 Senate Bill 565, *available at* http://mlis.state.md.us/2009rs/bills/sb/sb0565f.pdf.

2 *See generally* Same-Sex Marriage And Religious Liberty: Emerging Conflicts (Douglas Laycock, Anthony R. Picarello, Jr., & Robin Fretwell

Wilson eds., 2008).

3 *See* Senate Bill 565 § 2, *available at* http://mlis.state.md.us/2009rs/bills/sb/sb0565f.pdf; *see also*, *e.g.*, M.D. Const., Declaration of Rights, art. 36.

4 At the time of this speech, New York had not yet enacted same-sex marriage legislation.

5 *See* N.H. Rev. Stat. § 457:37 (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization," "celebration," or "promotion" of a marriage); Conn. Pub. Act No. 09-13 (2009) §§ 17-19, *available at* http://www.cga.ct.gov/2009/ACT/PA/2009PA-00013-R00SB-00899-PA.htm (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization" or "celebration" of a marriage, and providing separate exemptions for religious adoption agencies and fraternal benefit societies); 9 Vt. Stat. Ann. § 4502(l) (2009) (exempting religious organizations from "provid[ing] services, accommodations, advantages, facilities, goods, or privileges . . . related to" the "solemnization" or "celebration" of a marriage); Religious Freedom and Civil Marriage Equality Amendment Act of 2009, D.C. Law No. L18-0110 (enacted Dec. 18, 2009, effective Mar. 3, 2010), *available at* http://www.dccouncil.washington.dc.us/ lims/legisation.aspx?LegNo=B18-0482 (exempting religious societies and religiously affiliated non-profits from providing "accommodations, facilities, or goods for a purpose related to the solemnization or celebration of a same-sex marriage, or the promotion of same-sex marriage through religious programs, counseling, courses, or retreats . . .").

New York also enacted legislation with more robust exemptions. *See also* N.Y. Dom. Rel. Law § 10-b (2011) (exempting religious institutions, benevolent orders, and religiously affiliated not-for-profit corporations or any employee thereof from any requirement to provide "services, accommodations, advantages, facilities, goods, or privileges for the solemnization or celebration of a marriage").

6 Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw. J. L. & Soc. Pol'y 318 (2010).

7 Goodridge v. Dept. of Public Health, 798 N.W.2d 941 (Mass. 2003).

8 *See* Katie Zezima, *Obey Same-Sex Marriage Law, Officials Told*, N.Y. Times, Apr. 26, 2004, at A15.

9 *See also* General Law of Massachusetts, Chapter 151B, Section 5 (providing for civil penalties up to $50,000 when a party commits two or more discriminatory practices during a seven-year period preceding a complaint, and for smaller penalties in other instances).

10 Bernstein v. Ocean Grove Camp Meeting Ass'n, No. PN34XB-03008 (N.J. Dep't of Law and Public Safety, Notice of Probable Cause issued Dec. 29, 2008).

11 Jill P. Capuzzo, *Group Loses Tax Break over Gay Union Issue*, N.Y. Times, Sept. 18, 2007 (describing the case of *Bernstein v. Ocean Grove Camp Meeting Ass'n*, in which New Jersey revoked the property tax exemption of a beach-side pavilion controlled by an historic Methodist organization, because it refused on religious grounds to host a same-sex civil union ceremony).

12 Elane Photography v. Willock, No. D-202-CV-200806632 (N.M. 2d Jud. Dist. Ct.) (filed July 1, 2008).

13 *See, e.g.*, Md. Code Regs. 21.05.08.07 (2010) (prohibiting public works contractors from discriminating on the basis of, among other things, "marital status, [or] sexual orientation").

14 *See* Don Lattin, *Charities Balk at Domestic Partner, Open Meeting Laws*, S.F. CHRON., July 10, 1998, at A-1 (describing how the Salvation Army lost $3.5 million in social service contracts with the City of San Francisco because it refused, on religious grounds, to provide benefits to the same-sex partners of its employees).

15 410 U.S. 113 (1973).

16 *See, e.g.*, Taylor v. St. Vincent's Hospital, 523 F.2d 75 (9th Cir. 1975).

17 42 U.S.C. § 300a-7(c) (2011).

18 Same-Sex Marriage And Religious Liberty, *supra* note 3, at 299 (listing state statutes modeled after the Church Amendment).

19 *See, e.g.*, Iowa Code § 146.1 (2005) ("An individual who may lawfully perform, assist, or participate in medical procedures which will result in an abortion shall not be required against that individual's religious beliefs or moral convictions to perform, assist, or participate in such procedures. . . . Abortion does not include medical care which has as its primary purpose the treatment of a serious physical condition requiring emergency medical treatment necessary to save the life of a mother.").

20 *See* Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw J. L. & Soc. Pol'y 318 (2010).

21 *See* Patricia Wen, *"They Cared for the Children": Amid Shifting Social Winds, Catholic Charities Prepares to End Its 103 Years of Finding Homes for Foster Children and Evolving Families*, Boston Globe, June 25, 2006, at A1 (explaining how Massachusetts threatened to revoke the adoption license of Catholic Charities for refusing on religious grounds to place foster children with same-sex couples).

22 Letter to Senator Brian E. Frosh, Chairman of the Senate Judicial Proceedings Committee (Jan. 26, 2011), *available at* http://mirrorofjustice.blogs.com/files/maryland-letter.pdf; Letter to Senator Dean G. Skelos, New York State Senate (May 17, 2011), *available at* http://www.nysun.com/files/lawprofessorsletter.pdf.

23 An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, *available at* http://www.mainelegislature.org/legis/bills/display_ps.asp?ld=1020&PID=1456&snum=124.

24 *See* November 3, 2009 General Election Tabulations, *available at* http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html.

25 Senate Bill 565, *available at* http://mlis.state.md.us/2009rs/bills/sb/sb0565f.pdf.

26 *Id.*

27 *Id.*

28 Same-Sex Marriage and Religious Liberty: Emerging Conflicts (Douglas Laycock, Anthony R. Picarello, Jr., and Robin Fretwell Wilson, eds., 2008).

29 494 U.S. 872 (1990).

30 Douglas Laycock, *Afterword* in Same-Sex Marriage and Religious Liberty: Emerging Conflicts, *supra* note 1, at 200.

31 *See* Welsh v. United States, 398 U.S. 333, 344 (1970) (plurality decision) (interpreting the breadth of the conscientious objector status statute as extending to "deeply held moral" and "ethical" beliefs).

32 Md. Code Ann., State Gov't § 20-707 (2010).

33 Md. Ann. Code 49B, § 18(2) (2010) (exempting any "religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities" from the prohibition on discrimination in employment.)

34 Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw. J. L. & Soc. Pol'y 318 (2010).

35 18 Pa. Cons. Stat. Ann. § 3213(d) (West 2000).

36 Robin Fretwell Wilson, *Insubstantial Burdens: The Case for Government Employee Exemptions to Same-Sex Marriage Laws,* 5 Nw. J. L. & Soc. Pol'y 318 (2010).

37 Estate of Thornton v. Caldor, Inc., 472 US 703 (1985).

38 Corp. of the Presiding Bishop v. Amos, 483 U.S. 327, 338 (1987).

39 Cutter v. Wilkinson, 544 U.S. 709 (2005).

40 42 U.S.C. §2000cc-1, *et. seq.* (2011).

Healthcare Reform's Impact on Drug Patents

The George Washington University, November 19, 2009

Adam Mossoff*: Well, I want to thank you, Dean Maddox, and to thank the Federalist Society here at George Washington for inviting me to talk about drug patents. It's really a privilege debating John Duffy, whom I've been reading for a long time. I'm a big admirer of his work, and I have to confess, I feel a bit like a welterweight getting into a boxing ring with Mike Tyson. So, Professor Duffy, as long as you promise not to bite off my ear, I think we're going to have some fun here.

I'm really interested in healthcare reform and its impact on drug patents. I'm interested in this issue from the perspective of whether there is a constitutional problem with any restrictions on pharmaceutical patents that will follow from, and perhaps be a logical result of, the federal government's push for healthcare reform. Since we don't yet know exactly what the healthcare law will be, I will use here as my reference point some proposals that have been floated in Congress.

One actually is a bill for drug reimportation that Dean Maddox hinted at. These bills have been floated in Congress every year for a long time now. They permit reimportation of drugs from countries like Canada and other industrialized countries that have socialized healthcare systems and express price controls.

The way these bills work is that they eviscerate a patentee's ability to impose restrictions on wholesalers in other countries that prohibit them from reselling back to the United States. It's called territorial restrictions. So they sell to the Canadian bulk purchaser, stating that you can only sell your drugs in Canada and that you can't resell them in the United States. The reimportation bills work by eviscerating—prohibiting—pharmaceutical companies' rights to include those types of restrictions and other types of restrictions, like sale quantity and use restrictions and even price restrictions, in their sales contracts.

And also there is a great possibility down the road, especially if they adopt some sort of nationalized healthcare system here or the public option, of outright price controls. You can see the justification for this. If the federal government is paying for drugs, then it's going to be plainly justified in regulating the amount of money that private pharmaceutical companies can take from the public fisc, and it's going to eventually assert this as a price control measure.

I'm interested in whether the pharmaceutical companies may assert a regulatory takings claim in response to these types of legislative or regulatory restrictions on prices or sale restraints. Within regulatory takings law and patent law there's actually sound doctrine to suggest that these types of legal moves by Congress would actually result in a taking of the pharmaceutical companies' property rights in their drugs. In other words, they may seek protection under the Takings Clause of the Fifth Amendment. Depending upon what you think of the pharmaceutical companies, you can maybe just hum Darth Vader's imperial march theme in the background as I'm talking. Yes, I am here defending the pharmaceutical companies!

So I'm going to look to regulatory takings doctrine, the famous *Penn Central* inquiry,[1] as a framework in my remarks today to identify what I think are the essential property rights in drug patents, and therefore determine if there could there be a takings claim in response to price controls or other restrictions on these patents. It's important to note that I'm interested in this as a matter of doctrine, and I readily concede as a matter of practical politics that it's unlikely that the Court would actually rule in this way. As I fully expect Professor Duffy to note, there are strong countervailing policy considerations outside of the doctrine of both patent law and takings law on which the Court could rely in reaching the result that price controls on patented drugs are not a taking, and takings doctrine is nebulous enough to permit this type of decision. But I think there is still value in recognizing both the conceptual and normative standards that are built into the doctrine itself.

But even conceding that if you don't buy my story—as the saying goes, we're all legal realists now—then hopefully my remarks today will at least make you realize that you can't just quickly jump to the conclusion that these types of regulations are constitutional. There are many commentators who think there's no problem with this whatsoever. Actually, they have to engage in substantially more doctrinal and normative heavy-lifting than they assume. It's not as easy a decision as many see it.

All right, so let me start with a few important baseline observations. Patents are *intellectual property*, right? Why make this seemingly obvious point? It's important because in cases dealing with *intangible property* interests, the Court in regulatory takings cases seems to shift instinctively as to what it thinks is the essential nature of the property that's affected by the regulation. In several cases throughout the twentieth century involving intangible property rights, such as in *Armstrong v. United States*,[2] in which the U.S. destroyed the value in liens on boats owned by a bankrupt shipbuilder, in *Hodel v. Irving*[3] and in *Babbitt v. Youpee*,[4] in which a federal escheat statute eliminated the right to devise, and of course in *Monsanto v. Ruckelshaus*,[5] in which an FDA regulation forced the disclosure of trade secrets, the Court has consistently held regulatory restrictions to be a taking. I particularly like *Monsanto* because the Supreme Court cites John Locke as authoritative precedent that labor is the source of property.[6]

In these cases, the Court conceives of property in terms of the substantive rights of use, enjoyment, and disposal. And it is these rights that take central place in the takings analysis of the property interest that is affected by the regulation. What's most notable about these cases involving intangible property rights—liens, the right to devise, and trade secrets—is that the property owners have won.

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Prof. Mossoff made these remarks in a debate with Professor James Duffy at The George Washington University on Nov. 19, 2009. We are seeking to publish Prof. Duffy's remarks in a future issue of Engage.

Now this is in stark contrast with the traditional land cases that many people think of when they think of regulatory takings. In these cases, such as *Lingle v. Chevron*,[7] *Palazzolo v. Rhode Island*,[8] and the Lake Tahoe case,[9] the Court doesn't define property in terms of the rights of use, enjoyment and disposition, but instead focuses on the *right to exclude* as the sole right that makes something "property" under the Takings Clause. Once it determines that the right to exclude is unaffected by the regulation, it then discounts regulations restricting use and disposition against the overall social benefits that come from regulations. And it's not surprising in these particular land cases, the government always wins.

Now this is why the context of a patent as an intellectual property right is important, because this suggests that it will lead the Court to shift instinctively in the way that it thinks of the property. In such a case, it will shift to the substantive conception of property consisting of the rights of use, enjoyment, and disposition. As a result, the Court may then feel compelled to provide stricter constitutional protection, as it did in the other cases involving intangible property rights, for the substantive rights of use and disposition in drug patents. In particular, it will view licensing rights and the rights to control how a purchaser and a follow-on user of a patented invention—the drug in this case—may be able to use it as essential rights of the property right.

So the starting point for dealing with an intangible property right in a regulatory takings case would be to look at it from the perspective of the property owner, determining how a restraint affects the core expectations of the property owner.

Here I'm going to go walk through the multi-factor *Penn Central* inquiry, although I'm not going to walk through the factors literally because the Court doesn't even do this. Even though the Court says the *Penn Central* inquiry is the "polestar" for its regulatory takings jurisprudence,[10] it doesn't treat it literally as such. It mixes and matches the factors depending on the nature of the property interests at issue, as I've identified in the two conflicting lines of cases.[11] That's probably why this area of law is called an "inquiry" and not a "test."

All right, so the Court will think about the intangible property from the perspective of the importance of the rights of use and disposition. The question then becomes: how much does the government action interfere with the patent owner's expectations? In other words, what's the *character of the government action* and does it interfere with expectations secured under current law? Or does it simply enforce a limitation already built into the title, i.e., limitations that already exist in doctrine and that directly relate to the affected property interest?

Well, this is a tough question, as it is in all regulatory takings cases, but I don't think that price controls or reimportation laws can look to pre-existing patent law for support—as something that just reflects limitations already built into the title in the patent. The primary patent doctrine that delimits patentees' rights to dispose of their property is patent exhaustion doctrine. Even in the Supreme Court's recent decision in 2008 in *Quanta Computer, Inc. v. LG Electronics, Inc.*,[12] which announced a very stringent, mandatory rule on patent exhaustion—that patentees, when they dispose of their inventions in the market, exhaust all their property rights and thus they can't control downstream third-party uses of the patented inventions—it still recognized that patentees could impose restrictions directly on licensees, such as wholesalers, who are in privity with the patentee himself.

Thus—this is very important—a drug reimportation law would directly remove the licensing rights that patentees have long used with their wholesalers and licensees in foreign jurisdictions, like Canada. Moreover, price controls or other rate regulations would directly prohibit the free pricing of the property in a sale between a pharmaceutical company and a wholesaler or distributor, whether it's a public one or a private one. So the basic point here is that patentees have within patent law long-standing use and disposition rights—licensing rights—going back to the nineteenth century.[13] They have long been free to exploit their substantive rights of use and disposition in their property as they see fit to maximize their commercial return.

Now there may be perhaps doctrines that are external to patent law that might reflect a pre-existing limitation built into the title that could serve as a basis for justifying reimportation laws or price controls. For instance, one might think that antitrust has changed the expectations here. But I don't think so. Again, it is a difficult question, but the quick answer is that drug reimportation and price controls would not implicate a limitation that finds support in antitrust limits on drug patents.

In its application to patents, as a general matter, antitrust prohibits things like patent misuse, tie-in arrangements, and price-fixing. But patentees are generally insulated from antitrust liability for contractual restraints with licensees or wholesalers when it involves a *single* patent. In fact, it's in antitrust cases that you get some of the strongest statements about the importance of the substantive use and disposition rights of patentees. Thus, for instance, in *United States v. General Electric*,[14] the Supreme Court declared that the patentee had broad powers to condition sales by licensees and wholesalers in terms of territorial restrictions and other types of restraints, because—to use Chief Justice Taft's words for a unanimous Court—such rights all serve "the reward which the patentee by the grant of the patent is entitled to secure."[15]

Thus, the character of the government action—here, we're talking about a price control or a drug reimportation law—would be a radical shift in the nature of the types of rights that patentees have long expected to enjoy as part of their property. As part of their title, when they've obtained a patent, they have been able to go out into the world and impose territorial restrictions, impose sale quantity restrictions, and impose all sorts of other types of restrictions on their immediate purchasers in order to maximize the profit that they can obtain for the term of their patent, and this is the reward that the patent system intended to secure for them.

Lastly, of course, the factor I haven't talked about, the one that most people think about when they think of regulatory takings is *economic losses*. What are the losses that result from the regulation? And here, the pharmaceutical industry is highly specialized. It is one of the few industries that's actually built on the dynamic efficiency of intellectual property; that is, on the research and development of new molecules that it then turns

around and patents—it turns it into property—and then goes into commercial markets with it.

In fact, studies show repeatedly that the drug industry is the most research-intensive of all industries in the United States.[16] This has been true throughout most of the twentieth century when the drug industry engaged in traditional screening methodologies, where it has gone out and collected slime and screened it for whether it has molecules that are active against diseases or genetic defects. And this heavy research and development has only increased in the past twenty years with the rise of what's known as structure-based design methodologies, which has been part of the biotech revolution in which drug companies now design molecules from the protein up to provide treatments to patients.

As a result of this research-intensive environment, the average R&D costs behind each patented drug that is brought to market are between approximately $500 million to $1 billion, and sometimes as high as $1.1 billion.[17] Now why is this? I mean, just because you have heavy R&D, it doesn't necessarily mean that you're going to have $1.1 billion in sunk costs behind a single drug that comes on the market.

Well, one primary reason is that each drug is not only paying for itself, it's paying for thousands of dry wells in the research and development process. I don't know how many people know this, but on average, out of ten thousand compounds that are initially researched by a pharmaceutical company, only five are approved by the FDA for clinical trials. And out of those five that are approved by the FDA for clinical trials, only one actually gets approved for use in patients. Thus, one out of every ten thousand drug compounds that goes through research and development by pharmaceutical companies—and through the testing gauntlet imposed upon them by FDA—ultimately becomes a commercial product in the healthcare market.[18] Once out in the market, there's not even a guarantee of success. Studies show that only three out of ten FDA-approved drugs that reach the market provide enough money for a pharmaceutical company to recoup its basic R&D expenditures.[19]

Now these economic losses are really significant. They're really significant, but not in the way that they're normally framed in regulatory takings cases. The nature of the economic losses for the pharmaceutical company in the use of its property is unlike in land cases in which the Court adopts the idea of property as the right to exclude. In the land cases, it determines the right to exclude is unaffected by regulations that restrict the rights of use and possession, which is then deemed to be a relatively small price that we pay for the overall social benefits achieved by the regulations that are enacted according to a state's police powers.

This attitude is supported by the nature of the economic losses in land cases. In most land cases, you have single, one-time losses. One of the most significant losses in a modern regulatory takings case involving land was in *Palazzolo*, in which the landowner claimed that he lost $3.1 million as the result of an environmental regulation that prohibited development of a parcel of land in Rhode Island.[20] But this $3.1 million was a static, one-time loss. He said I will lose this amount if I try to sell my land on the market under this new regulation.

In a restriction on a drug patent, you actually have ongoing and continuing losses, so it's not a static efficiency loss. It's a dynamic efficiency loss. The research and development that pharmaceutical companies are paying for is tens of millions of dollars on a day-to-day, year-to-year basis, and thus they'd be looking at tens of millions in losses, not just a one-time $3.1 million loss. It thus becomes harder to discount these economic losses against generalized social benefits that might accrue to the rest of the country.

Moreover, there are clearly identifiable and substantial stakes at issue with a drug patent. As I said, $3.1 million seems like a lot of money, but to a pharmaceutical company, that's chump change. One pharmaceutical company, Vertex Pharmaceuticals in Boston, burned through $3 million in just two to three months before it brought its very first successful product to market, one of the first AIDS treatment drugs in the mid-1990s. And by then it had already spent $200 million, and that was in the early 1990s,[21] and so the costs are even higher today.

Now this economic data is significant but not because it will play a significant role in the regulatory takings analysis as such. It's interesting to note that in the regulatory takings cases involving intangible property rights—as I indicated, *Armstrong*, *Hodel*, *Youpee*, and *Monsanto*—the Court didn't talk very much about the economic losses. Why? Because in these cases, the Court emphasized that it must look at the substantive property rights under the Takings Clause—the rights of use and disposition—and thus it didn't engage in the discounting against the right to exclude that one sees in land cases.

And this is why these massive economic losses matter. Because they increase pressure on the Court to shift in its thinking about the nature of the property: it is not simply a bare right to exclude that's untouched by a regulation, but rather it is the substantive conception of the essential rights of use and disposition. When a pharmaceutical company has sunk costs of $500 million to $1.1 billion behind a single product, the rights of use and disposition—the right to make a profit in the marketplace—matter in a very dramatic way.

Of course, until we actually know what the healthcare legislation actually says, rather than the conceptual language that keeps being presented to us in the summaries of the 2000-page bills, it will be anyone's guess as to what impact ultimately will fall on the drug companies and how the Court might resolve a regulatory takings claim.

Thank you.

Professor Mossoff Response: I'll just quickly respond to each of Professor Duffy's points. First, I agree with Professor Duffy that there is massive distortion in the healthcare market right now, such as cost-shifting. In fact, most people don't realize how much healthcare in this country is already paid for by the government. When they talk about the failure of our free market system, people don't realize that about 50% of all healthcare costs in this country are paid for by the federal, state and local governments.[22] When 50% of your healthcare is being paid for by the government, you don't have a free market in the healthcare system.

If you talk to doctors and companies that work in the healthcare market, all of the inefficiencies of government are imposed upon them, from excessive bureaucracy to excessive paperwork,[23] and ultimately to the government strong-arming them to accept certain payments for services and products that are less than what they would accept normally. This occurs repeatedly with Medicare and Medicaid, and in fact, one reason why, if you have private healthcare insurance, you pay so much, is because hospitals and doctors do not receive as much to cover the actual costs under Medicare. They actually get less than marginal cost payments from Medicare for products and services. In hospitals, the doctors have to cover their expenses, so they just cover that extra cost by tacking it on to the other services and products that are paid for by private insurance companies.

So again, we have massive dislocations in the system, like cost-shifting, and I entirely agree with that, but I strongly doubt that the pharmaceutical industry is a winner in this. They are universally reviled and looked at as bad people, along with the insurance companies, and I admit that some of this is deserved. Like everyone else, they lobby for benefits, like Medicare Part D. In the run-up to the legislative debates, President Obama last spring got the pharmaceutical industry to support the proposed bills for national healthcare reform with a public option by promising that price control and reimportation provisions would not be considered as part of the reform bills. And now six months later, these provisions are already being considered, which explains why it's now lobbying against it, because the government has gone back on its promises about it. My attitude about this is that if you make a deal with the devil—the government—don't be surprised that the devil may stab you in the back.

On drug reimportation, I also agree that it's a public choice problem. In Canada, the government imposes price controls knowing full well that pharmaceutical companies will raise their prices in the United States to make up the difference because they have certain costs that they need to cover, and it's not the marginal costs. Covering the marginal costs will not make the least bit of difference in an R&D-based industry that needs to recoup its upfront expenses. In Canada, if it imposes price controls, the prices are just transferred to someone else, like us.

This has been happening in all the countries throughout the world, and it's a great example of a public choice problem because politicians in other countries are not responsive to the concerns of the American voter. They don't care if American voters are paying too much. All they care about is that Canadian voters are paying less so that they can get voted into office in Canada. Well, the buck stops with America. We're the last major country that doesn't impose price controls.

What will happen when the United States adopts price controls or reimportation laws is that prices are not going to rise in these other countries because those governments don't care what happens in our country. I mean, at the end of the day, you don't negotiate with a government like it's another private entity. When you're a drug company and you have a conversation with the government about how much it's going to pay in its socialized healthcare program, this is not like you sitting down with a homebuyer and having a negotiation with him about how much he's going pay for your house. The government says, we're going to pay you this much, and you're going to have to accept it because we're the only game in town.

Why then do pharmaceutical companies agree to this in other countries? Well, they would rather accept one penny than nothing at all because that's still something that they can get back on their sunk costs because the marginal costs, like I said, are not what is driving the price of their products. The pharmaceutical industry is not a marginal-cost industry; it costs almost nothing to make a pill. With their massive research investments behind their drugs, it's these costs that have to get covered for past and future R&D, and pricing at marginal cost isn't going to do that. As I said, this is an industry driven by dynamic efficiency, not static efficiency.

Lastly, the reason why it's only estimates on total R&D costs, with the opponents of the pharmaceutical industry claiming that R&D is $400-$500 million and the pharmaceutical industry saying that it's $800 million to over $1 billion, is that the R&D data is secret. They don't want to expose it, because this would reveal trade secrets and other commercial secrets. So we don't really know what their R&D is going to, but everyone assumes that it's all going to end-of-life treatments: drugs for the last two years of someone's life, like an elderly person with terminal cancer. But it's not just that, it's also going to treatments of major diseases that are killing all people, like AIDS. Vertex Pharmaceuticals, the company I had mentioned in my talk, was the first company to bring out a treatment for AIDS, which has saved countless numbers of lives, and ultimately led to the famous drug cocktails that people with AIDS now take. So young people who thought they were going to be dead in a couple of years are now still alive today, like Magic Johnson. So don't think all of the R&D expenses are entirely for end-of-life medical treatments for old people who are just buying a little more time to avoid the inevitable.

Endnotes

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

2 364 U.S. 40 (1960).

3 481 U.S. 704 (1987).

4 519 U.S. 234 (1997).

5 467 U.S. 986 (1984).

6 *Id.* at 1003 (citing Locke's *Second Treatise* for the proposition that property arises from "labour and invention").

7 544 U.S. 528 (2005).

8 533 U.S. 606 (2001).

9 Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002).

10 *Tahoe-Sierra Preservation Council*, 535 U.S. at 336 ("Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.").

11 I learned of this divide within the regulatory takings case law from Eric R. Claeys, *The* Penn Central *Test and the Tension between Classical- and Modern-Liberal Theories of Property*, 30 Harv. Envtl. L. Rev. 339 (2006).

12 128 S. Ct. 2109 (2008).

13 *See* Adam Mossoff, *A Simple Conveyance Rule for Complex Innovation*, 44 Tulsa L. Rev. 707, 711-720 (2009); Adam Mossoff, *Exclusion and Exclusive Use in Patent Law*, 22 Harv. J. L. & Tech. 321, 347-60 (2009).

14 272 U.S. 476 (1926).

15 *Id.* at 489.

16 *See* F.W. Scherer, *The Pharmaceutical Industry—Prices and Progress*, 351 New Eng. J. Med. 927, 927 (2004) ("The pharmaceutical industry is the most research-intensive of U.S. industries that support their research and development with private funds (as distinguished from defense and space contractors).").

17 *See* Joseph A. DiMasi, Ronald W. Hansen & Henry G. Grabowski, *The Price of Innovation: New Estimates of Drug Development Costs*, 22 J. Health Econ. 151, 181 (2003) (projecting total R&D costs for drugs approved in 2001 to be $1.1 billion). The pharmaceutical industry claims that the average R&D cost in 2000 was $800 million. *See What Goes into the Cost of Prescription Drugs? . . . and Other Questions About Your Medicines* 2 (2005), *available at* http://www.phrma.org/files/attachments/Cost_of_Perscription_Drugs.pdf (last visited Nov. 4, 2010).

18 *See What Goes into the Cost of Prescription Drugs? . . . and Other Questions About Your Medicines* 2 (2005), *available at* http://www.phrma.org/files/attachments/Cost_of_Perscription_Drugs.pdf (last visited Nov. 4, 2010).

19 *See* Henry G. Grabowski & John Vernon, *Returns to R&D on New Drug Introductions in the 1980s*, 13 J. Health Econ. 383, 404 (1994).

20 *Palazzolo*, 533 U.S. at 616.

21 Barry Werth, The Billion-Dollar Molecule 253-54 (1994).

22 Lin Zinser & Paul Hsieh, *Moral Health Care vs. "Universal Health Care*," 2 The Objective Standard 9, 17 (Winter 2007-2008) (citing 2006 U.S. Census Bureau report).

23 *See id.*; Stella Daily Zawistowski, *A Prescription for America's Health Care Ills*, 3 The Objective Standard 27, 29 (Fall 2010) (reporting that "regulation-strewn interactions with insurance companies" impose an extra $23 to $31 billion per year in costs on physicians).

Film Piracy and the Pirate Bay Cases

Indiana University School of Law-Bloomington, April 13, 2010

JOHN MALCOLM*: I thought I'd talk a little bit about the extent of movie piracy and something about what's going on in the fight against piracy. A lot of the action is now taking place internationally. But before doing that, I thought I'd talk a little bit about the movie industry and what's at stake here.

I hope we can all agree that movies are a tremendous cultural resource for this country. Movies profoundly affect the lives of people around the world. They make us laugh. They make us cry. They allow us to leave whatever it is we do during the day to be entertained for a while. And probably most importantly, they cause us to think about and rethink positions that we've taken on political and social issues.

In addition to being a very important cultural resource, filmed entertainment, which includes television too, is a very powerful economic engine for this country. There are over 2.5 million Americans employed in the movie business, and the overwhelming majority of these people are not Julia Roberts or Will Smith. They are grips and carpenters and set designers and animators and special effects designers. They're not mega-millionaires; they're just average citizens who happen to have a particular talent. They're trying to make a decent living for their families doing something that they enjoy, producing a product that we all get to enjoy as well.

In addition to that, making a motion picture is a very expensive and actually quite a risky undertaking. Everybody hears about the winners that make a lot of money, and certainly those films are there—*Dark Knight*, *Transformers*, *Avatar*, *Alice in Wonderland*—but for every one of those films, there's *Land of the Lost, Funny People, The Love Guru,* and *Speed Racer,* films that cost buckets of money, and the people who made them lost their shirts. In general, it costs over $100 million to make and market a major motion picture, and some films cost way more than that. Most films, throughout the lifecycle of the movie across all windows, end up losing money. There are ominous signs out there. While box office revenue is way up and people hear about the big winners at box office, and while rental is way up too, those constitute only a relatively small portion of the business.

Home entertainment, which is a much bigger portion of the business, is way down. DVD sales were off nine percent in 2008, thirteen percent last year, and in some countries like South Korea, the home entertainment market is dead. Hollywood Video declared bankruptcy last year. Blockbuster lost $483 million last year and has $1 billion in debt. It recently announced that it's closing over 1000 of its 5000 stores (including the one in my neighborhood).

Piracy obviously has a tremendous impact on the movie business. In terms of the extent of the piracy problem, in 2005 the MPAA undertook a study, not perfect but by far the most assiduous study that had been undertaken, about the effects of piracy in the movie industry, and in 2005 it was estimated that piracy cost the movie business over $18.2 billion. The situation since 2005 has undoubtedly gotten worse, in part because technologies have improved which create all sorts of opportunities but also create possibilities for abuse. Streaming piracy didn't exist in 2005. Cyberlockers and newsgroups are now used to commit piracy on a broad scale. And of course, broadband has proliferated, and where you have large broadband penetration, you're also going to get more piracy.

The greatest impact, I would posit, of piracy is on the kinds of films that I happen to love, those which have edgier content, mid-budget films in the $15- to $60-million range that are made by independent producers and that frequently feature new directors and new actors, people who are incredibly talented but we don't know about them yet and who have unproven box office appeal.

There's a lot happening on the piracy front, some of it taking place domestically. Two federal judges in California recently issued important rulings, one against a company called Real DVD, another against a major torrent site called isoHunt. However, the real action, it seems to me, is taking place, both legislatively and in terms of other negotiations and litigation, overseas. One case that got a lot of attention that I was asked to talk about was the *Pirate Bay* case. The *Pirate Bay* was a criminal prosecution in Sweden, a country that is not really known for robust criminal enforcement of IP rights.

For those of you who don't know what it is, the Pirate Bay is one of the most notorious and outspoken facilitators of peer-to-peer piracy in the world. It was set up to facilitate and profit from the illegal distribution of copyrighted material over peer-to-peer networks, and they have a staggering volume of material—movies, music, games, software, books, TV shows—that have been produced by creative artists around the world. To give you an indication as to how big and popular it is, the last time I checked, Pirate Bay was available in thirty-four languages. It touted that it had well over twenty million simultaneous users. They have well over a million torrents on that site, and at one point, the University of Delft estimated that fifty percent of the BitTorrent traffic around the world is handled by Pirate Bay's trackers.

In January 2008, the four owners and operators of the site, Fredrik Neij, Gottfrid Svartholm, Peter Sunde, and Carl Lundström, were charged with copyright infringement. The trial took place in February 2009. The evidence presented at trial showed that these individuals made a lot of money. Although

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Mr. Malcolm made these remarks in a debate with Ms. Beth Cate, Associate General Counsel for Indiana University, at Indiana University School of Law-Bloomington on April 13, 2010. We are seeking to publish Ms. Cate's remarks in a future issue of Engage.

they testified that they made just a pittance, in fact, they got a lot of money from banner ads and contributions and had bragged in e-mails that they were making over $3 million a year that they were splitting amongst themselves.

They argued at trial that the copyright-infringing files were not "hosted" on Pirate Bay. That was certainly true. They also argued that they didn't have any idea about whether the torrents posted on their site actually linked to infringing material, which was laughably untrue. They set up sites on the Pirate Bay, which is very well-designed with a user-friendly interface, for things like Academy Award films, many of which had only had a very limited release in the theater, and also for ripped Blu-rays. They said that the Pirate Bay would only remove torrents if the name associated with the torrent isn't in accordance with the content. They went on to say, and the site still says this, that any complaints from copyright and/or lobby organizations will be ridiculed and published at the site. That's an understatement.

At a conference in Malaysia in 2008 called Hack-in-the-Box, Sunde and Neij gave a keynote speech titled *How to Dismantle a $1 Billion Industry as a Hobby*. In 2008, Swedish book publishers complained that eighty-five percent of the bestselling books in Sweden were on the Pirate Bay site, to which Peter Sunde said that he was a bit sad that it wasn't a hundred percent. In response to a takedown request from Apple's lawyers, they sent back a reply suggesting that they use a particular model of a retractable baton in order to sodomize themselves.

Last April, the owners and operators of the Pirate Bay were convicted. They were sentenced to a year's imprisonment, which is practically unheard of in the Swedish justice system, and a $4 million fine, less than the victims wanted but still a pretty hefty fine. Not surprisingly, they are appealing that judgment, and only time will tell whether or not they are going to get their just desserts. The site remains up.

There are other developments going on, some of them favorable to rights holders, some of them not so favorable. The potential liability of ISPs and other online service providers is being tested out there in a variety of fora. Copyrights holders lost a big case in Australia recently against an ISP called iiNet. The year before, they won similar litigation against a Belgian ISP called Belgacom. The iiNet decision is going to be appealed.

Another big event that happened—there's a large cyberlocker, the most popular cyberlocker in the world, called RapidShare. There's a lot of legitimate material on RapidShare, but there's also a lot of pirated material on RapidShare—RapidShare has been sued successfully four times by the German Music Association. They just announced that they've entered into a deal with Warner Brothers, and they're going to test a site called RapidMovies that has the potential, if it works out, of offering, for a fee, premium content on the RapidShare site for Warner Brothers.

Rights holders won an important victory against a large indexing site in the Netherlands called Mininova. Some of you may have heard that. Mininova is still popular, but they have now yanked or are continuing to try and yank the copyrighted material from the site, and the site is not nearly as popular as it used to be. A lot of that traffic is moving to other sites. Rights holders also won a big case against a UK-based newsgroup indexer called NewzBin. So you're starting to see that kind of litigation going on.

There is also a lot going on, on the legislative front. In New Zealand, in Taiwan, and in France, legislation has been passed, in varied forms, in which ISPs will have some role to play in terms of trying to clear up their networks, and people who use those accounts in order to engage in copyright infringement will receive various warnings. They'll have many opportunities to stop the kind of activity, but if they continue to recidivate, they run the risk that they're going to get their accounts suspended or possibly terminated. In the UK, the House of Commons just passed the Digital Economy Bill, which does the same thing, so we'll see what happens when that goes to Parliament, but passages seems to be a foregone conclusion. And there a lot of discussions going on in the U.S. with Comcast, Time Warner Cable, Verizon about similar things. Congress has not poked its nose into this business yet, so we'll see what happens.

None of this is a silver bullet. There are always going to be very tech savvy people out there who want to get cool stuff for free, and they're going to find a way around whatever system is put in place, whether it's through proxies, encryption, anonymizers, or other systems that copyright holders will have to contend with. There are also a lot of very important questions that have to be asked with respect to the systems that are put in place—overbreadth and censorship, due process rights—to deal with people who have allegedly engaged in infringing activity. All of these are implicated, and they need to be addressed from a moral perspective, a legal perspective, and a technological perspective.

Now, hopefully, these matters can be addressed in a sensible and civil way. Certainly, I have my doubts about the latter; I have some hope for the former. And if they're addressed properly, then people are going to be able to take full advantage of all the wonderful opportunities that the Internet presents while at the same time leaving plenty of room for creativity and for the rights of artists who utilize their time and talents to enrich our lives.

Thank you.

Mr. Malcolm Response: With respect to the problems that we face and with respect to orphan works, I sympathize with you. I'm totally agnostic on orphan works. I do not care about the licensing of that. I'm also agnostic—since I no longer work with MPAA and the studios—with respect to the rightness of the length of the copyright terms. Probably the pendulum has swung too far.

I also agree with you that legislation, particularly when you're dealing with these sorts of technologies that are changing practically monthly, is a very blunt instrument, and that, while it can do some good, it can also serve as a hindrance on a marketplace. And I agree with you that trying to figure out how to address consumer demand in terms of getting content to them in ways which they would like that are legitimate and that respect the artist is also very important part of this debate.

Now that having been said, there are a couple of points to make. You said you don't want to be in a regime that brands quite possibly everybody in this room with being a criminal. I would say in that regard that the argument goes a little bit far,

in that there is a difference between an end-user lawsuit, which is a civil lawsuit, and a criminal prosecution, where somebody's going to become a misdemeanant or a felon, and that in terms of the types of criminal cases that have been taken by state and federal authorities (state for trademark; federal for copyright), they really have been judicious. If you look at the piracy prosecutions, they're targeting first uploaders of content, people who are running these pirate sites, the illegal camcorder thieves in the case of the movie industry. Those are the types of people who are going to be targeted for criminal prosecution.

I do hear your point about the fact that if you're a student and you're facing a very hefty fine, that could certainly seem very criminal to the person who is having this imposed upon him. I would say, one, any kind of settlement agreement that says, "pay a relatively small settlement amount, but if do this again, all bets are off," I wouldn't consider that particularly draconian. In fact, that's very common with respect to civil lawsuits of all kinds. It seems to be a fairly standard provision.

I would say, with respect to the large potential fines, two things. Again, you could quibble about whether it's the right amount or the wrong amount. One, it is an attempt to estimate an unknowable amount, which is the amount of harm to the rights holder that is caused by that particular act of infringement. Let's face it, we now live in a digital world where the Internet is borderless and seamless, and that one copy that you have can end up being duplicated thousands if not tens of thousands if not hundreds of thousands of times.

The other thing I would say is that everybody knows that the odds of your being sued are small. I mean, in a regime in which 30 million people around the world are engaging in infringement activity simultaneously as we speak, the odds of your getting plucked out are slim. But it is also the case, and it's case with many other laws such as antitrust penalties, which can result in treble damages, that Congress wants to have a big deterrent there so that if you're engaging in this sort of activity, the odds of your being caught are slim, but if you are engaging in this risky activity, and if you get caught, don't come crying about it, because you were warned ahead of time that the consequences could be great. Is the figure right? Who knows? But there is at least some methodology and thought behind that.

Do We Trust Judges Too Much? Did the Framers?

Western New England College School of Law, October 6, 2010

David Forte*: We have just had another Justice confirmed to the Supreme Court. The vetting process for possible nominees to the Court is now familiar to all of us. At the center of the process is the President. You will notice, and it is now become part of our political environment, that one of the reasons why we elect Presidents is because of whom he or she may appoint to the Supreme Court. It is a strange development in our constitutional structure. Our Presidents have themselves become electors, electors of the kinds of people who will actually make policy over us. If that sounds like a strange constitutional development, it was in fact the sort of thing that was predicted by the Anti-Federalists who opposed the Constitution.

The Anti-Federalist, who went by the *nom de plume* of Brutus, wrote in 1787 just before the New York Ratifying Convention, "Those who are to be vested with the judicial power are to be placed in a situation altogether unprecedented in a free country." He was right. "They are to be rendered totally independent both of the people and the legislature, and because they are in such an unchecked position, they will naturally aggrandize power to themselves and to the central government. This power will enable them to mold the government into almost any shape that they please." He seems to have been correct there also.

Some of you, in your undergraduate education or here, may have come across Hamilton's famous argument for judicial review and in defense of the courts in *Federalist* 78. He actually wrote that in response to Brutus, for Brutus's argument stung. In his response, Hamilton tried to assure those that might have been swayed by Brutus's argument that the courts are going to act differently from what Brutus predicted. Hamilton declared that judges are not political actors in the normal sense of the word. Hamilton went on to describe the different *natures* of the political institutions in the new government. The legislature is empowered with WILL, the executive with FORCE, but the judiciary only has JUDGMENT. And so he agreed that the judiciary was and should be unchecked. What does "unchecked" mean? It means that the courts are genuinely independent. Without being constrained by the checks and balances placed on the other departments of the government, they are free to act as they see fit. Will their acts be based on WILL? Or will their acts be based on JUDGMENT?

Did Hamilton reflect the Framers' own beliefs about what the Court should be? Absolutely. The Framers wanted the courts to be independent. One of the arguments against King George in the Declaration of Independence was that "[h]e has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." Both of those defects were cured in the Constitution.

Why did the Framers believe the courts could be trusted? They thought so for two reasons. The first came from their own experience with courts. Our forefathers were an extremely litigious group; documents show that they were in court as a nearly habitual activity. And yet, if you go through the records, one finds that the Founders would sometimes win, and they would sometimes lose, but one almost never see a litigant blaming the judge, as we seem to do today. There was a culture of judging that the founding generation experienced first-hand. They counted upon judges to be neutral, that is until the King started appointing his own judges, judges who were not independent of the King, and who could act at the political behest of the King.

So when Hamilton said that the legislature is empowered with WILL, he and the Framers meant that there's a moral danger in the nature of self-governance. It is in the nature of man. Destructive and factional WILL could be put into law, so let us split the legislature. Let us leave the legislature with only limited powers. The executive, Hamilton said, was to be invested with FORCE; that is why we have to make sure that the legislature can check the executive. But, he said, the courts are by nature different. They are to be invested with JUDGMENT. What Hamilton meant was that there was a "sense of public virtue": virtue that goes with judging that is not present in the same manner in which decisions are reached by the executive or by the legislature.

Where does this judicial virtue come from? Well, it is by training. It is by temperament. It is by having, as St. Thomas Aquinas said, an inclination to do justice that has been socialized into the work. It is the manner in which they reach decisions. Judges are to retire from the case and deliberate. Legislatures argue; judges deliberate. Deliberation is the rational process that Aristotle taught as being essential to make a virtuous act. Deliberate before you act was his moral command. It is a more internal way of making decisions. It relies upon character, and the Framers believed that they could trust the judges to do that.

Within the whole judicial process, there is a real structure of judging, with which all of you are familiar, which becomes part of, skin, flesh, and tissue of our lawyerly bodies. The structure is made up of respect for statutes and statutory interpretation, a respect for precedent, and a respect for judicial process. All of these constrain the judgment of the judge in a way that they do not constrain a legislature. The rules of statutory interpretation; res judicata; judicial ethics; stare decisis; the substance of legal doctrine, of process, of respect for the words and intent of the Constitution, and most importantly, of reason and accountability, are the material elements of the rule of law. They are imposed, not by parchment barriers, or by the mechanics of checks and balances, but by the moral culture of judging itself.

Think particularly of the obligation of judges to give an account of their deliberations and conclusions. Appellate judges have to give reasons for their decisions. That is quite an astounding institution in our system. They cannot just say, "I have the majority; therefore, I win." They have to give reasons to justify to those who are educated that they are acting neutrally and in a principled way.

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So if you look at, for example, Chief Justice Marshall's opinions, they are the perfect example of the public virtue of judging. He looks to the intention of the Framers. He analyzes words, context, constitutional structure, and history, all of which constrains the way he reaches a decision. And he justifies his decisions by giving public reasons for them.

It is fair to say, therefore, that Brutus was proved wrong at least through most of the 18th and 19th centuries. Judges did not act the way he had predicted. Yet, today on the Supreme Court, we have a different view of what judges do. They do seem to make national policy, whether the national policy is gun control, abortion, prison policy, or gay marriage. Judges preside over national policy that changes our lives, that changes the whole polity, changes the whole culture. Judges no longer seem to have the same limitations. How did they get there?

There was a major intellectual and jurisprudential movement in the late 19th century that ripened in the early 20th century into what became known as legal realism. What the legal realists said was—and I am painting with somewhat a broad brush here, but I hope not inaccurately—judges actually make law, and their decisions have the force of law. They change the way duties and obligations are defined. But the legal realists reasoned that because judges actually do make law, they have the right to make law as they feel is appropriate. In other words, the manner in which a judge makes the decision at bottom does not matter. And that was the legal realists' basic flaw.

In fact, the manner in which a judge makes a decision is to be based, according to the Framers, on the virtue of judgment, respecting statute, constraining reason, and respecting the other actions of government. But the legal realists thought that decision-making was fungible. Because the legislature makes decisions based on will, judges can too. This moral change occurred in the academy, in the law schools, among the professors, then their students, and then their students became judges. Finally, the new ethic seeped into judging, namely, that it was all right to use WILL as a method of reaching a decision, rather than JUDGMENT.

Originally, when the Franklin Roosevelt's legal realist Court came to power in 1938 and later, the judges accepted the principle that politics was WILL, but they deferred to the will of the legislature. They no longer limited Congress in terms of the Constitution with its scheme of limited powers. The will of the political process, they averred, had to be respected. But then, a real change came in the Warren Court and the Burger Court, where WILL became the action of the judges themselves. Thus in 1985, when Attorney General Meese said that it was time to return to a jurisprudence of original intention, he was making a moral argument, not just an interpretive plea.

The key constraint on the judge at the highest level of his decision making is respect for the law of the Constitution. If he does not respect the law of the Constitution, he does not respect the very document that gives him power. But if a judge has a jurisprudence of WILL, his will can be neglectful of the Constitution. Thus, in the 1960s, 1970s, and 1980s, there were very many opinions changing the nature of the way we live, because judges now felt morally empowered to make decisions based on will, on their sense of what ought to be done, rather than within a constrained notion of judicial virtue.

So, when Attorney General Meese said that we must return to a jurisprudence of original intention, he was not just saying that we need a different interpretive method of finding the right answers when we have a constitutional question. He was not only saying, "Look at the Constitution, not precedents, not just current theories of what the good life is, but look at what the Framers said and understood." He was saying much more. He was saying that we should return to a notion of what judicial virtue is.

And Mr. Meese had much to back up his argument because, since the 1980s, there has been more research done on the original understanding of the Constitution by the Framers than any time in our history. I am not exaggerating to say that we now know more—you and I probably know more—than any Justice in the Supreme Court after the time of Chief Justice Marshall of the founding generation as to what the original understanding was. It is now accessible in the extraordinary research into the original understand that scholars have brought forth over the last three decades.

Judges who are not trained in history now receive the best history education in the briefs that are submitted to them. Take, for example, the briefs submitted in *McDonald v. Chicago*, the case in which the Supreme Court incorporated the individual's right to possess arms into the Fourteenth Amendment. The briefs were authored, either directly or derivatively, by the best historians in the world, from Great Britain to here, who studied this issue. All of the opinions in the case, the majority, concurring and dissenting, are full of historical arguments as to what the original understanding truly was. Thus, original understanding becomes not only morally an aspect of judging, but it also becomes a practical aspect of judging once again.

Originalism is a real form of interpretation because the data is there now. We need not speculate about what the Framers might have thought in 1787. In many areas of the Constitution, we now know it. Judges now have the opportunity to be judges again. They now have the opportunity to earn our trust again. We now can say, Brutus, you have been right for fifty years, but maybe it is now time that you are wrong, and we can go back to the vision of Hamilton and the Framers, where a judge could be worthily trusted to reach his decisions on the basis of JUDGMENT.

Bruce Miller*: I actually do not have much to disagree about with Professor Forte's eloquent account of how judicial review ought to work, and as is often the case, I begin to wonder, why am I here, since I do not really disagree with him? In fact, much of what he said, it seems to me, is essential not only to judicial review but to law. Where I think we probably part company—I know we part company on a lot of different cases—is with respect to how helpful it is when the going gets tough to do what Professor Forte says judges ought to do. It is essential, but I think it is the beginning. Let me try to elaborate a little bit.

First, the legitimacy of judging for all of us has to depend on a distinction between law and politics. If all that the judges do is exercise their political will, we have no reason to invest them with the power that they have under Article III to decide

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cases and controversies because their politics are no better and no worse than our politics are. And if what you might call the progressive legal tradition depends in any way on this idea that what judges get to do, ought to do, or may do is to simply, in the guise of law, express their political judgments, we ought to give up the whole idea. There is no reason for them.

The distinction between law and politics—and here I agree with Professor Forte also—depends crucially on the distinction between judgment and will that Hamilton drew in *Federalist* 78. Judgment is what we expect of judges. Will is something that, you know, is the nature of the human condition, and we try to constrain it through channeling it through democratic political institutions. Will is politics.

In Professor Forte's essay on which his talk is based, which he kindly forwarded to me yesterday, he acknowledges something else that I think is very important, and that is that the exercise of judgment is not easy. It is very hard. And the last thing it is is mechanical. In fact, if deciding what is law were in any way mechanical, why would we have three years of law school for you guys to figure out how to be lawyers? Why would we, in our teaching, emphasize endlessly the hard cases, the indeterminacy? This is because, not that judgment is impossible, but rather, even more cussedly, it is difficult, but everything depends on it. And so you can see we have a broad range of agreement.

One last point that we agree on is that the culture of argument is crucial. The fact that judges must not just decide cases but explain why and how they did it, and put their explanations for what you might call the most important kind of peer review there is, the review of lawyers, the review of other judges, and the review of their informed fellow citizens, is essential to the discipline required to exercise judgment.

Now, here come the disagreements, or at least the modifications. In my opinion, there are not very many judges who would disagree with this on any side of the spectrum. When Justice Breyer was here two weeks ago, he said politics has nothing to do with what we do. That sounded a little naïve to me. But from the internal point of view of being a judge, if you are in the game, if you are acting as a judge, you believe not that you are determined by the legal materials, not that it is mechanical, but that you are doing law, not politics, that you are doing your best to wrestle with the often indeterminate, always complex sources of law that inform the decision that you must reach. The decision is simply the best that you can do with what you have, but you cannot claim for it anything more than that. This does not mean that relativism is true. Everybody is trying their best to reach the right decision.

The only judge I know who has given up the game is a conservative, Richard Posner, who has written and spoken many times to the effect that, inevitably, all judges do is make policy. I think he believes that. And most people from the external point of view looking in at what the judges do believe that that is the case, too, because the judges' decisions so often seem to coincide with what we take to be their political views. So, in that respect, there is a deep and important political impact and political effect of what they do. But from an internal point of view, judges do not think so. This, to me, means that it is very difficult to tell what is judgment and what is will.

Posner, even though he waxes very irreverent in print and on the hustings, he does not write his opinions as expressions of will. He plays what I think he thinks is a game, but what you and I think is real. In fact, there are some kinds of arguments that count and some kinds of arguments that do not count, difficult as it is to find the line.

What can we say more particularly about this problem of judgment and will? One example of judges who think that they are exercising judgment is the plurality opinion in *Casey v. Planned Parenthood,* in which the *Roe v. Wade* abortion right is reaffirmed by a plurality opinion written by Justices O'Connor, Kennedy, and Souter. The entire methods set forth for deciding that case appeal to Hamilton's *Federalist* 78 and reasoned judgment. Does that mean that it is reasoned judgment? Maybe not. I think it is; Professor Forte would think not.

Similarly, in the *Heller* case—this is a case in which it is absolutely true, the first gun-control case and the second, too—the exchange between the Justices is all about originalism and the original meaning. Does this mean that this is about reasoned judgment? It claims to be. But from my angle of vision, and I am one who takes seriously the pre-ambulatory language of the Second Amendment which refers to the militia, it feels to me that the majority opinion in *Heller* is policymaking dressed up as originalism.

The point here is that anybody can talk the talk, and the fact that I recognize the *Heller* decision as policymaking rather than law is not to say that the Justices who were in that majority did not believe that what they were doing is, in fact, law. This is a mystery and a paradox, and this is where our work begins. How do we reconcile the internal point of view of judging, which I think is in very much good faith—everybody believes that they are operating according to the legal materials—with the observations of political scientists to the effect that it is impossible? The legal realists were people who recognized this problem and succumbed to it.

In my opinion, the legal realists were all critique and no program. That is, their argument was not that judges should make policy. It was rather that it was inevitable that they do make policy, that there is simply no other option, and that it cannot simply be desirable to do what is impossible. I think that it is possible to exercise judgment rather than will, but it is difficult.

Howard Kalodner, who is moderating the discussion today, had the good fortune to clerk for one of the preeminent legal realists, in my opinion, and that was Felix Frankfurter. Felix Frankfurter understood probably better than all of us what the stakes are here, and he recognized the grave difficulty of any sort of easy way of saying what the legal sources meant in hard cases and the need for deference to political judgment. In my opinion, and I think probably not Howard's, Frankfurter ended up being crippled by his own insight in the sense that he thought that his own ideas about what things ought to be were illegitimate. He was, for that reason, very deeply restrained in his assessment of what the other branches were doing and maybe gave up more of the checking value that was essential. This was not, I think, because Felix Frankfurter suddenly became a conservative when he got on the Supreme Court. It is rather

because he had grave difficulty figuring out how you could make value judgments in the role of judging.

I think the need for value judgments in the role of judging is inevitable, even if you are an originalist. And maybe it is true, we are all originalists now. Certainly, it is hard to identify the values that underlie the Constitution without some reference to originalism. Without some reference, first, to the text and, secondly, to originalism, we are all unhinged. We would simply be making it up as we go along. But those values are often so abstractly stated—say, for example, the Equal Protection Clause—so indeterminate, that is, susceptible of being argued both ways, especially by able historians (i.e., the Second Amendment), or sometimes effectively silent about the issue at hand that it is often impossible to get far enough by reference to originalism, so that there are inevitably other arrows in the quiver here.

I recommend a book that is about twenty years old by a law professor named Phil Bobbitt, whose work you know well and whom I disagree with on almost everything. Bobbitt says that it is more than just originalism and text; there are questions, as well, of what you might call structure. Are there implications in particular cases from the structure of the Constitution, in *McCulloch*, for example, that states cannot tax a federal instrumentality? Or that discrete and insular minorities need special representation because of their inability to form the alliances necessary to participate in a democracy? These structural ideas, I think, are part of the argument, and they derive from the Constitution.

I think there are also inevitably financial considerations. What can judges actually do and accomplish, and what can they not? I think these inevitably matter and should matter.

The slippery slope matters because we are lawyers, and we always worry about the slippery slope.

And ethics matter. And the reason why ethics matter is that, even for originalists, there are arguments about substantive due process. *Calder v. Bull*, for example, suggested that we may have natural rights, and, of course, substantive due process is a kind of constitutional effort to apply that notion.

None of these things can be ruled out. So our big task is how to reconcile two things that we all experience, and that is, from an internal point of view as lawyers, we think law matters. When we do law, it always seems to us to matter. We always reach a judgment as to what the right or wrong legal decision is. Sometimes we feel like it is a tie, but very rarely. With our political assessment, as Professor Forte says, my God, this all seems so political, and all seems to be based on what the judges' politics are.

Professor Forte Response: Whenever I have spoken at this law school, I am always grateful for the company and responses of Professor Miller, a man who has always been a gentleman in all of our discussions. And once again, he has advanced the discussion enormously. He has made two major points. I will take one because we do not have time for both. The latter of his two points is this: what does actually doing originalism entail? Much has been written about that process, but let us put that off. The first point made by Professor Miller is more pointed: what are judges now doing when they think they are reaching judgments? Are they using will, or are they using judgment? Let me talk about that more specifically.

First of all, there was, for centuries—and it continued after the Constitution—a culture of judgment in the courts. It *is* a culture. The method of reaching decisions, the method of deliberating on decisions, including all of those mechanisms that we study in law school, is a culture of law that helps the rule of law maintain its coherence.

That was contested in the late 19th century by the progressivist movement, which said that all politics is will, including judicial politics, and the only question is whether you come out right, not how you get there. Once you do that, you are on the way to all kinds of problems that we have seen in other political systems. In terms of our legal culture, the progressive formula started to undermine the rule of law.

So it was the legitimacy of will as the way to reach decisions that started to infect the Court, but it came into a culture of judgment. How did the two mix? Let us start with Oliver Wendell Holmes, Jr. Oliver Wendell Holmes, Jr. believed that there was no "there" there. There really was no substantive value in the law. But there was the "game" of the law, so to speak; there was the craft of the law. That was what people called "law in the high tradition." So Holmes's crafting of the law is beautiful to behold, but he was cynical about whether it meant anything more than the craft itself.

After 1938—this is a repetition, but I think it bears on this subject—the judges would come to the court believing that judging was no longer legitimate *qua* judging and that it was a species of will. And so what they did was say that because the legislature is more representative of the people; let them do the willful things. We, the judges, will step back. And then, beginning in the 1950s and 1960s, the judges started saying to themselves—again I am painting broadly—why not us? Why can we not reach some judgments based upon what we think is correct for our contemporary society? Even Holmes' craft of judging became vitiated.

These are the kinds of variations you have. There are those whom I assert will use the language of judging, and the language of the virtue, to express their will. Some are frankly hypocrites. They are pretending to judge, and they are not. Justice Brennan, in my opinion, was the Justice who most exemplified this attitude. He manipulated decisions, he left dicta, case after case, that he could call upon in later cases because he knew what was coming down the path, and he influenced others on the Court, even including Chief Justice Rehnquist, to do the same.

There are other Justices who simply made policy, without Brennan's panache. For example, Justice Blackmun in *Roe v. Wade* asked, "Why is the right to terminate a pregnancy within the liberty interest?" His answer: "We feel it is." That is not judgment. That is not reason.

And then you have those who simply fool themselves, who think that they are using the language of virtue when they are actually—and they honestly fool themselves—when they are actually being very subjective about their will, and that includes Justice Stevens. Look, for example, at Justice Stevens's last opinion a couple of months ago in the *McDonald* case.

It is his valedictory. He meanders all over the place, and the opinion has little coherence, and Justice Scalia, as is his wont, gives him no mercy.

So what is the effect on this, even on good judges? Let me take the conservative opinion, and this is what I will conclude my response with, in *McDonald v. Chicago.* The historical evidence for the right to bear arms is highly persuasive. It is not totally unequivocal, but historians have gone through the Fourteenth Amendment's history for the last twenty years—mostly liberal historians, it should be noted. It is almost unequivocal that by the time the 14th Amendment was passed, a fundamental right of American citizenship was the right to bear arms.

Whatever the Second Amendment said, it was by 1866 contemporaneously interpreted as the right to bear arms, primarily focused on the right of blacks to defend themselves against being massacred in the Southern states after the Civil War. There is reference after reference to the situation of blacks being disarmed and killed in the Southern states as contrary to their fundamental right to bear arms as the basis of the 14th Amendment.

So what did the four-person plurality of Chief Justice Roberts and Justices Alito, Scalia, and Kennedy say, as opposed to Justice Thomas, who almost always says it honestly? They said the evidence is unmistakable that under the Privileges or Immunities Clause, there should be an individual right to bear arms; however, for the last fifty years, we have used the Due Process Clause, and that is good enough for us. So the Justices simply said, on the basis of habit, that because the Court has incorporated rights on the basis of the Due Process Clause, we will go there, and not decide the case based on historically what was understood when the Fourteenth Amendment was drafted. A true originalist who used reason, as Thomas did in this case, would have come out and acknowledged what the historians had discovered.

Virtue, as Aristotle said, is the habit of acting rightly. But judges, in many cases, have developed the habit of acting wrongly. That is the habit we have when we do not practice the virtue of judging the way it has been practiced, and even judges who want to be originalists wind up sometimes giving it the back of their hands.

The Impact of Judicial Activism on the Moral Character of Citizens

University of California, Berkeley, Boalt Hall School of Law, October 28, 2010

Ilya Shapiro*: Thanks very much for having me. I think I've spoken here a couple of times. I understand now that you like to have your speakers come with orange-jumpsuited protesters and so forth. I apologize, but I wasn't able to bring any of those.

One thing often mentioned about the Federalist Society is that it's for judicial restraint. I'm not sure that's the official policy of the Federalist Society, but in any event, these terms like "restraint," "activism," "minimalism," "neutrality"—you certainly don't want judges to have political bias—what do they mean? Quite often, "activist" is synonymous with any decision the speaker doesn't like, and "restraint" means the judge is being wise and "I agreed with that decision" (coincidentally).

So I want to make the case for an active rather than an activist judiciary. Indeed, to the extent my theory of constitutional interpretation or judicial action . . . if you want to call it activist, that's fine. That's just semantics, and I'll posit that judicial activism in the defense of liberty is no vice.

Depending on where you stand on the political spectrum, you might be angry about unelected liberal judges rewriting the Constitution to reflect their own ill-conceived policy notions, or you might be outraged that reactionary conservative judges are striking down laws and threatening all the progress we've made on civil rights and civil liberties. Either way, you're likely to view the actions of these dangerous black-robed arbiters as judicial activism that must be stopped at all costs.

But again, what is this judicial activism? If it's merely an invalidation of government action, as my former professor Cass Sunstein, now the regulatory czar, has proposed—he wrote this big empirical study and tried to have a neutral definition of activism and figure out which judges are activists. He said, anytime any legislation is struck down or federal agency action is overturned, we will call that "activist," which is a neutral definition.

There are certain problems with that because, for example, if an agency is promoting liberal regulations, then striking it down might be conservative activism—or vice versa. It depends on the nub of the matter of what exactly is being acted upon. If it's a legislature acting that has a Republican majority and it's being struck down, is that liberal activism? You get the idea. There are some methodological problems with that kind of method. But if we accept that kind of neutral definition—striking down government action—then what are the beloved liberal troika of *Miranda*, *Brown*, and *Roe* but unabashed activism? After all, each of those struck down government action.

Conversely, if President [George W.] Bush was correct that activism is disrespecting federalism and acting "without regard for the will of the people and their elected representatives," then what would be more activist than the Bush Justice Department's opposition to California's medicinal marijuana or Oregon's right-to-die statute? Those are firm positions by the DOJ. Examples like this abound.

Judicial activism is everybody's favorite bogeyman, but neither the left nor the right can provide a coherent definition beyond Justice Potter Stewart's famous dictum, which was issued in the context of obscenity, but really, as Sandra Day O'Connor proved, could be extended to an entire non-philosophy of jurisprudence: "I know it when I see it."

Most people who use the term don't have a coherent definition. It typically, again, means "a judicial opinion with which I disagree." So you have, for example, Cass Sunstein, who thinks that there are conservative judges who are striking down agency actions that are activist. On the other hand, you have Robert Bork, the failed Supreme Court nominee and former Solicitor General and legal scholar, who thinks that any judicial opinion that defends or upholds an unenumerated right is activist. So anything that isn't listed in the Bill of Rights, if a judge says that there is a right to that, that's activist. The Ninth Amendment is an ink blot essentially because we don't know what it means—and therefore it means nothing. Those are the extremes.

But I think there's a third way. The purveyors of conventional punditry all miss the larger point. The role of the judiciary in terms of constitutional interpretation is to fully interpret and apply the Constitution, period. So, if that means upholding a law, fine. If that means striking it down, fine. Activism is doing something that is not supposed to be the judicial role or not being faithful to the Constitution, which is no small task in part because of the doctrinal mess the Supreme Court has made. Again, whether a particular statute stands or falls is of no moment. Fidelity to the founding document should be the touchstone, not a circular debate over the virtues of judicial restraint or—as John Roberts put it at his confirmation hearing—modesty: just calling balls and strikes, just being in a kind of modest judicial role. Again, where you stand on those sorts of debates depends on where you sit.

As long as we accept that judicial review is constitutional and appropriate in the first place (*Marbury v. Madison*)—and how a judiciary is supposed to execute its role and ensure that government stays within its limited powers without the power of judicial review is beyond me—then we should only be concerned that a court get it right, regardless of whether the correct interpretation leads to a challenged law being upheld or overturned, or the lower court being affirmed or reversed. For that matter, an honest court-watcher shouldn't care whether one party wins or loses. Again, to paraphrase then-Judge Roberts at his confirmation hearing, the little guy should win when he is in the right and the big guy should win when he is in the right.

The Framers' constitutional understanding, *Federalist* papers 78 to 83 for example—the primary ones which discuss the judicial role—provide the boundaries between proper and improper judicial activism. And so, to paraphrase those understandings, there are a few rules I would apply about what courts should do.

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First, review all state action, government action, that implicates liberty. Then apply not a presumption "of constitutionality"—which is essentially what rational basis review is (Congress, everything it does, we presume, is constitutional)—but "of liberty" because, after all, the Constitution is there to promote freedom and liberty. And as *Federalist* 51, which is my favorite Federalist Paper—indeed, the vanity plate on my car says "Fed 51"—states, "If men were angels, we wouldn't need government." If angels govern men, well, no problem; angels do everything fine. But in a world where men govern men, we first have to empower the government to do certain things, preserve the rule of law and rules of the game, and then check that government.

Well, how do we do that? We don't do it by presuming that everything the government does is okay. We do it by asking the question, does this promote liberty? Then we void any exertion of power that is not expressly enumerated because, by definition, any exertion of power somehow infringes liberty. Sometimes, that's a good thing; when we criminalize something, for example, that infringes on the criminal's liberty—but that's good because he's detracting from the liberty of others. We have this calculus, the basis of the criminal law.

Next, give meaning to every word of the Constitution. You know, there are no ink blots, or technicalities, or outmoded, antiquated portions.

And, finally, only exercise judicial rather than legislative or executive power. What do I mean by that? Micromanaging war, for example, however you draw that line, would be getting into the executive power. Less so now, but in the 1960s and 1970s, courts would require legislatures to pass budgets for their school systems, micromanaging the legislative process.

But why go through all this tedious process anyway, trying to be faithful to the Constitution, to the founding text, rather than having a living Constitution or some other method of interpretation? The principal benefit of a written Constitution is that it subjects judges, legislatures, and executive officials to rules and principles that cannot be liberally changed by those same government officials. To be sure, judges of good will can and will read the same words and history and come up with different outcomes. Look at *District of Columbia v. Heller*, the big Second Amendment case, with Justice Scalia's majority opinion and Justice Stevens's dissent: everybody purported to be doing an originalist analysis of what the right to keep and bear arms meant at the time of the ratification of the Second Amendment, and they came up with different interpretations. That's okay. They were both engaged in good-faith judging, I would say.

But it's impossible to conceive of a process that would produce more consistent results or that would vest the judiciary with the credibility it needs to function if we're simply saying, "Judges, we are putting you up there because you are wise. Use your wisdom; use your judgment. That's what you're supposed to do." If we value the rule of law, there is simply no substitute for a good-faith effort to apply the meaning of the Constitution, especially in light of changing circumstances and exigencies. Just because we now have the internet does not mean that we do not understand what the Commerce Clause means. Just because we had stagecoaches rather than horseback riders, or horseless carriages after that, does not mean that each time, with each technological change, some bit of the Constitution gets outmoded.

The best founding documents are the ones that are simplest. Look at the Brazilian Constitution, which is something like 300 pages. It guarantees all sorts of different things, but I don't think that the rule of law is stronger in Brazil than in countries that have shorter constitutions.

The dividing line, then, is not between judicial activism or abdication, which is equally a type of activism—like, for example, *Kelo v. New London*, where the Court allowed the legislature to go through with its taking, which I would argue violated all sorts of rights, but the judiciary was being "restrained." So not between activism and restraint, but the line is rather between legitimate and vigorous judicial action and illegitimate judicial imperialism: thinking that "I am a judge; I know better."

For proof of this observation's legitimacy, look no further than the contrast between the public sentiment toward the very different activisms, or at least what some people call activisms, of the Warren and Rehnquist Courts, respectively. The Warren Court expanded the rights of criminals and found rights to privacy. It sometimes ended up being good policy, but some of the law is wishy-washy. The Rehnquist Court had a short-lived federalism revolution or, as I like to put it, armed insurrection. It did not go very far. But, nevertheless, a lot of its opinions were, at least by liberal commentators, labeled as activist. The public, by even now saying that the Court is too liberal, seems to have reconciled itself with the Rehnquist Court and seen that it was less activist than the Warren Court.

Ultimately, judicial power is not a means to an end—be that end liberal, conservative, or libertarian—but instead is an enforcement mechanism for the strictures of the founding document. To that end, as it were, certain judicial decisions will produce unpopular outcomes. But the solution to that in a republic with a founding document intended just as much to curtail democratic excesses as to empower democracy, is to change the law.

If we are governed by law and not men, and you don't like the decision that the judges have made interpreting the law, then pass a new law, or, in the case of a constitutional decision, amend the Constitution. People say that it's too hard to amend the Constitution. But that's because of the various constitutional perversions we've had going back to the New Deal and Progressive Era. If a decision was made to enact all sorts of facially unconstitutional legislation in the first place and just have courts go along with it, then, obviously, it becomes harder to pass actual constitutional amendments because we are effectively amending the Constitution without literally amending it.

Any other method than changing the law when you do not like the legal result, or changing the Constitution when you do not like the constitutional result, leads to a sort of judicial abdication and the loss of those very rights and liberties that can only be vindicated through the judicial process.

Think, for example, of the Lilly Ledbetter case. A few years ago, a woman sued Goodyear for sex discrimination in employment. She was paid less over many, many years than

men in her position. She got up to the Supreme Court, and the Supreme Court ruled that in their interpretation of the statute at issue, the statute of limitations had run. So it did not rule that she did not have a case or that she was not discriminated against, but that the statute of limitations had run. This became a huge political issue in the 2008 election, and, lo and behold, the first law that President Obama signed was the Lilly Ledbetter Fair Pay Act and Paycheck Fairness Act.

You can argue over the policy of it, but it changed the statute of limitations. I mean, what it actually did was say that every time that you received a new paycheck, a new statute of limitations would start running. There were alternatives that were proposed, but that is the one that won out.

That's a great result in terms of how our system is supposed to work: If you don't like the Supreme Court's interpretation, change the law. Otherwise, you simply have judges who are exercising judicial power divorced from any authority given to them by the Constitution, and they are no better than an executive tyrant or an out-of-control legislature.

Any other method leads to government or judging by pure force of will rather than by the consent of the governed, implied consent, protection for minority rights, or whatever your theory is of where the government receives its legitimacy to act. Or it leads to government by black-robed philosopher kings. As Justice Scalia is fond of saying, even if we wanted that kind of rule, why in the world would we pick *nine lawyers* for that job? There is a better way, whether we call it activism or, say, the proper role of an Article III judge.

Fred Smith*: Thank you for that, and thank you to the Federalist Society for this invitation. I think, in light of those remarks, this really is not a debate necessarily about judicial activism. I am not about to get up here and defend or take the position that judges should never be active.[1] It is really a debate about the role of a judiciary in a democratic society and the role of a judiciary in a society that has a Constitution that purports to guarantee to the states a republican form of government.

In a system that guarantees popular sovereignty and representative government, under what circumstances is it legitimate for appointed individuals or, in some cases, one appointed individual to overturn the legislation that has been duly enacted by people who have also taken an oath to faithfully uphold the Constitution?

We both agree that there is a role for judicial review, and I think we both agree that substituting one's own policy judgments for the law is always inappropriate. That said, I think we also probably agree that the phrase "freestanding activism" by itself is not very useful for many of the reasons that he just pointed out. In addition to Cass Sunstein's attempt to quantify it, more recently, Cory Yung has a piece in Northwestern Law Review that attempts to quantify judicial activism in terms of how frequently legislation is struck down.

Another approach, though, is to say that judges should only strike down legislation when it is unconstitutional beyond a reasonable doubt. This is a position that was taken by James Bradley Thayer, and the reason that he took that position was that if judges are too active in overturning democratically-enacted legislation, then, at some point, legislators and presidents and governors will not do their jobs. They will not faithfully uphold the Constitution because they know that if they overstep boundaries, the courts will step in. Therefore, you are reducing the role for democratically-enacted legislators to do their job in interpreting, or at least applying faithfully, the Constitution.

I actually have a lot more sympathy for that view than Ilya. That said, I believe that sometimes courts do have a duty to strike down legislation even if reasonable people can disagree. And to me the question is when should courts invalidate statutes about whose constitutionality reasonable people can disagree, and when should courts not do that? When should courts have a more or less active role?

Ambiguities in the Constitution abound. If we look at the phrase "equal protection" and try to answer that question just using text, it is pretty difficult. Does it include some sort of anti-subordination principle? Does it include gender? On the face of it, it does not say that it does and does not say that it does not. Does it only apply to race? Does it apply to the disabled? Does it only apply to laws that have a discriminatory purpose? The language's purpose does not appear in the Equal Protection Clause, but it has been interpreted to mean that. Does it apply to gender classifications? And if it does, does it apply to gender restrictions in marriage laws? That is just one example.

Another example would be, what does liberty mean? Does it only encompass physical constraints? Does it encompass state-created liberty interests? What about the freedom, more broadly, to be left alone? What does "cruel" mean? Who decides? Does it include the concept that punishment should be proportional to a crime? That is, would the death penalty be okay for stealing a bar of chocolate? Does it include the concept of whom a state may punish? That is, would it be okay to give the death penalty to a seven-year-old? What does "unusual" mean? What is the denominator when we are trying to decide what is "unusual"? Reasonable people can disagree about the meaning of these words, and, to add another layer of complication, we have, of course, the Ninth Amendment, which says that just because a right is not enumerated in the Constitution does not mean that it does not exist.

To add another layer of complication, the Constitution tells us about the scope of congressional action. Reasonable people, though, can disagree about those provisions, too. It is not obvious on the face of the Interstate Commerce Clause what that means. Does "interstate commerce" mean only when one state is engaging in commerce with another state? Using text alone, that strikes me as a plausible interpretation. Does it only apply to commercial activity that affects national markets? Does it apply to activity that affects national markets that is not commercial in nature, but in its consequences is commercial, even though the activity itself is not commercial? What about the tax power? Is it okay to attach tax consequences to certain conduct, like buying a home, being married, having kids, donating to charity, or having health insurance?

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Section 5 of the Fourteenth Amendment allows Congress to pass legislation—"appropriate legislation" is the language—to enforce that provision. Who decides what is appropriate? Does the Constitution thereby vest in Congress the ability to decide what is appropriate? Is it a political question to get into the muck of whether or not what Congress does with respect to Section 5 is valid or not, or appropriate or inappropriate? And are judges actually getting involved in the legislative role when they try to decide whether Congress acted appropriately?

Judges, by definition, therefore must apply judgment in all of these types of cases and many others. In my view, in deciding how to apply that judgment, the work of John Hart Ely is very useful because his view is that the problem with always relying on the legislature to take care of constitutional problems is that sometimes the legislature doesn't reflect the will of society, the channels of political change can be clogged in a number of ways, or there may be people who do not have an equal voice in government.

There are two consequences that flow from that fact. The first is that it is my view that constitutional provisions that are designed to protect the equality of rights and constitutional provisions that are designed to clear the channels of political change should be applied to government action even when reasonable people can disagree about the constitutionality of the action. In those situations, judges should be faithful to the text, the history, and precedent without respect to whether or not reasonable people can disagree.

By contrast, our constitutional design gives considerable voice to the rights of states. It is inherent in the design of the Constitution. By this, I mean, if you look to the Senate, every state has an equal voice in the Senate, and our Founders thought it was very consequential. Madison put it this way: "No legislation can be passed, first, without the consent of the majority of the people," referring to the House, "and then with respect to the majority of the states," referring to the Senate. Chief Justice Marshall said something very similar in *McCulloch v. Maryland*. He said that the states and their sovereignty are represented in the Senate. As a result, I think that in situations that involve states' rights, if reasonable people can disagree about text, history, and precedent, then courts should be more deferential to legislatures.

Second, I believe that the ultimate minority in any society is the individual, and as a result—actually, Ilya and I agree on this point—constitutional provisions that are designed to protect individual liberty, including the First, Second, Fourth, and Fifth, should be applied rigorously with attention to the text, history, and precedent regardless of whether reasonable people can disagree. One concern I have, however, is that sometimes there are different barriers that courts have placed in the way of litigants who are attempting to enforce their constitutional rights. And, by restricting the remedies that are available to people who are seeking their constitutional rights, courts, therefore, in effect were also restricting the right itself.

Chief Justice Marshall also told us that for any right, there must be a remedy. Karl Llewellyn said the same thing: if you do not have a remedy, then you do not have a right. You can call it a right all you want, but if there is no remedy, there is no right.

And there are a number of moments that, in my view, courts have unduly stepped in the way of litigants. One would be the context of sovereign immunity. The Eleventh Amendment says that the judicial power of the United States shall not be construed to extend to any class of cases in law or equity between a citizen of one state and another state, or between the citizen or subject of a foreign state and a state.

Despite that language, the Supreme Court has interpreted it somehow to mean very strange things. Number one, a citizen cannot sue his own state despite the very clear language of the Eleventh Amendment. And, number two, Congress cannot pass legislation that allows people to sue states, even when that means that someone is suing a state in state court despite the language, "the Judicial power of the United States." And I do not think that there is any reasonable construction of the Eleventh Amendment that would lead to that view. The only way that you get there is to do what the Court has been very candid about doing. Justice Scalia has said that the Eleventh Amendment stands not for what it says but for the broad presuppositions for which it stands. In my view, that is problematic.

Another example would be the role of qualified immunity. There are a number of moments where the Court has interpreted qualified immunity in ways that are not particularly tied to any constitutional provision. I mean, the words "qualified immunity" themselves appear nowhere in the Constitution.

Another example would be what are called *Bivens* suits. People are allowed to sue federal actors for different constitutional violations. But in recent years courts have been increasingly stingy about when they will allow different *Bivens* remedies. There is a case called *Arar* from the Second Circuit that came out last year that strongly implies that you do not have a remedy against a federal actor who violates different substantive due process rights, and the Court went out of its way in *Iqbal* to say that they have never said that you have a *Bivens* right for First Amendment violation, suggesting that the right to sue for this type of violation is now potentially on the chopping block as well. That is concerning because, again, there is no right if there is no remedy.

Another example would be standing. Sure, the Constitution says that you have to have a case or controversy, but the Court has gone much further than that language in deciding what constitutes a case or controversy before someone is able to come into court.

My basic point is that in a democratic society there should be deference given to legislators because we should trust that they take their responsibility seriously to uphold the Constitution, and therefore the background principle should be, when reasonable people disagree about constitutional text or history, deference should go to the legislature.

However, when you are dealing with a constitutional provision that is intended to clear the channels of political change or protect individual liberties, such as the Bill of Rights, that is a very different circumstance, and in this situation courts should faithfully apply the text, history, and precedent without respect to whether reasonable people disagree. I do not think

that the courts have done that in the context of sovereign immunity or in *Bivens* cases and, in some instances, in the case of qualified immunity.

Mr. Shapiro Response: Thanks very much for those remarks. This is a broad, high-level conversation we are having here, and I find myself agreeing with most of what Professor Smith has said, particularly with the examples he used: sovereign immunity, qualified immunity, and *Bivens*. On standing, I think the Court is pretty good except for the Establishment Clause issues, but that's because its Establishment Clause jurisprudence is a complete muddle.

But if you read between the lines of what he's saying and what I said, you do tease out one huge difference, and that is *the presumption*. Professor Smith mentioned such things as "when reasonable people disagree." When that happens, whoever bears the burden of persuasion, evidence, or proof loses because they have not borne that burden. Whoever is challenging loses.

I think that there should be a thumb on the scales of liberty at all times, and I guess I'm for less deference by the courts to the legislature than Professor Smith is. Legislators have taken an oath to uphold the Constitution. (And that is perhaps the only thing on which I agree with [former Delaware Senate candidate] Christine O'Donnell; I do think that congressmen and senators do need to consider the constitutionality of any legislation that's presented to them. I probably agree with her, too, that she's not a witch, although I really don't have the information to make a full determination on that.) But this does go to the role of a judiciary in a free and democratic society and what does a republican system of government mean?

There is one other key thing that I don't know if you picked up on. Professor Smith seems to apply a different presumption on the "liberty" provisions of the Constitution versus the rest, meaning, I guess, the "powers" or structural provisions of the Constitution. That is a false dichotomy. Our Constitution is a holistic document. The entire thing, even before the Bill of Rights was added, was created to promote individual liberty. Powers and rights are two sides of the same coin.

Remember the debate about whether even to have a bill of rights: Why do we need this? We don't give government any powers to violate our rights. Furthermore, if you enumerate the rights, that will disparage all these other ones. We can't enumerate every single right. I have a right to wear a hat that's red; I have a right not to wear a hat. I have the right to get out of bed on the right side, on the left side. We can't just enumerate all of these things. So we have the Ninth Amendment to do that. And to underline that we aren't giving the federal government any more powers, we have the Tenth Amendment.

The Ninth and Tenth Amendments, taken together, are the Constitution in a microcosm. We have a sea of liberty with islands of governmental authority to keep the rules of the game in check. For example, Professor Smith said that the Commerce Clause was nebulous or might change. The regulation of interstate commerce at the time of the ratification of the Constitution, was meant to apply to regular commerce that goes between states.

Commerce doesn't mean manufacturing or trade or anything with a dollar sign attached to it, as we now think of it in context. It means the interstate trade in goods. This was an anti-protectionism measure to prevent states from levying tariffs against each other, and other trade barriers, as continued to happen under the Articles of Confederation and prevented us from having a "more perfect union," as it were.

What we now conceive of as the dormant Commerce Clause was really, if you read the ratification debates, what that provision was all about. It was not a sword so much for the federal government to go and intrude in all areas of our life—we now have to debate, does this local economic activity have a substantial enough effect in the aggregate on interstate commerce if it is part of a comprehensive scheme? And how many angels dance on the head of that pin?—it was a shield to protect and promote liberty, to promote trade and commerce, and these sorts of things.

Go back to Political Theory 101. We all have our own 100-percent individual sovereignty of which we delegate certain bits to the government to protect our rights against murderers, for national defense, sometimes for public goods, these sorts of things. We delegate temporarily, enumerate these limited powers that we give to that other sovereign, the government. We retain all other powers, and we have all of our full natural rights.

To limit government power is to enhance our liberty. It's not a matter of presuming that everything that government does is constitutional. Congress could've been wrong in its assessment of its own powers. We don't want Congress to assess its own powers . . . And when reasonable, good people disagree, does a judge have to throw up his hands? No. The judge is paid to figure out, to make those hard calls about whether the Constitution permits the government to do that or not.

The main liberty-protecting provisions of the Constitution, as understood in 1789, 1791, and 1868—with the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments—were not in the Bill of Rights. They were the structural provisions of the Constitution. So having this thumb on the scales presuming that anything that Congress does as long as it might be reasonable is going too far. It gives too much power to legislators—and it [also] gives too much power to judges.

You know, they play this game of bifurcated rights that started with *Carolene Products*, footnote 4: Is this right "fundamental"? If it is, then government can't do what it's doing. If it isn't "fundamental," then the government can do what it's doing. It's not a principled way of judicial interpretation, and that's at the root of a lot of our disputes.

Professor Smith Response: Two things. First, with respect to standing, in particular, what bothers me about current standing doctrine is that if a litigant's constitutional rights have been violated and it is not compensable with damages for whatever reason—maybe because the litigant cannot show that it violated clearly established law, which is something you have to show under qualified immunity—and that person wants to seek an injunction from a court to say, I do not want this to happen to me again—I want to stop this practice that violates my constitutional rights and other people's constitutional rights—that litigant not only has to show that his constitutional rights have been violated before, he also has to show that his constitutional rights are likely to be violated again. And that has

been read into standing and mootness. It is at that intersection. That is what I was referring to when I referred to standing doctrine that I think is, at some point, divorced from the Constitution and ends up restricting constitutional rights.

But we do have a disagreement. We have a disagreement about what the institutional role of judges is, and what judges' comparative advantage is. I happen to think that legislators have a role in applying the Constitution faithfully. And I believe that if courts go too far, then legislators will not take that responsibility nearly as seriously as they should. I think that the reason why legislators do not take that responsibility as seriously as they should is that they think that if they go too far, then a court will step in.

Regarding the language regulating interstate commerce, I do not think that there is something inherent in the role of being a judge that makes them necessarily better at deciding what interstate commerce is than someone who has been elected to faithfully uphold the Constitution. That is why I believe in the background principle that when reasonable people can disagree, we should defer to legislatures on a number of questions and, again most notably, states' rights.

I have a reason for my dividing line. My dividing line between when we should have that deference and when we should not is clear. We want legislators to reflect the public will, but there are circumstances when legislation may not reflect the public will, most notably when the channels of political change are involved. If you have a poll tax or separate schools that relegate one segment of society to a place where they are not ultimately not able to express their voice, when the channels of political change are blocked, when groups of people are subjugated in our system such that it can hardly be called a republican form of government (which has happened throughout much of our history), those are the circumstances where I think that even if reasonable people can disagree, we should apply the text, the history, and precedent without respect to them.

Endnotes

1 "Active" here is defined as engaging in the process of judicial review.

Richard W. Garnett*: Thank you. It is a treat to be here with you and with my friend and colleague Professor Lash. It is also a bit bittersweet, because I wanted very much to lure Professor Lash to Notre Dame and he chose you instead. Congratulations.

I want to say at the outset of my remarks that anything Professor Lash says that is contrary to what I'm about to say is what you should believe.

Most of you don't remember—I am embarrassed that I do—the 1988 presidential election. One day, way back then, then-Vice President George H.W. Bush was out on the stump, recalling his experience as a young fighter pilot when he was shot down over the South Pacific in World War II. This is what he said (and, even if you don't remember the election, you might have heard Saturday Night Live's Dana Carvey imitating the former President's voice): "Was I scared, floating in a little yellow raft, off the coast of an enemy-held island, setting the world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I get from them. I thought about God and faith . . . and the separation of church and state."

Now, I hope this train of thought strikes us as a bit absurd. At the same time, it's understandable and perhaps even entirely American that "God" and "faith" couldn't be invoked by the would-be President as fundamental values without the awkward addition of "and the separation of church and state." It says a lot, better or worse, about how we Americans think about the content and the implications of what President Clinton once called our "first freedom," that is, the freedom of religion.

As I'm sure all of you know, an earlier president, Thomas Jefferson, in a campaign letter to the Danbury Baptists, once professed his "sovereign reverence" for what he saw as the decision of the American people to constitutionalize church-state separation. In doing this, he supplied what was going to become for many people the authoritative interpretation of the First Amendment. Professor Dreisbach has noted that "no metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson's 'wall separation' between church and state." We're familiar with these words, but that doesn't mean we agree about their meaning.

Notwithstanding Jefferson's reverence for the concept of church-state separation, and notwithstanding the comfort that it supplied to our paddling 41st President, the idea remains contestable and controversial. What does it really mean to say that "church" and "state" are "separate"? In what sense does the Constitution require that separation?

You might recall a more recent election in Delaware, when a candidate for the Senate caused a little bit of eye rolling and chuckling when she suggested that the First Amendment doesn't say anything about church-state separation. As it turns out, her critics were a bit too quick to pounce because, in fact, the First Amendment doesn't say anything about church-state separation. Yet it is the case that church-state separation as an idea, as an institutional arrangement, if it's properly understood, is a crucial dimension of the religious freedom that our Constitution does and should protect.

It was a mistake, therefore, for Representative Katherine Harris of Florida to say, a few years ago, that church-state separation is a "lie" that is told to keep religious believers out of politics and public life. John Courtney Murray, the American Jesuit and theorist of religious freedom, put it better when he said that church-state separation, properly understood, is not an anti-religious principle but rather a "policy to implement the principle of religious freedom."

True, the idea has been incorporated into our constitutional law in controversial ways. It has often been applied in mistaken ways. But there is a core to the idea that is important, and I think if we can scrape off the error that has built up on it, we can see that there is something there that we do want to embrace, not because we are hostile to religion, but because we understand that it is a dimension of real religious freedom.

The specific topic that Professor Lash and I are going to talk about is the question of whether, when, and why religious institutions should be able to discriminate and, more particularly, to discriminate in ways that would be unlawful for Wal-Mart, 7-Eleven, or General Electric. The Supreme Court, much to the delight of law geeks like me, has agreed to review a case called *Hosanna Tabor Evangelical Lutheran Church & School v. EEOC*. Full disclosure: I am doing an *amicus* brief in this case. I'm not neutral. I'm on one side, and you'll be able to figure out what side that is.

This case is an employment discrimination case of a kind that might seem utterly garden-variety to you, and yet it raises what I think are some of the most important questions of religious freedom and church-state relations that the Court has considered in decades. I want to tell you a little bit about the case and the doctrine it involves, and then suggest why I think this doctrine—the so-called "ministerial exception"—is important to church-state separation, correctly understood, and to the First Amendment, correctly understood.

A couple years ago, *The New York Times* was doing a series called "In God's Name," and the point of the series was to "examine how American religious organizations benefit from an increasingly accommodating government." The articles were interesting and informative, but their suggestion was that religious institutions were unfairly benefitting from a range of special deals, tax breaks, and exemptions. The concern was raised by the writer that "the wall between church and state is being replaced by a platform that raises religious organizations to a higher legal plane than their secular counterparts."

One of the installments in the series was called "Where Faith Abides, Employees Have Few Rights," and the point of this piece was to examine what the editors called the "most disturbing instance of favoritism for religion," namely, that

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employment discrimination by churches and religious entities is not only common but is also being protected by courts. In other words, the *Times* complained, courts are creating a "right to bias." This "right to bias," the ministerial exception, was, according to the writer, "a subsidy to religion that undermines core political values of equality and nondiscrimination."

The case that the Supreme Court has taken up is precisely what the *New York Times* was complaining about. Cheryl Perich was a teacher at a pervasively-religious Lutheran school. Actually, she wasn't just a teacher, she was a commissioned lay minister. She taught "secular subjects" but also led the kids in prayer regularly and taught religion classes. She was hired by the congregation. Eventually, she was fired.

The underlying facts are complicated, and I think it is fair to say that reasonable people can and do disagree about whether or not she was treated as well as she should have been. In any event, the district court said that it couldn't hear the case. It dismissed, invoking this ministerial exception, a rule that provides that religious institutions, in the context of a particular kind of relationship, should not be supervised or second-guessed by courts in the context of employment discrimination cases. I'm going to tell you a little bit more about that doctrine and where it comes from. The first thing to note is that it is different from another religion-related exception which some of you, if you've studied employment law, probably already know about.

Title VII prohibits employment discrimination on the basis of race and sex and religion and other categories, but it exempts religious institutions in this way: Religious institutions are allowed to take religion into account when they're hiring and firing. The ministerial exception is different. The Title VII exemption that religious schools get to discriminate is limited to religion-based decisions. The ministerial exception is both broader and narrower than the Title VII rule. The ministerial exception says that, with respect to certain kinds of positions, ministerial positions, religious institutions are in effect allowed to discriminate on the basis of other grounds as well, grounds that otherwise would be prohibited—race, sex, disability, age, and so on.

This ministerial exception has been developed by courts over the course of about thirty years, although there does not seem to be a consistent theory about the constitutional basis for it. Is it grounded in the Establishment Clause? The Free Exercise Clause? In the relevant statutes themselves? I am going to cheat, and skip over these questions. Where we are today is that every circuit in the country has recognized that there is a ministerial exception, and that one of the things it means is that employment-related lawsuits that might otherwise go forward if they were being brought against Wal-Mart should be dismissed if they are brought against churches. You might think, as the *New York Times* writers did, that this is kind of strange, or even worse. After all, why would we give some institutions a right to do something that we've decided institutions ought not to do, namely, discriminate in employment?

In 1972, in a case called *McClure*, one of the courts of appeals said, "The relationship between an organized church and its ministers is its lifeblood. Just as the initial function of selecting a minister is a matter of church administration and governance, so are the functions that accompany such a selection." "There is," the court continued, "a spirit of freedom for religious organizations and independence from secular control or manipulation that the Constitution protects."

One of the themes that sounds in all of the ministerial exception cases, and which I suspect the lawyers will be arguing about in the *Hosanna-Tabor* case, is that the right to religious freedom and to religious exercise belongs not just to individuals in their personal confrontations with government, but institutions and communities as well. So a religious community, institution, association, school, church, or congregation has the right, just as you and I have the right, to religious liberty. And one of the things that religious liberty includes for a church, religious community, or association is the right to decide questions like, "Who is going to speak for us?" and "To whom are we going to entrust the formation of our members, the propagation of our teachings, and the development of our doctrines?"

There are a number of strands in the Supreme Court's religious freedom and church-state law that feed into this ministerial exception, and one of the things I hope the Supreme Court will do is sort them out a little bit. For example, there are cases that stand for the proposition that churches enjoy something like "autonomy" in terms of their internal governance. Remember, the classic church-state problem is the king wanting to pick the bishops, and this is the kind of thing that the First Amendment does not permit.

There is also a strand of case law with which you are probably familiar involving the so-called *Lemon* test, which says, among other things, that we are wary of government actions that "entangle political and religious authorities." Certainly, one concern we might have about employment lawsuits involving ministerial positions is that they are likely to entangle political authority (that is, the courts) and religious authorities (the employer). How is a court to decide whether or not a religious authority is telling the truth when it says, "We fired our minister because he is a heretic"? We don't have heresy trials in our secular courts—at least, we don't admit that we have them—but we permit religious institutions to take doctrinal purity into account if they want to.

Finally, there are cases that have to do with things like church property disputes, and that teach that courts cannot make decisions about religious questions or doctrines. That is, it can't be the province of a secular court to decide what a church's doctrine really is, or really should be.

Putting all these ideas together, the courts have concluded that that there has to be something like the ministerial exception that prevents courts from adjudicating some employment law cases that they otherwise would hear.

What's the controversy, then? Why is this case before the Supreme Court if every circuit in the country agrees that the doctrine exists? Well, every circuit in the country agrees that the doctrine exists, but they do not agree about why it exists and they do not agree entirely about what the doctrine's content and contours are. You can probably spot for yourselves what some of the questions might be: It's one thing to say that religious institutions are protected by a ministerial exception. Well, what counts as a religious institution? What if a mega-church owns

a Starbucks? Are baristas covered by a ministerial exception? That seems like a relatively easy case. On the other end of the spectrum, there are also easy cases: Could, for example, the government really tell an Orthodox Jewish congregation that it had to, say, select a woman to be its Rabbi? Somewhere in between are the tricky cases. In these cases, courts have to wrestle with the questions "what kinds of institutions are covered?" and "what kinds of positions are covered?"

In the *Hosanna-Tabor* case, my sense is that everybody agrees that the institution, a religious school, is covered. This is a school that advertises to the world that it aims to provide a "Christ-centered environment" for educating children. It's a pervasively religious school. It is, like so many parochial schools, a thorough-goingly religious mission that nonetheless provides a quality secular education. What about the position? Again, you can imagine a spectrum. The person who is the religious education director of a school is almost certainly going to be covered in any circuit. But what about the person whose job it is to drive the school bus? Maybe we think that this person shouldn't be covered by the ministerial exception. How do we decide?

In *Hosanna-Tabor,* what the Sixth Circuit did is compare the amount of time the teacher spent doing things that the court thought were secular to the time spent on tasks that the court thought were religious. It tallied up the hours and decided that more minutes were spent doing secular things and therefore concluded that the ministerial exception did not apply.

The *amicus* brief that I'm going to be working on is going to say that this "count up the minutes" approach is not good enough and that instead we need to step back a bit and recognize that somebody can be a math teacher who spends ninety-nine percent of his or her time teaching math to kids in a school like this one and yet, from the perspective of the school, still be involved in the religious formation of the students. We should want the ministerial exception to cover someone like that.

But, of course, the challenge is to anticipate what the Court's hard questions are going to be, and we know what one of them is going to be. One of the Court's hard questions for the lawyers is going to be, "Where is the line? Where is the limit? Are you saying that every single employee is covered by the ministerial exception, and therefore no employee of a religious institution can ever bring a job discrimination case?" The lawyers for the school are probably not going to want to say that. On the other hand, the hard question for the other side is going to be, "Are you saying that if a church has a pastor who happens to be spending fifty-one percent of his time on a capital campaign, that pastor is no longer covered by the ministerial exception?"

I don't teach employment law. I'm not an expert in the area. Why am I so interested in this case? It seems to me, circling back to the former President Bush, that if the separation of church and state means anything, it is not that the Constitution requires a so-called naked public square. It is not that it is unconstitutional for President Obama to say "God bless America." It is not that there is a constitutional problem with a town called Sacramento. It is not that courts should measure the distance between a publicly displayed crèche and the accompanying reindeer.

What church-state separation is really about, it seems to me, is the crucial distinction between political authority and religious authority, a distinction that does not reflect fear or hostility with respect to religion but rather, I think, respect. This distinction does not, of course, preclude cooperation. My hope, then, is that when the Court is working through this technical question of employment law, it will at the same time take the opportunity in its role as teacher—the Supreme Court is often a teacher; it helps to form our constitutional values—to help reclaim this idea of church-state separation.

In so many of our political debates now, there's one side that wants to say that the separation of church and state is a myth, that it's anti-religious; that it unfairly requires believers to hide their lights under bushels or to hold their tongue in public debates. Again, church-state separation does not have to mean these things. What it can and should involve is an institutional arrangement that keeps the authority of the state from trying to answer religious questions and to direct the internal operations of religious communities. Such an arrangement is going to be good for religious freedom because it allows religious communities, the communities that are in charge of forming those of us who are religious believers, to operate and develop on their own.

Does this mean religious communities are above the law? Of course not. At least, it shouldn't mean that. It might well mean, though, that there are some questions about what happens in a religious community—like how to interpret a passage of Scripture or what should be the standards for administering the sacrament—that secular courts just don't answer, not because the questions are unimportant—they're very important—but because of a genuine respect for the limits of the competence of secular government.

This way of thinking about church-state separation is not new. It is ancient. From St. Augustine, to Roger Williams, and forward, this institutional and jurisdictional approach to separation has been at work. Accordingly, our Constitution does separate church and state not to confine religious belief, not to silence religious expression, but to curb the ambitions and reach of governments. In our laws, as Pope Benedict put it not long ago, "Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's."

Now, I'll let Professor Lash correct my errors.

Kurt T. Lash*: It is an absolute pleasure to be here and to talk and comment on the theory of church-state separation with my good friend, Rick Garnett.

Had I gone to Notre Dame, the person who brought me there would have been Rick Garnett. He does extraordinary work on constitutional theory and theory of religious freedom as well, and he's far too modest. He is the expert on the theory of religious freedom and religious freedom in American constitutional jurisprudence here, and it's an honor to be here simply to give my thoughts and my comments on his analysis.

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What I'd like to do is just spend a little bit of time backing up and talking about theories of religious freedom and some questions that I think are raised by this particular case and also by the principle of church-state separation of the kind Professor Garnett was talking about. I think it's wonderful the way he began by talking about the foundational principle of the separation of church and state and how it is so broadly accepted as being a fundamental constitutional principle of freedom under the First Amendment. It's quite true that it's not in the Constitution. You have, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

There's no separation of church and state, but that's how those words have quite often been interpreted, at least for the last 150 years or so. So much so that maybe if I were in a raft somewhere in the Pacific Ocean and was thinking about things that were important to me and God and family and then maybe even the society in which I have staked my life and my family's life and the freedom represented here in this country, I don't know if I would actually articulate separation of church and state. But the idea that I've been blessed by freedom, I think, might occur to me as something that would sustain me in difficult times and one of those theories that's quite common for people to think about. What is our freedom? Well, separation of church and state.

As Professor Garnett has spoken, he is quite right. In this very precise doctrinal issue as to whether or not a religious institution should have autonomy from antidiscrimination laws, that doctrinal question is undecided. It's been addressed by different courts. It hasn't been addressed in a specific way by the Supreme Court, so it is in play. And in determining the scope of autonomy that religious institutions ought to have, the Court will back up and think about first principles, and they are almost certainly going to back up and think about the principle of separation of church and state because it informs so much of our jurisprudence.

But what I just briefly would like to address is, where does that principle come from and how ought it to be defined? Here, I'd like to break the analysis into three separate parts. You can think of separation of church and state in terms of pure theory, perhaps a theory of Justice. You can think of it as a principle that informs the text of the Constitution; the proper interpretation of the First Amendment would be separation of church and state. Or you can think of it in terms of precedent. Whatever we think of theory, whatever we think of text, the Court has adopted that principle, and it plays out in a particular way in jurisprudence.

Now, as far as theory is concerned, I think one of the first questions we have to think about is, where does the theory of separation of church and state come from? Is this a religious principle? Is this a principle which maximizes the people's ability to thrive in their relationship with a deity? In other words, is it foundationally something that you would accept only if you have religious beliefs? And if that's the case, if this is a theory of religious freedom which is based upon your belief in a deity or your belief in certain religious principles, why should it be approached in a supportive manner by those who do not have religious beliefs? This is a question of how we come together as a polity and what will our foundational principles be, and why should a secularist adopt a theory of separation which maximizes a theory or belief that they do not share? So, is that what's driving this? Is this a religious principle? If so, then we have some problems as to why it should be developed by courts that are not based upon any particular religious theory.

Perhaps our recourse then is to text. We've had a society that has embraced certain religious-based doctrines and certain ideas of freedom, which include religious freedom, and some of those ideas have been enshrined in the text of the Constitution. This issue has been decided. We do believe in religious freedom. What makes us think that separation of church and state is part of the text of the Constitution? That is a difficult issue, and people have come to different conclusions about it. The text itself speaks of free exercise of religion. It speaks of non-establishment. But it doesn't necessarily spin out to separation of church and state, and it certainly doesn't necessarily spin out into exemptions of religious institutions from general anti-discrimination laws.

So we would have to know a little bit more. How do we interpret this text? Where do we go for tools for interpreting the text? Well, perhaps recourse would be to theories of popular sovereignty. If the people have the right to enshrine the text, then they should have the right to tell us what that text is supposed to mean. That might lead to principles of original understanding or originalism. And the courts generally do make that move in their jurisprudence. They talk about what was the original understanding of the text. But at the time of the Founding, there would appear to be a number of different ideas of religious freedom, and not all of them embraced what we would understand as separation of church and state.

You could follow the views of people like President George Washington, who very much believed that government should be involved in the support and the promotion and the pruning of religious exercise in order to protect the proper flourishing of democratic society. So neither he nor those who followed his particular model were separationists. And there are many states that had religious establishments where the government was involved. Massachusetts, for some time, at the time of the Founding and for years afterwards, believed in government involvement, not government separation.

There were separationists, of course, such as Thomas Jefferson. He wasn't involved in the drafting of the Bill of Rights, but his theory of the separation of church and state, that individual freedom best flourished if you separated government power and religious doctrine, did inform a number of members at the time of the Founding. This theory would spin out in particular ways that would lead to a hands-off approach from the government in its interference with religious institutions. But Jefferson's views were just a minority. There was also a third view, a view under which there wasn't any particular position that ought to be enshrined in the Federal Constitution. They wanted to leave the matter to individual debate in the states—leave Massachusetts free to establish if Massachusetts wanted to; leave Virginia free to disestablish if Virginia wanted to.

So I think there's a good argument that all of these views were in play at the time of the Founding: separationism, pro-government support, and federalist—federalist, meaning just

leave it to the states. Which is the one that we should adopt, and why? There are major implications depending upon which ones we adopt. If we adopt Washington's view, then government should be allowed a great deal of control over the operation of religious institutions in order to make sure that proper religious freedom develops. That certainly would not be a separationist view.

If we adopt Jefferson's approach, it would be fairly hostile to the concerns of religion. His separation of church and state was based on the idea that religion actually distorts the proper functioning of the democratic process. And so, presumably, Jefferson would be in favor of any kind of law that controlled those crazy, zealous religious institutions and would minimize their impact on people's lives—and hopefully would lead everyone to become a Unitarian someday. So that wouldn't necessarily get you to any strong religious freedom-maximizing principle.

And federalism doesn't lead you to any kind of maximizing principle. Some scholars have said that there was no religious freedom principle at all at the time of the Founding. They simply shunted it off to local officials and tried to keep the federal government out of the subject. If that is the principle that you approach, then, as long as anti-discrimination laws don't address the subject of religion or don't particularly target religion, then maybe even the federalist view is satisfied by allowing anti-discrimination principles to affect the operation of religious institutions, as long as they don't target particular religious beliefs.

You can come up with a Madisonian argument. I think Madison was very much in favor of religious freedom, and I would agree with those scholars. Professor Garnett has talked about this in his writings. I think there are ways that you can identify founders who wanted to maximize religious autonomy. But the point is that the text isn't self-defining, and the history is very difficult. There were a variety of views in play at the time of the Founding. So maybe we can't go to theory. Maybe we can't go to the historical understanding.

Perhaps our recourse in the end is to precedent. History is not clear. We can argue about whether or not the Court has properly engaged itself in these issues, but let's consider how the Supreme Court has approached this issue and see if precedent, at the very least, can help us resolve this particular question.

Precedent is difficult as well. When it comes to the free exercise of religion, the Court has taken the position that as long as the government doesn't discriminate against religion, it can regulate religion up the wazoo, or whatever the particular phrase might be.

There is no general remedy from generally-applicable laws under the Free Exercise Clause in cases like *Employment Division v. Smith*. As long as you don't discriminate, as long as your regulations affect everybody equally, then it can affect Starbucks or it can affect the Catholic Church or it can affect the Starbucks in the Catholic Church. As long as it's all equal, then it's fine.

In *Smith*, you can find some preservation of precedent that maybe leaves room for church autonomy, and I think it does leave room for church autonomy. But the thrust of *Smith* is equal treatment. So if that's the thrust, if that's the direction in which the Court is going, then it doesn't look good for the church. It looks more like the Court is heading toward equal treatment to be some of the Free Exercise Clause. What about the Establishment Clause? It's the same thing. Recent jurisprudential developments regarding the Establishment Clause by the Supreme Court head toward equal treatment.

For example, regarding government funding of religious institutions, it used to be separation of church, and no government could end up in the hands of religious institutions. The Court has changed that. Now it adopts a position that says, as long as the funding is equal, as long it's structured so that it ends up in both secular educational institutions and religious educational institutions, there's no skewing in favor of religion or against religion; there's equal treatment, then by and large it's perfectly proper for there to be equal treatment.

That doesn't perfectly resolve what the Court is going to do when it comes to the ministerial exception. But if that is the thrust of the direction of the Court's current jurisprudence, then it doesn't look good for the church. The Court's jurisprudence under both the Free Exercise and the Establishment Clauses seems to be heading in the direction of equal treatment, and no particular favored treatment or disfavored treatment of religion. So, if that's the thrust, then it seems to me that the autonomy case for the church in this case is fairly difficult. It's in danger.

One final thought: Maybe we should be thinking about this as a freedom of association case. There's an area of jurisprudence that might work in the favor of the church in this instance. In cases like *Dale*, the Boy Scout case, and in cases like *Hurley*, the parade case, the Court indicates that associations and expressive associations should be able to control their own membership and, in particular, ought to be able to control those people who have potentially influential roles—leadership roles, teaching roles, things along those lines—and that they should be associations immune from anti-discrimination laws. So, if anywhere, I think jurisprudence that's developing and that could be in favor of the church is under the Freedom of Association Clause and not under the provisions that are supposed to be protecting religious liberty.

I would like to close with this: How can it be that, under the American Constitution, if we're dealing with the thrust of precedent, if religious freedom is to be pursued, it can't be pursued under the Religion Clauses. The Constitution no longer provides any special protection for religion. You would have to find it someplace else. That, I think, is an indictment of the Court's jurisprudence all by itself, and I'd simply like to leave that provocative statement as my close.

Thank you for coming and thank you for being here with us today.

Professor Garnett Response: As I would have predicted, all of what Professor Lash says is correct. It is true that, with respect to exemptions, the *Smith* case says that the task of dealing with the incidental burdens on religious exercise that are caused by generally applicable laws is for the political process, and not for unelected federal judges. And in the context of the Establishment Clause, we've also moved to an equal-treatment approach. Where, then, can we find the grounding for this ministerial exception? As you heard, one possibility might be

this Boy Scout case and freedom of association. I share Professor Lash's surprise at the idea that the only way to protect religious freedom is to avoid the two clauses that actually speak about religion and go to a third one.

But here's another possibility, and it's one that I hope I remembered to mention when I was talking before. Notwithstanding the equal treatment thrust in both *Smith* and in the funding cases, it's still the law that secular courts are not supposed to make religious decisions, or decisions about doctrine. It seems likely that the grounding for the ministerial exception is going to be on this rule.

Did the Supreme Court Properly Decide *Christian Legal Society v. Martinez*?

Rutgers School of Law-Newark, October 5, 2010

Gregory Baylor*: Thank you to the Federalist Society and to the LGBT Caucus for inviting me and for sponsoring this debate. Thanks also to Dean Chen for agreeing to participate in our conversation. I look forward to hearing his insights on the case. We were chatting beforehand and I learned that we are both graduates of Dartmouth College. So, whatever differences we may have about this case, we both bleed green.

Let me start with a story. In September of 1969, most Americans still supported military involvement in Vietnam. Richard Nixon had won the White House in part based on a promise to restore "law and order." He was referring to some of the violent protests against the Vietnam War, many of which had occurred on college campuses.

Groups like Students for a Democratic Society, back then in 1969, were seen as radical, dangerous, un-American, something not to be tolerated. It was in the face of this cultural reality that a group of students at Central Connecticut State College came together and sought to form a chapter of Students for a Democratic Society, or SDS. They sought official recognition from Central Connecticut State College, and the college president rejected their request. The president's primary objection to this SDS group was the fact that they were associated with the national SDS. The president said that they would be "a disruptive influence on campus" and would be "contrary to the orderly process of change on campus." He also said that the group's "philosophies" were "counter" to the official policy of the college.

Faced with a public university's hostility to its counter-cultural message, the SDS sought assistance, help, vindication of its rights from the federal courts. SDS argued that Central Connecticut State College had violated its First Amendment rights by withholding recognition from it. They took their case all the way up to the Supreme Court, which even at that time had had a long history of vindicating the rights of racial, religious, and ideological minorities, protecting them from powerful majorities and from the government. The Supreme Court ruled in favor of SDS in this case, this countercultural group that was not recognized by its college.

The Court, at least in my view, upheld the Constitution. It ordered the college to recognize the group, and some of the fears that the college had about SDS did not come to pass. The college did not erupt into flames, and life went on as it had before. Except, over time, millions of Americans came to share the SDS's skepticism of and disagreement with American military involvement in the war in Vietnam.

Let me tell another story; fast-forward the time machine a little bit to 1973. At that time, most Americans believed that homosexuality was a psychological disorder. They believed that same-sex sexual intimacy was morally wrong. Rules banning discrimination on the basis of sexual orientation in housing, education, financial transactions, public accommodations, and business establishments had not yet been enacted. The idea that the federal government would recognize same-sex relationships as the equivalent of traditional marriages was pure fantasy at this time.

It was in the face of this cultural reality in 1973 that a student at the University of New Hampshire sought to form a GSO, a Gay Student Organization, and the president of that university rejected his request. He refused to recognize the group. He refused to allow them to do what they wanted to do, which was to specifically sponsor a dance and to sponsor a play.

The Governor of New Hampshire at that time, a man named Meldrim Thompson, wrote an open letter to the university's board of trustees. He warned that if they did not "take firm, fair, and positive actions to rid your campuses of socially abhorrent activities," he would "stand solidly against the expenditure of one more cent of taxpayers' money for your institution." And in response to this pressure from the government, the president of the university refused to recognize the GSO and condemned the distribution of what he called "homosexual literature." The university said that it had "an obligation to prevent action which affronts the citizens of the university and the town."

So the GSO, faced with the hostility of a public university, went to the federal courts to seek a vindication of its constitutional rights. The U.S. Court of Appeals for the First Circuit held that the University of New Hampshire violated the rights of the GSO by not allowing it to conduct its activities and by not recognizing it. The court acknowledged that the GSO "stood for sexual values in direct conflict with the deeply imbued moral standards of much of the community," but it held that this conflict did not justify the university's unwillingness to recognize the GSO and allow it to conduct its activities.

As was true of Central Connecticut State College and the SDS, the court's order that UNH recognize the GSO did not cause the skies to fall. The campus did not erupt in flames. Life went on pretty much as it had before. But over time, many Americans became more accepting of homosexuality.

One more stop on the time machine—let us go forward to 2004 in San Francisco in the month of September. By this time, San Francisco had become one of the most liberal places in America. No other Republican candidate for President, just to illustrate the point, has received more than twenty percent of the vote in that city since 1988. The city's Castro neighborhood had become a center of gay life in the United States. Harvey Milk had become the first openly-gay man to be elected to public office in California. More recently, the mayor of San Francisco at the time, Gavin Newsom, had begun issuing marriage licenses to same-sex couples well in advance of the California Supreme Court's discovery or recognition of a right to same-sex marriage in the California Constitution.

A few months after Mayor Newsom began issuing the same-sex marriage licenses, a student at Hastings College of Law in San Francisco had a conversation with Judy Chapman, who was at the time the director of student services there. The student told Dean Chapman that she and some associates of

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hers wanted to form a chapter of the Christian Legal Society at Hastings Law School. Chapman's first response foreshadowed what was going to happen next. She observed that the National Christian Legal Society had policies governing leadership and voting membership that were probably inconsistent with Hastings's policy on nondiscrimination, and she gave him a copy of that policy.

The students who spoke with Dean Chapman made the true observation that no one denies that CLS allows everyone and encourages everyone to participate in its meetings and in its events. But when it comes to the leaders of its organization, those who lead the Bible studies and those who select the leaders and set the agenda, may draw those folks from among those who share their views and beliefs.

So Dean Chapman's giving of the nondiscrimination policy to these two students foreshadowed the ultimate denial of recognition by Hastings College of Law of CLS, and just like SDS at Central Connecticut State College in the late 1960s, and just like the gay students' organization at the University of New Hampshire in the early 1970s, the CLS students went to the federal courts to vindicate what they believed were their judicial rights. They believed that Hastings had violated their First Amendment rights.

Unlike those two other cases, the federal courts, as you know, did *not* vindicate what I thought and what many of us thought were constitutional rights. As you heard, all the courts, the district court, the circuit court, and the U.S. Supreme Court, ruled for Hastings and against CLS. So the question before us today is whether the Supreme Court got it right. And you will not be surprised to know that my position in the debate is that the Supreme Court decided the case incorrectly.

I think it is important to be clear about what the Supreme Court decided. What was it asked to decide, and what did it actually decide? The Court was asked to decide whether Hastings had violated CLS's First Amendment rights by withholding from it registered student organization status because it draws its leaders and voting members (those who select the leaders) from among those who share its religious commitments, both doctrinal—"I believe X, Y, and Z"—and ethical—"I do this and don't do this." That was the question, whether that withholding of recognition because of CLS's practices was a violation of the First Amendment.

What precisely did the Court hold? A five-Justice majority held that Hastings did not violate CLS's First Amendment rights; it did not violate the Constitution by withholding recognition because of CLS's practices and policies—assuming that Hastings was applying a consistently-enforced "all-comers" policy. (That is a caveat to the general holding.) The general holding: Hastings won, and CLS lost.

What was their analysis? How did they get to that ultimate conclusion? The opinion is long and says Hastings wins, unlike the Ninth Circuit's opinion which says just about that but it is about two sentences long. The Supreme Court made a series of intermediate conclusions, and all of those conclusions add up to the result of the case. What were these intermediate conclusions? The first one was about what it is that the Court should be doing in the case. And more specifically, what questions should it be asking and answering? And, more specifically, what was the legal analysis that the Court should undertake?

And unlike many cases, there was a fundamental debate between the parties about what line of cases were most relevant. What mode of analysis? What test with all of its prongs should be applied by the Supreme Court? CLS had a number of claims, and it said that the Court should apply the tests that go with those claims separately and individually, acknowledging the possibility that it might win on claim A but not on claim B. But as long as it won on one claim, it could win the case. As you know, this is the way lawyers argue cases. You have alternative theories as to how to win the case.

One of CLS's claims was that under a body of case law under the First Amendment called expressive association doctrine—and there is a particular test for adjudicating expressive association claims—CLS said that the Court should apply that test. CLS also made a claim about—I apologize for getting into the weeds of Free Speech Clause doctrine but I think it's unavoidable in this case—a whole body of case law that deals with government regulating speech that happens on public property. This is called forum doctrine. There are different kinds of forums; the type of forum that you had at issue here was a student group recognition forum. We are going to have student groups; we are going to allow them to use meeting space; we are going to give them benefits; and they can do the things that they want to do.

What CLS argued was, we have a right to be in that forum, and if you exclude us from that, you have to justify it. More specifically, the argument was that the exclusion of CLS from the forum by Hastings was not reasonable, and it was not viewpoint-neutral. So you have an expressive association test with some prongs to it, and you have this access to forum speech test with some questions that the Court is supposed to ask. We argued that the Court needed to do all of that.

The Supreme Court said that only access to forum analysis will apply. That is one of the errors that they made, and I will explain why later. They decided that they were only going to ask the speech forum questions. And I think that there are only two questions that the Court is supposed to ask when it is adjudicating one of these claims from a speaker saying, "We're supposed to be in this speech forum and you wouldn't let us in there." The two questions are these. First, whether the exclusion was reasonable in light of the purposes of the forum. The Court made an important intermediate conclusion when applying this test. It said that the purpose of the forum was to promote tolerance among the students. It then held that excluding CLS because it did not allow everyone to be able to be a part of the organization was consistent with that policy and promoted that purpose of the speech forum. So that was the second piece of its analysis.

The third piece of its analysis was to say that this all-comers policy was the policy under which Hastings said a student group that wants recognition must allow everyone to be a leader or a voting member. The Court said that this was viewpoint-neutral on its face. Now it acknowledged that CLS had argued that this policy had been applied inconsistently, so it sent the case back down to the lower courts for adjudication of that claim. That

is what the Court was asked to decide, that is what the Court did decide, and that was a little taste of its analysis.

I could talk for hours about what I thought was wrong with the Supreme Court majority's opinion, but I will not do that. I will limit myself to three particularly significant things the Court did that I believe are mistakes and contributed to what I believe is an incorrect result. The first one is a refusal to follow precedent. The SDS case that I talked about, Students for a Democratic Society at Central Connecticut State College, is not just a nice story. It is a case that the Supreme Court decided and that I thought had precedential value for *CLS v. Martinez*. But obviously it was a different case: it did not involve CLS; it did not involve nondiscrimination policy. But the way that the Court ignored *Healy*, or sidestepped *Healy*, or misunderstood *Healy*, or misapplied *Healy*, was in its approach. What the *Healy* Court said was, if a public university is recognizing students groups, allowing them to meet, allowing them to use all these means of communicating with their campus community, it cannot not recognize them unless doing so would cause a substantial disruption of the educational process.

So not only did they say SDS wins, but they set forth an analysis under which courts should subsequently ask that question, would recognizing this group create a substantial disruption of the educational process? I believe that if the Court had faithfully followed *Healy*, it would have ruled for CLS because recognizing CLS would not have substantially disrupted the educational process at Hastings. The campus would not have burst into flames. It would have gone on much as it had before. So I think they failed to follow *Healy*.

They did not ignore *Healy*. What they said was that *Healy* is a case that is about hostility, and hostility was the dispositive fact of *Healy*. *Healy* stands for the proposition that when you know for a fact that the university administrator does not like the message of the group, refusal to recognize it is unconstitutional. I disagree. I think that is an overly narrow reading of the opinion. I suggest you read it for yourself and make your own judgment about it, but I do think that is an overly-narrow reading.

The second-most consequential thing the Court did, which I think was a mistake, was not to apply expressive association analysis. This is a claim that CLS was going to win. The right of expressive association acknowledges that people get together in groups to do expressive things, and the test acknowledges that governments can mess with that in a way that violates the right of expressive association.

Healy is an example in itself. The Court said that the unwillingness of a public university to recognize a student group can be a violation of the right of expressive association. Another example is the government telling a group, you must turn over your list of members (*NAACP v. Alabama*). A third way would be to force an organization to accept as leaders or members people who disagree with its message. That is the case of *Boy Scouts v. Dale* last decade. That is the right of expressive association.

I do believe that if the Court had faithfully analyzed that claim and applied that doctrine, it would have ruled for CLS. Requiring CLS's compliance with the all-comers policy, allowing atheists to lead its Bible studies, would undermine its ability to formulate and articulate its message, which is the essence of an expressive association right. And, in that case, the Court would have turned to Hastings and said that CLS has shown that this would undermine their ability to articulate their message; Hastings, what is your justification for that? And they would need a compelling justification. I believe if the Court had faithfully followed precedent and asked that question, they would have concluded that Hastings lacked a compelling justification for, for example, requiring an atheist to lead a CLS bible study.

The third thing the Court did which I think was a mistake and led to results which I believe were incorrect is that it mischaracterized this. I talked before about the test they applied, which was whether the exclusion was reasonable in light of the purposes of the forum. And there are two pieces to that. There is reasonableness, and there are the purposes of the forum. As I said before, the Supreme Court agreed with Hastings's argument that the purpose of the forum was to promote tolerance, and therefore, excluding CLS was very consistent with that objective. I would concede that. But I do not think that this was the purpose of the forum. I think the purpose of the forum was robust debate on a variety of subject matters, a virtually limitless list of subject matters from a variety of perspectives. You had pro-life, pro-choice, Democrat, Republican, environmental law society, business law society, you had the ultimate Frisbee club, you had the wine-tasting group, you had the Muslim group, the Jewish group, and the Christian group. There were sixty groups. There was really nothing that unified them other than the fact that they were student groups, and CLS simply wanted to be group sixty-one.

Other cases—the *Healy* case, the case called *Widmar*, the case called *Southworth*, the case called *Rosenberger*—all stand for the proposition that these recognition systems are wide-open and robust, and that was the mistake that the Court made in coming to its results.

Ronald Chen*: Thank you very much, Mr. Baylor, for your comments, and thank you for taking the time to come here all the way from Washington. I just had to come down the elevator. We very much appreciate your presence here to add to this debate.

As with so many things, the answer in a debate depends on how you frame the question. And we have heard at the outset at least one way to formulate the question: whether a publicly-funded law school student organization has the First Amendment right to limit leadership and voting membership based on its religious beliefs, including its beliefs about extramarital sexual conduct.

There is actually a lot that Mr. Baylor and I would agree on. I could actually answer that question with one slight emendation—although Mr. Baylor may not think it is slight—in the positive. I absolutely believe that organizations do have a First Amendment associational right both to associate, which necessarily implies the right not to associate with those who do not hold their beliefs. The two words I would just have to take

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out of that sentence are "publicly funded." I think the majority essentially found that this is what this case was about.

I will tell a story, too, of a case I had this past spring in the Constitutional Litigation Clinic. It involved a high school student, CH (she is a minor, so we still use two initials), and in this case the ACLU—this is a relatively rare event but it does happen—was in fact acting in cooperation with the Alliance Defense Fund. She wanted to, on a designated day, distribute pro-life literature, and wear an armband, really some duct tape on her arm that said "Life" on it. The school turned it down for a variety of reasons. First, they said it was the school uniform policy, but it was pretty clear that what they were really doing was objecting to the subject matter of her speech. The Alliance Defense Fund represented her; the ACLU came in, and between them the message was the same, that it is a clear violation of the First Amendment to preclude her from using the school, which, as all schools are, is some type of forum for expressing their beliefs.

How is that different from this case? I think it is different in several ways. I will admit, my viewpoint does not really stray that far from the majority, so I will simply give you some type of synopsis. The majority felt that the policy at issue was Hastings's "all-comers policy," that student organizations that seek recognition—which carries with it the ability to call upon resources, including the same type of student activities fee that you all pay and that the SBA disperses—that such organizations must accept or at least give the opportunity for membership to all members of the law school community.

There was some debate between the majority and the dissent. What about things like the Law Review that are somewhat exclusive? And in a war of footnotes, they decided that really what was at issue was that a member of every organization has the opportunity to participate in and cannot be excluded based on status or goal. Mr. Baylor is certainly correct that there was a lot of debate, certainly between the majority and the dissent, on what the actual policy was. The dissent, led by our own favorite son, Justice Alito, felt that the policy was not an all-comers policy but a nondiscrimination policy that said that student organizations could not discriminate based on religion or affectional preferences, I assume.

So the way I phrase this debate is along the lines of the majority. Does a public university violate any constitutional proscription if it requires that any student organization that receives government money or resources—that such an organization gives an opportunity to all students to become members of the organization? I say no, there is no violation if a public university does that.

First, I do not believe that such a restriction is content- or viewpoint-based. It is, in fact, in some ways—to some extent, I draw upon my own practical experience as an on-again, off-again law school administrator—a device to get the law school administration (i.e., the government) out of the business, sometimes a very messy business, of what actually motivates a group of students to do anything, whether they are excluding based on status or belief. I think it would be very problematic if I tried to ask the Italian-American Association whether they were excluding someone based on the consistency or not of that person's beliefs with the mission of the organization, as opposed to status.

A rule like this actually, frankly, makes—not that I expect a lot of sympathy—law school administrators' lives a lot easier because it gets us out of the business of intrusively inquiring into consistency with "mission," i.e. why student organizations are doing something. Basing it on a very outwardly, externally objective, verifiable circumstance—do you accept all comers or not?—gets us out of that, and it is, in my view, a viewpoint-neutral, content-neutral rule of general application. That, I would contend, is the distinction between this situation or situations like this and *Healy v. James*, which Mr. Baylor mentioned, which was a case, as he described, in which the university administration basically singled out a particular organization, in that case the SDS, for special discriminatory treatment, excluding them from the benefits in an otherwise general program involving student organizations. I think this case is almost the exact opposite of that. Here we have a neutral university policy, and it is the student organization that is essentially asking for the exemption from that neutral rule by asking that it be relieved from the obligations of the all-comers policy. That, to me, is a critical difference.

In the proper context, I would be the first to argue in favor of free speech associational rights, and I absolutely agree that the right to associate includes the right not to associate. It must, necessarily. I just do not think in this case that CLS at Hastings really lost any right of association. I do not mean to belittle this in any way, but it seems all this really came down to is money. They did not get access to the student activities fee. As I understand from the record, and I certainly think this is an important point, they could have access, for instance, to a meeting room just like any other group of students.

Let's face it: if a group of students wants to get together, talk about sports, talk about anything, or engage in Bible study, they can get a room to do it within a reasonable time so long as it is free. And, apparently, the majority said they had that right. They had access to bulletin boards and other methods of communications—or at least I would be the first to say that they should—just as any student here at Rutgers, sometimes to the annoyance of everyone else, has complete access to the student-wide listserv, and we approve everything that goes on that listserv.

I first adopted this policy, and at the time I told the SBA that there are two ways to do this: either no student has access to the list or everyone does. I am not going to do the in-between thing of deciding which student organizations or which students have access, because that is going to involve me being the super-editor and censor, and I am not going to have any of that. So the SBA actually voted at the time and said, "We'll keep the access for all policy with all the occasional annoyances that may cause."

So with those assumptions—that a public university must allow access to an organization which, due to some confessional standard or mission or belief, excludes from its membership those who do not meet those standards, as, quite frankly, would any run-of-the-mill religious denominations. We have campus ministries at Rutgers even though it's a public university. I

just looked it up. If you go to catholiccenter.rutgers.edu, you will find the website of the Catholic campus ministry, and if you go to episcopal.rutgers.edu, you will find the website for the Episcopal ministry at Rutgers. So they all have access to essentially the same methods of communications, and if anyone wanted to send a message on the listserv, at least I could say we would allow it so long as we allow open access to the listserv.

Where I think that the Court said that a public university was allowed to draw the line, a line that I think is a defensible one, is when, in addition to having means of communication and a place for a meeting, you also are seeking money, state money collected from you all in support of their mission. Actually, I could make an argument, though I do not think that it is necessary, that if Rutgers or Hastings or any other public university decided to do that, there might be a serious Establishment Clause violation in doing so. At the very least, it seems to me, it is a defensible decision of the university not to do that. And Hastings chose a way that did not require, in order to apply that rule, a viewpoint-based or content-based distinction. There is a certain elegance in this way that the all-comers policy achieved that result without having inquired into the inner workings of a student organization.

There was an argument that was raised before the courts that this all-comers policy would allow essentially a hostile takeover, that groups of students who had conflicting beliefs with the Christian Legal Society could become members and take over the association and do whatever they wanted. And the Court, I think, rightfully said that this is speculative. I would say at this point that it is fanciful that that was going to happen. At the very least, if you were going to rely on that as the basis for an argument that you have lost the right to association, there should be some record to indicate that it is anything more than a fanciful possibility, as I think you have heard suggested before (without naming the source), you all got the message that you have other things to do with your time. If you do not agree with an association's mission or belief, you do not join it; you join some other association. And that is the way things should work.

So I do not think that CLS really lost in any meaningful sense its ability to freely associate. What it had was a choice. It could decide to take the all-comers pledge, and the additional thing it received essentially was access to funds. And if it did not decide to do that, that would be fine, and it could, and presumably since that time has continued to exist and, for all I know, flourish. I do not think that it denies someone the right to association simply to say that we are not going to fund it, or give you a subvention. Religious organizations and religiously-affiliated organizations have existed since the beginning of the nation without state support and have done just fine.

So what do I think the outcome of this decision is? If a group of students wanted to conduct a Bible study in one of our rooms, or if the local Catholic or Episcopal ministry wanted to hold a service in this building, say, on Ash Wednesday, or if a group of Muslims students wanted to reserve a room to conduct their five required daily prayers, all those things not only should happen, I can say the experience in this law school, at least in my experience, they have happened on occasion, and I think nothing in this decision prevents that at all. All those things are still allowed under this decision within the confines of a public law school, and I think that is fine. And I think it is actually probably constitutionally required.

What if the decision had gone the other way? If we are going to talk about hostile takeovers, predictions of extreme outcomes to influence the debate, I will throw in one. What about if the Westboro Baptist Church wants to create a student organization here? We would have to allow it. I assume you all know the unhappy provenance of that organization. I suppose I will criticize myself and say that now it is me engaging in speculation. It would never happen.

But any denomination, any of what I will call the mainstream denominations that has a confessional requirement, which is most of them, would we be required to fund the Rutgers Catholic Student Law Student Association or Jewish Association or Muslim Association that had as a requirement of membership some requirement adhering to some confessional standard? Since I have litigated Establishment Clause cases before and have developed some friendships with opposing counsel, and now one more, I always tell public interest lawyers who litigate on the other side, "Be careful what you wish for; you might get it." If this decision had gone the other way, we would have had, in my view, increased government interaction and entanglement with the religious organizations in a way that might seem at the moment to be beneficial because you get some money, but, I think, in the long run might actually work against the free exercise rights of the religious organization involved. The Establishment Clause is as much for the protection of religious sects as it is for the state.

Mr. Baylor Response: Thanks, Dean. Those were great comments.

How many of you have read the opinion? A fair number. I mean, it is a complicated case, and the outcome was not self-evident. The fact that you had a circuit split over this question and that you had five Justices who are intelligent, thoughtful people, four Justices who also are intelligent, thoughtful people coming to different conclusions, is unsurprising. So I think you heard some of the alternative perspectives on this case and why it was so closely divided in the Court.

On the Establishment Clause question, Hastings did not justify what it did by reference to the Establishment Clause. In other words, it did not say it was trying to either comply with the Establishment Clause or even that it was trying to respect Establishment Clause values even if its actions were not required. I think that they did not do that because they realized that this was a non-starter argument.

The big religious freedom and church-state battle in the 1970s, 1980s, and 1990s was whether religious groups should have the same access to public meeting space as non-religious organizations, and the Court resolved that controversy over and over again; a conflict between a free exercise/free speech argument on one side and an Establishment Clause argument on the other side. In favor of the free speech argument, there was a case in 1981 called *Widmar v. Vincent*. It said that there is no Establishment Clause power recognizing a religious student group. Then, in 1995, in a case called *Rosenberger v. University of Virginia*, the Court did something that I think is somewhat

significant to this case because Dean Chen talked about the existence of the money and these other benefits besides meeting space. The Court said that there was no Establishment Clause justification for denying a religious publication money to publish religious things, and the Court said that denying that was a Free Speech Clause violation. It was a slightly different argument we made in this case, and I do not want to suggest that they are the same. But, in other words, all this church-state stuff was off to the side.

Another important debate in the case that you heard Dean Chen talk about a little bit was, how bad was it for CLS not to have recognition, and how bad would it be for CLS to comply with the policy? Let me take the second one first. How bad would it be for CLS to comply with the policy? Our argument in that regard did not rest entirely on the specter of 100 people who disagree with CLS's message showing up on a particular day in September and saying, "We're here to take over." The way that CLS operates and the way Hastings operated really put this into sharp relief without the existence of a real person who did not agree with CLS showing up and being excluded.

CLS is like a lot of religious organizations, and, in a way, unlike a lot of other kinds of organizations. When you join the Federalist Society, for example, you do not sign a creed that says, "I believe in X, Y, and Z," or if you join the Environmental Law Society or the LGBT Caucus, you do not sign a statement of beliefs. You have a general sense of what they are about. You have a general sense of whether you agree or disagree with them. But a lot of religious organizations are different. They do have creeds, and it is just a way that they, over time, develop a way of defining their boundaries. This is what we do believe; this is what we do not believe. It is a very common phenomenon in Christianity. It may strike you as odd, but it is a very normal thing for a religious group to say, "Here's what we believe."

Put that to one side. What Hastings was saying was, if you want to be recognized, you must promise in advance that you will allow someone who rejects your religious beliefs to be a leader or voting member. The policy did not work like, "here is this rule out there, and if you violate it—someone wants to be the president and is an atheist, so they cannot be president—we are going to come after you and de-recognize you." What Hastings said was, "CLS, you must promise in advance that you will never consider the statement of faith in making decisions about members." That is a promise that CLS could not make, out of conviction or out of conscience. They could not say truthfully that they were never going to consider somebody's religious beliefs. So, really, that is the downside of forced compliance. They really cannot in good conscience agree in advance that they are going to comply with the policy.

The other piece of this was, how bad is it to not be recognized? I will have to take issue with the factual recitation that Dean Chen put forth a little bit on this issue of meeting space. Hastings did say, "We give you access to meeting space as it is available." There were three instances between the time the lawsuit was filed and the time the record was closed in which CLS sought access to the meeting space. And, in each case, that request was denied. To be fair, they did not say, "No, we lied when we said you can have access to meeting space." What they did was they slowed up the request. They never responded to it until after the event had occurred.

And it sounds to me that you agreed that that is the wrong thing to have done, but that is what they did, and that was in the record.

So the assertion that CLS had access to the meeting space, yes, Hastings asserted that, but it did not comport with reality.

The second thing is that they did deny CLS access to all the means of communicating on campus. They did not have access to the listserv. They did not have access to the bulletin board. They did not have access to the list of registered student organizations on the website. I did a lot of debating on this case before the decision came down. And every time I would ask the leader of the group that was sponsoring the debate, whether it was the LGBTQ Group or the Federalist Society or the CLS chapter, whether these benefits are important. All of them said without exception, the benefits of recognition are important. The dissenting opinion correctly observes that recognition is the life blood of your activity on campus. I can see you can exist without recognition, but recognition is a helpful thing.

The last thing I will say is that I think it is worth considering what it was that Hastings was trying to accomplish. In other words, what was it that CLS was doing that was so terrible? I think, to put this in a broader context, American law acknowledges generally that discrimination is wrong. America acknowledges that religious discrimination is wrong. The debate is still going on about sexual orientation discrimination, but the law in those contexts always, in religion and sexual orientation, exempts religious organizations. Barney Frank's Employment Non-Discrimination Act, which essentially adds sexual orientation to Title VII, has an exemption for religious organizations. Essentially, what CLS wanted was for Hastings to behave in a way that most of Americans behave.

Dean Chen Response: Just a doctrinal clarification. I am sure you are right that Hastings did not raise any Establishment Clause defenses. I will speculate that they thought they did not have to because that argument is only something you bring out—i.e., we are not going to recognize this religious group because we do not want to violate the Establishment Clause—that is something you raise only if the state has to meet the compelling state interest test.

Widmar v. Vincent, which Mr. Baylor mentioned, did say at least hypothetically that avoidance of an Establishment Clause violation could constitute a compelling state interest that would justify a content-based restriction on speech. And that was essentially what happened in *Widmar*. Like *Healy v. James*, it was a school reaching out and saying to a particular type of speaker based on his content, because it was religious in nature, we are not going to give you the same access to the school, the facilities, or anything else. And I would be the first to agree that you cannot do that.

This again is, to me, the flip situation where there is a neutral rule under which the law school administration is not singling out a certain content or viewpoint or type of speech for special regulations applying a neutral rule. And again, it is

really the organization that is seeking the exemption from the rule, not the other way around.

And as for the factual matter—there, I am going to take the easy way out—I would not have done that. My discussion assumed that even if CLS does not have recognition, they have to have the same access to channels of communication as any other student. I suppose that means, if I were to wake up tomorrow or were to tell Dean Farmer to wake up tomorrow and cut off this all-comers access to our listserv, and we applied uniformly and it was not pretextual just to avoid this, that would be a different case. But so long as we have that policy, it has to be consistently applied, as is access to rooms. Sometimes, there is a problem getting a room in this law school, but I assure you now—you will just have to take my word, it is this new-fangled software that we are trying to use—it has nothing to do with, believe it or not, whatever it is that the student organization wants to do.

Civil Rights

Bullying as a Civil Rights Violation: The U.S. Department of Education's Approach to Harassment

*By Kenneth L. Marcus**

The Obama Administration recently mounted a high-profile campaign against bullying in public schools, staging a White House conference on bullying prevention, featuring the President and first lady; creating a White House anti-bullying website, stopbullying.gov; and issuing new regulatory guidance ostensibly to combat this problem.[1] The administrative core of the campaign has been a new federal bullying policy issued by the U.S. Department of Education's Office for Civil Rights (OCR) on October 26, 2010.[2] This policy, conveyed in a ten-page "Dear Colleague" guidance letter signed by Assistant Secretary of Education for Civil Rights Russlynn Ali, has been controversial: supporters have welcomed new protections for minority victims of this social problem, while critics have argued that the Obama Administration has effectively created a new right unauthorized by Congress. As a substantive matter, two things must be said about OCR's new bullying policy. First, it is neither new nor a bullying policy. Rather, it is a repackaging of longstanding OCR interpretations of harassment law. In this sense, as this article will show, it is not what supporters and critics alike have assumed it to be. Nevertheless, it is an important document, because there is considerable policy significance in the Obama Administration's determination as to which of OCR's prior decisions merit this form of codification, although its greatest substantive contribution may lie in an area that has received scant attention. Second, it is neither a straightforward application of federal anti-discrimination statutes, nor a faithful application of judicial case law. Instead, it provides OCR's distinctive and controversial interpretation of its civil rights statutes, deviating in significant ways from the courts' precedents.[3]

I. An Harassment Policy in Disguise

Given the amount of news coverage and political buzz that have surrounded the topic of bullying, it is not surprising that the Obama Administration would want to take a stand on it—or at least to be perceived as having done so. On its face, the OCR anti-bullying policy appears to be about the bullying. This may explain why supporters hailed the policy as a necessary reminder of federal laws against bullying,[4] and why some critics decried it for inventing a federal right against bullying that does not really exist.[5] The confusion is understandable in light of the document's introductory paragraph, which begins as follows:

> In recent years, many state departments of education and local school districts have taken steps to reduce bullying in schools. The U.S. Department of Education (Department) fully supports these efforts. Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential. The movement to adopt anti-bullying policies reflects schools' appreciation of their important responsibility to maintain a safe learning environment for all students.[6]

Despite these prefatory words, the ensuing policy has nothing to do with bullying. Its topic, rather, is harassment in federally-funded educational programs and activities. "I am writing to remind you," Assistant Secretary Ali writes, "that some student misconduct that falls under a school's anti-bullying policy also may trigger responsibilities under one or more of the federal antidiscrimination laws enforced by [OCR]."[7] Having made this gesture toward the topic of bullying, Ali then does not discuss it for the remainder of her ten-page policy missive and focuses instead on harassment. The reason for this is that OCR has no jurisdiction over bullying, but it does have jurisdiction over certain forms of discrimination. While Ali is not wrong to say that her policy applies to those forms of bullying which also trigger antidiscrimination laws, the policy equally addresses non-bullying discrimination while saying nothing at all about non-discriminatory bullying. In other words, it is about harassment, not bullying.

II. An Expansive Reading

As an *harassment* policy, OCR's new guidance has been widely and correctly understood as providing an "expansive reading" of the applicable statutes.[8] While this has been a source of praise in some circles, it has also occasioned strong criticism from at least one former OCR attorney who has characterized the policy as an "egregious display of administrative overreaching that shows disregard for the federal courts and the legal limits on its own jurisdiction."[9] This section will address the broad interpretation that OCR's new policy has taken with respect to the applicable legal standard, the status of "single-incident" harassment, the notice requirement, the status of sexual orientation, and the question of anti-Semitism.

A. The Legal Standard for Establishing Harassment

The new OCR policy has been roundly criticized for announcing a standard for establishing harassment under OCR's statutes that disregards the more restrictive standard previously adopted by the U.S. Supreme Court.[10] In fairness, it should be acknowledged that this deviation is not unique to the Obama Administration's approach, since the new policy merely reiterates a standard that OCR announced as early as 1994[11]

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and which OCR reiterated during the second George W. Bush administration.[12] Nevertheless, the conflict is a real one.

The new OCR policy employs the "severe, pervasive, *or* persistent" standard." Under this standard, "[h]arassment creates a hostile environment when the conduct is sufficiently severe, pervasive, *or* persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school. . . ."[13] This deviates from the 1999 "severe, pervasive, *and* objectively offensive" standard that the Supreme Court established in *Davis v Monroe County Bd. of Educ*. [14] That case held that Title IX plaintiffs seeking money damages "must establish sexual harassment of students that is so severe, pervasive, *and* objectively offensive . . . that the victim-students are effectively denied equal access to an institution's resources and opportunities."[15]

The difference between OCR's disjunctive standard and the *Davis* Court's conjunctive standard is most apparent in cases where plaintiffs allege a single severe but (by definition) non-pervasive offense. Under OCR policy, a single incident of harassment may be sufficient to violate its regulations,[16] even though the *Davis* Court expressly admonished that "we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment."[17]

The continuing difference between OCR's regulations and Supreme Court standards renders OCR's guidance vulnerable to challenge. OCR's response to this criticism has been to distinguish *Davis* on the ground that the Court was addressing only money damages actions, while different considerations apply in OCR's administrative proceedings.[18] For example, an OCR spokesperson recently argued that judicial money-damages standards are favorable to schools because "[c]ourts don't want to make schools pay punitive damages or lawyers' fees."[19] On the other hand, this spokesperson reportedly argued,[20] "OCR standards are different" because of the Department's "contractual relationship with schools," which creates "an obligation to see to it that people receive equal benefits and have equal access."[21] In fairness to OCR, it is at least arguable that federal funding institutions' obligations to ensure that their funds are not used in a manner that violates constitutional requirements may sometimes entail standards that are more stringent than those that courts craft for damages cases. In this instance, however, OCR would face a steep challenge in defending its policy in federal court, given that the Supreme Court rejected the single-incident approach based not upon such issues as punitive damages or lawyers' fees but upon its assessment of congressional intent in drafting the relevant language.

B. Gender Identity and Sexual Orientation

Equally controversial has been OCR's apparent movement towards recognizing gay, lesbian, bisexual, and transgender students as a protected minority group. Both supporters and critics have received the new policy as a tool to provide enhanced protections for gay students against bullying and harassment. In fact, the new policy has little to say about sexual orientation that is either substantive or new. The policy does continue OCR's longstanding recognition of gender identity discrimination, which relates closely to sexual orientation. This aspect of OCR's harassment policy is neither new nor entirely out of line with judicial doctrine (although its consistency with the statutory text is another question altogether).

The new OCR policy uses precise if somewhat vacuous terms to recognize that federal law does not bar sexual orientation discrimination in schools and colleges, while conveying the sense that the Education Department is sensitive to the concerns of gay students: "Although Title IX does not prohibit discrimination based solely on sexual orientation, Title IX does protect all students, including lesbian, gay, bisexual, and transgender (LGBT) students, from sex discrimination."[22] It is important in reading this key language to appreciate that it means almost nothing; specifically, it does not mean that any substantive rights are afforded to LGBT students on the basis of their sexual orientation. Instead, it means only that a lesbian student who faces sexist treatment will get the same protections as any other girl. This proposition is entirely uncontroversial. Moreover, it is entirely recycled from Clinton Administration guidance, which said substantially the same thing.[23]

The policy continues with another provision that seems to have excited some degree of popular interest, although it is in fact similarly empty: "When students are subjected to harassment on the basis of their LGBT status, they may also . . . be subjected to forms of sex discrimination prohibited under Title IX."[24] This means nothing more than that gay students who face anti-gay discrimination may face other forms of discrimination as well. The guidance continues, using language that similarly means less than it seems to say: "The fact that the harassment includes anti-LGBT comments or is partly based on the target's actual or perceived sexual orientation does not relieve a school of its obligation under Title IX to investigate and remedy overlapping sexual harassment or gender-based harassment."[25] In other words, if a lesbian is harassed for being both gay and female, OCR will investigate the sexism charges and ignore the sexual orientation issue. This too is recycled from the Clinton Administration and means nothing more now than it meant a decade ago.[26]

The closest that the new OCR policy comes to protecting GLBT students—for better or worse—is in its discussion of gender identity. Since *Price Waterhouse*, the courts have interpreted sex discrimination to include various forms of sex-stereotyping.[27] The new OCR policy recognizes this legal development, which is hardly new, and describes it in terms that are hardly radical:

> Title IX . . . prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping. Thus, it can be sex discrimination if students are harassed either for exhibiting what is perceived as a stereotypical characteristic for their sex, or for failing to conform to stereotypical notions of masculinity and femininity.[28]

Here again, the new OCR policy merely recycles the Clinton Administration policy.[29] The policy itself does not exceed the scope provided by *Price Waterhouse*, but it certainly pushes the

envelope on statutory interpretation. Moreover, it is easy to imagine cases in which an aggressive agency could push the boundaries between gender identity and sexual orientation—boundaries that are quite porous to begin with—in which case attentive oversight will be necessary to ensure that *ultra vires* measures are not taken.

C. Discrimination Against Ethno-Religious Groups

The one area in which the new OCR policy has truly changed course can be found, ironically, in a section which has received relatively little attention, namely, its treatment of anti-Semitism and related forms of ethno-religious harassment.[30] This has been difficult policy terrain for OCR, because Title VI prohibits discrimination on the basis of race or national origin, but no statute within OCR's jurisdiction bars discrimination on the basis of religion.[31] This created a policy dilemma for OCR. On the one hand, anti-Semitism is universally understood to encompass racial and ethnic as well as religious components; on the other, federal bureaucrats have been reluctant to be perceived as treating Jews as members of a separate race or nation, given the genocidal as well as pseudo-scientific connotations which these terms have historically had.[32]

The new OCR policy—which reverses a position taken earlier in the Obama Administration—firmly establishes that OCR will prosecute anti-Semitism cases that are based on "actual or perceived shared ancestry or ethnic characteristics,"[33] siding with the position taken by the first George W. Bush Administration and against the position taken by the second.[34]

Until 2004, OCR typically erred on the side of declining jurisdiction in cases alleging anti-Semitism on the grounds that Jewishness is exclusively a religion. This changed during the first George W. Bush Administration when this author issued a new policy establishing that OCR's jurisdiction over anti-Jewish ethnic discrimination is not diminished by the fact that Judaism is also a religion.[35] OCR's leadership during the second George W. Bush Administration and at the outset of the Obama Administration were differently inclined, and they tended to disregard the 2004 policy.[36] The new OCR policy is correctly characterized as a "clarification," in the sense that it merely continues and expands upon the 2004 policy, but it is substantively important because that policy had been largely disregarded for over five years.

In contrast to other sections of the new OCR policy, the agency's treatment of anti-Semitic harassment relies upon a relatively conservative reading of the applicable statute. The Supreme Court had previously held, in the case of *Shaare Tefila Congregation v. Cobb*, that Jews should be considered members of a distinct "race" for purposes of interpreting the Civil Rights Act of 1866.[37] The *Shaare Tefila* Court had applied an originalist theory for resolving this question, using legislative history and contemporaneous documents to determine that in 1866 Jews were considered to be members of a racially separate group. In a companion case to *Shaare Tefila*, the Court observed in dicta that "discrimination on the basis of ancestry" against such groups should also be considered, for the same reason, to be members of a distinct race for purposes of interpreting the Equal Protection Act.[38]

Intuitively, one might think the same methodology would generate the opposite result with respect to Title VI, since by 1964 Jews were no longer widely considered to be racially distinct. That intuitive position would however misunderstand the intent of Congress in passing the 1964 Civil Rights Act.[39] It is now long-established that congressional sponsors intended not to create new rights for racial minorities but rather to create new enforcement mechanisms to protect the rights that were established by the post-Civil War amendments.[40] As Senator Hubert Humphrey explained during floor debate, "the bill bestows no new rights" but instead only seeks "to protect the rights already guaranteed in the Constitution of the United States, but which have been abridged in certain areas of the country."[41] For this reason, the scope of protection afforded under Title VI must be co-extensive with that of the Equal Protection Clause.[42] In affirming that Title VI can be used to prosecute anti-Semitic harassment, OCR merely applies *Shaare Tefila* in a manner that is compelled by the language of the 1964 Act.

Although OCR's new policy is correct in its treatment of anti-Semitism, the viability of this policy in practice will turn on three questions.[43] First, to what extent will OCR apply this policy in cases involving the so-called new anti-Semitism? In recent years, anti-Semitism on American college campuses has frequently related in some fashion to animus against the State of Israel.[44] OCR must draw a clear line between constitutionally-protected criticism of Israel and anti-Semitic harassment. Second, how will OCR investigators distinguish between unlawful ethnic or ancestral anti-Semitism and those forms of religious anti-Semitism which are outside the scope of OCR's new policy? This will be a difficult challenge in practice. Some commentators (including this author) have argued, in part for this reason, that Congress should ban religious discrimination in education, or at least religious harassment, in the same way that it bans harassment of racial and ethnic minorities.[45] Finally, how faithfully will OCR investigators adhere to constitutional limitations on harassment investigations? This difficult question arises whenever federal agencies confront putative hostile environments, but it is a particular challenge for the new OCR policy, as the next section will address.

III. The First Amendment

In some respects, the new OCR policy may be as important, as controversial, and as problematic for what it omits as for what it includes. In particular, OCR has been criticized for excluding any discussion of First Amendment limitations upon its harassment policy. Wendy Kaminer, for example, has lambasted the Administration's "failure to advise schools on their obligations to respect First Amendment freedoms."[46] This omission is conspicuous, since OCR has usually been careful in recent years to state explicitly the manner in which free speech concerns circumscribe its antidiscrimination policies, especially in the area of hostile environment law.[47]

OCR's decision not to recognize First Amendment limitations is particularly conspicuous in its new policy document, given the aggressive position that it is taking on the legal standards for establishing harassment. To the extent that OCR will find harassment in single-incident cases of offensive

speech that are merely "severe, pervasive, *or* persistent," First Amendment concerns will inevitably arise. Indeed, some critics have argued that this definition is so broad that it will inevitably reach speech protected by the First Amendment.[48] The American Bar Association has taken a middle position, endorsing the new policy but admonishing that it "should not be used to compromise the protected First Amendment free speech rights of students."[49] OCR would be wise to heed the ABA's counsel, advising schools that the new policy should not be construed in ways that will limit speech protected under the First Amendment.

Endnotes

1 *See* Nia-Malika Henderson, *Obama Speaks out Against Bullying, Says, 'I Wasn't Immune,'* Wash. Post, Mar. 11, 2011, http://www.washingtonpost.com/blogs/44/post/obama-speaks-out-against-bullying-says-i-wasnt-immune/2011/03/10/ABTfMDQ_blog.html.

2 Russylnn Ali, Assistant Secretary of Education for Civil Rights, Dear Colleague Letter (Oct. 26, 2010), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

3 OCR's applicable civil rights statutes include Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq*. (sex); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (race, color or national origin); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability); and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131 *et seq*. (disability).

4 *See* Dana Rudolph, *White House Hosts Anti-Bullying Forum*, Windy City Times, *available at* http://www.windycitymediagroup.com/gay/lesbian/news/ARTICLE.php?AID=30913 (syndicated column).

5 *See* Hans Bader, *Washington Invents an Anti-Bullying Law*, Minding the Campus (Mar. 21, 2011) [hereinafter Bader, *Anti-Bullying Law*], *available at* http://www.mindingthecampus.com/originals/2011/03/_by_hans_bader_theres.html.

6 *Id.* at 1.

7 *Id.*

8 *See, e.g.*, Letter from Francisco M. Negrón, Jr., General Counsel, NSBA, to Charlie Rose, General Counsel, U.S. Department of Education (Dec. 7, 2010), http://www.nsba.org/SchoolLaw/COSA/Updates/NSBA-letter-to-Ed-12-07-10.pdf (commenting on "expansive" interpretation); Wendy Kaminer, *Obama Administration: Soft on Bullying, Hard on Speech*, Atlantic, Mar. 23, 2011, *available at* http://www.theatlantic.com/politics/archive/2011/03/obama-administration-soft-on-bullying-hard-on-speech/72926/ (same).

9 Bader, *Anti-Bullying Law*, *supra* note 5. Although this article addresses several of the most important and representative policy issues raised by the new guidance, it is not comprehensive in its scope. In addition to the issues addressed here, questions may arise, for example, about the notice requirement which the new OCR policy imposes on schools and colleges.

10 For representative criticisms, see, e.g., Negrón, *supra* note 8, at 2-3 (criticizing new policy's deviation from Davis); Kaminer, *supra* note 8 (same); Hans Bader, *Obama Administration Undermines Free Speech and Due Process in Crusade Against Harassment and Bullying*, OpenMarket.org, http://www.openmarket.org/2011/03/22/obama-administration-undermines-free-speech-and-due-process-in-crusade-against-harassment-and-bullying/, [hereinafter Bader, *Harassment and Bullying*] (same).

11 *See* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 10, 1994) (announcing substantially same standard); Office for Civil Rights, Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties 6 (2001), *available at* http://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf [hereinafter "Sexual Harassment Guidance"] (same).

12 The Clinton-era policy was archived during the first George W. Bush Administration but restored during the second. *See* Stephanie Monroe, Dear Colleague Letter (Jan. 25, 2006), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html (reissuing Clinton-era Sexual Harassment Guidance with substantially same standard).

13 Ali, *supra* note 2, at 2 (emphasis added).

14 Davis v. Monroe County Bd. Of Educ., 526 U.S. 629, 653-54 (1999) (emphasis added).

15 *Id.*

16 Ali, *supra* note 2, at 2; Sexual Harassment Guidance, *supra* note 11.

17 *Davis*, 526 U.S. at 652-53.

18 *See, e.g.*, *Education Department Attorney Addresses NSBA's Objections to Bullying Letter*, SBN Conference Daily (Apr. 2011), *available at* http://schoolboardnews.nsba.org/2011/04/education-department-attorney-addresses-nsba%E2%80%99s-objections-to-bullying-letter/ (reporting on the justification that OCR Regional Counsel Paul Grossman, speaking on behalf of Assistant Secretary Ali, provided for this discrepancy).

19 *Id.*

20 For a similar argument, based on a constitutional decision rules analysis, see Kenneth L. Marcus, *Anti-Zionism as Racism: Campus Anti-Semitism and the Civil Rights Act of 1964*, 15 Wm. & Mary Bill Rts. J. 886 n.292 (2007).

21 *Id.*

22 Ali, *supra* note 2, at 8.

23 *Cf.* Sexual Harassment Guidance, *supra* note 11, at 8 ("Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.").

24 *Id.*

25 *Id.*

26 *Id.* at 3 ("Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's program constitutes sexual harassment prohibited by Title IX under the circumstances described in this guidance.") (citations omitted).

27 Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion).

28 Ali, *supra* note 2, at 7-8.

29 Sexual Harassment Guidance, *supra* note 11, at 3 ("[G]ender-based harassment . . . based on sex or sex-stereotyping, but not involving conduct of a sexual nature, is also a form of sex discrimination to which a school must respond. . . .") (citation omitted).

30 Ali, *supra* note 2, at 5-6.

31 *See* Kenneth L. Marcus, *The Most Important Right We Think We Have but Don't: Freedom from Religious Discrimination in Education*, 7 Nev. L. J. 171 (2006).

32 *See* Kenneth L. Marcus, Jewish Identity and Civil Rights in America 9-10, 23-24, 98-103 (2010).

33 Ali, *supra* note 2, at 5.

34 This abbreviated history of OCR's treatment of anti-Semitism claims is drawn from *id.* at 26-35, 81-97, 202 and Kenneth L. Marcus, 2 *The New OCR Antisemitism Policy*, Journal for the Study of Antisemitism 479 (2011), http://www.jsantisemitism.org/pdf/jsa_2-2.pdf.

35 Kenneth L. Marcus, Deputy Assistant Secretary for Civil Rights Enforcement, Delegated the Authority of Assistant Secretary of Education for Civil Rights, Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004) , http://www2.ed.gov/about/offices/list/ocr/

religious-rights2004.html.

36 Marcus, Jewish Identity, *supra* note 32, at 81-97 [hereinafter 2004 policy].

37 481 U.S. 615 (1987).

38 St. Francis College v. Al-Khazraji, 481 U.S. 604, 613, n.5 (1987).

39 *See generally* Marcus, Jewish Identity, *supra* note 32, at 105-108.

40 *See, e.g.*, Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003); Alexander v. Sandoval, 532 U.S. 275, 280-81 (2001); United States v. Fordice, 505 U.S. 717, 732 n.7 (1992); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 286 (1978) (Powell, J.); *id.* at 327 (Brennan, White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part); Marcus, *Anti-Zionism*, *supra* note 20, at 866-67, 72-74.

41 110 Cong. Rec. at 5252. This sentiment, which the courts have treated as representative, is echoed throughout the legislative history of Title VI. *See* Marcus, *Anti-Zionism*, *supra* note 20, at 866-67 and sources cited therein.

42 *See generally* Marcus, Jewish Identity, supra note 32.

43 These three issues are discussed at greater length in Marcus, OCR Anti-Semitism Policy, *supra* note 34.

44 *See generally* Gary A. Tobin, Aryeh K. Weinberg & Jenna Ferer, The Uncivil University: Intolerance on College Campuses (2d ed. 2009).

45 *See, e.g.*, Kenneth L. Marcus, *Privileging and Protecting Schoolhouse Religion*, 37 J.L. & Educ. 505 (2008).

46 Kaminer, *supra* note 8.

47 *See, e.g.*, Gerald A. Reynolds, First Amendment Dear Colleague Letter (July 28, 2003), *available at* http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

48 Bader, *Harassment and Bullying*, *supra* note 5.

49 Am. Bar Ass'n Resolution 107A, adopted by the House of Delegates, Feb. 14, 2011, *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/house_of_delegates/107a_2011_my.authcheckdam.pdf.

Fisher v. University of Texas at Austin: Could the Supreme Court Revisit Its Decision in *Grutter*?

*By Joshua Thompson**

In *Grutter v. Bollinger*, the Supreme Court held that achieving the educational benefits that flow from diversity could be a compelling interest in higher education.[1] Yet Justice O'Connor, writing for a bare majority of the Supreme Court, also wrote that the Court did not expect the use of racial preferences in higher education to be necessary to promote diversity within twenty-five years.[2] A recent case out of the Fifth Circuit, *Fisher v. University of Texas at Austin*, has brought the *Grutter* decision back into the national consciousness.[3] If concurring Judge Garza's opinion from the Fifth Circuit is heard, the constitutional sanction of racial preferences in higher education will have a shorter lifespan than the twenty-five years announced by Justice O'Connor. Though the plaintiffs in *Fisher* were recently denied en banc review by the Fifth Circuit,[4] a petition for certiorari to the Supreme Court is likely forthcoming. If the writ is granted, Judge Garza has all but assured that the Court's holding in *Grutter* will be revisited.

Proponents and opponents of racial preferences in higher education have marked *Fisher* as the next battleground for this politically-charged fight. Amicus briefs flooded the Fifth Circuit from national organizations all around the country, from the NAACP (in favor of preferences) to the Center for Equal Opportunity (against preferences). Even the Obama Administration found it necessary to weigh in at the circuit stage.[5] Because *Fisher* has generated such interest within the legal community, this article brings the reader up to speed on the constitutional issues at stake as well as the factual background that has made *Fisher* so "compelling."

I. Applying Strict Scrutiny to Racial Classifications

Amidst anti-Japanese sentiment, the Supreme Court during World War II was confronted with an extreme case of governmental discrimination in *Korematsu v. United States*.[6] In *Korematsu*, the Supreme Court held that national security was a compelling government interest that allowed the United States government to exclude all persons of Japanese ancestry from military zones on the West Coast.[7] While *Korematsu* today is rightly ridiculed for justifying internment of Japanese-Americans based on hysteria and xenophobia, the case remains noteworthy as the first Supreme Court decision to apply strict scrutiny under the Equal Protection Clause to racial classifications.

Although *Korematsu* laid the foundation for strict scrutiny analysis of racial classifications, the Supreme Court did not apply it to all race-implicated equal protection cases immediately.[8] By the 1960s, however, the Supreme Court began routinely striking down racially-discriminatory statutes under strict scrutiny analysis.[9] Around this time the Supreme Court also upheld racial classifications designed for remedial purposes. These remedial cases are the first to find a governmental interest sufficiently compelling to permit race-based classifications. In a number of school desegregation cases following *Brown v. Board of Education*, the Supreme Court consistently found racial classifications to be constitutional when employed to remedy past intentional discrimination.[10]

By the 1970s, overt discriminatory race-based policies became less common, and soon the Supreme Court's attention turned to affirmative action, or race-preference policies. In *DeFunis v. Odegaard*, the Supreme Court was presented with a challenge to the University of Washington School of Law's race-based affirmative action policy.[11] Although ultimately decided on mootness grounds, *DeFunis* is interesting in that the University of Washington never argued that its program could withstand strict scrutiny under the rationale of "diversity." Indeed, "the term 'diversity' does not appear at all in the record of the case."[12]

Not until *Regents of the University of California v. Bakke* did the Supreme Court determine whether the government had a compelling interest in racial classifications outside of remedying past discrimination.[13] Before *Bakke*, only state policies designed to remedy the effects of past discrimination were held to be sufficiently compelling to deny an individual's right to equal protection. Indeed, many governmental entities that began race preference programs could not justify those programs under a theory that they were remedying the effects of past intentional discrimination, and, therefore, many of these programs were struck down.

II. On *Bakke* and Diversity

At issue in *Bakke* was a race-preference program at the University of California at Davis School of Medicine that guaranteed admission to students from certain minority groups.[14] Allan Bakke was a white male (a disfavored race under the policy) who was twice denied admission to the medical school.[15] Because the medical school was only opened in 1968, the preferential program could not be justified on the grounds that it was needed to remedy past discrimination.[16]

Interestingly, the university did not rely on diversity to uphold its race-conscious program. The university's petition for certiorari "frame[d] the university's racial preferences as primarily an effort to realize 'the goal of educational opportunity unimpaired by the effects of racial discrimination.'"[17] Nevertheless, it was the University's passing references to diversity that convinced Justice Powell, and only Justice Powell, that racial classification may be permitted when narrowly tailored to further the compelling interest of diversity. "Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body," wrote Justice Powell.[18]

In the years following *Bakke* but before *Grutter*, the Supreme Court heard a number of equal protection cases where those suing were not members of a preferred class. In

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that twenty-five-year span, the Supreme Court had many opportunities to introduce diversity as a compelling state interest but never did. Thus, pre-*Grutter*, remedying past discrimination was the lone constitutionally-recognizable rationale for the government's use of a racial classification.[19] Not surprisingly, race-preference programs almost universally failed strict scrutiny analysis. "Only once between its 1945 inception in *Korematsu* and its application in *Grutter* has an affirmative-action program survived both prongs of the strict scrutiny analysis."[20]

III. Diversity Can Be a Compelling Interest—*Grutter v. Bollinger*

Grutter concerned a challenge to the race-conscious admissions program of the University of Michigan Law School, a top-rated institution.[21] In 1996, Barbara Grutter, a nonminority Michigan resident with fairly good GPA and LSAT scores, unsuccessfully applied for admission to the law school and thereafter brought suit to challenge the constitutionality of the law school's race-conscious admissions plan. The *Grutter* majority opinion, authored by Justice O'Connor, begins with an analysis of *Bakke*. Justice O'Connor adopted Justice Powell's opinion for guidance in resolving *Grutter*.[22]

Having set forth the newly-adopted Powell framework, Justice O'Connor then articulated the majority's guiding principle: "not every decision influenced by race is equally objectionable."[23] She then acknowledged the law school's purported compelling interest: the educational benefits that flow from a diverse student body.[24] To achieve that end, outright racial balancing such as the kind entailed with quotas would not be allowed, but a university could use race to achieve "critical masses" of underrepresented minorities.[25] Justice O'Connor then embarked on an extended discussion of various educational benefits that she asserted flowed from a diverse student body, relying on a number of amicus briefs to show that such benefits extend beyond the classroom to the workplace, politics, and the military.[26]

Justice O'Connor next reemphasized from her *Bakke* discussion that race cannot be used as a blunt instrument, such that *Bakke*-style quotas, as well as *Gratz*-style point systems, are impermissible.[27] She also underscored that applicants must be understood as individuals and that race may only be used as one among many factors in a "holistic" review.[28] Race may be used as part of a "good faith" effort to achieve a permissible goal, and "some attention to numbers" is not the equivalent of a quota system.[29] Hence, the law school's keeping track of the race of admittees was permissible because the value given to race remained constant throughout the admissions process.[30] Justice O'Connor warned that race cannot become the defining feature of an application, and that no "bonus points" can be awarded because of race.[31] Justice O'Connor also observed that the law school's program gave serious consideration to other non-race factors when determining educational diversity.[32]

Justice O'Connor concluded her opinion with a discussion of when the law school's race-conscious admissions policy would end. She noted that all such race-based programs must have an endpoint, but that it would be unfair to require the law school to articulate a hard-and-fast deadline given the vagaries of critical mass and diversity.[33] Justice O'Connor observed that it had been about twenty-five years since Justice Powell's authorization of the use of diversity and race in university admissions, that minority test scores and admission rates had improved, and, thus, that it would be reasonable to expect that the law school's race-conscious program would become unnecessary in the next twenty-five years.[34]

IV. *Fisher v. University of Texas at Austin*

Prior to 1996, the University of Texas at Austin employed two criteria for student admission. The first, used to this day, is called the Academic Index. The Index rates a student's academic achievement according to her grade point average, SAT scores, and similar data.[35] The university's use of the second criterion—race—ended in 1996 when the Fifth Circuit ruled in *Hopwood v. Texas* that race-conscious admission policies are unconstitutional.[36] In response to *Hopwood*, the university developed a new race-neutral admission criterion termed the Personal Achievement Index, to be used in conjunction with the Academic Index.[37]

In 1997, the Texas Legislature responded to *Hopwood* by enacting the Top Ten Percent Law, which mandates that the top ten percent of students graduating from each public high school be guaranteed admission to the university.[38] (In 2010, the Texas Legislature amended the law to cap the number of guaranteed admissions to the University of Texas at Austin to seventy-five percent of the spots reserved to Texas residents).[39] Although the law is facially race-neutral, "underrepresented minorities were its announced target and their admission a large, if not primary, purpose."[40]

The admissions process changed again following the Supreme Court's decision in *Grutter*. *Grutter* effectively overruled *Hopwood* and spurred the university to reexamine its admission process. In response, the university commissioned two studies to determine whether, consistent with *Grutter*, the university had obtained a "critical mass" of minority students through the Top Ten Percent Law.[41] The university concluded that "it had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity."[42] The university accordingly adopted a new admissions policy under which race would be one factor to be considered in admissions.[43]

Texas residents Abigail Fisher and Rachel Michalewicz brought suit to challenge the university's denial of their admission to the Fall 2008 class at the University of Texas at Austin.[44] They alleged that the university's denial violated their rights against racial discrimination under the Equal Protection Clause of the Fourteenth Amendment.[45] The district court ruled in the university's favor, and the plaintiffs appealed. The Fifth Circuit panel affirmed the district court in three opinions. Judge Higginbotham wrote for all three members of the panel. Judge King concurred to note that he did not join in the lead opinion to the extent that it called into question the constitutionality of the Top Ten Percent Law.[46] Judge Garza wrote an extensive concurrence expressing the view that *Grutter* was wrongly decided.[47]

A. The Fisher *Lead Opinion*

All parties agreed that the university's admissions policy was to be reviewed under strict scrutiny and would require a showing of narrow tailoring.[48] But the parties disagreed over whether and to what extent the university's determinations regarding the lack of a critical mass and how to achieve that critical mass were entitled to judicial deference. Judge Higginbotham looked to *Grutter* for the answer. He noted that deference to the university was justified on two grounds: its admissions policy was the result of expert educational decisionmaking, and the policy emerged from an academic environment entitled to First Amendment solicitude.[49] Judge Higginbotham specifically rejected the plaintiffs' argument that deference was only merited for the university's determination that educational diversity is a compelling interest. He also concluded that *Grutter* requires that a court's "narrow-tailoring inquiry . . . [be] undertaken with a degree of deference to the University's constitutionally protected, presumably expert academic judgment."[50]

Judge Higginbotham began his analysis of the racial balancing issue by noting that the university, in designing its new policy, clearly wanted to avoid a quota system.[51] He emphasized that, whereas a quota presupposes some fixed goal, a *Grutter*-style diversity goal demands just a good-faith effort to reach a range established by the goal.[52] Moreover, the university's admission policies do not produce a result that is demographically consistent with Texas's general racial make-up, which, per Judge Higginbotham, supported the conclusion that the university's admission policy is not a quota system.[53]

The plaintiffs contended that the Top Ten Percent Law was an adequate and racially neutral way for the university to achieve its diversity goals. Consequently, the plaintiffs argued that the university's race-based admissions policy was necessarily *not* narrowly tailored. Judge Higginbotham rejected the argument, reasoning that the law and other "percentage plans" are not a constitutionally-required alternative to race-based plans.[54] He relied on *Grutter*'s conclusion that such percentage plans do not afford the individualized flexibility that universities need to achieve a diversity that begins, but does not end, with race.[55] And he reemphasized that "the Top Ten Percent Law alone does not perform well in pursuit of the diversity *Grutter* endorsed and is in many ways at war with it."[56]

Judge Higginbotham noted two additional policy-based criticisms of the law. First, following Justice Ginsburg's dissent in *Gratz*, he observed that percentage plans give parents an incentive to keep their children in underperforming schools, and students a reason to take easy classes to protect their GPAs.[57] Second, Judge Higginbotham noted that the law creates very intense competition for the ten percent of slots left after the law's operation, such that on average those students admitted by virtue of their Academic and Personal Achievement Indices have higher average SAT scores than those admitted under the law. That result purportedly hurts "minority students (who nationally have lower standardized test scores) in the second decile of their classes at competitive high schools."[58] Thus, Judge Higginbotham concluded that the Top Ten Percent Law was "a blunt tool for securing the educational benefits that diversity is intended to achieve," and hence the university was not constitutionally mandated to use it instead of a race-conscious program to achieve such *Grutter*-style diversity.[59]

Lastly, the plaintiffs argued that because the Top Ten Percent Law already substantially increased the number of minorities at the university, it placed the university's race-conscious program beyond *Grutter*'s protective ambit. Judge Higginbotham agreed to a point, conceding that the law's "substantial effect on aggregate minority enrollment at the University . . . places at risk [the University's] race-conscious admissions policies."[60] Nevertheless, Judge Higginbotham rejected the plaintiffs' proposed percentage-based levels of minority participation that would establish a critical mass, reasoning that they were grounded in the incorrect notion of critical mass as being just that number of students necessary to achieve representation in class discussions and to avoid feelings of isolation.[61] He also rejected the plaintiffs' contention that the law achieves critical mass because minority enrollment now exceeds minority enrollment before *Hopwood*, when the university last used race-conscious admission policies.[62] Judge Higginbotham found that argument unconvincing, both because it assumed without proof that pre-*Hopwood* minority numbers were at critical mass levels, and because pre-*Hopwood* numbers would not reflect demographic changes in Texas since that time.[63] Judge Higginbotham again underscored that, because *Grutter*-style diversity is not simply a function of racial diversity, *Grutter*-style diversity cannot be achieved by "any fixed numerical guideposts."[64]

B. Judge Garza's Special Concurrence

Judge Garza also authored a special concurrence, agreeing fully with the lead opinion to the extent that it faithfully applied *Grutter* to the university's admission policy, but also arguing that *Grutter* was wrongly decided and that the Supreme Court should revisit the use of race in university admissions.[65] Judge Garza advanced several criticisms of *Grutter*. First, he chastised the Court for replacing the traditional "least restrictive means" interpretation of narrow tailoring with "a regime that encourages opacity and is incapable of meaningful judicial review [because] [c]ourts now simply assume . . . that university administrators have acted in good faith in pursuing racial diversity."[66] Relatedly, Judge Garza criticized *Grutter* for relieving universities of the "require[ment] to use the *most effective* race-neutral means," such that, assuming good faith, universities "are free to pursue less effective alternatives that serve the [diversity] interest about as well."[67]

Judge Garza also took aim at *Grutter*'s conclusion that incorporating race into a holistic analysis cured any concerns about the use of quotas.

> If two applicants, one a preferred minority and one nonminority, with application packets *identical* in all respects save race would be assigned the same score under a holistic scoring system, but one gets a higher score when race is factored in, how is that different from the mechanical group-based boost prohibited in *Gratz*? Although one system quantifies the preference and the other does not, the result is the same: a determinative benefit based on race.[68]

In Judge Garza's view, the use of catch phrases like "individualized consideration" and "holistic review" simply obscure the unchanging fact that race is used in essentially the same way as it is in blunter quota systems.[69] Even worse, *Grutter*'s prohibition against the quantification of race or ethnicity prevents courts from providing any meaningful review, because courts cannot determine whether race or ethnicity functions as just a plus factor or instead as a but-for cause of admission.[70]

Judge Garza also took issue with *Grutter*'s malleable concept of diversity, which would allow universities to continue to claim a need for race in admissions even if aggregate minority enrollment could be increased substantially through race-neutral means, so long as "these minority students were still disproportionately bunched in a small number of classes or majors."[71] Indeed, such a standardless understanding of critical mass would allow educators to use race until "the elusive critical mass had finally been attained . . . major-by-major and classroom-by-classroom."[72]

Judge Garza also criticized *Grutter*'s conclusion that educational diversity, in which race plays some ill-defined role, constitutes a compelling state interest. He noted that there is no sound way to measure any of the purported benefits flowing from educational diversity. "*Grutter* permits race-based preferences on nothing more than intuition—the type that strict scrutiny is designed to protect against."[73] Moreover, *Grutter* erroneously assumes that increasing racial diversity will increase viewpoint diversity.[74] But that assumption runs right up against the ultimate remedial purpose of the Equal Protection Clause: to prevent government from treating people according to race on account of outmoded or unsubstantiated stereotypes about what members of certain races think or believe.

Grutter sought to have it both ways. The Court held that racial diversity was necessary to eradicate the notion that minority students think and behave, not as individuals, but as a race. At the same time, the Court approved a policy granting race-based preferences on the assumption that racial status correlates with greater diversity of viewpoints.[75]

Judge Garza lambasted *Grutter* for its shift from "emphasis on diversity in educational *inputs* with a new emphasis on educational *outputs*"; in other words, from focusing just on the supposed value of diversity in the classroom to the supposed value of diversity in the workplace and in civic life, as well.[76]

Judge Garza concluded his critique of *Grutter* with a review of the decision's effectiveness criterion. Just how successful must a race-based program be at increasing diversity to be constitutionally justified? In Judge Garza's view, the standard should be whether the race-based program "meaningfully furthers its intended goal of increasing racial diversity on the road to critical mass."[77] After an exhaustive review of the data in the record, Judge Garza concluded that "the University of Texas's use of race has had an infinitesimal impact on critical mass in the student body as a whole" and thus "the University's use of race can be neither compelling nor narrowly tailored."[78] That conclusion follows because, if the impact on racial balance is minimal, then necessarily the University's race-based admissions program will have "no discernable educational impact."[79] Judge Garza ended his concurrence with reaffirmation of the principle that "the Constitution prohibits all forms of government-sponsored racial discrimination," such that the university's race-based program could never be justified if "the Court[s were to] return to constitutional first principles."[80]

C. The En Banc Denial

Shortly after the Fifth Circuit issued its decision in *Fisher*, the plaintiffs petitioned for rehearing en banc. On June 15, 2011, by a vote of nine to seven, the Fifth Circuit denied rehearing en banc.[81] Consistent with his view that the panel decision strictly followed *Grutter*, and despite his misgivings about the reasoning of that precedent, Judge Garza joined the majority denying rehearing en banc. However, Chief Judge of the Fifth Circuit, Edith H. Jones, authored a dissent to the rehearing denial, in which she, joined by four judges, argued that the panel decision misapplied *Grutter*.[82]

Chief Judge Jones offered three reasons the panel decision was not a strict application of *Grutter*. First, she argued that the panel decision watered down *Grutter*'s strict narrow tailoring requirement by adopting a new "'serious good faith consideration' standard of review."[83] This new standard of review "distorts narrow tailoring into a rote exercise in judicial deference."[84] The dissent goes so far as to describe the panel's application of strict scrutiny as "wholesale deference" and "judicial abdication."[85]

The Chief Judge also favored en banc rehearing because, as Judge Garza had noted in his special concurrence, the race-conscious admissions policy has had a minimal impact on the increase in diversity at the university.[86] On this point, the university's admissions plan differed significantly from *Grutter*. In *Grutter*, the race-conscious admissions policy tripled the number of minorities that would otherwise have been accepted.[87] Conversely, in Texas, under the Top Ten Percent Law, minorities were already being enrolled, in large numbers, in a race-neutral manner. Thus, the university's race-conscious preference program did not have the necessary impact to be constitutional.[88]

Lastly, Chief Judge Jones objected to the panel's countenance of the university seeking diversity on a classroom-by-classroom level. She rhetorically asks, "[w]ill classroom diversity 'suffer' in areas like applied math, kinesiology, chemistry, Farsi, or hundreds of other subjects if, by chance, few or no students of a certain race are enrolled?"[89] The Chief Judge argued that classroom-by-classroom diversity goals would mark a leap from *Grutter*'s narrow holding, and would open the door to racial quotas in each classroom without containing any logical end point on the use of race in admissions.[90]

V. Conclusion

Even before Judge Garza took aim at the *Grutter* decision, or Chief Judge Jones dissented from the panel's application of *Grutter*, the legal community had marked *Fisher* as the next big case dealing with race in higher education admissions. With Judge Garza's opinion, it is all but assured that when the *Fisher* plaintiffs petition for a writ of certiorari, the Supreme Court will be presented with an opportunity to end the diversity rationale altogether. Or, if the high court takes up the case, it may adopt Chief Judge Jones's view that *Grutter* cannot be extended in the manner urged by the University of Texas. At a

minimum, *Fisher* presents the Supreme Court the opportunity to explain *Grutter* (and *Gratz*), and provide clarity to this highly contentious area of law.

Endnotes

1 Grutter v. Bollinger, 539 U.S. 306 (2003).

2 *Id.* at 343.

3 Fisher v. University of Texas at Austin, 631 F.3d 213 (5th Cir. 2011).

4 Fisher v. Univ. of Texas at Austin, 644 F.3d 301 (5th Cir. 2011).

5 Brief for the United States as Amicus Curiae Supporting Appellees, Fisher v. University of Texas at Austin, 631 F.3d 213 (5th Cir. 2011) (No. 09-50822).

6 323 U.S. 214 (1944).

7 *Id.* at 223.

8 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) (holding that segregated schools violate the Equal Protection Clause because of the social and psychological harms caused by segregation in education); Rachel C. Grunberger, Note, Johnson v. California*: Setting a Constitutional Trap for Prison Officials*, 65 Md. L. Rev. 271, 276 (2006) (discussing *Korematsu* and the application of strict scrutiny to racial classifications).

9 *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (striking down law banning interracial marriage); Grunberger, *supra* note 7, at 276-77 (discussing the 1960s Court's strict scrutiny standard for racial classifications).

10 *See* Brown v. Bd. of Educ., 349 U.S. 294 (1955) (*Brown II*); Green v. County Sch. Bd., 391 U.S. 430 (1968); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

11 416 U.S. 312 (1974).

12 Peter Wood, Diversity 111 (2003).

13 438 U.S. 265 (1978).

14 *Bakke*, 438 U.S. at 369 (plurality opinion).

15 *Id.* at 276.

16 *Id.* at 372 (Brennan, J., opinion). The Brennan opinion argued that race could be taken into account to remedy the effects of past discrimination generally. Indeed, Justice Brennan noted that the "underrepresentation of minorities [in medical schools nationwide] was substantial and chronic." However, on this point, Justice Brennan could not command a majority of the Court.

17 Wood, *supra* note 11, at 104.

18 *Bakke*, 438 U.S. at 314 (Powell, J., opinion).

19 In *Korematsu*, the Supreme Court found national security to be a compelling government interest. However, the *Adarand* Court's statements on *Korematsu* bring into strong question whether that reasoning could command a majority of the Court today.

20 Libby Huskey, Case Notes, *Constitutional Law—Affirmative Action in Higher Education—Strict in Theory, Intermediate in Fact? Grutter v. Bollinger*, 123 S. Ct. 2325 (2003), 4 Wyo. L. Rev. 439 (2004); *see also* United States v. Paradise, 480 U.S. 149, 165-66 (1987) (upholding race-conscious remedy designed to "remedy the present effect of past discrimination); Robert J. Donahue, Note, *Racial Diversity as a Compelling Governmental Interest*, 30 Ind. L. Rev. 523, 540-41 (1997) (discussing cases upholding race conscious policies under the compelling interest of remedying the effects of past discrimination).

21 *Id*. at 311-13. The Supreme Court considered this case in conjunction with a parallel challenge to the university's race-conscious admissions program for its undergraduate schools in *Gratz v. Bollinger*, 539 U.S. 244 (2003).

22 *Grutter*, 539 U.S. at 325. Justice O'Connor observed that the lower courts have long been confused as to which *Bakke* opinion controls. She avoided that issue by simply declaring that the holding of *Bakke* is that race and ethnicity can play some role in the admissions process. The split-decision debate in *Bakke* has revolved around how to apply the test articulated in *Marks v. United States*. *Cf.* Damien M. Schiff, *When* Marks *Misses the Mark: A Proposed Filler for the "Logical Subset" Vacuum*, Engage, Vol. 9, Issue 1, at 119-24 (Feb. 2008) (discussing application of the *Marks* test to *Rapanos v. United States*, a split decision concerning the scope of the Clean Water Act, 33 U.S.C. § 1251, *et seq*.).

23 *Grutter*, 539 U.S. at 327. Justice O'Connor's statement is remarkable given that many commentators believed that, after *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (in which the Court's majority opinion was authored by Justice O'Connor), *all* racial classifications—even so-called "benign" classifications—would be subject to the most exacting of judicial scrutiny. *See, e.g.*, Russell N. Watterson, Jr., Note, Adarand Constructors v. Pena*: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation*, 1996 BYU L. Rev. 301, 301 n.3 (1996) (observing that *Adarand* requires strict scrutiny even for benign racial classifications); Stephen C. Minnich, Comment, 46 Case W. Res. 279, 286 (1995) (same); L. Darnell Weeden, *Yo, Hopwood, Saying No to Race-Based Affirmative Action Is the Right Thing to Do from an Afrocentric Perspective*, 27 Cumb. L. Rev. 533, 553 (1996/1997) (same); *cf. Adarand*, 515 U.S. at 227 ("We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Evidently, with *Grutter* the Court rejected that absolutist position for one in which the "strictness" of the scrutiny is based on contextual factors. *See* Paul Brest, *Some Comments on* Grutter v. Bollinger, 51 Drake L. Rev. 683, 690-91 (2003).

24 *Grutter*, 539 U.S. at 328. Justice Thomas in dissent observed that the real compelling interest was not those educational benefits attributable to having a diverse student body but rather obtaining those benefits in an *elite* institution, or simply achieving a diverse student body—an "aesthetic"—regardless of its benefits. *See id*. at 354-56 (Thomas, J., concurring in part and dissenting in part).

25 *Grutter*, 539 U.S. at 329-30. It is unclear how the use of race to achieve "critical mass" is different from the use of race in quota systems, at least in those quota systems where slots are provisionally set aside for minorities. *See* Brian N. Lizotte, Note, *The Diversity Rationale: Unprovable, Uncompelling*, 11 Mich. J. Race & L. 625, 650 (2006) ("Unfortunately, 'critical mass' seems impossible to define concretely without resort to any poisonous 'quota.'").

26 *Grutter*, 539 U.S. at 330-33.

27 *Id.* at 334.

28 *Id.*

29 *Id.* at 335.

30 *Id.* at 336.

31 *Id.* at 337.

32 *Id.* at 338.

33 *Id.* at 342.

34 *Id*. at 343.

35 *Fisher*, 631 F.3d at 222.

36 Hopwood v. Texas, 78 F.3d 932, 934-35 (5th Cir. 1996).

37 *Fisher*, 631 F.3d at 223.

38 *See* Tex. Educ. Code § 51.803 (1997).

39 *See id*. § 51.803(a-1) (2010).

40 *Fisher*, 631 F.3d at 224.

41 *See id.* at 224-25.

42 *Id*. at 226.

43 *Id.*

44 *Id.* at 217.

45 *Id.*

46 *See id*. at 247 (King, J., concurring specially).

47 *See id*. at 247-66 (Garza, J., concurring specially).

48 *Id*. at 231 (lead opinion).

49 *Id.*

50 *Id.* at 232.

51 *Id.* at 234-35.

52 *Id.* at 235.

53 *Id.* at 235-36.

54 *Id.* at 239.

55 *Id.*

56 *Id.* at 240.

57 *Id.* at 241.

58 *Id.*

59 *Id.* at 242.

60 *Id.* at 243.

61 *See id.* at 243.

62 *See id.* at 244.

63 *Id.* at 244. He also observed that the university enrolled fewer minorities in 2004 than in pre-*Hopwood* 1989. *See id.* at 244.

64 *Id.* at 244-45.

65 *See id.* at 247-48 (Garza, J., concurring specially).

66 *Id.* at 249.

67 *Id.* at 240-51.

68 *Id.* at 252.

69 *Id.*

70 *Id.* at 252-53.

71 *Id.* at 253.

72 *Id.* at 254.

73 *Id.* at 255-56.

74 *See id.* at 256.

75 *Id.* at 256.

76 *See id.* at 258.

77 *Id.* at 260.

78 *Id.* at 263.

79 *Id.*

80 *Id.* at 266.

81 Fisher v. Univ. of Texas at Austin, 644 F.3d 301 (5th Cir. 2011).

82 *Id.* (Jones, C.J., dissenting).

83 *Id.*, slip op. at *6.

84 *Id.* at *13.

85 *Id.* at *14.

86 *Id.* at *14-15.

87 *Id.* at *15 (citing *Parents Involved*, 551 U.S. at 734-35).

88 *Fisher*, 644 F.3d 301, slip op. at *15-16 (Jones, C.J., dissenting).

89 *Id.* at *18.

90 *Id.*

Pruning the Overgrowth of Government Contracting Preferences

*By George R. La Noue**

The policy of creating preferences for businesses owned at least fifty-one percent by members of "minority" groups is now more than three decades old. In 1977, Congressman Parren Mitchell, the head of the Congressional Black Caucus, inserted into the Public Works Employment Act an amendment guaranteeing that at least ten percent of the funding of all contracts under this program be awarded to minorities ("blacks, Hispanics, Asians, Native Americans, Eskimos and Aleuts"). In *Fullilove v. Klutznick*,[1] the Supreme Court, in a ruling without a clear standard of review, decided that the expenditure program was constitutional. After the Court's response to these federal racial preferences, copycat programs spread to a variety of federal agencies and to many state and local governments where the political climate was favorable.

In *City of Richmond v. Croson*,[2] however, the Supreme Court became suspicious of the racial politics underlying these local contracting programs and decided that the standard of review for a racial classification was strict scrutiny requiring a judicial finding that a compelling interest existed and that the use of race was narrowly tailored.

Later, in *Adarand v. Pena*,[3] the Court ruled that the same standard exists for federal as well as state and local programs. With few exceptions, however, most preferential contracting programs have survived. Not many cases opposing the preference programs were brought, and many that were begun were underfinanced or underlawyered. Due to the imbalance of resources, these lawsuits can be difficult to pursue against government entities.

Recently, the Obama Administration has used the regulatory process to increase significantly the number of beneficiaries in various preferential programs. Women-owned businesses were added to the Small Business Administration "8(a)" set-aside program. In transportation-related programs, the definition of an "economically disadvantaged" person, which is based on the net worth of owners (excluding the value of the business and principal residence), was raised from $750,000 to $1.3 million. Thus, the Obama Administration has expanded the preferences for "disadvantaged businesses" to include literally millionaire owners. Because of the Uniform Certification practice, where a firm can simultaneously become certified in various preferential programs, that new definition of economic disadvantage will be adopted by many state and local preferential programs as well.

Given the entrenched nature of preferential contracting programs, what is the prospect of any suit against them being successful? It will depend on the level to which the government extends the preferences.

Federal preferences are the most difficult to challenge, but history demonstrates that success is not impossible.

In *Rothe v. Department of Defense*,[4] the plaintiffs were able to convince a unanimous Federal Court of Appeals that the ten-percent price preference for minorities bidding on Department of Defense (DOD) contracts had no compelling interest, either because the information Congress relied on was out-of–date, or because state and local disparity studies that the Department of Justice placed in the record were not reliable since they did not control for the capacity of minority and non-minority businesses. The Department of Justice (DOJ) chose not to risk an appeal to the Supreme Court.

In *Western States Paving v. Washington State Department of Transportation*,[5] the Ninth Circuit held that, while Congress had a compelling interest to establish a national Disadvantaged Business Program (DBE), local recipients of federal transportation funds had to make a finding of discrimination in their marketplaces in administering their programs to meet the "narrowly tailored" requirement. Further, those findings had to take into account DBE and non-DBE capacity and qualifications, and there needed to be a finding of discrimination against each major group benefitting from the preferences.

Again, the federal government decided not to appeal and simply instructed recipients in other circuits that they need not follow *Western States.* That strategy has been successful, and other courts have declined to follow the ruling in that case. Within the Ninth Circuit, however, each state and many local governments have commissioned disparity studies, with mixed results. After receiving the study results, some states (Idaho, Montana, and Nevada) moved to an entirely race-neutral system and no longer set DBE goals on individual contracts, and most other states significantly reduced their race-conscious goals. Other governments have been forced to exclude particular groups from their preferential programs. For example, based on its study, the California Department of Transportation (Caltrans) no longer permits construction firms owned by Hispanics or Asian Pacific American males to be used to meet DBE goals. Logically, that should reduce the state's overall goal. Some local governments and airports in the Ninth Circuit, not wishing to bear the cost of a disparity study, have moved to race-neutral programs.

So what pending attempts to prune these preferential programs appear promising? The Pacific Legal Foundation, on behalf of the Associated General Contractors (AGC) of San Diego, has sued Caltrans to void what is left of its DBE program. Although the trial judge did not substantially engage the issues in the case and ruled against the plaintiff from the bench, the case will be appealed.

Two substantial and novel questions will be raised. The first is whether, in setting goals on a transportation contract using a mixture of state and federal funding—a commonplace practice—the DBE goals can be set on the state portion. Since California's Proposition 209 forbids the use of racial, ethnic, and gender preferences where state funds are involved, Caltrans'

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assertion that it would be bureaucratically inconvenient to separate federal and state funding streams may not suffice as a compelling interest. Some other states—Arizona, Louisiana, Michigan, Nebraska, and Washington State—have Prop 209-like provisions in their state constitutions, though most states lack such provisions Furthermore, since the federal regulations do not require that DBE goals be set on state dollars, a ruling in California on this issue might have a ripple effect in many parts of the country.

The second issue, involving the determination of which persons are eligible for preferences, would strike at the heart of many federal, state, and local preferential programs. To maintain the image that these programs are narrowly tailored, in theory not every firm owned by a minority or women is eligible for preferences. The key to participation is the ability of firms to become certified as a DBE or MWBE, which means that the owner must affirm that he or she is "economically disadvantaged" and "socially disadvantaged." The threshold for defining "economic disadvantage" varies by the federal, state, or local program involved, but the definition of "social disadvantage" is almost everywhere the same. All of these programs begin with the "presumption" that all minority persons or women are socially disadvantaged, but then the certification process requires the certification applicant's signature affirming that he or she has "been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities."

The certification form does not distinguish between identified discrimination that might have led to a business handicap or "societal discrimination," which the Supreme Court has ruled is not a basis for a preferential program. It does not require that the discrimination be relatively recent, be continuing, or have occurred in the jurisdiction involved. In short, the certification process does not create a narrowly-tailored program by screening out appropriate from inappropriate beneficiaries.

In *Western States*, the Ninth Circuit was unconvinced that these individual attestations provided appropriate evidence of discrimination because "they do not provide any evidence of discrimination within the Washington transportation contracting industry." Now, in *AGC, San Diego v. Caltrans*, the Ninth Circuit will be given a chance to review the "social disadvantage" definition in the certification process. A judicial requirement that governments verify that an applicant actually has suffered recent and relevant discrimination, just as the government now checks to see that the economic statements on the certification form are accurate, would have a dramatic impact on the future of DBE and MWBE programs.

There are other pruning approaches. In all circuits, it is clear that a state or local preferential program must be supported by a finding of discrimination in the industry involved. Most often, this requires a disparity study. While about 200 such studies have been completed, there are a number of state and local preferential programs that exist without any studies. Moreover, the study must be reasonably recent. The U.S. Commission on Civil Rights believed that five years was the reasonable limit.[6] The federal court of appeals in the *Rothe* case declined to adopt that limit but did agree that much of the evidence the government relied upon was "stale."

Moreover, there are a number of cases, including *Croson,* that stand for the proposition that programs must have justification for the preferences for each major group receiving them. For example, the recent decision by the Fourth Circuit in *Rowe v. North Carolina Department of Transportation* stripped women, Hispanics, and Asians from the state's MWBE program because of lack of evidence in the state disparity study to support their inclusion.[7] Yet because of the politics involved, many jurisdictions do not restrict their preferences to the groups and industries where their studies found a disparity. These programs are highly vulnerable.

Also, there is the question of the validity of the disparity study involved and its findings. *Croson* requires that such a study compare contracting awards that qualified, willing, and able MWBE firms garner with similar non-MWBE firms to determine whether statistically significant disparities create an inference of discrimination. Obviously, if MWBEs are smaller, younger, or in less skilled specialties, differences in contracting awards cannot be attributed solely to discrimination.

The disparity study industry is controlled by a handful of firms. Some of the largest, NERA and Mason Tillman, for example, make no examination of the relative qualifications of MWBEs and non-MWBEs and treat ability or capacity cursorily. Such studies are vulnerable, particularly if the list of "available" firms the consultants used to create their disparity ratios can be acquired. Such lists will show that firms of vastly different characteristics were considered by the consultants as equally available. As the federal circuit court noted in *Rothe*, a microbrewery and Budweiser are in the same business, but it would not be expected that they would have the same sales volume. Most important, the circuit court found that it was not enough to establish a threshold of being able to bid on one contract to determine availability because that measure fails to account for "the relative capacity of businesses to bid *on more than one contract at a time.*"[8]

Another area where additional clarification would contribute to the purpose of the law in creating a level playing field is in goal setting. Assuming for the sake of argument that a DBE or MWBE goal is based on a compelling interest, there are important narrow tailoring issues about the goal-setting process and ultimate result. Typically, a government will set an annual aspirational goal and then higher or lower goals on individual contracts. While the annual goals usually compare the number of minority- and women-owned firms to other firms, they often ignore differences in the qualifications, willingness, and ability of firms in each group and thus are not narrowly tailored. Specific contract goal-setting is even more problematic. Often the availability of non-DBEs or non-MWBEs is ignored altogether, and a goal will be set if at least three DBEs or MWBEs are believed to be available. This type of goal-setting in effect can create a subcontracting quota and thus does not form a level playing field.

Finally, while some may hope for a homerun judicial decision eliminating all preferential contracting programs, it is likely that some courts will be more receptive to a series of decisions that will make such programs actually remedy discrimination where it exists and terminate programs that are merely reflections of racial and gender politics.

Endnotes

1 448 U.S. 448 (1980).

2 488 U.S. 469 (1989).

3 515 U.S. 200 (1995).

4 545 F.3d 1023 (2008) (*Rothe VII*).

5 407 F.3d 983 (2005).

6 U.S. Comm'n on Civil Rights, Disparity Studies as Evidence of Discrimination in Federal Contracting (2006).

7 See also *Croson*, 488 U.S. at 506: *Western States*, 407 F.3d at 1002-3; Monterey Mechanical Co. v. Wilson,125 F.3d 702 (9th Cir. 1997); Builders Ass'n of Greater Chi. v. County of Cook, 256 F.3d 642 (7th Cir. 2001); Associated Gen. Contractors of Ohio v. Drabik, 214 F.3d 730 (6th Cir. 2000); O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992), in support of the principle that separate findings of discrimination must be made for each group.

8 *Rothe VII*, 545 F.3d at 1044 (emphasis in the original).

The Origins of the Privileges or Immunities Clause: John Bingham and the Second Draft of the Fourteenth Amendment

*by Kurt T. Lash**

The current debates over the incorporation of the Second Amendment have reignited interest in the historical understanding of the Privileges or Immunities Clause of the Fourteenth Amendment. The Supreme Court's history-laden analysis of the Second Amendment in *District of Columbia v. Heller*[1] signaled the Court's openness to an originalist understanding of the Bill of Rights. Not surprisingly, the Court's decision to hear *McDonald v. Chicago*[2] and consider whether to extend the right recognized in *Heller* against the states triggered an avalanche of briefs (both principle and amici) that explore the history behind the Privileges or Immunities Clause and its relationship to the original Bill of Rights.

It was something of a disappointment, therefore, when the majority in *McDonald* declined the plaintiffs' invitation to rely on the Privileges or Immunities Clause and instead followed its traditional substantive due process analysis in deciding that the Second Amendment ought to be treated as a fundamental liberty. Even if a disappointment, though, the Court's avoidance of the clause was not really a surprise.

In their briefs, the petitioners had argued that the Privileges or Immunities Clause not only incorporated the Second Amendment, but also protected all fundamental natural rights—whether enumerated in the text of the Constitution or not. This was met with a rather high degree of skepticism at oral argument. When pressed by Justice Ginsburg to define the rights protected by the clause, Alan Gura declared that "it was impossible to give a full list of unenumerated rights that might be protected by the Privileges or Immunities Clause." Mr. Gura's blithe refusal to suggest even the existence of a limiting principle prompted ridicule by other members of the Court[3] and probably guaranteed the ultimate decision would not invoke Privileges or Immunities Clause, if only to avoid opening a pandora's box of unenumerated rights.

In the extended article upon which this essay is based, *The Origins of the Privileges or Immunities Clause, Part II: John Bingham and the Second Draft of the Fourteenth Amendment*, I argue that there is a more plausible, and more limited, reading of the Privileges or Immunities Clause than that pressed by the petitioners in *McDonald*. The historical evidence strongly suggests that John Bingham, the man who drafted the Privileges or Immunities Clause, understood it as protecting only those substantive rights expressly enumerated in the Constitution, in particular the first eight amendments to the Constitution. This view justifies the Supreme Court's doctrine of incorporation (including the incorporation of the Second Amendment), but rejects any reading that opens the door to a limitless list of unenumerated natural rights.

John Bingham

There are two dominant views of the man who drafted the Privileges or Immunities Clause, Ohio Representative John Bingham. Anti-incorporationist scholars tend to disparage Bingham as an inconsistent buffoon. Charles Fairman in the 1940s is an early example of this negative portrayal, but you can still find this in fairly recent work by scholars like John Harrison. The general idea is that Bingham's seemingly inconsistent and just plain quirky remarks about the Bill of Rights and the Fourteenth Amendment disqualify him as a reliable witness regarding the original meaning of the Amendment.

The pro-incorporationist view, on the other hand, treats Bingham as a kind of latter day James Madison. Starting with William Crosskey and continuing through the work of scholars like Michael Kent Curtis and Akhil Amar, this reading of Bingham downplays his inconsistent statements, or ignores them altogether and focuses on his statements regarding the need to protect the rights listed in the first eight amendments to the Constitution.

Neither portrayal gives us an accurate picture of John Bingham and his role in the development of the Fourteenth Amendment. Pro-incorporationists are correct that Bingham never waivered in his desire to require the states to respect the Bill of Rights. They are wrong, however, to ignore or downplay Bingham's inconsistencies. It is simply a fact that Bingham made radically inconsistent statements regarding the meaning of Article IV and its relationship to his proposed fourteenth amendment. Anti-incorporationists, however, are wrong to suggest these inconsistencies reveal muddleheaded thinking. Instead, I believe the evidence suggests that the debates over John Bingham's first draft of the Fourteenth Amendment caused him to change his mind about Article IV and its relationship to the Bill of Rights. His seemingly inconsistent statements were made in regard to his *second* draft. Rather than reflecting inconsistency, these later statements actually reflect Bingham's new and far more plausible understanding of how to draft an amendment that would protect constitutionally enumerated rights against state action.

Bingham's First Draft

In early February of 1866, the Joint Committee on Reconstruction adopted John Bingham's first draft of the Fourteenth Amendment:

> The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each state all privileges and immunities of citizens in the several states (Art. 4, Sec. 2); and to all persons in the

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> several States equal protection in the rights of life, liberty, and property (5th Amendment).[4]

As noted in Journal of the Joint Committee (the notations are reproduced above), the wording of this first draft was taken from the Privileges and Immunities Clause of Article IV, Section 2—the so-called Comity Clause[5]—and the Fifth Amendment to the Constitution.

In a speech before the House of Representatives, Bingham explained that he used the language of Article IV because the Comity Clause, properly understood, bound the states to enforce the Bill of Rights, and had done so from the earliest days of the Constitution. It was only because states had failed to live up to this responsibility that Bingham proposed an amendment which would grant Congress the power to enforce the "privileges and immunities" of Article IV against state action—privileges and immunities which Bingham believed included the liberties listed in the Bill of Rights.[6]

This was an exceedingly odd argument. As students of the Constitution already know, the original Bill of Rights bound only the federal government, not the states. This was the famous holding of Chief Justice John Marshall in *Barron v. Baltimore* (1833). No one had ever before suggested that Article IV actually bound the states to protect the Bill of Rights. Bingham arrived at his conclusion about the language of Article IV and the Bill of Rights by way of a rather idiosyncratic rendering of the Comity Clause. According to Bingham, the Comity Clause should be read as if it contained an "ellipsis": "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (applying the ellipsis "of the United States") in the several States."[7] By adding the language of the "ellipsis," Bingham could argue that the "privileges and immunities" of Article IV were privileges and immunities of "citizens of the United States" (not merely the rights of "citizens in the several states") and these national rights included all those rights expressly listed in the people's national charter, the Constitution. Bingham went so far as to argue that Article IV *itself* was part of the Bill of Rights.[8] Finally, because his amendment authorized only the enforcement of rights expressly listed in the original Constitution, Bingham argued that his proposed amendment took nothing from the states that belonged to them under the original Constitution. As Bingham put it,

> The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. It "hath that extent—no more."

Unfortunately for Bingham, no one else in the Thirty-Ninth Congress shared his idiosyncratic reading of Article IV. In fact, by using the language of Article IV, he opened the door to interpretations that he very much opposed. Radical Republicans had longed called for a broad reading of the Comity Clause of Article IV as a basis for federal control of all civil rights in the states. These members of the Thirty-Ninth Congress regularly cited the antebellum circuit court case *Corfield v. Coryell* and Justice Bushrod Washington's reference in that opinion to "fundamental" privileges and immunities.[9] If one followed the Radical reading of Article IV (and *Corfield),* Bingham's draft would allow the federal government complete control over all "fundamental" civil rights in the states—an unlimited catalogue of unenumerated natural rights.

Conservative Republicans, on the other hand, had a very different view of Article IV—and thus a very different view of Bingham's first draft of the Fourteenth Amendment. The conservatives viewed Article IV as doing nothing more than providing traveling citizens equal access to a limited set of state-conferred rights. As one might expect, this group strongly objected to the radicals' broad interpretation of *Corfield* and Article IV. While they were willing to require the states to equally enforce state law, they resisted efforts to nationalize the Bill of Rights. They were willing to support Bingham's proposal only because they understood his language as doing nothing more than following the traditional understanding of Article IV and simply providing an added degree of protection against discriminatory application of state law.

Bingham, of course, disagreed with both the radical and conservative readings of his proposed amendment. He opposed the radicals' call to federalize the subject of civil rights in the states. On the other hand, he also wanted to do much more than simply enforce the equality principles of the Comity Clause. Unfortunately, by using the language of Article IV, Bingham almost guaranteed that his intentions would be misconstrued. Faced with equally unacceptable readings of his text from both friend and foe, Bingham soon realized he had made a mistake and voluntarily withdrew his amendment.

Bingham's Second Draft

A month later, the Joint Committee produced a second draft of the Fourteenth Amendment, once again drafted by John Bingham. In this second draft, Bingham replaced the language of Article IV ("privileges and immunities of citizens in the several states") with language protecting "the privileges or immunities of citizens *of the United States*." This new language (which Bingham had earlier tried to add to Article IV as an "ellipsis") echoed the language commonly found in United States treaties. From the 1803 treaty which added the Louisiana Territory to the United States, to the 1866 Treaty which gave us Alaska, these documents spoke of rights, advantages and immunities *of citizens of the United States.* Influential antebellum figures such as Daniel Webster—a hero to John Bingham--described this language as referring to federal rights expressly enumerated in the Constitution.

In his speech to the House of Representatives on May 10, 1866, Bingham explained that this new draft protected "the privileges of citizens of the United States." These rights, according to Bingham, were "provided for and guarantied in your Constitution." Bingham then mentioned the federal franchise rights of Article I, as well as the Eighth Amendment's protection against cruel and unusual punishments, as rights of United States citizens that would be protected against state action by this second draft. Bingham did not use the particular term "Bill of Rights," but his use of the Eighth Amendment as an example suggests that he understood the draft as protecting rights listed in the first eight amendments.

As he had when he introduced his initial draft, Bingham continued to insist that nothing was being taken away from the states that belonged to them under the original Constitution. Instead, it was the states who had acted "contrary to the express letter of the constitution" by violating the Eighth Amendment.

There is nothing in Bingham's speech about "ellipsis" in Article IV—indeed, there is no discussion of Article IV at all. Bingham simply insists that the language in this second draft protected rights expressly listed in the Constitution, such as those found in Article I and in the Bill of Rights.

Jacob Howard

When Jacob Howard stood up to explain the second draft to the Senate, he echoed the approach of John Bingham that viewed the amendment as protecting those rights actually listed in the text of the Constitution. Instead of citing Article I liberties and the Bill of Rights, Howard cited Article IV and the Bill of Rights as examples of the "mass of privileges and immunities" of citizens of the United States.

Because Howard cited *Corfield* and Article IV as examples of the privileges and immunities protected under the Fourteenth Amendment, libertarian scholars often cite Howard's speech as evidence that the text nationalized all fundamental rights, whether or not listed in the Constitution. This is not, however, a necessary reading of his speech and, in context it seems quite unlikely to have been either Howard's intent or how Howard was understood.

To begin with, Howard's speech mirrors Bingham's—they both cite enumerated federal rights as examples of privileges or immunities. The equal protection rights of Article IV are in fact among the enumerated rights of American citizens, just as are the rights listed in the first eight amendments. Although Radical Republicans understood Article IV as referring to fundamental natural rights, neither moderate nor conservative Republicans agreed with such a broad reading—nor, in fact, had any antebellum judicial opinion. The consensus antebellum interpretation of the Comity Clause view the provision as requiring nothing more than equal treatment when it came to a certain set of state laws, and not as a provision protecting unenumerated natural rights. In fact, Howard later expressly rejected efforts to federalize the general subject of civil rights in the states. Most of all, it is clear that neither conservatives nor moderates would ever have supported the amendment had they understood Howard as embracing the radical reading of Article IV—yet no objections were raised either during or after Howard's speech. There is good reason to think, then, that Howard's inclusion of Article IV indicated nothing more than his belief that the equal protection rights of Article IV and the *substantive rights* of the first eight amendments were all part of the "mass" of "privileges or immunities of citizens of United States."

Post-Adoption Debate

However unclear Howard's views, we do not need to guess when it comes to John Bingham. One of the most famous pieces of historical evidence regarding Bingham's view of the second draft of the Fourteenth Amendment is a speech Bingham delivered a few years later in 1871. Here, Bingham declares that the second draft protected the first eight amendments, but *did not* nationalize civil rights in the states.

Bingham's 1871 speech is discounted by anti-incorporationist scholars, of course, as post-hoc wishful thinking by a muddleheaded gasbag. But there is no evidence that this is the case. Nothing in this speech contradicts Bingham's initial explanation of his second draft. In fact, Bingham's views seem rather clear even without this speech as evidence of his views. The speech is nevertheless important, however, because it expressly contradicts one of the most common claims about John Bingham—that he based the *final* draft of the Fourteenth Amendment on the Comity Clause of Article IV. Bingham's speech is almost entirely devoted to refuting that very claim.

Bingham's speech was delivered in the context of debates over the 1871 Ku Klux Klan Act, which regulated private interference with the rights of United States citizens. Radicals defended the Act on the grounds that the Fourteenth Amendment gave the federal government control over the general subject of civil rights in the states. Opponents of the Act claimed that Bingham had abandoned any effort to protect substantive rights in the states when he withdrew his initial draft of the Fourteenth Amendment. Bingham supported the Act, but he opposed the interpretations of the Privileges or Immunities Clause being put forward by the radicals *and* the conservatives. In his speech, he addresses what he viewed as both unduly broad and unduly narrow readings of the Privileges or Immunities Clause.

First, Bingham explained that the Privileges or Immunities Clause protected substantive federal rights, including those listed in the first eight amendments to the Constitution. Having refuted the conservatives, Bingham then addressed the radical claim that the Clause federalized the common law "privileges and immunities" which had received only equal protection under Article IV.

According to Bingham, "the privileges or immunities of citizens of the United States" had to be "contradistinguished" from the privileges and immunities of "citizens of a State." Where one had to consult state law to determine the laws which must be equally provided under the Comity Clause, Fourteenth Amendment "privileges or immunities" were "chiefly defined in the first eight amendments to the Constitution of the United States." Just to drive the point home, Bingham then quoted verbatim the first eight amendments to the Constitution.

Then, specifically responding to radicals who tried to use *Corfield* and Article IV in their interpretation of the second draft, Bingham declared:

> [I]s it not clear that other and different privileges and immunities than those to which a citizen of a State was entitled are secured by the provision of the Fourteenth Article, that no State shall abridge the Privileges or Immunities of citizens of the United States, which are defined in the eight articles of amendment, and which were not limitations on the power of the States before the Fourteenth Amendment made them limitations.[10]

Bingham could not have been clearer: The rights of the privileges or immunities clause involved the substantive rights listed in

the Constitution, and not the state-law derived rights given a degree of equal protection under Article IV. All in all, the 1871 speech confirms what we already knew: Bingham had no desire to transform the vast (indeed limitless) category of common law rights granted equal protection under Article IV into a limitless category of substantive national privileges or immunities. Bingham's efforts, from the beginning, were merely to require states to protect those rights that the people themselves had placed in the text of the Constitution.

John Bingham's second draft of the Fourteenth Amendment "hath this extent—no more."

Endnotes

1 128 S. Ct. 2783 (2008).

2 Nat'l Rifle Ass'n v. Chicago, 567 F.3d 856, 857 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. City of Chicago, 78 U.S.L.W. 3137 (U.S. Sept. 30, 2009) (No. 08-1521).

3 According to Justice Scalia, Gura's approach to the Privileges or Immunities Clause was "the darling of the professoriate" and that the only reason for making the argument must be because he was "bucking for a place on some law school faculty."

4 Benjamin B. Kendrick, Journal of the Joint Committee of Fifteen on Reconstruction: 39th Congress, 1865-1867, at 61 (1914).

5 U.S. Const. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

6 Cong. Globe, 39th Cong., 1st Sess., 1088-91 (The purpose of the amendment was simply "to arm the Congress of the United States . . . with the power to enforce the bill of rights as it stands in the Constitution today.") (John Bingham).

7 As Bingham explained in his speech of January 9, 1866:

> When you come to weigh these words, "equal and exact justice to all men," go read, if you please, the words of the Constitution itself: "The citizens of each State (being *ipso facto* citizens of the United States) shall be entitled to all the privileges and immunities of citizens (applying the ellipsis "of the United States") in the several States." This guarantee is of the privileges and immunities of citizens of the United States in, not of, the several States.

Cong. Globe, 39th Cong., 1st Sess. 158 (Jan. 9, 1866).

8 Cong. Globe, 39th Cong., 1st sess. 1033 (Feb. 13, 1866) (describing Article IV and the Fifth Amendment as "these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution"); *see also* N.Y. Times, Feb. 27, 1866 (presenting a slightly different version of Bingham's speech) ("But it was equally clear that by every construction of the Constitution—its contemporaneous and continuous construction—that great provision contained in the second section of the fourth article and in a portion of the fifth amendment adopted by the first congress in 1789, that that immortal bill of rights had hitherto depended on the action of the several States.").

9 *See* Corfield v. Coryell, 6 Fed. Cas. 546, 551 (C.C.E.D. Pa. 1823) (Bushrod Washington) (privileges and immunities provided equal protection under Article IV include rights which are "in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign.").

10 Cong. Globe, 42d Cong. 1st Sess. app. at 84.

Originalism and the Fourteenth Amendment's Protection of Unenumerated Rights: A Response to Prof. Kurt Lash

*by Alan Gura***

When Justice Scalia derided the originalist interpretation of the Fourteenth Amendment as a "darling of the professoriate," he obviously did not have Professor Kurt Lash in mind. Setting aside the question of how the people who ratified the Fourteenth Amendment might have understood its language, Lash seizes upon the Amendment's legislative history, indeed, primarily upon "*post*-enactment history,"[1] for the proposition that the Fourteenth Amendment's Privileges or Immunities Clause does not secure against the states any rights beyond those otherwise specified in the Constitution's text.

The theory, if not its underlying methodology, might be soothing to judicial minimalists long distressed by the Constitution's textual guarantees of unenumerated rights.[2] Alas, what the people thought the Privileges or Immunities Clause meant in 1868 is not what Professor Lash today thinks Fourteenth Amendment author John Bingham thought those words meant in 1871—and indeed, even this latter theory does not withstand examination on its own terms.

The Original Meaning of "Privileges" and "Immunities"

"[A]n amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption, . . . For it was for public adoption that it was proposed.'"[3] As Justice Scalia wrote recently, "we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'"[4] In arguing *McDonald v. Chicago*, I was not about to "fritter away two out of nine votes by failing to address what Justice[s] Thomas and [Scalia] consider dispositive," at least in most cases: "what the text was thought to mean when the people adopted it."[5]

"At the time of Reconstruction, the terms 'privileges' and 'immunities' had an established meaning as synonyms for 'rights.' The two words, standing alone or paired together, were used interchangeably with the words 'rights,' 'liberties,' and 'freedoms,' and had been since the time of Blackstone."[6] The theory that John Bingham believed these words referred only to rights literally enumerated is strained, at best. Even if true, the evidence overwhelmingly shows a contrary understanding among the ratifying public in 1868.

"Privileges and immunities" were secured, to some extent, by the original Constitution's instruction that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."[7] Justice Bushrod Washington's circuit-riding opinion in *Corfield* v. *Coryell*[8] famously described "privileges and immunities" in this context as eluding any

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simple cataloguing of their content. The provision secured "those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union . . . ."[9]

Corfield did not describe what Lash fears as "an unlimited catalogue of unenumerated natural rights."

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole.[10]

"[S]ome" examples of privileges and immunities "deemed fundamental" included:

> The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the state; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state . . . [and] the elective franchise . . . .[11]

Knowing what "privileges and immunities" meant in Article IV, Section 2, did not fully describe that provision's impact.

> Notably, Justice Washington did not indicate whether Article IV, § 2 required States to recognize these fundamental rights in their own citizens and thus in sojourning citizens alike, or whether the Clause simply prohibited the States from discriminating against sojourning citizens with respect to whatever fundamental rights state law happened to recognize.[12]

Bingham had endorsed the former view of Article IV, Section 2, and believed the rights which the states were bound to respect included both those constitutionally enumerated, and those as described in *Corfield*. Lash terms this "an exceedingly odd argument. . . . No one had ever before suggested that Article IV actually bound the states to protect the Bill of Rights." Not so. For example, in his *Treatise on the Unconstitutionality of Slavery*, leading abolitionist Joel Tiffany defined the privileges and immunities of American citizenship to include "all the guarantys of the Federal Constitution for personal security, personal liberty, and private property,"[13] including rights enumerated in the Bill of Rights.[14] He interpreted Article IV to mean that "[t]he states can pass no laws that shall deprive a person of the right of citizenship. Nor can they pass any law that shall in any manner conflict with that right."[15] Indeed, it was a staple of abolitionist legal thought that slave states had been violating their Article IV obligations to secure at least the fundamental rights, including those enumerated in the Bill of Rights, of traveling citizens.[16]

Perhaps most importantly, the Supreme Court acknowledged that rights enumerated in the Bill of Rights, as well as certain unenumerated rights, were among the privileges and immunities of citizenship that states would be bound to respect as adhering in visiting citizens (at least, assuming the states secured those rights to their own citizens). For precisely that reason, the Court had rejected the idea that African-Americans could be citizens:

> [I]f [blacks] were so received, and entitled to *the privileges and immunities of citizens*, it would exempt them from the operation of the special laws and from the police regulations [related to blacks]. It would give to persons of the negro race, who were recognised as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation. . . [and] the full liberty of speech in public and in private upon all subjects upon which [the State's] own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.[17]

Rights of speech, assembly, and arms are, of course, enumerated in the Bill of Rights—but a right to "sojourn" and "go where [one] please[s]" is enumerated nowhere in constitutional text.

The question of whether Article IV imposed anything more than comity was, in the end, irrelevant to the Fourteenth Amendment debate. Right or wrong, the Supreme Court had long held that the states were not bound by the Bill of Rights for lack of mandatory enforcement language in the constitutional text, akin to the "No State shall" language of Article I, § 10 directing prohibitions against the states.[18] Of course, the same logic would bar federal imposition of unenumerated rights against the states *ab initio*. This alleged defect in the original Constitution is what the Fourteenth Amendment sought to correct.

Justice Thomas understated matters in offering that "it can be assumed that the public's understanding of [the Fourteenth Amendment's Privileges or Immunities Clause] was informed by its understanding of [Article IV's Privileges and Immunities Clause]."[19] The Fourteenth Amendment's ratification history is replete with invocations of *Corfield*'s "privileges and immunities" definition. After all, the people had no better reference for the meaning of terms employed by new constitutional text, than the established meaning of those very same terms in text long-ago adapted. Arguably more familiar to the American mind at the time was the *Dred Scott* decision, with its reference to enumerated and unenumerated rights alike as falling within the privileges and immunities of citizenship.

Thus, introducing the Fourteenth Amendment in the Senate, Reconstruction Committee Member Jacob Howard explicitly defined "privileges" and "immunities" first by reciting *Corfield*'s definition of "privileges and immunities." Howard then continued:

> To these privileges and immunities, whatever they may be—for they are not and cannot be fully defined in their

> entire extent and precise nature—to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . and the right to keep and to bear arms . . . . here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution . . .[20]

Lash implicitly finds Howard's discussion of *Corfield* rights to be limited to considerations of comity, but those words simply are not there. Notably, the ratifying public in 1868 saw no such emanations from the penumbras of Howard's well-publicized words. Paraphrasing *Corfield*, and Senator Howard's widely-publicized speech, "Madison" wrote the *New York Times* that the new Amendment would secure against state interference not only enumerated rights including rights of speech and arms, but also offered:

> What the rights and privileges of a citizen of the United States are, are thus summed up in another case: Protection by the Government; enjoyment of life and liberty, with the rights to possess and acquire property of every kind, and to pursue happiness and safety; the right to pass through and to reside in any other State, for the purposes of trade, agriculture, professional pursuits or otherwise; to obtain the benefit of the writ of habeas corpus to take, hold, and dispose of property, either real or personal, &c., &c. These are the long-defined rights of a citizen of the United States, with which States cannot constitutionally interfere.[21]

The Fourteenth Amendment's opponents shared this broad view of the Privileges or Immunities Clause. Representative Rogers stated,

> What are privileges and immunities? Why, sir, all the rights we have under the laws of the country are embraced under the definition of privileges and immunities. The right to vote is a privilege. The right to marry is a privilege. The right to contract is a privilege. The right to be a juror is a privilege. The right to be a judge or President of the United States is a privilege. I hold if that ever becomes a part of the fundamental law of the land it will prevent any State from refusing to allow anything to anybody embraced under this term of privileges and immunities . . . .[22]

Ascribing the words a controversial breadth was no mere debating tactic. Years after the Amendment's ratification, one Southern sympathizer lamented that his narrow view of "privileges" and "immunities" was not widely shared:

> But I want also to invite attention to the meaning of the words "privileges and immunities" as used in this section of the amendment. It appears to be assumed in the popular mind, and too often by the law makers, that these are words of the most general and comprehensive nature, and that they embrace the whole catalogue of human rights, and that they confer the power and the obligation to enact affirmative and most dangerous laws.[23]

Not surprisingly, the popular understanding of the Privileges or Immunities Clause as securing both *Corfield* and enumerated rights was judicially acknowledged beyond the four *Slaughter-House* dissenters. Future Justice William Woods held that the Fourteenth Amendment's Privileges or Immunities "are undoubtedly those" as described in *Corfield*, and "[a]mong these we are safe in including those which in the constitution are expressly secured to the people . . . ."[24]

Considering this extremely expansive view of "privileges" and "immunities," terms already found in the Constitution and loaded with a powerful, popular meaning, it is difficult to suppose that Bingham employed these terms with the hope that they would effect a vastly different, narrower meaning. If Bingham had narrower intent, the language of the Fourteenth Amendment would contain narrower text. Or at least, the legislative history would include some evidence of a more limited intent, with Bingham and perhaps others rising to refute the popular understanding of "privileges" and "immunities" as containing what Lash asserts is "an unlimited catalogue of unenumerated natural rights."

Theories of Legislative Intent

Notwithstanding the Fourteenth Amendment text's original public meaning, Professor Lash distills from the Amendment's legislative history, and from statements offered by Bingham years following its ratification, the proposition that Bingham changed his mind regarding the scope of the Privileges or Immunities Clause. According to this theory, whereas an earlier draft would have federalized and enforced all civil rights encompassed by *Corfield*'s broad definition of "privileges and immunities," the language finally ratified secured only those rights spelled out in the Constitution's text, primarily those of the first eight amendments.

The theory's first difficulty lies in Bingham's denial that the Amendment's reformulation narrowed its scope. The Fourteenth Amendment "is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition."[25] The distinction between Bingham's two drafts was that the former might have allowed Congress, rather than the Supreme Court, to define constitutional standards.[26] In the ratified version, congressional power is remedial, not substantive. The meaning of "privileges or immunities" may now be a matter of judicial interpretation, but however interpreted, the nature of this substantive limitation is unaltered.

Lash correctly points out that in one speech, Bingham declared that the Fourteenth Amendment would enforce "the bill of rights as it stands in the Constitution today. It 'hath that extent—no more.'"[27] But as the speech continues, it becomes clear that Bingham's usage of "bill of rights" is somewhat more expansive than Lash's invocation of the term. Bingham declares that the proposed amendment "seeks the enforcement of the second section of the fourth article of the Constitution."[28] He references "the bill of rights that all shall be protected alike in life, liberty, and property," and declares that the Amendment was to right the "great wrong" of denying "equal protection *or any protection* in the rights of life, liberty, and property."[29] Bingham would add that "[t]he franchise of a Federal elective office is as clearly one of the privileges of a citizen of the United States as is the elective franchise for choosing Representatives

in Congress or Presidential electors."[30] The textual location of these rights is unclear.

In other words, even if Bingham believed the Privileges or Immunities Clause embodied only rights referred to in the constitutional text, Article IV, Section 2 is very much a part of the Constitution, and nothing indicates Bingham's rejection of *Corfield*. To the contrary, Bingham sought "any protection in the rights of life, liberty, and property," and for good measure included rights that could be inferred from the constitutional text even if not precisely delineated anywhere.

Shifting to 1871, years after ratification, Lash zeroes in on Bingham's statement that Article IV secured different rights than those contained in the Fourteenth Amendment. Bingham specifically cited the right to jury trial, freedom of the press, and "the rights of conscience and the duty of life" with respect to aiding escaped slaves, as rights the states could violate prior to the Amendment's ratification.[31] But Bingham did not deny that these rights were of the same character as those secured in Article IV. He merely acknowledged that rights could be "den[ied] to any" under a regime that imposed only comity, including a comity of absence of rights. The rights of Article IV were indeed different— in that as they were secured only as a matter of comity, they were optional.

But why excavate clues as to the Fourteenth Amendment's meaning from this 1871 comparison of the Amendment to Article IV, when that very speech contains direct statements regarding the Fourteenth Amendment's scope? After describing Section One as nothing less than a guarantee, commensurate with that of the Magna Carta, that "we will not deny to any man right or justice,"[32] Bingham declared, "Liberty, our own American constitutional liberty . . . is the liberty, sir, to work in an honest calling and contribute by your toil in some sort to the support of yourself, to the support of your fellowmen, and to be secure in the enjoyment of the fruits of your toil."[33] This is, of course, an apt description of the livelihood right recognized in *Corfield*, the livelihood right endorsed by the *Slaughter-House* dissenters two years later, and still upheld today as a matter of modern Article IV, § 2 comity.

Of course, the liberty to work in an honest calling is nowhere to be found in the antebellum Constitution's explicit text. That Bingham would invoke this crucial *Corfield* right in an 1871 debate considering enforcement of the Fourteenth Amendment, should dispel the notion that he secretly changed his mind as to the meaning of "privileges and immunities" in 1866.

The Future of Unenumerated Privileges and Immunities

As it stands today, precedent confirms that the Privileges or Immunities Clause secures at least some unenumerated rights. Although grievously wrong, *The Slaughter-House Cases* continue to hold that the Clause secures a swath of unenumerated rights of national citizenship, including the unenumerated rights to visit the U.S. Mint, or obtain the Navy's protection on the high seas. As recently as 1999, the Supreme Court observed that regardless of one's view of *Slaughter-House*, the Privileges or Immunities Clause is properly understood to secure a right of interstate travel.[34]

And indeed, even in *McDonald*, the Supreme Court tacitly acknowledged that the Fourteenth Amendment generally, if not the Privileges or Immunities Clause specifically, secures unenumerated rights. "Today, it is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866."[35] Among these are the rights "to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property,"[36] none of which are specifically enumerated anywhere in the Constitution.

With neither Justice Washington, nor Representative Bingham, nor Senator Howard daring to provide a precise catalog of every freedom secured in our tradition of constitutional liberty, it would have been at least presumptuous—and doubtless, disastrous—for me to attempt such a feat in the middle of a twenty-minute argument concerning application of an *enumerated* right. Lash views this reticence as "blithe." I prefer terms such as "modest" and "realistic." As Justice Thomas observed, "The mere fact that the Clause does not expressly list the rights it protects does not render it incapable of principled judicial application."[37] But my attempts to discuss the limiting principles governing application of unenumerated rights were cut-off by a certain former law professor from the University of Chicago.

McDonald has revived, not closed, the debate over the Privileges or Immunities Clause's original public meaning. The case exposed the lack of a current Supreme Court majority for endorsing the error of *Slaughter-House*, or, indeed, for embarking upon any particular new direction. The day will yet arrive when the Court gives the people the Fourteenth Amendment ratified by our ancestors. "To be sure, interpreting the Privileges or Immunities Clause may produce hard questions. But they will have the advantage of being questions the Constitution asks us to answer."[38]

Endnotes

1 Sullivan v. Finkelstein, 496 U.S. 617, 631 (1990) (Scalia, J., concurring in part).

2 Arguably including U.S. Const. art. IV, §§ 2 and 4; U.S. Const. amend. IX; U.S. Const. amend. XIV, § 1.

3 Adamson v. California, 332 U.S. 46, 63 (1947) (Frankfurter, J., concurring) (citation omitted), *overruled on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

4 District of Columbia v. Heller, 128 S. Ct. 2783, 2788 (2008) (citation omitted).

5 Justice Antonin Scalia, *Foreword*, 31 Harv. J.L. & Pub. Pol'y 871 (2008). In the absence of an originalist argument, the case would have been lost. The plurality invoked sources referencing the original meaning of the Privileges or Immunities Clause, to which it would then refer to as "the Amendment" or "§ 1." *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3033 n.9 (2010) (plurality). And Justice Thomas's pivotal fifth vote would not have been secured sua sponte. *See* Carhart v. Gonzales, 550 U.S. 124, 169 (2007) (Thomas, J., concurring) (federal abortion law upheld in absence of possible Commerce Clause challenge).

6 *McDonald*, 130 S. Ct. at 3063 (Thomas, J., concurring in judgment); *see also* Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. Rev.

1071 (2000) (containing exhaustive survey of American historical usage of "privileges" and "immunities").

7 U.S. Const. art. IV, § 2.

8 6 F. Cas. 546 (C.C.E.D. Pa. 1823).

9 *Corfield*, 6 F. Cas. at 551.

10 *Id*. at 551-52.

11 *Id.* at 552.

12 McDonald v. City of Chicago, 130 S. Ct. 3020, 3067 (2010) (Thomas, J., concurring in judgment). Regardless of how the clause should have operated, states could, and did, refuse to recognize rights inhering in people they declined to accept as citizens.

13 Joel Tiffany, A Treatise On The Unconstitutionality of American Slavery 97 (1849).

14 *Id.* at 99.

15 *Id.* at 96.

16 *See, e.g. The Claim Of Property In Man,* The Liberator, Sept. 21, 1838, at 149.

17 Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 416-17 (1857) (emphasis added).

18 Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

19 McDonald v. City of Chicago, 130 S. Ct. 3020, 3066 (Thomas, J., concurring in judgment).

20 Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

21 "Madison," *The National Question: The Constitutional Amendments—National Citizenship*, N.Y. Times, Nov. 10, 1866, at 2 (second emphasis added).

22 Cong. Globe, 39th Cong., 1st Sess. 2538 (1866) (Rep. Rogers).

23 Cong. Globe, 42d Cong., 1st Sess. app. 47 (1871) (Rep. Kerr).

24 United States v. Hall, 26 F. Cas. 79, 81 (S.D. Ala. 1871).

25 Cong. Globe, 42d Cong., 1st Sess. app. 83 (1871).

26 City of Boerne v. Flores, 521 U.S. 507, 520-23 (1994).

27 Cong. Globe, 39th Cong., 1st Sess. 1088 (1866).

28 *Id.* at 1089.

29 *Id.*

30 *Id.* at 2542.

31 Cong. Globe, 42d Cong., 1st Sess. app. 84 (1871). It is unclear where the "rights of conscience and the duty of life" are enumerated.

32 *Id.* at 83.

33 *Id.* at 86.

34 Saenz v. Roe, 526 U.S. 489 (1999).

35 McDonald v. City of Chicago, 130 S. Ct. 3020, 3041 (citation omitted).

36 14 Stat. 27 (April 9, 1866).

37 *McDonald*, 130 S. Ct. at 3086 (Thomas, J., concurring in judgment).

38 *Id.*

A Response to Alan Gura's Reply

by Kurt Lash

I appreciate Mr. Gura's attempt to defend his claim during oral arguments in *McDonald v. Chicago* that "it's impossible to give a full list of all the enumerated rights that might be protected under the Privileges or Immunities Clause." Mr. Gura believed (and apparently still believes) that such an argument was necessary for his client's case. I, on the other hand, believe that all his client needed was an originalist argument supporting incorporation of the Second Amendment.[1] My reading of the Privileges or Immunities Clause does just that.[2]

But Mr. Gura believes the Clause protects much more than just enumerated rights. According to his view, Justice Washington's Article IV opinion in *Corfield v. Coryell* is the template for understanding the substantive rights of citizens of the United States. Mr. Gura's historical case for such a view is the same case made for decades by liberal (and libertarian) scholars: (1) The words "privileges" and "immunities" can be found in both the Fourteenth Amendment and in Article IV. (2) The Article IV case *Corfield,* and Article IV itself, were both repeatedly discussed during the debates over the Fourteenth Amendment. (3) This repeated reference suggests that both were used as models for the Privileges or Immunities Clause. (4) Because *Corfield* mentions numerous rights that are not expressly mentioned in the Constitution, this means that the Privileges or Immunities Clause provides substantive protection for rights not listed in the Constitution.

There are a number of critical assumptions built into Mr. Gura's argument. It requires that we assume that the *different* language of Article IV and the Privileges or Immunities Clause ("citizens of the several states" v. "citizens of the United States") does not signal that the clauses protect a different set of rights. It also requires that we assume "lots of discussion" of Article IV and *Corfield* in the Thirty-Ninth Congress indicates that there was "lots of agreement" about Article IV and *Corfield*. And, finally, it assumes that the members of the Thirty-Ninth Congress believed that *Corfield* listed national rights that would receive substantive protection under the new Privileges or Immunities Clause. If any one of these assumptions is not true, then his argument fails. None of them are true.

Taking the first, Mr. Gura's response ignores the fact that John Bingham *removed* the language of Article IV from the final draft of the Fourteenth Amendment. John Bingham's first draft used the *exact* language of the Comity Clause of Article IV, specifically its reference to the rights "of citizens in the several states." Bingham deleted this language in his second draft and instead called for the protection of the rights "*of citizens of the United States*."[3] If Article IV was supposed to be the template for understanding the Privileges or Immunities Clause, then it seems exceedingly odd to have first used and then removed the language of Article IV from the final draft. As far as I can tell, Mr. Gura has no explanation for Bingham's decision to abandon the language of Article IV. My two articles, on the other hand, explain why Bingham changed his mind. After hearing the debates over the first draft, Bingham realized that the language of Article IV would not achieve his goal of

protecting substantive rights listed in the Constitution. So he changed the language.[4]

Which leads to Mr. Gura's second assumption: Lots of references to *Corfield* and Article IV in the Thirty-Ninth Congress must mean there was lots of agreement about *Corfield* and Article IV. In fact, during the debates of the Thirty-Ninth Congress, there was spirited and express disagreement over the meaning of *Corfield* and Article IV. It was this disagreement that led Bingham to abandon his original Article IV-based draft. Radical Republicans originally held the same broad interpretation of *Corfield* and Article IV as that currently claimed by Mr. Gura. The radicals (who embraced the label, by the way) welcomed Bingham's original Article IV-based draft because they believed that it would grant the federal government control over the substantive content of civil rights in the states. Moderate and conservative Republicans, however, balked at the idea of federal control of civil rights in the states (particularly in light of the danger that Democrats would become a political majority once they were readmitted to Congress). The moderates and conservatives pointed out that the consensus antebellum understanding of *Corfield* and Article IV was that the Comity Clause provided nothing more than equal access to a limited set of state-conferred rights. Faced with overwhelming evidence of antebellum case law and commentary, the radicals in the Thirty-Ninth Congress abandoned their claims about *Corfield* and Article IV. In fact, by the end of the congressional term, radicals had *embraced* the consensus view that the Comity Clause of Article IV provided nothing more than the rights of equal protection. This understanding was the *express* basis of Radical Republican Samuel Shellabarger's use of Article IV language in his proposed civil rights bill (discussed in my full article at p. 409).

So, yes, there were lots of references to *Corfield* and Article IV during the debates. But, no, this did not signal broad agreement with the radical Republican's original (and Mr. Gura's current) reading of *Corfield* and Article IV. Just the opposite. By the end of the debates in the Thirty-Ninth Congress, even radical Republicans were using the language of Article IV fully expecting (and planning) that this language would be understood outside of Congress as providing nothing more than the rights of equal protection. Shellabarger and the radicals, of course, wanted much more (and Shellabarger says so in his speech), but they realized that this was not the public understanding of the language of the Comity Clause of Article IV (and he says so). Thus, citing repeated references to *Corfield* and Article IV is not enough; you have to read those references. When you do so, the evidence shows that, by the end of the Thirty-Ninth Congress, there was an overwhelming agreement with the equal protection reading of *Corfield* and Article IV. As far as the public at large is concerned, informed citizens would know that antebellum case law established the Comity Clause as an equal protection provision, and anyone following the debates (many of which were published) would know that the Thirty-Ninth Congress held the same view.

In fact, if Mr. Gura is right, and *Corfield* and Article IV were the templates for the Privileges or Immunities Clause, then this strongly supports an equal protection-only reading of that Clause. True, Mr. Gura is right to point out that the Comity Clause protects "unenumerated rights" including the right to travel and certain economic rights. But it was broadly agreed that these unenumerated rights received nothing more than *equal protection* under the Comity Clause. Indeed, scholars such as John Harrison and Philip Hamburger who agree with Mr. Gura that Article IV served as the template for the Privileges or Immunities Clause argue that this means that the Privileges or Immunities Clause does nothing more than provide equal protection rights.[5] I do not disagree with their reading of *Corfield* and Article IV. My argument is that the Privileges or Immunities Clause of the Fourteenth Amendment is *not* based on *Corfield* and Article IV.

But just because the Privileges or Immunities Clause is not based on Article IV, this does not mean the Clause has no impact on Article IV. Every time John Bingham described a particular right protected by the Privileges or Immunities Clause, he mentioned rights actually listed in the text of the Constitution. Bingham spoke of rights against cruel and unusual punishments (Eighth Amendment); protection of life, liberty, and property (Fifth Amendment); and rights of state representation in Congress (Article I, sections 2 & 3). Bingham believed that all rights actually listed in the Federal Constitution were the rights "of citizens of the United States." In taking this position, Bingham followed the same approach as his hero Daniel Webster who, during antebellum debates over slavery in the territories, insisted that slavery was not a right "of citizens of the United States" because it was not expressly listed in the Federal Constitution.

Article IV, of course, *is* a right expressly listed in the Constitution. And it protects a great many rights not actually enumerated in the Constitution. As Justice Washington put it, it protects everything from "the enjoyment of life and liberty" to the right "to pursue and obtain happiness." But the consensus in the Thirty-Ninth Congress was that these were not substantive rights. Instead, the Comity Clause required states to *equally* extend its protection of its residents' right "to pursue happiness" with those citizens visiting from other states. Rights listed in the first eight amendments, on the other hand, are substantive rights, such as the personal right against cruel and unusual punishments. Thus, if one reads the Privileges or Immunities Clause as protecting enumerated federal rights, then this includes protecting the *substantive* rights of the Bill of Rights and the *equal protection* rights of Article IV.

This is why John Bingham insisted that his second draft protected everything in his first draft and more. Because his first draft used the language of Article IV, his fellow moderates understood him as trying to protect nothing more than the equal protection rights of Article IV. Bingham, however, wanted to do much more; he wanted to protect all federally enumerated rights. So, he abandoned the language of Article IV in his second draft and instead invoked the full set of privileges or immunities belonging to the "citizens of the United States." This set of enumerated rights includes the equal protection rights guarded by Article IV *and* the substantive rights listed in the first eight amendments. Jacob Howard agreed: the Clause protected *both* the rights of Article IV and the first eight amendments. Unlike Mr. Gura, however, neither Howard nor any other moderate or conservative (or even, eventually, any radical Republican)

believed that the language of Article IV went beyond the rights of equal protection.

Finally, the alert reader will notice that everything I have written here is based on the pre-adoption historical record.[6] Yes, I think that John Bingham's 1871 speech strongly supports everything I've argued above. But it is not necessary; nothing I have argued above requires going beyond the debates of 1866. Mr. Gura tells us that a minority of justices in an 1873 case shared his substantive vision of *Corfield* and Article IV. Perhaps so. In 1866, however, there is no evidence that anyone other than radical Republicans shared such a view—and even they abandoned it before the year was out. Instead, a Congress controlled by moderates produced a moderate Privileges or Immunities Clause, one which protects the Bill of Rights against state abridgment but which leaves the content of unenumerated civil rights to the control of the people in the states subject only to the requirements of due process and equal protection. If the current Supreme Court is concerned about opening the door to an "unlimited" (and judicially defined) list of unenumerated rights, the concern is unfounded in terms of both text and history. We have a limited, but critically important, Privileges or Immunities Clause. It protects the Bill of Rights against state intrusion while maintaining critical aspects of federalism. We will never know if a majority of the Supreme Court would have been willing to adopt such a reading in *McDonald*, but we can hope that the day will soon come when they get the chance to take another look.[7]

Endnotes

1 In his reply to this response, Mr. Gura does not dispute this basic and fundamental criticism of his failed strategy to get the Supreme Court to rely on the Privileges or Immunities Clause.

2 In his reply to this response, Mr. Gura claims my work does not involve "originalism" in the sense that it does not create a case for the original public meaning of the Privileges or Immunities Clause. But Mr. Gura must know my work involves both the public understanding of Article IV "privileges and immunities of citizens in the several states" and evidence of the public understanding of terms like "privileges and immunities of citizens of the United States." Most of all, my work presents the consensus understanding of *Corfield* and Article IV both inside and outside the halls of Congress. That public understanding undermines Mr. Gura's argument that *Corfield* and Article IV were broadly understood as representing substantive rights. Without this piece of the puzzle, Mr. Gura's entire argument about the Privileges or Immunities Clause falls apart.

3 Both Mr. Gura and myself agree that the terms "privileges" and "immunities" were understood as being the same thing as "rights."

4 In his most recent reply, Mr. Gura appears to have abandoned his earlier claim that Bingham and a majority of the members of the Thirty-Ninth Congress intended the Privileges or Immunities Clause to embrace a substantive rights theory of Article IV despite their having *removed* the language of Article IV from the final draft. In fact, Mr. Gura has yet to offer any explanation for the decision to remove the language of Article IV from the second draft of the Fourteenth Amendment.

5 This point undercuts Mr. Gura's claims that references to *Corfield* and Article IV support his unenumerated substantive rights reading of the Privileges or Immunities Clause. Although Mr. Gura relies on congressional debates when they are helpful to his case, he never once addresses how Article IV was understood either inside or outside the halls of Congress. Doing so is fatal to his case. Every Supreme Court case handed down before and after the framing of the 14th Amendment read Article IV as providing nothing more than the rights of equal protection. The majority of the Thirty-Ninth Congress read Article IV the same way. Radicals tried to press a broader reading but then backed off, with even Shellabarger accepting the equal protection reading of Article IV as representing the consensus understanding. Thus, if Mr. Gura is right and the public understanding of the Privileges or Immunities Clause *was* based on the public understanding of Article IV, then the clause protects no substantive rights at all.

6 My two articles explore both the consensus understanding of the Thirty-Ninth Congress *and* the antebellum public understanding of phrases like "privileges and immunities of citizens in the several states" and "privileges and immunities of citizens of the United States."

7 In his reply to this response, Mr. Gura abandons his earlier reliance on the debates in the Thirty-Ninth Congress. Instead, Mr. Gura now claims that it is *I* who seek to rely on the "discredited" method of considering legislative history. Similarly, Mr. Gura abandons his earlier reliance on nineteenth century political documents. Instead, he now claims that it is *I* who rely on "dusty diplomatic codicils." Having cut off the branches he once stood upon, Mr. Gura now relies on the opinions in *Slaughterhouse* and *Cruikshank* and claims that my work can be characterized as a "fatwa." I think this argument pretty much speaks for itself. The Supreme Court was right to incorporate the Bill of Rights, including the Second Amendment. But it was also right to reject Mr. Gura's reading of the Privileges or Immunities Clause.

Reply to Professor Lash

by Alan Gura

Professor Lash's unique vision of the Fourteenth Amendment shares the same analytical methodology with the discredited collectivist vision of the Second Amendment. Both theories rely heavily on legislative history, inferring the meaning of language from context to distill conclusions that escaped mention, if not understanding, by the Framers. For Lash, as for Justice Stevens in *Heller*, the meaning of constitutional provisions depends largely on what legislators personally, secretly believed; what they must have agreed or disagreed about with each other; and various influences that, we are assured, must have prompted telling changes in legislative draftsmanship. Under this vision, the penumbra's meaning does not emanate from the text, but rather, the text's meaning emanates from the penumbra.

This is definitely original stuff, but it is not originalism. The Professor's theory is not based on "what the text was thought to mean when the people adopted it,"[1] and its conclusion, though perhaps consistent with dusty diplomatic codicils, conflicts with the way in which the Fourteenth Amendment's "words and phrases were used in their normal and ordinary as distinguished from technical meaning"—the way the Amendment was "understood by the voters" and "ordinary citizens."[2]

Were Professor Lash's assertions regarding the Fourteenth Amendment accepted in the framing era, or indeed, were even known at the time, why is it that *none* of the *Slaughter-House* justices, in majority or dissent, asserted this meaning? It would have been very simple for the *Slaughter-House* majority to uphold Louisiana's butchering monopoly by simply declaring that the Privileges or Immunities Clause is limited to the protection of enumerated rights. Yet instead, the majority offered its own description of the unenumerated rights secured by that provision, complete with representative examples. Indeed, *Slaughter-House* saw unanimous agreement that the

Clause secures unenumerated rights, although the Justices divided sharply as to the nature of those rights.

And if ever there were a time for Professor Lash's theory to find framing era expression, that time came, and went, in *Cruikshank*—decided within a decade of the Fourteenth Amendment's ratification—where not one Justice read *Slaughter-House* in the manner suggested by Professor Lash, or sought to distinguish *Slaughter-House* by dissenting on the grounds that the Fourteenth Amendment must protect enumerated as opposed to unenumerated rights.

In contrast to what Professor Lash espouses, the approach I urged in *McDonald* is not at all original. That the Fourteenth Amendment secures a vision of classical liberty has long been established not merely as the "darling of the professoriate," but also that of its Framers, their ratifying public, practically all contemporaneous legal commentators, various Supreme Court Justices, and, most notably, the Fourteenth Amendment's bitterest opponents. One commentator went so far as to applaud the *Slaughter-House* Court for having "dared to withstand the popular will as expressed in the letter of [the Fourteenth] amendment."[3]

That is not to say that Professor Lash's "enumerated rights only" vision of the Fourteenth Amendment is broadly unappealing today. Throughout the *McDonald* litigation, I heard loud and clear the voices of results-oriented, self-described conservatives who wish to conserve not the Framers' vision of how individuals relate to their government, but rather, the interpretive landscape of 1972—grudgingly accepting incorporation of most of the Bill of Rights, but without *Roe* and *Lawrence.* Having tasted what they claim to be the radical excesses of so-called judicial "activism," these "conservatives" naturally warm to any theory limiting courts to the enforcement of rights textually enumerated in 1791. Over 130 years after the Fourteenth Amendment's ratification, they may find in Professor Lash's theory a constitutional fatwa of sorts blessing the arrangement.

But while this result may be politically attractive to some today, it was not particularly desired in 1868, when "Privileges" and "Immunities" had a meaning derived from *Corfield*, and substantive due process was largely unknown. The Fourteenth Amendment's Framers were quite familiar with the unenumerated rights to earn a living, pursue a livelihood, make and enforce contracts, and own and convey property. The Nation was scandalized by the widespread violation of these rights throughout the unreconstructed South, prompting the adoption of the Civil Rights Act of 1866 and the Amendment that constitutionalized it. Nor were these rights new concepts in this country. The Declaration of Independence itself condemned King George for having "erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance," a refrain that echoes constantly throughout American political discourse.

Thus, however abortion, assisted suicide, gay marriage, and the rest might fare under an originalist approach to the Fourteenth Amendment, at least some manifestations of the modern regulatory state afflicting all Americans today are made possible only by *Slaughter-House*'s repudiation of the Fourteenth Amendment's text, and the tradition of classical liberty it was plainly understood to secure. *McDonald* signals the start of a long process that will yet end with a full restoration of the Fourteenth Amendment we were meant to have. Professor Lash has plainly worked hard, and dedicated his considerable talent to the creation of a unique constitutional framework. But so did the 39th Congress, and in the end, it is their blueprint for constitutional liberty to which we must adhere.

Endnotes

1 Justice Antonin Scalia, *Foreword*, 31 Harv. J.L. & Pub. Pol'y 871 (2008).

2 *District of Columbia* v. *Heller*, 554 U.S. 571, 576-77 (2008) (citations omitted).

3 Christopher Tiedeman, The Unwritten Constitution of the United States 103 (1890). For a comprehensive survey of the reaction to *Slaughter-House*, *see* Richard Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughter-House Cases*, 70 Chi.-Kent L. Rev. 627, 678-86 (1994).

Corporations, Securities & Antitrust

Developments in Whistleblower Laws: Advantage Whistleblower?

*By Larry R. ("Buzz") Wood, Jr. and Richard William Diaz**

Whistleblower lawsuits represent one of the fastest-growing segments of the court dockets,[1] and the rapidly changing force of whistleblower laws increasingly poses complex legal and business challenges for employers. Legislative reforms, such as those ushered in by the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act" or "the Act")[2] have led commentators to opine that "[t]hese days, there's a cottage industry to support—and profit from—whistleblowing."[3] Indeed, in the wake of the recent reforms, lawyers have done everything from advertise in movie theaters[4] to create handbooks to guide whistleblowers through the process.[5] At the same time, regulatory agencies are increasing enforcement efforts—raising the real risk of potential incarceration for a company's employees and executives.

To frame the potential impact of the Act and reforms, consider a few recent whistleblower settlements and verdicts. First, AstraZeneca settled a whistleblower claim over its marketing of an antipsychotic therapy for $520 million. The employee who blew the whistle stands to obtain $45 million from that settlement.[6] Remarkably, this same employee had only recently also blown the whistle on his former employer, Eli Lilly, also relating to its marketing of its antipsychotic. Eli Lilly settled that claim for $1.4 billion, and this same whistleblower stands to obtain a portion of the $100 million reserved for the whistleblowers from that settlement.[7] Second, GlaxoSmithKline ("GSK") entered into a criminal guilty plea and settlement for alleged labeling and product violations that were initially raised internally by an employee who was subsequently terminated in what was referred to as "a 'redundancy' related to [a recent merger]."[8] The whistle-blowing former employee secured at least $96 million in what is "believed to be the largest award given to a single whistleblower in U.S. history."[9] Third, two former in-house intellectual property attorneys recently secured a combined $2.2 million jury verdict in a whistleblower retaliation action against International Game Technology ("IGT").[10]

In light of the reforms, significant awards, and stepped-up enforcement efforts, the question naturally becomes what proactive approaches are available to employers who are likely to be confronted with whistleblower lawsuits, and what are some of the issues these approaches create. The initial volley for this question requires an assessment of the recent legislative reforms. In light of the substantial awards and protections afforded by the reforms, it quickly becomes evident that a prudent ready position[11] entails developing a robust internal compliance/whistleblower system that allows employers to uncover fraudulent behavior by encouraging whistleblowers to report fraud within the organization. Employers also must prepare to rally against corporate bounty hunters by developing strategies regarding how they will approach the parallel investigations and proceedings generated by whistleblower claims.

I. Recent Legislative Reforms: Protecting and Incentivizing the Corporate Bounty Hunter

One of the key legislative reforms helping to create a "cottage industry" of whistleblowing is the Dodd-Frank Act.[12] In a nutshell, Dodd-Frank provides enhanced incentives and protections to a whistleblower that provides "original information" to the Securities and Exchange Commission ("SEC")[13] leading to a successful judicial or administrative enforcement action resulting in over $1 million in monetary sanctions.[14] The Act's bounty program is the central incentive included in the legislation. Under the Act, the SEC must pay a qualified whistleblower between ten to thirty percent of the amount of monetary sanctions that the SEC and other authorities are able to collect.[15] In determining the amount of the award, the SEC will consider (1) the significance of the information provided to the success of the action; (2) the degree of assistance provided by the whistleblower; (3) the programmatic interest of the Commission in deterring securities law violations by making awards to whistleblowers; and (4) whether the award otherwise enhances the SEC's ability to enforce the federal securities laws.[16] While there is no requirement that a whistleblower utilize an employer's internal compliance/whistleblower system, "the proposed rules include provisions to discourage employees from bypassing their own company's internal compliance programs."[17]

The Dodd-Frank Act provides considerable protections for employees that engage in whistleblowing. Under the proposed rules,[18] a whistleblower is generally entitled to protection from discharge, demotion, suspension, threats, harassment, and other forms of discrimination regarding the terms and conditions of employment.[19] Whistleblowers may institute a private right of action with a six-year, and potentially up to ten-year, statute of limitations, and, significantly, they have the right to a jury trial.[20] After Title VII of the Civil Rights Act of 1964 ("Title VII") was amended to add the right to a jury trial, employment discrimination claims skyrocketed.[21] If history is a guide, it is very likely that the addition of a jury trial right under the Dodd-Frank Act will also result in a dramatic increase in whistleblower claims. Finally, for purposes of the statute's antiretaliation provision, the requirement that a whistleblower provide "information to the [SEC]" is satisfied if "an individual provides information to the [SEC] that relates to a *potential violation* of the securities law."[22]

The Dodd-Frank Act provides several significant amendments to the whistleblower protections available under Section 806 of the Sarbanes-Oxley Act of 2002 ("SOX").[23] First,

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the Dodd-Frank Act provides that an individual instituting an action under SOX is entitled to a jury trial.[24] As discussed above, this is a significant entitlement that is likely to lead to a sharp rise in whistleblower suits under SOX.[25] The Act also increases the statute of limitations for filing a complaint from ninety to 180 days and extends the limitations period to include the period "after the date on which the employee became aware of the violation."[26] Furthermore, the Dodd-Frank Act eliminates an employer's ability to enforce waivers of a whistleblower's rights or remedies or require arbitration of claims of retaliation through pre-dispute agreements[27]—a process that an observer notes has proven to be beneficial to both sides of the bar in employment discrimination actions.[28]

In addition, the Act and a recent United States Department of Labor Administrative Review Board ("Board") opinion eliminate the debate over whether the employees of a publicly-traded company's subsidiaries and affiliates are covered by SOX. In *Johnson v. Siemens Building Technologies, Inc.*,[29] the Board held that the whistleblower provisions of SOX extend to a non-public subsidiary whose financial information is included in the consolidated financial statements of its publicly-traded parent.[30] The Board observed that, prior to the Dodd-Frank Act, "[s]ignificant conflicts [developed] in the case law interpreting pre-amendment Section 806's coverage of subsidiaries."[31] "Opinions [ranged] from near universal subsidiary coverage to no coverage for subsidiaries."[32] The Dodd-Frank Act amendments provide a degree of clarity by extending the retaliation protections of SOX to employees of subsidiaries and affiliates of public companies "whose financial information is included in the consolidated financial statements of [the] company."[33] The Board's decision in *Johnson* and the Dodd-Frank Act amendments clearly illustrate that organizations must monitor and provide programs for certain public *and private* subsidiaries and affiliates within their portfolio.

Recent amendments to the FCA also increase the likelihood that employers will confront corporate bounty hunters. As a general matter, the FCA provides for liability for triple damages and a penalty from $5,000 to $10,000—"as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990"—per claim for anyone who knowingly submits or causes the submission of a false or fraudulent claim to the United States.[34] In 2009 and again in 2010, the FCA was amended to broaden both the substantive provisions of the FCA and increase protection for whistleblowers.[35] To the potential dismay of employers, the intended effect of the 2009 and 2010 amendments is to expand liability and make it easier to investigate claims and win recoveries under the FCA.[36]

The recent changes to the whistleblower landscape coincide with a general shift in increasing employment claims and, specifically, retaliation claims. Nationally, workplace discrimination retaliation claims "have increased by 60 percent over the past five years . . . ."[37] The origin of this increase can be traced back to the United States Supreme Court's ruling in *Burlington Northern & Sante Fe Railway Company v. White*,[38] which broadened the standard for determining the type of conduct that constitutes retaliation under Title VII. The Court has continued to broaden the scope of retaliation protections available under anti-discrimination statutes. In three separate opinions from the October 2010 term alone, the Court held that (1) Title VII's antiretaliation provision protects a co-worker who is a relative or close associate of an employee;[39] (2) an employer may be held liable under the "cat's paw theory" of liability for discrimination perpetuated by an employee other than the primary decision-maker;[40] and (3) the FLSA's anti-retaliation provision protects written and oral complaints.[41]

II. Finding Ready Position—Developing a Robust Internal Compliance/Whistleblower System

In light of the various reforms, employers seeking a sound ready position have an incentive to adopt and implement a robust internal compliance/whistleblower system.[42] The primary reasons for adopting a robust whistleblower system include protecting the reputation of the business and the business reputation of both the directors and the CEO.[43] As the corporate scandals of the last decade illustrate, corporations and independent boards of directors cannot simply rely upon senior management for information about fraudulent behavior.[44] This empirical observation is buttressed by a 2007 PricewaterhouseCoopers ("PwC") survey—which observed that internal controls designed to detect fraud, alone, are insufficient.[45]

Thus, employers should have an effective system that allows employees to communicate up the chain and should create a corporate culture that inspires internal reporting. Internal compliance/whistleblower systems are not new. SOX historically required that public companies, whose securities are listed, establish an internal compliance program. But, after SOX, "many public companies merely adopted a 'paper' whistleblower policy . . . ."[46] These paper policies do not really provide the benefits sought by employers and actually may militate against the central finding noted in the PwC survey—that whistleblowers are one of the most effective sources for detecting and rooting out fraudulent activities.[47]

There are a number of core elements that should be included in a robust internal compliance/whistleblower system.[48] First, employers should provide training to all employees regarding the system on a regular and reoccurring basis. Confidentiality is also of paramount importance. All employers implementing a robust internal compliance/whistleblower system must create internal safeguards that, to the fullest extent possible, protect the identity of the whistleblower.[49] In addition, the recent legislative reforms provide an incentive for employers to create monetary awards to hedge against corporate bounty hunters. Rather than external reporting in the hopes of obtaining some piece of a large settlement (as noted above), employers should consider rewarding internal whistleblowers by creating and publicizing the potential to receive a substantial monetary award for disclosing fraudulent behavior *inside* the organization. For example, employers could offer a prospective whistleblower a comparable percentage—ten to thirty percent—of the money saved by the whistleblower's internal report.[50] It may well be difficult for any employer to compete with the astronomical bounties that are available under the Act or the FCA,[51] but for every employee who reports externally, there likely are many more employees who would prefer to report internally and maintain their belief that the organization is a good corporate

citizen.[52] Employers should also dedicate time and energy to determining how the robust system will be administered. Retaining outside counsel, whose engagement is limited to administering the system, may serve to both insulate an organization through the use of the attorney-client privilege and work product doctrine and provide legitimacy to the system in the eyes of the whistleblower.[53]

Although there are numerous benefits associated with a robust internal compliance/whistleblower system, there is a downside risk vis-à-vis workforce management. Even the most ardent advocates of a robust system recognize that certain employees may attempt to use the system as a shield—by raising baseless allegations in order to impede an otherwise legitimate employment termination or disciplinary process.[54] A robust internal system also raises the risk that employers will be forced to aggressively investigate every single allegation without any threshold considerations of materiality. Certainly, it is easy to dismiss these concerns as mere collateral damage associated with an effective compliance program. Yet, meritless claims can significantly burden employers by requiring the expenditure of considerable resources investigating the merits of the claim and by forcing managers to deal with unproductive and/or disruptive employees. Employers who adopt a robust system, however, are not completely helpless. As discussed below, many of the antiretaliation provisions found in the various federal statutes protecting whistleblowers permit employers to terminate a whistleblower if they have clear and convincing evidence that they would have terminated the employee notwithstanding their report. For instance, in *Giurovici v. Equinix, Inc.*,[55] the Board concluded that the employer established that a termination was backed by clear and convincing evidence where the record showed that the complainant had a documented decline in job performance and demonstrated instances of insubordination.[56] Likewise, in *Tides v. Boeing Company*,[57] the District Court held that the employer presented clear and convincing evidence supporting termination where two former employees disclosed confidential information to the media.[58] Therefore, traditional workforce management best practices—such as consistently enforcing workplace policies, documenting all performance related issues, and establishing policies to protect confidential information—take on greater importance when finding ready position relating to whistleblower issues.

III. Rallying Against the Corporate Bounty Hunter—Preparing for Parallel Investigations and Proceedings

As a general matter, employers must be prepared for three kinds of parallel proceedings when the whistle blows.[59]

First, employers must be prepared for investigations of an active whistleblower's allegations. Internally, this raises a number of considerations. For instance, employers must determine when and how to engage independent counsel. As discussed above, having dedicated counsel to administer the system is one means of preparing for the investigation. If dedicated counsel is not in place, retaining outside counsel that has not advised the independent board of directors may serve to provide a similar layer of privilege protections. Employers also must consider what type of documentary evidence needs to be compiled, and they must determine how to use the evidence strategically. Moreover, employers need to work diligently to determine the merits of the claim—both in an effort to identify and eliminate fraudulent behavior within the organization and to determine whether the report was submitted in an effort to impede an employee's termination.

Although employers need to respond to a whistleblower's allegation(s) promptly, the circumstances from the investigation at French car maker Renault AG serves as a case study for why employers must be cautious not to act too quickly. The investigation commenced after several top managers received an anonymous tip alleging that a senior executive negotiated a bribe. In what observers view as a snap judgment, Renault terminated the executive and two other managers following a brief four-month investigation of the allegations. Despite the professed innocence of the employees, Renault's CEO publicly stated that the company possessed evidence against them. But the company ultimately failed to uncover any evidence against the dismissed employees—either before or following their termination. Although the company is said to be preparing to exonerate employees, one can reasonably assume that the negative repercussions of this snap judgment are just beginning to emerge.[60]

Externally, employers must prepare for investigations by administrative agencies and be strategic about a number of issues raised by the investigation. The agency's investigation findings could, potentially, serve as the basis for whether or not the employer is liable for fraudulent activity occurring within the organization. The findings may also serve as a key piece of evidence in any litigation regarding the propriety of an employer's subsequent termination of the whistleblower.[61]

Second, employers need to prepare for the possibility of an administrative investigation into claims of retaliation.[62] Although the enforcement agency and procedures will vary by statute, the procedures utilized by the Department of Labor ("DOL")—the main federal enforcement agency—provide a basic framework. For the most part, the DOL has delegated the authority to investigate whistleblower retaliation complaints under the statutes it enforces to the Occupational Safety and Health Administration ("OSHA").[63] Each law OSHA administers generally requires that a complaint be filed within a certain number of days of the alleged retaliation.[64] Thereafter, OSHA generally must attempt to complete its investigation within thirty days of receiving the complaint.[65] OSHA utilizes a common prima facie framework for evaluating liability.[66] Should OSHA determine that a violation has occurred, it will issue a determination and preliminary order for relief that is subject to de novo review.[67] In addition, employers must consider that certain statutes, such as SOX, permit a whistleblower to terminate the investigation and file a civil action in federal court if a final decision is not rendered within a certain number of days.[68]

A key component of OSHA's investigatory function is acting as a gatekeeper to dispose of meritless complaints. To that end, if the whistleblower fails to establish a prima facie case, then the complaint will be dismissed without investigation.[69] Even if a whistleblower establishes a prima facie case, employers still possess an alternative. OSHA must terminate an investigation "if the employer demonstrates, by

clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior."[70]

Third, employers must prepare for the possibility of parallel civil and criminal proceedings generating a plethora of complex legal and practical considerations. Managing negative publicity, liaising with prosecutors *and* investigators, and the possibility of being confronted with formal civil and judicial proceedings can overwhelm any organization—regardless of size or staffing. Employers also need to give serious consideration to how they will handle the matter from a public relations perspective. Investigating agencies, such as the SEC or Department of Justice, will likely issue a press release regarding charges or complaints they file against an employer.[71] Therefore, employers should be prepared to respond in a manner that minimizes the impact of the agency's release.

As whistleblower claims continue to focus on potential monetary windfalls to employees and former employees and employment discrimination/retaliation, a reactionary approach by employers becomes a less viable option. Rather, employers should be proactive in detecting and rooting out fraudulent behavior within the organization, while also guarding against any negative reaction and/or employment fallout to the whistleblowing employee.[72]

Endnotes

1 *See, e.g.,* Robert C. Blume et al., *2010 Year-End False Claims Act Update: Part 1*, Westlaw News & Insight (BETA)—National Litigation, *available at* http://westlawnews.thomson.com/National_Litigation/Insight/2011/03_-_March/2010_year-end_False_Claims_Act_update___Part_1/ (discussing sharp and sudden rise in False Claims Act litigation in 2010) (last visited Apr. 11, 2011).

2 Pub. L. No. 111-203 (2010).

3 Eamon Javers, *Whistleblowers: The New Bounty Hunters—Using Greed—and Lots of Cash—to Fight Greed*, CNBC, Feb. 8, 2011, *available at* http://www.cnbc.com/id/41257939.

4 *See* SECSnitch.com, http://www.secsnitch.com/ (listing theaters in New York displaying commercial along with the movie Wall Street 2—Money Never Sleeps) (last visited Apr. 10, 2011).

5 Stephen M. Kohn, The Whistleblower's Handbook: A Step-by-Step Guide to Doing What's Right and Protecting Yourself (2011).

6 *Whistleblower Twice Over: First Lilly, Now AstraZeneca*, WSJ.com, Apr. 28, 2010, *available at* http://blogs.wsj.com/health/2010/04/28/whistleblower-twice-over-first-lilly-now-astrazeneca/tab/print/.

7 *Id*.

8 Peter Loftus, *Whistleblower's Long Journey—Glaxo Manager's Discovery of Plant Lapses in 2002 Led to Her $96 Million Payout*, Wall St. J., Oct. 28, 2010, at B1.

9 *Id*.

10 *See* Van Asdale v. Int'l Game Tech., No. 3:04-CV-0703-RAM, Docket Entry No. 316-317, 321 (D. Nev. Feb. 8, 2011) (providing jury verdicts and judgment). Among the potential lessons learned from *Van Asdale* is the reminder that the timing of an adverse action may provide an inference of discrimination. *See* Van Asdale v. Int'l Game Tech., 577 F.3d 989, 1003-05 (9th Cir. 2009) (reversing summary judgment and remanding where employees' termination in close proximity to reporting potential fraud raised a genuine issue of material fact regarding whether their protected activity was a contributing factor to their terminations).

11 "Ready position" is a tennis term of art describing the sport's fundamental position that prepares a player for their shot, whether it be a return of serve, a groundstroke, or a volley. BBCSport.com, Tennis—Skills, http://news.bbc.co.uk/sport2/hi/tennis/skills/4230606.stm (last visited Apr. 12, 2011). "If your ready position is wrong, then you have little chance with the rest of the shot." *Id*.

12 The Dodd-Frank Act was signed into law on July 21, 2010. *See supra* note 2. Whistleblowers may be entitled to an award for information provided on or after July 22, 2010. U.S. Securities and Exchange Commission, Dodd-Frank Spotlight—Whistleblower Program, http://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml ("A whistleblower may be eligible to receive an award for original information provided to the Commission on or after July 22, 2010, but before the whistleblower rules become effective, so long as the whistleblower complies with all such rules once effective.") (last visited Apr. 11, 2011). The final regulations implementing the Act's whistleblower provisions are due on April 21, 2011. *See* Pub. L. No. 111-203, § 924(a) (ordering final regulations to be issued "not later than 270 days after the date of enactment of this Act"); Dodd-Frank Spotlight—Whistleblower Program, *supra* (noting that regulations implementing Dodd-Frank's whistleblower provisions "are required to be adopted no later than April 21, 2011") (last visited Apr. 11, 2011).

13 The Act provides a similar set of protections and incentive to whistleblowers who report violations of the Commodities Exchange Act to the Commodities Futures Commission. Pub. L. No. 111-203, § 748. With the exception of a shorter statute of limitations—two years—the protections and incentives essentially mirror those provided to whistleblowers who provide original information to the SEC under § 922. *Id*.

14 Pub. L. No. 111-203, § 922. Original information means that the information

> (A) is derived from the independent knowledge or analysis of a whistleblower; (B) is not known to the Commission from any other source, unless the whistleblower is the original source of the information; and (C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

Id.

15 Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, 17 C.F.R. Parts 240 and 249, Release No. 34-63237, at § 240.21F-5 (Nov. 3, 2010) [hereinafter Proposed Rules].

16 *Id*. at § 240.21F-6.

17 SEC Proposes New Whistleblower Program Under Dodd-Frank Act, Release 2010-213, *available at* http://www.sec.gov/news/press/2010/2010-213.htm (last visited Apr. 12, 2011). The provisions include allowing a whistleblower to preserve their "place in line" by treating an employee as a whistleblower under the SEC program as of the date that they report information internally—provided that the employee provides the same information to the SEC within ninety days—and awarding higher percentage awards to employees who first report through "effective company compliance programs." *Id*.

18 Dodd-Frank Spotlight—Whistleblower Program, *supra* note 12 (discussing controlling nature of proposed rules) (last visited Apr. 11, 2011).

19 Specifically, the Act provides:

> No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower— (i) in providing information to the Commission in accordance with this section; (ii) in initiating, testifying in, or assisting in any investigation or judicial or administrative action of the Commission based upon or related to such information; or (iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a et seq.), including section 10A(m) of such Act (15 U.S.C. 78f(m)), section 1513(e) of title 18, United States Code, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

Pub. L. No. 111-203, § 922.

20 *Id*.

21 Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 123-25 (2009) (noting that employment discrimination claims continue to be more likely to go to trial than non-job claims and categorizing increase in jury trial claims as "dramatic" following 1991 addition of a right to jury trial); Martha Halvordson, *Employment Arbitration: A Closer Look*, 64 J. Mo. B. 174, 174 (Jul.-Aug. 2008) (observing that number of discrimination charges filed "skyrocketed" after jury trials added to employment discrimination causes of action).

22 Proposed Rules, *supra* note 15, at § 240.21F-2.

23 Pub. L. No. 111-203, § 922. For purposes of SOX's whistleblower protection provision, the statute generally protects an employee who provides information regarding any conduct "which the employee *reasonably believes*" constitutes a violation of the Securities Exchange Act. 18 U.S.C. § 1514A(a) (emphasis added).

24 Pub. L. No. 111-203, § 922.

25 *See supra* note 21 and accompanying text.

26 Pub. L. No. 111-203, § 922. Employers also need to consider whether actions they undertake may serve to toll the statute of limitations. *See* Hyman v. KD Resources, No. 09-076, 2010 DOLSOX LEXIS 27, at *17-21 (Arb. Mar. 31, 2010) (holding that *pro se* complainant's otherwise untimely filing tolled where employer led complainant to "reasonably believe that he would be returned to his former employment or alternatively given a one-year consulting contract, that he would be financially compensated for having been wrongfully terminated (including payment of back salary), and that [the employer] would resolve the SOX compliance issues that [complainant] had raised").

27 Pub. L. No. 111-203, § 922.

28 Halvordson, *supra* note 21, at 181.

29 ARB Case No. 08-032, ALJ Case No. 2005-SOX-015 (Mar. 31, 2008).

30 *Id*.

31 *Id*.; *see also* Jay P. Lechner, *Sarbanes-Oxley Whistleblower Provisions: A Study in Statutory Construction*, Engage, Oct. 2007, at 121-23 (discussing divergent views of whether SOX's retaliation protections extended to employees of a subsidiary).

32 *Johnson*, ARB Case No. 08-032, ALJ Case No. 2005-SOX-015.

33 Pub. L. No. 111-203, § 929A. Prior to the Dodd-Frank Act, publicly-traded company was defined under SOX as a "company with a class of securities registered under section 12 of the Securities Exchange Act of 1934. . . ., or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934. . . ."

34 31 U.S.C. § 3729(a)(1). On the civil side, the FCA permits a private person ("relator") to bring a civil action on behalf of the United States, where the relator has information that the named defendant has knowingly submitted or caused the submission of false or fraudulent claims to the United States. 31 U.S.C. § 3730(b)(1).

35 John T. Boese, Civil False Claims and Qui Tam Actions § 1.09-.10 (4th ed. 2011).

36 *Id*. For instance, the 2009 amendments eliminated defenses developed by courts and the 2010 amendments expanded the original source exception. *Id*. In addition, the Dodd-Frank Act expanded the FCA's retaliation protections by supplying a uniform three-year statute of limitations period and by extending the protections to those associated with a whistleblower in furtherance of an FCA action or who participate in an effort to stop a violation of the FCA. Pub. L. No. 111-203, § 1079A.

37 Jeff Blumenthal, *EEOC Complaints Spike: Claims Rise in Nation, Phila. Area*, Phila. Bus. J., Mar. 11, 2011, *available at* http://www.bizjournals.com/philadelphia/print-edition/2011/03/11/eeoc-complaints-spike.html (last visited Apr. 11, 2011).

38 548 U.S. 53 (2006).

39 Thompson v. North American Stainless, 131 S. Ct. 863 (2011).

40 Staub v. Proctor Hospital, _ U.S. _ (Mar. 1, 2011).

41 Kasten v. Saint-Gobain Performance Plastics Corp., _ U.S. _ (Mar. 22, 2011).

42 For a complete discussion of the advantages and disadvantages of a robust whistleblower system, see generally Frederick D. Lipman, Incentives, Disincentives and Business Protection Strategies (forthcoming J. Wiley & Sons 2011) (manuscript on file with authors).

43 *See generally id*. (discussing reasons for adopting a robust whistleblower system).

44 *See id*. at ch. 6 (discussing independent board of directors' inability to rely solely upon senior management for information about fraudulent behavior).

45 PriceWaterhouseCoopers, The 4th Biennial Global Economic Crime Survey—Economic Crime: People, Culture and Controls 10-13 (2007) [hereinafter PwC Survey]. The PwC Survey is based on a survey of corporate executives at more than 5400 companies in over forty countries. *Id*. at a3.

46 Lipman, *supra* note 42, at ch. 7.

47 PwC Survey, *supra* note 45, at 22-24.

48 For a comprehensive list of best practices, see Lipman, *supra* note 42, at ch. 7; PwC Survey, *supra* note 45, at 23.

49 *See* Lipman, *supra* note 42, at ch. 7 (discussing ways in which an employer may preserve confidentiality, such as by indemnifying a legitimate whistleblower up to a reasonable limit or forming an entity to protect the whistleblower's identity).

50 According to a survey by the Society for Human Resource Management (SHRM), some employers have started offering incentives to employees to encourage internal reporting. *See* Dori Meinert, *Whistleblowers: Threat or Asset?—Be Prepared Lest Lawsuits Proliferate*, HR Mag., Apr. 2011, at 32 (reporting SHRM poll finding that three percent of respondent employers have developed internal incentive programs).

51 See *supra* notes 6-10 and accompanying text for a discussion of extraordinary recoveries recently secured under the FCA.

52 *Glaxo Whistle-Blower Lawsuit: Bad Medicine*, CBSNews.com, Jan. 2, 2011, *available at* http://www.cbsnews.com/stories/2010/12/29/60minutes/main7195247_page4.shtml?tag=contentMain;contentBody (noting that following her termination Ms. Eckard was "[s]till worried about patient safety, [and, therefore, she] took the same information she had sent to her Glaxo bosses and turned it over to the FDA") (last visited Apr. 11, 2011). In fact, recent surveys show that almost ninety percent of eventual whistleblowers attempt to raise their concerns internally before going outside of the organization. *See* Meinert, *supra* note 50, at 30 (discussing surveys conducted by the National Whistleblowers Center and Ethics Resource Center). Furthermore, researchers in the health care industry have found that whistleblowers are motivated by altruism, public safety, justice, self-preservation, and—most importantly—integrity. *Id*. at 28.

53 Lipman, *supra* note 42, at ch. 7.

54 *Id*. at ch. 6.

55 No. 07-027, 2008 DOL Ad. Rev. Bd. LEXIS 180 (DOL Ad. Rev. Bd. Sept. 30, 2008).

56 *See id*. at *17-21 (discussing employer's compliance with "clear and convincing" affirmative defense despite complainant's inability to establish that he engaged in a protected activity under SOX).

57 No. C08-1601-JCC, 2010 U.S. Dist. LEXIS 11282 (W.D. Wash. Feb. 9, 2010).

58 *See id.* at *5-11 (holding that disclosures to media are not protected SOX activity and that employer established by clear and convincing evidence that employees dismissal for leaking confidential documents to media was not pretextual).

59 Daniel P. Westman & Nancy M. Modesitt, Whistleblowing—The Law of Retaliatory Discharge Ch. 9.VI (2d ed. 2004 & Supp. 2010).

60 Ashby Jones & Joann S. Lublin, *Firms Revisit Whistleblowing*, Wall St. J., Mar. 14, 2011, at B5.

61 *See* Westman & Modesitt, *supra* note 59, at ch. 9.VI (2d ed. 2004 & Supp. 2010) (illustrating how findings of administrative investigation could serve as key piece of evidence regarding whether a whistleblower reported an alleged violation in good faith).

62 There are a multitude of federal and state statutes that provide antiretaliation protections for employees that engage in whistleblowing activities. *See id*. at Appendix B-C (cataloging state and federal statutes protecting whistleblowers employed in the private sector).

63 OSHA's Whistleblower Investigations Manual setting forth the procedures governing OSHA investigations of retaliation under each statute it administers is available at http://63.234.227.130/pls/oshaweb/owadisp.show_document?p_table=DIRECTIVES&p_id=3016 [hereinafter OSHA Whistleblower Manual].

64 For instance, a complaint under the Surface Transportation Assistance Act, 49 USC § 31105, may be filed by telephone or in writing within 180 days of the alleged retaliation. OSHA Whistleblower Manual, at ch. 10. Likewise, a complaint under SOX must be filed *in writing* within 180 days of the alleged retaliation. *See* OSHA Whistleblower Manual, at ch. 14 (providing general investigation procedure); Dodd-Frank Act § 922(c)(1)(A)(i), amending 18 U.S.C. § 1514A(b)(2)(D) (amending statute of limitations under SOX) (emphasis added).

65 Certain statutes, such as SOX, provide a sixty-day investigation period.

66 With respect to the whistleblower's prima facie case, OSHA's investigation must reveal (1) that the employee engaged in protected activity; (2) that the employer knew about the protected activity; (3) that the employer took an adverse action; and (4) that the protected activity was a contributing factor in the decision to take the adverse action. Westman & Modesitt, *supra* note 59, at 230.

67 *Id*. at 242-43. Relief may include reinstatement, back pay, and fees and costs. *Id*. at 242. However, courts continue to recognize that reinstatement may be impractical. *See* Solis v. Tenn. Commerce Bancorp, Inc., No. 10-5602, 2010 U.S. App. LEXIS 15302, at *3 (6th Cir. May 25, 2010) (concluding that harm to company if forced to reinstate outweighed harm to former employee).

68 *See, e.g.*, Stone v. Instrumentation Lab. Co., 591 F.3d 239, 240, 249 (4th Cir. 2009) (holding in case of first impression that whistleblower entitled to seek de novo review in federal court under SOX unless DOL issues a final order within 180 days of administrative complaint filing); OSHA Fact Sheet—Filing Whistleblower Complaints under the Sarbanes-Oxley Act, *available at* www.osha.gov/Publications/osha-factsheet-sox-act.pdf ("If a final agency order is not issued within 180 days from the date the employee's complaint is filed, then the employee may file it in the appropriate United States district court.") (last visited Apr. 11, 2011).

69 29 C.F.R. § 1980.104(b).

70 *See, e.g.*, 49 U.S.C. § 42121(b)(ii) (discussing investigation under AIR21). See *supra* notes 55-58 and accompanying text for an example of an employer satisfying clear and convincing evidence standard.

71 *See, e.g.*, SEC Charges Johnson & Johnson with Foreign Bribery, Exchange Act Release No. 2011-87 (Apr. 7, 2011), *available at* http://www.sec.gov/news/press/2011/2011-87.htm (announcing SEC charges under the Foreign Corrupt Practices Act ("FCPA")); Press Release, U.S. Department of Justice, United States Joins Suit Against Community Health Systems Inc. and Three of Its Hospitals in New Mexico (Mar. 6, 2009), *available at* http://www.justice.gov/opa/pr/2009/March/09-civ-200.html (announcing DOJ intervention in FCA suit).

72 On May 25, 2011, the SEC adopted the final rules for implementing the whistleblower provisions of Section 21F of the Securities Exchange Act of 1934. Although the final rules contain several revisions to the proposed rules discussed in this article, the revisions are, for the most part, de minimis. For example, the final rules continue to encourage—but still do not require—a whistleblower to report possible violations of federal securities laws internally before contacting the SEC directly. In addition, even though the final rules extend the time period in which a whistleblower may preserve their "place in line" from ninety to 120 days, the modest increase will continue to place significant pressure on an employer's ability to conduct an effective and comprehensive internal investigation. With respect to the definition of whistleblower and the antiretaliation protections of the Act, the final rules replace the term "potential violation" with "possible violation" that "has occurred, is ongoing, or is about to occur" and add a "reasonable belief" requirement. *Compare* notes 12-22 and accompanying text.

Criminal Law & Procedure

The Evolution of Wiretapping

*By Paul Rosenzweig**

In 2010, the government of India approached Research In Motion (RIM), the manufacturer of Blackberry devices, with a demand. India wanted to monitor the encrypted e-mails and Blackberry Messages (a form of internet chat) that passed across RIM's servers between corporate clients. And it wanted help in decrypting the encrypted messages. This was, the Indian government argued, essential to allow it to combat terrorism. And, they added, if you don't give us this access, then we'll pull your wireless license and close down Blackberry in India. Faced with the loss of more than one million Indian corporate customers, RIM compromised—it found a way to share with the Indian government where to find the encrypted messages the government wanted—in effect identifying the servers where the information originated—without actually decrypting the messages itself.[1]

In making this arrangement (and, by all reports, placating the Indian government), RIM nicely illustrated two distinct, yet linked, issues that relate to the security of cyber communications, and are deeply imbedded in all aspects of the conflict in cyberspace. One is the issue of encryption—when and how communications and information can be encoded and decoded so that only the people you want to read the information can have access to it. The other is wiretapping—that is, whether and under what rules someone can intercept messages in transit and divert or copy them to their own purposes. The linkage between the two seems apparent—wiretapping a message you cannot decrypt still conceals the content of the message, and even unencrypted information is safe if the transmission channels are absolutely secure. Those engaged in a conflict in cyberspace want both capabilities—to intercept/divert information and to decode it so that they can read its contents.

And therein hangs a tale. India is not alone in its interest in being able to read people's encrypted mail. Other governments from Dubai and China to the United States have the same interests—for good or for ill. Indeed, late in 2010 the United States government disclosed plans to expand its wiretapping laws to apply to encrypted e-mail transmitters like BlackBerry, social networking websites like Facebook and software that allows direct "peer to peer" messaging like Skype.[2] How well (or poorly) a nation achieves this objective bears directly on its ability to successfully win conflicts of espionage, crime, and war in cyberspace—and also on how great or little intrusion the government makes into the communications of its private citizens.

* * * * *

The Internet is a means, essentially, of transmitting information across large distances at a ridiculously rapid pace. All of the various types of attacks and intrusions that have become commonplace on the Internet today are, fundamentally, based upon the ability to corrupt the flow of accurate information—whether by stealing a portion of it for misuse, disrupting the flow so that accurate information does not arrive in a timely manner, or inserting false information into an otherwise secure stream of data. If the confidentiality and integrity of the information being transmitted cannot be relied upon, then the system or network that acts based upon that data is vulnerable. That, in a nutshell, is the core of much of cyber warfare, cyber crime, and cyber espionage—the ability to destroy or corrupt the flow of information from your enemies through intrusion or attack—and the collateral real-world effects of that destruction.

What if you could make your data incorruptible (or, slightly less useful but almost as good, if you could make your data tamper-evident, so that any corruption or interception was known to you)? If your goal is to protect your own information from attack, there are a number of ways you might achieve that objective. One of the earliest defensive measures taken in cyberspace was a method as old as human history—data and information were protected by encryption.

But this expansion of cryptographic capabilities to protect cyber networks comes with an uncertain cost to order and governance. Advances in cryptographic technology have made it increasingly difficult for individuals to "crack" a code. Code breaking is as old as code making, naturally. But as the run of technology has played out encryption increasingly has an advantage over decryption, and recent advances have brought us to the point where decryption can, in some cases, be effectively impossible. This has the positive benefit of allowing legitimate users to protect their lawful secrets—but it has the inevitable effect of distributing a technology that can protect malevolent uses of the Internet. If the United States government can encrypt its data, so can China, or the Russian mob, or a Mexican drug cartel.

An alternative strategy that works in concert with encryption is to make your information transmission immune to interception. Here, too, the changes wrought by Internet technology have made interception more difficult and enhanced the security of communications. In the world of telephone communications, for example, intercepting a communication was as simple as attaching two alligator clips to the right wire—hence the word "wiretapping." Communications through the Internet are wholly different: the information being transmitted is broken up into small "packets" that are separately transmitted along different routes and then reassembled when they arrive at their destination. This disassembly of the data makes effective interception appreciably more difficult.

These two technological developments have led to controversy over critical policy issues that bear on cyber conflicts today. In the wiretapping realm, can the government require communications transmission companies to assure the

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government access to communications? In other words, can they require internet service providers (ISPs) to provide them access to the data as it transits the net?

And if they can, under what rules would these communications be accessed? At the whim of a government? Or only with an appropriate court order? Under what sorts of standards?

I. Wiretapping—Yesterday and Today

Pre-Internet, wiretapping was an easy physical task. Early telephony worked by connecting two people who wished to communicate through a single, continuous wire (typically made of copper). The image that captures this concept most readily is of a telephone operator moving plugs around on a board and, by that effort, physically establishing an end-to-end wire connection between the two speakers.

That made wiretapping easy. All that was required was attaching a wire to a terminal post and then hooking the connection up to a tape recorder. The interception didn't even need to be made at the central Publicly Switched Telephone Network (PSTN) switching station. Any place on the line would do. And, there was only one telephone company, AT&T, and only one system, so coordination with the PSTN was easy if it was authorized.

Things became a little more complicated when AT&T broke up into the "Baby Bells," but the real challenge came with the development of new communications technologies. As microwave, FM, and fiber optic technologies were introduced, the technical challenges of intercepting communications increased as well.[3] The technological difficulty in intercepting communications grew exponentially in a relatively short period of time.

Today the problem is even more complex—in addition to cellular telephones, we now have instant messaging and email and text messaging for written communications. If you want to communicate by voice, you can use Skype (a web-based video conferencing system), or Google Chat (an embedded browser-based chat program). Businesses use web-teleconference tools for teleconferences, and many people (particularly in the younger generation) communicate while present in virtual worlds through their "avatars." Twitter and Facebook allow instant communication between large groups of people.

In short, we have created a massive number of ways in which one can communicate.[4] When combined with the packet-switching nature of Internet web transmissions, and the development of peer-to-peer networks (that completely do away with centralized servers), the centralized PSTN network has become a dodo. And the Internet Engineering Task Force (the organization that sets standards for operation of the Internet) has rejected requests to mandate an interception capability within the architecture of the Internet communications protocols.[5] With these changes, the laws and policies for authorized wiretapping have, effectively, become obsolete.

Contemporary Communications Systems

Skype
X-fire
Google Chat
Google Apps
Go-To-Meeting
Quick Connect
Reddit
Tumblr
Facebook
My Space
Second Life
EVE Online
Chat Anywhere
Napster
Grokster

II. Wiretapping and Changing Technology

The law enforcement and intelligence communities face two challenges in administering wiretap laws in the age of the Internet—one of law and one of technology. The legal issue is relatively benign and, in some ways, unencumbered by technical complexity, though highly controversial nonetheless. We need a series of laws that define when and under what circumstances the government may lawfully intercept a communication. For the most part the authorization issues are ones involving the updating of existing authorities to apply explicitly to new technologies. The technical issue is far harder to solve—precisely how can the desired wiretap be achieved?

Legal Authorization—In *Katz v. United States*,[6] the Supreme Court held that the Fourth Amendment applied to electronic communications, and that a warrant was required for law enforcement-related electronic surveillance conducted in the United States. *Katz* was codified in the Omnibus Crime Control and Safe Streets Act of 1968, with particular requirements for such interceptions laid down in Title III.[7] In general, Title III prohibits the interception of "wire, oral, or electronic communications" by government agencies without a warrant and regulates the disclosure and use of authorized intercepted communications by investigative and law enforcement officers.

Reflecting its pre-Internet origins, Title III originally covered only "wire" and "oral" communication. It has since been modified to take account of technological changes and now covers all forms of electronic communication (including, for example, e-mails).[8] The law also regulates the use of "pen register" and "trap and trace" devices (that is, devices designed to capture the "addressing information" of a call, such as the dialing information of incoming and outgoing phone calls). In general, this "non-content" information may be collected without a warrant or showing of probable cause, unlike the "content" portions of a message.

As a core part of its structure, Title III also incorporates certain privacy and civil liberties protections. It permits issuance of an interception warrant only upon a judicial finding of probable cause to believe that the interception will reveal evidence that "an individual is committing, has committed, or is about to commit" certain particular criminal offenses.[9] Title III also has minimization requirements—that is, it requires the adoption of procedures to minimize the acquisition and retention of non-publicly available information concerning

non-consenting U.S. persons who are not the targets of surveillance, unless such person's identity is necessary to understand the law enforcement information or assess its importance. In other words, if while investigating a terrorist case, the wiretap intercepts a conversation with a doctor, or a lover, or a pizza salesman that is not relevant to the investigation, that conversation must be "minimized," and information not meeting that standard may not be disseminated.

Beyond this, the use of Title III warrants is subject to periodic congressional review and oversight. Most significantly, electronic evidence collected in violation of Title III may not be used as evidence in a criminal case.

As Title III applies in the law enforcement context, the Foreign Intelligence Surveillance Act (FISA) authorizes the collection of communications for certain intelligence purposes. Passed in 1978, the Act creates the mechanism by which such orders permitting the conduct of electronic surveillance could be obtained from a specialized court—the Foreign Intelligence Surveillance Court (FISC). This court was, initially, authorized to issue orders for targeting electronic communications in the U.S. of both U.S. and non-U.S. persons based on a showing of probable cause of clandestine intelligence activities, sabotage, or terrorist activities, on behalf of a foreign power. The law was subsequently expanded to authorize the court to issue warrants for physical searches (1994), the use of pen registers/trap and traces (1999), and the collection of business records (1999).

To obtain a FISC order authorizing surveillance, the government must meet the same "probable cause" standard as in a criminal case: it must make a showing of probable cause to believe that the target of the electronic surveillance is a foreign power or an agent of a foreign power. And, as with Title III, the law imposes minimization obligations on the agency intercepting the communications.[10]

Technical Capacity—While amending the laws authorizing wiretaps to accommodate changes in technology has been, for the most part, a ministerial exercise of amending legislation, the same cannot be said of maintaining the technical capacity to tap into the ever-changing stream of communications.

Congress first attempted to address this problem through the Communications Assistance for Law Enforcement Act, known as CALEA.[11] CALEA's purpose was to insure that law enforcement and the intelligence agencies would not be left behind the technology curve, by requiring telecommunications providers to build the ability to intercept communications into their evolving communications systems.

CALEA dealt with a technically feasible requirement. Initially, many digital telephone systems did not have interception capabilities built in.[12] CALEA required providers to change how they built their telecommunications systems so that they had that capacity—an effort that could be achieved, generally, without interfering with subscriber services. (As an aside, CALEA also provided for a federal monetary subsidy to the telecommunications providers to pay for the changeover.)

As drafted in 1994, CALEA's requirements were applicable only to facilities-based telecommunications providers—that is, companies who actually owned the lines and equipment used for the PSTN and Internet. "Information services providers" (in other words, those who provide e-mail, instant messaging, chat, and other communications platforms that are not dependent on traditional telecommunications) were excluded, at least in part because those forms of communication were still in their infancy and of relatively little importance.[13]

Finally, and perhaps most importantly, CALEA did not say that telecommunications providers had to give government a way of decrypting encrypted messages that were put on its network for transmission. A telecommunications provider only had to decrypt messages if it provided the encryption services itself. So if an individual independently used encryption at the origin of the message, all that CALEA required is that the telecommunications provider should have a means of intercepting the encrypted message when authorized to do so.

III. The Wiretapping Problem Today

The problem today is two-fold: Cyber criminals, cyber spies, and cyber warriors are increasingly migrating to alternative communications systems—ones like Skype and virtual worlds that are completely disconnected from the traditional PTSN networks covered by CALEA. And they are increasingly using encryption technology that prevents law enforcement, counter-espionage, and counter-terrorism experts from having the ability to listen in on communications.[14] On the wiretapping front the problems are, again, both technical and legal.

Technologically, the distributed nature makes true interception capabilities extremely difficult. In a peer-to-peer network there is no centralized switching point. And in a packet switching system where the message is broken in many parts, there is no place on the network where the whole message is compiled, save at the two end points. While peer-to peer systems can be used for illegal activity (e.g. illegal file sharing),[15] they are also an integral part of legitimate file-sharing activities.[16]

The government must use sampling techniques to intercept portions of a message and then, when a problematic message is encountered, use sophisticated techniques to reassemble the entire message (often by arranging for the whole message to be redirected to a government endpoint). The FBI developed such a system in the late 1990s, called Carnivore.[17] It was designed to "sniff" packets of information for targeted messages. When the program became public, the uproar over this sort of interception technique forced the FBI to end the program.

It is said that the National Security Agency (NSA) uses a packet sniffing system, called Echelon, for intercepting foreign communications traffic that is significantly more effective than Carnivore ever was when deployed domestically.[18] Indeed, according to the *New York Times*, the Echelon system was at the core of the NSA's post-9/11 domestic surveillance system. [19] While little is publicly known about the capacity of the Echelon system, one observer (an EU Parliamentary investigation) has estimated that the system could intercept three million faxes, telephone calls, or e-mails per minute.[20]

In order for a system like Carnivore or Echelon to work, however, the routing system must insure either that traffic is routed to the sniffer along the way or that the sniffer is physically located between the two endpoints of the communication.

Therein lies the problem—many of the peer-to-peer systems are not configured to route traffic to law enforcement sniffers.

IV. Changing Law—Addressing New Challenges

To address these problems, the U.S. government has announced its intent to seek an amendment to CALEA. According to public reports, the government would seek to extend CALEA's wiretapping requirements for traditional telecommunications providers to digital communications technologies. Doing so would, according to the government, close a growing gap in existing surveillance capabilities that increasingly places criminal or espionage activity behind a veil that the government cannot pierce.

The proposed changes would have three components: 1) expansion of CALEA's decryption requirement to all communications service providers who give their users an ability to encrypt their messages;[21] 2) a requirement that foreign-based service providers doing business in the United States have a domestic office to which the government may go where interceptions can take place; and 3) apparently, a requirement that providers of peer-to-peer communications systems (like Skype) alter their software to allow interception of distributed communications. The government, speaking through Valerie Caproni, the General Counsel for the FBI, has argued that these proposed changes (which are expected to be the subject of legislative consideration in the coming year) would not give additional wiretapping authority to law enforcement officials, but simply extend existing authority "in order to protect the public safety and national security."[22]

The government's proposal poses any number of challenging legal and policy issues that will need to be addressed when (or if) Congress gets around to considering the question (some of these are issues unique to American consideration, others will be repeated globally).

The principal legal issues will, as before, involve authorization rules and standards for operation. Presumably, if the government is to be taken at its word, it will be seeking no greater interception authority than exists today for wire communications—routinized access to non-content "header information" joined with a probable cause standard for access to "content."

In some conceptions, the CALEA expansion might also implicate the Fifth Amendment protection against self-incrimination. Imagine an individual who encrypts messages he sends across the Internet. The courts have yet to determine whether or not an effort to compel that individual to disclose the decryption key constitutes a violation of his Fifth Amendment privilege. In general, the answer to the question will turn on whether disclosing the decryption key is thought of more like the production of a physical object (such as the physical key to a lock box), which may be compelled, or like the production of a person's mental conceptions (such as the memorized combination to a safe), which may not be.[23]

These Fifth Amendment considerations are likely to be of limited applicability. Even in many peer-to-peer applications (like Skype), the encryption keys are held by a centralized provider who uses the user-generated keys to enable encrypted communications from a variety of different platforms where the user might log in. In effect, to make the system more convenient, the user allows a third-party coordinator (here, Skype) to have access to the key. In doing so, Fifth Amendment protections are likely waived.

At bottom, however, the issues raised by the nascent proposal are more policy questions than legal questions. Consider a short list of these sorts of questions:

Is implementation of an expanded CALEA even technically feasible in all cases? How will software developers who are providing peer-to-peer services provide access to communications when there is no centralized point in the network through which the data will need to pass? Presumably this will require developers to reconfigure their software products in ways that permit the interception and decryption.

Think, for example, of an open-platform encryption program like TrueCrypt, where users retain sole possession of their own generated encryption keys. Here, the users might retain Fifth Amendment rights against self-incrimination that would protect them against the compelled disclosure of their keys—but could CALEA be amended to require that software commercial vendors who manufacture such programs include decryption back-doors? The answer is unclear.

And if they could, what then? Depending on how broad the modified CALEA requirements are, the economic costs of modifying existing platforms could run into the hundreds of millions, if not billions, of dollars. When CALEA was first implemented, the federal government made funds available to offset the costs of the upgrades.[24] Would it do so again, and to what degree?

More significantly, what would be the security implications of requiring interception capabilities in new technologies? Building in these capabilities would necessarily introduce potential vulnerabilities that could be exploited, not only by those who would have authorized access, but by hackers who found a way to crack the capabilities of the protection itself.[25]

And, finally, there are issues to be considered in connection with international perceptions of American conduct. In recent months, there has been a spate of efforts by various foreign governments to secure access to Internet communications.[26] It is difficult, if not impossible, for the United States to oppose such efforts in international fora when its own policy favors expansions of interception capabilities domestically. Indeed, our stated public policy favors Internet freedom, in large part as a way of energizing democracy movements around the world[27]—a policy that is difficult to square with a domestic move toward greater governmental interception capabilities.

Conclusion

Technology has evolved far faster than the law. Existing wiretapping laws will, at a minimum, need to be updated to reflect the changing architecture of distributed communications. More fundamentally, we will need to consider whether (or not) to mandate the development of technology in a particular direction for the purposes of enabling governmental activities. Doing so will surely have positive investigative benefits for the government, but there will undoubtedly be collateral legal, economic, and political ramifications of such a requirement.

Endnotes

1 Vikas Bajaj, *India May Be Near Resolution of BlackBerry Dispute*, N.Y. Times, Aug. 17, 2010, *available at* http://www.nytimes.com/2010/08/18/business/global/18rim.html.

2 Charlie Savage, *U.S. Wants to Make It Easier to Wiretap the Internet*, N.Y. Times, Sept. 27, 2010, *available at* http://www.nytimes.com/2010/09/27/us/27wiretap.html?_r=2&hp.

3 Jeffrey Yeates, *CALEA and the RIPA: the U.S. and the U.K. Responses to Wiretapping in an Increasingly Wireless World*, 12 Alb. L.J. Sci. & Tech. 125, 135-36 (2001).

4 In the film He's Just Not That Into You (New Line Cinema 2009), one of the characters, Mary (played by Drew Barrymore), bemoans the proliferation of communications methods: "I had this guy leave me a voicemail at work, so I called him at home, and then he e-mailed me to my BlackBerry, and so I texted to his cell, and now you just have to go around checking all these different portals just to get rejected by seven different technologies."

5 IETF Policy on Wiretapping, May 2000, http://www.ietf.org/rfc/rfc2804.txt.

6 389 U.S. 347 (1967).

7 Title III is now codified in the United States Code at 18 U.S.C. §§ 2510-22.

8 Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified at 18 U.S.C. § 2510).

9 The list of offenses can be found at 18 U.S.C. § 2516.

10 The law makes clear that U.S. persons cannot be targeted solely on the basis of their lawful business or political relationships with foreign governments or organizations, or on the basis of other activities protected by the First Amendment.

11 Communications Assistance for Law Enforcement Act, Pub. L. No. 102-414, 108 Stat. 4279 (1994) (now codified at 47 U.S.C. § 1001-1021).

12 Dan Eggen & Jonathan Krim, *Easier Internet Wiretaps Sought; Justice Dept., FBI Want Consumers to Pay the Cost*, Wash. Post, Mar. 13, 2004, at A01; Marcia Coyle, *Wiretaps Coming to Internet; Critics Considering Legal Challenges*, Nat'l L.J., Aug. 15, 2005, at P1.

13 Initially, Voice over IP (VoIP) services (that is, telephone-type connections using the web instead of phone lines for the connection) were excluded from CALEA. In 2006 interconnected VoIP services (i.e. any service where a portion of the call was connected to a PTSN, like the service provided by Vonage) were included under CALEA. *See In re* Commc'ns Assistance for Law Enforcement Act & Broadband Access & Servs,, 20 F.C.C.R. 14989, ¶¶ 9-37 (2005).

14 Charlie Savage, *U.S. Tries to Make It Easier to Wiretap the Internet*, N.Y. Times, Sept. 27, 2010, *available at* http://www.nytimes.com/2010/09/27/us/27wiretap.html?_r=2&pagewanted=1.

15 Napster, for example was the first peer-to-peer network used for large-scale music sharing. Since then, there have been dozens of similar file sharing programs, many used for seemingly illicit purposes.

16 For example, Ubuntu Linux and World of Warcraft patches are distributed using the BitTorrent protocol.

17 John C. K. Daly, *Echelon—the Ultimate Spy Network?*, United P. Int'l, Mar. 1, 2004, http://slickmisc.spunge.org/list/200403/msg00006.html.

18 Duncan Campbell, *Inside Echelon: The History, Structure and Function of the Global Surveillance System Known as Echelon*, Echelon On Line, July 25, 2000, http://echelononline.free.fr/dc/insideechelon.htm.

19 James Risen & Eric Lichtblau, *Bush Lets US Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005, at A1.

20 Daly, *supra* note 17.

21 Google, for example, now encrypts all e-mail in its system, while in transit, unless a user opts out of the encryption policy and chooses to send his e-mail unencrypted. Presumably, under the government's proposal Google would need to re-engineer its system to allow decryption upon receipt of an authorized government request.

22 Savage, *supra* note 14.

23 The contrasting formulations were posited as useful analogies in *Doe v. United States*, 487 U.S. 201 (1988). In *Doe*, the signing of a blank bank consent form was considered more like the production of a physical object. By contrast in *Hubbell v. United States*, 530 U.S. 27 (2000), the documents produced by the defendant in response to a subpoena were organized and selected through his own mental analysis and thus protected from disclosure. Few court cases have addressed the encryption question directly: Two, *United States v. Rogozin*, 2010 WL 4628520 (W.D.N.Y. Nov. 16. 2010) and *United States v. Kirschner*, 2010 WL 1257355 (E.D. Mich. March 30, 2010) thought that the password could not be compelled, while another, *In re Boucher*, 2009 WL 424718, *1 (D. Vt. 2009), *available at* http://federalevidence.com/pdf/2009/03-March/InreBoucherII.pdf, was decided on the technicality that Boucher had already given the government access to his computer once, so he could not object to doing so a second time and disclosing his encryption key.

24 *See* FBI & Dept. of Justice, Communications Assistance for Law Enforcement Act (CALEA) Implementation Plan, Part V, Mar. 3, 1997, *available at* http://www.cdt.org/digi_tele/CALEA_plan.html#five.

25 When the Clipper chip (a chip to allow decryption of encrypted phone traffic) was first introduced, flaws in it were quickly found. *See* Matt Blaze, Protocol Failure in the Escrowed Encryption Standard (Aug. 20, 1994), *available at* http://www.crypto.com/papers/eesproto.pdf. More recently, Greek official communications were intercepted illegally through a security flaw created by the inclusion of built-in interception feature. *See Vodafone Greece Rogue Phone Taps: Details at Last*, H Security, *available at* http://www.h-online.com/security/news/item/Vodafone-Greece-rogue-phone-taps-details-at-last-733244.html.

26 In addition to the Indian example mentioned at the outset, see *UAE Crackdown on BlackBerry Services to Extend to Foreign Visitors*, Wash. Post, Aug. 3, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/02/AR2010080204752.html.

27 Hillary Clinton, Remarks on Internet Freedom, Jan. 21, 2010, *available at* http://www.state.gov/secretary/rm/2010/01/135519.htm.

Federalism & Separation of Powers

Ramifications of Repealing the 17th Amendment

An Exchange Between Todd Zywicki and Ilya Somin

Repeal the 17th Amendment and Restore the Founders' Design

*by Todd Zywicki**

The election of United States senators was an essential part of the Founders' original design for the Constitution. Ratified in 1913, the Seventeenth Amendment replaced the election of U.S. senators by state legislators with the current system of direct election by the people. By securing the Seventeenth Amendment's ratification, progressives dealt a blow to the Framers' vision of the Constitution from which we have yet to recover.

Would repealing the Seventeenth Amendment be a panacea for America's constitutional ills? No, of course not. Our constitutional culture has become too intellectually shallow and corrupted by decades of structural protections destroyed by expediency and special interests to believe that any single change could restore the constitutional culture.

But could reinstating the Founders' design for the Senate provide a marginal step toward restoring constitutional government and deepening citizen understanding about the Constitution? I believe it could.

The Constitution did not create a direct democracy; it established a constitutional republic. Its goal was to preserve liberty, not to maximize popular sovereignty. To this end, the Framers provided that the power of various political actors would derive from different sources. While House members were to be elected directly by the people, the president would be elected by the Electoral College. The people would have no direct influence on the selection of judges, who would be nominated by the president and confirmed by the Senate to serve for life or "during good behavior." And senators would be elected by state legislatures.

Empowering state legislatures to elect senators was considered both good politics and good constitutional design. At the Constitutional Convention in Philadelphia, the proposal was ratified with minimal discussion and recognized as the approach "most congenial" to public opinion. Direct election was proposed by Pennsylvania's James Wilson but defeated ten-to-one in a straw poll. More important than public opinion, however, was that limitations on direct popular sovereignty are an important aspect of a constitutional republic's superiority to a direct democracy. As Madison observes in *Federalist* 51, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Election of senators by state legislatures was a cornerstone of two of the most important "auxiliary precautions": federalism and the separation of powers. Absent some direct grant of federal influence to state governments, the state governments would be in peril of being "swallowed up," to use George Mason's phrase. Even arch-centralizer Hamilton recognized that this institutional protection was necessary to safeguard state autonomy. In addition, the Senate was seen as a means of linking the state governments together with the federal one. Senators' constituents would be state legislators rather than the people, and through their senators the states could influence federal legislation or even propose constitutional amendments under Article V of the Constitution.

The Seventeenth Amendment ended all that, bringing about the master-servant relationship between the federal and state governments that the original constitutional design sought to prevent. Before the Seventeenth Amendment, the now-widespread Washington practice of commandeering the states for federal ends—through such actions as "unfunded mandates," laws requiring states to implement voter-registration policies that enable fraud (such as the "Motor Voter" law signed by Bill Clinton), and the provisions of Obamacare that override state policy decisions—would have been unthinkable. Instead, senators today act all but identically to House members, treating federalism as a matter of political expediency rather than constitutional principle.

There is no indication that the supporters of the Seventeenth Amendment understood that they were destroying federalism. But they failed to recognize a fundamental principle of constitutional design: that in order for constraints to bind, it is necessary for politicians to have personal incentives to respect them. "Ambition," Madison insisted in *Federalist* 51, "must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."

Under the original arrangement, senators had strong incentives to protect federalism. They recognized that their reelection depended on pleasing state legislators who preferred that power be kept close to home. Whereas House members were considered representatives of the people, senators were considered ambassadors of their state governments to the federal government and, like national ambassadors to foreign countries, were subject to instruction by the parties they represented (although not to recall if they refused to follow instructions). And they tended to act accordingly, ceding to the national government only the power necessary to perform its enumerated functions, such as fighting wars and building interstate infrastructure. Moreover, when the federal government expanded to address a crisis (such as war), it quickly retreated to its intended modest level after the crisis had passed. Today, as historian Robert Higgs has observed, federal expansion creates a "ratchet effect."

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Just as important as its role in securing federalism, the Senate as originally conceived was essential to the system of separation of powers. Bicameralism—the division of the legislature into two houses elected by different constituencies—was designed to frustrate special-interest factions. Madison noted in *Federalist* 62 that basing the House and Senate on different constituent foundations would provide an "additional impediment . . . against improper acts of legislation" by requiring the concurrence of a majority of the people with a majority of the state governments before a law could be enacted. By resting both houses of Congress on the same constituency base—the people—the Seventeenth Amendment substantially watered down bicameralism as a check on interest-group rent-seeking, laying the foundation for the modern special-interest state.

Finally, the Framers hoped that indirect election of senators would elevate the quality of the Senate, making it a sort of American version of the House of Lords, by bringing to public service men of supreme accomplishment in business, law, and military affairs. There is some evidence that the indirectly-elected Senate was more accessible to non-career politicians than is today's version. And research by law professor Vikram Amar has found that during the nineteenth century, accomplished senators such as Webster and Calhoun frequently rotated out of the Senate and into the executive branch or the private sector, with an understanding among state legislators—and, notably, the senator selected to fill the seat—that they could return to service if they wished to do so or were needed. Foes of the Seventeenth Amendment argued at the time that its enactment would spawn a deterioration in the body's quality. Whether the modern titans of the Senate such as Trent Lott, Bill Frist, Harry Reid, and the late Ted Kennedy are superior to Webster, Clay, and Calhoun is to some extent a matter of taste. But it is likely that reinstating the original mode of selection would change the type of individuals selected—and it is not implausible to think that the change would be positive.

Criticisms of Repealing the Seventeenth Amendment

Critics of repealing the Seventeenth Amendment raise several concerns. But those criticisms are either misguided or overstated.

Establishment media and liberal politicians have mocked calls for repeal of the Seventeenth Amendment as anti-democratic. To be sure, indirect election would be less democratic than direct election, but this is beside the point. The Framers understood what today's self-interested sloganeers of democracy do not: What matters is not whether a given method of selecting governmental officials is more or less democratic, but whether it will safeguard the constitutional functions bestowed upon each branch and conduce to their competent execution. Notably, those who purport to be most shocked by the anti-democratic implications of repealing the Seventeenth Amendment are also the most vociferous in denouncing democratic election of judges, implicitly recognizing that democracy is simply a means to constitutional government, not an end in itself.[1]

Moreover, certain of the Senate's duties—such as its role as a type of jury to hear impeachment proceedings—make sense only if it is somewhat insulated from the public's passions of the moment, as was well demonstrated by the farcical Senate trial of Bill Clinton. The decision to abandon the Senate's original composition as an indirectly-elected body necessitates a redesign of impeachment proceedings, at least for partisan impeachments, reallocating that authority from the Senate to some less political institution.

Critics of repeal have also contended that election of senators by state legislatures was, and would be today, unusually prone to corruption and bribery. But research by historian C. H. Hoebeke found that of the 1,180 Senate elections between 1789 and 1909, in only fifteen cases was fraud credibly alleged, and in only seven was it actually found—approximately one-half of one percent. Nor does anyone but the most oblivious person believe that elections today are free of corruption, bribery, and the quasi-bribery of modern political fundraising and lobbying. Even in the progressive era it was not believed that direct election of senators would be a panacea to prevent corruption, and there is no evidence that politics became cleaner or less corrupt once direct election of Senators was adopted. Among the Seventeenth Amendment's staunchest supporters were urban political machines (hardly advocates of clean government), which understood that direct election would boost their control of the Senate as they drove and bribed their followers to the polls.

Others argue that repealing the Seventeenth Amendment would make little material change in restoring the original constitutional structure. Perhaps. And, indeed, as during the era before the Seventeenth Amendment, many states would probably adopt either de facto direct election of senators, in which legislatures essentially agree to ratify the popular vote, or attenuated forms of it, such as primaries or conventions to select party nominees from whom the legislatures choose. Although adopting popular methods for selecting nominees or senators would substantially reduce the value of indirect election of senators on restoring the constitutional system, my intuition is that even an entirely formalistic process might reinstitute some degree of accountability of senators to state legislators and to restore the public's understanding of the difference between a direct democracy and a democratic constitutional republic.

Contrasting Seventeenth Amendment Repeal to Other Proposals

Others argue that in light of the predicted ineffectiveness of the Seventeenth Amendment, defenders of constitutional government instead should focus on other reforms that prove more effective in practice. Two proposals are particularly noteworthy. First, it is argued that many of the goals of repealing the Seventeenth Amendment could be achieved by judicial enforcement of the Tenth Amendment and/or the Commerce Clause as limits on the federal government. Second, Randy Barnett has proposed a "federalism amendment," which would permit the states by a three-fourths vote to nullify a law enacted by the national government.[2] I agree that both of these proposals would reinforce federalism and would be positive developments in improving our constitutional structure. So let me stress that I have no objection to those proposals.

But they are incomplete substitutes for the role envisioned by the Framers for a state-appointed U.S. Senate.

First, although those proposals would help to reinforce federalism, they would do little to buttress the second, equally-important purpose of the original Senate: to create a robust form of bicameral legislature with the end of frustrating special interest influence over politics. Second, the Tenth Amendment and the federalism amendment would not substitute for many of the other institutional roles of the original Senate, such as the Senate's role in judicial confirmation proceedings. Senators more attuned to state interests might change the confirmation process for federal judges (and thereby the nomination process as well) toward the selection of judges that are more aware of federalism and other structural constitutional issues.

Third, state legislatures would be able to affirmatively propose amendments to the federal constitution via their influence over the Senate. Other than arguably the Twenty-First Amendment repealing Prohibition, *none* of the constitutional amendments adopted since the founding era (the Bill of Rights and Eleventh Amendment) constrain or limit the federal government's powers, although many of them limit states' powers. This should not be surprising: since the adoption of the Seventeenth Amendment, the Article V amendment process is biased toward the adoption of amendments that increase the power of the federal government relative to the states. Absent a new convention, states are limited to the passive role of ratifying or rejecting proposals generated by the House and Senate by two-thirds vote, thereby requiring members of Congress to voluntarily reduce their own power. In light of the ability of Congress to exercise agenda control to block amendments that limit their power, it is entirely unsurprising that proposals such as a balanced budget amendment, term limits, and other popular proposals remain permanently bottled up—as will, inevitably, the federalism amendment.

Fourth, with respect to the protection of federalism, both the Tenth Amendment and the federalism amendment place *ex post* limits on the exercise of national power rather than *ex ante*. The authority of state legislatures to compose one branch of the legislative process empowers the states to have their views heard as an organic part of the logrolling and negotiations that go into legislation, rather than having simply an after-the-fact ability to raise constitutional challenges to particular provisions. Moreover, there is a huge gulf between the ability of states to influence legislation through the informal process of political compromise on one hand and those that are so egregious as to fail constitutional muster under the Tenth Amendment or to trigger the cumbersome process of a federalism amendment. Allowing the states to exercise influence over the development of legislation should tend to influence the organic influence of state interests in the legislative process.

During the nineteenth century the Supreme Court had a very modest role and jurisprudence in enforcing federalism limits on the national government. Instead, to the extent that Marshall and his successors ventured into federalism issues, it tended to be to knock aside state interference with national power. Why the Court was more concerned with strengthening national power under the Constitution was obvious: because of the role of the state legislatures in electing the Senate, the national government rarely sought to legislate to the full extent of the outer reaches of its constitutional power. Legislation that stretched the reach of the Commerce Clause simply was not enacted in the first place; thus it was rarely necessary for the Court to define the constitutional limits on the federal government.

Reading the debates of the Founding era, it is evident that the authors of *The Federalist Papers* and others believed that election of the Senate by state legislatures would be both a necessary and sufficient condition for preserving federalism and limiting the federal government. Anti-Federalist George Mason endorsed the composition of the Senate, expressing his fear that "the national Legislature [would] swallow up the legislatures of the States. The protection from this occurrence," he continued, would "be the securing to the state legislatures the choice of the senators of the United States." Anti-Federalist John Dickinson also noted that the election of the Senate by state legislatures would "produce that collision between the different authorities which should be wished for in order to check each other." And it seemed to perform exactly that function for the century-plus that it was in existence.

But the role of the original Senate in enforcing federalism and bicameralism points to a corollary challenge: to the extent that those remain constitutional *ends*, what is to be done in light of the fact that the Seventeenth Amendment eliminates the proposed constitutional *means* for achieving those goals? There is no indication that the framers of the Seventeenth Amendment intended to renounce the constitutional principles of federalism and bicameralism when they modified the process for selecting Senators.

In that case it does point to the need to develop new constitutional means for securing the ends of limited and divided government. In the absence of repealing the Seventeenth Amendment, therefore, renewed judicial enforcement of federalism limits as well as proposals such as the federalism amendment are reasonable and salutary efforts to recreate the means of constitutional government that the Seventeenth Amendment secured so well for over a century.

Endnotes

1 Todd Zywicki, *On the "True Story of the History of the Seventeenth Amendment and Federalism*," posting to the Volokh Conspiracy (Nov. 15, 2010), http://volokh.com/2010/11/15/on-the-true-story-of-the-history-of-the-seventeenth-amendment-and-federalism/.

2 Randy E. Barnett, *The Case for a Federalism Amendment*, Wall St. J., Apr. 23, 2009, at A17, *available at* http://online.wsj.com/article/SB124044199838345461.html.

Why Repealing the 17th Amendment Won't Curb Federal Power

*by Ilya Somin***

Some conservatives and libertarians believe that the 1913 adoption of the Seventeenth Amendment—which requires that senators be elected by popular vote, rather than by state legislatures—was a great mistake that led to a vast expansion of federal power. They argue that repealing the amendment would be a major step toward reigning in federal overreach.[1] In 2010, the call for repeal was taken up by many activists associated with the Tea Party Movement.[2]

Repeal advocates such as Gene Healy of the Cato Institute assert that the Amendment "has done untold damage to federalism and limited government."[3] The assumption underlying such claims is that senators elected by state legislatures would be more interested in protecting state autonomy than senators elected by voters, and therefore more committed to limiting federal power.

Unfortunately, repeal of the Seventeenth Amendment is unlikely to have the effect that advocates hope for. This is so for two reasons. The Amendment actually had little if any effect on the scope of federal power because most senators would have been popularly elected even without it. Moreover, there is no reason to expect senators elected by state legislatures to be more opposed to federal power than popularly-elected senators.

I. Nearly All Senators Would be Elected by Popular Vote Even Without the Seventeenth Amendment.

As Professor Todd Zywicki (a leading academic critic of the Amendment) showed in a 1997 article, by 1908 twenty-eight of the then forty-six states already had laws that mandated popular election of senators.[4] Nine other states required the legislature to take account of popular votes, though they stopped short of taking away all legislative discretion.[5] Given the strong political trend toward popular election of senators at the state level, it is likely that all but a handful of states would have enacted popular election within a few years after 1913 even without the federal constitutional amendment. It is debatable whether any states would have held out against popular election to the present day. Even if one or two had done so, the likely effect on policy outcomes would probably have been minimal. The presence of two or four legislatively-selected senators in a chamber with 100 members would have done little to change the general trend of legislation.

If the amendment were repealed today, popular election would almost certainly remain in the vast majority of states. As Todd Zywicki recognizes, "Democracy is popular."[6] In theory, popular election could potentially be blocked if the amendment repealing the Seventeenth included a ban on state legislation designed to ensure that senators are chosen by popular vote. It would be difficult, but perhaps not impossible, to draft an amendment that could effectively preclude all the different devices state legislatures could use to promote popular election of senators.[7]

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But an amendment of that type would face even more daunting political odds than a straightforward repeal of the Seventeenth. In addition to the extraordinary uphill struggle that any amendment effort faces, such a preclusive amendment could be portrayed as infringing on state autonomy, as well as undermining democracy. And even an amendment banning the use of popular vote devices for selecting senators could not prevent state legislators from promising to choose whatever candidate for the Senate had the greatest amount of popular support, as demonstrated, for example, by public opinion polls. In many states, there might be substantial political pressure for state legislators to make such pledges.

II. Senators Chosen By State Legislators Would not Want to Limit Federal Power More than Popularly-Elected Senators Do.

Even if a constitutional amendment could effectively eliminate popular election of senators and replace it with selection by state legislatures, it is far from clear that federal power would contract. The claim that senators chosen by state legislatures would act to curb the feds relies on the assumption that state governments oppose federal power. Professor Todd Zywicki argues that, before the Seventeenth Amendment, "senators had strong incentives to protect federalism [because] [t]hey recognized that their reelection depended on pleasing state legislators who preferred that power be kept close to home."[8]

Whatever was the case before 1913, under modern conditions senators chosen by state legislatures often have strong incentives to support expanded federal power. Those incentives arise precisely *because* senators' reelection depends on "pleasing state legislators." The state legislators in question are often heavily dependent on federal subsidies and regulations. They are unlikely to do anything to overturn the federal trough at which they themselves regularly feed.

State governments routinely lobby for grants of federal money.[9] In recent years, state dependence on federal funding has increased enormously, as a result of the fiscal crisis some states have found themselves in during the present recession. In 2009, federal grants-in-aid accounted for 24.2% of all state government revenue, up greatly from 19.8% in 2007.[10] State governments are anxious to get as much federal grant money as possible. This reality is unlikely to change if the Seventeenth Amendment were repealed and legislative selection of senators reinstated. To the contrary, senators chosen by state legislators would face even stronger incentives to lobby for additional federal grants than popularly-elected senators do. The political survival of the former would be completely at the mercy of the very state governments that benefit from federal grants.

State governments also often support federal regulations and spending programs that reduce competition between state governments and benefit interest groups that have influence at the state level.[11] States compete with each other for businesses and taxpayers. Like any other competitors, they often prefer to establish a cartel that will minimize competition and enable them to collect higher "profits" in the form of increased tax revenue.[12] Here too, senators chosen by state legislators would have strong incentives to lobby for expanded federal power

whenever such is in the interest of the state governments they represent.

If senators were chosen by state governments rather than by voters, the *composition* of federal spending and regulation might indeed change. More federal money would flow to state governments and those interest groups that have influence over them. We could potentially see more federal grants to small, local interest groups, such as those that lobbied for the notorious "bridge to nowhere" in Alaska.[13] There would also be more regulations benefiting state officials and associated private interests. On the other hand, the federal government might become less solicitous of interest groups that do not have much leverage at the state level.

Repeal of the Seventeenth Amendment *could* potentially lead to reduced federal spending if the Supreme Court began to enforce constitutional limits on federal grants to state governments.[14] If Congress could not hand out money to the states or could only do so for a very narrow range of purposes, then state governments would have more reason to oppose federal spending. Increased federal spending and taxes would then make it more difficult for the states to raise tax revenue for themselves.

But so long as Congress has the power to give the states handouts for virtually any purpose, senators chosen by state legislators are unlikely to oppose federal power any more than current senators do. At this point, there is little prospect that the Court will crack down on federal grants to state governments in the foreseeable future. In *Sabri v. United States*, a 2004 decision, the justices unanimously ruled that even grants with conditions that have very tenuous links to any federal interests are constitutional.[15] In the key 1987 case of *South Dakota v. Dole*, the Supreme Court reiterated the rule that the Spending Clause of the Constitution gives Congress the power to give grants to the states so long as they promote the "general welfare" and emphasized that courts should "defer substantially to the judgment of Congress" in determining whether any particular grant program actually advances the general welfare or not.[16] Although I and some other academic commentators have criticized this deferential policy,[17] there is little chance that it will change in the near term. Both conservative and liberal justices seem to accept the status quo.

Conclusion

The Seventeenth Amendment is not necessarily beneficial. I am not convinced that any great harm would result from repealing it. Indeed, a straight-up repeal of the amendment would probably have little effect of any kind, since popular election of senators would persist in most states even if it were no longer constitutionally mandated. Even a more aggressive repeal amendment that outlawed popular election might not make the political system any worse than it is today.

But advocates of federalism and political decentralization have little if anything to gain from pursuing repeal. Even if they somehow succeed, such efforts are unlikely to result in any meaningful new constraints on federal power.

Perhaps an effort to repeal the Seventeenth Amendment could help rein in federal power by galvanizing support for political decentralization more generally. In that event, it might still be worth undertaking. But any such effect seems unlikely. Repeal of the Seventeenth Amendment is not a cause likely to attract much political support outside of a hard core of conservative and libertarian activists. If the Tea Party movement or other conservatives choose to make repeal a major focus of their political efforts, the attempt could even backfire. Associating federalism with an "anti-democratic" amendment could help turn moderate public opinion against federalism more generally.

Those who believe that repeal of the Seventeenth Amendment is the key to a revival of federalism in the United States are barking up the wrong tree. They would do well to invest their limited political resources elsewhere.

Endnotes

1 *See, e.g.*, Todd Zywicki, *Repeal the Seventeenth Amendment*, Nat'l Rev., Nov. 15, 2010, available http://www.nationalreview.com/articles/252825/repeal-seventeenth-amendment-todd-zywicki?page=1; Gene Healy, *Repeal the 17th Amendment?* Wash. Examiner, June 8, 2010, *available at* http://www.cato.org/pub_display.php?pub_id=11876.

2 *See, e.g.*, Aaron Blake, *Tea Party Pushes 17th Amendment to the Forefront*, Hill, May 3, 2010, *available at* http://thehill.com/blogs/ballot-box/house-races/95705-tea-party-pushes-17th-amendment-to-the-forefront?page=1#comments.

3 Healy, *supra* note 1.

4 Todd Zywicki, *Beyond the Shell and Husk of History: The History of the 17th Amendment and Its Implications for Current Reform Proposals*, 45 Cleve. St. L. Rev. 165, 192 (1997).

5 *Id.*

6 *Quoted in* Healy, *supra* note 1.

7 *See* Zywicki, supra note 4, at 191-93 (describing several of them).

8 Zywicki, *Repeal Seventeenth Amendment*, supra note 1.

9 *See* John McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 Nw. U. L. Rev. 89, 117-18 (2004).

10 Figures calculated from Council of Economic Advisers, Economic Report of the President, Tbl. B-83 (2011), *available at* http://www.gpoaccess.gov/eop/2011/xls/ERP-2011-table83.xls.

11 *See generally* Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 Mo. L. Rev. 285, 333-340 (2003) (showing how states can lobby for federal intervention that reduces interstate competition).

12 *See* Geoffrey Brennan & James M. Buchanan, The Power to Tax: Analytical Foundations of a Fiscal Constitution 182-83 (1980); *id.* at 333-40; Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments,* 90 Geo. L.J. 461, 470-71 (2002).

13 This $398 million bridge project would have benefited only a tiny handful of people. It was finally abandoned after it became a national scandal and symbol of wasteful federal spending benefiting local interest groups. *See* Steven Quinn, *Alaska Abandons Controversial Ketchikan Bridge Project,* Seattle Times, Sept. 22, 2007, *available at* http://seattletimes.nwsource.com/html/localnews/2003897011_webbridge22.html.

14 For a defense of such judicial intervention, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments,* 90 Geo. L.J. 461 (2002); and John Eastman, *The Spending Power*, 4 Chap. L. Rev. 1 (2001).

15 Sabri v. United States, 541 U.S. 600 (2004) (upholding federal grant to state governments conditioned on allowing prosecution of state officials for taking bribes even if the bribery in question had no connection any federal project).

16 South Dakota v. Dole, 483 U.S. 203, 207 (1987).

17 *See* Somin, *Pandora's Box*, *supra* note 14; Eastman, *supra* note 14; Lynn Baker, *The Spending Power and the Federalist Revival*, 4 Chap. L. Rev. 195 (2001).

The Unbearable Rightness of *Marbury v. Madison*: Its Real Lessons and Irrepressible Myths

*By William H. Pryor Jr.**

For the last several years, I have taught Federal Jurisdiction at the University of Alabama School of Law, and like many teachers of that subject, I begin by requiring my students to read and discuss *Marbury v. Madison*.[1] There are many important lessons in that famous decision,[2] but a lot of what Americans have been told during the last century about *Marbury* is wrong.

Modern scholarship establishes that *Marbury* is a victim of historical revisionism.[3] *Marbury* is occasionally described as the event where allegedly Americans invented judicial review,[4] but that notion is so untrue as to be laughable. *Marbury* is routinely cited as supporting judicial supremacy,[5] but it does nothing of the sort. *Marbury* is also celebrated as a triumph of judicial activism,[6] but that proposition too is false. In fact, *Marbury v. Madison* is an example of judicial restraint.

I agree with those who describe *Marbury* as "our greatest case"[7] or "the single most important decision in American constitutional law and in defining the role of the federal courts,"[8] but to understand *Marbury*, we must distinguish its real lessons from its irrepressible myths. Lawyers and judges especially should understand what makes *Marbury* great and why.

To explain the real *Marbury* and why it is a great decision, I will address three topics. First, I will provide an overview of the events that led to the decision. Second, I will describe the decision and its enduring lessons. Third, I will address the irrepressible myths about *Marbury* and how those myths were created.

I. The Events that Led to the Decision.

The story of *Marbury* begins in 1800 with the election of President Thomas Jefferson and his supporters in Congress and the defeat of President John Adams and the Federalists.[9] Although the defeat of Adams was clear soon after the election,[10] the victory of Jefferson was settled much later in Congress, on the thirty-sixth ballot, as a result of the tie of votes in the Electoral College between Jefferson and his running mate, Aaron Burr.[11] That mess led to the adoption of the Twelfth Amendment to the Constitution.[12]

While Jefferson and Burr awaited the settling of their election, President Adams received a letter of resignation from Chief Justice Oliver Ellsworth, who was ill in Paris, where he had negotiated a proposed treaty with France.[13] Adams suddenly had the opportunity to nominate a new Chief Justice and have the lame duck Congress confirm the appointment before the Jeffersonians came to power in March 1801. On December 18, 1800, Adams nominated John Jay, who had served as the first Chief Justice and was serving then as Governor of New York, but Governor Jay declined the appointment.[14]

Adams next decided to nominate his Secretary of State, John Marshall, to be Chief Justice.[15] Marshall had served as an aide to General George Washington during the Revolutionary War,[16] had established a successful law practice in Richmond and a reputation as perhaps the leading lawyer in Virginia,[17] and had played an important role in support of the adoption of the Constitution at the ratification convention in Virginia.[18] George Washington once had offered to appoint Marshall as Attorney General, but Marshall had declined.[19] Later Marshall had served in Congress, where he had been a floor leader for Adams in the House.[20] In the infamous XYZ Affair,[21] Marshall also had served as one of three representatives of the United States to negotiate a treaty with France and had heroically refused to offer a bribe solicited by the French foreign minister, Charles-Maurice Tallyrand.[22]

Marshall also was a second cousin once removed of Thomas Jefferson, and the two men detested each other.[23] In fairness, Marshall could have thought worse of Jefferson. Marshall once joked, "The democrats are divided into speculative theorists and absolute terrorists: with the latter I am not disposed to class Mr. Jefferson."[24] So John Marshall did not consider his second cousin, the author of the Declaration of Independence, and the third President to be an absolute terrorist.

On January 27, 1801, the Senate unanimously confirmed John Marshall to be the third Chief Justice of the United States.[25] That confirmation came one week after Adams's nomination of Marshall, who did not have to endure a hearing in the Senate.[26] On February 4, 1801, Justice William Cushing of Massachusetts administered the oath of office to the new Chief Justice, who wore a plain black robe in keeping with the custom of Virginia, which set the standard that we follow today.[27] Other Justices that day wore the so-called party-colored robes that were fashionable in England.[28]

Although now it would be considered "unthinkable," Marshall briefly served in two branches.[29] He had promised President Adams to continue serving as acting Secretary of State until Adams left office in March.[30] The Supreme Court had only a few days of work in February to burden the new Chief Justice,[31] but the Secretary of State had much work left for President Adams.[32]

Near the end of its lame duck session, the Federalist Congress enacted the Judiciary Act of 1801, which reduced the number of Justices of the Supreme Court from six to five, created a new system of circuit appellate courts and sixteen new judgeships, and eliminated circuit riding responsibilities for Justices of the Supreme Court.[33] Soon afterward, Congress also created several new justices of the peace.[34] Adams busily worked to appoint Federalists to the new judgeships, the so-called "midnight judges."[35]

As acting Secretary of State, Marshall was responsible for the administration of the judicial appointments of Adams.[36] Marshall received letters from the applicants, prepared the nomination papers, and affixed the great seal to the commissions that he was then responsible for delivering to the

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appointees.[37] For the latter task, Marshall enlisted the assistance of his younger brother, James, whom Adams also had appointed to a new judgeship.[38]

Marshall finished his work in preparing the commissions, but a few of them were not delivered before Adams left office.[39] One undelivered commission was for William Marbury to serve as a justice of the peace.[40] Soon after Marshall administered to Jefferson the oath of office of the presidency,[41] President Jefferson discovered Marbury's commission and others in the office of the Secretary of State.[42] Jefferson, of course, had served as our first Secretary of State.[43]

Jefferson, in his words, "forbade" the delivery of the commissions of Marbury and others.[44] In Jefferson's view, the delivery was necessary to effectuate the appointment, and Jefferson, to say the least, was angry about Adams's appointment of the midnight judges.[45]

On December 17, 1801, former Attorney General Charles Lee presented to the Supreme Court a petition for a writ of mandamus on behalf of William Marbury and three other men whose commissions as justices of the peace had not been delivered.[46] Lee asked the Court to issue a writ of mandamus to the new Secretary of State, James Madison, to deliver the commissions.[47] After Lee presented this petition, the new Attorney General, Levi Lincoln, declined to take any position on behalf of Madison.[48] The Jefferson Administration refused to show respect for the Supreme Court in this matter.[49] The next day, the Supreme Court announced that it would hear Marbury's petition in June 1802.[50]

The Jeffersonians soon moved to thwart the Federalists in the judiciary.[51] On January 6, 1802, Jefferson's ally, Senator John Breckenridge of Kentucky, introduced a bill to repeal the Judiciary Act of 1801.[52] The Jeffersonians argued that the new judgeships created by the recent Act were unnecessary, and the Federalists, led by Senator Gouverneur Morris of New York, responded that the bill to abolish the judgeships was an unconstitutional assault on judicial independence.[53]

In March, Congress enacted the repeal of the Judiciary Act of 1801,[54] and the Jeffersonians then went a step further by passing the Judiciary Act of 1802.[55] Not only did the Jeffersonians return the Justices of the Supreme Court to their earlier circuit riding; the Jeffersonians also cancelled the June and December Terms of the Supreme Court.[56] The Supreme Court would not be able to meet again to hear Marbury's petition until February of 1803.[57] These historical events, among others, explain why I am both amused and bewildered when leaders of the Bench, like retired Associate Justice Sandra Day O'Connor, and leaders of the Bar, like the presidents of the American Bar Association and the American Law Institute, suggest that the modern judiciary recently has been under some kind of "unprecedented" assault.[58] The Marshall Court confronted a far more difficult challenge than anything the federal judiciary has encountered recently.

The new laws enacted by Congress created a dilemma for the Supreme Court. Federalists wanted the Court to declare the acts of Congress unconstitutional and the Justices to refuse to ride circuit.[59] The Justices disliked circuit riding, but they concluded that, if it had been constitutional for Congress to require circuit riding before 1801, then it was constitutional to return the justices to their circuit riding responsibilities in 1802.[60] Federalist lawyers later objected to the new composition of the circuit courts,[61] and former Attorney General Charles Lee, in the case of *Stuart v. Laird*,[62] objected to Chief Justice Marshall sitting on a circuit court.[63] Marshall overruled Lee's objection, and the final judgment was appealed to the Supreme Court.[64]

When the Supreme Court convened in February 1803, *Marbury v. Madison* and *Stuart v. Laird* were both on the docket, and in both cases, former Attorney General Lee represented the plaintiffs.[65] In *Marbury*, Attorney General Levi Lincoln still refused to present an argument on behalf of the Jefferson Administration.[66]

II. The Decision and Its Lessons

When the Court on February 24 announced its judgment in *Marbury*, Chief Justice Marshall delivered a unanimous opinion. Before Marshall became Chief Justice, the Justices had delivered separate opinions in each case.[67] Marshall had changed that practice, and we still follow the custom he established.[68] This practice infuriated Thomas Jefferson, especially when his appointees and those of his successor, James Madison, joined Marshall's opinions.[69]

Chief Justice Marshall explained that the Court would answer three questions[70] in the order that former Attorney General Lee had presented them.[71] First, "[h]as the applicant a right to the commission he demands?"[72] Second, "[i]f he has a right, and that right has been violated, do the laws of this country afford him a remedy?"[73] Third, "[i]f they do afford him a remedy, is it a *mandamus* issuing from this Court?"[74]

In his answer to the first two questions, in this politically-charged case, Marshall grounded the opinion of the Court in the rule of law. He wrote, "The government of the United States has been emphatically termed a government of laws and not of men."[75] Marshall explained as follows that liberty itself depended on the rule of law: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[76] I do not quarrel with the view of many scholars that the first section of Marshall's opinion, grounded in the rule of law, was intended, at least in part, to upbraid President Jefferson whom Marshall regarded as lawless, but what Marshall wrote was timeless and right as a matter of first principles.

Marshall explained that, if the subject of the controversy was a discretionary act of the President or, in other words, a political decision, then the Court could not interfere. Marshall wrote, "By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his conscience."[77] Political decisions, in Marshall's words, "respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."[78] This explanation that political questions are not justiciable—that is, the political decisions of the other branches are not reviewed by the judiciary—is the first important lesson of *Marbury*.[79]

Marshall next turned to the corollary rule: when the executive acts as an "officer of the law," the judiciary can review

his decision.[80] Marshall stated that an executive officer "cannot at his discretion sport away the vested rights of others,"[81] which was surely a barb aimed at Jefferson. This proposition that every official, no matter how high or low, is accountable to the law is the second important lesson.[82] This lesson means as well "that the individual who considers himself injured has the right to resort to the laws of his country for a remedy."[83] Several years ago, Louise Weinberg argued persuasively that this lesson was Marshall's main purpose and achievement in *Marbury*: "There can be little doubt that *Marbury* was intended first and foremost to establish judicial control over the government—over executive officials."[84]

Marshall explained that mandamus was the correct remedy to compel an officer to perform a legal duty.[85] Marshall rejected the notion that "the office alone exempts [the officer] from being sued."[86] Marbury's petition presented a case of a judicial nature, but the final question remained: Could the Supreme Court issue the writ?

Marshall concluded the opinion with an explanation of the constitutional duty of the judiciary. That duty has two components: one is jurisdictional and the other is interpretive. Marshall addressed both.

Marshall explained that Article III of the Constitution defines and limits the jurisdiction of the Court. The original jurisdiction of the Supreme Court is defined by the Constitution, and the appellate jurisdiction is regulated by Congress. That description is the third important lesson: Article III makes all federal courts—both the Supreme Court and the inferior courts—courts of limited jurisdiction.[87]

Some critics of *Marbury* argue that Marshall misinterpreted Article III to confine the original jurisdiction of the Supreme Court to a narrow class of cases involving interstate disputes and "cases affecting ambassadors, other public ministers and consuls."[88] They argue that Congress can somehow expand the original jurisdiction of the Supreme Court under the guise of creating an exception to the appellate jurisdiction of the Court.[89] They have speculated that Marshall misinterpreted Article III to create an opportunity to exercise the power of judicial review.[90]

I have never been persuaded by this argument. Marshall's reading is the natural one of the text.[91] It is also the reading that Alexander Hamilton provided in *The Federalist*[92] and that John Marshall himself expressed as a delegate to the ratifying convention in Virginia.[93] Those who argue that Marshall had an ulterior motive that corrupted his reading offer no evidence that their alternative reading was part of the original understanding.

The problem for the Court was that section 13 of the Judiciary Act of 1789 purported to empower the Court to issue a writ of mandamus in an original action against the Secretary of State or any federal official even though Article III, section 2, of the Constitution did not provide jurisdiction for Marbury's original action in the Supreme Court. Section 13 broadly granted, "The supreme court . . . shall have the power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office under the authority of the United States."[94] Article III, section 2, of the Constitution limits the original jurisdiction of the Supreme Court as follows: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction . . . ."[95]

Some scholars have suggested that a better reading of section 13 was that it was intended to allow the Court to issue a writ only in aid of its appellate jurisdiction[96] or where the Court had original jurisdiction under Article III,[97] but without Attorney General Levi Lincoln's appearance for Secretary Madison, the Court never heard that argument. We do not even know whether Levi Lincoln held that view. The Court instead responded to the argument presented, and that argument by former Attorney General Lee was based on a literal reading of section 13.

Lee argued that the Court itself had read section 13 that way in a few cases before Marshall became Chief Justice when other petitioners invoked the original jurisdiction of the Court in unsuccessful attempts to obtain a writ of mandamus.[98] James Pfander argued in 2001 that the decisions cited by Lee supported his reading of section 13,[99] but Louise Weinberg persuasively responded two years later that those earlier precedents, unlike *Marbury*, involved petitions for writs of mandamus that were within the original jurisdiction of the Supreme Court provided by Article III.[100] Under either view, Marshall did not misinterpret section 13.

In *Marbury*, the Court explained that the conflict between Article III, section 2, of the Constitution and section 13 of the first Judiciary Act, as Lee read the statute, presented an unavoidable issue. Marshall wrote, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[101] That portion of Marshall's opinion offers the fourth key lesson of the decision: that the judiciary is obliged to interpret the law that governs the case before it, and the Constitution is law.[102]

Marshall concluded by explaining why the Court had the authority—indeed, the duty—to obey the Constitution and dismiss the writ for lack of jurisdiction even if section 13 of the first Judiciary Act, as Lee read it, granted the Court jurisdiction to issue the writ. Marshall explained, "The judicial power of the United States is extended to all cases arising under the constitution."[103] Marshall listed several provisions of the Constitution—the prohibition of bills of attainder and ex post facto laws and the requirement of two witnesses, in the absence of a confession, in a prosecution for treason—as peculiarly addressed to the judiciary.[104] Marshall explained, "[I]t is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature."[105] [Note well that Marshall invoked the Framers' intent in interpreting the Constitution.] He concluded by explaining that the judicial oath to support the Constitution meant that the Court like other branches had to follow the Constitution and, in this instance, not exercise the jurisdiction that former Attorney General Lee had argued had been granted

by section 13 of the first Judiciary Act.[106] Marshall's conclusion offers the final lesson of the decision: that the Constitution is the law for all branches of the government.[107]

A week after the Court decided *Marbury*, the Court announced its decision in *Stuart v. Laird*.[108] Chief Justice Marshall did not participate in the decision because he had ruled on the question in the circuit court,[109] but the Court upheld the authority of Congress to restructure the inferior courts and return the Justices to circuit riding.[110] If any Federalists had hoped that the discussion about judicial review in *Marbury* foreshadowed a decision that the Judiciary Act of 1802 violated the Constitution, their hope was dashed in an opinion that contained all of four paragraphs.[111] It is hard to understand how Federalists could have had too high of hopes about *Stuart v. Laird*. The abolition of judgeships created by Congress was not at issue as none of the appointees of President Adams were before the Court seeking their reinstatement.[112] The only issue was whether Congress could return the Justices to circuit riding, and the Justices had already made the decision to return to that duty.[113] In any event, the Marshall Court avoided a conflict with the Jeffersonians.[114]

III. The Myths of *Marbury*

Now that we have reviewed the real *Marbury* and its lessons, let us consider the three myths of *Marbury*. First, did the Court in *Marbury* invent the practice of judicial review? Second, did the decision in *Marbury* establish the supremacy of the judiciary as the final arbiter of the meaning of the Constitution? Third, is the decision in *Marbury* an example of judicial activism? To each of these questions, the answer is no.

The first myth is easily refuted. The decision in *Marbury* was not a magical moment when the Supreme Court suddenly created judicial review. In recent decades, William Michael Treanor[115] and Sylvia Snowiss[116] have published scholarship that establishes that there was an historical practice of judicial review in American courts before the decision in *Marbury*. Phillip Hamburger has published an authoritative book entitled *Law and Judicial Duty* that explains in great detail how judicial review in early America was the application of the well-established duty at English common law to decide cases in accordance with the "Law of the Land" and to treat inferior law as void when it conflicts with superior law.[117] Alexander Hamilton explained the duty of judicial review at great length in *The Federalist* Number 78, more than a decade before the Supreme Court decided *Marbury*. He wrote that "whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former."[118] Hamilton concluded, "No legislative act, therefore, contrary to the Constitution can be valid."[119] "At the Virginia ratification convention . . . , [John Marshall] defended the authority of the judiciary to declare an act of Congress unconstitutional."[120] In 1792, eleven years before *Marbury*, five of the six Justices of the Supreme Court, including the first Chief Justice, John Jay, riding circuit in *Hayburn's Case*,[121] ruled that an act of Congress, the Invalid Pensions Act of 1792, which provided assistance to wounded veterans of the Revolutionary War, violated the Constitution insofar as it required the judiciary to provide advisory opinions to the Secretary of War about which veterans should be paid assistance. That decision was an exercise of judicial review.

When the Supreme Court rendered its decision in *Marbury*, there was little, if any, reaction of displeasure that the Court had declared section 13 of the Judiciary Act of 1789 unconstitutional.[122] There was not much controversy about the *Marbury* decision at all, which had avoided a conflict between the executive and judiciary.[123] President Jefferson complained privately that Marshall should not have expressed an opinion about compelling an executive officer to perform a legal duty, and Jefferson repeated his view that an undelivered commission did not vest a legal right in the appointee.[124] But Jefferson said nothing negative about the exercise of the power of judicial review.[125] As David Engdahl has explained,

> Jefferson himself highly praised Virginia's judges for having disregarded state legislation found to be at odds with the state constitution; and his assumption that courts would perform likewise with respect to the federal Constitution was advanced by him as a principal reason for adding a "bill of rights" by amendment.[126]

The discussion of the fundamental power of judicial review in *Marbury* was so unremarkable that the Marshall Court never cited the decision again for that proposition.[127] When the Taney Court became the next to declare an act of Congress unconstitutional, in the infamous decision, *Dred Scott v. Sandford*,[128] the Court did not cite *Marbury*.[129] Robert Lowry Clinton has determined, "This pattern continued during the period from 1865 through 1894 . . . . During these years, the Court invalidated national laws in no fewer than twenty cases, yet *Marbury* is mentioned in none of them."[130]

The second myth—that *Marbury* established the judiciary as the supreme and final authority in determining the meaning of the Constitution—is contrary to the language of the decision itself. When Marshall wrote that the "particular phraesology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void,"[131] he tied that statement to the conclusion "that *courts*, as well as other departments, are bound by that instrument."[132] Marshall described the Constitution as establishing "a rule for the government of *courts*, as well as of the legislature."[133]

Marshall's argument was for the supremacy of the Constitution, not the supremacy of the Court. Marshall explained that the Constitution controls all the departments of the government. He wrote, "This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The government of the United States is of the latter description."[134]

Marshall did not say, in any way, that the judiciary was the ultimate arbiter of the meaning of the Constitution.[135] Marshall interpreted a statute that governed the Supreme Court and decided that the statute was unconstitutional as applied to Marbury's petition, which was outside the original jurisdiction provided by Article III. Marshall did not say anything negative

about the duty of other branches to interpret the Constitution within their own spheres of responsibility.[136]

As Engdahl has explained, Marshall had long shared James Madison's view that "judicial authority is specific to 'cases.'"[137] Consider the language of the *Marbury* opinion following this famous quotation: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to *particular cases* must of necessity expound and interpret that rule."[138] The emphasis on cases continues in the opinion:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a *particular case*, so that the court must either decide *that case* conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs *the case*. That is the very essence of judicial duty.[139]

Marshall's view "was that the judiciary's determination of constitutional question is limited both in opportunity and in authoritative impact to a particular 'case'"[140]

The third myth—that *Marbury* is an example of judicial activism—is perhaps the strangest of all when you consider the actual result of the decision. The Supreme Court dismissed Marbury's petition for lack of jurisdiction and refused to exercise its power to create a conflict with the executive branch. When the judiciary engages in judicial activism, it usurps the constitutional power of a political branch and fails to adhere to the constitutional text. Judicial activism is about wielding judicial power for political ends. In *Marbury*, the Court obeyed the Constitution and exercised restraint by refusing to compel a political officer to act or refrain from acting. The *Marbury* Court in no way frustrated popular will. The *Marbury* Court grounded its decision in the text of Article III, section 2, of the Constitution and narrowly construed its own power. "[T]he underlying intent of the [*Marbury*] opinion was to set forth a principled statement of the judiciary's place in the American constitutional system that disavowed any political role for courts and judges."[141] "John Marshall and the other Federalist justices achieved their narrow goals in *Marbury* and *Stuart* by distinguishing between the domain of law and the domain of politics."[142]

The myth that the *Marbury* Court engaged in judicial activism is dependent on the premise that the Court deliberately misread either section 13 of the Judiciary Act of 1789 or Article III, or both, so that the Court could exercise the power of judicial review. But the premise is entirely flawed. The Court sensibly interpreted Article III and correctly rejected former Attorney General Lee's reading of section 13. The *Marbury* Court also did not need to create a landmark precedent for judicial review, which was an already widely accepted practice.

The more interesting questions are when, why, and how the *Marbury* myth was perpetrated. Robert Lowry Clinton offered the answers to those questions in 1989 in his book, *Marbury v. Madison and Judicial Review*. Clinton explained that "in 1894, the Supreme Court for the first time cited *Marbury* in support of an actual exercise of its power to invalidate acts of Congress in *Pollock [v. Farmers' Loan & Trust Co.]*,[143] the famous Income Tax Case."[144] He attributed the "creation of the *Marbury* straw man [to] the leaders of [what was then] the conservative wing of the American Bar Association."[145] "[T]he laissez-faire wing of the Bar championed a more expansive idea of judicial power than that which characterized earlier periods."[146] Clinton explained, "In the early twentieth century, conservatives defended court supervision of legislation as essential for protection of institutional property rights. On the liberal side, before 1937, 'historians and politicians were "proving" that judicial review was a usurpation of power defeating the original intent.'"[147] Judicial review was the bane of progressives who supported legislative supremacy and economic regulation, and judicial review was the favored and effective tool of laissez-faire conservatives at the turn of the twentieth century:

> Between 1897 and 1937, almost as many state laws were invalidated on Fourteenth Amendment grounds alone as had been struck down *in toto* during the previous 110 years. Once the rights of blacks had been 'read out' of the Fourteenth Amendment in *Plessy v. Ferguson*, the Court's primary target became statutes regulating various forms of business activity. During that forty-year period, the Court struck down some 209 state laws on Fourteenth Amendment grounds. . . . As to federal laws, the Court overturned some fifty-five acts of Congress between 1896 and 1936, nearly tripling the previous number.[148]

But then came the New Deal. President Franklin Roosevelt's legislative program not only changed the size and scope of the federal government; the New Deal also reversed political perspectives about the judicial role: "After 1937, the positions began to shift, and by the 1960s liberals had begun to argue that review was necessary either for protecting or countering the democratic process. Conservatives, on the other hand, argued that judicial review was just plain 'undemocratic.'"[149]

During the first half of the twentieth century, a few historians created a scholarly foundation for the *Marbury* myth.[150] Edward Corwin, a progressive who taught at Princeton, published a series of writings about judicial review between 1910 and 1920 that laid the foundation for the "conventional narrative."[151] Albert Beveridge, a biographer of Marshall, contributed to the narrative during the same period.[152] William Winslow Crosskey, a constitutional historian and professor of law at the University of Chicago, later endorsed Corwin's "progressivist critique . . . [as] part of his attack on the early New Deal Court."[153] These scholars, although great in many respects, perpetrated the *Marbury* myth to support a critique of the modern exercise of judicial review.[154]

The completion of the *Marbury* myth occurred during the tenure of Chief Justice Earl Warren and continued during the tenure of Chief Justice Warren Burger. As Clinton's study establishes, "The Court adopted the theory of its own supremacy in constitutional interpretation in 1958, . . . and grounded that adoption in *Marbury v. Madison*."[155] Clinton's statistics about citations of *Marbury* by the Supreme Court after 1958 tell the story about the acceptance of the myth:

> There are eighty-nine separate citations of *Marbury* [from 1958 to 1983], which almost equals the total of

> the previous 154 years. Of these eighty-nine, fifty utilize *Marbury* in support of some kind of judical review. Of these fifty, at least eighteen read *Marbury* as having justified sweeping assertions of judicial authority. Of these eighteen, nine apply *Marbury* to support the idea that the Court is the 'final' or 'ultimate' interpreter of the Constitution, with power to issue 'binding' proclamations to any other agency or department of government respecting any constitutional issue.[156]

After the Warren Court adopted *Marbury* as a precedent for judicial supremacy, the fans of the Court in the law schools put a positive spin on the *Marbury* myth. Professor Alexander Bickel of Yale wrote in 1962, "[I]f any social process can be said to have been 'done' at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the cast of *Marbury v. Madison*."[157] In 1969, Professor William Van Alstyne of Duke wrote, "Of all [Marshall's] significant contributions to our constitutional history, none has been more acclaimed or seems more secure as enduring precedent than his decision in *Marbury v. Madison*."[158] The *Marbury* myth had come full circle: from the tool of the critics of the Supreme Court to the event celebrated by proponents of judicial supremacy.

Chief Justice Marshall deserves neither credit nor blame for the modern view of judicial supremacy. "Popular mythology dishonors this straightforward man by depicting him as a master of subtle statecraft. . . . He was not a 'result-oriented' judge."[159] The argument he stated in favor of a modest exercise of judicial review in *Marbury* was neither novel nor controversial. *Marbury* is not a precedent for judicial activism. *Marbury* is a victim of historical revisionism by both proponents and critics of decisions of the Supreme Court in the second century of this country.

The moral of the history of *Marbury* is clear. For those who want to distort the principles of our constitutionalism, it is often helpful to revise the history of its practice. For those who want to restore the principles of our constitutionalism, it is always necessary to know the truth of the history of its practice. We should still teach and celebrate *Marbury*, but we should do so for the right reason: for its exposition of the limited and essential role of the federal judiciary under the Constitution.

Endnotes

1 5 U.S. (1 Cranch) 137 (1803). The casebook that I use presents both the opinion and substantial commentary about the case. *See* Richard H. Fallon Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 58–80 (6th ed. 2009). Many other casebooks provide shorter treatment of *Marbury*. *See, e.g.*, Michael P. Allen, Federal Courts: Context, Cases, and Problems 19-28 (2009); Howard P. Fink, Linda S. Mullenix, Thomas D. Rowe Jr. & Mark V. Tushnet, Federal Courts in the 21st Century: Cases and Materials 35-37 (3d ed. 2007); Arthur D. Hellman, Lauren K. Robel & David R. Stras, Federal Courts: Cases and Materials on Judicial Federalism and the Lawyering Process 24-32 (2d ed. 2009); Martin H. Redish & Suzanna Sherry, Federal Courts: Cases, Comments, and Questions 1-16 (5th ed. 2002). Two popular casebooks notably do not provide substantial commentary about *Marbury*. *See* Peter W. Low & John C. Jeffries Jr., Federal Courts and the Law of Federal-State Relations (6th ed. 2008); Charles Alan Wright, John B. Oakley & Debra Lyn Bassett, Federal Courts: Cases and Materials (12th ed. 2008).

2 There are five conventional lessons about *Marbury* for a course in federal jurisdiction. *See generally* Erwin Chemerinsky, Federal Jurisdiction § 1.3, at 12–20 (2007). The classic guide for teaching law students about *Marbury* was published more than forty years ago. William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 Duke L.J. 1. For a dissenting view, see Sanford Levinson, *Why I Do Not Teach* Marbury *(Except to Eastern Europeans) and Why You Shouldn't Either*, 38 Wake Forest L. Rev. 553 (2003).

3 *See, e.g.*, Robert Lowry Clinton, *Marbury v. Madison* and Judicial Review (1989); Charles E. Hobson, The Great Chief Justice: John Marshall and the Rule of Law 47-71 (1996);William E. Nelson, *Marbury v. Madison*: The Origins and Legacy of Judicial Review (2000); R. Kent Newmyer, John Marshall and the Heroic Age of the Supreme Court 157-75 (2001); Jean Edward Smith, John Marshall: Definer of a Nation 296-326 (1996); Sylvia Snowiss, Judicial Review and the Law of the Constitution (1990); Akhil Reed Amar, Marbury*, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. Chi. L. Rev. 443 (1989); David E. Engdahl, *John Marshall's "Jeffersonian" Concept of Judicial Review*, 42 Duke L.J. 279 (1992); James A. O'Fallon, *Marbury*, 44 Stan. L. Rev. 219 (1992); James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L. Rev. 1515 (2001); Louise Weinberg, *Our Marbury*, 89 Va. L. Rev. 1235 (2003); Gordon S. Wood, *The Origins of Judicial Review, or How the Marshall Court Made More Out of Less*, 56 Wash. & Lee L. Rev. 787 (1999). *But see* Dean Alfange Jr., Marbury v. Madison *and Original Understanding of Judicial Review: In Defense of Traditional Wisdom*, 1993 Sup. Ct. L. Rev. 329. *Marbury* too has been recently the subject of a popularly accessible and acclaimed book. Cliff Sloan & David McKean, The Great Decision: Jefferson, Adams, Marshall, and the Battle for the Supreme Court (2009).

4 Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 1 (1962) ("[I]f any social process can be said to have been 'done' at a given time and by a given act, it is Marshall's achievement. The time was 1803; the act was the decision in the cast of *Marbury v. Madison*.").

5 *See, e.g.*, Cooper v. Aaron, 358 U.S. 1, 18 (1958) ("This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the country as a permanent and indispensable feature of our constitutional system."); Archibald Cox, The Court and the Constitution 45 (1987) (*Marbury* is the "cornerstone of judicial supremacy in applying the Constitution.").

6 *See, e.g.*, Edward S. Corwin, John Marshall and the Constitution: A Chronicle of the Supreme Court 66 (1919) (describing *Marbury* as "a political coup of the first magnitude"); 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 1040 (1953) (*Marbury* "must have been motivated on a political basis only"); Robert H. Jackson, The Struggle for Judicial Supremacy 27 (1931) (describing Marshall's political strategy as "masterly"); Leonard W. Levy, Original Intent and the Framers' Constitution 75 (1988) ("one of the most flagrant specimens of judicial activism and . . . one of the worst opinions ever delivered by the Supreme Court").

7 Weinberg, *supra* note 3, at 1244.

8 Chemerinsky, *supra* note 2, at 12.

9 Nelson, *supra* note 3, at 49; Sloan & McKean, *supra* note 3, at 9-29.

10 Sloan & McKean, *supra* note 3, at 28.

11 Nelson, *supra* note 3, at 49; Sloan & McKean, *supra* note 3, at 49-52.

12 U.S. Const. amend. XII.

13 Nelson, *supra* note 3, at 50; Sloan & McKean, *supra* note 3, at 32; Smith, *supra* note 3, at 2.

14 Nelson, *supra* note 3, at 50; Sloan & McKean, *supra* note 3, at 33-36; Smith, *supra* note 3, at 14, 278.

15 Nelson, *supra* note 3, at 51; Newmyer, *supra* note 3, at 142; Sloan & McKean, *supra* note 3, at 37; Smith, *supra* note 3, at 278-79.

16 Nelson, *supra* note 3, at 41-42; Newmyer, *supra* note 3, at 21-27; Sloan

& McKean, *supra* note 3, at 23, 37; Smith, *supra* note 3, at 4, 37-69.

17 Nelson, *supra* note 3, at 43; Sloan & McKean, *supra* note 3, at 38; Smith, *supra* note 3, at 5, 144-68; Weinberg, *supra* note 3, at 1254.

18 Nelson, *supra* note 3, at 43; Newmyer, *supra* note 3, at 28, 68, 171; Sloan & McKean, *supra* note 3, at 38; Smith, *supra* note 3, at 5, 115-43.

19 Newmyer, *supra* note 3, at 111; Smith, *supra* note 3, at 6, 163-64; Weinberg, *supra* note 3, at 1254.

20 Nelson, *supra* note 3, at 46-48; Newmyer, *supra* note 3, at 119-28; Sloan & McKean, *supra* note 3, at 40; Smith, *supra* note 3, at 6, 234-67.

21 *See generally* William Stinchcombe, The XYZ Affair (1980); *see also* Smith, *supra* note 3, at 192-233.

22 Nelson, *supra* note 3, at 45; Newmyer, *supra* note 3, at 112-19; Sloan & McKean, *supra* note 3, at 23-24; Smith, *supra* note 3, at 6, 192-233.

23 Nelson, *supra* note 3, at 49; Newmyer, *supra* note 3, at 148-49; Sloan & McKean, *supra* note 3, at 42; Smith, *supra* note 3, at 4, 11-14.

24 Letter from John Marshall to Charles Cotesworth Pinckney (Mar. 4, 1801), *in* 6 The Papers of John Marshall 89 (Charles F. Hobson, ed. 1990); Newmyer, *supra* note 3, at 148; Smith, *supra* note 3, at 18; Weinberg, *supra* note 3, at 1276 n.56.

25 Nelson, *supra* note 3, at 51; Newmyer, *supra* note 3, at 142; Sloan & McKean, *supra* note 3, at 45.

26 Nelson, *supra* note 3, at 51; Newmyer, *supra* note 3, at 142; Sloan & McKean, *supra* note 3, at 45.

27 Sloan & McKean, *supra* note 3, at 47; Smith, *supra* note 3, at 285-86.

28 Sloan & McKean, *supra* note 3, at 47; Smith, *supra* note 3, at 285-86.

29 Sloan & McKean, *supra* note 3, at 47.

30 Nelson, *supra* note 3, at 52; Sloan & McKean, *supra* note 3, at 47, Smith, *supra* note 3, at 280.

31 Nelson, *supra* note 3, at 52; Sloan & McKean, *supra* note 3, at 48.

32 Sloan & McKean, *supra* note 3, at 54-63.

33 Act of Feb. 13, 1801, ch. 4, 2 Stat. 89; Nelson, *supra* note 3, at 57; Newmyer, *supra* note 3, at 152; Sloan & McKean, *supra* note 3, at 54; Smith, *supra* note 3, at 302; Van Alstyne, *supra* note 2, at 4.

34 Act of Feb. 27, 1801, ch. 15, §11, 2 Stat. 89; Sloan & McKean, *supra* note 3, at 60-63; Smith, *supra* note 3, at 300; Van Alstyne, *supra* note 2, at 4.

35 Nelson, *supra* note 3, at 57; Sloan & McKean, *supra* note 3, at 53-63; Smith, *supra* note 3, at 303.

36 Sloan & McKean, *supra* note 3, at 54.

37 *Id.*; Smith, *supra* note 3, at 300.

38 Sloan & McKean, *supra* note 3, at 63.

39 Nelson, *supra* note 3, at 57; Sloan & McKean, *supra* note 3, at 63; Smith, *supra* note 3, at 300; Van Alsytne, *supra* note 2, at 4.

40 Nelson, *supra* note 3, at 57; Sloan & McKean, *supra* note 3, at 63; Smith, *supra* note 3, at 300.

41 Nelson, *supra* note 3, at 51; Newmyer, *supra* note 3, at 148; Sloan & McKean, *supra* note 3, at 66–70; Smith, *supra* note 3, at 19, 286.

42 Sloan & McKean, *supra* note 3, at 76; Smith, *supra* note 3, at 300.

43 Sloan & McKean, *supra* note 3, at 76.

44 *Id.*; Smith, *supra* note 3, at 300.

45 Sloan & McKean, *supra* note 3, at 76; Smith, *supra* note 3, at 300.

46 Nelson, *supra* note 3, at 57; Sloan & McKean, *supra* note 3, at 94-98; Smith, *supra* note 3, at 299-300.

47 Sloan & McKean, *supra* note 3, at 94-98; Smith, *supra* note 3, at 301.

48 Sloan & McKean, *supra* note 3, at 98; Smith, *supra* note 3, at 300.

49 Newmyer, *supra* note 3, at 153.

50 Sloan & McKean, *supra* note 3, at 99; Smith, *supra* note 3, at 300-01.

51 Nelson, *supra* note 3, at 58; Sloan & McKean, *supra* note 3, at 99–100; Smith, *supra* note 3, at 304.

52 Sloan & McKean, *supra* note 3, at 105; Smith, *supra* note 3, at 304.

53 Sloan & McKean, *supra* note 3, at 106–08; Smith, *supra* note 3, at 304.

54 Sloan & McKean, *supra* note 3, at 112.

55 Act of March 8, 1802, ch. 8, § 1, 2 Stat. 132; Sloan & McKean, *supra* note 3, at 113-14.

56 *Id.*; Smith, *supra* note 3, at 305.

57 Sloan & McKean, *supra* note 3, at 113-14.

58 William H. Pryor Jr., *Not-So-Serious Threats to Judicial Independence*, 93 Va. L. Rev. 1759, 1759-61 (2007).

59 Sloan & McKean, *supra* note 3, at 116; Smith, *supra* note 3, at 305-11.

60 Sloan & McKean, *supra* note 3, at 116–20; Smith, *supra* note 3, at 306-09.

61 Smith, *supra* note 3, at 310-11.

62 5 U.S. (1 Cranch) 299 (1803).

63 Sloan & McKean, *supra* note 3, at 120; Smith, *supra* note 3, at 311.

64 Sloan & McKean, *supra* note 3, at 120; Smith, *supra* note 3, at 311.

65 Sloan & McKean, *supra* note 3, at 126; Smith, *supra* note 3, at 313.

66 Sloan & McKean, *supra* note 3, at 132; Smith, *supra* note 3, at 315-16.

67 Newmyer, *supra* note 3, at 405; Antonin Scalia, *The Dissenting Opinion*, 1994 J. Sup. Ct. Hist. 33, 34; Smith, *supra* note 3, at 1.

68 Scalia, *supra* note 67, at 34.

69 Newmyer, *supra* note 3, at 405; Scalia, *supra* note 67, at 34.

70 *Marbury*, 5 U.S. (1 Cranch) at 154.

71 *Id.* at 146.

72 *Id.* at 154.

73 *Id.*

74 *Id.*

75 *Id.* at 163.

76 *Id.*

77 *Id.* at 165-66.

78 *Id.* at 166.

79 Chemerinsky, *supra* note 2, at 14–15 ("[T]he Court in *Marbury* announced that there was a category of issues, termed *political questions*, that were not reviewable by the federal courts."). Dean Chemerisky identifies this lesson as the second and my second as the first.

80 *Marbury*, 5 U.S. (1 Cranch) at 166.

81 *Id.*

82 Chemerinsky, *supra* note 2, at 13 ("*Marbury* established the power of the federal courts to review the actions of the executive branch of government. . . . The Court concluded that no person, not even the president or executive officials, can ignore the law.").

83 *Marbury*, 5 U.S. (1 Cranch) at 166.

84 Weinberg, *supra* note 3, at 1404.

85 *Marbury*, 5 U.S. (1 Cranch) at 173.

86 *Id.* at 170.

87 Chemerinsky, *supra* note 2, at 15-16 ("Third, *Marbury* establishes that Article III creates the ceiling on the Supreme Court's jurisdiction. . . . More generally, . . . *Marbury* helped establish the principle that federal courts are courts of limited jurisdiction.").

88 U.S. Const. art. III § 2.

89 *See, e.g.*, Van Alstyne, *supra* note 2, at 30-33.

90 Levinson, *supra* note 2, at 565-66.

91 Amar, *supra* note 3, at 463-67.

92 The Federalist No. 81, at 487–91 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

93 Weinberg, *supra* note 3, at 1368.

94 Judiciary Act of 1789, § 13, 1 Stat. 73, 81 (1789).

95 U.S. Const. art. III, § 2.

96 William N. Eskridge Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 Colum. L. Rev. 990, 1071 (2001).

97 Amar, *supra* note 3, at 456.

98 *Marbury*, 5 U.S. (1 Cranch) at 148–49.

99 Pfander, *supra* note 3, *passim*.

100 Weinberg, *supra* note 3, at 1321-31.

101 *Marbury*, 5 U.S. (1 Cranch) at 177.

102 *Cf.* Chemerinsky, *supra* note 2, at 16-17("Fourth, and most important, *Marbury v. Madison* established the power of the federal courts to declare federal statutes unconstitutional.").

103 *Marbury*, 5 U.S. (1 Cranch) at 178.

104 *Id.* at 179.

105 *Id.* at 179-80.

106 *Id.* at 180.

107 *Cf.* Chemerinsky, *supra* note 2, at 18-19("*Marbury* appears to establish the Court as the authoritative interpreter of the Constitution. . . . But *Marbury* actually is ambiguous about which branch is the authoritative interpreter of the Constitution.").

108 5 U.S. (1 Cranch) 299 (1803).

109 Newmyer, *supra* note 3, at 156; Smith, *supra* note 3, at 311; Weinberg, *supra* note 3, at 1281.

110 Newmyer, *supra* note 3, at 156, Smith, *supra* note 3, at 324.

111 Smith, *supra* note 3, at 324.

112 Weinberg, *supra* note 3, at 1282.

113 Hobson, *supra* note 3, at 50; Smith, *supra* note 3, at 311; Weinberg, *supra* note 3, at 1283-87.

114 Hobson, *supra* note 3, at 156-57; Smith, *supra* note 3, at 324-25.

115 William Michael Treanor, *Judicial Review Before* Marbury, 58 Stan. L. Rev. 455 (2005).

116 Snowiss, *supra* note 3, at 1-89.

117 Phillip Hamburger, Law and Judicial Duty (2008); *see also* Mary Sarah Bilder, *Idea or Practice: A Brief Historiography of Judicial Review*, 20 J. Pol'y Hist. 6, 7 (2008) ("Marshall did not invent judicial review. Judicial review developed from a longstanding English practice of reviewing the bylaws of corporations for repugnancy to the laws of England.").

118 The Federalist No. 78, at 468 (Alexander Hamilton) (Clinton Rossiter ed. 1961).

119 *Id.* at 467.

120 Smith, *supra* note 3, at 326.

121 2 U.S. 408 (1792).

122 Clinton, *supra* note 3, at 102-02; Hobson, *supra* note 3, at 48; Smith, *supra* note 3, at 325.

123 Hobson, *supra* note 3, at 49.

124 Clinton, *supra* note 3, at 105-06; Smith, *supra* note 3, at 324-25.

125 Clinton, *supra* note 3, at 105; Smith, *supra* note 3, at 324.

126 Engdahl, *supra* note 3, at 285.

127 Clinton, *supra* note 3, at 117, 119.

128 60 U.S. (19 How.) 393 (1856).

129 Clinton, *supra* note 3, at 108-09.

130 *Id.* at 119.

131 *Marbury*, 5 U.S. (1 Cranch) at 180.

132 *Id.*

133 *Id.*

134 *Id.* at 176.

135 Nelson, *supra* note 3, at 59; Smith, *supra* note 3, at 323, 326.

136 Nelson, *supra* note 3, at 59.

137 Engdahl, *supra* note 3, at 318.

138 *Id.* at 325 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

139 *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 178).

140 *Id.* at 326.

141 Hobson, *supra* note 3, at 49.

142 Nelson, *supra* note 3, at 59.

143 157 U.S. 429 (1895).

144 Clinton, *supra* note 3, at 121.

145 *Id.* at 183.

146 *Id.* at 139-40.

147 *Id.* at 192-93.

148 *Id.* at 207.

149 *Id.* at 192-93.

150 Weinberg, *supra* note 3, at 1236.

151 *Id.*

152 *Id.*

153 *Id.*

154 Clinton, *supra* note 3, at 95, 138, 185, and 190-91.

155 *Id.* at 220.

156 *Id.* at 123.

157 Bickel, *supra* note 3, at 1.

158 Van Alstyne, *supra* note 2, at 2.

159 Engdahl, *supra* note 3, at 329-30.

Critique of a Proposal to Allow State Bankruptcy

*By John S. Baker, Jr.**

Note from the Editor:

This article and the article that follows by Michael S. Greve explore various ways to relieve the financial issues that currently confront some states and take diverging views as to the viability of a state bankruptcy option, which would allow a state to declare bankruptcy under federal law. We hope that publishing these articles helps contribute to the debate over the current financial challenges facing these states. The Federalist Society takes no position on particular legal or public policy initiatives. We welcome your responses to these articles; to join the debate, you can e-mail us at info@fed-soc.org.

A proposal by Professor David Skeel of the University of Pennsylvania Law School would change federal bankruptcy law so as to allow states the option of declaring bankruptcy.[1] Professor Skeel, a renowned authority on bankruptcy, has performed an important public service by focusing attention on the "the next frontier in 'too big to fail'" and by prompting consideration of important constitutional issues.

He has written two articles that rest on two essential claims: 1. "the constitutionality of bankruptcy-for-the states is beyond serious dispute"; and 2. Bankruptcy is "the best option we have, if we want to have any chance of avoiding massive federal bailouts of state governments."[2]

Professor Skeel's confidence in the constitutionality of a state-bankruptcy law is questionable. Much would depend on the actual language of the provisions included in proposed legislation. Professor Skeel assumes that making bankruptcy "voluntary" would protect the sovereignty of the states and, therefore, make such a law constitutional. Even if the Supreme Court would eventually uphold such a law, Congress should first give serious consideration to the constitutional question and also to other constitutionally acceptable options to address state insolvency.

Professor Skeel's Approach

Professor Skeel's proposal is based on the assumption that California and other states lack the political will to rein in public-employee unions that have driven up public-employee salaries, benefits, and pensions. It is driven by the fear that California or other large states might default on their debts and thereby plunge the nation into another financial crisis. Such a crisis, of course, could devastate state public employees/retirees whose pension funds have invested in state-government debt. The 1.6 million-member California Public Employees' Retirement System, the country's largest public pension, is already greatly underfunded, with only about 70% of the assets necessary to pay its obligations. Since Professor Skeel put forth his proposal, however, the governors of Wisconsin, Ohio, and New Jersey have demonstrated the power of federalism by exercising the political will to put their own fiscal houses in order.

Professor Skeel's constitutional argument points to existing provisions in the Bankruptcy Code allowing municipalities to declare bankruptcy. He offers the availability of municipal bankruptcy as proof of the constitutionality of a state-bankruptcy provision and as a model which—with some modifications—could basically be extended to the states.[3] He says state sovereignty does not pose a constitutional difficulty because states would be able to choose, but not be forced into, bankruptcy. As he notes, the Bankruptcy Code currently does not allow municipalities to be forced into bankruptcy.

The notion that a federal state-bankruptcy provision would merely be voluntary ignores what has happened to the states under the Spending Clause. In theory, participation in grant programs created by Congress pursuant to the Spending Clause is "voluntary." The theory says that states need not accept grants from Congress, but if they do they are subject to conditions imposed on the grants. Of course, over time, as states become more dependent on particular grants, Congress tends to impose more onerous conditions. Thus, with the health care law's modifications to Medicaid, a number of states have made the claim that the program has become "coercive" and, therefore, unconstitutional. The states are not likely to persuade the Supreme Court that their continued participation in the Medicaid program is being coerced. Although twenty-six states prevailed against Obamacare in the Florida federal court decision on January 31st, the court's opinion holds that the states' continued participation in Medicaid is "voluntary."[4] A federal state-bankruptcy option could also be manipulated legislatively so that the "voluntary" morphs into something very different.

Professor Skeel does not account for the history of Congress's recognition of constitutional protections for states later being interpreted as matters of legislative grace. Consider what happened to states on the minimum wage. Long ago, when it was assumed that the federal government could not constitutionally impose the minimum-wage laws on state governments, Congress exempted states from those laws. When Congress changed its mind, states and municipalities initially prevailed on the constitutional issue in *National League of Cities v. Usery*,[5] on the basis that Congress could not use the Commerce Clause to regulate states "in areas of traditional governmental functions." When Justice Blackmun switched his vote, however, *National League of Cities* was reversed in *Garcia v. San Antonio Metropolitan Transit Authority*.[6] It is not difficult to imagine a scenario in which Congress *de facto* forces states into bankruptcy by using the Spending Clause for a bailout of states on the condition that they "voluntarily" choose to go into bankruptcy.

Regardless of which case—*Usery* or *Garcia*—was correctly decided, it is a mistake to lump states and their municipalities

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together for purposes of the Constitution. Municipalities do not have the residual sovereignty enjoyed by states under the Constitution. In its interpretation of the civil rights statute,[7] for example, the Supreme Court has certainly been affected by the difference. The Court has interpreted the statute to allow recovery of damages under certain circumstances against a municipality because a city is a "person" under 1983,[8] but not against a state (or state agency), which is not a "person" under 1983.[9]

Professor Skeel's statements about the constitutionality of a state bankruptcy rest on one case, a case upholding the constitutionality of municipal bankruptcy, *United States v. Bekins*.[10] He claims that this case on municipal bankruptcy means that "[t]here is little doubt that a federal bankruptcy law for states, based on a similar federal law enabling cities to declare bankruptcy (Chapter 9 of the Bankruptcy Code), would be constitutional." He does not mention more recent developments, namely the Supreme Court's re-invigoration since 1990 of federalism in the Commerce Clause and 11th Amendment/sovereign immunity cases.

On federalism issues since the 1990s, the Court has see-sawed between favoring and not favoring the states in different closely-divided decisions. One of those cases did involve the Bankruptcy Clause, *Central Va. Community College v. Katz*.[11] There, a 5-4 majority upheld Congress's power to allow a trustee in bankruptcy to sue state agencies. This and other cases involving state sovereignty issues have been inconsistent due to a swing vote. That makes a reliable prediction of how a Supreme Court majority might rule on a state-bankruptcy law almost impossible. Professor Skeel is neither an originalist nor a persuasive prognosticator of where the law might be heading.

Professor Skeel's proposal reminded me in some ways of the bankruptcy reform in the 1970s. At the time, I was a research assistant for University of Michigan Law Professor Frank Kennedy, who was executive director of the Commission on Bankruptcy Laws. The Commission eventually proposed bankruptcy legislation to Congress which laid the foundation for the Bankruptcy Reform Act of 1978. Although Congress considered the constitutional issue that would eventually be decided by the Supreme Court, the congressional leadership ultimately ignored the constitutional concerns of many of its members. It may have been that after decades of the Supreme Court acquiescing to its will, the congressional leadership was not that concerned about questions of constitutionality.

In *Northern Pipeline Construction Co. v. Marathon*,[12] the Supreme Court declared it unconstitutional for Congress to give non-Article III bankruptcy judges the power to adjudicate state-law claims. Given the existing cases at the time, the result in *Northern Pipeline* could have gone the other way. That it did not was mainly attributable to Justice Brennan's insistence on protecting the independent federal judiciary in the constitutional structure of separation of powers. While Professor Skeel's proposal is a very different one, he has placed too much weight on a single case and not enough on the basic structure of the Constitution.

An Originalist Approach

Congress has its own distinct role regarding constitutional interpretation. Congress—as demonstrated by the bankruptcy reform addressed in *Northern Pipeline*—should not only look to what particular Supreme Court precedents appear to allow under the Constitution. More importantly, to fulfill its own constitutional responsibility, Congress should be asking whether particular proposals are consistent with the structure of federalism and separation of powers.

As was once assumed, members of Congress have an independent obligation—even if the Court might say that something is constitutional—to determine whether proposed legislation is "necessary and proper." The reason the Court generally upholds exercises of congressional power under the Necessary and Proper Clause is that the Court should not be second-guessing Congress's judgment of what is "necessary and proper." The Court should only declare unconstitutional that legislation which cannot fit within a fair interpretation of one or more of the enumerated powers, including the Necessary and Proper Clause. In other words, Congress is supposed to make the first judgment whether proposed legislation is constitutional. While Congress should not enact legislation that the Court will certainly declare unconstitutional, it is perfectly proper for Congress to decide that proposed legislation is not "necessary and proper" even if the Court would likely uphold the legislation.

State Insolvency in History and the Supreme Court

Insolvency of state governments is not a new issue. Prior to the adoption of the Constitution, a number of the states could not pay their debts. In the 1840s, nine states defaulted on their debts. After the Civil War, a number of southern states—notably Louisiana and North Carolina—could not pay their bills.

Nor is state insolvency a new constitutional issue. A major objection to the Constitution raised during ratification was the claim that states could be sued for their debts in federal court. *Federalist* 81 insisted that the principle of sovereign immunity prevented suits by creditors against the states without their consent. Nevertheless, the Supreme Court's first major decision, *Chisholm v. Georgia*,[13] held exactly to the contrary. The 11th Amendment, whose text nullified *Chisholm* by barring suits against a state by citizens of other states, followed soon thereafter.

Following the Civil War, the Supreme Court again faced the constitutional issue triggered by state insolvency. In *Hans v. Louisiana*,[14] the Supreme Court barred a Louisiana citizen from suing Louisiana despite the fact that the text of the 11th Amendment did not cover the situation. The Court took the position that *The Federalist* was correct and *Chisholm* wrong. The Court reaffirmed that the bar against suing states without their consent is inherent in the principle of sovereign immunity, which was not changed by the Constitution and not dependent solely on the 11th Amendment.

The fact that sovereign immunity protects every state from being sued without its consent means that states have the ability to, and have in the past, defaulted on their debts.

Recognizing that a state has power to avoid paying its debts, however, is not to approve the practice. As Hamilton wrote in *Federalist* 81, states have a moral obligation to pay the debts even though not enforceable by the courts. Moreover, if

a state has waived its sovereign immunity, creditors can sue it. Consent by states to be sued varies from state to state depending on its constitution and also on particular contracts which may include waivers.

Even when a state defaults, it suffers consequences. Defaulting affects a state's ability to borrow at reasonable rates. That effect can last a long time. About a decade ago, Mississippi went into the international markets to borrow and was surprised to learn that the state was still blacklisted from its default on Civil War debts. Private lenders and creditors are much less forgiving than government lenders.

State and Federal Alternatives to Federal Bankruptcy

Today, the consequences of a state default on its obligations would not be isolated to one state. A default would affect every pension fund that had invested in what were once thought to be safe assets. Accordingly, Professor Skeel argues that the consequences of a complete default by a state would be "far worse" than reducing its bond debt through a bankruptcy proceeding. Nevertheless, Professor Skeel admits that the bond market was "already beginning to take account of the possibility of a default" by California.

In his first article, Professor Skeel saw "little evidence that either state [California or Illinois] has a recipe for bringing down its runaway expenses, a large portion of which are wages and benefits owed to public employees." Since then, Illinois has substantially increased state taxes. The neighboring states of Wisconsin, Indiana, and Ohio are in the process of cutting expenditures. These different approaches represent competitive federalism in operation. May the state with the best economic public policy win! Citizens of each of the states will be able to "vote with their feet." Corporations apparently are already considering doing so.

Modifying Contracts with Public-Employee Unions:

Professor Skeel is probably correct in saying that California's Governor Brown will not rein in public-employee unions. As other states do so, however, the Supreme Court will be faced with the constitutional question of whether, and to what extent, the Constitution's Contract Clause prevents states from changing contracts with public-employee unions. The federal appellate courts that have faced the constitutional issue have given conflicting answers.[15]

Even if the Contract Clause bars the states from modifying contracts with public-employee unions, Congress has considerable ability to regulate labor relations pursuant to the Commerce Clause. As eventually decided by the Supreme Court during the New Deal, Congress can regulate labor relations on the basis of the effect on interstate commerce. Although specific proposals would need to come from experts in labor law, federal legislation targeting public-employee unions presents a less serious threat to federalism than does a state-bankruptcy law.

Liquidating Non-Governmental State Assets:

In advocating for a state-bankruptcy law, Professor Skeel takes liquidation of state assets off the table because "it seems unlikely that Congress would give bankruptcy judges the power to compel sales in bankruptcy." As an alternative to state bankruptcy, discussed in the next section, Congress might consider blocking and conditioning federal funds.

The reason courts should not be selling state assets is the same reason courts should not be administering any kind of state bankruptcy. First of all, bankruptcy judges are not Article III judges.[16] Even if the legislation provided for federal district judges, Article III judges, to preside over the bankruptcy of a state, the federal judge would be governing much of that state. Such a development may not bother those who favor federal judges administering schools and prisons. State bankruptcy would increase judicial control of state self-government, even if courts were nominally restricted from interfering with a state's legislative process.

The likelihood that Congress would not allow liquidation, as it does not in municipal bankruptcies, means that a major power of a bankruptcy proceeding would not be available. Thus, says Professor Skeel, "the effectiveness of state bankruptcy would depend a great deal on the state's willingness to play hardball with its creditors." Of course, the ability of the state to do so would depend on the trustee appointed by the judge, backed up by the powers of the court. Given that some federal judges have greatly abused their power over the states when administering schools and prisons, something similar is certainly possible under state-bankruptcy administrations.

Having federal courts assist states in pressuring creditors would turn upside down one of the original, most important roles of federal courts vis-à-vis the states. Prior to adoption of the Constitution, a number of states were discriminating against those from other states, notably creditors. In response, the Constitution created diversity jurisdiction for federal courts, established the Privileges and Immunities Clause, and barred states from impairing the obligation of contracts. These provisions were created in large part to protect creditors from debtor-dominated states and, thereby, to move credit into the interior of the country for purposes of economic development.

Checking Irresponsible States:

Rather than encouraging states to "play hardball with creditors," Congress should—if anything—"play hardball with" irresponsible states. This is not a radical idea, but a forgotten dimension of federalism. The state and federal governments are supposed to check each other, rather than either governing the other.[17] When necessary, Congress can check rogue states in order to protect other states.[18]

On occasion, Congress has had to enact legislation whose sole purpose was to restrain the actions of a particular state as a means of protecting other states. Congress did so, for example, in the early 1890s by enacting the Lottery Act in order to block the Louisiana Lottery from undermining the laws of other states. At a time when all states except Louisiana outlawed gambling, the other states could not effectively enforce their own anti-gambling laws because the "Dormant" Commerce Clause prevented them from blocking the flow of goods, including lottery tickets, into their states. The Lottery Act did not outlaw gambling or otherwise change Louisiana law; rather, it simply

prevented sending any lottery tickets across state lines into other states. Although the Supreme Court upheld the Lottery Act, the Court's opinion took a much more expansive view than had Congress of its powers under the Commerce Clause.[19]

What might Congress do to isolate the potential consequences of a default by California? Congress could begin with federal oil royalties from drilling on the Outer Continental Shelf (OCS). The OCS is governed by the federal, not state, government. Federal legislation could do for bondholders what federal tax legislation does for the states. The IRS deducts from taxpayer refunds unpaid state taxes which it sends to state treasuries. Similarly, Congress might enact a law setting aside amounts from a state's federal off-shore oil royalties in order to pay bondholders.

California's share of federal oil royalties of over $68 million amounts to no more than a "drop in the bucket" of California's over $6 billion annual debt service. Still, setting aside a state's share of federal oil royalties is an example of legislation which does not impinge on state sovereignty. It would be a start in a new direction of checking a state's irresponsible spending.

Rethinking Federal Spending and Taxing:

Congress could also look at any and all federal spending that goes to the states. In the past, Congress has attached conditions to federal aid that accomplish purposes barely related to the spending.[20] Congress would be more justified to insist on state financial responsibility in programs funded by federal grants.

As Congress considers state insolvency, it is an occasion for fundamentally reconsidering related issues of taxing and spending. The big states in trouble—California, Illinois, and New York— send per capita more taxes to the federal government than they receive in federal aid. Rather than bailing out these states, allowing them to keep more of their own tax dollars would be a more responsible way to improve their balance sheets. Their representatives in Congress should—but likely would not—decide to support federal spending and tax cuts in order to leave more tax dollars in their states.

Professor Skeel has put forth his state bankruptcy proposal as an alternative to pressure from California for a bailout. But consider a bailout for California with certain conditions. As just discussed, all federal aid to the states comes with "strings attached." Any bailout for California should be tied to opening off-shore drilling on the sea bottom within state control. Such an exchange would be consistent with the first federal government bailout of the states, when following ratification of the Constitution the federal government assumed state debts in return for states giving up their claims to Western lands. It is almost a certainty that California's representatives and their allies in the environmental movement would defeat such a proposal. Nevertheless, calls for a California bailout can be countered and effectively defeated by proposing what most of the country would consider a reasonable exchange.

Conclusion: The Essence of Self-Government

Bankruptcy for the states would continue the consolidation of power in the federal government. If this trend continues, the states will be reduced to nothing more than administrative districts, being completely dependent on the federal government. That kind of unitary state, similar to that of France, is exactly the form of government which was anathema to the Founders—both those for and against the Constitution.

State bankruptcy may appear to be a "silver bullet" that would kill off the menacing threat of insolvent states. In reality, it would be yet another bullet into our wounded constitutional system. An essential principle of our Constitution is that the federal government should not govern state governments.[21]

Self-government requires self-discipline. Within our federal system, we have two selves: the state and the federal governments. As James Madison wrote in *Federalist* 51, American liberty depends on the federal and state governments checking the power of each other. Just as the state electorates largely voted in November to force the federal government to put its financial house in order, the federal government must—and can consistent with federalism—force profligate states to make the tough choices necessary to put their financial houses in order.

Endnotes

1 *See* David Skeel, *A Bankruptcy Law—Not Bailouts—for the States*, Wall St. J., Jan. 18, 2011, *available at* http://online.wsj.com/article/SB10001424052748703779704576073522930513118.html; David Skeel, *Give States a Way to Go Bankrupt*, Wkly. Standard, Nov. 29, 2010, *available at* http://www.weeklystandard.com/articles/give-states-way-go-bankrupt_518378.html.

2 Skeel, *A Bankruptcy Law—Not Bailouts—for the States*, *supra* note 1; Skeel, *Give States a Way to Go Bankrupt*, *supra* note 1.

3 Skeel, *A Bankruptcy Law—Not Bailouts—for the States*, *supra* note 1; Skeel, *Give States a Way to Go Bankrupt*, *supra* note 1.

4 Florida v. U.S. Dept. of Health & Human Servs., No. 3:10-cv-91-RV (N.D. Fla. 2011) (unpublished decision). A three-judge panel of the Eleventh Circuit affirmed the district court's holding that the states' participation in the Medicaid program was voluntary. Florida v. U.S. Dept. of Health & Human Servs., No. 3:10-cv-91-RV-EMT (11th Cir. 2011).

5 426 U.S. 833 (1976).

6 469 U.S. 528 (1985).

7 42 U.S.C. § 1983.

8 Monell v. Dept. of Soc. Servs., 436 U.S. 658 (1978).

9 Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989).

10 304 U.S. 27 (1938).

11 546 U.S. 356 (2006).

12 458 U.S. 50 (1982). Last Term, the Supreme Court upheld its decision in *Northern Pipeline*, concluding that a bankruptcy court lacked the authority under Article III to make a judgment on a state-law counterclaim. Stern v. Marshall, 2011 U.S. LEXIS 4791 (June 23, 2011). A majority of the Court, in an opinion written by Chief Justice Roberts, followed the reasoning of Justice Brennan's plurality opinion in *Northern Pipeline*. *Id.*

13 2 U.S. (2 Dall.) 419 (1793).

14 134 U.S. 1 (1890).

15 Fraternal Order of Police Lodge No. 89 v. Prince George's County, 608 F.3d 183 (4th Cir. 2010) (upholding county's implementation of public employee furlough plan); Buffalo Teachers Fed'n v. Tobe, 464 F.3d 362 (2d Cir. 2006) (upholding public employee wage freeze); Balt. Teachers Union v. Mayor of Balt., 6 F.3d 1012 (4th Cir. 1993) (upholding salary reduction for city employees); Local Div. 589, Amalgamated Transit Union v. Massachusetts, 666 F.2d 618 (1st Cir. 1981) (upholding state law instituting different arbitration procedures from original public employee contract). *Contra* Am.

Fed'n of State, County & Mun. Employees, Local 2957 v. City of Benton, 513 F.3d 874 (8th Cir. 2008) (requiring city to continue paying retiree health insurance premiums); Univ. of Haw. Prof'l Assembly v. Cayetano, 183 F.3d 1096 (1999) (affirming preliminary injunction against state salary deferral program for public employees); Condell v. Bress, 983 F.2d 415 (2d Cir. 1993) (striking down state salary deferral program for public employees); Ass'n of Surrogates & Supreme Court Reporters v. New York, 940 F.2d 766 (2d Cir. 1991) (same).

16 *See supra* note 10.

17 *See* The Federalist No. 51 (James Madison).

18 See *Federalist* 9 and 10 for a discussion of how the federal system avoids the corruption of one state spreading to others.

19 *See* Champion v. Ames, 188 U.S. 321 (1903).

20 *See, e.g.,* South Dakota v. Dole, 483 U.S. 203 (1987) (upholding Congress's conditioning of five percent of federal highway funds on a state having a law prohibiting the sale of alcohol to persons under twenty-one years of age).

21 *See* The Federalist No. 15 (Alexander Hamilton) ("The great and radical vice, in the construction of the existing confederation, is in the principle of LEGISISLATION for STATES or GOVERNMENTS, in their CORPORATE or COLLECTIVE CAPACITIES, and as contradistinguished from the INDIVIDUALS of whom they consist."); s*ee also* Printz v. United States, 521 U.S. 898 (1997) (declaring an act of Congress unconstitutional because it legislated that state officials take certain actions); New York v. United States, 505 U.S. 144 (1992) (same).

Bailouts or Bankruptcy?

*By Michael S. Greve**

American Federalism: Bankrupt at Every Level

In early 2011, the states' financial travails were the stuff of headline news. Deficits for the current budget cycle were estimated at $175 billion. In some states (Texas, California, Nevada, and Illinois), the shortfall exceeded thirty percent of projected budgets. One way or the other, states closed those gaps to comply with the balanced-budget amendments contained in all state constitutions except Vermont's, and public attention shifted to the budget-and-debt-ceiling melodrama in Washington, D.C. However, the parlous fiscal condition of state and local governments remains a lasting concern.

Unfunded pension obligations are estimated at upwards of $1 *trillion* and are probably three or four times that amount. Unfunded health care commitments clock in at upwards of a half trillion. Bond debt issued by state and local governments comes in around $2.8 trillion. It is true that some heartland states are in decent shape. However, the Dakotas, Nebraska, and Indiana cannot compensate for the disaster that is Illinois, let alone the bicoastal basket cases. It is also true that lately, state (but not local) revenues have trended upwards and that a robust economic recovery would create additional breathing room. But the most afflicted states' problem is structural, not cyclical. Under any plausible economic scenario, revenues will barely cover their ongoing operations, let alone their long-term obligations.

In some debt-plagued states, governments have shown commendable courage in attacking systemic fiscal problems. Concurrently, though, the states' collective predicament has prompted a debate over what, if anything, the federal government could do to assist in an orderly management of the crisis. Among the few concrete, plausible suggestions is a bankruptcy option for states, analogous to the process that Chapter 9 of the federal Bankruptcy Code has long provided for municipalities. Some scholars have championed the idea,[1] and GOP legislators have considered legislative proposals to that effect.

For two reasons, the proposal merits serious examination. *First*, the search for a federal response draws much-needed attention to the fact that the states' travails are not entirely homegrown but a federal coproduction. *Second*, a bankruptcy option, and even a vigorous public debate about it, may be a step toward restoring fiscal sanity—provided that its central objectives are kept in mind. State bankruptcy must serve to break the stranglehold of public-sector unions over state politics and budgets; help restore the federal government's precommitment against bailing out states; and advance, rather than distract from, the far more fundamental federalism reforms that will be required over the coming years.

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Who Put the Funk in Dysfunction?

In thinking about state insolvency, we should focus on the chief culprit: intergovernmental grants and transfer payments. These "fiscal federalism" programs—the warp and woof of the American entitlement state—were introduced on a broad scale under the New Deal and increased, massively and disastrously, under the Great Society. Federal outlays to state and local governments grew from under $50 billion in 1960 to well over $400 billion in 2008 (in 2005 dollars).[2] They have come to constitute the single largest revenue source for the states. The principal driver has been Medicaid—the most generous federal transfer program, which pays for over fifty-seven percent of the states' health care spending on eligible populations and services.

In decades past, politicians and scholars across the ideological spectrum celebrated fiscal federalism as a means of squaring national policy imperatives with local control—provided the national government pumps enough dollars into the system and leaves the states sufficient freedom to spend the money as they see fit. This, in a nutshell, was the agenda of President Richard Nixon's "new federalism" and Newt Gingrich's push for "devolution," and it resonates today in vocal demands to liberate states from ObamaCare's onerous mandates.

Federalism scholars, in sharp contrast, have come to conclude that devolution—the combination of federal tax authority and discretionary state spending authority—appears to have devolved from the devil.[3] Fiscal transfer programs inflate the demand for government at all levels (national, state, and local); support local politicians and political elites, especially public-sector unions; and produce moral hazard—that is, state and local overspending and bets on a federal bailout. The first two effects are intended; the third is inevitable. All three are upon us.

Bailouts Under Any Name

The moral-hazard problem has been endemic to every fiscal federalism system, from Argentina to Brazil to Germany to, recently and dramatically, the European Union. The common, temporizing response is to stage bailouts under a different name. Our own federalism illustrates the pattern:

- *The Children's Health Insurance Program* (initially enacted in 1997 as S-CHIP) subsidizes health insurance coverage for children whose parents might not qualify for Medicaid in all states but who cannot afford private insurance. The federal reimbursement rate under the CHIP program is even higher than under Medicaid. The point and effect of the program is to relieve pressure on states to expand Medicaid to previously ineligible populations.

- *The 2003 prescription drug benefit*, known formally as Medicare Part D, shifted the cost of prescription drugs for "dual-eligible" senior citizens from Medicaid to Medicare. Since states cover an average of forty-three percent of Medicaid costs while Medicare is fully funded by the feds, the

transfer—even with a partial federal "clawback"—represented a significant break for the states.

• *The American Recovery and Reinvestment Act (ARRA)*, better known as the 2009 "stimulus" bill, enacted a temporary increase in Medicaid's reimbursement formula (ending July 2011). It also pumped enough money into state budgets to close the predicted budget gaps at the time of passage, thus serving as a bailout for overextended states.

• *Build America Bonds*, also contained in the ARRA, provided a 35 percent interest subsidy for state and local bonds. The program, which expired in December 2010, supported the issuance of well over $115 billion in state and municipal bonds.

• *ObamaCare* is shaping up as a de facto bailout for states. To make its envisioned, monumental expansion of Medicaid palatable for the states, the act offers them a 100 percent reimbursement rate for newly-covered Medicaid populations (scheduled to decline to ninety percent in later years). More consequentially, the statute—once it is fully operational—will allow a transfer of hundreds of thousands of state and local employees and their health care expenses from state-funded programs into federally-subsidized health care exchanges.

Far from providing lasting relief, the interventions have merely steepened the states' financial cliff. Note, though, their accelerating pace and escalating scale. Note, too, that the interventions are often aimed at "curing" the effects of the most generous and therefore most destructive program, Medicaid.

That strategy has now reached its limits. States can no longer afford to undertake new federally-funded commitments unless the feds pay 100 cents on the dollar. At that level, our federalism can no longer produce the fiscal illusion that is its raison d'etre. Moreover, the federal government cannot credibly commit to full funding because everyone knows that it, too, is flat broke. A natural question, then, is what else Washington might be able to offer its stricken state clients. Bankruptcy may be one option.

Bankruptcy?

Since the 1930s, we have had a bankruptcy process for municipalities (but not states), codified in Chapter 9 of the Bankruptcy Code. It is tempting to think of state bankruptcy as the equivalent of corporate bankruptcy under Chapter 11. However, there are several important differences between municipal and corporate bankruptcies.

In terms of the mechanics, Chapter 9 (unlike Chapter 11) requires the filing entity to be actually insolvent. There must also be a showing that the entity has tried but failed to negotiate debt readjustments, and only the insolvent entity, not its creditors, can file for bankruptcy. Inside the bankruptcy process, municipalities have greater protections than corporations, and the court's authority is far more limited. No trustee can be appointed. The local political leadership stays in place, and the bankruptcy judge may not interfere with the municipality's political institutions in any way. Conversely, creditors enjoy much less protection under Chapter 9 than under Chapter 11. For example, they cannot submit a restructuring plan of their own.

These arrangements reflect not only a respect for democratic institutions but also crucial differences in the purpose of private and public bankruptcies.[4] Roughly, Chapter 11 contemplates two basic scenarios. A corporation may have temporary liquidity problems, but its underlying business is sound. In that case, the debt is restructured, and everyone walks off a winner. (This is sometimes called the "fresh start" theory of bankruptcy.) Or, the corporation is a basket case. In that event, we liquidate the capital structure, satisfy the creditors in order of priority, and, to the extent we can, and move on.

Can one replicate this model for government entities? As to liquidity problems, yes. Most successful Chapter 9 proceedings are initiated by small jurisdictions that suffered an exogenous shock—usually, a tort suit. There is not anything wrong with the local government, only with the state's tort law. So the municipality files under Chapter 9, the creditor takes a haircut, and everyone lives happily ever after.

The bankruptcy of larger jurisdictions, and especially states, is wholly different. Their problem is not a lack of liquidity; their entire business model is a nightmare. Obviously, though, one cannot liquidate or even restructure a large municipality—let alone a state—in bankruptcy. A state would leave the process as it entered it—saddled with federal transfer programs that incentivize unsustainable commitments, politicians whose time horizon extends no further than the next election, and public-sector unions that will immediately try to recover lost ground. So what good could the process do?

The good it could do is make it easier for states to get out from under their pension obligations and collective bargaining agreements. This is actually easier under Chapter 9 than under Chapter 11, and federal law could make it easier still—for example, by doing away with the obligation to renegotiate a collective bargaining agreement prior to bankruptcy filing, or by making it clear that compliance with state labor law is not a condition for a unilateral modification of a bargaining agreement in bankruptcy. (The few judicial opinions on this issue have gone both ways.) Perhaps a federal bankruptcy code could even permit the modification of pension and other obligations incurred under earlier agreements and now owed to retirees, thus reducing the states' legacy costs.

Those suggestions, in turn, point to the purposes and desirable contours of any state bankruptcy option, and to the importance of remaining clear about the objectives and getting the details right:

• Under Chapter 11, we try to make creditors whole. (The process simply serves to overcome holdout problems.) The point of state bankruptcy would be just the opposite—to make a large class of creditors, public-sector unions, *worse* off relative to their bargained-for advantages and their positions under ordinary law. That abrogation is not an awkward detail of state bankruptcy; it is the entire point. A state bankruptcy code that fails to serve this purpose would do more harm than good.

• Few if any states will avail themselves of bankruptcy so long as the possibility of a federal bailout remains on the horizon; and the least responsible states—the ones most in hock to public-sector unions, and most in need of an orderly

bankruptcy process—will be most inclined to gamble on that prospect. The temptation is to lure them and their creditors with federal funds: go bankrupt, and we will forgive or defer your federal payment obligations for *x* years. Any plausible state bankruptcy code would have to foreclose that scenario. Recall that the General Motors and Chrysler bankruptcies in 2008–2009 were preceded by a thinly disguised $25 billion federal check to the United Auto Workers. A public-sector replay is the last thing we need.

If Not Bankruptcy, What?

The history of municipal bankruptcies suggests that state bankruptcy, even within the parameters and for the purposes just sketched, may be ineffectual and perhaps counterproductive. In seven-plus decades, only one major jurisdiction (Orange County) actually filed for bankruptcy. And, after emerging from bankruptcy in 1995, it took Orange County all of seven years to lock itself into yet another pension hike for public-sector unions (sheriffs)—retroactive, mind you—with an unfunded liability in excess of $100 million and in the teeth of unequivocal state constitutional provisions prohibiting such maneuvers.[5] This experience suggests, among other things, that Wisconsin Governor Scott Walker had and has it right: without an end to collective bargaining, any union concessions (in- or outside bankruptcy) will prove short-lived. In the meantime, though, what are the alternatives to bankruptcy?

One alternative is the Kirchner option: pay back the looming debts in Argentinean pesos, or the equivalent thereof. Inflation of five or six percent over a period of some years would take care of the states' debts, as well as a good chunk of the federal debt. In the long run, our paralyzed political system may well resign itself to this course of action. But the option is highly unattractive and, for the time being, officially anathema. (Our policy is to export inflation, not to consume it at home.)

Another alternative is to let states default on their debts. Historically, this is what we have done. States suspended debt payments temporarily, and a few actually defaulted, in the late 1830s, after the Civil War, and in one instance during the Great Depression. Calls for a federal bailout went unheeded on each occasion. However, this may no longer be an option. Throughout our history, we have had what few federal systems in the world have had—a credible federal precommitment against bailing out states. That commitment, however, was sustainable only so long as, and because, federal transfer programs remained limited. Under a bloated transfer economy and in the wake of multiple stealth bailouts, it has collapsed.

Once the credit markets seize up or a state defaults, we will no longer have a choice between bailing out the states and not bailing them out. We will rather confront the European Union's choice vis-à-vis the "PIIGS" (Portugal, Italy, Ireland, Greece, and Spain)—bail out the creditors indirectly, via the states, or bail them out directly. Perhaps one can imagine a Congress and an Administration that would tell the public-sector unions to face the music. It is well-nigh inconceivable that we will tell bondholders the same thing.

The central problem, then, is to restore a credible federal precommitment against bailouts. That cannot be done in a single enactment or overnight; it will require a fundamental reform of the entire federalism architecture. However, big tasks are often best begun in smallish steps. In late 2010, Congress took a first step and—facing down the concrete lobby, the intergovernmental lobbies, and the municipal-bond peddlers—let Build America Bonds expire. The decision increased borrowing costs and temporarily rattled the muni-bond market; but then, the complacent denizens of that peculiar market are overdue for electroshock treatment. A well-designed bankruptcy-for-states statute could be an additional step in the right direction: it could send a much-needed signal that we might in fact *not* bail the states out. If we can make unions, officials, and bond markets guess instead of gamble, then that would be progress.

Think!

The fiscal crisis of the states, and its embeddedness in the federal structure, is a challenge to the country. Over the coming years, Democrats and Republicans alike will have to reconceptualize federalism and develop a commensurate political agenda. To that end, they must confront and rethink three problems: the margin problem, the devolution problem, and the moment problem.

The margin problem is that in fiscal federalism, as everywhere, everything that matters happens on the margin. The conservative impulse is to look at the "good" margin, meaning the courageous little state (e.g., Indiana, Wisconsin, Utah) that wants to experiment with efficient, small-government, citizen-friendly reforms and accordingly seeks freedom from stifling federal mandates. However, empowering states is a dangerous strategy. To illustrate the difficulty: a shift from ObamaCare's mandates to a capped Medicaid block grant would spell fiscal relief and better services for the citizens of, say, South Carolina. In the meantime, though, some much larger state will make the rational, budget-maximizing choice: defund the most vulnerable and expensive Medicaid populations, divert the "savings" to the nurses' unions and provider lobbies, and plead poverty. The federal cap will then be under assault, and the demand for federal funding will be higher than ever.

In that light, a funded nonmandate (that is, a block grant) is not a plausible alternative to an unfunded mandate, and may in fact make things worse. (Historically, Medicaid has grown like Topsy not on account of federal grant conditions but as a result of federal "waivers" that allowed states to expand the program.) Sensible fiscal federalism reform should facilitate experimentation by "good" states without, at the same time, liberating exploitative states to maximize their take from the federal till. No fiscal federalism program, past or present, conforms to this model; and perhaps none ever will. However, a clear-eyed recognition of the basic problem will at least yield a tried-and-true rule of thumb: first, do no harm.

The devolution problem is the conservative-libertarian *ceterum censeo* that federalism and "devolution" equal smaller government. That belief is demonstrably false in the regulatory arena, where "devolution" means hellhole jurisdictions and unleashed state attorneys general, and it is false in the fiscal arena. It was one thing to champion devolution when Wisconsin governor Tommy Thompson experimented with welfare reform. It is an entirely different thing to let California and Illinois

experiment with unsustainable programs, in the expectation of a federal bailout. "Devolution" in this context is another word for moral hazard and fiscal disaster. The central task, and the necessary precondition of fiscal discipline, is not to devolve our federalism but to disentangle it.[6]

The moment problem is the notion that we will surely reform our institutions when we must: we are Americans, and exceptional, and pragmatic. Much as we like to tell ourselves otherwise, however, nothing pre-ordains that our constitutional story must have a happy ending. Exceptionalist happy-talk is light years removed from the Founders' perspective, and it has real costs. They are illustrated by the near-universal failure to recognize the *constitutional* dimension of the events in Madison, Trenton, Columbus, and other state capitals earlier this year.

"Among the most formidable of the obstacles" to the constitutional project, Alexander Hamilton wrote in *Federalist* No. 1, was the opposition of state politicians, who would resist any "diminution of the power, emolument, and consequence of the offices they hold under the state establishments." As *state* officials, they would lack any encompassing interest for the union. As *elected* officials, they would seek to maximize their returns over their own expected tenure, and that time horizon is too short to support the calculus of a constitution designed to last for ages to come. Provincialism and shortsightedness, Hamilton knew, would carry forward into politics under the Constitution.

Instead of acting on his insight, we have constructed a fiscal federalism that feeds on and amplifies those pathologies. By dint of luck or perhaps a newfound realism among voters, we have lately been blessed with a bumper crop of politicians, especially state governors, who do *not* conform to type and expectation—who are prepared to sacrifice their own popularity and electoral interests to the demands of long-term, structural reform, and who recognize that the road to fiscal hell is paved with federal grants. That good fortune, however, will not last, and it will not occur again in most of our lifetimes. Thus, the political agenda should be shaped by the attitudes so admirably displayed by the Constitution's framers—an unsentimental understanding of federalism's political economy; a long-term institutional perspective; and above all a recognition that moments of great opportunity are also moments of great danger. Call it the fierce urgency of now.

Endnotes

1 *See, e.g.*, David A. Skeel, Jr., *Give States a Way to Go Bankrupt: It's the Best Option for Avoiding a Massive Federal Bailout*, Cal. J. Pol. & Pol'y 3:2 (2011), *available at* http://www.bepress.com/cjpp/.

2 U.S. Federal Budget, http://www.gpoaccess.gov/usbudget/fy11/hist.html.

3 For a first-rate discussion and survey of the literature, see Jonathan Rodden, Hamilton's Paradox: The Promise and Peril of Fiscal Federalism (2006).

4 For these paragraphs, see Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 Yale J. on Reg. 351, 362–365 (2010).

5 A California appeals court has sanctioned the measure: County of Orange v. Ass'n of Orange County Deputy Sheriffs, 192 Cal.App.4th 21 (2011).

6 For my earlier suggestions in this direction, see Michael S. Greve, *Washington and the States: Segregation Now*, AEI Federalist Outlook (May 2003), *available at* www.aei.org/outlook/17053.

Financial Services & E-Commerce

Is FINRA Constitutional?

*By Joseph McLaughlin**

It would come as news to most Americans that large parts of our economy are regulated by two nominally private, non-profit organizations. Each of these nonprofits was created within the past few years. Each of them oversees the activities of thousands of large and small private companies and hundreds of thousands of their employees, with the power to levy ruinous fines and penalties and even to put them out of business.

One of these non-profits is famously the Public Company Accounting Oversight Board ("PCAOB"), which was the subject in June 2010 of a decision by the U.S. Supreme Court. That decision, *Free Enterprise Fund v. PCAOB*,[1] involved an attack on the constitutionality of the PCAOB for, among other things, violating the separation of powers. The parties conceded that the PCAOB was "part of the Government" and that its board members were "Officers of the United States" who exercise "significant authority pursuant to the laws of the United States." Given those concessions, the Court held that it was a violation of the Constitution's separation of powers for the PCAOB's own regulator—the Securities and Exchange Commission ("SEC"), whose members are removable by the President only for cause—not to have the ability to remove PCAOB board members at will.

But there is another non-profit with clout even greater than that of the PCAOB—and that is even less accountable to the President. The Financial Industry Regulatory Authority, Inc. ("FINRA"), like the PCAOB, has expansive powers to govern an entire industry—in this case the securities industry. Federal law requires nearly all U.S. securities firms to register with FINRA, to pay substantial fees and to comply with FINRA's rules and oversight. FINRA enforces against its "members" the federal securities laws, the SEC's rules, and its own rules. It can issue severe sanctions, including suspension or termination of a firm's or an individual's registration. Unlike the PCAOB, whose assessment of fines and penalties cannot exceed $15 million for a firm or $750,000 for an individual, FINRA may impose monetary fines and penalties in an *unlimited* amount.

There is, of course, a strong statutory resemblance between the PCAOB and FINRA. This is because Congress, in the Sarbanes-Oxley Act of 2002, modeled the PCAOB on the self-regulatory organizations ("SROs") in the securities industry—which at the time included principally the New York Stock Exchange ("NYSE") and FINRA's predecessor the National Association of Securities Dealers, Inc. ("NASD"). But there is also a major difference between the PCAOB and FINRA (which assumed the NYSE's regulatory functions in 2007). This difference is that the SEC appoints the members of the PCAOB board while the members of the FINRA board are either appointed by the board or elected by FINRA's members.

Understandably, the plaintiffs in *Free Enterprise Fund* and at least one supporting *amicus*[2] chose not to call into question the constitutionality of the long-established SROs, emphasizing their "private" nature in contrast to that of the congressionally-created PCAOB. On the other hand, the PCAOB's defenders chose to emphasize the SEC's "pervasive control" over both the SROs and the PCAOB as a basis for the constitutionality of each type of organization.

The Court chose not to make an issue of the SROs where the parties had not done so, and it accepted the proposition that the PCAOB was modeled on "private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members subject to Commission oversight."[3] It also accepted the proposition that "[u]nlike the self-regulatory organizations, . . . the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry."[4]

The folks at FINRA must have read these words and breathed a sigh of relief. And one might indeed conclude from the Court's words that it was not troubled by the separation of powers implications of the "private self-regulatory organizations." But the status of the SROs was not before the Court, and the parties did not address—and the Court was not asked to consider—how these organizations have evolved since the adoption of the relevant legislation in the 1930s.

Decline of Self-Regulation and Its Ultimate Spin-Off from the Trading Markets.

The Securities Exchange Act of 1934 ("1934 Act") required securities firms to register with the SEC if they met the statutory definitions of "broker" or "dealer" and effected transactions otherwise than on a national securities exchange (such as the NYSE). On the other hand, it left it to the NYSE and the other exchanges to regulate their member firms. It was not until the Maloney Act's invention in 1938 of the "national securities association" that a non-voluntary self-regulatory structure was developed for the over-the-counter ("OTC") market. The NASD became a national securities association in 1939. FINRA, the NASD's successor, is still the only significant national securities association.

In the 1934 Act, Congress had given the SEC the power to begin the end of the NYSE as a "private club," but this power

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was greatly expanded by the 1975 amendments to the 1934 Act. These amendments gave the SEC the power not only to approve every new or changed SRO rule but also to require any SRO to adopt any rule the SEC deemed necessary. The amendments also required the boards of the exchanges and the NASD to have members from outside the securities industry.

For most of the rest of the 20th century, a member firm of an exchange was principally regulated by that exchange, while firms that were not members of exchanges were principally regulated by the NASD. One of the advantages often claimed for "self-regulation" was that participants in a given securities market had a large stake in preserving the integrity of that market and were also likely to be well-informed about the workings of that market. Indeed, a former SEC commissioner has described the NASD's self-regulatory model in nearly bucolic terms:

> Initially, the NASD was a nationwide voluntary organization of broker-dealers engaged in trading over-the-counter ("OTC") stocks. Its membership was nationwide, large and diverse. Its emphasis was on self-regulation and discipline by members, as distinguished from regulation by a hired staff, and in promoting voluntary compliance with ethical standards. Principles emanating from the [1934] Exchange Act and guiding the NASD were democratic organization, business persons' judgment and local autonomy.[5]

In the aftermath of a trading scandal, however, the OTC market's trading and regulatory functions were separated in 1996. The NASD's board was required to consist of a majority of non-industry members, and regulatory and disciplinary authority passed from decentralized business conduct committees to a full-time hired staff. FINRA eventually replaced NASD as the industry regulator, and the OTC trading function became a national securities exchange (Nasdaq) under the auspices of a publicly-traded company (The NASDAQ OMX Group, Inc.).

Meanwhile, with the merger in 2006 of NYSE Group, Inc. and Archipelago Holdings, Inc., NYSE membership was no longer linked to trading privileges. With the NYSE itself becoming part of a publicly-traded company (NYSE Euronext) and delegating its regulatory responsibilities to FINRA in 2007 (as have many other exchanges), the separation of the securities industry's regulatory function from its trading functions was nearly complete.[6]

FINRA was thus established as the most important national regulator (other than the SEC) of the securities industry in all its complexity, with authority to enforce all the provisions of the 1934 Act and the SEC's related rules, but without any of the connections to industry professionals and trading markets that had previously been thought to provide the traditional benefits of "self-regulation."

Is FINRA Still an "SRO" as Conceived by the Court?

As many have observed, there is not much "self" in the SROs any longer. It was therefore misleading in the *Free Enterprise Fund* litigation to appeal to the "SRO model" as a justification for the PCAOB structure. The "SRO model" no longer exists.

As noted above, the Court in *Free Enterprise Fund* accepted the distinction between the PCAOB and the SROs on the basis that (1) the SROs are "private" and neither "Government-created [nor] Government-appointed," (2) the PCAOB has "expansive powers to govern an entire industry," and (3) the SROs in fact exercise "self-regulatory" authority, investigating and disciplining "their own members."

But does FINRA, as it currently operates, correspond to the Court's assumptions about "self-regulation"?

A. Is FINRA "Private" and Neither "Government-Created" Nor "Government-Appointed"?

FINRA is a Delaware non-stock corporation with antecedents as far back as the Investment Bankers Association of America in 1936. Unlike the PCAOB, which Congress in Sarbanes-Oxley created as a "body corporate" with the powers of a District of Columbia nonprofit corporation, FINRA is constituted by a Delaware certificate of incorporation. From a strictly formal point of view, therefore, FINRA is a "private" organization that is not "Government-created."

FINRA is also not "Government-appointed" since the SEC does not appoint the members of FINRA's board as it does the members of the PCAOB's board.

On the other hand, FINRA derives its extensive authority from Section 15A of the 1934 Act (added in 1938 by the Maloney Act), which contemplated the creation of private groups to be recognized by the SEC as national securities associations. FINRA's powers are based on the SEC's recognition of FINRA as a national securities association. Thus armed, FINRA may adopt rules to prevent fraud and manipulation, to promote "just and equitable principles of trade," and to subject its "members" to fines, penalties, suspension, and expulsion for any violation of the 1934 Act, the SEC's rules, or FINRA's rules. FINRA can thus be said to be "exercising significant authority pursuant to the laws of the United States" within the meaning of Article II, § 2, clause 2 of the Constitution,[7] an activity that is not typical of "private" organizations that are not "Government-created" or "Government-appointed."

B. Does FINRA Have "Expansive Powers to Govern An Entire Industry"?

Prior to 1983, a securities firm that did not engage in underwriting activity or that confined its business to the floor of a single exchange could choose not to become a member of the NASD and to be regulated directly by the SEC. Congress eliminated this option in 1983 except for firms doing business on the floor of a single exchange. The result was that, while the SEC continued to exercise direct regulatory authority over securities firms, it could rely on the NASD (and later FINRA) as a first line of defense. Indeed, the SEC over the years delegated entirely to FINRA the SEC's statutory responsibility for registering new broker-dealers.

According to FINRA's website, it oversees approximately 4600 brokerage firms, 163,000 branch offices, and 630,000 registered securities representatives. By contrast, the PCAOB had recently registered approximately 1400 U.S. accounting firms and 900 from other countries.

FINRA's revenues in 2009 were more than $1 billion, including nearly $50 million in fines (which FINRA does not classify as "operating revenues"). The PCAOB's revenues in 2009 were $157 million, less than one-sixth of FINRA's revenues.

FINRA has approximately 3000 employees. The PCAOB has just over 600.

In fact, FINRA's revenues are about equal to the SEC's current budget authorization, and FINRA has nearly as many employees as the SEC.

It would appear beyond dispute that FINRA, at least as much as the PCAOB and perhaps as much as the SEC, has "expansive powers to govern an entire industry."[8]

C. Does FINRA Exercise "Self-Regulatory Authority" over Its "Own Members"?

The Court's reference to the NYSE's "investigat[ing] and disciplin[ing] [its] own members" is a throwback to the years when self-regulation meant that market participants, having by definition the greatest interest in the integrity of their market and also the greatest knowledge about its workings, could be the most effective regulators. And the "members" subject to self-regulation were "seat" holders, "member firms," "allied members," "floor brokers," "$2 brokers," and others who were subject to NYSE discipline because they had so elected.

There is no longer anything elective about FINRA "membership," and as discussed above its regulatory functions have nearly completely passed from member-run business conduct committees to a full-time hired staff. Indeed, it is hard to escape the conclusion that FINRA clings to the notion of "membership" less because of the formalities of Delaware non-stock corporations than to preserve the fiction that FINRA is a membership organization like the local golf club.

The facts are that, far from being "members" of FINRA comparable to the former owners of seats on the NYSE and their associates, securities firms are today the functional equivalent of regulated entities with little or no input into FINRA's regulatory policy or corporate governance.[9]

Does FINRA Exercise "Executive Authority"?

Much of the scholarly constitutional analysis of the securities industry's SROs has been devoted to whether they—or, under our current circumstances, FINRA alone—should be classified as public entities or state actors that are subject to self-incrimination and due process limitations in investigations and disciplinary proceedings against securities firms or their employees.[10]

But the question presented by *Free Enterprise Fund* is whether FINRA exercises "executive Power" within the meaning of the Constitution. If it does, then *Free Enterprise Fund* inevitably leads to the conclusion that FINRA is unconstitutional because the President's ability to control FINRA is even less than that deemed insufficient in *Free Enterprise Fund*.

There is no question but that FINRA, even more so than the PCAOB, exercises investigative and prosecutorial functions. These functions relate not only to FINRA's own rules but also to the provisions of the 1934 Act and the SEC's antifraud, anti-manipulation, and record-keeping rules. In 2010, FINRA filed approximately 1300 new disciplinary actions, barring nearly 300 individuals, suspending more than 400 others, and expelling 14 firms. It levied approximately $45 million in fines and ordered more than $8 million in restitution—and 2010 was a "down" year compared to the preceding three years.

FINRA also conducted more than 2600 routine examinations and more than 6600 "for cause" examinations. By contrast, the PCAOB conducted fewer than 400 inspections in 2009 and initiated only thirteen formal investigations.

There is also no question but that such functions are clearly within the "executive Power." The cases leave no doubt on this question. The Court in *Morrison v. Olson* so found, upholding the Independent Prosecutor statute only because the Attorney General retained the power to remove an independent counsel for good cause. "There is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch."[11] By contrast, the PCAOB was found wanting in *Free Enterprise Fund* because its exercise of executive power was constrained only by the SEC's ability to remove its members for cause, a "second layer of tenure protection" that impermissibly undermined the President's constitutional authority.[12]

It is no answer that many of FINRA's investigations and disciplinary proceedings relate to violations of FINRA rules and do not explicitly involve violations of the federal securities laws or the SEC's rules. First, although FINRA's consolidated rulebook is already comprehensive enough to enable FINRA to cast as a rule violation nearly every imaginable violation of the federal securities laws or the SEC's rules, the fact remains that FINRA is obligated by statute to enforce the latter against its members. Second, the PCAOB is also obligated by statute to enforce its rules as well as the applicable federal securities laws and SEC rules.

The PCAOB's defenders in *Free Enterprise Fund* relied upon the SEC's broad power over the PCAOB as sufficient to preserve the principle of presidential control, albeit indirect control. The Court responded that "[b]road power over Board functions is not equivalent to the power to remove Board members." It added:

> Even if Commission power over Board activities could substitute for authority over its members, we would still reject respondents' premise that the Commission's power in this regard is plenary. . . . [T]he Board is empowered to take significant enforcement actions, and does so largely independently of the Commission. . . . Its powers are, of course, subject to some latent Commission control. . . . But the [Sarbanes-Oxley] Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.[13]

The SEC's power to review FINRA sanctions is equal to its power to review PCAOB sanctions, but its formal power to influence FINRA policy is *less* than what the Court in *Free Enterprise Fund* found to be constitutionally insufficient in

respect of its power to influence PCAOB policy. This is because the SEC does not have the ability to remove FINRA board members—even for cause.

It will not do to say that the SEC should not be able to remove FINRA board members because it has no role in their appointment. That argument proves too much. First of all, we do not know what role the SEC or its staff plays in reviewing proposed nominations to the FINRA board. Second, it may be that FINRA's structure violates not only the separation of powers but also the Appointments Clause since FINRA's board members are collectively just as much "inferior officers" as the PCAOB's board members and whose appointment should therefore be vested in the SEC. Third, the emphasis under *Free Enterprise Fund* has to be whether the President has the ability to control executive action, and that ability can only be achieved for separation of powers purposes by removal authority exercised directly or through an officer whom the President can remove at will.

It should be noted that FINRA cannot cure its separation of powers deficiencies by deciding to grant additional due process and other constitutional protections to the firms and individuals that become the subjects of its investigations and disciplinary proceedings. That might cure deficiencies arising from its being characterized as a part of the government or a state actor, but it cannot cure a separation of powers violation.

That said, many of FINRA's functions may not be subject to separation of powers objections. Like the Municipal Securities Rulemaking Board (whose rules FINRA enforces), FINRA should be able to continue to register firms and their representatives and adopt rules regarding their conduct. Also, like other SROs, FINRA should be able to enforce business conduct rules of an ethical nature.

A simple non-legislative solution to FINRA's separation of powers problem would be for the SEC to require FINRA to adopt a by-law that gives the SEC the power to remove FINRA board members at will.[14]

Congress could also simply fold FINRA into the SEC. This is an unlikely scenario, since Congress will be reluctant to increase the federal budget by more than $1 billion. Also, folding FINRA into the SEC would require finding a "home" for FINRA's investment portfolio, which amounted to $1.4 billion at the end of 2009. The first solution might, and the second solution surely would, lead to the result that securities firms and individuals would clearly be entitled to due process and other constitutional protections in future FINRA investigations and disciplinary proceedings. That would be a small price for FINRA to pay for constitutional certainty.

Endnotes

1 *Free Enterprise Fund et al. v. Public Company Accounting Oversight Board*, 130 S.Ct. 3138 (08-861) (June 28, 2010).

2 Brief of *Amici Curiae* Law Professors in Support of Petitioners 23-31 (August 3, 2009).

3 *Free Enterprise Fund*, 130 S.Ct. at 3147.

4 *Id.*

5 Roberta Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?* 14 STAN. J. L. BUS. & FIN. 151, 161 (2008) (footnotes omitted).

6 Of course, many specialized exchanges and clearing agencies continue to have supervisory and disciplinary authority over their members with respect to members' conduct or activities related to the particular exchange or market.

7 *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (*per curiam*).

8 In addition, FINRA has urged the SEC to seek legislation that would permit the SEC to establish one or more SROs for the nation's thousands of investment advisers. According to press reports, FINRA is interested in taking on this function.

9 By-law amendments must receive the approval of a majority of FINRA's members (as well as the SEC's approval), but only the FINRA board may propose by-law amendments.

10 *See, e.g.*, Roberta Karmel, *supra* note 5.

11 *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

12 *Free Enterprise Fund*, 130 S.Ct. at 3154.

13 *Id.* at 3158-59.

14 The author offers no views on whether such a by-law would be consistent with Delaware law.

Something for (Almost) Everybody in Dodd-Frank: Racial, Gender, and Diversity Considerations in the Dodd-Frank Wall Street Reform and Consumer Protection Act[1]

*By Christopher Byrnes**

Scattered throughout the 849 pages of the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] are numerous references to diversity, race, and gender. These considerations may seem out of place in a bill whose stated goal was to "promote the financial stability of the United States by improving accountability and transparency in the financial system."

These references may seem odder still given the evidence that suggests that racial and ethnic discrimination played an important role in the mortgage and resulting financial crisis.[3]

Various experts have concluded that government efforts to pressure lenders to disburse more loans to certain racial, ethnic, and income groups helped cause the crisis.[4]

The inclusion of race, gender, and diversity considerations in the Act may not seem odd, however, in light of the breadth of the legislation. Nor should their inclusion seem odd in light of other recent insertions of diversity, race and gender considerations into federal legislation and rulemaking otherwise unrelated to civil rights, such as the health care bill[5] and the Securities and Exchange Commission's new regulations regarding corporate boards.[6]

The provisions of the Act that deal with race, gender, and diversity generally fall into two categories: those that ask financial regulators to take these considerations into account in addressing systemic financial risk and those that ask these regulators to take these considerations into account in their workforces, the workforces of their contractors, and the businesses they regulate. All of these provisions raise various legal and policy issues.

I. Race and Gender Considerations in Addressing Systemic Financial Risk

The Act calls for financial regulators to begin considering race in making decisions related to systemic financial risk[7] in many instances. The sponsor of these particular provisions, Representative Maxine Waters, supported them, in part, with these arguments:

> Since minorities were preyed upon by unscrupulous lenders and other financial actors and are at higher risk when the economy takes a down turn, I am pleased that my legislation to ensure access to affordable, safe insurance products and to study the impact of wind down on underserved communities is included in the legislation that passed the House today.[8]

With these concerns in mind, the Act specifically:

- charges the newly created Financial Stability Oversight Council to consider the impact of a company or financial activity on minority communities when determining whether to place a company or activity under Federal Reserve Board supervision[9] and whether to recommend that certain financial regulators regulate a financial activity more stringently;[10]
- directs various financial regulators (the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission, the Director of the Federal Insurance Office and the Federal Reserve Board) to include written descriptions of how minority communities would be affected by a proposed disposition of certain financial companies in danger of default;[11]
- directs the FDIC to consider and mitigate potential adverse effects on minority communities in its liquidation plans for failing financial companies placed into government receivership;[12] and
- directs the newly-established Federal Insurance Office to monitor the extent to which "traditionally underserved communities" and minorities have access to affordable insurance products (except health insurance).[13]

These provisions import the disparate impact theory of liability from civil rights law into the world of financial regulation. Under this theory, courts or administrative agencies could find a facially non-discriminatory practice to be discriminatory if the practice had a disproportionate or adverse impact on members of a minority group. The Obama Administration has revived the theory as a basis for civil rights enforcement actions.[14] The current Supreme Court, however, seems generally unwilling to recognize this theory to test for violations of a law unless there is statutory language to support its use.[15]

Whatever their statutory basis, agency actions under the disparate impact theory may violate principles of equal protection, since defendants may feel compelled to adopt racial and gender quotas to get their "numbers right."[16] The agencies affected by these provisions should interpret and enforce these provisions and any implementing regulations with these concerns in mind. Additionally, the agencies should take care to enforce these provisions and any implementing regulations consistently with the Fair Housing Act[17] and the Equal Credit Opportunity Act,[18] which already forbid intentional discrimination in lending.

II. Racial and Gender Diversity Considerations for Their Own Sake?

The above provisions relate to the federal government's coordinated response to systemic risk in the United States

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financial system, but other sections of the Act appear to introduce race, gender, and diversity considerations into employment and contracting.

A. Section 342

Section 342 requires the heads of the departmental offices of various new and old financial regulators[19] to establish an "Office of Minority and Women Inclusion."[20] Each of these Offices would be responsible for "all matters of the agency relating to diversity in management, employment, and business activities."[21] So far, these Offices have been established in the Board of Governors Federal Reserve and all twelve Federal Reserve Banks[22] and the National Credit Union Administration.[23]

Each covered agency's Office of Minority and Women Inclusion would be responsible for either identifying and in some instances addressing concerns about race and gender in three areas: their own agency's workforce, the agency's contracting and other business activities, and the diversity policies and practices of the entities that the agency regulates. The Director of each of these Offices is required to develop standards for "equal employment opportunity and the racial, ethnic, and gender diversity" of the agency's workforce and management.[24] The Director is also required to develop standards to increase the participation of minority-owned and women-owned businesses in the programs and contracts of the agency[25] and to assess the diversity policies and practices of entities regulated by the agency.[26]

The law is also seemingly clear as to what these Directors may not do—their responsibilities do not include "enforcement of statutes, regulations, or executive orders pertaining to civil rights," except that each Director has to coordinate with the agency administrator (or his or her designee) regarding "the design and implementation of any remedies resulting from violations of such statutes, regulations, or executive orders."[27] This latter exception seems to create the risk of overlapping jurisdiction between covered agencies and the established federal civil rights enforcement apparatus.

Representative Waters' remarks in the Congressional Record and her subsequent press releases[28] offered a diversity rationale for Section 342, tying this diversity to meeting the financial needs of the Nation and minority communities:

> These offices would provide for diversity in the employment, management, and business activities of these agencies. The data for the need for these offices speaks for itself. Diversity is lacking in the financial services industry, with the GAO reporting from 1993 to 2004 the level of minority participation in the financial services professions only increased marginally, from 11 percent to 15.5 percent. We took care of that in this bill. And now we have the opportunity to not only give oversight to diversity, but to help these agencies understand how to do outreach, how to appeal to different communities so that we can get the kind of employees that will create the diversity to pay attention to all of the needs of the people of this country.[29]

1. Diversity in the Workforces of Financial Regulators

Each covered agency must take "affirmative steps to seek diversity" in their own workforce consistent with applicable law.[30] These affirmative steps must include recruiting at colleges with high percentages of women or minorities, advertising in print media outlets aimed at minorities and women, partnering with organizations that focus on the placement of minorities and women, and partnering with girls' high schools and high schools with high percentages of minorities to set up or improve financial literacy programs and provide mentoring.[31] Title VII of the Civil Rights Act of 1964 generally prohibits employers and employment agencies from discriminating on the basis of race and sex in recruitment and referrals.[32] The Equal Employment Opportunity Commission, the agency responsible for enforcing Title VII, has suggested that some forms of targeted recruitment aimed at increasing the number of applicants from underrepresented groups is permissible under the statute.[33] Others have argued that race- and gender-targeted recruitment are not wise policy if the underrepresentation of certain groups in the applicant pool is not due to discrimination and the recruitment itself translates into preferences at the hiring stage.[34]

The agency's Office of Minority and Women Inclusion must then report to Congress annually on the "successes achieved and challenges faced . . . in operating minority and women outreach programs,"[35] as well as the "challenges the agency may face in hiring qualified minority and women employees."[36] At least one of the covered agencies, the Consumer Financial Protection Bureau, must report to Congress semiannually with an analysis of its efforts to increase workforce and contracting diversity consistent with the procedures established by its Office of Minority and Women Inclusion.[37] It is difficult to imagine how these agencies could report on the success achieved in seeking racial and gender diversity in their workforces without reporting on the numerical breakdown of minorities and women employed there. Covered agencies may thus feel forced to adopt racial and gender preferences, including quotas or caps, in order to "get their numbers right."

These provisions appear to be government racial classifications. When the federal government uses any classifications based on race, these classifications raise constitutional concerns under the equal protection component of the Due Process Clause of the Fifth Amendment.[38] Indeed, these kinds of classifications are "presumptively invalid"[39] and are reviewed by courts under a standard of strict scrutiny.[40] Under strict scrutiny, the government must demonstrate that the racial classification is "narrowly tailored" to further a "compelling public interest."[41]

Any racial preferences adopted under these provisions would trigger strict scrutiny review under the Fifth Amendment of the Constitution if challenged in court. Section 342's author included these provisions to "not only give oversight to diversity, but to help these agencies understand how to do outreach, how to appeal to different communities so that we can get the kind of employees that will create the diversity to pay attention to all of the needs of the people of this country."[42] Her

press releases assert that these provisions would "broaden and improve the workforce of these agencies."[43] She also hoped that these provisions would ensure that "competent and qualified minorities and women . . . have a seat at the table."[44]

The Supreme Court has so far recognized a discrete number of interests sufficiently compelling to justify race-conscious government decisions, but diversity in either the federal or private workforce has not been among them.[45] As a whole, Rep. Waters's assertions do not indicate whether the provisions seek diversity for its own sake or diversity with some incidental benefit in mind. Where the Supreme Court has upheld racial diversity as a compelling interest justifying race-conscious measures, the Court deferred to the University of Michigan's judgment that racial diversity was vital to ensuring intellectual diversity and its resulting educational benefits.[46] This deference hinged in part on the academic freedoms protected by the First Amendment belonging specially to colleges and universities. Representative Waters' reference to "all of the needs of the people of this Country" suggests that greater racial diversity in the covered agencies will somehow result in greater attention paid to the impact of their actions on minority communities, but it is not clear how this is so. So far, Section 342's defenders have not clearly articulated any such incidental benefits to the much sought-after diversity or any countervailing constitutional interests to protect.[47]

It is possible that the government interest here is remedying past discrimination by the covered agencies, which has fared better in surviving strict scrutiny. But it would be hard to show past discrimination in the covered agencies newly established by the Act and also hard to show it in the older covered agencies, since they have been bound by Title VII of the Civil Rights Act of 1964, which categorically prohibits the federal government from discriminating on the basis of either race or sex in hiring.[48]

Assuming there is a compelling interest, any racial hiring preferences adopted under Section 342 would also have to be narrowly tailored. For example, the covered agency would have to demonstrate that it gave serious good-faith consideration to race-neutral approaches to meeting its racial diversity goals.[49]

Any hiring preferences based on gender would also be presumptively invalid under an equal protection analysis, requiring an "exceedingly persuasive justification."[50] The government would have to show that the challenged action furthers an important government interest by means that are substantially related to that interest.[51] Generally, the Supreme Court has recognized that remedial purposes can justify gender-based classifications in the equal protection context, but not diversity purposes.[52]

These provisions of Section 342 also raise concerns under the antidiscrimination provisions set forth in Title VII of the Civil Rights Act of 1964,[53] which prohibits the federal government from discriminating on the basis of either race or sex in hiring. The Supreme Court has allowed the limited use of racial and sexual preferences in hiring under Title VII, but only to redress past employment practices that resulted in "manifest imbalances" of the groups being discriminated against in "traditionally segregated job categories."[54] Since many of these covered agencies are newly created, it would be difficult to demonstrate historical entrenched discrimination. It would likewise be difficult to show such discrimination in the older agencies, since they have been subject to the amended scope of Executive Order 11,246 since 1967.[55] Federal appeals courts have so far rejected preferences based on the diversity rationale in the Title VII context.[56] Diversity in an agency's workforce would seem to require ongoing maintenance by the employer, and the Supreme Court has noted that preferences can only be used to attain, not maintain, racial balance.[57]

2. Diversity and Inclusion in Contractors and Their Workforces

Covered agencies must now come up with and follow procedures to ensure the fair inclusion and utilization of women and minorities (and business owned by either group) in all their businesses and activities.[58] They must also now consider the diversity of an applicant when weighing contract proposals.[59] They must require a written assurance from contractors that they will ensure fair inclusion of women and minorities in their workforces and those of any subcontractors. [60] Finally, covered agencies will hold the contractors to these assurances and may penalize them by terminating the contract.[61] The Act does not create a private right of action for aggrieved contractors, nor does it create a procedure by which an aggrieved contractor can lodge a complaint with the agency.

The Act does not define the term "fair inclusion." Critics of the Act point out that defining "fair" in the antidiscrimination context has long eluded bureaucrats, university admissions officials, and employers. Worse, according to these critics, federal agencies like the Department of Education have defined "fair" as "proportional" in areas like intercollegiate athletics, which could likewise lead to the adoption of racial and gender quotas by the agencies, contractors, and subcontractors.[62] Several members of the United States Commission on Civil Rights have warned that these firms will do just that to ward off regulatory trouble.[63]

Federal contractors' obligations under the Act and elsewhere tend to substantiate this fear. Regulations promulgated under Executive Order 11,246 already require federal contractors to set goals and timetables to remedy "underrepresentation" among minorities and women.[64] Section 342 requires each covered agency's Office of Minority and Women Inclusion report to Congress annually on the total amounts paid to minority-owned and women-owned business with which the agency contracts and the challenges the agency faces in contracting with qualified minority-owned and women-owned businesses.[65]

Any government preference for a minority-owned or women-owned business raises the same concerns under the equal protection component of the Fifth Amendment's Due Process Clause as those cited above. It is not clear what interest, either compelling or important, can be found to justify these fair inclusion provisions and whether fair inclusion is coextensive in any way with diversity or remedying specific past discrimination. Representative Waters believed that these provisions would expand opportunities for minority-owned and women-owned small businesses to participate in government contracting programs rather than "continuing to rely on the same 'old boy' network and handful of Wall Street firms responsible for the

crisis in the financial markets."[66] She may have meant to suggest that greater participation by minority- (and women-) owned businesses in contracts with covered agencies would somehow avoid another financial meltdown, but it is not clear that this is true or how these goals are consistent with other compelling or important government interests.

More problematic is that this provision calls for the covered agencies to impose new obligations on contractors and subcontractors. Contractors must now provide written statements that they will ensure "fair inclusion" of women and minorities in their workforces and those of any subcontractors. Businesses eager to obtain lucrative contracts with the covered agencies may feel pressure to adopt race and gender preferences in hiring to live up to these assurances. As discussed, these preferences will likely only survive a court challenge under Title VII if they were adopted to redress past employment practices that resulted in manifest imbalances of the groups being discriminated against in traditionally segregated job categories.

It would be difficult to assert a remedial basis for these fair inclusion guarantees and any attendant racial and gender preferences, goals, or timetables set by the contractor. It does not seem plausible that federal contractors have a history of recent and entrenched discrimination, since they have been bound by Title VII and Executive Order 11,246 as amended since 1967, both of which prohibit federal contractors from discriminating in employment on the basis of race, color, religion, sex, or national origin. Executive Order 11,246 also requires federal contractors to take "affirmative action" to ensure that they consider applicants and treat employees without regard to their race, color, religion, sex or national origin.

Any racial hiring preferences adopted by a contractor may also violate Section 1981, which was originally enacted as part of the Civil Rights of 1866 but later amended by the Civil Rights Act of 1991. Section 1981 prohibits racial discrimination in the making, enforcing, modification, and termination of employment contracts.[67] Thus, covered agencies would have to interpret any obligations they seek to impose under Section 342 in a manner consistent with Title VII, Section 1981, and Executive Order 11,246.

3. Diversity in the Regulated Entities

As enacted, the Act does not place any obligations on regulated businesses regarding the racial and gender makeup of their workforce. The Director of each covered agency's Office of Minority and Women Inclusion is required to develop standards for assessing the diversity policies and practices of these entities, but the Act adds that nothing in that requirement "may be construed to mandate any requirement on or otherwise affect the lending policies and practices of any regulated entity, or to require any specific action based on the findings of the assessment."[68] Each Office must report to Congress annually "any other information, findings, conclusions, and recommendations for legislative or agency action, as the Director determines appropriate,"[69] which could presumably contain the Director's assessment of the diversity policies and practices of the regulated entities.

It is possible that the purpose of the covered agencies' assessment of these entities' diversity policies and practices is to build a factual predicate for further federal intervention into the hiring practices of financial services companies. Any further regulation should be consistent with the Act, Title VII of the Civil Rights Act of 1964, and Section 1981, which already govern the hiring practices of these companies.

B. Section 735

Section 735 requires that a board of trade, if a publicly traded company, "endeavor to recruit individuals to serve on [its] board of directors and its other decision-making bodies . . . of the board of trade from among, and to have the composition of the bodies reflect, a broad and culturally diverse pool of candidates."[70] The Act does not specify whether cultural diversity in this instance includes race.

It is possible that the regulators in this case, the Securities and Exchange Commission and the Commodity Futures Trading Commission, may construe a racial diversity requirement here and require the boards of trade to use racial preferences in appointments to their boards of directors. A government racial classification like that would raise the equal protection concerns cited above. If the board of trade were to adopt them on their own to appease their regulators, then this may raise the same concerns under Title VII and Section 1981 as those cited above.

The Commodity Futures Trading Commission has proposed two rules to implement this statutory requirement, neither of which indicates that this requirement seeks to remedy past discrimination.[71] Rather, these regulations seek to ensure that a diversity of perspectives is brought on to the board of directors of these contract markets. For example, a footnote in a rule proposed earlier this year states that:

> Section 735(b) of the Dodd-Frank Act retains the existing DCM core principle on conflicts of interest and governance fitness standards, but (i) amends the existing DCM core principle on composition of governing boards of contract markets to state: "[t]he governance arrangements of the board of trade shall be designed to permit consideration of the views of market participants," and (ii) adds a new DCM core principle on diversity of the Board of Directors. Together, such core principles empower the Commission to develop performance standards for determining whether a DCM has: (i) Appropriate fitness standards for directors, members, and others; (ii) rules to minimize conflicts of interest in DCM decision-making; (iii) appropriate governance arrangements to permit the Board of Directors to consider the views of market participants; and (iv) rules, if the DCM is a publicly-traded company, regarding the cultural diversity of the Board of Directors.

The constitutional and legal viability of this provision would rest on shaky ground if any implementing regulations required that race be used as a proxy for a diversity of views.[72] With these concerns in mind, some have asked the CFTC to not extend the meaning of "diversity" beyond that in the statute. These critics have also pointed out that the careful scrutiny that companies give in vetting the few board members

they do hire may sufficiently uncover the diversity of viewpoint sought. Thus, it would be harder for these companies to justify using race as a proxy in this effort.[73]

III. Conclusion

The race, gender, and diversity provisions of Dodd-Frank are illustrative of similar provisions Congress has inserted into a large number of recent statutes. Because their existence may be overshadowed by the primary effect of the legislation, and because they may bring to life problematic implementing regulations, the public should be aware of these provisions. Race and gender considerations in the sections of the Act addressing the financial system could risk distracting financial regulators and their regulated entities from concerns such as the financial stability of an institution or the creditworthiness of a loan applicant.

It is possible that federal financial regulators may undertake recruitment strategies ranging from targeted to inclusive to attract higher numbers of qualified applicants from all groups to meet their diversity goals. These regulators may undertake targeted recruitment, and only targeted recruitment, for the same end. They may also turn to goals, timetables, and hiring preferences based on race and gender. How much discrimination takes place within these agencies will depend on which of these roads they choose.

It remains to be seen how much discrimination will take place outside of the federal government. Companies eager to maintain profitable contracting relationships with the financial regulators will be under pressure to live up to their required guarantee of fair inclusion of women and minorities in their workforce. As such, they may turn to racial and gender quotas, goals, and timetables. Likewise, companies regulated by these agencies may feel pressure to fend off an unfavorable diversity assessment from their regulator and any future intrusive legislation and regulation which may result. They should remain always vigilant that they do not violate any law, regulation, or executive order which forbids discrimination.

Endnotes

1 The reader may wish to also consult Roger Clegg, Race, Sex, and the Dodd Frank Financial Regulation Bill (Federalist Society New Federal Initiatives Project 2010), *available at* http://www.fed-soc.org/doclib/20100712_DoddFrankBill.pdf, for a summary of some of the provisions cited here and the constitutional and legal problems they present.

2 Pub. L. No. 111-203 (2010) (hereinafter "The Act"). President Obama signed the Act into law on July 21, 2010. A copy of the Act may be found at http://www.gpo.gov/fdsys/pkg/PLAW-111publ203/pdf/PLAW-111publ203.pdf (last visited Mar. 24, 2011). Although the version made available above by the Government Printing Office comes in at 849 pages single-spaced, various sources have reported that the Act was over 2300 pages in length. *See, e.g.*, Ben Protess, *Unearthing Exotic Provisions Buried in Dodd-Frank*, DealBook/N.Y. Times (July 13, 2011), *available at* http://dealbook.nytimes.com/2011/07/13/unearthing-exotic-provisions-buried-in-dodd-frank (last visited Aug. 22, 2011); *The Uncertainty Principle*, Wall St. J. (July 14, 2010), *available at* http://online.wsj.com/article/SB10001424052748704288204575363162664835780.html (last visited Aug. 22, 2011).

3 *See, e.g.*, Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report (2010) (dissent of Commissioner Peter Wallison), *available at* http://c0182732.cdn1.cloudfiles.rackspacecloud.com/fcic_final_report_wallison_dissent.pdf (last visited Mar. 24, 2011); Peter J. Wallison, Am. Enterprise Inst., Cause and Effect: Government Policies and the Financial Crisis 1 (Nov. 25, 2008), *available at* http://www.aei.org/docLib/20081203_1123724NovFSOg.pdf (last visited Mar. 24, 2011); Stan J. Liebowitz, *Anatomy of a Train Wreck; Causes of the Mortgage Meltdown*, Nat'l Rev., Oct. 3, 2008, at 34-42 ("The government had been attempting to increase homeownership in the U.S., which had been stagnant for several decades. In particular, the government has tried to increase homeownership among poor and minority Americans. Although a seemingly noble goal, the tool chosen to achieve this goal was one that endangered the entire mortgage enterprise: intentional weakening of the traditional mortgage-lending standards."). *See generally* United States Commission on Civil Rights, Civil Rights and the Mortgage Crisis 25-29 (Sept. 2009) (summary of research).

4 *See, e.g.,* Thomas Sowell, The Housing Boom and Bust (2010); Howard Husock, *Housing Goals We Can't Afford*, N.Y. Times, Dec. 11, 2008, *available at* http://www.nytimes.com/2008/12/11/opinion/11husock.html (last visited Apr. 7, 2011); Editorial, *Covering Their Fannie*, Investor's Bus. Daily, Apr. 3, 2010, *available at* http://www.investors.com/NewsAndAnalysis/Article.aspx?id=529897 (last visited Apr. 7, 2011); Editorial, *The Subprime Lending Bias*, Investor's Bus. Daily, Dec. 22, 2008; Liebowitz, *supra* note 3; Paul Taylor, *The Risks Posed to National Security and Other Programs by Proposals to Authorize Private Disparate Impact Claims Under Title VI*, 46 Harv. J. Legis. 57, 105-06 (2009); Hans von Spakovsky, *It's Time to Uproot the Real Cause of the Mortgage Crisis*, Pajamas Media, Dec. 20, 2008, *available at* http://pajamasmedia.com/blog/its-time-to-uproot-the-real-cause-of-the-mortgage-bailout (last visited Apr. 7, 2011).

5 Pub L. No. 111-148, §§ 5301 and 5303 (2010) (authorizes the Secretary of Health and Human Services to give priority consideration in awarding contracts or grants to medical and dental schools that have a record of training individuals from underrepresented minority groups).

6 74 Fed Reg. 68334 (Dec. 23, 2009), *codified at* 17 C.F.R. § 229.407 (c)(2)(vi).

7 The Act also includes race or minority status in imposing several record-keeping requirements and in calling for outreach to minority communities. For example, Section 1443 requires the Director of Housing Counseling to develop and conduct national public service multimedia campaigns promoting housing counseling to "elderly persons, persons who face language barriers, low-income persons, minorities, and other potentially vulnerable consumers" and other seeking or maintaining a residential mortgage loan. Section 1450 requires the Director of the Consumer Financial Protection Bureau to prepare a booklet to help consumers applying for federally related mortgage loans to understand the nature and costs of real estate settlement services. The Director must prepare the booklet in "various languages and cultural styles" (as he or she determines to be appropriate), so that the booklet is "understandable and accessible to homebuyers of different ethnic and cultural backgrounds."

See also The Act, *supra* note 2, at §§ 1071 (requiring each financial institution, in the case of an application for credit for either a small business or a women-owned or minority-owned business, to both inquire whether the business is a women- or minority-owned business or a small business and maintain a record of the response), 1077 (requiring the Bureau of Consumer Financial Protection and the Department of Education to submit to Congress a report on private education loans that contains "socioeconomic characteristics (including income and education levels, racial characteristics, geographical background, age, and gender)"), and 1109 (mandating that the Comptroller General's audit of the Federal Reserve System include an examination of the "extent to which the current system of appointing Federal reserve bank directors effectively represents 'the public, without discrimination on the basis of race, creed, color, sex or national origin . . . in the selection of bank directors, as such requirement is set forth under section 4 of the Federal Reserve Act").

8 *See* Press Release, Waters Wins Big for Minorities, Women in Wall St. Reform and Consumer Protection Bill (July 1, 2010), *available at* http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=193428 (last visited Mar. 31, 2011); *see also* 156 Cong. Rec. H5242 (2010) (statement of Maxine Waters).

9 *See* The Act, *supra* note 2, at § 113.

10 *See id.* at § 120. These other financial regulatory agencies are required to impose the standards recommended by the Council. *See id.* at § 120 (c)(2).

11 *See id.* at 203 (a)(2). Written recommendations by various financial regulators (the Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission, the Director of the Federal Insurance Office and the Federal Reserve Board) to the Secretary of the Treasury concerning the disposition of certain financial companies in danger of default must include a "description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities."

12 *See id.* at § 210 (n)(9)(A).

13 *See id.* at § 502 (a)(3).

14 *See, e.g.,* Press Release, Department of Justice, Justice Department Settles Lawsuit Against the City of Portsmouth, Virginia, Alleging Discrimination Against African Americans in the Hiring of Firefighters (Mar. 25, 2009), *available at* http://www.justice.gov/opa/pr/2009/March/09-ag-272.html (last visited Apr. 11, 2011); Press Release, Department of Justice, Justice Department Settles Lawsuit Against the City of Dayton, Ohio, Alleging Discrimination Against African Americans in the Hiring of Police Officers and Firefighters (Feb. 26, 2009), *available at* http://www.justice.gov/opa/pr/2009/February/09-crt-172.html (last visited Apr. 11, 2011); *see also* Paul Baskin, *Education Department Promises Push in Civil Rights Enforcement*, Chron. of Higher Educ., Mar. 8, 2010, *available a*t http://chronicle.com/article/Education-Department-Promises/64567/ (last visited Apr. 11, 2011); Neil King, Jr., *Students' Civil Rights to Get Scrutiny*, Wall St. J., Mar. 8, 2010; Transcript of U.S. Secretary of Education Arne Duncan Press Conference Call on Civil Rights Enforcement, Mar. 8, 2010, at 10.

15 *See, e.g.*, Smith v. City of Jackson, 544 U.S. 228 (2005). Only three statutes—the 1991 amendments to Title VII of the Civil Rights Act of 1964, the 1982 amendments to the Voting Rights Act of 1965, and the Americans with Disabilities Act—set forth a disparate impact cause of action. The Court has not recognized the validity of the disparate impact theory outside of employment and voting.

16 *See, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658, 2681-2682 (2009) (Scalia, J., concurring) ("Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.").

17 42 U.S.C. § 3605 (b)(1) (2006).

18 15 U.S.C. §§1691-1691f (2006).

19 The Department of the Treasury, the Federal Deposit Insurance Corporation, the Federal Housing Finance Agency, each of the Federal Reserve Banks, the Board of Governors of the Federal Reserve, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Securities and Exchange Commission, and the Bureau of Consumer Financial Protection.

20 *See* The Act, *supra* note 2, at § 342 (a)(1).

21 *See id.* at § 342 (a)(1)(A).

22 *See* Press Release, Board of Governors of the Federal Reserve System (Jan. 18, 2011), *available at* http://www.federalreserve.gov/newsevents/press/other/20110118a.htm (last visited Apr. 1, 2011).

23 *See* Media Advisory, NCUA Opens New Office of Minority and Women Inclusion (Jan. 21, 2011), *available at* http://www.ncua.gov/news/press_releases/2011/MA11-0121MatzCutsRibbonFINAL.pdf (last visited Apr. 1, 2011).

24 *See* The Act, *supra* note 2, at § 342 (b)(2)(A).

25 *See id.* at § 342 (b)(2)(B). Section 342 also applies to "all contracts of an agency for services of any kind, including the services of financial institutions, investment banking firms, mortgage banking firms, asset management firms, brokers, dealers, financial services entities, underwriters, accountants, investment consultants, and providers of legal services." The contracts include "all contracts for all business and activities of an agency, at all levels, including contracts for the issuance or guarantee of any debt, equity, or security, the sale of assets, the management of the assets of the agency, the making of equity investments by the agency, and the implementation by the agency of programs to address economic recovery."

26 *See id.* at § 342 (b)(2)(C).

27 *See id.* at § 342 (a)(3).

28 Press Release, U.S. Congresswoman Maxine Waters, Congresswoman Waters Celebrates Approval of Provision to Promote Inclusion of Minorities & Women; Blasts WSJ for Distortions in Editorial (June 18, 2010), *available at* http://waters.house.gov/News/DocumentSingle.aspx?DocumentID=191382 (last visited Mar. 23, 2011). This press release states:

> What this legislation will do is help address an indisputable problem, the lack of diversity in financial services. Rigorous analysis documents the discrimination that women and minorities face compared to white men of similar educational background and age. Data from the Office of Personnel Management shows the lack of African-American and Hispanic senior managers at the federal financial services agencies.
>
> At the Treasury Department, for example, minorities only make up 17.2 percent of employees at senior pay levels. A recent report from the Government Accountability Office points to the lack of diversity within the financial services industry, with virtually no improvement at the management level from 1993 to 2008. The lack of contracting opportunities for minority- and women-owned businesses through programs like TARP has also been documented.
>
> The provision is designed to broaden and improve the workforce of these agencies and expand opportunities for our nation's small businesses—including minority- and women-owned businesses—to participate in programs and contracts instead of continuing to rely on the same "old boy" network and handful of Wall Street firms responsible for the crisis in the financial markets.

29 156 Cong. Rec. H5242 (2010) (statement of Maxine Waters).

30 *See* The Act, *supra* note 2, at § 342 (f); *see also* §§ 156 (b)(2)(C)(i) and 1067 (b)(2)(C)(i). Under these provisions, the Office for Financial Research and the Consumer Financial Protection Bureau must each submit annual reports to Congress that include a recruitment and retention plan that includes the steps needed to target "highly qualified applicant pools with diverse backgrounds." While these provisions do not explicitly call for these agencies to consider race and gender diversity in these recruitment and retention plans, it is possible that the agencies will construe "diversity" to include these considerations.

31 *See id.*

32 *See* 42 U.S.C. § 2000e-2 (2011).

33 *See, e.g.*, Equal Employment Opportunity Commission, Compliance Manual at §§ 15-VI (A) and (C)(2006), *available a*t http://www.eeoc.gov/policy/docs/race-color.html (last visited Apr. 7, 2011).

34 *See, e.g.*, Equal Employment Opportunity Commission, Meeting on the E-Race Initiative, Feb. 28, 2007 (testimony of Roger Clegg), *available at* http://www.eeoc.gov/eeoc/meetings/archive/2-28-07/clegg2.html and http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=147&Itemid=54.

35 *See* The Act, *supra* note 2, at § 342 (e)(3).

36 *See id.* at § 342 (e)(4).

37 *See id.* at § 1016 (c)(9).

38 The Fifth Amendment to the Constitution of the United States does not provide a guarantee of equal protection of the laws as does the Fourteenth Amendment. However, the Supreme Court has held that such a guarantee inheres in the Fifth Amendment's guarantee that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." *See* Adarand Constructors, Inc, v. Pena, 515 U.S. 200, 212-217 (1995).

39 *See* Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

40 *See Adarand*, 515 U.S. at 224.

41 *See id.* at 227.

42 *See* 156 Cong. Rec. H5242 (2010) (statement of Maxine Waters).

43 *See* Press Release, *supra* note 28.

44 *See id.*

45 The Supreme Court has so far recognized only a discrete number of these compelling interests: national security (*see* Korematsu v. United States, 323 U.S.

214, 217-20 (1944)), the educational benefits that flow from a diverse student body in higher education (*see* Grutter v. Bollinger, 539 U.S. 306, 328-330 (2003)), and remedying specific past discrimination (*see* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490-92 (1989)).

46 539 U.S. 306 at 328-330.

47 *See* Press Release, *supra* note 8. Perhaps Ms. Waters hopes that racial diversity at a federal financial regulatory agency would allow the agency to better understand the impact of its actions (and presumably the actions of the businesses it regulates) on minority communities and prevent irresponsible lending and any possible future financial failure.

48 *See* 42 U.S.C. § 2000e-16 (a) (2011) ("All personnel actions affecting employees or applicants for employment . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.").

49 *See, e.g.*, *Grutter*, 539 U.S. 306 at 339-340; *Adarand*, 515 U.S. 200 at 237-38.

50 *See* United States v. Virginia, 518 U.S. 515, 533-534 (1996); Miss. Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).

51 *See Hogan,* 458 U.S. at 724-725; Craig v. Boren, 429 U.S. 190 at 197 (1976).

52 *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam) ("Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.").

53 *See* 42 U.S.C. § 2000e-16 (a).

54 *See, e.g.*, Johnson v. Transportation Agency, Santa Clara County, 480 U.S. 616-639 (1987) (gender preferences); United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 208-209 (1979) (racial preferences).

55 *See* Exec. Order No. 11,246, 30 Fed. Reg. 12, 319 (Sept. 24, 1965) ("It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin."). President Johnson issued Executive Order 11,375 in 1967 to amend Executive Order 11,246 to include sex as a protected category. *See* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967); *see also* 41 C.F.R. §§ 60-2.1-60-2.35 and 60-4.1 to 60-4.9 (2008).

56 *See*, *e.g.*, Messer v. Meno, 130 F.3d 130, 135-137 (5th Cir. 1997); Taxman v. Bd. of Educ. of the Twp. of Piscataway, 91 F.3d 1547, 1557-1563 (3d Cir. 1996) (en banc).

57 *See Johnson,* 480 U.S. at 639.

58 *See* The Act, *supra* note 2, at § 342 (c)(1).

59 *See id.* at § 342 (c)(2).

60 *See id.*

61 *See id.* at § 342(c)(3). The Director of Minority and Women Inclusion is required to make a determination as to whether an agency contractor or subcontractor has failed to make a good-faith effort to include minorities and women in their workforce. If the Director determines that the contractor or subcontractor failed to make this good-faith effort, he or she must recommend to the agency administrator to terminate the contract. The agency administrator may then terminate the contract, make a referral to the Department of Labor's Office of Federal Contract Compliance Programs, or take other appropriate action.

62 *See* Diana Furchtgott-Roth, *Racial, Gender Quotas in the Financial Bill*, Real Clear Markets, July 8, 2010, available at http://www.realclearmarkets.com/articles/2010/07/08/diversity_in_the_financial_sector_98562.html (last visited Mar. 29, 2011).

63 *See* Letter from Commissioners Todd Gaziano, Gail Heriot, Peter Kirsanow, and Ashley Taylor to Joseph Biden, President of the Senate, and Senators Harry Reid, Mitch McConnell, Richard Durbin, John Kyl, Christopher J. Dodd, and Richard G. Shelby, *available at* http://blog.heritage.org/wp-content/uploads/DoddFrankLetterFINAL.pdf (last visited Mar. 31, 2011) ("All too often, when bureaucrats are charged with the worthy task of preventing race or gender discrimination, they do in fact precisely the opposite: Consciously or unconsciously, they *require* discrimination by setting overly optimistic goals that can only be fulfilled by discriminating in favor of the groups the goals are supposed to benefit.") (emphasis in the original).

64 *See* 41 C.F.R. §§ 60-2.1-60-2.35 and 60-4.1 to 60-4.9 (2008).

65 *See* The Act, *supra* note 2, at § 342 (e).

66 *See* Press Release, *supra* note 28.

67 *See* 42 U.S.C. §§ 1981 (a) and (b) (2011).

68 *See* The Act, *supra* note 2, at § 342 (b)(4).

69 *See id.* at § 342 (e)(5).

70 *See id.* at § 735 (b)(22).

71 *See, e.g.*, Governance Requirements for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities; Additional Requirements Regarding the Mitigation of Conflicts of Interest, 76 Fed. Reg. 722, 729 (proposed Jan. 6, 2011); Core Principles and Other Requirements for Designated Contract Markets, 75 Fed. Reg. 80572, 80574 (proposed Dec. 22, 2010).

72 *See, e.g.*, Lutheran Church-Missouri Synod v. FCC, 141 F.3d 355, 355 (D.C. Cir. 1998):

> We do not mean to suggest that race has no correlation with a person's tastes or opinions. We doubt, however, that the Constitution permits the government to take account of racially based differences, much less encourage them. One might well think such an approach antithetical to our democracy… Indeed, its danger is poignantly illustrated by this case. It will be recalled that one of the NAACP's primary concerns was its belief that the Church had stereotyped blacks as uninterested in classical music.

73 *See, e.g.*, Comments of Commissioners Gaziano, Heriot, and Kirsanow of the United States Commission on Civil Rights on 76 Fed. Reg. 722 (Mar. 7, 2011); Comment of Center for Equal Opportunity on 76 Fed. Reg. 722 (Mar. 7, 2011). Both comments are available on the CFTC's website.

International & National Security Law

War Powers Irresolution:

The Obama Administration and the Libyan Intervention

*By Robert J. Delahunty**

The U.S. military intervention in Libya, now in its fourth month, has brought two fundamental and recurrent constitutional questions to the fore. The first is whether the President can initiate a war, admittedly not in national self-defense or for the protection of U.S. persons or property abroad, without prior approval from Congress. The second is whether the provisions of the War Powers Resolution[1] that require disengagement if the President has not obtained congressional sanction within two months of beginning such a war are constitutional.

Both questions have been prominent in public policy debates from the Vietnam War up to the 2008 presidential election and after. Political leaders, legal scholars, and activists in the Democratic Party over four decades have denounced what they see as the pretensions of an "Imperial Presidency" bent on aggression and conquest, and called for the restoration of what they contend are Congress' original powers over war policy.[2] Moreover, before assuming their current offices, the President, the Vice-President, and the Secretary of State had all emphatically stated views on the matter that reflected the dominant opinion within their party. I shall discuss and analyze in Part I the Administration's legal position on the President's war powers. Then in Part II, I will consider the Administration's stance on the War Powers Resolution.

I. The Justice Department's Opinion

On April 1, 2011, the Office of Legal Counsel (OLC) of the Department of Justice issued an opinion defending the legality of President Obama's attack on Libya.[3] OLC's main argument for concluding that the President needed no antecedent declaration of war or other specific congressional authorization was, in substance, that the Libyan intervention would turn out to be a small, short war. Affirming that the President "had constitutional authority, as Commander in Chief and Chief Executive and pursuant to his foreign affairs powers, to direct . . . limited military operations abroad, even without prior specific congressional approval,"[4] OLC "acknowledged one possible constitutionally-based limit on this presidential authority"—"a planned military engagement that constitutes a 'war' within the meaning of the Declaration of War Clause."[5] The purported constitutional distinction turned on "whether the military operations that the President anticipated ordering would be sufficiently extensive in 'nature, scope, and duration' to constitute a 'war' requiring specific congressional approval."[6]

OLC's distinction between small, short wars that the President may begin unilaterally and large, long wars that require prior congressional approval has no foundation in the Constitution's text. The Declaration of War Clause says simply that Congress has the power "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[7] Nothing in the clause explicitly differentiates between "small" and "large" wars. Dr. Samuel Johnson's *English Dictionary,* which provides evidence of how the term would have been understood in the Founding period, defines "war" as "[t]he exercise of violence under sovereign command against withstanders."[8] That definition covers wars both large and small. Further, American and English courts in the Framing period followed the lead of Hugo Grotius[9] in denying that there could be an intermediate legal space between "war" (whether large or small) and "peace."[10] Hostilities authorized and organized by a state could be considered tantamount to "war." Thus, Lord Ellenborough said in 1813 that "Nations may be at war with each other by reciprocal acts of hostility done and suffered."[11]

If the Declare War Clause imports any distinction, it is between *public* and *private,* not *large* and *small*, wars. A "declaration" of war—if needed at all[12]—could affirm that (even pre-existing) hostilities had the legal attributes of a "public," state-sanctioned, war.[13] It served to "prove[] the existence of actual hostilities."[14]

True, State practice near the Founding period also appeared to recognize that some hostilities might not amount to a general war. On October 19, 1739, the British Crown, in what is picturesquely known as the War of Jenkins' Ear, declared war on Spain.[15] The British declaration had been preceded by lower-level hostilities. In March 1739, the Crown had announced that it would "grant Letters of Reprisal, to such of His subjects, whose Ships, or effects, may have been seized on the High Seas by Spanish *garda costas,* or ships, acting by Spanish Commissions."[16] The Crown issued "letters of marque" to merchant vessels in July, and Vice-Admiral Edward Vernon led out nine men-of-war and a sloop against the Spanish shortly afterwards.[17] Some scholars have accordingly argued that the Letters of Marque and Reprisals Clause and the Captures Clause were designed to sweep in smaller wars and to ensure that Congress alone possessed the authority to initiate them. The better view, however, is that these clauses "concern[] the distinction between the public and private waging of war and the right of a sovereign nation to make decisions regarding that distinction."[18] In any event, if the clauses were designed to ensure that Congress alone could initiate small wars, the distinction between large and small wars would turn *against* OLC.

The text and background of the Declare War Clause, therefore, do not support OLC's position. But constitutional text alone is not dispositive. The Supreme Court has read a distinction into the Fourth Amendment between police "stops" (which do not require probable cause) and "searches"

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(which do), although nothing in the Amendment's language hints at this.[19] Likewise, the Declare War Clause might harbor an implicit distinction between large and small wars. But why suppose so?

OLC's answer is that "the 'historical gloss' placed on the Constitution by two centuries of practice" must guide interpretation of the Declare War Clause.[20] U.S. history, OLC argues, is "replete with instances of presidential uses of military force abroad in the absence of prior congressional approval."[21] And that practice "is an important indication of constitutional meaning, because it reflects the two political branches' practical understanding . . . of their respective roles and responsibilities."[22]

This is true, but it proves too much for OLC's purposes. Practice amply demonstrates that Presidents have initiated large as well as small wars without a prior declaration of war (or other congressional authorization).[23] By OLC's own criteria, Presidents have fought a good many large wars without having sought Congress' approval first. Of those large wars, the best known is the Korean War (1950-53). But there are many other cases. President George H.W. Bush launched an invasion of Panama in 1989 that brought down the Noriega regime. From 1899 to 1901, the United States employed 126,468 troops to combat the Philippine Insurrection. In 1900, President McKinley sent 5000 U.S. troops to China to join the forces of other powers in suppressing the Boxer Rebellion. After the First World War, the United States deployed some 14,000 troops into Russia to oppose the Bolsheviks and halt Japan's expansion into Siberia.[24] Moreover, on several occasions in which formal declarations of war had been preceded by limited military engagements, Congress affirmed that a state of war was *already* in existence, indicating that the existence of "war" does not hinge on the scope or duration of the conflict.[25] Thus, while past practice may support the claim that the President may initiate war unilaterally, it does *not* support OLC's further claim that he may do so only when military operations will be brief and on a small scale.

OLC's distinction between "large" and "small" wars does not trace back to constitutional law or practice, but rather to—now largely obsolete—international law.[26] Beginning in the nineteenth century,[27] writers distinguished between "war" strictly so-called and "forcible measures short of war," including reprisals, embargoes, and pacific blockades.[28] Reflecting this distinction, Congress enacted the Hostage Act in 1869, authorizing the President to take measures "not amounting to acts of war" to secure the release of U.S. citizens captured and held abroad. The Court of Claims, dealing in 1886 with French "spoliation claims," considered that a state of persisting reprisals "straining the relations of the state to their utmost tension, daily threatening hostilities of a more serious nature" might still fall "short of war."[29] President (later Chief Justice) William Howard Taft wrote in 1915 that while the President had the constitutional authority to commit the marines into hostilities in Central America, "if troops of the regular army are needed, it seems to take on the color of an act of war."[30] But the distinction between "war" and measures "short of" war was difficult to apply.[31] And the UN Charter and other post-World War Two instruments have swept away the basis for any general distinction in international law between "war" and "forcible measures short of war."[32]

In any case, the U.S. intervention in Libya is by no means a "measure short of war." As President Obama and other NATO leaders have repeatedly insisted, the Allies' overriding war aim is regime change—to bring down Colonel Muammar Gaddafi's government.[33] Further, despite official disclaimers, NATO forces have obviously been seeking to "decapitate" the Libyan regime by targeting Gaddafi and other senior figures in his government.[34] The costs of the operation as of mid-May to the U.S. alone are $750 million—and climbing.[35] The President's original claim to members of Congress that his intervention would be successful in "days, not weeks" has been falsified by events[36]: the President now acknowledges that there is no end in sight.[37] On June 1, 2011, NATO announced the extension of the Libyan campaign for at least a further ninety days, and some reports indicate that NATO may be mulling the introduction of ground troops into Libya. Any candid evaluation of the "scope" of the conflict should also take into account that Libyan-sponsored terrorists may attack Western cities or civilians (as Libya has done in the past). And although the President thought the Libyan operation to be too "small" to require Congress' approval beforehand, he also considered it sufficiently "large" to require a sign-off from the UN Security Council before he went forward.

The President and his senior colleagues have also held inconsistent positions on the question of presidential war powers. In a 2007 interview with *The Boston Globe*, then-candidate Obama stated, "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."[38]

Then-candidate Hillary Clinton told the *Globe*, "[T]he Constitution requires Congress to authorize war. I do not believe that the President can take military action—including any kind of strategic bombing—against Iran without congressional authorization."[39]

Vice President Joe Biden stated in 2007 (in the context of a possible U.S. attack on Iran):

> I was chairman of the Judiciary Committee for 17 years . . . I teach separation of powers in constitutional law. This is something I know. So I got together and brought a group of constitutional scholars together to write a piece that I'm gonna deliver to the whole United States Senate, pointing out the president has no constitutional authority to take this nation to war against a country of 70 million people unless we're attacked or unless there is proof that we are about to be attacked. And if he does . . . I will move to impeach him. . . . I would lead an effort to impeach him.[40]

II. The War Powers Resolution

The War Powers Resolution (WPR) was enacted over President Richard Nixon's veto in 1973 by a Democrat-controlled Congress in the depths of Vietnam and Watergate.[41] Since then, the WPR has remained a venerated talisman for anti-war advocates whenever a war looms. Presidents, however, invariably see things Nixon's way. Since Nixon's

veto, "every President has taken the position that [the WPR] is an unconstitutional infringement by the Congress on the President's authority as Commander in Chief."[42]

The WPR states that the President's "constitutional powers . . . as Commander-in-Chief" to introduce U.S. armed forces into actual or threatened hostilities are exercised "only" pursuant to (1) a declaration of war; (2) specific statutory authorization; or (3) a national emergency created by an attack on the U.S. or its armed forces. It requires the President to "consult" with Congress "in every possible instance" before troops are introduced into hostile situations. Section 4(a) requires the President to report to Congress when (in the absence of a declaration of war) armed forces are deployed (1) into actual or threatened hostilities; (2) "into the territory, airspace or waters of a foreign nation, while equipped for combat . . ."; or (3) in numbers which "substantially enlarge" U.S. armed forces equipped for combat who were already in a foreign nation. The heart of the WPR is section 5(b), which requires the President, within sixty days of filing (or being obligated to file) a report under section 4(a)(1), to "terminate any use of United States Armed Forces" that was subject to the reporting requirement unless Congress in the interval has declared war, enacted a "specific authorization" for the deployment, extended the sixty-day period, or been unable to meet because of an attack on the U.S. The sixty-day period may be extended by an additional thirty days "if the President determines and certifies to the Congress in writing that *unavoidable military necessity requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces*" (emphasis added).

The executive branch has frequently objected to the sixty/ninety-day limit as unconstitutional. In his veto message, President Nixon objected that under this framework, "[n]o overt Congressional action would be required to cut off [the President's] powers—they would disappear automatically unless the Congress extended them." Arguing that this enabled Congress to increase its policy-making role through mere inaction, Nixon maintained that "the proper way for Congress to make known its will on such foreign policy questions is through a positive action, with full debate on the merits of the issue and with each member taking full responsibility of casting a yes or no vote."[43]

In a similar vein, Monroe Leigh, Legal Counsel to the State Department in the Ford Administration, argued that the sixty/ninety-day framework imposed an unconstitutional straitjacket on the President's power:

> The question inevitably arises: If the president has an independent constitutional power to order troop movements in the first place, how can a statute of Congress override or limit the exercise of that power? . . . [I]t seems to me that the specific constitutional issue that is central to the entire superstructure of the [WPR] is whether Congress by mere statute can inhibit the president in the exercise of his independent power as commander-in-chief. Obviously I think it cannot . . . . [A] statute cannot constitutionally limit the President's discretion when to commit and when to withdraw armed forces from hostilities.[44]

These objections do not exhaust the possible constitutional arguments against WPR § 5(b). Critics can also appeal to constitutional structure, which assigns the federal branches very different responsibilities with respect to foreign affairs.[45] Section 5(b) impairs the President's effectiveness in conducting diplomatic negotiations (which the Constitution entrusts solely to the executive) because the ability to make credible threats of force is important to successful diplomacy. In the Libyan situation, for instance, the U.S., its NATO partners, its Russian and Chinese rivals, the Arab League, and Libya itself were and are engaged in strategic interactions premised on certain assumptions about U.S. intentions, resolve, and capabilities. Thus, Britain and France might not have intervened militarily but for the expectation of continuing U.S. involvement; likewise, the Libyan rebels might have surrendered by now but for the hope of more substantial U.S. support. If foreign actors come to expect the U.S. to begin withdrawing its forces after two months unless the President managed to persuade Congress to extend that period, our prospective partners' willingness to co-operate with us would be diminished, while our enemies' resolve to resist us would likely be strengthened.

But the WPR has survived intact despite all efforts to repeal or amend it. President Clinton supported a 1995 effort to eliminate the sixty-day withdrawal provisions, and Senator Majority Leader Dole's 1995 proposal to repeal most of the WPR even became the subject of a hearing. But Congress has consistently declined to act. The continuing vitality of the WPR as statutory law therefore cannot be doubted. Both the Authorization for the Use of Military Force (2001) and the Authorization for the Use of Force Against Iraq Resolution (2002) explicitly referenced it. Indeed, on March 21, 2011, President Obama himself reported to Congress on the start of military operations in Libya "consistent with the War Powers Resolution."

With the expiration of the sixty-day period, therefore, the President faced a seemingly inescapable choice: either discontinue operations in Libya as the WPR requires; or declare the WPR's withdrawal provisions to be unconstitutional. Instead, he did neither.

In his May 20, 2011 letter to Congress, the President wrote:

> On March 21, I reported to the Congress that the United States, pursuant to a request from the Arab League and authorization by the United Nations Security Council, had acted 2 days earlier to prevent a humanitarian catastrophe by deploying U.S. forces to protect the people of Libya from the Qaddafi regime. As you know, over these last 2 months, the U.S. role in this operation to enforce U.N. Security Council Resolution 1973 has become more limited, yet remains important. . . . The initial phase of U.S. military involvement in Libya was conducted under the command of the United States Africa Command. By April 4, however, the United States had transferred responsibility for the military operations in Libya to the North Atlantic Treaty Organization (NATO) and the U.S. involvement has assumed a supporting role in the

coalition's efforts. Since April 4, U.S. participation has consisted of: (1) non-kinetic support to the NATO-led operation, including intelligence, logistical support, and search and rescue assistance; (2) aircraft that have assisted in the suppression and destruction of air defenses in support of the no-fly zone; and (3) since April 23, precision strikes by unmanned aerial vehicles against a limited set of clearly defined targets in support of the NATO-led coalition's efforts. While we are no longer in the lead, U.S. support for the NATO-based coalition remains crucial to assuring the success of international efforts to protect civilians from the actions of the Qaddafi regime. . . . Congressional action in support of the mission would underline the U.S. commitment to this remarkable international effort. Such a Resolution is also important in the context of our constitutional framework, as it would demonstrate a unity of purpose among the political branches on this important national security matter. It has always been my view that it is better to take military action, even in limited actions such as this, with Congressional engagement, consultation, and support.[46]

The President's statement does not reflect any willingness to comply with the WPR's withdrawal requirement. It does not actually mention the WPR or in any way acknowledge that the WPR might apply to the Libyan intervention. Instead, it defies that law—though not so as to draw attention to that defiance. Section 5(b) states, in terms that are excruciatingly clear, that if the President wishes to continue a deployment into hostilities after the sixty-day period has run, he must advise Congress that "*unavoidable military necessity requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.*" But rather than claiming that additional time is needed as an "unavoidable military necessity" before the "prompt removal" of our forces, the President explicitly affirmed that our forces will *continue* operations indefinitely ("U.S. support . . . remains crucial"). In speeches and press conferences after May 20, the President remained adamant on the goal of regime change in Libya and saw no discernible end to U.S. military participation in the NATO campaign until after Gaddafi's fall.

Two principled courses of action were open to the President. If he considered the WPR constitutional, he should have ordered U.S. forces to stand down immediately in Libya, as the statute required. (Since there were no U.S. troops on the ground and at risk in Libya, there was no apparent need to wait an additional thirty days.) If he considered the WPR unconstitutional (as his predecessors in office had), he should have laid out his arguments, declined to order a stand-down, and accepted the legal and political consequences of his decision. Instead, in a message that did not contain any legal reasoning, he did neither. He stated that it would be "better" for him to have "Congressional engagement, consultation, and support"—and then did not mention an Act of Congress designed to ensure that Presidents in his position would engage Congress, consult with it, and seek its support.

In his 2007 *Boston Globe* interview, Obama was asked if "the Constitution empower[s] the president to disregard a congressional statute limiting the deployment of troops"? He answered:

> No, the President does not have that power. To date, several Congresses have imposed limitations on the number of US troops deployed in a given situation. As President, I will not assert a constitutional authority to deploy troops in a manner contrary to an express limit imposed by Congress and adopted into law.[47]

In mid-June, just before the end of the WPR's ninety-day period for ceasing operations in Libya, the Administration submitted a report to Congress with less than a paragraph of legal reasoning supporting the continuation of conflict without congressional authorization. Here is that reasoning in full (emphasis added):

> The President is of the view that the current U.S. military operations in Libya are consistent with the War Powers Resolution and do not under that law require further congressional authorization, *because U.S. military operations are distinct from the kind of "hostilities" contemplated by the Resolution's 60 day termination provision.* U.S. forces are playing a constrained and supporting role in a multinational coalition, whose operations are both legitimated by and limited to the terms of a United Nations Security Council Resolution that authorizes the use of force solely to protect civilians and civilian populated areas under attack or threat of attack and to enforce a no-fly zone and an arms embargo. U.S. operations do not involve sustained fighting or active exchanges of fire with hostile troops, nor do they involve the presence of U.S. ground troops, U.S. casualties or a serious threat thereof, or any significant chance of escalation into a conflict characterized by those factors.[48]

So the WPR does not apply because the U.S. is not engaging in "hostilities" in Libya. Colonel Gaddafi and other targets of U.S. drone attacks would surely be confounded by this assertion. So might the U.S. military personnel who have been drawing combat pay since April for their service in the President's Libyan intervention.[49]

The Administration's attempt to downplay the extent of U.S. military actions in Libya in its mid-June Report to Congress was undercut some two weeks later when the U.S. Air Force confirmed that since NATO's Operation Unified Protection Protector (OUP) took over from the American-led Operation Odyssey Dawn on March 31, the U.S. military has flown hundreds of strike sorties. Previously, Washington had claimed it was mostly providing intelligence, surveillance and reconnaissance (ISR) and tanker support to NATO forces operating over Libya. "U.S. aircraft continue to fly support [ISR and refueling] missions, as well as strike sorties under NATO tasking," AFRICOM [Africa Command] spokeswoman Nicole Dalrymple said in an emailed statement. "As of today, and since March 31, the U.S. has flown a total of 3,475 sorties in support of OUP. Of these, 801 were strike sorties, 132 of which actually dropped ordnance."[50] Consider some of the consequences of the Obama Administration's understanding of "hostilities." Actions like President Nixon's bombing of Cambodia—the very type of operation one might have thought the framers of the

WPR intended to cover—might be excluded (no U.S. ground troops; no exchanges of fire; no serious risks of U.S. casualties or of escalation). The same would seem to be true of actions similar to President Kennedy's Bay of Pigs operation; President Reagan's mining the harbor in Managua, Nicaragua; or the U.S. "no-fly zone" in Iraq, maintained by Presidents George H.W. Bush and Clinton. And what if the US were to impose a naval arms embargo tomorrow on Cuba—would this conduct not constitute "hostilities" under the law?

Future Presidents using advanced or even current types of weaponry against other nations will also not be engaging in "hostilities" in this Administration's judgment. Presidents could engage in major, covert cyber wars—say, destroying Iranian nuclear facilities by using the Stuxnet computer worm—without introducing U.S. ground troops, engaging in active exchanges of fire, risking U.S. casualties, or even causing a significant chance of escalation.[51] They could use extra-terrestrial lasers or unmanned drones to strike at North Korea. They could even drop a nuclear weapon on Caracas if Hugo Chavez refused to relinquish power: again, no "hostilities."

The Administration attempts to argue *both* that the U.S. is not engaging in "hostilities" in Libya *and* that our military participation in the NATO campaign is indispensable for its success. The Report states:

> The United States is providing unique assets and capabilities that other NATO and coalition nations either do not possess or possess in very limited numbers—such as suppression of enemy air defense (SEAD); unmanned aerial systems; aerial refueling; and intelligence, surveillance, and reconnaissance (ISR) support. These unique assets are critical to the successful execution and sustainment of NATO's ability [to conduct military operations in Libya.][52]

How, one might ask, can the U.S. *not* be engaged in the ongoing "hostilities" in Libya, even though we insist that our military efforts are critical to NATO's success? The Administration is trying to talk law out of one side of its mouth, and diplomacy out of the other. The result is incoherence.

Conclusion

The Libyan intervention is rich in ironies. Three former Senators now at the helm in the Executive branch—Obama, Biden, and Clinton—have all discarded, without explanation or apology, their earlier, seemingly well-considered views on the constitutional allocation of the war powers between Congress and the President. The party that enacted the War Powers Resolution and championed it for decades thereafter, now in possession of the White House, blithely disregards it. And the Administration hardly lifts a finger to win congressional authorization for its Libyan adventure, even though it courted the Arab League assiduously and would not have dared to strike a blow at Libya without the Security Council's permission.

What explains these shifts? We are seeing a contradiction emerge between two policy imperatives. One imperative, codified in the WPR, is to oppose making wars that protect U.S. national security and promote U.S. interests. The newer, contrary imperative is to support humanitarian wars that uphold the international human rights of oppressed peoples. These imperatives led, respectively, to opposition to wars in Vietnam and Iraq, and to support for wars in Kosovo and, now, Libya.[53] The WPR is a substantial legal obstacle to pursuing wars of either kind: hence supporters of humanitarian wars can neither wholly accept it nor wholly reject it. Indeed, the WPR is a more serious obstacle to wars of humanitarian intervention, because the political costs to the President of "selling" such wars to Congress within two months are much higher. The public understands the arguments for what may be wars of necessity; it has little appetite for what are clearly wars of choice.

Endnotes

1 50 U.S.C. 1541-48.

2 Thus, in a July 30, 1998 Senate speech, then-Senator Biden argued:

> [T]he "monarchist" view of the war power has become the prevalent view at the other end of Pennsylvania Avenue, and it does not matter whether it is a Democratic President or a Republican President. And the original framework of the war power clause envisioned by the Founding Fathers, I think, has been greatly undermined over the last several decades.

Cong. Rec. 105th Cong. (1998), *available at* http://thomas.loc.gov/cgi-bin/query/F?r105:1:/temp/~r105NnZHOi:e5170.

3 *See Re:* Authority to Use Military Force in Libya, 35 Op. Off. Legal Counsel 1 (2001) [hereinafter OLC Opinion] (written by Caroline D. Krass, Principal Deputy Attorney General).

4 *Id.* at 6.

5 *Id.* at 8.

6 *Id.* at 10.

7 U.S. Const., art. I, § 8, cl. 11.

8 Johnson's English Dictionary, as Improved by Todd, and Abridged by Chalmers 1008 (1835) (entry for "war").

9 *See* Hugo Grotius, On the Law of War and Peace, Book III, ch. 21, secs. 1-2 (1625),

10 For extracts from, and discussion of, those authorities, see William J. Ronan, *English and American Courts and the Definition of War,* 31 Am. J. Int'l L. 642, 642-3 (1937). Other cases recognized a state of partial "suspension of war" when a belligerent licensed trade with the enemy. *See, e.g.*, Coppell v. Hall, 74 U.S. 542, 554 (1868); The Julia, 12 U.S. 181, 193 (1814). But those decisions are not relevant to OLC's position.

11 Hagedorn v. Bell,1 M. & S. 450, 459 (K.B. 1813).

12 In *The Maria Magdelena,* (1779) Hay & M. 247, 165 E.R. 57, a Swedish ship with British goods on board was captured by the Royal Navy while bound from London to France (from which the goods were to be re-shipped to the rebel United States), allegedly before war had been "declared" by Britain on France but after a British "declaration of reprisals" and a French declaration that "actual hostilities with England" existed. The court said:

> Where is the difference, whether a war is proclaimed by a Herald at the Royal Exchange, with his trumpets, and on the Pont Neuf at Paris, and by reading and affixing a printed paper on public buildings; or whether war is announced by royal ships, and whole fleets, at the mouths of cannon? The relative state of subjects as to foreign nations is that of their Prince. . . . If learned authorities are to be quoted, Bynkershoek has a whole chapter to prove, from the history of Europe, that a lawful and perfect state of war may exist without proclamation.

Id. at 252. Eighteenth century wars commonly commenced with the outbreak of actual hostilities, rather than with declarations. *See* William Edward Hall, International Law 319 n.2 (1880) (listing many eighteenth century wars not preceded by declarations, including the 1778 French intervention in

the American Revolutionary War).

13 *See, e.g.*, William Hazlitt & Henry Philip Roche, *A Manual of the Law of Maritime Warfare* 6-7, 9 (1854) (collecting authorities).

14 The Eliza Ann, 1 Dodson 244, 247 (1813), 165 E.R. 1298.

15 *Historical Chronicle: Saturday 23 October*, Gentleman's Mag., Oct. 1739, at 551, *available at* http://www.bodley.ox.ac.uk/cgi-bin/ilej/image1.pl?item=page&seq=4&size=1&id=gm.1739.10.x.9.x.x.551|.

16 Letter from Lord Newcastle (Mar. 2, 1739), *quoted in* Harold W.VC. Temperley, *The Causes of the War of Jenkins' Ear,* 3 Trans. Royal Hist. Soc. 197, 209 (1909).

17 *Historical Chronicle: Tuesday, 31 July*, Gentleman's Mag., July 1739, at 383 & 384.

18 J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers,* 28 Harv. J. L. & Pub. Pol'y 465, 468 (2005).

19 Terry v. Ohio, 392 U.S. 1 (1968).

20 OLC Opinion, *supra* note 3, at 7.

21 *Id.*

22 *Id.*

23 OLC's argument also proves too little, because most past unilateral interventions by far were undertaken, not out of humanitarian concern for foreign civilians, but to protect U.S. lives, property and interests abroad. OLC acknowledges that some of the main precedents on which it relies, including the 2004 intervention in Haiti and the 1992 intervention in Somalia, were motivated by these purposes. In fact, only a handful of past interventions—all of them recent—were "humanitarian" in the sense in which the Libyan intervention is. These are, primarily, Kosovo and Bosnia in the 1990s; and Kosovo, at least, was, constitutionally, a highly contested case. Reliance on the historical record alone cannot sustain a claim that the President has constitutional power unilaterally to deploy military force in humanitarian interventions.

24 *See* Terry Emerson, *War Powers Legislation,* 74 W. Va. L. Rev. 53, 71-2 (1972).

25 Two such occasions were the 1898 Declaration of War on Spain, which was issued after the (suspected) attack on the U.S. Navy's *The Maine,* and the 1846 Declaration of War on Mexico, which was preceded by the battles of Palo Alto and Resaca de la Palma. For the texts of these declarations, see Jennifer K. Elsea & Richard F. Grimmett, Cong. Research Serv., Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications 81-3 (2011); *see also* Elbert Jay Benton, International Law and Diplomacy of the Spanish-American War 54-5 (2010 reprint of 1908 ed.).

26 *See* Christopher Greenwood, *The Concept of War in Modern International Law,* 36 Int'l L. Q. 283, 301 (1987) (finding "no room for the argument that a State which resorts to force without creating a state of war does not violate the [United Nations] Charter [Art. 2(4)]").

27 *See* Fritz Grob, The Relativity of War and Peace ch. II (1949).

28 *See, e.g.*, John Westlake, International Law Part II at 1 (1907) (distinguishing "war" from forcible measures short of war, such as reprisals, embargoes, and pacific blockades). By the 1930s, scholars were beginning to recognize that these distinctions served mainly to provide cover for aggression. *See* Albert E. Hindmarsh, Force in Peace: Force Short of War in International Relations 7-8, 80-1, 89-96 (1933).

29 Gray, Adm'r v.U.S., 1800 WL 1537, at *19 (Ct. Cl.); *see also* J.H. Toelle, *The Court of Claims: Its Jurisdiction and Principal Decisions Bearing on International law,* 24 Mich. L. Rev. 675, 689-90 (1926) (background of "French spoliations").

30 William Howard Taft, Our Chief Magistrate and His Powers 95 (1915).

31 *See, e.g.*, Kelley (USA) v. Utd. Mexican States, Reports of Int'l Arbitral Awards, vol. IV, p. 608, 609 (Oct. 8, 1930) (declining to decide whether landing of U.S. ground troops at Vera Cruz in 1914 was a "measure[] stopping short of war").

32 Corfu Channel Case, 1948 I.C.J. 4, 34-5 (Apr. 9, 1949).

33 On NATO's war aims and tactics, see David Rieff, *Saints Go Marching In,* Nat'l Int., June 21, 2011, *available at* http://nationalinterest.org/article/saints-go-marching-5442.

34 *See* Josh Rogin, *Exclusive: Top US Admiral Admits We Are Trying to Kill Qaddafi,* Foreign Pol'y, June 24, 2011, *available at* http://thecable.foreignpolicy.com/posts/2011/06/24/exclusive__top__admiral__admits__we__are__trying__to__kill__qaddafi. The killing of a head of state (or other high-ranking government functionary) has been long regarded as an act of war. The assassination in July 1914 by suspected Serbian agents of the Archduke Franz Ferdinand, heir to the Austro-Hungarian throne, precipitated the First World War. Austria-Hungary, defending its harsh ultimatum to Serbia in a Letter of Explanation Transmitted to the Various European Powers (July 23, 1914), stated that "the sentiments of all civilized nations . . . cannot permit regicide to become a weapon that can be employed with impunity in political strife."

35 *Gates Puts Cost of Libya Mission at $750 Million,* N.Y. Times, May 12, 2011, *available at* http://www.nytimes.com/2011/05/13/world/africa/13gates.html?. The Administration subsequently revised that figure downward (to $715.9 million as of June 3), but estimated a cost of about $1.1 billion through September 30. *See* United States Activities in Libya 13-4 (2011) (report submitted to Congress), *available at* http://www.foreignpolicy.com/files/fp_uploaded_documents/110615_United_States_Activities_in_Libya_--_6_15_11.pdf.

36 Jake Tapper, *Obama: U.S. Involvement in Libya Would Last 'Days, Not Weeks,'* ABC News, Mar. 18, 2001, *available at* http://abcnews.go.com/International/libya-crisis-obama-moammar-gaddafi-ultimatum/.

37 In a press conference on May 25, the President said: "[U]ltimately this is going to be a slow, steady process in which we're able to wear down the regime forces and change the political calculations of the Qaddafi regime to the point where they finally realize that they're not going to control this country."Barack Obama, President of the United States, Remarkswith Prime Minister Cameron of the United Kingdom in Joint Press Conference in London, United Kingdom (May 25, 2011).

38 Charlie Savage, *Barack Obama's Q&A,* Boston Globe, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/?page=full.

39 Charlie Savage, *Hillary Clinton Q&A,* Boston Globe, Dec. 20, 2007, *available at* http://www.boston.com/news/politics/2008/specials/CandidateQA/ClintonQA/?page=full.

40 *Quoted in* Monte Kuligowski, *Per the War Powers Resolution (and His Own Words), Obama Should Be Impeached*, RenewAmerica.com, Apr. 8, 2011, *available at* http://www.renewamerica.com/columns/kuligowski/110408; *see also* Adam Leech, *Biden: Impeachment If Bush Bombs Iran*, Seacoastonline.com, Nov. 29, 2007, *available at* http://www.seacoastonline.com/apps/pbcs.dll/article?/AID=/20071129/NEWS.

41 The War Powers Resolution was one of several "framework" statutes enacted in the 1970s to constrain executive power, chiefly in the national security area. The "framework" has not endured: the statutes have proven to be ineffective, if indeed they have not become dead letters. *See* Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 85-9 (2010). On the War Powers Resolution in particular, see Major Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 Wm. & Mary L. Rev. 1149, 1151-2 (2001) ("Looking back over this period, it is indisputable that the central component of the War Powers Resolution—the requirement that the President obtain express congressional authorization to conduct such operations—has been virtually meaningless. In fact, it is probably only a slight exaggeration to state that the most significant effect of the War Powers Resolution has been to provide separation of powers scholars with an interesting subject to analyze and debate. Analysis of the actual operation of the Resolution in relation to these various combat operations reveals a consistent pattern of executive side-stepping, legislative acquiescence, and judicial abstention.").

42 Richard F. Grimmett, Cong. Research Serv., War Powers Resolution: Presidential Compliance 3 (2011).

43 President Nixon's Statement Vetoing the War Powers Resolution (Oct. 24, 1973).

44 Monroe Leigh, *A Modest Proposal for Moderating the War Powers Controversy,* 11 Geo. Mason U. L. Rev. 195, 198 (1988/9).

45 For a skillful elaboration of this point, see W. Michael Reisman, *War Powers: The Operational Code of Compliance*, 83 Am. J. Int'l L. 777, 784-5 (1989).

46 *President Obama's Letter About Efforts in Libya,* N.Y. Times, May 20, 2011, *available at* http://www.nytimes.com/2011/05/21/world/Africa/21libya-text.html?.

47 *See Barack Obama's Q&A*, *supra* note 34.

48 Report, *supra* note 31, at 25.

49 "The Defense Department decided in April to pay an extra $225 a month in 'imminent danger pay' to service members who fly planes over Libya or serve on ships within 110 nautical miles of its shores. That means the Pentagon has decided that troops in those places are 'subject to the threat of physical harm or imminent danger because of civil insurrection, civil war, terrorism or wartime conditions.'" *See* David A. Fahrenholdt, *Obama's Negation of 'Hostilities' in Libya Draws Criticism,* Wash. Post, June 20, 2011, *available at* http://www.washingtonpost.com/politics/obamas-negation-of-hostilities-in-libya-draws-criticism/2011/06/20.

50 Dave Majumdart, *AFRICOM: AF, Navy Still Flying Libya Missions,* Air Force Times, June 30, 2011, *available at* http://www.airforcetimes.com/news/2011/06/defense-africom-air-force-navy-flying-libya-missions.

51 The Pentagon has recently concluded that cyber attacks *would* be acts of war. *See* Siobhan Gorman & Julian E. Barnes, *Cyber Combat: Act of War, Wall St. J.*, May 31, 2011, at A1..

52 Report, *supra* note 31, at 12.

53 The growing strength of the second imperative seems explicable if the U.S. is withdrawing from its role as global hegemon, and is increasingly following, rather than trying to lead, the international community.

Remarks upon Accepting the 2011 James Madison Award

*By Michael B. Mukasey**

Many thanks to my good friend Andy McCarthy for those kind remarks—and it is obvious from those remarks that he is a good friend. Actually, there is no one I can think of who is better suited to present an award named after Jimmy Madison than Andy McCarthy. Those of you who have read his works and read his columns and posts regularly know what I mean. Those of you who haven't, should, and I envy you in advance for what you are about to experience.

And of course, thanks as well to the New York Chapter of the Federalist Society for this singular honor. When I think about the others who have received this award, I think they are possibly the only people who would be more surprised than I am to see my name join the list.

Before I get any further in these remarks, I should thank as well the people who have made possible this and everything else worthwhile I have done in the last few decades—my wife, Susan, who has put up not only with me but also with the rigors that go with an occasionally public life, and of course my children, who had the experience of putting up with the reduced circumstances that go with public life while they were still under our roof, only to see the circumstances—and the size of the roof—increase when I returned to private life after they went out on their own—what a bummer for them.

The French philosopher Pascal wrote that the first rule of morality is to think clearly, and I believe there is no more fitting way for me to try to thank the Federalist Society at the source, James Madison as the namesake and Andy McCarthy as the presenter of this award, than to try to do some clear thinking about the smog that now passes for our politics, in particular when it comes to the subject of how a country that has dealt successfully in the last century with Fascism and with Communism is now going about trying to deal with the "ism" of the current century—Islamism—both at home and abroad.

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 have known about the other two "isms" that we successfully conquered 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 dismantled the shell of what was left of the Muslim caliphate in Turkey, banned fez's and headscarves, and dragged his country by the lapels—and it had to be 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 Brotherhood. That fellowship was intended to have the benign effect of getting him out of the country.

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 inoffensive place than post-World-War-II Greeley Colorado, but for a prudish man like 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 Gamal Abdel Nasser's coup against the corrupt monarchy in 1952, but then became disillusioned with Nasser when he 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, who 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, 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

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* *Partner, Debevoise & Plimpton, and Former U.S. Attorney General.*

Mr. Mukasey made these remarks at the New York City Lawyers Chapter's 25th Anniversary Dinner on April 25, 2011 upon receiving the 2011 James Madison Award. He was introduced by Andrew C. McCarthy, Co-Chair of the Center for Law and Counterterrorism and the Foundation for Defense of Democracies. Mr. McCarthy's introductory remarks are available here: http://www.fed-soc.org/publications/detail/2011-james-madison-award-presentation-prepared-remarks.

practice at a shooting range in Calverton, Long Island. When they approached they were accused of what we now call racial profiling and backed off. In November 1990, one of those men, El-Sayid Nosair, would assassinate a right-wing Israeli politician named Meir Kahane, in the ballroom of a Manhattan hotel. The case was treated by the Manhattan DA Robert Morgenthau 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. Authorities reviewed the amateur video of Kahane's speech the night he was killed and 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.

The man who served as the spiritual advisor to Nosair and the 1993 trade center bombers, Omar Abdel Rahman, the so-called Blind Sheikh, along with Nosair and several others, were tried before me 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 Sayid Qutb's brother in Saudi Arabia.

At the time, 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 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 that we were at war, which was 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.

And yet, here we are, going on ten years after September 11, 2001, which I think was felt at the time to be at least a moment of singular national clarity, thrashing around like someone lost in heavy underbrush, seeking a way out and straying from the way, tearing the thorns and being torn by them, still struggling with such basic questions as who is our enemy, what kind of conflict are we in, what do we do with the people we capture who are fighting us, what does winning mean?

How come all of this still seems so much up for grabs?

Well, for one thing, we are handicapped in no small measure by the apparent religious motivation underlying the essentially political goals of our opponents. Those goals involve the recreation of the Islamic caliphate and the imposition of Sharia law over as broad a swath of the world as possible. This is a profoundly anti-democratic movement at its core, regarding the whole idea of man-made law as anathema.

As a nation we are historically uncomfortable with drawing religious distinctions among ourselves, and between ourselves and others. Even before the nation was established our colonies were settled by people fleeing religious persecution. The tendency toward not asking questions about people's religion during debate on public issues runs historically deep. I don't mean to presume to channel James Madison, but I think he would be familiar with that discomfort.

Add to that the experience we had relatively recently during World War II when we interned thousands of Japanese under circumstances that I think are pretty well accepted now as a national shame. That is something we have been careful not to repeat.

And so if FDR had stood before Congress on December 8, 1941, and said that the peaceful Shinto religion had been kidnapped by extremists, he likely would have been hooted off the podium, but President Bush could and did say that about Islam repeatedly in the days following 9/11. He could tell it to Congress with an Imam in camera range and have what he was saying taken as accepted wisdom.

When we want to avoid something uncomfortable, and candor apparently won't do, our language gives us away. And so even after 9/11 although we say we are at war, it is a war on terror, or terrorism, which gives rise to quibbles to this very day from people who argue that terror is a state of mind, and terrorism is a means, and you can't have a war on a state of mind or a means.

Of course, everyone with a pulse understands at least in general terms what is going on, but we leave the discussion open to people who wish to quibble about what it is we are at war with, and so the discussion at times drifts off into absurdity. If such people were entirely at the periphery, then I suppose it would not matter much, but right now I must tell you that such people are right at the core of where there should be clarity. One of them in fact is the President's assistant for national security, who actually got up before an audience at the Center for Strategic Studies—this is one of our officially designated deep thinkers talking to other deep thinkers—and ridiculed the idea of a war on terrorism or on terror, saying that you can't have a war on a means or a state of mind.

This called to my mind a zany British revue that ran on Broadway before many of you were born called *Beyond the Fringe*, and in particular one sketch from that review involving an official police spokesman trying to explain to the press why Scotland Yard had not yet solved the Great Train Robbery of 1963. He said that they had at first been confused by the name "Great Train Robbery," but after investigation they had found

that trains were quite large, nearly impossible to conceal, that they ran on rails, and generally were hard to make off with. "So you see," he said, "Great Train Robbery is a misnomer; there is no question here of a missing train; we have the train; it's the contents of the train that are missing." Now, that review was a farce, but John Brennan, the President's national security expert, did not consider his remarks to the Center for Strategic Studies a farce.

To our historical aversion to subjects religious, and our aversion to repeating the World War II experience with the Japanese, we must add the political delicacy of the times we live in. So it is now I think an accepted theorem that no good can be accomplished by force. It was not always so. And so not only did FDR not get up before Congress and say that the peaceful Shinto religion had been kidnapped by extremists, but when the war was over, during the occupation, General Douglas MacArthur, on orders from President Truman—and this was one time when MacArthur had no difficulty following President Truman's orders—made the Japanese change the way the Shinto religion was practiced, and MacArthur, to his great credit, made the medicine go down relatively easily. But make no mistake; it was accomplished by force.

Lest anyone think that I hold the current Administration alone responsible for the inability to express simple clarity, I should mention the contribution to the English language made by the Administration that I served in, when effective interrogation procedures developed by the CIA and duly submitted for approval to the Justice Department were analyzed by lawyers in the department's Office of Legal Counsel down to a mosquito's eyelash; that program was referred to—in one of the most absurd marketing campaigns since New Coke—as "enhanced interrogation techniques."

As those of you who have read the memos of the Office of Legal Counsel analyzing that program are aware, or read about them, those interrogation techniques were harsh; they were coercive. I can tell you also that using them required approval at the highest levels of the CIA, and that they were rarely used—the most coercive of them, waterboarding, was used on three people. Those techniques were enormously effective. There are many people alive today who would not be alive if they had not been used.

And yes, they were, in the estimation of the lawyers in the Office of Legal Counsel, and also in my estimation after I reviewed the then-classified memos and related material, perfectly lawful under the standards that applied from 2001 to 2003, after which they were no longer used. But when you come up with a term like "enhanced interrogation techniques," to try to make it sound like you are talking about something innocuous, something that sounds like an improved toothpaste or Wash Day product, the unmistakable impression is that you must be covering up something too horrible to describe, or at the very least that you are trying to sanitize something that cannot be cleansed, that you are covering up your true meaning—to bring it up to date, sort of like saying you are running a temporary kinetic exercise, or a foreign contingency operation.

And what are we to do with the folks we capture, who have taken up arms against us. We still struggle and strain with what to call them. In 1943, two groups of German would-be saboteurs landed off Long Island and Florida, and were rounded up, tried before a military commission sitting in Washington, and executed—all within three months, and with no right of appeal, although the procedure itself was reviewed by the Supreme Court and found lawful in an opinion issued after they were already dead.

They were called unlawful enemy combatants because that was the term attached to people who fought out of uniform, or targeted civilians, or failed to carry their arms openly, or did not follow a recognized chain of command. They gave up the protection due soldiers under international law by taking off their uniforms. In fact, it is obvious that they knew very well what wearing a uniform versus not wearing one meant because they landed in uniform and then changed on the beach. The only explanation for that hazardous procedure is that if they were caught during the landing, which is the most vulnerable part of the operation, they could have claimed the protection due prisoners of war because they hadn't yet acted against any civilian target. But they gave up that protection, and as a consequence were called unlawful enemy combatants.

Fast forward to 2001, and we started referring to the terrorists who violate all the rules by not wearing uniforms, not following a regular chain of command, not carrying their arms openly, and targeting civilians—we referred to them as unlawful enemy combatants, a designation well-recognized under the law but which meant that they did not have the rights of prisoners of war, and certainly did not have the rights of ordinary criminal defendants.

Yet now, because we shrink in public discourse from any harsh imagery, even that has been softened to unprivileged belligerents, although what privileges are in fact going to be withheld remains a mystery.

What unlawful combatant status might have meant at another time is that some dangerous people would simply be locked up, and others who had committed war crimes would get the benefit of a trial in which the underlying facts would be reviewed—fairly but without such niceties as the hearsay rule—and a judgment rendered.

That I think was the loosely formulated plan of the Bush Administration at the outset. I say loosely formulated because however detailed were the plans that were eventually drawn for military commissions, first by presidential decree and then, when the Supreme Court ruled that out even though the German saboteurs had been tried on that basis, by act of Congress, the plans were drawn without much clear and explicit thought as to why we have trials in the first place.

At the close of World War II, the allies convened a military tribunal at Nuremberg, and another in Tokyo, at least in part to create a record of what the Germans and the Japanese had done so that there could be no future denial. There is hardly a need to create such a record today, when the underlying deeds are well-documented. And so to the extent that we occasionally hear parallels drawn between our own current situation and the Nuremberg tribunals, I think those parallels are seriously misplaced.

There are other ingredients that make up the haze surrounding the subject of what we do with the folks we catch.

The circumstances in which we catch people on the battlefield make it impossible to bring to trial in civilian courts those who might be charged with committing war crimes, even if we decided we wanted to give unprivileged belligerents the bonus of a civilian trial as a reward for violating all the rules developed over the last several hundred years to civilize the rules of combat.

We have assigned this responsibility to the military by statute, in the Military Commissions Act, but I would suggest to you that the results so far of that process have not been encouraging, in part because this is not what the military is for; it is not their mandate. The armed forces are there to win wars, not to run a justice system parallel to the civilian one. Although we have used military commissions at various times in our history, from the Revolutionary War through and including World War II, they have been used on an episodic and not an ongoing basis. The rules may be there, but the larger institution, including even such a simple thing as a career track, isn't.

And I don't mean it simply as a criticism to say that the results have been disappointing. That is entirely natural given the circumstances, which include that the country seems to regard the whole enterprise as simply an unpleasant inconvenience, about which the less said the better. Again, the results are not promising. For example, the sentence imposed on Osama Bin Laden's driver, who was arrested in possession of rockets that were to be used against U.S. troops, who was responsible for the safety of the leader of Al Qaeda, and who was therefore obviously a well-trusted confederate close to the central leadership of that organization, was less than seven years, which amounted to time served. It appeared that the military judge in the case simply could not understand the rudiments of conspiracy law that hold responsible even those not directly involved in unlawful activity so long as that activity is within the reach of the agreement in which they do participate. And so Osama Bin Laden's driver was regarded as simply a driver, whose light sentencing included the good wishes of the military judge.

It seems very much open to question whether we can continue to use military commissions on a long-term basis, even if there is on the civilian side the political will to use them on a long-term basis, which itself is open to doubt.

And there are others as to whom we do not have evidence of war crimes but who are nonetheless too dangerous to release, even assuming that there is a jurisdiction to which they might be sent. Common sense might dictate that they be detained until we can say with some assurance that they are no longer a threat to us. But here we run up against simple denial—the claim in some quarters that we cannot, that we do not, simply detain people without trial because they are dangerous; after all, we are a society of laws.

Well, in point of fact, we *do* detain people without trial, and have been doing it for some time. We detain people who are a danger to themselves or to others after a civil commitment proceeding that determines nothing other than that dangerousness; we detain pregnant women who use drugs so that they do not harm their unborn children; we detain sex offenders even after they have completed their sentences if the circumstances suggest that recidivism is likely. Are there safeguards for the person detained in each of those situations? Of course there are, but we can't have a discussion of what safeguards might be appropriate for would-be terrorists until we first say straight out that we ought to be able to detain them.

And while we are on that subject, we might wish to consider that in fact the greatest value in just about any newly-captured detainee, regardless of where he is caught, isn't his status as a defendant, but rather his potential as an intelligence source. We should put in place properly trained and effective interrogators to step in quickly, determine who is likely to have valuable information, and get it.

The alternative is that either we turn them over to foreign governments that have fewer qualms and less scruple about how to deal with detainees, and get distorted intelligence if any, or that we kill them with drones, and in the process deny ourselves completely whatever intelligence we might otherwise get.

It was not always this way. During World War II, we kept tens, perhaps hundreds of thousands of them, captive in the United States. Not one was permitted to file a habeas corpus petition in a federal court, and even when one did file such a petition from a camp in a zone occupied abroad by U.S. troops, Justice Jackson made short work of the idea that one captured in wartime could hale his captors into court even as they were occupied in defending the country.

But we are told, World War II was finite. Yes, we knew that in 1945, when it was over, but I can assure you that when the Germans marched into Poland in 1939, and when the Japanese began their forcible expansion across East Asia even earlier, they did not scatter leaflets proclaiming, "Don't worry, all of this is going to end in 1945."

Wholly apart from a history that makes us reluctant to confront a religiously-motivated enemy, and the delicacy that occasionally goes by the code term "political correctness," it appears that for many the administration of what we know as the law involves not the common sense application of neutral principles across the board, with the psychic reward coming after the fact if it comes at all, but rather the minute by minute consideration of how any particular step makes us feel, or, a closely related question, how we think it makes us look.

Here you need go no further than to consider the statements surrounding the announcement in November 2009 that those accused of organizing the September 11, 2001 attacks on the United States would be tried in a federal court in Manhattan, and the statements surrounding the announcement in April of this year that those same accused would be tried before a military commission at Guantanamo Bay—replete as those statements were with references to the proceeding as a centerpiece in the careers of those involved; references to confidence in our federal courts, to the 200-year history of those courts in successful administration of justice; contrasting references to the courts as "tools" in the fight against terrorism, which makes you wonder whether we can have any faith at all in their 200-year history; references to the security of our prison system; even references to the certainty of a conviction and a capital verdict, which of course made a complete hash of a lot of the other rhetoric on display at the time; references to

catering to the perceived desires of the families of the victims. One need only look at those statements to realize that reality and law as it exists in the real world were not at the top of the list of considerations on either occasion.

For starters, administering a legal system is not an exercise in self-fulfillment, and courts are not anybody's tool, because if they are, what they produce isn't justice. So far as whether federal courts have an honorable history and can in fact administer justice—and administer it good and hard when necessary—and whether federal prisons can hold those convicted, those matters were never in doubt before or after either of these announcements was made. It may make us look good and feel good to defend what is not in doubt, and to attack what is not at issue, but it hardly contributes clarity to the discussion.

And so far as victims' families are concerned, they have some rights guaranteed by federal law, including the right to be heard at sentence in connection with cases tried in federal court, and there is no reason why they could not be similarly heard at the analogous time before a military commission. But we have a legal system in which all of us, including victims and their families, give the government a monopoly on the use of force, and give up the right to determine what happens to an accused, in return for the government's guarantee to use that force to protect us. That is called the social contract. There are countries where that is not entirely true, where the victim's family is given the right to determine whether there will be punishment, and indeed to administer the punishment themselves. This country is not among them.

And what about the question of what victory will look like? We are told repeatedly that this will not end with a signing ceremony on the deck of the Battleship Missouri. Well, that's a valuable insight, but it has absolutely no implications for how strongly we defend ourselves and our way of life; it is not an excuse to throw up our hands.

In a target-rich political environment like the one we live in, it doesn't take much in the way of courage to stand up here and skip rocks off several of those targets. But how does one really bring clarity to the discussion?

I suggest we start by identifying Islamism as our adversary, and then try to understand it, and by understand it I mean not only its manifestation as terrorism, but its entire anti-Western and anti-democratic agenda. That will allow us at least not to empower it. I do not suggest that we can bring about the kind of change in the Islamist point of view that Douglas MacArthur brought about in the practice of the Shinto religion; that kind of change in fact will have to come from reformist elements within Islam, and they exist. I recognize, particularly receiving an award named after James Madison, that if the Establishment Clause of the First Amendment to our Constitution means anything, it means that our government cannot go around picking winners and losers in theological debates.

But we can certainly defend ourselves, and when fundraising for Muslim charity, a religious duty called *zakat*, becomes fundraising for organizations that support terrorism, that behavior should be prosecuted under statutes that criminalize material support for terrorism, rather than encouraged in the guise of facilitating charity. We should not have prosecutors being told, as they are, not to bring such cases for fear of giving offense to people who are bent on our destruction. We must realize that cultivating them not only endangers us, but also endangers and silences people in the Muslim community with moderate views.

When our government does outreach to the Muslim community, as it does constantly, there is no reason why that outreach cannot go to reformers, and why we cannot avoid going to organizations that are affiliated, whether directly or indirectly, with the Muslim Brotherhood, the organization founded by Hasan al Banna in Egypt in the 1920s, whose representatives were invited to attend President Obama's speech at Al Azhar University in 2009, and an organization that continues to this day to function actively in Egypt and through affiliates in this country, including such organizations as ISNA—the Islamic Society of North America, which was proved during the terrorist funding trial of an organization called the Holy Land Foundation to be involved in funding Hamas—and others that have been the objects of outreach by the government.

We can ask Congress to face the fact that we have to detain people, and pass a statute that defines who is subject to detention, and with what safeguards, and make intelligence gathering a principal and not a secondary goal following capture. I don't know whether it will come as a surprise to you that the only authority the government relies on now is the Authorization for Use of Military Force passed by Congress in September 2001, and that does not even mention the word detention.

And it may well be that if detainees must be charged with war crimes on an ongoing basis—and we don't have a large number of them in custody now, but that could change—in that event, it may well be that what is called for is a national security court to replace military tribunals, presided over by Article III judges but staffed perhaps from the military. Many people, including Andy McCarthy, have written extensively about what such a court might look like.

Some of these steps need to be taken immediately—recognizing the danger and prosecuting material support cases instead of worrying about the sensibilities of people who mean to destroy us are at the top of that list. Serious efforts at intelligence gathering from all terrorism detainees are a close second.

I think it would be helpful at least to start the discussion about a viable detention statute. We are holding people in custody now at Guantanamo who are not charged with war crimes and will not be so charged, but are deemed too dangerous to release or cannot be released to any jurisdiction where they will be safe. There are about 100 such people, and the Supreme Court in the *Boumediene* case said that they had to be able to file habeas corpus petitions, but left it to individual judges to devise the rules for conducting such cases. Those cases are being filed in the District of Columbia where the judges, being human, are coming up with different standards and differing results in factually similar cases.

It may be that all of this will sort itself out in the usual mess of appeals and remands and so forth, but if the numbers of prisoners for some reason goes up sharply, or if there is pressure

for uniformity because divergent results that were only a mild irritant until now come to be regarded as intolerable, then at least such a discussion will have generated proposals, and we will have something at hand.

A national security court is even further on the horizon, and so perhaps we don't have to start actively talking about that yet.

Procrastination is generally regarded as a bad thing, but when it comes to answering the questions we have refused to face in the last ten years, a bit of triage is in order. We can't take on all the questions at once; triage means dealing with what you have to deal with first.

And so far as the ultimate one is concerned, what will winning look like, I would prefer to worry about that when there are more Islamists who are concerned about their movement giving up the goal of imposing Sharia on the West than there are Islamists who dream of achieving that goal. I don't think we are quite there yet.

Thank you very much for the honor of this award and for the even greater honor of speaking to you. Good night.

Religious Liberties

European Court of Human Rights Finds No Right to Abortion Under European Human Rights Convention

*By William L. Saunders**

Before the European Court of Human Rights ("ECHR" or "the Court") delivered its decision in the case of *A. B. and C. v. Ireland* ("*ABC*" or "*ABC v. Ireland*") on December 16, 2010, there had been widespread speculation as to the potential breadth of the decision and its implications for the sovereignty of nation states that are members of the Council of Europe.[1] Such speculation was encouraged by the fact that instead of being heard by a single Chamber of the ECHR, the case had been referred to the Grand Chamber, composed of all judges of the ECHR, and by the fact that the Court took longer than it normally does to issue its opinion.

When issued, the opinion settled the question whether there is a "right" to abortion to be implied from the articles of the European Convention on Human Rights ("the Convention") that supersedes a nation's (in this case, Ireland's) domestic law (where there is no such right), while simultaneously unsettling the political landscape in Ireland because of the ECHR's interpretation of Irish national law, as will be discussed below.

I. Ireland's Law

Ireland protects the right to life of the unborn. Abortion was illegal under the Offenses Against Persons Act of 1861, and Irish case law before 1983 held that the Constitution's right to life implicitly protected the unborn. On September 7, 1983, the people of Ireland voted to make that implicit guarantee explicit, adopting the Eighth Amendment.[2]

The Eighth Amendment became Article 40.3.3 of the Irish Constitution, which recognizes the right to life of the unborn, and makes that right equal to that of the woman: "The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

In a 1992 case, *Attorney General v. X and Others* ("the *X* case"), Ireland's Supreme Court was asked whether a suicidal pregnant minor could leave the country to obtain an abortion. In interpreting the Constitution's provision respecting the life of the unborn, Ireland's Chief Justice opined that abortion in Ireland is permissible in certain limited circumstances,

> the proper test to be applied is that if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, which can only be avoided by the termination of her pregnancy, such termination is permissible, having regard to the true interpretation of Article [40.3.3] of the Constitution.[3]

A measure to narrow the *X* decision was rejected by the Irish voters, 65% to 34%.[4] In addition, the Thirteenth Amendment to the Irish Constitution makes clear that a woman may leave the country to have an abortion elsewhere.[5] The Fourteenth Amendment also clarifies that information regarding abortion in other countries is not forbidden.[6]

II. The Complaint(s)

In the *ABC* case, three anonymous women, A., B., and C., claimed that an inability to obtain legal abortion in Ireland was a violation of their Convention rights. The ECHR determined that there were distinguishable and consequential differences between the women's circumstances, and thus examined the arguments of A. and B. distinctly from those of C.

A. desired an abortion because of her "history of alcoholism, post-natal depression, and difficult family circumstances."[7] The Court classified A.'s reasons as concerning her "health and well-being."[8] The Court accepted as B.'s "core factual submission" that her abortion was sought because "she was not ready to have a child." (B.'s complaint included that she had at one point feared her pregnancy to be ectopic,[9] but she acknowledged that she knew her pregnancy was not ectopic before her abortion.[11]) The Court thus classified B. as asserting "well-being reasons."[12]

As characterized by the Court, C. sought an abortion "mainly [because she] feared her pregnancy constituted a risk to her life."[13] The Court considered her core submission to be that she desired an abortion

> because of a fear (whether founded or not) that her pregnancy constituted a risk to her life (that her cancer would return because of her pregnancy and that she would not be able to obtain treatment for cancer in Ireland if she was pregnant) and because she would be unable to establish her right to an abortion in Ireland.[14]

The first two women, A. and B., complained under Article 3 (prohibition against torture), Article 8 (respect for private and family life), Article 13 (effective remedy), and Article 14 (discrimination) of the Convention about the prohibition of abortion in Ireland on health and well-being grounds. C. made an additional complaint under Article 2's "right to life."

Notably, even in the plaintiffs' own words, "[n]one of the Applicants here are claiming that the State put any restrictions on their ability to *travel*; rather, they dispute that not being able to obtain necessary health care inside the State conflicts with their Convention rights."[15]

The Court found that the plaintiffs failed to establish that they "lacked access to necessary medical treatment in Ireland before or after their abortions."[16] Moreover, C.'s "suggestions as to the inadequacy of medical treatment available to her for a relatively well-known condition (incomplete abortion) are too

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general and improbable to be considered substantiated."[17] The Court's handling of the merits of the plaintiffs' other arguments will be discussed below.

III. Procedural Concerns

Article 35 §1 of the Convention requires that all possible domestic remedies be exhausted before the ECHR has jurisdiction.[18] This requirement does not mean that individuals complaining of violations of their rights *can* take their case first to their nation's court, but that they *must* first take their case through the courts of the country concerned, up to the highest possible level of jurisdiction. The *procedural* requirement respects the sovereignty of nations, and gives the State the first opportunity to provide redress for the alleged violation.

In the *ABC* case, there was no judgment of the Irish Courts for the ECHR to review because the applicants never sought such redress. Ireland's counsel highlighted the significance of this failure during oral arguments, "no doubt that this application is a significant case . . . but also for the Court's relationship with contracting states, their judicial processes and the principle of subsidiarity. . . . Rarely, if ever, [has the Court been asked to address] such important issues on such inadequate factual basis."[19]

However, the applicants (plaintiffs) argued that they did effectively exhaust domestic remedies. They asserted that bringing their cause in the Irish courts would be futile,[20] compromise their confidentiality,[21] and that for these women (who had all had their abortions prior to initiating their case with the ECHR) pursuing a domestic remedy would not "result in timely, tangible relief within Ireland for any of the women."[22]

A 2006 ECHR case, *D. v. Ireland,* provided precedence for dismissal for failure to exhaust local remedies. The case involved an Irish woman who, not allowed an abortion in her home country, traveled to Britain in order to legally abort. She sued the government of Ireland before the ECHR, citing several articles of the Convention in her complaint, including Article 3, which states that no one should be subjected to torture, inhuman or degrading treatment, or punishment, and Article 8, which recognizes the right to respect for private and family life. On July 5, 2006, the Court declared the case inadmissible "on the ground that the applicant had not exhausted domestic remedies, in that she failed to bring an action before the Irish courts."[23]

Though dismissal on procedural grounds thus appeared to be warranted in *ABC*, an early action signaled that such a dismissal was unlikely when the Court made the unusual move of referring the case to the Grand Chamber before the lower chamber issued an opinion.[24] Even so, there appeared some chance the case would be dismissed on Article 35 grounds when the hearing by the ECHR in December 2009 was noted as being "on the procedure and the merits."

In any event, in the *ABC* decision itself, the Court reiterated that Article 35 §1 requires "that it may only deal with a matter after all domestic remedies have been exhausted."[25] It noted that "it is incumbent on the aggrieved individual to . . . allow the domestic courts to develop [constitutional] rights by way of interpretation."[26]

As noted above, the Court considered the causes of A. and B. as distinct from C. on both the procedural and merit questions. And, the Court concluded, since A. and B. clearly would have not been permitted a legal abortion in Ireland (as they did not assert claims that an abortion was necessary for their "lives"), there was no "effective remedy available both in theory and in practice under which the first and second applicants were required to exhaust."[27]

As for C., who complained that she feared her pregnancy posed a risk to her life—as opposed to her health or well-being—the Court found, "the question of the need for [her] to exhaust judicial remedies is inextricably linked, and therefore should be joined, to the merits of her complaint under Article 8 of the Convention."[28]

Thus, the ECHR did not dismiss any of the three cases on Article 35 grounds.

IV. Merits of the Plaintiffs' Claims—Articles 2, 3 and 8

The "right to life" is found in Article 2 of the Convention, which states:

> *1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
>
> *2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:*
>
> *(a) in defence of any person from unlawful violence;*
>
> *(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;*
>
> *(c) in action lawfully taken for the purpose of quelling a riot or insurrection.*

Asserting a violation of her Article 2 right to life, C. claimed:

> [C.'s] right to life was violated by the State's failure to ensure abortion when a woman's life is at risk from continued pregnancy. The State's assertion that the threat to Applicant C's life constituted a "completely hypothetical scenario," simply demonstrates the irrationality of laws that require an acute distinction between when continuation of pregnancy poses a substantial risk to a woman's health rather than a risk to her life. [29]

The Court, however, found C.'s complaint under Article 2 to be "manifestly ill-founded." The Court held that there was "no evidence of any relevant risk" to her life, since there was no impediment to her traveling to England for an abortion "and none of her submissions about post-abortion complications concerned a risk to her life."[30] Similarly, the associated claim ("no effective remedy") made under Article 13 was rejected.[31]

Next the Court considered the claims under article 3. The prohibition against torture of Article 3 of the Convention reads: "*No one shall be subjected to torture or to inhuman or degrading treatment or punishment.*" To fall under Article 3's definition of torture, the "ill-treatment must attain a minimum level of severity."[32] The Court found that the facts alleged by the

plaintiffs failed to reach that level of severity.[33]

The Court spent the bulk of its opinion analyzing the plaintiffs' claims made under Article 8's "respect for private and family life." Article 8 of the Convention states:

> *1. Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

A. and B.'s complaints under Article 8 were based on the fact that Irish law does not permit abortion for "health and/or well-being" reasons.[34] C.'s complaint was based on lack of "legislative implementation" of measures of which she could avail herself to determine whether she would be afforded a legal abortion.[35]

The Court noted that the "notion of 'private life' within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal autonomy and personal development: "It concerns subjects such as gender identification, sexual orientation and sexual life, a person's physical and psychological integrity as well as decisions both to have and not to have a child or to become genetic parents."[36] Prior Court decisions found that "legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman" and that "[t]he woman's right to respect for her private life must be weighed against competing rights and freedoms invoked including those of the unborn child."[37]

Importantly, the Court noted that "Article 8 cannot, accordingly, be interpreted as conferring a right to abortion." But the Court found that the complaints of A. B. and C. "come within the scope for their private lives and accordingly Article 8."[38] Again, however, noting a "substantive" difference between C.'s complaint and those of A. and B., the Court thus considered the merits under their Article 8 claims distinctly.[39]

Citing both *Bruggemann and Scheunter v. Germany* and *Vo v. France*, the Court acknowledged that "not every regulation of the termination of pregnancy constitutes an interference with the respect for the private life of the mother."[40] Moreover, "the essential question," the Court held, is whether there was an "unjustified interference" with the rights guaranteed under the Convention.[41]

The Court recalled that "the protection afforded under Irish law to the right to life of the unborn was based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum."[42] And, though the Convention does not require the protection of the unborn, "it would be equally legitimate for a State to choose to consider the unborn to be such a person and to aim to protect that life."[43]

The plaintiffs argued that "[t]he public consensus within Ireland and throughout the Council of Europe States supports exactly this type of balance which respects the State's interest in the foetus yet allows legal abortion in select circumstances necessary to preserve the woman's health and well-being."[44] And they asked the Court to dismiss Ireland's rationale for its abortion law by asserting:

> [T]here is little support for the State's argument that the current abortion regulations are necessary to protect public morals. . . . The public's moral view and the moral viewpoint found in relevant international human rights law accept that abortion should be legal in certain circumstances. . . . Yet regardless of the ideological basis for the State's assertion that banning all abortion protects the public morals, in fact, a moral viewpoint that seeks to balance the interests of the foetus with that of a woman's health and well-being in particular circumstances is far more proportionate and, thus, has been adopted by the majority of the Council states and by most human rights bodies worldwide.[45]

The Court, however, noted that the "State authorities are in principle in a better position than the international judge to give an opinion on the 'exact content of the requirements of morals' in their country, as well as on the necessity of a restriction intended to meet them."[46]

The plaintiffs additionally argued that "[t]he State's view is disproportionate because it does not reflect current domestic consensus supporting greater access to legal abortion within Ireland."[47] However, the Court also noted that Ireland's rejection of a referendum of the Lisbon Treaty in 2008 was in part influenced by "concerns about maintaining Irish abortion laws."[48]

The Court concluded that the restriction "pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect."[49]

Of significant importance to the Court's decision was whether the questions of how and when to regulate abortion fall within a nation's "margin of appreciation." Supra-European courts have traditionally considered abortion a national issue, giving great deference to individual member states regarding its regulation. In line with this judicial philosophy, they have not recognized the right of a woman to obtain an abortion, nor have they recognized a right to life of the unborn child, under the Convention. The Court has held that the right to life of the unborn, and the corollary regulation of abortion, fall in the margin of appreciation left to the Member States.

However, a 2007 case, *Tysiac v. Poland* modified this jurisprudence somewhat.[50] Alicja Tysiac, suffering from myopia, sought an abortion under the health exception to Poland's abortion law in 2000, believing her pregnancy would exacerbate the degenerative eye disease. No specialist who saw Tysiac would certify that her health was threatened by the pregnancy, which was necessary to meet the Polish health exception for abortion, and she subsequently gave birth to her child. After the delivery, her eyesight continued to worsen but three ophthalmologists and a panel of the medical experts concluded that "the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight."[51] The Court dismissed Polish legal criteria for determining the legitimacy

of a woman's claim for a health exception, declaring, "Once the legislature decides to allow abortion, it must not structure its legal framework in a way that would limit real possibilities to obtain it."[52] Specifically, the Court found Poland had violated Article 8 of the European Convention.

In the *ABC* case, the plaintiffs argued against abortion regulation falling within Ireland's margin of appreciation by proffering that, "A strong international consensus can demonstrate that a less burdensome alternative is available and preferred throughout the member States. . . . The State fails to address the fact that Ireland's abortion laws are completely incongruous with the European consensus and international standards on lawful abortion to protect women's health and well-being."[53]

The Court considered that there is "indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law."[54] However, the Court continued that it "does not consider that this consensus decisively narrows the broad margin of appreciation of the State."[55] Rather, "of central importance is the finding in [*Vo v. France*], that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life . . . ."[56] And, the margin of appreciation for protecting the life of the unborn "necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother."[57]

Though not an "unlimited" margin of appreciation,[58] the Court determined that Ireland need not allow abortion for health and well-being reasons as asserted by A. and B.:

> Having a right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in respect to the Irish State.[59]

Accordingly, the Court concluded that no violation of the Article 8 rights of A. and B. had occurred.

However, since Irish law potentially permitted an abortion in C.'s circumstances (i.e. where the "life" of the mother was at stake, though C had not established she fit thereunder), the Court considered the appropriate question for examining C.'s claim to be "whether there is a positive obligation on the State to provide an effective and accessible procedure allowing [her] to establish her entitlement to a lawful abortion in Ireland . . . ."[60]

The Court complained that, subsequent to the *X* case's determination that an abortion was permissible where "as a matter of probability there is a real and substantial risk to life . . . .," there has been "no criteria or procedures . . . whether in legislation, case law, or otherwise, by which that risk is to be measured or determined. . . ." Thus, the problem in C.'s circumstance was that there was an "uncertainty as to [the law's] precise application."[61]

The Court considered it "evident that the criminal provisions of the 1861 Act would constitute a chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act."[62] Therefore, the Court found that the "normal process of medical consultation" was not sufficient for a woman to determine whether or not she was afforded a legal abortion.

Though the Court found there was a violation of C.'s Article 8 rights, the Court noted that it was not its role "to indicate the most appropriate means for the State to comply with its positive obligations."[63] However, the Court observed that "legislation in many Contracting States has specified the conditions governing access to a lawful abortion and put in place various implementing procedural and institutional procedures."[64]

The ECHR's suggestion that Ireland enact legislation to comply with its Article 8 obligations has caused a good deal of political turmoil. Many in Ireland regard the ECHR's characterization of their laws as inaccurate. (They claim that there is no "right to abortion" in any circumstances in Ireland; rather there is a right of a woman to medical treatment that may result in the death of the unborn child as a side-effect.) In the recent political elections, politicians from the winning parties signed pledges not to change the law.[65]

Conclusion

The question of whether nation-state members of the Council of Europe are obligated to create legal rights to abortion under the European Convention of Human Rights has apparently been settled by the ABC decision. Abortion is one of several social issues largely left to the individual state to decide, under the long-standing "margin of appreciation." However, to the extent a state does create abortion rights, the ECHR's decision in *ABC* demonstrates that it will require that state to make, pursuant to its Article 8 obligations, "effective means" available to obtain that right.

Endnotes

1 The Council of Europe was established by the European Convention on Human Rights and is currently composed of forty-seven nations.

2 The referendum passed on a vote of 67% to 33%. *See* Dep't of the Env't, Heritage, and Local Gov't, Referendum Results 1937-2009, at 32-33 *available at* http://www.environ.ie/en/LocalGovernment/Voting/Referenda/PublicationsDocuments/FileDownLoad,1894,en.pdf (last visited May 26, 2011) [hereinafter Referendum Results].

3 Attorney General v. X, [1992] 1 I.R. 1 (Ir. S.C.) (Finlay, C.J., opinion).

4 Referendum Results, *supra* note 2, at 42. The proposed additional text to Article 40.3.3 would have read, "It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction."

5 *Id.* at 44-45 ("This subsection shall not limit freedom to travel between the State and another state.").

6 *Id.* at 46-47 ("This subsection shall not limit the freedom to obtain of make available, in the State, subject to such conditions as may be laid down by law,

information relating to services lawfully available in another State.").

7 Applicants' Reply to the Observations of Ireland on the Admissibility and Merits, Application No. 25579/5, at 106 (Dec. 23, 2008) [hereinafter Applicants' Reply Brief]. In the very first footnote of the reply brief, the plaintiffs defined "health" broadly, stating that "[h]ealth is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." *Id.* (citing to the Preamble to the Constitution of the World Health Organization, July 22, 1946, 14 U.N.T.S. 185).

8 A. B. C. v. Ireland, Application no 25579/05, 16 December 2010, at125.

9 *Id.*

10 An ectopic pregnancy is one in which the fertilized egg develops somewhere outside the uterus, presenting a danger to the mother.

11 *A.B.C.*, Application no 25579/05 at 125.

12 *Id.*

13 *Id.*

14 *Id.*

15 Applicants' Reply Brief, *supra* note 7 at 42.

16 *A.B.C.*, Application no 25579/05 at 127.

17 *Id.*

18 Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, *available at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (last visited May 26, 2011) [hereinafter Convention].

19 Video footage of the oral arguments before the Grand Chamber is available at http://www.echr.coe.int/ECHR/EN/Header/Press/Multimedia/Webcasts+of+public+hearings/webcastEN_media?&p_url=20091209-1/en/ (last visited May 26, 2011).

20 Applicants' Reply Brief, *supra* note 7, at 35: "Requiring Applicants A, B, and C to pursue domestic litigation in order to comply with the exhaustion requirement is futile because the State has demonstrated numerous times that it will not provide an effective remedy for women and girls harmed by its draconian abortion regulation." Moreover, they argued:

> Each Applicant's chance of success in the domestic courts is further diminished by the fact that when interpreting the use of the term "unborn" in the Constitution, the Irish courts would be prohibited from weighing the evolving domestic and international consensus that favours access to abortion when a woman's health or well-being is at risk, nor could the courts be informed by any public or State discussion on the evolving meaning of the Irish constitutional provision regarding abortion.

Id. at 47.

21 *Id.* at 58 (stating that there is a "high likelihood that Applicants A, B and C would not have been able to keep their identities confidential had they brought their claims in the domestic courts.")

22 *Id.* at 49.

23 D. v. Ireland, 27 June 2006, no. 26499/02.

24 *See* European Court of Human Rights, The Court in 50 Questions, *available at* http://www.echr.coe.int/NR/rdonlyres/5C53ADA4-80F8-42CB-B8BD-CBBB781F42C8/0/FAQ_ENG_A4.pdf (last visited May 26, 2011). A case comes to the Grand Chamber, an exceptional situation, in one of two ways. First, after a Chamber judgment has been delivered, the parties may request referral of the case to the Grand Chamber and such requests "are accepted on an exceptional basis." Second, cases are sent to the Grand Chamber when relinquished by a Chamber. "The Chamber to which a case is assigned can relinquish it to the Grand Chamber if the case raises a serious question affecting the interpretation of the Convention or if there is a risk of inconsistency with a previous judgment of the Court."

25 A. B. C. v. Ireland, Application no 25579/05, 16 December 2010, at 142.

26 *Id.*

27 *Id.* at 149.

28 *Id.* at 155.

29 Applicants' Reply Brief, *supra* note 7, at 17, 104. (citing *Joint Obs. of Center for Reproductive Rights*).

30 *A.B.C.*, Application no 25579/05, at 158-159.

31 *Id.* at 159.

32 *Id.* at 164.

33 The associated claim under Article 13 was thus rejected.

34 *Id.* at 167.

35 *Id.*

36 *Id.* at 212.

37 *Id.* at 213.

38 *Id.* at 214.

39 *Id.*

40 *Id.* at 216.

41 *Id.* at 218.

42 *Id.* at 222.

43 *Id.*

44 Applicants' Reply Brief, *supra* note 7, at 67.

45 *Id.* at 76. (citing *Joint Obs. of the Center for Reproductive Rights*).

46 *A.B.C.*, Application no 25579/05, at 223.

47 Applicants' Reply Brief, *supra* note 7, at 86.

48 *A.B.C.*, Application no 25579/05, at 225.

49 *Id.* at 227.

50 Tysiac v. Poland, Application no. 5410/03, 20 March 2007.

51 *Id.* at 21.

52 *Id.* at 116.

53 Applicants' Reply Brief, *supra* note 7, at 90.

54 *A.B.C.*, Application no 25579/05, at 235.

55 *Id.* at 236.

56 *Id.* at 237.

57 *Id.* at 237.

58 *Id.* at 238.

59 *Id.* at 241.

60 *Id.* at 246.

61 *Id.* at 253.

62 *Id.* at 254.

63 *Id.* at 266.

64 *Id.*

65 The Court concluded that while there was a violation of C.'s Article 8 rights, there was not an established causal link between the violation and her claims for damages regarding her travel abroad for her abortion: "While it may be that [she] preferred the certainty of abortion services abroad to the uncertainty of a theoretical right to abortion in Ireland, the Court cannot speculate on whether she would have qualified or not for an abortion in Ireland had she had access to the relevant regulatory procedures." The Court did award damages—in the sum of 15,000 Euros—for the "considerable anxiety and suffering" experienced by C., for lack of the process (not for lack of obtaining a legal abortion). *Id.* at 279.

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