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Engage: The Journal of the Federalist Society's Practice Groups Volume 7, Issue 2 October 2006

ENGAGE

The Journal of the Federalist Society Practice Groups

Project of the E.L. Weigand Practice Groups

CONVENTION ISSUE

SPECIAL FEATURE:
THE TEMPLETON DEBATES

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Third and Final Installment: "Ninth Circuit Split: Point/Counterpoint"
Why Chief Justice Schroeder and Split Opponents Should Swap a Broad Circuit for a Broader Perspective
by Diarmuid F. O'Scannlain

Reviewing (and Reconsidering) The Voting Rights Act
by Abigail Thernstrom

Premises Owner Liability for Secondhand Asbestos Exposure: The Next Wave?
by Mark Behrens & Frank Cruz-Alvarez

The Rapanos *Case*
M. Reed Hopper & Damien M. Schiff

Constitutional Rights of the Boy Scouts
by Scott H. Christensen

BOOK REVIEWS

Cornerstone of Liberty, America's Constitution, The Fallacy of Campaign Finance Reform, Reclaiming the American Revolution, Trapped, The Limits of International Law & Law without Nations?

Volume 7, Issue 2 October 2006

Volume 7, Issue 2

Letter from the Editor . . .

Engage, the Journal of the Federalist Society for Law and Public Policy Studies, is a collaborative effort involving the hard work and voluntary dedication of each of the organization's fifteen Practice Groups. These Groups aim to spark a level of debate and discussion all too often lacking in today's legal community. Through their programs, conferences and publications, they contribute to the marketplace of ideas in a way that is collegial, measured, and insightful.

This is a Special Feature issue, showcasing five of a series of debates held at various colleges in the fall of 2005 on the topics of religious liberty and free enterprise, made possible by a generous grant from The Templeton Foundation. We are pleased to present them here to a wider audience. The remainder of the issue, as usual, is dedicated to original articles produced by Society members and friends. Contained herein is the third and final installment of a three-part series entitled "Ninth Circuit Split: Point/Counterpoint." Judge Diarmuid F. O'Scannlain responds to "A Statement of a Number of Ninth Circuit Judges," which appeared in our last issue. Abigail Thernstrom examines how the Voting Rights Act has become a tool for divisive racial politics, a theme carried in R. Keith Gaddie's insider account of the Texas gerrymandering case and Professor Heriot's look at Hawaii Senator Akaka's pending tribal bill.

Please do not forget to check our Book Review section, at the end of the Journal. We are gratified to feature in this issue an extraordinary number of excellent reviews on very thought-provoking and policy-relevant titles in print or coming this fall. Included in this number are Timothy Sandefur's *Cornerstone of Liberty*, a survey of property rights in contemporary America—a darkened landscape in the wake of *Kelo*, according to several of the authors in this issue—and Akhil Amar's *America's Constitution*.

Upcoming issues of *Engage* will continue to feature original articles, essays, book reviews, practice updates and transcripts of programs that are of interest to Federalist Society members. We hope you find these issues well-crafted and informative, and encourage members to offer their feedback.

The Journal of the Federalist Society for Law and Public Policy Studies

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The Journal of the Federalist Society's Practice Groups

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The Templeton Debates

Make Way for Wal-mart! Eminent Domain after Kelo

*Scott Bullock vs. Daniel R. Madelker**

PROFESSOR MANDELKER: As a beginning, I wish to give you some background on urban redevelopment in this country. As a young lawyer, over fifty years ago, I was assigned to the department in the then Federal Housing Agency that was responsible for the then brand new Urban Redevelopment Program. One of our functions was to guide the states and local attorneys whose programs were beginning to be challenged constitutionally because they did not serve a public use. We wrestled with those issues and gave legal guidance.

In the spring of 1936, *Life* magazine published a picture on its front cover of the Capitol of the United States. In the background, from the steps of the Capitol, you could see the slums of Southwest Washington. Those slums were cleared and became the focus of *Berman v. Parker* some twenty years later. Eleanor Roosevelt actually took a delegation of senators around the Southwest Washington slums to get their endorsement of the then pending Public Housing Act, which was passed. When war broke out, President Roosevelt appointed an Interim Committee on Urban Redevelopment to work out a redevelopment policy for the country. There were 450 acres of slums in the Mill Creek redevelopment project in St. Louis alone, which had 10,000 outhouses and relied on burning coal for heat.

During the war, the Interim Committee found there were many reasons for a national role in the redevelopment process. They found there was a need for comprehensive redevelopment of slum areas. There was also a holdout problem, individuals in projects who did not want to sell. The *Kelo* project is a modern-day representation of everything the Interim Committee worried about, because there were holdouts who did not want to sell and the project was the very kind of redevelopment project the Interim Committee endorsed.

The Housing Act of 1949 began a program of federal assistance for urban renewal as a follow-up to the Interim Committee's work. I was in the federal housing agency as the federal urban renewal program was getting started, and we drafted model legislation that was adopted all over the country and that requires a finding of blight for redevelopment. The New London project used a very different kind of law that did not require a blight finding, and which directly posed the question of whether using eminent domain for redevelopment is a public use.

MR. BULLOCK: Thank you very much, Professor. The Institute for Justice litigated the infamous *Kelo* case from its beginning in trial court on up to the U.S. Supreme Court. I argued the case in February (2005) and the Supreme Court released its decision in June, now one of the most infamous Court decisions in recent memory. Few Supreme Court decisions have been met with such, almost universal, disdain and outrage from people across the country, the political spectrum, and the other typical divides in American life.

It is a dreadful, breathtaking decision with dire consequences for homeowners, small-business owners, churches, and property owners throughout the country. For the first time, the Supreme Court held that the use of eminent domain simply for so-called economic development purposes, (for revitalizing the economy in the form of higher tax revenues, more jobs, or the economic well-being of a particular community), is a public use under the Constitution, and that the Constitution does not prevent local, state, or even the federal government from using eminent domain in this manner. Justice O'Connor, who prides herself on moderation, said that under the majority opinion any Motel 6 can be taken for a Ritz-Carlton, any home taken for a shopping mall, any farm taken for a factory. That is why a vast majority of Americans are opposed to and outraged by this decision. They were not aware that this had been happening throughout the country, although awareness had certainly been growing. Certainly they could not believe that the Court would approve something like this.

One of the things you hear in response to the outcry over *Kelo,* and to Justice O'Connor's ominous dissenting opinion, is that these are just hypothetical horror stories. That's simply not true. We're already seeing it, and we've been seeing it increasingly over the past decade. The Institute released a report in 2003 that documented over 10,000 instances of filed or threatened condemnations for private development over just a five-year period. In the months since *Kelo*, the floodgates to eminent domain abuse have already opened. Hours after the *Kelo* case was decided, for example, the City of Freeport, Texas, condemned two family-owned, waterfront seafood businesses for a private developer to build an $8 million private boat marina. That's the equivalent of taking a Motel 6 for a Ritz-Carlton. Justice O'Connor's point was that the government can take lower tax-producing businesses and give the land to higher tax-producing businesses, and that's exactly what happened in Freeport. In July, the City of Sunset Hills, Missouri, voted to condemn eighty-five homes and small businesses to build a $165 million shopping complex. That's taking homes for a shopping mall, just as Justice O'Connor predicted, and there are many other examples.

One of the defenses of the *Kelo* case is that it's different because New London had a plan for the redevelopment of the city, which they called the Fort Trumbull Municipal Development Plan. They had public hearings, went through

**Scott Bullock is an attorney with the Institute for Justice. Daniel R. Mandelker is a Professor of Law at Washington University in St. Louis, where this debate was held in September 2005.*

a planning process, and decided to take these homes to give the land to private developers, which would bring more tax revenue into the struggling community.

Justice Stevens is very enamored of planning and seems to think it will somehow put the brakes on eminent domain abuse. That is completely disconnected from reality. I have worked on dozens of these cases throughout the country, and in virtually every case there is a plan and a process underway for the government to exploit eminent domain. To think this provides any substantive protection against the use of eminent domain for private development is very naïve. It shows that the Supreme Court hasn't looked at these cases realistically. The government knows how to make plans and have public hearings. That's not going to provide a check in most cases. Even if there was any limit on that in the past, I will guarantee you that there will be no limit on the use of eminent domain in the future—(pursuant to a so-called development plan). Attorneys that work with developers, planners, and local governments are already advertising their services for putting together an "airtight redevelopment plan" in *Kelo*'s wake.

The Court emphasized in the *Kelo* case that there was no evidence that these takings were designed to benefit a particular private party. They claimed the evidence showed that the government was motivated by a desire to benefit the "public" in the form of higher tax revenues, more jobs, and a revitalization of the economy. Therefore, because there was no evidence of a plan to specifically benefit a private party, they held that the condemnations were for public benefit, and were thereby constitutional under the Fifth Amendment.

There are several problems with this, many of which Justice O'Connor pointed out in her dissenting opinion. First, it is extremely difficult to figure out what truly motivates public officials, unless you have a *Law and Order* type of moment where somebody breaks down on the stand and says, "Yes, the real reason why we did this is because we want to benefit the Novus Development Corporation!" Novus Development Corporation is the developer in Sunset Hills that's trying to take all the properties there. Absent a whistleblower, confession, or smoking-gun email, it's very difficult to figure out what truly motivates people who vote for the use of eminent domain for private economic development.

An even more fundamental problem is that it's very hard to, in the Court's words, "disaggregate public and private benefit." The takings in this case, the municipal development plan, were put together after Pfizer moved next door to the Fort Trumbull neighborhood. Pfizer agreed to put its global research facility in New London, next to Fort Trumbull. This was a big coup for New London, a poorer city by Connecticut's standards, though not by the standards of many other states. To do this, they had certain requirements they wanted the government to meet as part of the agreement. The wastewater treatment facility had to be cleaned up. The state park had to be renovated. The Fort Trumbull neighborhood had to be redeveloped. Pfizer wanted a five-star luxury hotel, upscale condominiums, short-term condominiums for visiting scientists and employees, and private office space for subcontractors and others it might do business with. This was not for Pfizer itself, but the so-called spin-off developments of Pfizer.

The City went through its planning process, heard public testimony, and listened to people like Susette Kelo and the Dery family that had lived there for over 100 years. They wanted to incorporate the homes in the neighborhood because there are dozens of acres of land available for redevelopment to the City of New London in this area, and the people's homes constituted a mere 1.54 acres in a 90-acre project area. Yet the City and the New London Development Corporation pushed forward despite having so much other land available for development projects.

After the public hearing and the planning process, the municipal development plan had a five-star luxury hotel, upscale condominiums, and private offices—just as Pfizer had requested. The city did this because Pfizer was their largest taxpayer, they were the biggest economic engine in town, and they wanted to please them. Pfizer's voice was obviously much more important than the voice of Susette Kelo.

Their motivation wasn't solely private benefit, though. They wanted the so-called public benefits, the secondary effects of bringing any private business to a particular city. That's one of the good things about a free-market economy. Private businesses are able to make a profit, but they also produce secondary, public benefits in the form of increased tax revenue, more jobs, and business attraction to the area as a result of businesses moving there. When those are considered public uses, how can you separate the public and private benefit? They really become one. They want to give enormous benefits to private companies, but usually the reason is they want more money. They want tax revenue. They want their city to improve.

One of the most radical aspects of the *Kelo* decision is that it isn't in keeping with a broad range of precedents going back fifty years, even where the Supreme Court was very lenient and gave broad deference to governments to make public use determinations and to use eminent domain as they thought fit. Admittedly, there was very broad language in those cases, the *Berman* case from 1954 and the Hawaii Housing Authority case from 1984 (*Midkiff*). But what distinguished those cases—Justice O'Connor incidentally wrote the decision for *Midkiff*—is that in both there was a problem with the land or the land ownership. In the *Berman* case, you were talking about a severely blighted area. Mr. Berman's department store itself was not blighted, but the area immediately surrounding it and the area in which he was located was in bad shape. Over sixty percent of the properties were beyond repair. I think over eighty percent of the properties did not have indoor plumbing. They had twice the disease and death rates, and so forth.

In *Midkiff*, the Court approved the use of eminent domain to break up an oligopoly of land ownership. Hawaii was essentially a monarchy until it joined the Union, and the federal government owned about half the land; the other half was owned by a handful of Hawaiian families. The Court said we don't like oligopolies in this country, they're harmful.

Eminent domain can therefore be used under those limited circumstances to remove the harmful, offensive conditions.

What makes the *Kelo* case so different, and why it should be of such concern to everyone, is that the majority said there was no need for a finding of harm. Indeed, the City in the *Kelo* case did not allege that these homes were blighted. This was an ordinary, working-class neighborhood of homes and small businesses. The sole justification was what the property was going to be used for after it was taken: new development, "higher and better uses" of the property. There's now no requirement under Supreme Court precedent for there to be any problem with the land or the land ownership structure. That really does put every neighborhood, every home, and every business potentially at risk for takings for "higher and better uses of property," and that is a frightening prospect.

There is some good news coming out of the decision, though. After the *Kelo* case there was a public outcry against the Supreme Court's decision and a call by people to change the laws on the state and local level to make sure that what happened to the people in New London does not happen in their state or community. One of the high points in the majority opinion of *Kelo* is where Justice Stevens admits that state courts are free to interpret their own state constitutions differently than how the U.S. Supreme Court interpreted the Fifth Amendment to the U.S. Constitution. He says that state supreme courts, under their own takings clause, can give more protections to property owners. The state supreme courts know that, and they always know that federal courts only provide a floor of protection under the U.S. Constitution, and state courts can provide more. For him to almost encourage state courts to reach different conclusions is promising, and there will surely be a lot of action in the state courts about the use of eminent domain for private development.

There are also calls for a change in state laws to ensure what happened in Connecticut does not happen in other states. So far thirty-five states either have introduced legislation or promised to introduce legislation that would provide greater protections and in many instances ban the use of eminent domain for private economic development. That's desperately needed, and we're going to work hard for it. The Congress is seriously considering legislation that would cut off federal funding for projects that use eminent domain for private economic development. It can't overturn the Supreme Court or reinterpret the Constitution short of a constitutional amendment, but the Spending Clause is a very powerful weapon that Congress can use to show its disapproval. The Fort Trumbull Project, for instance, received $2 million in federal funding, and this is true of many of these projects.

One of the most encouraging things about the backlash to this decision is how it has united people across the country. Polls on this are overwhelming: ninety, ninety-four or ninety-six percent oppose the decision. Most issues, especially the more controversial ones the Court has considered, are typically fifty-fifty. This isn't a divided country when it comes to the use of eminent domain for private economic development. George Will is against it. Molly Ivins is against it. Bill Clinton is against it. Ralph Nader is against it. The first person on the floor of the Senate to denounce the *Kelo* case was John Cornyn, conservative Republican from Texas. The first person on the floor in the House of Representatives to denounce the *Kelo* case and demand action from Congress was Maxine Waters, one of the most liberal Democrats in the House of Representatives. When Tom DeLay and Maxine Waters can stand together and say we oppose the *Kelo* decision, something might well come of it.

There are, however, powerful forces on the other side. Mayors and city officials want to retain the power to use eminent domain for private economic development. Developers, private businesses, and big-box retail stores also want to maintain this power and will work very hard to keep it. Mayors control cities; they control votes. Developers give a lot of money to political campaigns, so even though the public is overwhelmingly against the use of eminent domain, these are going to be very hard-fought battles.

In the end, however, I hope you're going to see much good come from a very bad decision. Many people come up to me and say congratulations on the *Kelo* case. That's not typically what people say when you lose a Supreme Court opinion. It's because we've worked very hard to make what was a dreadful Supreme Court decision into a victory for home and small-business owners throughout the country. Thank you.

PROFESSOR MANDELKER: I'm really not outraged at the decision at all. Unfortunately, it was a confusing decision and that, plus the ability of property groups to market their ideas, has caused the public outcry. Justice Stevens even apologized for the case at a Bar Association meeting. There were other voices, however. Before the *Kelo* case a law professor at Notre Dame, Nicole Garnett, wrote a very fine article on the Public Use Clause. When the Supreme Court took the case, thirteen of us signed on to an *amicus* brief endorsing Nicole's approach. The Court paid little attention to what we said, but I hope it will be picked up later. Otherwise, we on the moderate side, the side interested in the redevelopment of our cities, have not come up with our own set of ideas and concepts, and we've lost ground to the other arguments.

I believe I can tell you why this happened. Cities were beginning to gear up for urban redevelopment in the 1950s, and the question was, How should we defend this? After all, in redevelopment you take land from A and give it to B. Where is the public use? There were two thoughts in the federal housing agency. One was to defend redevelopment as an implementation of the comprehensive plan because the statutes require a comprehensive plan. The leadership of the agency thought that wouldn't work because courts would not accept that argument, so they decided to defend the law not on what was coming into the city but on what was being taken out. That was the public use, we argued. This may seem a little strained to you, but take southwest Washington, D.C. as an example. We were taking this terrible slum out of the city and making the area into a healthier and

better place to live. That was the public use, and the state courts mostly went along with that idea.

Berman v. Parker presented the issue to the Supreme Court, but unfortunately Justice Douglas confused everything by sweeping it under the table. He said the question of public purpose was not for him or the Court to decide, and that there could be a very broadly stated public purpose of redevelopment in the city. He also said the issue of taking property from A and giving it to B was a means to an end and could not be challenged, which was totally contrary to what the Supreme Court had said earlier. To compound the difficulties, when we drafted those blighting statutes we included a section called "economic blight and social blight," and we meant areas that were seriously economically distressed. This authority has been abused by cities that blight areas that are not really blighted in the sense we meant in order to assist redevelopment by private entities. This abuse of the power of eminent domain partly explains why there has been a terrible reaction to the *Kelo* decision, which was a marginal extension of previous decisions.

This has quite properly led to outrage. When the *Kelo* case came before the Court, it involved a statute authorizing eminent domain for redevelopment. It's easy to characterize the case as Scott did, but I view it as a poster-child for redevelopment: a declining waterfront city that had lost a naval base and a program in which the state had taken a direct interest. But the use of eminent domain in redevelopment was dodged in *Berman v. Parker*, was never decided, and was ignored for many years. The question certified to the Supreme Court in *Kelo*, I believe, was the constitutionality of redevelopment as a public use. It was not whether the New London project was a proper and correct use of that power. It wasn't supposed to be about New London. If you read the decision, Justice Stevens states the certified question in one paragraph, but later he says that New London had a great project because they had a comprehensive plan for it. People became concerned because lower-income plaintiffs were to be displaced and because of other issues, including the city's decision to leave a building standing apparently because its owner's had local political connections, which is simply awful.

My reaction to Justice Stevens' reliance on comprehensive planning is a little different. If it's planning for a particular project, that's not planning; that's site development. The statutes have had a requirement that urban redevelopment must be consistent with a city comprehensive plan for a long time. If you really have decent, comprehensive planning at the city level, and the city decides in the plan that a neighborhood has to be redeveloped, that's different. The planning side of this is an important part of the whole process, as it affects the public use concept, and I'm glad to see that Stevens discussed it a little, though perhaps not enough.

The other side is the individual property owner, especially people living in older homes. Imagine an old neighborhood in St. Louis. If the city condemned it, those people could not replace those homes anywhere else in the city. You are compensated in eminent domain only for the value on the market, not the value to you. We've understood that to be a long-standing problem. The Uniform Federal Relocation Act, which applies when there is federal assistance, requires adequate compensation though it doesn't reach this problem. The Act doesn't apply when there's no federal assistance, however, and there isn't any federal assistance for urban redevelopment anymore. Kirkwood, a St. Louis suburb, dealt with this problem by paying compensation as required by the federal act, and did not have a land acquisition issue. Adequate compensation should be part of the public use equation, and I hope this issue will be considered as legislatures begin to revise their eminent domain statutes.

Finally, the Motel 6 issue. In the *Kelo* decision, Justice Stevens left the door open for that kind of case, where the Court thinks there has been some abuse. Justice Kennedy's concurring opinion was very explicit on this problem. That is where the Court should have given some guidance, and where we tried to give some guidance in our brief.

Professor Fennell, in a very interesting recent article, talked about what she calls thin markets and thick markets. We're bothered if the government takes one piece of property and gives it to someone else. If you have a large area like New London, however, and the government takes a large number of properties and uses them for a variety of purposes that serve public needs, she thinks that should be viewed differently. This insight may provide some guidance to legislatures as they deal with this problem. My hope is that legislatures and courts will take up Justice Kennedy's invitation and deal with arbitrary uses of the eminent domain power in redevelopment. Thank you.

Priveleges, Immunities, and Free Enterprise

*Richard Epstein & Mark Graber**

PROFESSOR EPSTEIN: This is a very strange debate because I don't know which side I'm on, nor do I know which side Mark is on. I'd like to think of myself on the side of truth and enlightenment, but it would be rather inappropriate to cast my opponent under such a cloud before we start to speak—if he is an opponent, which I don't think he will be.

I wrote a paper on the Privileges or Immunities Clause of the Fourteenth Amendment [*Of Citizens and Persons: Reconstructing The Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU Journal of Law & Liberty 334 (2005); see also *Further Thoughts on the Privileges or Immunities Clause of the Fourteenth Amendment*, 1 NYU Journal of Law & Liberty 1095] mainly because I was asked to teach *The Slaughter-House Cases* once at Brooklyn Law School as a visitor for one day. I decided to do something extremely daring in light of the modern styles of constitutional interpretation—reading the entire 14th Amendment, first clause, first section, which is not that long, from beginning to end in an effort to figure out both substantively and structurally what it accomplished and what it was meant to do.

Using this very simple canon, let us begin with the first sentence, which says that all persons born and naturalized in the United States are citizens of the United States, and citizens of the state in which they reside. The purpose there, as Mark can tell you much better than I, was to overrule the decision *Dred Scott*, which said that former slaves could not become citizens of the United States. This decision partly led to the Civil War, which tells you that Supreme Court decisions really matter. It should also tell you that citizenship matters, as much now as it certainly did in the nineteenth century. There was no question then that citizens were thought to have had certain advantages that were denied to other individuals who, nonetheless, were not thought to be without any rights.

Knowing something of the general background, I read the Clause, and here's what I found. It said, "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States." Then we have the Due Process and Equal Protection Clauses, neither of which applies only to citizens; both apply consciously to all persons in the United States. At least one of the questions one wants to answer in reading a clause like Privileges and Immunities is why the first clause of Section 1 of the 14th Amendment defines who is a citizen; the second clause gives the payoff of being a citizen; and the third and fourth clauses (on equal protection and due process) take a somewhat different tack and start talking about protections that are given to all persons.

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There's an important little moral here. One of the great tensions every legal system has to face is that between the claims of natural law and positive law. The traditional account of natural law refers to those rules, practices, ordinances and instructions that apply commonly everywhere to everyone and therefore are not to be a gift or preference which is conferred on you by the sovereign. In contradistinction stands the highly positivist tradition, in which the sovereign has citizens who owe and must demonstrate allegiance, but in exchange receive special benefits that aren't given to all persons. So there is a built-in tug-of-war in the 14th Amendment if you look at it this way—between the special positions that citizens have under the Privileges or Immunities Clause and the more generalized protections that are given to everyone, citizen and alien alike, in the Equal Protection and Due Process Clauses.

I wondered why they drew this kind of distinction, and this is what I came up with. First, you have to be able to make sense of a clear structural distinction that is built into the Amendment, but which gets completely elided and forgotten in modern interpretations. Because if you forget the Privileges or Immunities Clause when you talk about persons, then you don't think about it in opposition to citizenships; you just simply treat them as persons and protect everyone.

Second, it is a clause whose key phrase "privileges or immunities" you'd like to be able to define with reference to ordinary meaning, but cannot. Many words in the Constitution like "religion" and "private property" and "freedom of speech" provide some particular sense of meaning. At least you think they do when you start out, even though you know you're going to get beaten to a pulp when you try to work out the implications of grand terms for particular cases. These are not what you'd call words of conventional meaning, however. They're essentially words of natural meaning used in the Constitution in more or less the same way they're used in ordinary language. When you get to privileges or immunities, you can't give rely on that particular interpretive history. The word "privilege" taken alone often means that somebody is going to be privileged *vis à vis* somebody else. The word "immunity" generally means that you're exempt from certain kinds of lawsuits. Yet if you put the words "privileges and immunities" together, you can't parse them by saying, first of all, find out what the privilege is and then we'll find out what's immunity. You need some sense of the meaning a particular phrase has in ordinary usage. This exercise is extremely dangerous because whenever you have a conventional term inside the Constitution, to some extent you're forced to rely on some extrinsic sources to find out exactly what that particular term means and how it ought to be construed.

The great first principle of constitutional interpretation is pay close attention to the text, and the second is how you find out what terms mean when they have only conventional

meanings. There is an informal structure between professional historians. On the one hand, you're anxious to trace down every use of a particular phrase as it existed in the original debates over the 14th Amendment and the ratification debates that took place in the states, and on the other hand, those of us who are more lawyer-like say the text has to be self-contained if it's going to be the source of authority for future decisions. To cite what a person in the New Hampshire debates said and treat it as justification for interpreting something one way or another is most unsatisfactory because you will find that many people said many different things, and there's no way to reconcile all the disparate private explications of a given text into a single coherent whole.

What are we to do? It's like parole evidence; you don't accept slippery memory of individual statements. You try to find stable and customary meanings that were widely known and publicized by all so you don't have these credibility and interpretive problems that you have with the testimonial evidence of the supporters and detractors of particular provisions. You start by looking backwards in time to see where these phrases appear.

With respect to the Privileges or Immunities Clause, you can trace some version of it to the Middle Ages, because when people were anxious about their status, the King would grant them a charter which says he preserved to them as to all other Englishmen their liberties, franchises, and privileges of one sort or another. You never quite knew what that phrase meant either, but in its original form, it was a guarantee of nondiscrimination. Whatever you do to your other citizens, you're going to do to me—nothing worse and definitely nothing better. One of the great protections that people have is to make sure that if they are put in a boat, other people are in the same boat with them; if they go down, they're not alone. Singling out is a very effective way in which to impose either special privileges that people don't earn or special burdens they don't deserve. There's some sense of parity very much associated with the early use of privileges and immunities.

When it comes into the American context, chiefly through the Articles of Confederation, we're starting to talk about mutual intercourse and comity between the various states. Here 'privileges and immunities' seems to take on a somewhat different meaning, in which the major objective is to make sure that the United States will operate more or less like a free trade zone across state boundaries. The argument here, in perfect consistency with the basic nondiscrimination theme that we've talked about, is that everyone knows that protectionism is a great vice in a country made up of competitors in a political common market, which they hoped the United States would be.

At the same time, nobody—certainly no one at the constitutional level—knows what the ideal set of rules ought to be with respect to commercial transactions in any particular state. So rather than try to specify in great detail what state A or state B or state C must do with respect to their commercial regulations, the basic principle is one which is still adopted under the World Trade Organization today: Whatever particular roles you have with respect to your own citizens you must also extend to outsiders, so that the tinge of favoritism will no longer darken the political landscape. In the United States Constitution, Article IV, Section 2, what we have in the Privileges and Immunities Clause is a pretty clear statement that the citizens of one state are entitled to the privileges and immunities of the citizens of several states. The theory here is that once you travel to another place, you're not going to be put at a competitive disadvantage.

Is there any limit to what the Privileges and Immunities Clauses of Article IV covers? This issue was addressed in a case in 1823 called *Corfield v. Coryell*, which had to do with a very interesting problem. The state passed a rule which said that only citizens of the state of New Jersey were entitled to use the extensive oyster beds in that state, and all other persons were excluded from their use. Some fishermen from outside the state challenged the statute, claiming that it deviated from the standards associated with the Privileges and Immunities Clause and, therefore, ought to be struck down.

How did the courts respond to this? The Court in this case was Bushrod Washington, justice of the United States Supreme Court, who was riding on circuit. And he denied the claim. In so doing, however, he gave an extremely broad definition of what constitutes a privilege and immunity. These included the right to contract, the right to own property, the right to testify, and other things. After he gives a series of capacity rights like the ability to enter into voluntary and associational transactions with other individuals, and to hold property (very much in the Lockean tradition), he adds that we also have the right under local law to have the elective franchise in accordance with its established rules. This is a little incongruous because one of the things that we do know is that citizens of one state are not normally entitled to vote in elections of another state. They will be entitled if they decide to become citizens of that second state, and indeed one of the functions of the Privileges and Immunities Clause seems to have been to allow people not only to trade and return to their own countries but also to decide to pick up shop in one place and then move to another state and become citizens of that state by establishing residence alone. The Clause was extremely important because it meant that residential freedom, which we all take for granted today, was in fact an integral part of the original Constitution.

There is a great deal of confusion as to how the Privileges or Immunities Clause associated with the 14th Amendment ought to be read, for a couple of reasons. The first point is that there is no explicit nondiscrimination provision in that clause. It is treated now as a categorical guarantee. It is good against state interpretation or enforcement and also against state legislation. "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." One of the longest historiographical debates is whether it is a nondiscrimination principle. Anyone who spends time reading the ratification debates and beyond might be inclined to conclude that such was the design, even if the details were not worked out. Yet when you read the text as it stands, it cannot support that particular meaning, for it looks like a substantive guarantee.

Once you decide, however, that it is a substantive provision and parity is not enough, you have to figure out what it means. In *The Slaughter-House Cases*, Justice Miller's interpretation was clearly understood to be wrong, as ingenious as it was. Justice Miller said, in effect, this is an Amendment that was designed to trump in some way the relationships between the federal and state governments. There's no question the people who understood the way in which the Constitution was put together in the Antebellum period, tended to lament—(if they lamented anything at all)—the absence of direct federal checks on state conduct which might infringe the ordinary liberties and rights of property that people in the several states enjoy. Slavery triggered that. The 14th Amendment starts to put powerful restrictions on what the state can do. It calls for judicial enforcement, but under Section 5 it also allows the Congress to enforce these restrictions on state behavior by appropriate legislation.

To Miller, if you gave the term "privileges or immunities" a very broad construction, it meant in effect that the federal government would not become "the perpetual censor" of all the activities that took place inside all the states. What he did not want to accept, for all sorts of institutional and structural reasons, was the thought that the entire 14th Amendment could work such a massive transformation over state and federal government. If you just read it and you're not worried about political consequences but fidelity to constitutional text, it has those massive consequences because that's the way it was written.

How does Miller avoid the textual conclusion? He doesn't read the second clause of Section 1 in the same way he reads the first clause. He says, in effect, When it refers to citizens of the United States, it doesn't mean those persons who were born and naturalized in the United States, who are now subject to protection against various kinds of abuses of their states. Rather it refers only to these people in their role as federal citizens, and the only thing governed by the Privileges and Immunities Clause is the right, for example, to travel across state lines to petition for a redress of grievances in Washington, which is protected under the First Amendment.

A vanishingly small interpretive sphere is created by this very artificial convention of saying that it's not the people that it's protecting; it's the people in their particular role. When this same clause is used in the 15th Amendment, it's talking about citizens of the United States who cannot be abridged of their right to vote because of race and color and so forth. It is perfectly clear that it's referring to people, not to roles. Nobody would have ever said that states could, under the 15th Amendment, abuse the rights of ordinary citizens on the ground of color in state elections, but could not do so with respect to federal elections. You take the parity between the various clauses and the whole Miller construct makes no sense at all.

The question, then, is what happens when you get the Privileges or Immunities Clause right? In effect you import for the substantive rights the ones that were on the list referenced by Bushrod Washington, and the Clause is going to be much bigger with respect to what it does. It's clearly going to have commercial implications, but it might also be possible that things that were not in the original Privileges and Immunities Clause of Article IV would be read back in, like the right to conscience, the right to marry, and so forth. Are these going to be covered or are they not? Are they privileges or immunities? There's going to be a lot of hard work to do because when you go back to the tradition, Bushrod Washington cannot be the sole person to give content to an amendment. If some sorts of associational liberties are going to be protected, there's going to be a very natural tendency to try to expand that list of associations to cover things that are not commercial. That's the first point.

The second point is whether these rights will be absolute. I think the answer to that particular question is, They are not going to be. Anybody looking at the interpretive tradition that goes back to Biblical or Roman law understands the following: Every major proposition which protects liberty or property, or provides equality of religion and so forth is always going to be subject to a series of implied exceptions. Nobody can use the rights that are therein conferred upon them in ways that systematically derogate from the parallel rights that are given to other individuals. I may have freedom of action. It doesn't mean that I can beat you to a pulp, because under those circumstances your freedom of action is necessarily denied. The state in its police power is supposed to intervene where self-defense leaves off, and therefore provide protection to people against the aggressions of other individuals, limiting the use other people make of their property, all in the name of the health, safety, general welfare, and public morality, which was the traditional nineteenth-century formulation.

To some people, that means you take away with the police power everything you give with the basic grant. That was not the view of the nineteenth-century judges, who on this point were more astute than many of the twentieth-century judges. Rather, they construed the police power as modern judges construe it with respect to the First Amendment, where they actually care about the basic liberty and would never want that to go. Force and fraud are clearly out. Control of a monopoly and the allowance of certain forms of taxation are okay, but they must be circumscribed because the mere indication that there is some police power virtue is not sufficient to sustain the Amendment. You need the legislatures to show that it's narrowly tailored; other means are not available; and all the rest of it, which becomes modern constitutional interpretation very quickly.

Using this interpretation, the *Lochner* decision comes out the same, in many ways, as it actually was in 1905, with one key exception. Since it's dealing with privileges and immunities, it's only citizens, not all persons, who are protected. You can discriminate against aliens with respect to things that would otherwise be privileges and immunities. The history was very odd on this particular point, however. The dissenters in *The Slaughter-House Cases* were not amused by the fact that "privileges or immunities" was construed into nothingness. In the 1880s and the 1890s when the same issue started to come up again, they said to their opponents, "you may have won on privileges and immunities, but there's still 'liberty' insofar as it relates to the Due

Process Clause, and we're going to give it a very broad and capacious meaning so that it covers not only freedom from arrest and imprisonment but also the right to engage in various kinds of economic liberties." Ironically, that interpretation, along with the interpretation of substantive due process, seems to me to be clearly wrong-headed if "privileges or immunities" is construed in its proper fashion, against what many people, including myself, have thought in the past.

The entire two-tier structure of the 14th Amendment is, in effect, that there are certain basic rights given to all persons and that there are additional rights that are given preferentially to citizens. The line that is convenient to draw is essentially the one used today with regulatory takings on the one hand and physical dispossessions on the other. Citizens are the only ones who enjoy the rights of going into markets and having various kinds of contractual opportunity. Other people, aliens, are given a basic set of rights: you can't throw them in jail or strip them of their property without trial. Then the Due Process Clause really is about process, and it extends universally to all individuals. It would be indefensible to distinguish between, for example, men and women with respect to the due process of law and all the other kinds of things. Equal protection gets exactly the same meaning.

What's left out? First, the alien protections are gone, and this was not a trivial issue in the period between 1890 and 1920, because of the huge influx of aliens into the United States. There were many explicit statutes which simply said that aliens could not engage in various kinds of activities within a state, which were struck down on the strength of the Due Process Clause. Would they be permitted under Privileges or Immunities? It would be much more difficult to use, because you'd have to argue that when you restrict the ability of an alien to contract with a citizen, you're also restricting the right of the citizen, and so therefore the only thing that you could prohibit are contracts between two aliens, not between citizens and aliens. We never tried to develop that line of jurisprudence, because we never had to.

The second, more important point is that if you go back to the *Corfield* case, one of the striking things about nineteenth-century constitutional law is that, while it's pretty good in protecting individuals against various kinds of interventions by the state, it is notoriously weak in answering the question of how the state ought to distribute various forms of public largesse. For example, because of *Corfield* states can give fisheries whomever they want, within their situational limitations. Maybe they can't distinguish among citizens, but they can certainly knock out the farms. When you're trying to figure out how public benefits are going to be supplied, the Privileges and Immunities Clause doesn't give you much purchase. When you get to a case like *Brown v. Board*, it is much more difficult to argue that it's correctly decided if in fact the state provision of education is something exclusively within its province. That's heretical today but it's probably consistent with the historical evidence, which cut both ways. There were both explicit black preference programs, forty acres and a mule, and segregated galleries at the time it was being debated.

Would all this be able to last? My answer embraces a form of constitutional fatalism. When you start to think about constitutional law, there are basically two levels. In international law, people usually follow the ordinary rules until their vital interests are at stake, and then they go to war. When you're dealing with constitutional issues, in all the mid-level questions that one routinely faces, generally judges will show a certain degree of fidelity to text and basic structure. With an issue as important as *de jure* racial segregation, however—which you think will eat out the guts of a country unless you do something about it—the attitudes start to shift a little bit. Some degree of legerdemain is probable with respect to the way in which the Amendments work. Much of what happened in the Warren Court with segregation, the voting cases and so forth, relied on a very aggressive reading of equal protection and due process, which in fact would not be possible if they were only concerned with the standard rules associated with criminal trials. Equal protection would mean that I couldn't put heavier sanctions on you than on me in a criminal case. I would have to give everyone, regardless of race, sex, or anything else, the same kinds of criminal protection.

How do I know that's right? I don't know. But let me make this simple observation. On the Equal Rights Amendment and making sex characterizations explicit in the Constitution . . . they don't use Equal Protection anymore. They say the "equality" of the law shall not be abridged. Why are they shifting it around? Intuitively, they sense that the word "protection" was used in its night-watchman sense, and the word "equality" is in fact a much broader form of guarantee. This is a controversial history in which much of what I believe myself is called into question. But the reason I'm not sure it's a debate is because when you're of two minds, you never quite know which side of the world you stand on. With that happy note, I will now turn things over to Mark. Thank you.

PROFESSOR GRABER: Following Professor Epstein is particularly difficult because he has done a thing extraordinarily rare in scholarship. Most of us inherit stock positions. We spend our academic lives developing new arguments for these stock positions. When I was in law school, everyone knew *Lochner* was wrongly decided. It was simply beyond the pale to say the case was correctly decided. If you said so, you flunked the exam. All you could do was develop a new justification for thinking *Lochner* and the freedom of contract wrong. Thanks to Professor Epstein, that is no longer the case. He has almost single-handedly made constitutional arguments for economic liberties respectable. He has added to the stock of ideas we debate. One person has literally created new forms of argument that the academic world regards as respectable. Now when you say *Lochner* was correctly decided, you get graded fairly.

One problem with casting this as a debate, as Professor Epstein said, is that legal historians think differently than academic lawyers, and my background is in legal/political history. People commonly make assertions that have unintended legal consequences. The 21st Amendment may illustrate this phenomenon. The plain text of that Amendment

seems to indicate that states may discriminate on behalf of the state alcohol industry, although as an historical matter, no framer had this outcome in mind. As a legal historian, I'm mostly interested in what people were trying to do, while an academic lawyer like Professor Epstein is mostly interested in what people legally did. We look at the proverbial elephant and reach very different conclusions because people may try to do something legally, and fail, or do other things.

A good example of our differences is in the structure of his talk. He says here are four sentences in Section 1; let us find the distinct meaning of each and how they all fit together. John Marshall and others similarly assumed that the Constitution has no superfluous passages. Indeed, one of the claims Justice Field makes in *The Slaughter-House Cases* is that Justice Miller must be wrong because if he's right, the Privileges and Immunities Clause is superfluous. An historian might take a different view. In practice, people repeat themselves. Let me say this again: People repeat themselves. Is that clear? Is anyone going to go home tonight and take the past four sentences and try to figure out if each of them has a different meaning? There is a good deal of evidence that constitutionally we repeat ourselves. The 11th Amendment tells the Supreme Court that the decision in *Chisholm v. Georgia* wrongly held that citizens of one state could sue a different state in federal court. The framers of the 11th Amendment believed the original Constitution did not vest federal courts with jurisdiction over such cases; the matter just needed to stated clearly for the benefit of the justices. We might call the 11th Amendment the "Constitution for Dummies." The same is true for the 16th Amendment, if you believe the Income Tax Cases of 1895 were wrongly decided. If you believe James Madison's speech introducing the Bill of Rights, the entire Bill of Rights is already in the Constitution.

The Constitution may mean something else from a lawyer's perspective after the Bill of Rights was added. As an historian I want to say maybe the Bill of Rights did not legally change the Constitution. Maybe the Framers simply made the constitutional obligation to protect certain liberties more explicit. More important for present purposes, this same kind of analysis may help us understand the purpose and meaning of the Civil War Amendments. I start not with the text, but with what people were trying to do. I ask what were the regional differences between the sections that caused the Civil War? What were the problems Reconstruction Republicans were trying to address? We begin where Justice Miller began, by asking about the central purposes of the post-Civil War Amendments. First, I want to ask, what is slavery?

Justice Miller and Richard Epstein, in his paper, read slavery very narrowly, as did the civil rights cases: slavery as bondage. Did Republicans in 1866 read slavery that narrowly? Interestingly, American thought about slavery evolved. When Americans in the 1780s spoke of slavery, they spoke of political slavery, being unable to vote. Taxation without representation. When Americans in 1850 spoke of slavery, they spoke of economic and family relationships. The defining element of slavery was that slaves had no right to enjoy the fruit of their labors, and that slaves could not control their families. It's important for understanding the 14th Amendment that the lack of family rights was as much a defining element of slavery as the lack of economic rights. What economic rights, however, is unclear. The Republican Party before and after the Civil War celebrated free labor. Is there a difference between free labor and free enterprise? How does knowing that the Republican Party was composed 80 percent of Whigs who supported a tariff and internal improvements affect our analysis of what free labor meant in 1866?

Relying on the 13th Amendment, these Republicans passed a rash of legislation. The Civil Rights Act of 1866 was passed under the 13th Amendment. The Freedmen's Bureau, which was a welfare law giving positive rights, was passed under the 13th Amendment. Many Republicans insisted that Section 1 of the 14th Amendment was legally superfluous. Ratification was necessary only because President Johnson failed to comprehend the broad scope of the 13th Amendment when vetoing the above bills. Prominent Republicans believed everything they wanted to do under the 14th Amendment could be justified under the 13th Amendment, but new language had the virtue of removing any constitutional taint from their program. They passed the 14th Amendment for a second reason. Justice Miller was wrong when he said the post-Civil War Amendments were only about slavery. They were also about the Southern states' violations of the rights of white people.

In 1798, a law passed in Georgia criminalized efforts to enforce the Supreme Court decision in *Chisholm v. Georgia*. Black seamen laws were passed by many Southern states, imprisoning any person of color who came aboard a ship to port. Northern states protested, sending a delegation led by Samuel Hoar to South Carolina and another to Louisiana. The governors of both states told each delegation to leave immediately; or be lynched or imprisoned.

We know about nullification. We know that James Buchanan claimed he had no constitutional authority to enforce federal law in the states that had seceded. What did the Radical Republicans say on the floor of Congress when the Privileges and Immunities Clause was debated? They condemned nullification and Buchanan; they condemned these examples of southern insolence; and they insisted that the federal government must have the power to defend federal law in recalcitrant states. It is perhaps true that the dormant Commerce Clause protected the right of black seamen, but the dormant Commerce Clause had not provided that protection before the Civil War. During the years immediately after the Civil War, Republicans concluded that more language was needed. The Privileges and Immunities Clause was probably that language. To understand why, we need to know about privileges, immunities, and rights.

An important distinction existed in nineteenth century constitutionalism: citizens have privileges and immunities; persons have rights. The natural law jurisprudence in the years before the Civil War was far more extensive than Professor Epstein describes in his paper. The first invocation of substantive due process in a Supreme Court opinion was not in the late nineteenth century. It was not even in *Dred Scott*, a case in which both sides invoked substantive due

process. It was actually in a patent case, *Bloomer v. McQuewan*, which condemned under due process legislation that transferred property from A to B.

Due process rights are moreso natural rights than are privileges and immunities of citizens, because, as every good American knew in 1866, you had no natural right to be a citizen. This was central to Thomas Jefferson,'s political thought. He maintained that slavery violated the natural rights of slaves, but that slaves had no natural right to be citizens. Colonization violated no rights, because free blacks have no natural right to be citizens of the United States. Southern courts, when talking about the rights of blacks, insisted that blacks had no natural rights, but that all communities may vest them with certain statutory *privileges*. These are matters of legislative discretion, but if the legislation exists and free blacks have such a positive right, the court must respect that right as a matter of law.

This is the meaning of the 14th Amendment. It is not an Amendment that says citizens get greater rights, perhaps even more natural rights, than aliens. Rather, the Due Process Clause is to some degree a natural rights clause. The Privileges and Immunities Clause is a nationalism clause directed at violations of federal law like those that took place in the South before the Civil War. That's how it was introduced in Congress, and the language makes sense.

To summarize where our differences are and where they aren't: Professor Epstein and I agree that the 14th Amendment probably protects certain natural rights. He tends to locate them primarily in the Privileges and Immunities Clause; I locate them primarily in the Due Process Clause. Another reason I think due process is historically the correct location is the antislavery movement made extensive use of natural laws arguments, and they consistently invoked the due process clause when doing so. They did not, by comparison, make many privileges and immunities arguments. In short, we disagree primarily on location.

We probably also disagree on one clause that Professor Epstein left out. If we're going to read the 14th Amendment, we should read all of it, including Section 5: "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The Supreme Court was not very popular among many Republicans in 1866. They hated the justices who decided *Dred Scott*, and feared with good reason that the judicial majority was hostile to congressional Reconstruction. Most historians believe the crucial provision of 14th Amendment was Section 5, which empowered Congress to determine how best to enforce the post-Civil War Constitution. Section 1 was somewhat vague because Republicans left for future Republican congressional majorities the task of figuring out what liberties needed national protection. In short, future Republicans officials were constitutionally charged with the responsibility of determining the rights of Americans on the basis of circumstances before them, and not simply the circumstances of 1866. This strongly suggests that, at least with respect to legislatures, the Fourteenth Amendment constitutionalizes the possibility that understanding of natural rights may evolve, that we may have better knowledge of morality and natural rights than our ancestors. Thank you very much.

How High a Wall? Originalism and the Separation of Church & State

*Seamus Hasson vs. James Nickels**

MR. HASSON: Thank you for having me. I'm going to tell you some stories and ask you some questions. The first story is my favorite.

In 1989, there was a Japanese Tea Garden in Golden Gate Park in San Francisco like Japanese tea gardens everywhere in the world—landscaping, monuments, and *feng shui*. It was neat, orderly, manicured, and well-laid-out. Except for one thing. There was an abandoned parking barrier at the back of the Tea Garden. It was nothing other than a bullet-shaped lump of granite that some crane operator late on a Friday didn't want to haul back to the garbage heap, but it messed up the *feng shui*. For four years this parking barrier stood there, and park-goers sent increasingly irate letters to the powers-that-be, saying, The parking barrier in the Tea Garden is ugly; would you kindly remove it? Bureaucrats being bureaucrats, nothing happened until one day in 1993.

That day, a New Age group looked at the parking barrier and declared it a manifestation of the Hindu god Shiva, and began worshipping it. Whereupon, the exact same bureaucrats who couldn't remove an eyesore sprang into action, announced that they had a constitutional duty to avoid violating the separation of God and state, and hauled it away. The New Agers sued for the return of their deity, and the park ranger said, We have thousands of these things; it's not worth fighting over. You can have it, provided you worship it in private someplace else.

Now, think about that. If ever there were a religion that didn't threaten to coerce anyone, it had to be parking barrier worship. Who can mistake parking barrier worship for an officially established religion, even in San Francisco? Who's going to think that you have to raise taxes for the parking barrier? Who's going to worry their kids are going to convert to parking barrier worship? If so, close the park. If you can come and worship the shrubbery, why can't you come and worship the parking barrier? Because, said the park ranger, religion belongs in private and the park system is civil.

In my book *The Right to be Wrong*, the park rangers represent one set of villains in the debate over religious liberty—the people who say that in the name of freedom, we have to banish people's truth claims. Andrew Sullivan is an arch-park ranger. He says truth claims are such volatile things that we can't allow them out in public. We have the private realm with respect to religious freedom.

There are park rangers everywhere. In Hillsmere, New Jersey, park rangers banned Valentine's Day from public schools in the name of separation of church and state, because it's named after St. Valentine, and that is a truth claim: St. Valentine was a saint. A twelve-year-old boy who has a crush on a twelve-year-old girl in Hillsmere, New Jersey has to send her a "Special Person Card" that says February 14th is "Special Person Day." In Lansing, Michigan, you can't have an Easter bunny because that violates separation of church and state and the rabbit is a "Special Bunny." In Arlington, Virginia, the public library, for one year before the court laughed it down, replaced the Easter Egg Hunt with the "Spring Egg Roll."

Then there are the Pilgrims, that other group of villains. We have Pilgrims and park rangers. Why the Pilgrims? Because the enduring myth of American society is that Pilgrims came here looking for religious freedom, found it, and we have all lived happily ever after. That's wrong on all three points. They weren't, they didn't, and we haven't.

There were arguments about religion aboard the Mayflower. The pilgrims weren't fleeing persecution, at least not the majority of them. The majority had come from Holland. They left England ten years earlier and had all the freedom they wanted in Holland. Their kids were assimilating because Holland was a tolerant place, and they were fleeing permissiveness.

In order to flee permissiveness, come to the wilderness, and build their commune where they could live in full purity, they had to get financial backers in London who required them to bring military experts, building tradesmen, and so forth. The Pilgrims were very idealistic but kind of incompetent. In fleeing Holland for the wilderness to get away from the impurity, they had to bring impurity with them. Imagine their frustration.

And imagine the other people's discomfort. They're not leaving their country for some great spiritual reason but because it's the best job they can find. Here they are, stuck on a small ship with zealots. They had absolutely no fun whatsoever, and they're all headed to the wilderness together.

The Pilgrims call themselves the Saints, by the way, on account of modesty. They called the others the Strangers. They were diplomatic, too. The Saints quickly outvoted the Strangers, set up established churches, and banished the Anglican clergy that came over to try and separate the church.

In October 1621, a remarkable thing happened. The culture war over Christmas erupted. It's been raging ever since. That month, we had what would develop into "the first Thanksgiving." It lasted several days. It was recorded in the Pilgrim's journals as being full of marksmanship contests and other sports. It was festive, inasmuch as Pilgrims could be. Six weeks later, it's December 23rd and a shipload of even more Strangers show up. The Pilgrims are overjoyed; yet more impurity has arrived. Two days later, December 25th, William Bradford is banging on the door and saying, Get up; it's time for work. They say, Work? It's Christmas. He said, Not in this colony, it's not.

The Pilgrims thought Christmas was a heretical feast. Because they couldn't find it in the reading of the Bible, they couldn't celebrate it. Not only could you not celebrate it as a Pilgrim, you couldn't let other people celebrate it in public. Bradford reports in his journal that it was against the

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Strangers' "good consciences to work on Christmas." Bradford assented that it may be a question of conscience and excused them until he could be fully or better informed. That lasted until about lunchtime, when he found them playing the same games in the streets that Pilgrims had played on Thanksgiving. But this isn't the Pilgrim's official culture; this is that heretical counter-culture, Christmas. He confiscates their sports gear and tells them, If you want to celebrate Christmas as a matter of devotion, celebrate it privately in your home; there will be no reveling in the streets. Who ever heard of reveling at home? The reason that they reveled in the streets is because reveling is a communal activity.

Pilgrims said that truth required them to restrict other people's freedoms. Not only could they not celebrate traditional, heretical things in public, nobody else could either. It looks like we have plenty of park rangers around. We've still got plenty of Pilgrims around, people who want to protect the "true faith." There are Muslim Pilgrims, Christian Pilgrims, Hindu Pilgrims . . . all sorts of Pilgrims. The culture war is a shooting war, metaphorically speaking, between parts of the truth. If you get freedom, you have questions of freedom and truth again. What's the solution?

Here's another story about the Pilgrims' next-door neighbors, the Puritans of Massachusetts Bay. It's about 30 years later, 1656. The Quakers movement had erupted in New England. Quakers were considered the most radical offspring of the Reformation because they didn't believe in clerical *or* Scriptural authority. They believed only in the authority of the Inner Light, God's invisible presence in your soul. So they would do whatever they felt like. The Inner Light, as you can imagine, is vastly unpredictable. It led to Quakers turning up naked at Anglican services, shouting, "Hypocrisy!" The Bay Colony wanted nothing to do with people like that.

Remember when you read the *Scarlet Letter* in high school? Hester Prynne had to have a scarlet "A" sewn on her cloak for committing adultery. She actually got off easy. In the real Massachusetts Bay Colony, they branded it on your skin—on your wrist for a first-time offense, then your cheek for a repeat offense. If you were a glutton, you got a G; if you were a drunkard, you got a D; an adulterer, you got an A. This was a place that didn't tolerate dissent.

The Quakers were coming, so they decided to outlaw Quakers. In 1653, Quakers who turned up were flogged and thrown out of the Colony. Quakers turned up, the Puritans kicked them out, and they came back because they saw the light. The Puritans said the law's too lenient. They passed a new law in 1657: if they flog you and kick you out and you come back, for the first offense they cut off your left ear. For the second offense, they cut off your right ear. For the third offense, they bore your tongue through with a hot iron. Three men, John Rous, Christopher Holder, and John Copeland, lost their ears in Boston perfectly lawfully, and they came back because the Inner Light told them to.

It's now 1657 or 1658 and the Legislature thinks its leniency is still a problem. They passed another law that said: if you show up, we'll flog you and kick you out; if you come back, we'll kill you. Mary Dyer came back four times, and so on Boston Common, she was duly and lawfully hanged, one of three Quakers. The King got word of this and said we won't have this. Send the Quakers over here. We'll take them and you won't have to kill them. So they repealed the death penalty, but they passed another statute called the Cart's Tail Law. Quakers were stripped naked from the waist up, tied to a cart's tail, and dragged through the town while being flogged, until they got to the border of the colony.

There's the story. Here's the question. Why didn't Mary Dyer have it coming? The legislature duly enacted the statute. She knowingly and willingly violated the statute. She violated it; why shouldn't she hang, if she was guilty? It was legally required. It's not because it was unconstitutional; there wasn't a constitution. Why shouldn't they do it?

While you're thinking, let me tell you another story. To avoid the "long ago and far away" feeling people seem to have about things that happened in the Colonies, let's fast-forward a little bit to the nineteenth-century.

The Vermont Constitution has a provision that says all officeholders must "hold to profess the Protestant religion." You can be any kind of Protestant you want; you just can't be Catholic, an atheist or a Jew. You couldn't be a Catholic because they were presumably loyal to the Pope and you couldn't trust them. You couldn't be an atheist because they were thought to be undeterred by the future prospect of damnation; you couldn't trust them. The Jews were just implicitly untrustworthy, as a matter of sheer anti-Semitism. It was an exclusion of who's out. Let's say you're the Secretary of State for Vermont, and a Catholic, a Jew, and an atheist show up and want to register for the election. What do you do? Do you enforce the law? Do you refuse them under the law? If the law says you must be anti-Semitic, may you be? While you're thinking of that, here's a third story.

It's now 1995 and in China Gedhun Choekyi Nyima, a six-year-old boy has just been arrested. He's been in prison or in custody for ten years. He's now sixteen and still in custody. All indications are he's going to be in custody for the rest of his life. He's not even alleged to have committed a crime. He's being held simply because he's believed to be the reincarnation of the Panchen Lama, who's the number two guy after the Dalai Lama. The Tibetan Buddhists revere him as such, and the Chinese government fears him as such. When the NGOs and the State Department denounced China for this outrage against religious liberty, China's response was always the same: You're interfering with internal affairs. Question: Why aren't they right?

Question: Why didn't Mary Dyer have it coming? The law said she may be executed, but why aren't they right? It's the same question. Across faiths and across time is the question of where religious liberty comes from. If you think it comes from the state, or if you think it comes from culture, or if you think it comes from pragmatism, then you're going to think that Mary Dyer had it coming, the Vermont Constitution was alright, and the Chinese are still right.

If you don't think those things, then you must agree with James Madison that religious liberty comes from

something other than law or culture. The traditional way of describing it is that James Madison was relying on natural law. Even the U.N. Declaration of 1955 made the claim that there's something about who we are inside.

Religious liberty follows from our experience of thirsting for the truth about anything and everything, yearning for the ultimate truth, yearning for the good. Conscience is driving us to seek the truth and the good, driving us to embrace the truth and then spread it from the top of our lungs. We need that for a free country, and I will argue that the only place to spread that truth is in public; otherwise you'll wind up hanging the Mary Dyers of the world.

The Pilgrims and the park rangers are both wrong. The park rangers are wrong for saying that religious liberty comes from the state, and the state can take it away. The pilgrims are wrong for saying it comes from their version of the truth, and only that version of the truth is allowed in public. The real truth—the truth about who we are as human beings, the fact that we need to seek the good and the right—demands freedom. We can embrace truth publicly, and still be free.

PROFESSOR NICKEL: Let's start with the attractive idea, suggested by Mr. Hasson, that humans yearn to know the truth and find the good. We should not overstate this idea since many humans are comfort-lovers and are not much concerned with what is true and good. But at least a lot of us have the sense "that we're somehow incomplete without that truth, unfailingly thirsty without that good, and we long to find it." Those of us who feel that way can sometimes be troublemakers. We argue about what is true and good, and we disrupt the peace of the comfortable with our preaching, arguing, and proselytizing.

Accepting that humans yearn to know the truth and find the good has not tended, historically, to lead to religious liberty. Instead, it has often led to attempts to create areas of religious and social uniformity in which particular visions of the true and good can be lived and taught. We band together with our co-religionists, those who have settled upon the same truth or the same view of the good, and try to get our own territory where we can have a religious or ideological monopoly.

My own ancestors were Anabaptist Mennonites, and since they were always small in number and—as pacifists—unwilling to fight, they could not impose their religion and way of life by force. Instead they often fled from one country to another in hopes of finding some place where they could have their own little territory where they'd be left alone so that their version of Christianity could be the dominant religion in the region. I think their desire to have a region in which their preferred religion ruled represents a very strong human tendency. And maybe it was okay to combine the political and religious orders when there was a lot of territory and groups could go off by themselves and have their own religion and way of life. It got harder when human populations became larger and land for new settlements scarce. Then it became necessary to coexist with people who weren't your co-religionists, or who weren't even your religious cousins, but who were really quite different religiously and culturally.

For a complete justification of the human right to freedom of religion, we probably have to go beyond Mr. Hasson's conception of what people are like and add another idea, namely fair terms of social cooperation in a diverse society where people have to live, work, and interact in spite of their religious and ethical disagreements.

We may arrive at the idea of fair terms of cooperation with people who have different ideas after failing to conquer or destroy those people. Long periods of religious war can teach tolerance. Or maybe at some point some our ancestors became too civilized and humane to be willing to kill and conquer in order to promote their religion. Either way, we end up needing to find a way to live together with people who have different visions of the true and the good. How to live together peacefully and successfully comes to have great practical importance.

But it may be more than just practicalities. Religious tolerance may become a matter of principle. In spite of the fact that I have fastened onto the wrong beliefs or values, you may be willing to tolerate me and count me as a full citizen. You recognize me as a human being who has as much claim to membership, liberty, and participation as those who share the beliefs and values you endorse.

The grounds of tolerance may be (or include) a commitment to fairness for all residents of the country. It requires us to identify terms on which we can all coexist as equals and pursue our visions of the true and the good, while being successful and productive as a society and also avoiding falling back into suppression and violence. Finding, accepting, and living by fair terms of cooperation is a difficult matter, and we should not be surprised by (or ashamed of) the fact that we find it difficult, and by the fact that we still have disagreements about how exactly to do it.

The First Amendment protects the free exercise of religion and says that Congress shall make no law respecting an establishment of religion. I think that we're now pretty good on the free exercise part. The wisdom of religious tolerance has been widely accepted in the United States. Free exercise is, as John Rawls says, a fixed point in our moral and political sensibilities.

Harder for us, though, is what exactly to make of the Establishment Clause. Its core is obvious, I think, because if we go too far in establishing a religion we're going to infringe free exercise. If government uses legal coercion to force people to join, support, and profess a particular religion then we do not have free exercise. Free exercise supports the prohibition of establishment, but only so far. Brazil and Britain are religiously free countries even though they have established churches. How far the separation of church and state should go remains a difficult question.

PROFESSOR WEINSTEIN: Thank you, Professor Nickel. Mr. Hasson, I'm going to take the two minutes yielded by my colleague, Professor Nickel, to take up where you left off about the Establishment Clause.

There are two clauses in the First Amendment that have common interests, but maybe some tension as well.

Mr. Hasson gave us some examples of some absolutely silly overreactions to the Establishment Clause within the schools, examples where they have gone way, way too far. I don't know where Mr. Hasson comes out on this, but I just want to emphasize that this other clause, this anti-establishment clause, does have an important value that it's trying to accomplish as well. When you're considering the role of religion in the public square—I'm not arguing that it should be nil—you have this countervailing problem of when the government gets involved in promoting that, how do people who are not in the majority religion feel about their citizenship?

MR. HASSON: Thank you for your presentations. There's hardly been a Christmas Eve, which I celebrate, or Hanukkah, which I don't celebrate, that my organization hasn't been in court defending a nativity scene or a menorah, or both. There has never been a St. Patrick's Day that I've been in court fending off an Anglophile trying to enjoin St. Patrick's Day parades as an Irish supremacist plot. I have never once been in court in February with Anglo-Americans saying that African-American History Month was a racist power event. I've never once represented a Croatian-American organization trying to enjoin a Serbian-American event.

The 14th Amendment standard for equal protection puts every bit as stringent restrictions on government ethnic preferences and racial preferences as the Establishment Clause does on religious preferences. So why should we sue each other over nativity scenes and menorahs and not sue each other for official city parades on St. Patrick's Day? It's because we have common sense.

Everybody knows that this is not a case of ethnic preference or ethnic cleansing. It's an ethnic dimension of the culture of some of the citizens and the mayor being a mayor. He's not wearing a green tie to make a statement about Irish supremacy. He's wearing a green tie because he's the mayor, and he's doing what mayors do when people celebrate. It should be the same thing when he lights the Hanukkah menorah. He's not testifying to the miracle of the oil; he's lighting a lamp. If you were to put a time-lapse photographer in front of a reasonably active City Hall in most places in America, you'd see flags going up and down and parades going back and forth and displays being erected and taken down. You would realize that none of these things are being foisted upon anybody. These are things that are a celebration of the religious and ethnic cultures of different people. Not everyone celebrates Christmas or Hanukkah. Not every one celebrates St. Patrick's Day, either. One of the skills you need in a democracy as opposed to a religious society is the ability to listen respectfully to things that you disagree with.

You can cross the line and become coercive, and public schools are a natural place for that to happen. We don't want the government picking our religion or our kids' religions, because, after all, they're the same people who brought you the DMV and the IRS. We can do without a coach or a homeroom school teacher leading us in prayer.

Now we get to a trickier thing, and that's the Pledge of Allegiance, which my organization defended for a variety of clients. The original Pledge of Allegiance, without "one nation under God", was challenged by Jehovah's Witnesses in the 1940s, in the *Barnette* case. It reads so much like a Free Speech case that it's easy to lose sight of what was at stake. To Jehovah's Witnesses, the flag is an idol. Raising it and saluting it was idolatry. That is to say, it's exactly the same thing for them as it is for Michael Newdow with the phrase "one nation under God".

The question becomes why is pledging allegiance different? How is it remedied simply by being able to sit down while everybody else pledges allegiance? When it's an official prayer, which I don't want, the remedy is shutting the whole thing down. Where on the line of things between the Pledge of Allegiance and prayer does the remedy shift from just being able to sit out without needing to silence everybody else? That's the interesting question, and it's always been a hard one. Democracy is knowing how to draw the line and knowing who should draw the line.

What I'm about to say is uncontroversial, but there's a controversial premise. The Establishment Clause was a crummy compromise at the beginning. There was a reason. The Executive wasn't going to amend the Constitution, and the Oaths Clause and the Religious Test Clause appear right next to each other. The Oaths Clause says that officials of the federal and state governments, when they take their oath of allegiance to the Constitution, neither swear nor affirm it. The reason for that was Quakers couldn't take oaths. They built that combination right into the Constitution so Quaker officials of the federal or the state government could take them.

The next words out of the Constitution's mouth are, No religious tests shall ever be employed for any office or trust under the United States. Why are there oaths of office for the federal and state levels and a religious test ban just for the federal level? Because eleven states had religious tests for public office, like the Vermont one I told you about, and they wanted to keep them. They weren't opposed to a religious test; they just wanted their legislature imposing their religious tests on their people, not somebody else's legislature imposing a different religious test on them. The unamended Constitution was set up to leave the question of full reign on religious legislation to the states, which is how we wound up with religious rights in Philadelphia and Manhattan and with religious tests for public office, the Blaine Amendments, and all sorts of things. It was a bad time, and it was a bad year. It was the crummy way to set things up.

The First Amendment didn't change that. It was a crummy compromise that said, "Congress shall make no law respecting the establishment of religion." It didn't say the states couldn't, but it said Congress couldn't make a law respecting the establishment of religion; it couldn't make a law that imposed the federal establishment over Virginia's disestablishment. There were eleven out of thirteen states that had state tests, excepting New York and Virginia. Virginia didn't want to be opposed to federal establishment. Massachusetts had a state establishment; it didn't want to be overruled by federal disestablishment. So Congress could do neither of those two things. It could make no law respecting the establishment of religion.

That left the states free to persecute, and they did. In the twentieth century, the Supreme Court fixed that by incorporating the Establishment Clause through the Due Process Clause, and the liberty of the due process clause. That solved one practical problem but it created another. Now the First Amendment meant something, but the only thing you know for sure about it is it meant something different from what it said. It said, "Congress shall make no law respecting the establishment of religion," but it now meant that public school teachers couldn't do things.

Part of the problem is that the Justice Stevenses of the world say that it was clear from a rigorously philosophical perspective that we can't do anything that has anything to do with religion. Justice Stevens has never in his career voted on the pro-religion side of a case that wasn't unanimous. Neither the Establishment Clause nor the Free Exercise Clause is a statutory provision. It amazes me. The Justice Scalias of the world say if you look at the history, there's a lot you can do. They not only disagree about what the First Amendment means, they disagree on where you look to find out. It's a mess.

My only proposal is that the Establishment Clause, incorporated, makes no sense. It's sort of an idiom. We should stop asking the question and we should let the Free Exercise Clause theory prevail today. The Free Exercise Clause itself precludes establishment because establishment ignores people's consciences. James Madison used the word "free exercise" as the shorthand for the natural right to religious liberty. If I were on the Court, I would say free exercise means the right to embrace religious expression, the right to embrace, not to express; the right to be free from establishment.

There are a lot of other things that aren't managed with the Court that will be managed with Miss Manners. That's how one is able to get along in society.

PROFESSOR NICKEL: There at the end, an interesting disagreement emerges. Insofar as we need to find contemporary grounds for the Establishment Clause I would suggest that we view it as sketching terms of fair accommodation between groups who have different religious perspectives and who, of course, bring those religious perspectives with them into the public sphere. So I suggest that we ask what's fair, what's workable, what, as Professor Weinstein suggests, will allow people to feel like full citizens? What set of workable arrangements would affirm everyone's full citizenship, even if they're not part of the cultural mainstream?

MR. HASSON: We are not in disagreement. I just want to distinguish between what is a good idea and Miss Manners, and what is the constitutional role.

GOD AND GOVERNMENT

*ERWIN CHEMERINSKY VS. GREGORY WALLACE**

PROFESSOR CHEMERINSKY: The Religion Clause of the First Amendment offers a simple but wise teaching: private religion is a good thing and it should be protected, but government-sponsored religion is a bad thing. Thomas Jefferson was exactly right when he said that there should be a wall that separates church and state. I've always understood that to mean that the place for religion is in the private realm—in people's homes, churches, synagogues, mosques, hearts, and minds—but that our government should be secular.

Why should our government be completely secular? There are several reasons. One is that we want to make sure that every citizen feels equally that it is his or her own government. Justice O'Connor captured this well in her opinion in *Wallace v. Jaffre*, when she said that the central teaching of the Establishment Clause is that none of us should be made to feel outsiders under our own government, nor should others be made to feel that they're insiders relative to the government. Imagine that you, as a non-Christian lawyer, walked into a courtroom with a large Latin cross behind the judge's bench. Would you feel that this was your courtroom or your government? The answer is clearly no. If City Hall had a large cross on top, those who aren't Christian would clearly feel like outsiders. One reason why we want to make sure that our government is secular is so that each of us, from every faith or no faith, can equally believe that it is our government.

Another reason why we want the government to be strictly secular is it is wrong to spend a person's money to support a religion that he or she doesn't believe in. Over 200 years ago, James Madison said it's immoral to spend one person's money to support the religion of another. By making sure that our government is secular, we ensure that our dollars aren't advancing a faith that we don't believe in or even find repugnant.

Another reason why we want our government to be strictly secular is because religion is divisive. If the history of the world teaches anything about religion, it's how intense people's religious feelings are, how much society can be divided over religion. If the government becomes aligned with religion, there's going to be a fight about which religion. Even if the Christian majority decides it's going to be a Christian religion, then you have the question of what denomination of Christianity is going to be in control. By saying our government is secular, we avoid that.

Finally, we keep our government secular to protect religion itself. Robert Williams, who was one of the founders of the Constitution, expressed this long ago when he said that the reason we want a separation of church and state is to protect the church, because once the government starts giving money to religion, the government can regulate what religion does. We protect the free exercise of religion by ensuring that our government is secular.

Now, that was abstract. Here are a few concrete examples of what secular government means. First, government-sponsored religious activity in public schools is unconstitutional. The Supreme Court has been exactly right on this for over forty years. It has said that prayer, even voluntary prayer, is unconstitutional because it is government-sponsored religious activity. The Supreme Court has said that clergy-delivered prayers at public school graduations are unconstitutional because students feel pressure to be at their graduation and prayer should not be part of that if they don't believe in it. Five years ago the Supreme Court said that student-delivered prayers at high school football games are unconstitutional. The Court explained that students often have to be at football games, as part of the band, for getting credit, for being cheerleaders, and the like, and to have a prayer, even a student prayer, violates this principle. The Supreme Court has even said that a moment of prayer is unconstitutional. In reality students have been saying silent prayers as long as teachers have been giving tests. The government doesn't need to institutionalize silent prayer; if it does, it is a government-sponsored religious activity.

Perhaps even more controversial, I think the words "under God" in the Pledge of Allegiance in public schools are unconstitutional. The words "under God" are inherently religious; they cannot be secular. Yet those who believe in no religion or a non-theistic God will feel enormous pressure to participate in pledging allegiance to a god. When my youngest grandchild, now seven, was in kindergarten in the public school in Los Angeles, she came home at the beginning of the second week of school and showed mom and me how to do the Pledge of Allegiance. She put her hand on her heart and recited it. My wife said, "I thought you won a Ninth Circuit decision that the words 'under God' in the Pledge of Allegiance were unconstitutional." I said, "Well, the Ninth Circuit stayed that order." My granddaughter said, "No, you have to say that or you get sent to the principal's office." That's not what the teacher said, but what she internalized in the five days of school is, you do what the teacher says or you go to the principal's office as punishment. That's what children all over the country feel today, because of the words "under God" in the Pledge of Allegiance in the public schools.

The second example is that religious symbols should not be on government property, if they symbolically endorse religion. This has been a principle that the Supreme Court has followed for almost two decades. Thus, the Supreme Court has said that there can be a nativity scene on government property if it's surrounded by symbols of other religions and secular symbols. A nativity scene all by itself is impermissible, however. Last June, the Supreme Court said that a Ten Commandments display at a Kentucky county courthouse was unconstitutional because the government

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acted with the purpose of advancing religion. The Court was wrong in another Ten Commandments case decided the same day, and I confess to self-interest that I argued that case in the Supreme Court and lost five-to-four. It was about the six-feet-high, three-feet-wide Ten Commandments monument on the Texas state capitol grounds, at the Texas Supreme Court. It sat all by itself at that corner and had in huge letters, "I am the Lord thy God." Given its placement and context, it is clearly government's symbolic endorsement of religion. What about somebody who doesn't believe in religion or is atheistic? Would they still feel that it's their government as they walk into the state capitol? Won't they inevitably feel like outsiders? Aren't their tax dollars every year paying to take care of that monument?

One final example: the government should not give assistance that can be used for religious instruction in parochial schools. Until very recently, the Supreme Court was exactly right in this area. The government should be able to give aid to parochial schools if it's the same that it's giving the public schools and if it can't be used in religious instruction. The Supreme Court has modified this recently to say that the government can't give aid to parochial schools that goes into religious indoctrination, because my tax dollars and your tax dollars shouldn't be supporting religions that we don't believe.

This isn't about hostility to religion. I believe in a robust Free Exercise Clause, but religion should be in the private realm and not in the government's realm. Sandra Day O'Connor wrote in a decision about the Ten Commandments on June 27th, "By enforcing the [Religion] Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or the bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. . . . Those who would re-negotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?"

Professor Wallace.

PROFESSOR WALLACE: Thank you, Professor Chemerinsky. I agree with much of what you said. The reasons that you gave for government being strictly secular are also, in many respects, good reasons for government avoiding an establishment of religion, which is what, in fact, the Religion Clause prohibits. There is nothing in the text of the Religion Clause that says government must be "strictly secular." I hope that Professor Chemerinsky might further define for us what he means by "strictly secular" when he responds in a moment.

There's nothing in the Religion Clause that says government cannot make any references to God or government cannot act as if God exists. In fact, in formulating the Religion Clause, broader language actually was proposed and rejected by Congress. Samuel Livermore proposed that the Religion Clause read, "Congress shall make no law touching religion." That broad interpretation of how government should relate to religion was rejected by Congress.

The Religion Clause does prohibit an "establishment of religion." Now, that is a term that we are not terribly familiar with, since we haven't seen religious establishments in their formal sense in this country for more than a hundred years. Because of that, we need to consult history and tradition to help us understand what the Religion Clause means. The hallmark of religious establishments was state-enforced religious uniformity. The government would use its coercive power to pressure people to conform to the religion of the majority. Now, we don't want government pressuring people to hold certain religious beliefs or to perform certain religious acts. We might describe this as a no-imposition principle. We don't want government interfering with or directing people's individual religious choices.

The question that we're concerned with today is, Can government speak about God in a way that doesn't pressure people to change their religious beliefs or actions? I think it can. The position that Professor Chemerinsky has taken is that of strict neutrality. I'm curious as to how far, exactly, that goes. Does it require complete government agnosticism toward religion? If it does, I think there are some problems with that position.

First, official agnosticism is inconsistent with the history and tradition of our country. There are references to God in the Declaration of Independence and other public documents. We have a long history reaching back to the founding period of governmental religious proclamations. There is a reference to God in our national motto. We can see that on the money that we carry around. We see references to God in the Pledge of Allegiance, on public buildings, on monuments, in speeches of our leaders. For example, there are fourteen references to God in the 699 words of Abraham Lincoln's Second Inaugural Address, which is inscribed on the walls of the Lincoln Memorial. Court sessions are opened with an acknowledgment of God: "God save the United States and this honorable Court." To take the position that the Religion Clause requires government agnosticism conflicts with our long history and tradition.

A second problem with requiring government agnosticism is this: If government cannot show cognizance of God, then it cannot recognize limits on its own power. This is one of the central ideas of the Declaration of Independence: People have certain inalienable rights endowed by their Creator, and when government acts in conflict with those rights, when government acts in a way that violates those rights and oppresses people, people have the right to overthrow the government. By recognizing God, government can assert the limits of its own power and prerogative, and it can affirm a transcendent source of human rights and dignity. Thomas Jefferson worried about how the liberties of our nation would be secure if removed from what he called their only firm basis: a conviction in the minds of people that these liberties are a gift of God.

Finally, the predominant justifications for our constitutional commitment to religious freedom presuppose

God's existence. The whole idea of religious freedom is based on taking seriously the central claim of religion, namely, that God exists. Religious freedom makes sense only if God's being makes sense: God makes claims on humans; those claims are prior to and superior to the claims of the state; the individual's response to God's claims, if it is to be authentic, must not be coerced; the state, therefore, must not attempt to define or direct the relationship between God and individual. On the other hand, if God doesn't exist, then religion is nothing more than silly superstition — on the same level as fortune-telling or believing in ghosts — and it makes no sense to constitutionalize its protection. Look at Jefferson's bill for establishing religious freedom, which was introduced in the state of Virginia. The entire preamble amounts to a religious argument for religious freedom. Requiring government agnosticism would eliminate the very justifications for Jefferson's bill. It would be ironic to interpret our constitutional protection for religious freedom to require government agnosticism about God's existence. The Religion Clause would be in conflict with itself.

I think a better approach is not strict secularism but what I call a no-imposition principle. First, government should not favor any one particular religion over the other. This, of course, would forbid the display of a cross behind the judge or in a state house. Second, government should not engage in a religious imperative. By this I mean that government should not tell people what to believe and practice in matters of religion. This is the hallmark of an establishment of religion, and it's what the Religion Clause prohibits. Government must not speak in a way that is likely to pressure people to make religious choices or to engage in religious acts. For government to interject itself into individual decision-making in religious matters is to violate religious conscience.

There are times when government can speak religiously and not interfere with individual religious decisions. I agree with Professor Chemerinsky that the school prayer cases were decided correctly because, in that context, pressure was brought to bear on children to engage in a religious activity — prayer — in violation of their religious conscience. Simply exposing persons to religious messages, such as by referring to God in the Declaration of Independence or national motto or by hanging a religious painting in a government-sponsored museum, without more, does not seem to me to be the kind of infringement on religious conscience that the Framers contemplated.

In a pluralistic society where the government is a significant participant in the formation of public culture, the best understanding of what the Religion Clause forbids and permits is one that allows government speech to reflect the mixture of religious and nonreligious perspectives in the private sector. In that way, government influence on religious choices is minimized because the public would be presented with the same variety of perspectives if government were absent from public cultural sphere.

Professor Chemerinsky.

PROFESSOR CHEMERINSKY: If all you're saying is, It's okay to have "In God We Trust" on money or "God save this honorable Court" at the beginning of the Supreme Court sessions, I don't think we disagree, although I could argue that is pretty trivial. If what you're saying is that the government can express a profoundly religious message, that the government can indoctrinate people by communicating religious views in government speech, then we disagree.

I began by saying we need to have our government be secular, and I gave several reasons for that: to ensure we're all treated as equal citizens and equally in the government, it's wrong to give some of our money to support the religion of others, it's inherently divisive if the government becomes aligned with religion, and it threatens religion itself. I assume we agree on that.

Professor Wallace says several things. First, the Religion Clause prohibits the establishment of religion. Not quite right. The First Amendment prohibits the government from any law "respecting the establishment of religion." That's broader than just prohibiting the establishment of religion, but what does that mean?

Second, he talks about there being references to God throughout American history. That depends on context. I'd rather our money didn't say "In God We Trust," because I think government shouldn't be expressing religious messages. If it bothers you that your money says that, I'm glad to take the problem off your hand. I don't think it's a very big deal, however. Likewise, I'd rather they didn't say before Court sessions, "God save this honorable Court", but I don't see it as a very big deal. If you change that a little bit — and I apologize if you view it as blasphemy — "In the name of Jesus Christ, God save this honorable Court", I would be deeply offended because it's invoking a particular religion. Is there a difference for an atheist between saying "one nation under Jesus Christ" and "one nation under God"? Both are equally objectionable. The Pledge of Allegiance is different than "In God We Trust" on coins or "God save this honorable Court" because in order to spend money in the store, you don't have to say "In God We Trust"; in order to argue at the Supreme Court, you don't have to say, "God save this honorable Court". Children feel pressure every day to say "one nation under God," and that's objectionable.

The next point you make is that to have limits on government power, we need to recognize the existence of religion. I vehemently disagree. Our limits on governmental power come initially from the Constitution, which formed the United States government, and secondly from theories of government like social contract theory and natural law (or, for you, religion). I don't accept that the only theory that provides limits on government is a religious theory. There are countless jurisprudential theories and philosophical theories that can also limit government power.

Finally, he said that religious freedom makes sense only if we acknowledge the existence of God. Again, I strongly disagree. All we need to protect religious freedom is to recognize that there are many people in this country who believe in religion. Even those who don't believe in religion can recognize that for those who do, it's very important, and the Constitution says we'll protect free

exercise of religion. We'll protect free exercise for those who do and for those who don't believe in religion. We don't need to believe in God in order to believe that the free exercise of religion is important.

It's easier to identify disagreements if we talk about specifics. First of all, Professor Wallace says he believes in a no-imposition principle. I also think that the government shouldn't impose religion. What does that mean and is it sufficient, or is it just part of what the Religious Clause meant? I have three specific examples. First, there shouldn't be government-sponsored religious activity in public school classrooms. No prayers, no voluntary prayer, no silent prayer, and not even "under God" in the Pledge of Allegiance because students feel pressure to say it. That's clearly consistent with the no-imposition rule. Second, there shouldn't be religious symbols on government property in a manner that appears to endorse religion. When you said there shouldn't be a large Latin cross behind the judge's bench or on top of the seal, I think you agree with that. I see no difference between the large Ten Commandments monument and a large cross.

The Ten Commandments monument on the Texas state capitol grounds, in the Texas Supreme Court, displays the Protestant version of the Ten Commandments. The Jewish version of the Ten Commandments is different; it has different language in a number of places. The First Commandment, in the Jewish version, says "I am the Lord thy God who took you out of Egypt, out of bondage." That's not the version at the Texas state capitol. The Catholic version of the Ten Commandments is also traditionally different. It does not prohibit images of God because of the importance of saints and statuaries within the Catholic faith. That's not the Texas version. If you accept no-imposition, the Supreme Court was wrong. Putting the Protestant version of the Ten Commandments at the Texas state capitol is the imposition of *a* religion.

Finally, with regard to aid to parochial schools, I said the government should not provide any assistance to parochial schools that will be used for religious indoctrination or religious education, because that would be the government supporting imposition of faith. If we agree on those three specifics, then we really agree on the principle. Maybe there's some abstract agreement, but my guess is that there is a fundamental disagreement between us. Our government should be, to the greatest extent possible, a secular government. The place for religion should be a robust free exercise clause. As Justice O'Connor said, this is the system that has served us well for 200 years. Why replace it with a system that has served others throughout the world, throughout history, so poorly?

PROFESSOR WALLACE: I am pleased to see Professor Chemerinsky concede that there is some place for government to acknowledge God in its speech, but he says, Not in the occasional setting, not in government symbols, and not in government funding. I'm not sure exactly what sphere of government activity that leaves. The strictly secular approach urged by Professor Chemerinsky might make more sense if two things were true: first, that we had a minimalist government; and second, that we had no long history of religious speech by government.

Let me address the first. Given our modern regulatory state with its ever-growing influence over personal behavior, over education, over public culture, strictly secular government speech would not be neutral toward religion. Secular speech, because it encompasses only that which is this-worldly, can convey the idea that all knowledge and value is confined to the secular or temporal world and that this reality is the only reality that really counts. As one writer has said, it's a fallacy to suppose that by omitting a subject, you teach nothing about it; on the contrary, you teach that it is to be omitted, and that it therefore is a matter of secondary importance. For the state to convey only secular or non-religious viewpoints would make those viewpoints and ideals familiar, easily understood, acceptable. On the other hand, total silence about God would marginalize or trivialize religious views by making them seem irrelevant or outdated or even strange.

So, for the state to confine itself to non-religious speech in all the ways that it affects public culture would not in any sense be "neutral." And as I suggested earlier, when government is a significant participant in the formation of public culture, the best understanding of neutrality is one that allows government speech to reflect the same mixture of religious and nonreligious perspectives in the private sector. In this way, government is not able to leverage its power on individual religious choice. People would be exposed to the same diverse voices as if government were not in the public sector at all.

The second problem for Professor Chemerinsky is our long history of government religious speech. Given that long history, the elimination of all religious language and symbols from the government sphere, as Professor Chemerinsky proposes, would send a forceful message of hostility toward religion. If you're going to take his position seriously, it would mean removing the inscriptions containing religious language from the walls of the Lincoln and Jefferson memorials, changing names of streets, cities, mountain ranges, expunging from public school textbooks the religious affirmations in the Declaration of Independence and other public documents, etc.

Professor Chemerinsky would allow for some government religious speech for government that doesn't endorse religion. I don't find the endorsement test particularly helpful here because any time government speaks or acts as if God exists, even in the statement "In God We Trust," it is a religious affirmation. That affirmation is an endorsement of a claim that is central to religion: God exists. I don't see how a consistent application of the endorsement test would not lead to the kind of completely secular sphere that Professor Chemerinsky advocates.

Thank you.

The Role of Government in the Free Market

*Timothy Sandefur vs. Henry Brown**

MR. SANDEFUR: I'd like to briefly explain the law of economic liberty, and why this is an important area that really deserves much more judicial certainty and judicial protection than it has today. When you talk about economic liberty and the law, the big case is *Lochner v. New York*. *Lochner* was rightly decided, and it ought to be revived today. The reasons why are a little bit complicated for such a brief presentation, but I'll do my best.

What happened in that case was the State of New York made it illegal for bakery workers to work more than sixty hours a week. Some bakers who didn't have enough money liked to work more than this so they could earn more money. Mr. Lochner owned a bakery and allowed one of his workers to work overtime to earn more money—and was arrested. The New York State courts upheld the conviction, and the U.S. Supreme Court, in a 5-4 decision, overturned the conviction saying that the law violated Due Process Clause of the 14th Amendment.

The whole issue in *Lochner* centers on what is meant by "substantive" due process? To understand that, you need to look into political philosophy. What is the purpose of the state? That's a very complicated question, one that many people don't think is relevant today. Many people think that the state has no purpose. It simply is. Government simply is an outgrowth of human existence. People like Robert Nisbet, Richard Weaver, or Russell Kirk would make this argument.

America's Founding Fathers disagreed. They believed government does have a purpose and to understand what it is, they examined the writings of several political philosophers from centuries hence. One of these was Thomas Hobbes. In *Leviathan*, Hobbes starts by imagining what the world would be like if there were no such thing as government, what he called the "state of nature." In this state of nature, people go around beating people up and taking away their things. Life in a state of nature would be "nasty, brutish, and short." People would hate this so much that they would create a government in order to protect them.

What's interesting about Hobbes's state of nature is that he says there's *nothing wrong* with the big, strong people beating up the weak people and taking their things. There's nothing wrong with that because justice is whatever the government says it is. There's no such thing as justice without an authority figure to declare something just or unjust. If the government doesn't exist, there's no reason for the strong not to beat up the weak and take their things.

He says that in the state of nature, "There would be no property, no mine and thine distinct, but that would be every man's that he can get, and only for so long as he can keep it." There are no natural limits on what people can do to each other in a state of nature, no natural justice about people's treatment of each other; therefore, there's nothing to limit what kind of government people create. If you have the right to beat up weaker people in a state of nature, you can create a government that does just this.

John Locke, the seventeenth-century political philosopher, disagreed. He said that you can imagine what the world would be like without government, in a state of nature, and yes, people would beat each other up and take away their things. It would be *wrong*, however, because justice *does* exist before the state. Justice is something natural about human beings. Since it's wrong to beat up people and take their things, even if the government doesn't say so, then when the people get together to create a government, they face limits on what kinds of government they can create. Since they don't have the right to beat people up, they don't have the right to ask the government to beat people up for them. There are natural limits on what government can do.

Government exists to protect us from bullies; therefore, government cannot fall into the hands of bullies. It would be easy for it to do so. Bullies could take over the government and use it as a tool for their own benefit. Instead of beating people up on the sidewalk, they could create a bureaucracy to do it for them.

I'm reminded of an episode of *The Simpsons*, where Homer goes back to college, befriends the nerds, and gets them kicked out for a prank that he pulls. As the nerds are sadly leaving the college, Snake the Bully comes up and says, "Wallet Inspector." They hand over their wallets and say, "You'll find this all in order." He says, "I can't believe that worked," and runs off with their wallets. Now, according to Hobbes, there's no reason that the government couldn't create a Wallet Inspector Department to just take people's wallets. Locke says that would be unjust. It would be a bully exploiting the power of the state for his own benefit, which would violate the basic purposes of government. If you had a security guard at a bank who decided to rob the bank, he would have exceeded his authority and committed wrong; he loses his legitimacy. The issue would be the same.

The difference between a legitimate use of force and an illegitimate use of force is, therefore the difference between law and mere command, and that's really important. Lockean political philosophy, unlike Hobbesian political philosophy, can distinguish between law and a mere command. *Law* is the use of the state's force to actually protect all of the people in society from wrongdoing. A *command* could be that, or it could be a bully using the power of the state for his own benefit, by taking away property belonging to people he doesn't like, like the King of England did.

That's largely what the Magna Carta was written to address. King John was using the state to take away property from people he didn't like and keep it for himself. The Magna Carta has a provision that says no freeman shall be "disseised of his freehold, except by the law of the land." You can't use the power of the state to take people's stuff

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just because you don't like them, or just because they're unpopular or rich. You can only take people's stuff in punishment for a legitimate public offense, or in the furtherance of some kind of law that actually protects the general public.

So we see here two competing visions of government. Are there natural limits on what government may legitimately do to us, or is government radically free to do to us anything that it wants? Can government fall into the hands of bullies? In *Federalist* 51, Madison says, When you create a government, first you must create a government strong enough to control the people, but then you must also create a government strong enough to protect itself from falling into the hands of bullies who will use the government power to take people's things or to pass mere commands rather than law. The Founding Fathers intended to ensure that when government takes our things, it does so only for legitimate public reasons and not just to benefit particular classes. That's what the discussion of factions in *Federalist* 10 and *Federalist* 51 are about.

Modern economists call this the public choice problem, or rent-seeking, which tells us basically that when government can take things from some people and give them to others, that power will become a prize in a political contest. People will compete against one another to get the government to do it on their behalf. Let's say there are fifty people in this room, and I could take a dollar from each of you and give the fifty dollars to one of my three best friends. How much are they going to spend in an effort to convince me to give them that fifty dollars? It's simple gambling odds: $50 times the 1/3 chance of them succeeding: a little over $16. If they spend more than that, they tend to lose out. Now, how much are all of you going to spend to convince me not to take the one dollar from you? Only ninety-nine cents, right? If you spend two dollars trying to talk me into not taking your one dollar, you still lose. There's all this effort to get me to give you the money, but not much effort to get me to *not* take away *your* money. Everybody wants the government to do something for them, but they don't really care about the government taking their stuff.

There is a distinction between law and mere command. Mere command is when the state uses its power outside the boundaries of legitimate government, and it can do that because of the public choice problem to benefit organized groups against those who are disorganized or who are less politically able, persuasive, and adept. Who are those people? The poor.

The greatest case on this subject is *Loan Association v. Topeka*, a case from the 1870s in which the Supreme Court considered the constitutionality of a law that took taxpayer money and bought bonds in a private railroad. It took money from people who couldn't say No—because it was tax money—and gave it to a private railroad for its own private profit and private development. It took money from people who earned them and gave it to people who did not, because the railroad company had better lobbyists. The Supreme Court said that was unconstitutional under the Due Process Clause because it's mere command and not a law. Robbery, the Supreme Court said, is "nonetheless robbery if it is done under legal forms." That was the concept of economic substantive due process, and that's similar to what appeared in the *Lochner* case.

In *Lochner*, when New York made it illegal for people to work more than 60 hours, it was not actually benefiting the public; it was benefiting a particular class—those people who favored the law, the bakers who benefited from the law, and the labor activists who liked the law—at the expense of another class of people, those bakers who did want to work more time. It was not for a legitimate public reason, because there was no connection between the law and protecting the public health. The Supreme Court said there's no evidence that tired bakers cause illness, or that exposure to flour causes illness, or that the public at large is at risk from bakers who work overtime. It does not advance the public welfare and therefore does not satisfy the Due Process Clause, because it's not a law. It doesn't do something for legitimate public reasons. It's mere command.

Lochner is an unremarkable case in itself, but Justice Oliver Wendell Holmes' dissent is really interesting. Justice Holmes was a Hobbesian, very explicitly so. Holmes did not believe in natural rights or individual rights at all. For Holmes, to talk about the idea of morality having some connection to human nature was absurd; it was, he said, "like churning the cosmos in hopes of making cheese," because there is no such thing as natural morality. Morality is whatever the people say it is. As a result, the government can do anything it wants to people, including forcibly sterilize them against their consent. There's no natural limit to what the government can do.

In his *Lochner* dissent, Holmes says that "a constitution is written for people with fundamentally differing views." That is an astonishing statement! Never before in the history of Western political philosophy had anybody suggested that you can have a constitution for people of fundamentally differing views. You have a constitution for people of fundamentally *shared* views. They may differ on the specifics, but they have to share common core beliefs about justice and injustice and right and wrong to have a constitution. For Holmes, however, the Constitution is simply a mechanism by which groups battle for power, because that's all there is for Holmes. There's no such thing as individual rights.

In his great dissent about free speech in *Abrams v. the United States*, he opens by saying "persecution seems perfectly logical to me." For him, free speech was only a matter of social usage. It was good for society, and that's the only reason people have free speech. It's not a right; it's a privilege. That attitude toward rights took over after *Lochner* was decided and is today the prevailing view in the legal world. It became thus in 1937, with New Deal cases such as *United States v. Carolene Products* that invented the rational basis test.

When the government deprives you of your right to earn a living, a right protected in common and case law since at least the 16th century, a right which Justice William O. Douglas himself called "the most precious liberty that man possesses", that is basically okay. The law only has be "rationally related to a legitimate government interest." As

long as some non-drunk person could have voted for the law, it passes the rational basis test, and that's the current level of protection for economic freedom in this country.

Who is harmed by the rational basis test? That depends on your view of the free market. A lot of people hold this mythological view that capitalism is bad for the poor. Nothing could be more absurd. Capitalism is the only hope of the poor. Capitalism is the only way to lift people from a low economic status to a high economic status. To talk of economic liberty as benefiting the wealthy is patently absurd.

I'll give you an example. When I was clerking at the Institute for Justice, we considered doing a case in Florida about taxi cab drivers in Miami-Dade County. To drive a taxi in Miami-Dade County, you need a license, and the licenses cost $15,000 each, which means that you have to lease them. You can't afford to buy them. All of the licenses are owned by three main businesses that lease them to drivers at $500 a week, which means that the drivers drive from Sunday until Thursday to pay for their licenses. What they make the rest of the week is theirs to provide for their families and themselves. Now, it's not rich white guys driving taxis. It's the poor. It's the members of the underprivileged class, the immigrants, the people who live in the inner-city, who need the opportunity to earn a living. Unfortunately, the regulatory welfare state that we have imposed on people, largely by ignoring the 14th Amendment's Due Process Clause, deprives them of economic opportunities, makes it more expensive to hire them, makes them comply with absurd licensing requirements that are almost impossible to satisfy to get a legal job, raises the minimum wage to make it more expensive to hire people and provide them the kind of training they need in order to advance socially, and drives them into underground black markets providing services without a license, or even into the drug trade.

That's the briefest possible explanation of *Lochner* and why *Lochner* was right. *Lochner* stands for the principle that government exists to protect us in our rights. It does not exist to take things from the weak and give to the strong. It does not exist in order to give special favors to the politically favored at the expense of those who cannot persuade the government to do their bidding. The people who win in a competition of interest groups in the lobbying contests are the rich, the powerful, and the politically connected. The more power that you give to the government to redistribute wealth, the more power you're giving to lobbyists. The more power you give to lobbyists, the less power you give to the people who live in the inner-city, the working-class people who have to work for a living rather than trying to persuade the City Council to do things for them. Liberty helps us all, and it helps the poorest most of all because they don't have political power. They have to rely on the Constitution.

PROFESSOR BROWN: There is a distinction between a philosophical discussion as to what we think we ought to do and what we can't do. What is the role of government in a free market? Whatever it wants. I don't say that because that's what I'd prefer. I say that because I think the Constitution gives the government a fair degree of leeway. How does it do that? Before I answer that, there are two other questions. One is what is a permissible role of government? What can the government do under our Constitution? The second one is what's the advisable role? Tim has spoken very eloquently about the advisable role. I think we also have to speak to the issue of the permissible role, which is dictated in Article 1. "Congress shall have the power to regulate commerce with foreign nations, and among the several states," and to make all laws which are necessary and proper for carrying that out. If they make the connection between commerce and what they seek to legislate, Congress has room to act. That's number one. Then the question is, Should they act?

For that question, you should take a look at the intent behind the Commerce Clause. In 1783, Great Britain was closing its ports to U.S. shippers. Today, U.S. shippers would go to the government and say, If Britain is closing their ports to us, we ought to close our ports to them. That's fair; we need that to protect free markets in our own country. At that time, however, we couldn't do that, because the Articles of Confederation did not give the federal government power to act in those situations. When the Founders were debating the Constitution, one of the things that came up was we need to have a federal government with sufficient power to regulate interstate commerce and commerce with foreign nations to protect the free markets, U.S. industry, and U.S. businesses. The Constitution would be viewed as a document designed to protect the economic interests of the property class. It's protected through the power to regulate, not the power to let alone. They want that regulation to protect their interests. One of the primary reasons for the Commerce Clause, in the first place, was to protect the power and the interests of the business class in the free markets of the United States.

In *Lochner*, the Court says that the maximum hour law is invalidated for three reasons. One, it infringes upon the workers' freedom to contract. They felt that the worker had the right to work; they had a right to the job. A law that precludes them from working as they would infringes upon their freedom to do that, their freedom of contract, and their freedom to make a living. Second, government can interfere with that agreement or contract only to serve a valid police purpose, and it's for the Court to decide what a valid legal purpose is. Finally, it was the role of the Judiciary to scrutinize legislation to protect the people from a broken contract. In other words, the Court in *Lochner* saw its role as protecting the freedom of contract in a free market, not interpreting the role of government in the Constitution.

The Court views the Government's actions in the *Lochner* case as a form of wealth redistribution, as a way of distributing wealth in a negative fashion. After the Depression, after the Roosevelt threat of court-packing, the Court returned to this issue. Chief Justice Hughes later asks what this freedom of contract is, for the Constitution does not speak of it. I would say, Maybe it's in the same place as this right to privacy. Conservatives would argue that there's no right to privacy, yet they will strongly hold onto freedom of contract. Hughes is saying, where in the document do

you get this freedom of contract? Going back to my first issue, what can the government do to regulate the free market? Anything it wants. Why? Because there's nothing in the Constitution to preclude that. To the contrary, the Constitution gives the federal government broad powers to regulate markets. But should the government regulate markets?

It's easy to answer the first question. Do they have the power? Yes. The second question is harder: Ought they to do that? Are there reasons why the government should stay out of it? From a practical perspective, the government's not very good at that. There are certain inefficiencies with respect to the government's activities, with respect to the market, but there are other issues to consider. Number one, what do we mean by free market? Whenever we talk about the free market and the rights of business to be free from government intrusion, it's not entirely clear to me what we define as free markets. We have great laws which greatly favor U.S. business, both domestically and internationally. By businesses, I don't mean businesses in general. We have laws that favor some businesses over others. We have tax policies that favor businesses in general. The Bush Administration has passed tax cuts that favor one to ten percent of the population, generally people who own or invest in businesses. If you have a tax policy that disproportionately redistributes wealth to the wealthy, that policy will also help business. We have a policy that strikes me as not necessarily free in the conventional sense because it is a policy that encourages certain types of behavior that are most favorable to business. Finally, we have Federal Reserve policies which encourage businesses to reinvest in infrastructure and in stocks. When the Federal Reserve manipulates the interest rate, those choices are made in part to encourage you to make certain decisions, decisions which favor business. The government is very involved in the free market and in manipulating the process, and it's often in a way that favors business over the individual. I'm not entirely certain what we mean by free market. Free market in the classic sense is that the government is not involved. From the perspective of policy, in regard to taxation as well as manipulating the process, our government is directly involved in this process.

It's really not a free market. Congress sent President Bush a letter complaining about Halliburton's activities. They pointed out a couple of key things that Halliburton is doing they felt were improper for the government to promote by giving them provisional contracts. They pointed out bribery, big-rigging on foreign projects, dealing with nations suspected of terrorism, considering employees indicted for fraud. There was an audit that determined there was $2.8 million charged for hotel costs, while the audit found there were cheaper alternative hotels. There was a charge that the company was overcharging fuel supplies that came out to $212 million. There was a charge that the company billed the government over 36% more for meals than were allegedly served to troops in Iraq. How is it a free market when we have an administration that gives preferential treatment to particular companies? More importantly, not only did we give preferential treatment but we allowed them to be fairly lax in how they take advantage of that freedom, of those choices, of that preference. How are we defining a fair market if other companies are kept out of the process of bidding for Iraq work, or one company gets a disproportionate share?

What is the appropriate role, considering all these issues, of a government in a free-market? There are three key areas. One is to regulate Congress to ensure nondiscriminatory policies, and by that I mean policies which favor business. What is the traditional use of the Commerce Clause? It is to protect businesses from discriminatory processes and allow unfettered transit of commerce throughout the states to help business.

Second, to protect citizens from the aggressive tendencies of the marketplace. That's both for prospective workers and purchasers. When companies aggressively act in the marketplace to the detriment of workers and purchasers, it is to the disadvantage of all citizens. The local Channel 7 here has this "Eye On" segment where they investigate business practices, and they expose whatever the business practice is and make them change their practices for the betterment of the citizens. That's at five and eleven o'clock. When a business does something to the detriment of the consumer, they look to the government for aid and regulation. When we look at the cost of prescription drugs, we look to the government for aid in stemming the high tide of that cost or for relief from the burden of the cost in the United States. We look to the government for some help with these issues, to encourage behavior which benefits the whole. At the extreme, we have *U.S. v. Heart of Atlanta*, the case in which the Civil Rights Act of 1964 was used to prohibit the motel from excluding African-American guests. Does the Constitution support regulation of private actors? No. However, Congress would be able to take the Commerce Clause and pass legislation on issues that affect interstate commerce. The argument is that if you run a motel, that motel is in the business of interstate commerce. The discriminatory practice of that interstate commerce discourages people from travel in certain parts of the country. That behavior is one that is good behavior for Congress to discourage, and they do so through the Commerce Clause. They do so as a form of regulation of business.

Are they taking the commerce clause to its logical extreme? Absolutely, but it's one that benefits a societal goal. On many levels, that is a permissible use of government action with respect to regulation of the marketplace. All you're doing is stopping undesirable tendencies. If anything, you're actually increasing their business by increasing the people who are able to use the hotel. Some people might say I'm no longer going to go there because they encourage these people to come, but most likely they will be off-set by the people who will start going to the hotels.

Government can clearly use preferential policies to encourage business to act. Does that improve the free market? Absolutely. Does that interfere with the freedom to choose? No doubt about it. If the society is acting in a way that's not beneficial to the whole, then government is free to use the tools at its disposal to encourage different behavior. Often those tools have a direct effect on the free market.

Kenneth Lux's book, *Adam Smith's Mistake*, has an interesting parable in it. Sometime during the waning days of the Middle Ages, two merchants and a monk were traveling together. The monk was just returning from a pilgrimage to Rome. The merchants entertained both themselves and the monk with stories of what they had bought and sold during various exploits. The monk, feeling somewhat badly that he didn't have much to offer in the way of stories, thought to show the merchants the silver chalice he had purchased in Rome and was bringing back to his cathedral. He was pleased when they were duly impressed, as he had been, with its simple elegance and beauty. Being merchants, accustomed to being bold in such matters, they asked the price. When the monk told them, they were amazed. He had paid far less for it than it was worth. Laughingly, they congratulated his unworldly soul for driving such a hard bargain. They were surprised, however, when the monk did not take pleasure or satisfaction in their congratulations. Instead, he became rather morose and turned silent, and his face began to dim. The monk said, This is terrible. I must now proceed back to Rome and try to find this fellow and give him a fair price. The merchants, at the very least, must have rolled their eyes.

This story is told because we make assumptions about the free market, how the free market benefits society, how, if we always act in our self-interest, if we always make choices that will maximize our own economic worth, we will benefit the whole. An example of that, Bush's tax cuts benefit the whole. If the definition of benefit is that the size of the pie is going to increase, that the amount of wealth has been maximized, there's no disputing that tax cuts benefit the whole. But at what cost? Katrina happens. Millions of dollars a month are spent on Katrina and instead of having a surplus, we now have a deficit. When Bush speaks of sacrifice, the sacrifice is not the tax cuts, which benefits business in the free market. The sacrifice is the individual. Katrina will be paid for with that sacrifice. You can't always make decisions based solely on the assumptions of the free market. In effect, the free market will write a contract. The right to make the choices will ultimately benefit the whole. Sometimes there's just a policy choice. Sometimes the whole is better benefited by encouraging behavior which is more beneficial to it.

ADMINISTRATIVE LAW AND REGULATION

THE ABA AND THE PRESIDENTIAL SIGNING STATEMENTS CONTROVERSY

*BY RONALD A. CASS & PETER L. STRAUSS**

The big news from the American Bar Association's annual meeting this year was its resolution condemning the misuse of presidential signing statements. This followed a much-ballyhooed report by a blue-ribbon ABA task force and statements from its chair, Neil Sonnett, tying the ABA action to criticism of the Bush Administration.

News media reported the action as a slap to the Administration, rebuffing President Bush's prolific use of signing statements as an abuse of office. Sonnett explained the final resolution—changed from a sweeping condemnation of presidential signing statements to a condemnation only of their "misuse"—clarifying that any use of such statements to assert the unconstitutionality of elements of a statute, or to direct an interpretation inconsistent with clear congressional purpose, is a misuse of presidential power. Other ABA leaders proclaimed that the Constitution gives the President the simple choice of vetoing laws or signing them, adding that if the President signs a bill into law, he cannot qualify that choice. They see signing statements as violations of a constitutionally mandated separation of powers.

A number of prominent conservative critics have condemned this action as politically partisan, noting that the ABA remained silent when President Clinton issued signing statements but is now condemning President Bush. Some liberal groups have seized on the ABA's action as evidence Bush is flaunting the Constitution and undermining the law. Statements by Sonnett and others—refusing to see the change in the final resolution from a sweeping condemnation of presidential signing statements to a condemnation only of their "misuse" as making any difference and continuing to press arguments targeted at the Bush Administration—lend credibility to the conservative criticism.

Whatever the impetus for the ABA action, the actual resolution was not what the news reported. It was not a blanket attack on signing statements, and not simply a slap at President Bush. It may still be ill-advised, but the actual issues surrounding these statements are far more complex and considerably different from media reports.

* * *

Presidential signing statements are formal documents issued by the President, after wide consultation within the executive branch, when he signs an enacted bill into law. They state the President's understanding of the legislation he is signing and also may give instructions to the executive branch regarding how the new law's provisions are to be treated. While such views have been formulated for as long as there has been a veto power to be exercised and the President has served as head of the executive branch of government, it is only recently that they have become readily available public documents. On the whole, this is a desirable development; it is always useful for the citizenry (and Congress) to know how the executive branch understands the laws Congress enacts.

On occasion, however, Presidents have used signing statements to express doubts about the constitutionality of elements of legislation they are nonetheless signing into law, or to state interpretations inconsistent with Congress's understanding of the legislation it sent forward to the President. Signing statements like these generate three separate legal questions.

The first and simplest is whether they are constitutional. Although the Constitution says nothing about signing statements, it also is silent regarding the reports regularly written by congressional committees. The President takes an oath to support the Constitution and laws of the United States and has clear authority to explain how he views the legislation he is signing or deciding not to sign, just as congressional committees have authority to explain their views on the legislation they send forward. Claims that signing statements, as such, violate the Constitution and transgress constitutional separation of powers are either silly or radically overbroad.

The harder questions are what weight courts should give presidential statements when interpreting the laws and how signing statements fit rule-of-law concerns. These are related, but not identical, questions.

The question with judicial interpretation is largely the same as with congressional contributions to legislative history. The best evidence of what a law means almost always is the words used in the law itself. But the size, complexity, and mixed parentage of laws today sometimes produces text that, read literally, is difficult to credit as what could have been reasonably understood by those who enacted it. At times, the law is ambiguous and the legislative history clears up a point. At times, the law is clear enough and the

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To read the ABA report, as well as responses in support and critical of it, please visit our website: www.fed-soc.org.

legislative history is designed to revise the understanding in ways that never would have commanded majority support in the legislation—which is why lobbyists work so hard to have favorable language that couldn't make it into law inserted into the history.

Presidential signing statements offer the same benefits and the same problems. They can assist in understanding a law or they can state a view that, while capturing the President's view of good law, could never have commanded majority support in the legislature. Like legislative history, and unlike a veto override vote, there is no clear way of testing the congruence of the President's view with the congressional majority. Unlike much legislative history, the signing statement at least is likely to state the clear view of one essential player in the enactment of law.

Courts have developed principles of construction to sort through what weight to give text and history in particular contexts. These do not provide great clarity as to what courts, or even individual judges, will do in any given case. Nor is any set of general rules likely to be able to resolve the difficult issues respecting actual interpretation of law—that is why the canons of construction have been so effectively ridiculed for many years, by Karl Llewellyn and many more. The point is not that there is a simple answer to the weight to be given presidential signing statements. Rather, it is simply that the problems of construction are similar in the legislative history and presidential signing statement contexts.

There are at least two settings in which the question might arise whether the interpretive view offered in a signing statement has *legal*, not simply persuasive, force when construction of the law is contested. The arguments in favor of their having such force distinguish presidential signing statements interpreting law from the issues surrounding the use of legislative history. They may help to understand the ABA's overstated concerns.

The first setting arises from the possible use of signing statements within an administration to resolve disputable questions of interpretation. One common view of the constitutional and practical order of executive life accepts that officials in cabinet departments and other governmental bodies are obliged to accept the President's interpretation of law in carrying out their duties, because as Chief Executive he is entitled to give them instructions of this sort. The President appoints the cabinet members, is the person in whom executive authority is entrusted by the Constitution, and has the authority to remove executive officers who do not carry out their duties to the President's satisfaction. In short, his interpretation governs within the administration because he is the boss. This view of the unitary executive has gained a stronger following over the past two decades. Under it, cabinet officials and other executive officials could be obliged to regard presidential interpretations stated in signing statements as legally binding upon them.

The opposing view is that although the Constitution does make the President chief executive, outside the military and foreign relations contexts its text repeatedly imagines (as is of course the case in practice) that the responsibilities for law administration will be placed in the hands of others. In this view, his duties in respect of ordinary domestic administration are those of an overseer, not decision-maker. With limited exceptions, the President can remove from office those whose administration displeases him—but Congress has placed the responsibilities for decision-making in their hands and not the President's; removal may carry a high political cost (including notifying Congress about the treatment the President is seeking for its work), and the President will have to get congressional approval of the successors he appoints. People holding this view note the many historical struggles between Presidents and their appointees reflecting this understanding. They fear that if high officials believe that they have a legal obligation to let the President decide disputed points within their statutory responsibilities, the result will be a concentration of enormous power in one place, and that the President may often be successful in exercising that power confidentially and without public process. This they see as the road to presidential tyranny. When statutes confer regulatory authority on agencies, not on the President, they conclude, actual interpretation is the business of the agencies and outside the President's authority directly to determine.

Remarkably, the question of how strong is the character of our unitary executive remains contested, after more than 200 years. The growing acceptance, in practice and in the literature, of the view that our Constitution creates a strong, unitary executive gives weight to the argument for presidential control over interpretations of law, but it also helps understand the ABA's concern. It marks only a direction—but not necessarily an endpoint—in the argument about presidential authority.

The second setting in which legal force might be claimed for the President's view can arise in court. Courts have said that when statutory language is ambiguous and has been reasonably interpreted by an administrative agency charged to administer the statute, the courts must accept that interpretation rather than engage in their own independent analysis. Later decisions have qualified this principle as limited to interpretations that emerge from public procedures or other contexts in which Congress has clearly envisioned the responsible agency exercising such authority. But the exact contours of that limitation are anything but precise.

Given the current state of play on judicial deference to the executive branch's interpretations of law, one can imagine the government arguing that a signing statement announcing the President's reasonable interpretation of an ambiguous provision is entitled to the same treatment as an agency's. Yet such statements are *not* products of public procedures such as are used in agency notice-and-comment rulemaking. Thus, they would seem to fall outside the ambit of interpretations that the courts have thus far identified as meriting judicial deference. While this issue has yet to be presented, one Supreme Court decision last year (upholding the Oregon assisted suicide statute in the face of a similar kind of interpretation made by then Attorney General John Ashcroft) suggests that the Court would agree. But three Justices dissented from that holding, and Justice Alito, who in other contexts has voted to uphold strong executive claims, did not participate. Ascendancy of the unitary executive

theory would, at the least, make the interpretive effect of signing statements an important issue. This possibility, too —giving the President's unilateral interpretation legal force —may well underpin the ABA's overstated alarm.

* * *

The greatest controversy, and most serious issue, attaches to statements asserting that provisions of a law the President is signing are unconstitutional and, hence, will not be enforced or respected by the president. The question here is what the President properly may do when he believes a statutory provision is contrary to constitutional command. This is a question of congruence with rule-of-law precepts, rather than with any express or implied constitutional limitation on the president. But it is a serious question in its own right.

One pole of the controversy is marked by the simple, sweeping assertion that the President should never sign legislation if he believes it has provisions that are unconstitutional. This is the analytical twin to the sweeping assertion of signing statements' unconstitutionality. It is similarly bold, broad, and wrong. Presidents, just as much as judges, are responsible for upholding the Constitution; they take an oath to do so. They have independent constitutional authority for asserting views of constitutional meaning. And, just like every other officer with similar constitutional authority, they are responsible for doing what best advances their view of constitutional command.

In a world of large, complex laws—some running to hundreds of pages—no official is tied to a simple, two-choice model of possible actions. Legislators need not vote against a large, complex law because they believe one of its provisions to be unconstitutional. They may support the law and trust that the problematic provision will not be enforced or will be struck down in court in an appropriate case. Judges, similarly, are not always required to invalidate in its entirety legislation that has one or two unconstitutional provisions. So, too, a President is not limited to either vetoing legislation that has one or two provisions he believes to be unconstitutional or signing it without objection. The President—like any individual legislator—well might decide that, on balance, a law is beneficial, even if he believes that one or more provisions violate constitutional strictures.

If that is his view, the President is not then bound simply to go along with every aspect of the law. The President is not obliged to enforce all laws, even those contrary to constitutional command. He should be expected to place constitutional command over legislative command, and decisions by the President and other executive branch officials respecting law enforcement generally have been given extraordinary deference by other branches. He especially should be expected to protect the constitutional powers of the presidency and to tailor executive branch implementation of laws accordingly.

So, for example, if Congress includes a legislative veto provision in a complex law—as it has done numerous times since the Supreme Court ruled such provisos unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983)—the President might properly choose to sign the legislation, but also properly choose not to respect the unconstitutional legislative veto provision. In those circumstances, a signing statement indicating the President's view that the provision is unconstitutional advances rule-of-law interests. It puts others on notice of his intentions with respect to the law, accords with respectable views of constitutionality, and comports with institutional interests of the executive branch. All of those elements advance the predictability and legitimacy of the law. In the main, this has been the pattern of presidential uses of signing statements.

There is, however, a use of presidential signing statements that is properly criticized as undermining the rule of law. If the law put before the President is one that at its core would command conduct that the President believes to be unconstitutional, the President sends a clear message by vetoing the law—he is willing to stand on principle and reject legislation that is fundamentally not in line with his view of the Constitution. If the President signs such a law while suggesting that its core provisions are unconstitutional, he reduces the clarity and predictability of the law.

The line between the proper and improper use of the veto versus signing statements obviously can be argued over. It is not a bright line. But we believe that there are relatively good examples of signing statement misuse in presidencies of the left *and* of the right.

Consider, for example, President Bill Clinton's signing the Social Security Independence and Program Improvements Act of 1994, which made the Social Security Administration an independent agency. Although the law made other changes, a central provision—as widely noted in contemporaneous accounts—was to make the agency independent of the President. It gave the agency's single administrator a six-year term of office—longer than a presidential term—and provided that that administrator could be removed only for cause. President Clinton did not veto the law, but his signing statement indicated that he viewed this change as an unconstitutional encroachment on the power of the presidency.

Similarly, President George W. Bush chose to sign the Detainee Treatment Act of 2005, sponsored by Senators McCain and Graham, among others, despite his clear disagreement with the law's core provisions. The Act recommits the United States to observance of the Geneva Conventions and other laws respecting torture and the humane treatment of prisoners. In signing the bill into law, President Bush expressed concern that it intruded on constitutionally reserved presidential authority and reserved the choice to refuse enforcement of key portions of the law. His objection was not to an incidental aspect of otherwise desirable legislation, but went to the very heart of what Congress had done.

In both cases, the Presidents' decisions to sign the laws while condemning central provisions sent decidedly mixed messages, seeming to give with one hand and take back almost as much with the other. In the second case, this concern is compounded by the probability that presidential actions inconsistent with the statute will be taken out of

public view, and that judicial review of those actions is unlikely. But this difference is ultimately one of degree. Both actions are hard to defend as preferable to vetoes of legislation the President believes violates the Constitution at its core. Without recourse to a signing statement indicating strong disagreement with the law, it is hard to imagine that the Presidents would have signed these bills.

Such uses of signing statements constitute the limited set that can properly be addressed under the heading of "misuse." We underscore, in light of other pronouncements about the ABA resolution, that this label properly attaches to a small subset of presidential signing statements—and that it is important to avoid tarring other presidential signing statements with an overly broad brush.

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After all is said and done, the ABA's resolution can be understood as accepting the use of presidential signing statements as an appropriate, often helpful—and certainly a constitutional—tool of presidential participation in the process of enacting and enforcing our laws. The resolution can be understood as well as properly identifying a smaller set of signing statements that are not consistent with rule of law values. But so long as ABA leaders continue to portray a great many signing statements as suspect, they will seem to be on a political mission divorced from thoughtful analysis of the legal and jurisprudential issues surrounding signing statements.

Manufacturer's Immunity: The FDA Compliance Defense

*By Daniel Troy**

MR. TROY: Thank you, Dean, and thank you to the Federalist Society and Ave Maria for hosting me. It's always a pleasure to be outside the Beltway. You know, Justice O'Connor said about Washington, it has more lawyers than it does people.

Often when I talk about this topic I get in trouble because I tell the following joke. But I'm going to tell it anyway. The joke is about a receptionist at a law firm. The phone rings. The person says, I'd like to talk to my lawyer. The woman says, Oh, I'm sorry, he passed away last week. The next day, the same person calls and asks, I want to talk to my lawyer. The receptionist says, I thought I told you yesterday, he passed away. Wednesday, Thursday, Friday —finally, the receptionist says, you know, you've called every day this week, and I keep telling you your lawyer passed away. Why do you keep calling? The person said, I just love hearing that.

Usually, then, I say, I like to think of the person on the other end of the phone as the plaintiff. And then I get into a lot of trouble.

But anyway, it is important, I think, to try to have a sense of humor about this issue. It is plain that the current liability environment is threatening one of the greatest industries in the world, and certainly in the United States. It's a sad fact that we should have to defend an industry that has been principally responsible for extending life expectancy in the United States, as well as quality of life, and whose products on net have actually reduced the overall cost of hospitalization. But these days the pharmaceutical sector, for reasons that on occasion I find hard to fathom, is at a very low ebb for its reputation. And I think the lawsuits have fueled that reputation.

Just to give you a couple of numbers about how bad the situation is, tens of thousands of cases are filed against pharmaceutical drug companies all the time. Wyeth, for example, has paid $21 million in connection with the Phen-Fen case and still faces about 60,000 plaintiffs. There has been evidence of fraud in some of these cases that have been brought against it, but nonetheless Wyeth continues to fight for its life. Merck, as you all know, faces litigation over Vioxx. The Wall Street estimates are that it could cost it anywhere from $4 to $50 billion. And Vioxx is a product that arguably should still be on the market. I was at the FDA when they came in and voluntarily withdrew it, and if they had come in and asked for a Black Box warning—"The product should not be taken chronically beyond eighteen months"—I think there's a fair chance that the product would have remained on the market. And yet again, Merck, a company that is traditionally one of the major vaccine manufacturers in the country, is literally fighting for its life.

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To read Mr. Troy's paper on this issue, please visit our website: www.fed-soc.org.

Full disclosure: I represent people in the pharmaceutical sector, including many of the companies I'll probably mention.

I want to talk about at least four harmful effects of the current liability environment on the public health because that's ultimately what really matters. The first is the extent to which current liability environment really skews and harms research and development. The AMA said this as long ago as 1988, when it talked about products that are not being developed. Justice O'Connor said it in the *Browning-Ferris* case. But you really see it especially in vaccines. You know, there are reasons why there are so few vaccine manufacturers in the United States; there's a reason why there are so few innovations in vaccines. You see it in terms of the treatments for pregnant women. There's almost no research that is done to treat pregnant women. And the thing is, we've been living in a model for blockbuster drugs, where we can to a certain extent afford this litigation tax. But as we move to a world of personalized medicines where the therapies are more and more targeted to individuals based upon diagnostic tests—where we can assess whether or not a particular therapy can be useful to you based upon your genes—there is clearly a question of whether we are going to be able to continue to afford the enormous litigation tax that we bear. The litigation costs involved in just two drugs last year were equal to ten percent of the entire revenues of the pharmaceutical sector. So we're talking about an enormous amount of money.

But it also affects individual people in terms of products being available. I'll give you, again, one of the key examples. There's a product called Bendectin. Bendectin is the only treatment that the FDA has ever approved for morning sickness. Morning sickness can be quite serious. It can lead to hospitalization. It can lead to miscarriage. On occasion, it's sufficiently life-threatening that—I don't want to get into it, but there are abortions as a result. And there was literally no sound science behind the assault on Bendectin. But one person published a paper alleging it caused birth defects, and there were more than 1,700 suits. The product was withdrawn from the market. So it is not available here, but it is available in Europe. The FDA went so far as to make a formal finding in 1999 that the product was not withdrawn for reasons of safety and effectiveness, but rather because of product liability.

There are other very useful products that were brought to market and withdrawn. There was a product called Norplant, which, for those of you who believe in the use of contraception, is a very effective and useful contraceptive. It is no longer on the market. It's the one that was implanted in a person and stayed there for six months.

Nearly all DTP manufacturers of vaccines have exited the market. Congress tried to deal with the vaccine problem with the Vaccine Injury Compensation Fund, but plaintiff's lawyers have found a way around this and are suing for Thimerosal being in these vaccines. Thimerosal has been an approved FDA preservative since the 1930s.

So, it affects innovation. It affects availability. It clearly affects price. One economist did a study of the difference in price of a product called levothyroxine, another generic product that's been around for a long time—in the difference between here and Canada. And a big reason why it's cheaper in Canada—well, partly their price controls. But, in this case, the major thing that accounted for the price difference was product liability. In some cases, ninety to ninety-nine percent of the costs associated with certain vaccines were product liability related.

Those three effects have been known and focused on for a long time, but there's really a fourth one that I think the FDA has been talking about of late, and that is the extent to which the liability environment interferes with what you might call rational prescribing and leads to over-warning. What the FDA does in its very comprehensive regulation of a drug is to try to pick an appropriate and titrated warning. Its review of labeling is comprehensive. The drug companies can come in with a proposed label, but it's really the FDA's territory. The FDA rewrites it and pretty much gets to decide exactly what's on the label. And the FDA tries to pick an appropriate warning that appropriately communicates the risks and the benefits of the drug, because it is very well aware that all drugs have risks, and the label is meant to be its means of communicating with healthcare practitioners, who can then make individualized decisions about whether or not a product is appropriate for a particular individual.

But, because of the product liability environment, labels are increasingly being written by lawyers, and not by doctors for doctors. Perhaps the best example is a case in which the FDA found its own authority on labels so encroached upon that it felt the need to get involved in the case. The case is a California Supreme Court case called *Dowhal*. What happened in that case was a plaintiff's attorney trying to use Prop. 65, which of course requires certain kinds of warnings, tried to force onto a nicotine replacement therapy product the warning, "Nicotine can harm your baby."

The FDA, in a series of citizen petition responses and letters, said, No, we don't want that warning. We want a much more titrated warning. We want one that says try and stop smoking without this product; see your doctor, but this product can be useful. It did not want pregnant women to be misled into thinking, Nicotine replacement therapy, smoking, both of them have nicotine and they can harm my baby, so I'm going to keep smoking instead of quitting. Quite remarkably, a California Court of Appeals said, You know what? More warnings are always better. It's always better to have more warnings. Prop. 65 was not preempted, even by the FDA speaking directly to the precise question at issue, to paraphrase *Chevron*, of what label should be on this particular product. Fortunately, the California Supreme Court unanimously saw it differently and said, We're the FDA; this should be the warning; juries and state law do not get to supplant that. And the FDA became involved in a number of other cases where it found that its authority over the label was encroached upon.

I think it's very important to understand that when the FDA makes a risk-benefit calculus from a kind of macrocosmic perspective to assess whether or not a drug should be on the market, it is making, again, a public health/public policy decision, understanding that all drugs have risks and all drugs have benefits. When you take an individual who's been harmed and you put them in front of a jury, it is not science-based. Often the players are not schooled in science. Almost inevitably their focus is on that individual and trying to make sure that that individual is able to live their life with compensation, enough money, and they are not able to think about the question in a kind of titrated risk-benefit public health calculus, which is really what the FDA does.

So, the FDA recently put out a statement in a preamble to something called the physician labeling rule, which is a major overhaul of—when I say the labeling of the drug, I mean that package insert that's really meant to be written for doctors, that little folded piece of paper that comes in some of your medications. If you get something from a pharmacist and it just comes in the plastic vials, you may or may not get the package insert. So the physician label is also known as the package insert, and that's what I'm talking about. FDA has completely overhauled this, and in doing so they really stressed the comprehensive nature of FDA regulation.

It's hard to think of many products in the American economy regulated more comprehensively by the federal government than a prescription drug. You can't ship it in interstate commerce without the FDA's approval; you can't test it on somebody without the FDA's prior approval; you can't say a word about it without the FDA's prior approval. The FDA has a very comprehensive regulatory authority over the advertising. You can't change the manufacturing of it without the FDA approving it. The FDA has to approve the product and every aspect of its manufacture before it goes on the market. And the FDA regulation of prescription drugs is really meant to be both a floor and a ceiling. This comes up again particularly in the war here in context, where the FDA is trying to pick a titrated warning, an appropriate warning that does not dissuade people who should be using the drug from using it.

Let me give you what I think is one of the best examples. There are these products called anti-depressants, SSRIs, that people for a long time have wanted to bear a warning that says, "This product can cause suicide." Well, depression can also cause suicide, and in fact depression causes suicide a lot more often than anti-depressants do. Indeed, the evidence may be that this causes suicidal ideation, which means suicidal ideas, but we have not necessarily seen in the adult population an increase in suicide as a result of these products. But, in part, plaintiff lawyers went on an aggressive campaign to try to get a Black Box warning on the product, and, if you do a content analysis of all the stories beforehand, they were all about these products and suicide.

Well, guess what? The FDA finally put a Black Box warning on the product, mostly after a review of the respective pediatric literature—and, by the way, most of these products aren't even approved for children. But the FDA put a Black Box warning on them. And if you take a look at the stories now, it's all about how depression is being undertreated. Suicide from untreated depression is up. The AMA has asked the FDA to take a look at this Black

Box warning because they think it's scaring people away from using these products. And so, I think, this really illustrates that the FDA tries to pick an appropriate warning.

And it is simply not the case that more warnings are always better. There are a couple of social science reasons for that. First, there's 'The boy who cried wolf' phenomenon. There are so many warnings, they lose credibility. And there's also essentially a consumer perception issue. People can only absorb so much information, and so less can be more when it comes to risk communication.

So the FDA, again, has tried to make it clear that its regulation is both a floor and a ceiling. It put out at least six different circumstances where it believes state law is preempted. So you might say, Oh, the FDA has taken care of the problem. Why do we need this Michigan law? Well, the reason why we need this Michigan law is because the FDA is doing as much as it can to flesh out the preemptive scope of its regulations and its regulatory power. But the problem is created by state law, by state juries that are encroaching on federal authority and on federal regulation of these products in a very comprehensive way. And so, what the Michigan law does is recognize that these products are regulated by the federal government in a very comprehensive way, again more comprehensively than pretty much any other product, except maybe nuclear power plants. I'm not a nuclear power expert, but it's hard to think of products that are as comprehensively regulated.

So, the Michigan state law helps, in Michigan at least, moderate and ameliorate many of the baleful effects that I've talked about. It helps promote innovation. It helps increase availability of drugs. It helps with price. It also, most importantly, I think, helps avoid interference with rational prescribing, interference with good risk communication, and over-warning.

The paper I wrote actually encourages other states to look at Michigan as the model and to adopt the Michigan law. There are other states where FDA regulation precludes punitive damages—which, you know, is and should be the easiest case of all. But, from a public health and public policy perspective, from the FDA perspective, from the federal government perspective, having the law that you have here in Michigan helps avoid the problem to which the FDA's statement is essentially a defensive measure and, again, recognizes that we are literally killing the goose that is laying golden eggs, again and again and again.

For those people who think that, Well, no matter what we do to the drug companies, they'll always be there, and they'll always generate more drugs; or, for the many who think that, Well, it's not the drug companies that make the drugs anyway, it's really the National Institutes of Health (NIH), the NIH itself came out and said that of the last fifty blockbuster drugs, it had something to do with just four of them. The drug companies spend far more in R&D than even the NIH and the federal government. And, when you're told that they spend more on marketing than they do on R&D, that marketing number includes little things like rent. What the opponents of the industry do is they loop in or lump together marketing plus administration, and administration is basically all overhead. But these companies are research companies. It costs close to a billion dollars to bring an individual drug to market. In fact, the number of drugs receiving approval is going down dramatically. Last year, there were, I think, only twenty NMEs, new molecular entities, which are completely new drugs, because it's getting harder and harder to get through the process, to find the targets, to bring products to market. And, for those who think that the drug companies are an endless supply of money and there's, you know, no possibility that we can kill the goose lays the golden eggs, well, I think you're wrong, and the reason you're wrong is not necessarily because of the drug companies, it's because of Wall Street.

The people who really end up controlling things is of course the people who are willing to invest and buy the stock. And if you talk to the hedge funds, as I often do, or to the investment banks, they are very keenly aware of what's going on in the product liability environment and in the FDA, and if there are not competitive returns coming from this extraordinarily risky industry, because, in part, of the product liability environment, capital will simply flow away from this industry. They will not have the money to bring to market the life-saving therapies that many of us are hoping for, relying on, and, in some cases, praying for.

Thank you.

Reviewing (and Reconsidering) the Voting Rights Act

*By Abigail Thernstrom **

Race is the third rail of American politics. So perhaps it's no surprise that Congress recently passed the Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 with almost no dissent. In the House of Representatives the vote on July 13 was 390 to 33, with many in the small band of opponents objecting primarily to a bilingual ballot requirement, arguably the least important of the issues on the table. The bill reached the Senate a week later, on the day the President was rushing to the NAACP's annual convention to beg for appreciation. That afternoon, the final vote in the world's greatest deliberative body came down 98-0.

Bush quickly signed the bill into law on July 27—not even waiting for the Voting Rights Act's 41st anniversary, ten days later. It was altogether a rush-job. Of course, the core provisions of the 1965 statute are permanent. At issue were the temporary provisions, which were not due to expire until August 2007. But Congress acted twelve months ahead of the deadline, with the Administration's blessing and scarcely any debate, in a clear political panic.

No one is sure what the new, so-eagerly-embraced statutory language means. But the statute has been a murky mess for decades—and one that has little to do with voting rights in their common-sense meaning. Access to the polls for southern blacks—ninety-five years after the passage of the Fifteenth Amendment—was the original Act's sole purpose. That aim had been easy to understand; the deliberate disfranchisement that pervaded the South was a clear moral wrong. By now, however, the act has become an instrument for the creation of safe, race-driven (and thus almost inevitably contorted) legislative districts for candidates that black and Hispanic voters prefer. How did we get from there to here? And is this really where we want to be?

* * *

The day the Reauthorization Act was signed into law, Wade Henderson, executive director of the Leadership Conference on Civil Rights, offered a toast: "We had the commitment; we had the expertise; we had the drive and we had the optimism of the most wonderful civil rights coalition, men and women right here in this room . . . And it worked, better than we could possibly have imagined."[1] He certainly had reason to be pleased. The coalition had gotten everything it wanted in the statute.

In great part, their complete triumph was due to the protected status of civil rights bills in general. The title of the Act alone—containing the names of Fannie Lou Hamer, Rosa Parks, and Coretta Scott King—was politically intimidating, clearly the inspiration of a marketing genius. But, in addition, the Voting Rights Act is barely understood by most of the public. The issue before Congress was easy to distort and demagogue.

Just a taste of that distortion and demagoguery: "Most people do not know the Voting Rights Act is in jeopardy . . . . It'll be time to go back to the streets and march to alert people and mobilize people before the fact, not after the fact. 2007 will be too late," Jesse Jackson said in an interview reported in August 2005.[2] Georgia Rep. Sanford Bishop spoke of the danger of "Reconstruction revisited" if Congress did the wrong thing—by which he undoubtedly meant the end of Reconstruction.[3] Shortly before the 2004 elections, the NAACP branch in Tacoma, Washington sent out a newsletter that declared: "In the year 2007 we [i.e., black Americans] could lose the right to vote!"[4] That widely circulated rumor forced the Justice Department to post on its web site a "Clarification" to reassure Americans that "[t]he voting rights of African Americans are guaranteed by the United States Constitution and the Voting Rights Act, and those guarantees are permanent and do not expire."[5]

"From the beginning of the reauthorization process . . . critical facts were repeatedly ignored or misunderstood . . . ," Senators Cornyn and Coburn noted in "Additional Views" appended to the Senate Judiciary Committee Report on the bill. "[M]isunderstanding about the nature and timing of the expiration of certain provisions of the Voting Rights Act," they went on, "contributed to an unnecessarily heightened political environment that prohibited the Senate from conducting the kind of thorough debate that would have produced a superior product."

Some of the confusion (but not all) was the consequence of willful deception. Amazingly enough, not even the White House seems to have understood the 2006 statute that it so strongly backed. Its own "Fact Sheet" (available on the White House web site) describes the newly amended legislation as extending "[t]he prohibition against the use of tests or devices to deny the right to vote in any Federal, State, or local election."[6] In fact, "the use of tests or devices" has been permanently banned since 1975. But perhaps the White House can be forgiven; outside a small circle of voting rights scholars and attorneys, almost no one understands the Voting Rights Act. Once simple, it has become absurdly complicated—a fact that, in itself, stifles debate.

* * *

It's not possible to cut through the confusing statutory mess without understanding the Voting Rights Act as it was originally envisioned. The single aim of southern black enfranchisement dictated the entire structure of the Act in 1965. The legislation contained both permanent and

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temporary provisions. Section 2, its permanent opening provision, restated in stronger language the promise of the Fifteenth Amendment, while Section 3, for example, gave federal courts permanent authority to appoint "examiners" (registrars), or observers, wherever necessary to guarantee Fourteenth and Fifteenth Amendment voting rights. Those federal officers could be sent to any jurisdiction in the nation.

The temporary provisions of the Act—which made the statute the effective instrument for racial change that it was—constituted emergency action. Section 4 contained a statistical trigger designed to identify the states and counties targeted for extraordinary federal intervention. No southern state was singled out by name. Instead, jurisdictions that met two criteria—the use of a literacy test and total voter turnout (black and white) below 50% in the 1964 presidential election—were "covered."[7]

The logic of the statistical trigger was clear. Literacy tests were constitutional, the Supreme Court had held in 1959, but the framers of the Act knew the South was using *fraudulent* tests to stop blacks from registering.[8] Blacks were being tested, for instance, on their ability to read the *Beijing Daily*. Thus, those who designed the legislation took the well-established relationship between literacy tests and low voter turnout in the South, and used the carefully chosen 50% figure as circumstantial evidence indicating the use of intentionally fraudulent, disfranchising tests.

Critics complained that the 50% figure was arbitrary. But in 1965, the framers of the statute had worked backwards. Knowing which states were using fraudulent literacy tests and had been turning a blind eye to violence and voter intimidation, they fashioned a statistical trigger that would bring under coverage only those jurisdictions in which blacks would remain disfranchised absent overwhelming federal intervention.

* * *

From the inferred presence of egregious and *intentional* Fifteenth Amendment violations in the states that had both a literacy test and low voter turnout, several consequences followed. Literacy tests in the covered jurisdictions—all in the South—were suspended and, at the discretion of the Attorney General, federal "examiners" and observers could be sent to monitor elections.

In addition, Section 5 stopped covered states and counties (those identified by the statistical trigger in Section 4) from instituting any new voting procedure in the absence of prior federal "preclearance." Only changes that were shown to be nondiscriminatory could be approved—that is, "precleared"—either by the Attorney General or the U.S. District Court of the District of Columbia. The former became the usual route, saving affected jurisdictions both time and money.

It was an extraordinary provision; state and local laws are usually presumed valid until found otherwise by a court. But whenever a covered jurisdiction altered a rule or practice affecting enfranchisement, invalidity was presumed. In the context of the time, however, it was perfectly reasonable to believe that *any* move affecting black enfranchisement in the Deep South was deeply suspect. And only such a punitive measure had any hope of forcing the South to let blacks vote.

The point of preclearance was thus to reinforce the suspension of the literacy tests. Section 4 banned literacy tests in the covered jurisdictions—those southern states identified for emergency intervention. Section 5, preclearance, made sure the effect of that ban stuck. It was a prophylactic measure—a means of guarding against renewed disfranchisement, renewed efforts to stop blacks from registering and voting. In 1965 no one could imagine it would be used to ensure districting that was "racially fair"—by ill-defined and indeed indefinable standards—or to insist on single-member districts drawn (to the greatest extent possible) to ensure proportionate racial and ethnic representation whenever a city annexed suburban territory to enlarge the tax base.

Originally, Section 5 applied to Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and most counties in North Carolina. Had the scope of the Act been wider and the trigger less accurate—had it hit states outside the South and allowed federal intrusion into traditional state prerogatives to set electoral procedures where there was no evidence of appalling Fifteenth Amendment violations—it would not have survived constitutional scrutiny. The emergency provisions were passed in the context of the "unremitting and ingenious defiance of the Constitution," Chief Justice Earl Warren noted a year later in upholding the constitutionality of the Act.[9] But, in recognition of their extraordinary nature, these special provisions were designed to expire in 1970—thirty-six years ago. Having just been renewed for another twenty-five years, they are now scheduled to sunset in 2031. The emergency of constitutional defiance has evidently become near-permanent.

* * *

I have described the Voting Rights Act as it was first designed in 1965 not because I believe it should have remained untouched. But its internal consistency and logic make it the benchmark that helps illuminate the illegitimacy of subsequent change wrought by Congress, the courts and the Department of Justice.

Statutory change was inevitable. As early as 1969, the Supreme Court recognized that the list of electoral changes that required preclearance could not be confined to new rules governing voting registration procedures, absentee ballots, the format of ballots, and other such obvious disfranchising devices. Mississippi had tried to stop blacks from getting elected to local office by allowing counties to replace single-member districts with county-wide voting in the election of local supervisors (commissioners). Where whites were a majority of voters in the county as a whole, at-large voting ensured the election of white-preferred candidates. And in response, the Court held (picking up from the reapportionment decisions) "that the right to vote can be affected by a *dilution* of voting power as well as by an absolute prohibition on casting a ballot."[10]

Faced with such an obvious effort to suppress the power of the new black vote, the Court could hardly refuse to act as it did. Moreover, for civil rights advocates, black ballots were only the first step on the road to political equality; they rightly saw blacks holding public office as critical to their larger goal. Nevertheless, the Voting Rights Act was structured to deal with one kind of question. After 1969 quite another kind was raised.

Preclearance—a provision, remarkably, barely noticed in 1965—permitted the Justice Department to halt renewed efforts to proscribe the exercise of basic Fifteenth Amendment rights; it allowed swift administrative relief for obvious constitutional violations. Attorneys in the Civil Rights Division were expected to confront a straightforward question: Will the proposed change in voting procedure keep blacks from the polls? But after the decision in *Allen*, the questions were no longer so simple. The statute had placed in federal administrative hands (paralegals and equal opportunity specialists as well as attorneys) the insurmountable task of resolving basic questions of electoral equality, determining when ballots "fully" count.

* * *

It should be no surprise that the Justice Department has not been up to the task. Nor has the D.C. district court or the Supreme Court, when called upon to weigh in. Other federal courts deciding other types of cases have also lost their way. If jurisdictions seeking preclearance of a change in election procedure prefer not to use the administrative route, or decide to begin anew (their prerogative) after an adverse ruling by the DOJ, they are confined to the D.C. court. But the doors of all federal courts are open to those seeking redress under another, permanent provision of the Act—Section 2.

Judicial decisions in Section 2 cases have been equally troubling. Section 2 was amended in 1982 to prohibit a method of voting in any jurisdiction (not just those covered by Section 5) that "results in a denial or abridgment of the right to vote." Courts were directed to look at the "totality of circumstances" to determine whether the political process was "not equally open to participation" by members of protected groups. "Not equally open" was defined as meaning that minority citizens had "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

But what was the "totality" that judges had been directed to assess? And against what standard was the absence of proper "opportunity" to be measured? The fill-in-the-blanks statutory language was an invitation to judicial mischief which quite quickly took the form of an insistence on maps that contained the maximum possible number of majority-minority districts. The right to vote, nationwide, had become an entitlement to proportional racial and ethnic representation—to the degree that such proportionality can be created through the crude mechanism of single-member districts. But the assumption that only minority officeholders can properly represent minority voters had never been embraced by Congress—much less, the American public. And indeed it was a notion that other Section 2 language seemed to explicitly reject, although that was immediately (and conveniently) ignored.

* * *

Other problematic amendments preceded that of Section 2. In 1970 the trigger was updated to rest on turnout in the 1968 presidential election. But the formula that determined coverage—a literacy test combined with turnout below 50%—had only made sense in 1965. Turnout in the l968 presidential election had been low across the nation. Reflecting the national trend, participation in three boroughs in New York City, for instance, had dropped slightly to fall just under the determining 50% mark. Blacks had been freely voting in the city since the enactment of the Fifteenth Amendment in 1870 and had held public office for decades. The doors of political opportunity had not suddenly closed. Rather, faced with a choice between Nixon and Humphrey, more New Yorkers than before had stayed home.

In 1970, assorted counties in such disparate states as Wyoming, Arizona, California, and Massachusetts with no history of black disfranchisement were also put under federal receivership. None of these counties were in the South, and no other evidence suggested that these were jurisdictions in which minority voters were at a distinctive disadvantage. In 1965 the 50% mark (combined with the use of a literacy test) was carefully chosen to make sure the right localities were affected. That same cut-off point was arbitrary when applied to the 1968 turnout data. There was another problem: Two New York City boroughs escaped coverage, and yet what was the logical distinction between Manhattan and Queens? In fact, why not cover Chicago or Cleveland? Once minorities in Brooklyn qualified for the extraordinary benefits of Section 5, there was no logical place to stop.

Further amendments in 1975 compounded the problem of increasing incoherence. The trigger for coverage was once again senselessly updated to rest, as well, on 1972 turnout data. Henceforth, English-only ballots (and other election materials) considered equivalent to a literacy test when used in jurisdictions in which more than five percent of voting age citizens were members of a "language minority"—defined as citizens who were "American Indian, Asian American, Alaskan Natives or of Spanish heritage."

The analogy between fraudulent literacy tests keeping ballots from blacks with Ph.D.s in Alabama and the use of English-only ballots should not have withstood the laugh test. But the end of providing Texas with preclearance coverage—enabling the Justice Department to attack districting plans seemingly unfavorable to Hispanic political power—was regarded as justifying any and all means. And yet, if minority voters in Texas and Arizona were entitled to the extraordinary federal protection that Section 5 provided, why not those in nearby New Mexico, where Hispanics were already above 35% of the population, twice the percentage in Arizona. New Mexico, however, escaped coverage because the state already provided bilingual ballots.

* * *

Concern about electoral arrangements instituted with the unmistakable intention of undermining the power of black ballots was legitimate. That concern, however, need not have led to the picture drawn in *Miller v. Johnson*, for instance, of federal attorneys on an ideological crusade, which produced egregious racially gerrymandered districts designed by the ACLU and forced on Georgia over the objection of a black state attorney general, as well as important black leaders in the state legislature.[11] Nor need it have led to Justice Department attorneys equating the failure to draw the maximum possible number of safe minority districts with discriminatory purpose, as it did in the 1980s and 1990s.[12] In shaping and enforcing the Voting Rights Act, Congress, the courts, and the Justice Department very quickly lost their bearings, and the 2006 amendments continue that unhappy tradition. Moreover, as indicated at the outset, in important respects the statute has become a Rorschach test; who knows how the ink blot will be read by courts and Justice Department attorneys in the future?

This is not a benign story. In a 1994 decision on the legal standards governing minority vote dilution, Justice Clarence Thomas charged his colleagues with having "immersed the federal courts in a hopeless project of weighing questions of political theory." Even worse, he went on, by segregating voters "into racially designated districts . . . [they had] collaborated in what may aptly be termed the racial 'balkaniz[ation]' of the Nation."[13]

The Voting Rights Act cannot be administered like a highway bill. Enforcement depends on unacknowledged normative assumptions, which, when embedded in law, affect the racial fabric of American society. At a minimum, those normative assumptions and the record of administrative and judicial enforcement deserved robust debate before Congress signed on the dotted line this past July.

Footnotes

[1] Hazel Trice Edney, *Leaders Toast Voting Rights Victory But Worry About Getting Toasted*, Atlanta Daily World, Aug. 04, 2006.

[2] Hazel Trice Edney, *Rally Planned for Reauthorizing the Voting Rights Act*, Philadelphia New Observer, Aug. 2, 2005.

[3] Bob Kemper, *Voting Rights Act Under Scrutiny: Georgians in D.C. Oppose Provision*, The Atlanta Journal-Constitution, Oct. 28, 2005.

[4] Quoted in John J. Miller, *Every Man's Burden: Will the Voting Rights Act Be Necessary . . . Forever?*, National Review, Apr. 10, 2006.

[5] U.S. Department of Justice, Civil Rights Division Voting Section, *Voting Rights Act Clarification*, www.usdoj.gov/voting/misc/clarify3.htm.

[6] White House, *Fact Sheet: Voting Rights Act Reauthorization and Amendments Act of 2006*, http://www.whitehouse.gov/news/releases/2006/07/20060727-1.html.

[7] The statutory language refers to both registration and turnout, but the registration figure was, in fact, irrelevant. If any southern state had had registration of, say 51%, but turnout of only 30%, that under 50% turnout would trigger coverage.

[8] The constitutionality of literacy tests was upheld in *Lassiter v. Northampton County Board of Elections*, 306 U.S. 45 (1959).

[9] South Carolina v. Katzenbach, 383 U.S. 301, 309 (1966).

[10] Allen v. State Board of Elections, 393 U.S. 544 (1969)

[11] 515 U.S. 900 (1995).

[12] *See* Abigail Thernstrom, Whose Votes Count?, ch. 8 (1988) and Maurice T. Cunningham, Maximization, Whatever the Cost: Race, Redistricting, and the Department of Justice (2001).

[13] Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J., concurring).

An Unenumerated Right of Privacy... And What to Do About It

*By Judge Harold R. DeMoss, Jr.**

One of the most perplexing issues now confronting the American people in general, and agitating the confirmation process of recent Supreme Court nominees in particular, is the question of whether the Constitution contains 'a right of privacy,' or any of the other rights the Supreme Court has found to be derived from that right, including the right to an abortion and rights related to sexual preference. I have come to the personal conclusion that a 'right of privacy' is clearly not enumerated in the Constitution, and exists only as a figment of the imagination of a majority of the Justices on the modern Supreme Court. I will attempt to set forth for the public the reasons for that conclusion in Question-and-Answer format.

Question: What does the word unenumerated mean?

Answer: Webster's Dictionary defines enumerate as "to name or count or specify one by one." Roget's Thesaurus states that the synonyms for enumerate are "to itemize, list, or tick off." I have added the negative prefix 'un' so that each of the definitions or synonyms is reversed. Therefore, unenumerated means "not named," "not counted," "not specified," "not itemized," "not listed."

Question: Why do I say the 'right of privacy' is "unenumerated"?

Answer: Because neither the word privacy nor the phrase right of privacy appears anywhere in the Constitution or its amendments. The same can be said of the word 'abortion' and the words 'sexual preference,' which are protected under the right of privacy in the minds of some Supreme Court Justices.

Question: When was the 'right of privacy' concept first recognized by the Supreme Court as a part of the Constitution?

Answer: In 1965, Justice Douglas used this concept when writing for the majority in *Griswold v. Connecticut*.[1] This opinion was issued 176 years after ratification of the Constitution in 1789, 174 years after ratification of the Bill of Rights in 1791, and 97 years after the ratification of the Fourteenth Amendment in 1868. In *Griswold*, the Supreme Court held that a state law criminalizing the use of contraceptives was unconstitutional when applied to married couples because it violated a constitutional right of marital privacy.

Question: What precisely did Justice Douglas say in *Griswold* about the right of privacy?

Answer: The following quotations best capture the view of Justice Douglas:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[2]
>
> .....
>
> We have had many controversies over these penumbral rights of "privacy and repose." . . . These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.[3]

Note the phrase 'which presses for recognition here' in the last quotation above. That phrase clearly indicates that the right of privacy, which is still hotly debated by the American people today, was first recognized by the Supreme Court in this opinion. Note also that if the right of privacy had been "named" or "listed" or "specified" or "itemized" in the Constitution, there would have been no need for it to "press[] for recognition" in this opinion. What the Supreme Court was really doing with such language was interpreting some of the specific protections enumerated in the Bill of Rights as indicating the existence of a general right of privacy that is not expressly written, and then finding a new specific right, i.e., freedom to use contraceptives, as an unstated part of the unstated general right of privacy.

This same technique was used by the Supreme Court in *Roe v. Wade*, in which the majority stated:

> The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as *Union Pacific Railroad Company v. Botsford*, 141 U.S. 250 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, . . . in the Fourth and Fifth Amendments, . . . [and] in the penumbras of the Bill of Rights. . . .
>
> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[4]

If you substitute "a woman's right to terminate her pregnancy" (*Roe*) for "a married couple' right to use contraceptives" (*Griswold*), it becomes apparent that the Supreme Court was again finding an unstated specific right within the unstated general right of privacy. Note also that the Supreme Court admitted in the first sentence of this quote from *Roe v. Wade* that "the Constitution does not explicitly mention any right of privacy." In truth, the Constitution does not "mention" the right of privacy at all, in anyway, shape, or form. Therefore, I think my use of the adjective 'unenumerated' in this context is both accurate and appropriate.

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Question: What does the word 'penumbra' mean in these opinions, and what does the phrase 'penumbras of the Bill of Rights' refer to?

Answer: Webster's Dictionary states that the word "penumbra" comes from two Latin roots: *paene* meaning 'almost,' and *umbra* meaning 'shadow.' The first meaning of penumbra, as stated in the dictionary, is "a partial shadow, as in an eclipse, between regions of total shadow and total illumination." The second meaning of the word is "a partially darkened fringe around a sunspot." The third meaning of the word is "an outlying, surrounding region." This third meaning is the only one that could have any relevance in the phrase "penumbras of the Bill of Rights," and so the use of the word "penumbra" by the Supreme Court should be understood to mean that the right of privacy exists somewhere in the region that surrounds and lies outside of the Bill of Rights. But there is absolutely nothing in the text of the Bill of Rights about any such surrounding or outlying area nor is there any catch-all phrase (like 'other similar rights') indicating that the rights specifically enumerated exemplify a larger class of rights that were not enumerated. Consequently, whatever rights might be found in the phrase 'penumbras of the Bill of Rights' exist only in the mind, contemplation, and imagination of each individual reader and are not part of the constitutional text.

Question: What light does the Fourteenth Amendment shed on this question?

Answer: Not much. Some proponents of a constitutional right of privacy say that it can be found in the "liberty clause" of the Fourteenth Amendment. But the "liberty clause" of the Fourteenth Amendment is identical to the "liberty clause" in the Fifth Amendment; and just as in the case of the Bill of Rights, neither the word 'privacy' nor the phrase 'right of privacy' appears anywhere in the Fourteenth Amendment, much less in the "liberty clause." Furthermore, "liberty" is not a synonym for "privacy" and "privacy" is not a synonym for "liberty." The fact that the Supreme Court has said that the right of privacy could come from the First, Fourth, Fifth, or Fourteenth Amendments strikes me as evidence that the Court is just guessing about where it does come from. [One might add here: even if liberty did include privacy, the Amendments say that liberty can be denied so long as due process is followed—e.g., so long as the law is the product of the normal legislative process.]

Question: Has the Supreme Court attempted to amend the Constitution by finding a right of privacy therein?

Answer: Yes, clearly. The Supreme Court wrote new language into the Constitution. It did not interpret existing language. When dealing with a written document like the Constitution, there are two ways to amend it: (1) you can delete words that already exist therein, or (2) you can add new words not previously included. The latter is what the Supreme Court has done, and this action differs fundamentally from its legitimate task of interpreting and applying existing words and phrases like 'cruel and unusual punishment,' 'due process,' 'public use,' and 'establishment of religion' that appear verbatim either in the text of the Constitution or its amendments.

Question: Does the Constitution give the Supreme Court the power to amend the Constitution?

Answer: No. Neither the Supreme Court (the Judicial Branch of Article III) nor the President (the Executive Branch of Article II) is mentioned in Article V of the Constitution, which defines the process for amending the Constitution.

Question: Where does the ultimate power to make changes or amendments to the Constitution lie?

Answer: As defined in Article V, the power to amend lies with "the People," acting through the Congress and the state legislatures. In our Declaration of Independence, one of the truths we declared to be self-evident is that "governments are instituted among men, deriving their just powers from the consent of the governed." Likewise, it is "We, the People, of the United States" who are expressly denominated as the acting parties in our original Constitution who "do ordain and establish this Constitution for the United States of America."

Our first president, George Washington, in his farewell address to the Nation in 1796, put it as follows:

> The basis of our political systems is the right of the people to make and to alter their constitutions of government. But the Constitution which at any time exists till changed by an explicit and authentic act of the whole people is sacredly obligatory upon all. The very idea of the power and the right of the people to establish government presupposes the duty of every individual to obey the established government.
>
> . . . If in the opinion of the people the distribution or modification of the constitutional powers be in any particular wrong, *let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation*; for though this in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed. (Emphasis added.)

Finally, Chief Justice John Marshall echoed the thoughts of President Washington in his historic opinion in *Marbury v. Madison:*[5]

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected.[6]
>
> This original and supreme will organizes the government, and assigns, to different departments, their respective powers.[7]
>
> From these, and many other selections which might be made, it is apparent, that the framers of the [C]onstitution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.[8]

> Thus, the particular phraseology of the [C]onstitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the [C]onstitution is void; and that *courts*, as well as other departments, are bound by that instrument.[9]

Question: Does the Constitution speak to the circumstance of unenumerated rights?

Answer: Yes, clearly, in the Ninth and Tenth Amendments. The Ninth Amendment in simple plain English says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The right of privacy is not one of the rights enumerated in the Constitution, and consequently, the Ninth Amendment gives us two instructions: first, we are not "to deny or disparage" the existence of a right of privacy simply because it is not enumerated in the Constitution; and second, we are required to recognize that any such right of privacy is "retained by the people." Clearly, a right of privacy exists at some level, but it has not been made subject to the Constitution unless and until the people act to make it so.

Likewise, the Tenth Amendment simply states, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

* * *

The Constitution does not delegate to the Supreme Court (or any other branch of the government) any power to define, apply, or enforce whatever may be the right of privacy retained by the People. Similarly, the Constitution does not prohibit any state in particular, nor all states in general, from defining, applying, or enforcing whatever the people of that state may choose as the right of privacy (*see* U.S. Const. art. III, § 10). Therefore, as the Tenth Amendment clearly provides, the power to define, apply, or enforce a right of privacy is "reserved to the States respectively, or to the people." The Ninth and Tenth Amendments are the very heart and soul of the concepts of limited government, separation of powers, and federalism that were the unique contributions of the Constitution to the philosophy and principles of government.

For these reasons, I conclude that by finding a constitutional right of privacy that is not expressly enumerated in the Constitution, the Supreme Court has, in President Washington's words, "usurped" the roles and powers of the People, the Congress, and the state legislatures. Shed of all semantical posturing, the critical issue becomes: Does the Constitution permit amendments by judicial fiat?

I am certainly aware that there are those who take the contrary view, arguing that the Constitution must be a "living, breathing instrument" and that it is right and proper for a majority of the Supreme Court to decide when, where, and how the Constitution needs to be changed so as to be "relevant to modern times." These folks operate on the premise that the Supreme Court is infallible and omnipotent, and that once the Supreme Court has spoken, there is no way to change its ruling. I disagree with that view. But we as a society must decide which view should prevail.

The Supreme Court has on several occasions held that Congress does not have the power to change by legislation what the Supreme Court interprets the Constitution as saying. Similarly, there is nothing in the Constitution that authorizes the President to change a Supreme Court ruling regarding constitutional language. Therefore, to remedy the "usurpation" by the Supreme Court as to a 'right of privacy,' we must go to the highest authority —the People. We must ask the people who ordained and established the Constitution for a declaration as to their consent, one way or the other. The ultimate remedy to this controversy lies not with the individual members of the Supreme Court, but in getting an expression from the People in the form of a national referendum either affirming or rejecting the Supreme Court's actions.

Such a national referendum would be a win-win situation. For those who support the power of five justices to amend the Constitution as they see fit, this referendum would afford the opportunity to demonstrate that a majority of the people in each of a majority of the states agree with the Supreme Court and, therefore, that the right of privacy should be treated as a part of the Constitution, just as if it had been adopted by the amendment process in Article V.

On the other hand, for those of us who believe the Supreme Court has usurped the power of the People to consent or not to consent to a constitutional change, a national referendum would afford the opportunity to demonstrate that a majority of the people in each of a majority of the states reject the power of the Supreme Court to make constitutional changes. The will of the People would then override any judicially fabricated constitutional amendment, and the right of privacy would not be treated as part of the Constitution.

This referendum could be called by Congress and placed on the ballot. Such a referendum would reflect the will of all of the people, not just the view of a very small sample as is reflected in private polls.

This controversy has now been brewing for more than thirty years with little sign of resolution. But as more of the general public (the People) become fully informed and aware of the shaky foundation on which the Supreme Court has exercised its power, the pressure mounts to correct this action.

The best thing for our society, our nation, and our federal government would be to settle this controversy one way or another as quickly as possible. The best way, and perhaps the only way, to settle it is to allow all of the people to vote on the proper resolution. Therefore, as a U.S. citizen, I respectfully petition the Congress to call a national referendum to permit the People "to just say no"—or yes—to the Supreme Court's usurpation of the power to amend the Constitution.

Footnotes

[1] 381 U.S. 479 (1965).

[2] *Id.* at 484.

[3] *Id.* at 486 (citations omitted).

[4] 410 U.S. 113, 152-153 (1973).

[5] 5 U.S. 137 (1803).

[6] *Id.* at 176.

[7] *Id.*

[8] *Id.* at 179-80.

[9] *Id.* at 180.

"*Aloha!*," Akaka Bill

*By Gail Heriot**

Hawaii has long been known for its warm and welcoming "Spirit of Aloha." It's hard to believe its politics could be any different. But at least with regard to issues of race and ethnicity, Hawaiian politics falls well short of the Aloha standard.

In a nation in which special benefits, based on race or ethnicity, are part of the political landscape in nearly every state, Hawaii is in a class by itself. Special schools, special business loans, special housing and many other benefits are available to those who can prove their Hawaiian bloodline. "Haole," as some ethnic Hawaiians refer to whites, need not apply. And the same goes for African Americans, Hispanics, or Asian Americans—no matter how long they or their families have lived on the islands.

As explained further below, it is against that background that the proposed Native Hawaiian Government Reorganization Act (known as the "Akaka bill")[1] is best understood. But let's look at it apart from that context first. If passed (and as of late passage seems unlikely any time soon), the Akaka bill would create the institutional framework necessary for the nation's approximately 400,000 ethnic Hawaiians to organize into one vast Indian tribe or quasi-tribe. So organized, it would be considerably larger than any existing Indian tribe.

That would have been a momentous step even if the issue were not tied up with preserving Hawaii's extensive system of special benefits for ethnic Hawaiians. Nevertheless, as of a little over a year ago, few outside of Hawaii had ever heard of the bill and few inside had much knowledge of how it would work. The Akaka bill was a sleeper.

It's not that the bill had no opposition. Indeed, although the entire Hawaiian delegation to Congress supported the bill, the only full-scale poll ever done indicates that ethnic Hawaiians reject the notion of a tribe—48% to 43%—when they are informed that under a tribal government they would not be subject to the same laws, regulations and taxes as the rest of the state. And Hawaiians generally oppose the so-called "reorganization" by an astonishing two-to-one ratio. Nevertheless, perhaps in part on the strength of the bill's popularity among political activists, a version of the bill passed the House of Representatives in a previous Congress. That made the Senate the bill's most serious obstacle, where for years a number of Republican Senators had been working to keep the ill-advised bill off the agenda. But those efforts had been quiet, and as a result of a complex series of parliamentary maneuvers by the bill's supporters by the summer of 2005 they had faltered. The bill appeared to be headed for a vote sometime in September. Opponents were not at all certain they could defeat it.

Then came Hurricane Katrina. No time on the Senate floor could be spared for less pressing matters. The Akaka bill would have to wait. That wait might have had a decisive effect. The intervening months created an opportunity for more careful public consideration of the bill. Most notably, after a public briefing, the United States Commission on Civil Rights issued a report on May 18, 2006, which stated the Commission's conclusion very plainly:

> The Commission recommends against passage of the Native Hawaiian Government Reorganization Act of 2005 . . . or any other legislation that would discriminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degree of privilege.[2]

Meanwhile, newspaper columnists were commentating and bloggers blogging. Even radio talk show hosts got in on the act. Slowly, well-informed voters were learning about the Akaka bill. And they often found themselves uncomfortable with it. Finally on June 7, 2006, the Bush Administration formally came out in "strong" opposition to the bill. The next day a petition for cloture was defeated—four votes short of the necessary sixty. The bill is now considered "dead." But in modern political parlance "dead" doesn't mean dead. It means it's gone for a while and its opponents hope it won't come back. Bill supporters are already talking about the return of the bill. It's therefore worth it to look closely at it.

* * *

Supporters point out that the Akaka Bill would not itself create a tribe. Instead it would create, at taxpayer expense, a Commission made up of ethnic Hawaiians with "expertise in the determination of Native Hawaiian ancestry and lineal descendancy." Their task would be to determine whose bloodline justifies membership in the new tribe and whose does not. Federal employees could be detailed to the Commission to assist in the process. Once the official rolls are constituted, the enrolled adults could elect the members of the "interim governing council." The council would in turn eventually make way for the creation of a more permanent (but as yet unnamed) "governing entity." Two additions to the federal bureaucracy—the Office for Native Hawaiian Relations at the Department of the Interior and the Native Hawaiian Interagency Coordinating Group—would be called upon to facilitate the "reorganization" and to deal with the tribe and its government once established. Supporters are thus correct that the Akaka bill does not itself create a tribe. It simply creates the framework. But the distinction hardly seems worth making. It's clear that unless the Akaka bill passes, there will be no Native Hawaiian government or any Native Hawaiian political entity at all.

The legal and constitutional status of Indian tribes has never been clear. Recently, in *United States v. Lara*,[3] Justice Clarence Thomas called upon the Court "to re-examine the premises and logic of our tribal sovereignty cases" and suggested that much of the "confusion" in Indian

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law arises from "largely incompatible and doubtful assumptions" underlying the case law. Indian law is in fact riddled with inconsistencies and difficulties, and the Akaka bill raises some of the most basic questions: Can Congress authorize the Department of Interior to take steps leading to the creation (or even the re-creation) of a new tribe? Or is it limited to recognizing those groups that have been continuously functioning as an independent social and political unit for a significant period of time?

Some would argue that the Akaka bill attempts to create a tribe where none has ever existed. And they have certain facts on their side. Prior to the unification of the Hawaiian Islands under King Kamehameha I in 1812, the islands were a patchwork of warring tribes, not a single unit. By the time of unification, however, Hawaii was already well on its way to becoming a multi-racial society. The Kingdom of Hawaii had sizable numbers of Asian, European and American immigrants. Far from being "outsiders," they were often government officials and close advisors to the crown. The Hawaiian royal family freely intermarried with non-ethnic Hawaiians. Indeed, Queen Liliuokalani herself was married to an American of European descent. In any event, no one would argue that an ethnic Hawaiian political and social unit exists today. An existing political and social unit would have a defined membership. It would have its own laws and legal institutions. Ethnic Hawaiians do not.

It is worth pointing out that the Constitution contains no clear statement of congressional authority to regulate *existing* Indian tribes (as opposed to commerce between the United States and Indian tribes), much less to create or organize additional ones. The authority to regulate existing tribes is sometimes said to derive from the necessity of dealing with reality. The existence of Indian tribes in 1787 (as well as today) is a fact. Surely it was the intention of the framers to confer power on Congress to deal with that reality, whether it's considered a happy reality, an unhappy reality, or something in between—or so the argument runs.

But the power to authorize the creation of new tribes (or even authorize the reorganization of a previously existing tribe) is not merely the practical power to cope with the world as it is. New tribes and newly reconstituted tribes alter the status quo in significant ways. If the power to create them exists, what limits are placed on it? Does Congress have the authority to create an Indian tribe for Mexican Americans in Southern California? The Amish of Pennsylvania? Orthodox Jews in New York? (Religious groups would be among the groups most likely to desire tribal status, since tribes, if they are conceptualized as sovereign or quasi-sovereign entities, are not governed by the Bills of Rights, except insofar as the Indian Civil Rights Act of 1968 imposes that legal responsibility on the tribe.[4] A religious group could thus arguably surmount the Establishment Clause difficulties dealt with by the Supreme Court in *Board of Education of Kiryas Joel School District v. Grumet*, by becoming a tribe).[5]

Even assuming the Constitution permits it, is this a power that Congress really wants to exercise? When other groups seek tribal status in the future, where is the political will to tell them no going to come from?

Advocates of the Akaka bill argue that Congress has reorganized tribes before, so no new ground is being broken. But the best precedent they can point to for their argument doesn't provide the support they need. The example of the Menominee Indian tribe of Wisconsin never reached litigation. But even if it had, it is very different from the Hawaii case. In 1954, during a period in which it was fashionable to favor moving away from the concept of tribal sovereignty, Congress had adopted the Menominee Indian Termination Act,[6] which terminated federal recognition of the Menominee tribe. But the Menominee tribe did not cease to exist as a result. It simply took on a corporate existence under the laws of the State of Wisconsin. In 1973, the Menominee sought and obtained re-recognition in the Menominee Restoration Act.[7] Changes were made to the structure of the group in converting from a corporate back to tribal status. But there was always a structure in place.

* * *

The issue of congressional authority to authorize the creation of a tribal structure where none previously existed recedes in importance, however, beside the issue of racial and ethnic discrimination. Indeed, the desire to legally sanitize Hawaii's vast system of special benefits for ethnic Hawaiians is what drives the push for the Akaka bill. The State of Hawaii's Office of Hawaiian Affairs[8] administers a huge public trust—worth billions of dollars—that in theory benefits all Hawaiians, but for reasons that are both historical and political, in practice, provides benefits exclusively for ethnic Hawaiians. Among other things, ethnic Hawaiians are eligible for special home loans, business loans, housing and educational programs. On the OHA web site, the caption proudly proclaims its racial loyalty, "Office of Hawaiian Affairs: For the Betterment of Native Hawaiians."[9]

The constitutionality of the system has recently been called into question as a result of the Supreme Court's decision in *Rice v. Cayetano*[10] and the Ninth Circuit's decision in *Doe v. Kamehameha Schools*.[11] *Rice* held that Hawaii's election system under which only ethnic Hawaiians could vote for Trustees of the Office of Hawaiian Affairs (identified by the Court as "a state agency") was a violation of the Constitution's Fifteenth Amendment, which prohibits discrimination on the basis of race in voting rights. *Doe* held that the prestigious King Kamehameha schools cannot give ethnic Hawaiians priority over students of all other races and ethnicities for admission without violating 42 U.S.C. Section 1981. Given the results in these cases, it is considered by many to be only a matter of time before other aspects of the OHA's special benefits program will be challenged in court on equal protection and other civil rights grounds and ultimately found contrary to law.

The best hope of those who favor these programs is to transform them from programs that favor one race or ethnicity over others to programs that favor the members of a tribe over non-members. As the Supreme Court held in *Morton v. Mancari*,[12] a case involving a hiring preference for tribal members at the U.S. Bureau of Indian Affairs, such a benefit is "granted to Indians not as a discrete racial group,

but, rather, as members of quasi-sovereign tribal entities." In other words, it's not race discrimination, it's discrimination on the basis of tribal membership.

But *Morton v. Mancari* can't apply to a tribal group that does not yet exist. The very act of transforming ethnic Hawaiians into a tribe is an act performed on a racial group, not a tribal group. When, as here, it is done for the purpose of conferring massive benefits on that group, it is an act of race discrimination subject to strict scrutiny—scrutiny that it might not survive. The proof of all this is apparent if one simply alters the facts slightly. If the State of Hawaii were operating its special benefits programs for whites only or for Asians only, no one would dream that the United States could assist them in this scheme by providing a procedure under which whites or Asians could be declared a tribe and state assets could be thus redirected to the newly created entity.

* * *

Last year, Senator Akaka was asked in a National Public Radio interview whether the sovereign status granted in the bill "could eventually go further, perhaps even leading to outright independence." The question must have seemed extraordinary for anyone unfamiliar with the growing strength of the push for Hawaiian independence. Back in the 1970s, its supporters were considered kooks and lunatics. But today, perhaps as a result of the general multi-cultural movement, although nowhere close to a majority, they are too numerous to be dismissed as crazy. If you drive down a country road in Hawaii, it's surprisingly easy to see an upside down Hawaiian flag, the symbol of the movement, flying over someone's home. Even more extraordinary was Akaka's answer: "That could be. That could be. As far as what's going to happen at the other end, I'm leaving it up to my grandchildren and great-grandchildren."

It's impossible to know, of course, whether the passage of the Akaka bill would have led to serious pressure for Hawaiian independence or whether it would have led to demands for tribal status for other American groups. What seems likely is that it would have added to the pressures that already divide Americans. Fortunately, for now, its passage seems unlikely.

FOOTNOTES

[1] S. 147.

[2] The Native Hawaiian Government Reorganization Act of 2005: A Briefing Before the United States Commission on Civil Rights Held in Washington, D.C., January 20, 2006 at 15.

[3] 541 U.S. 193, 214 (2004).

[4] 25 U.S.C. Sec. 1301-1303.

[5] 512 U.S. 687 (1994).

[6] 25 U.S.C. sec. 891-902.

[7] 25 U.S.C. sec. 903a(b), 903b(c).

[8] *See* HAW. CONST. art. XII, §. 5.

[9] http://www.oha.org.

[10] 528 U.S. 495 (2000).

[11] 416 F.3d 1025 (9th Cir. 2005), *reh'g en banc* Doe ex rel. Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate, 441 F.3d 1029 (9th Circ., Feb. 22, 2006).

[12] 417 U.S. 535 (1974).

Corporations

Twombly: Naked (Alleged) Conspiracy Does not Strip Freedom of Unilateral Action

*By John Thorne**

When the Supreme Court hears *Bell Atlantic Corp. v. Twombly* this fall, it will confront both a fundamental issue of pleading law in an antitrust context and an important question of substantive antitrust law at the pleading stage. The case could throw open the door to vexatious litigation, or the Court could affirm district courts' authority to dismiss abusive lawsuits—before plaintiffs have the opportunity to impose massive discovery costs—by insisting that plaintiffs plead facts that demonstrate an entitlement to relief. The case could impose a tax on ubiquitous business conduct by turning all "parallel" conduct into fair game for enterprising plaintiffs' lawyers, or the Court could protect the important antitrust principle that parallel but unilateral conduct is lawful, thereby reinforcing a trend of antitrust decisions that preserve individual economic actors' freedom to behave in ways that are efficient without concern about baseless but costly litigation.

The case began when plaintiffs—representatives of a purported class of virtually everyone in the United States—filed a complaint alleging that the major local telephone companies "conspired" to suppress competition. That complaint— prepared by the Milberg, Weiss law firm— rested on two sets of allegations. First, plaintiffs alleged that defendants had refused to render sufficient assistance to new competitors, failing to live up fully to the expansive regulatory obligations imposed by the FCC under the Telecommunications Act of 1996 (and later vacated by the courts). Second, plaintiffs alleged that defendants had refrained from "meaningful" competition in one another's traditional service territories, even though such entry opportunities were supposedly attractive business opportunities.

The district judge—Gerard Lynch, a former prosecutor, Columbia Law School professor, and highly respected jurist —dismissed the complaint. The district court noted that antitrust laws draw a basic distinction between lawful unilateral action and conspiratorial conduct. Accordingly, when a complaint seeks to draw an inference of agreement from allegations of otherwise lawful parallel conduct "the basic requirement that plaintiffs must fulfill is to allege facts that, given the nature of the market, render the defendants' parallel conduct, and the resultant state of the market, suspicious enough to suggest that defendants are acting pursuant to a mutual agreement rather than their own individual self-interest."[1] Judge Lynch carefully explained why the allegations in the *Twombly* complaint failed to meet that standard: rational businesses are expected to resist demands that they share assets with rivals, and *non*-entry—particularly in a new business that plaintiffs themselves alleged was fraught with risk—is a perfectly reasonable exercise of self-interest on entirely unilateral grounds.

The Second Circuit reversed, finding that Judge Lynch's careful analysis was simply unnecessary. Instead, it held that allegations of parallel conduct (that is, the claim that rivals or potential rivals acted in a similar way), combined with a conclusory allegation of "conspiracy," will almost always suffice to state a claim under Section 1 of the Sherman Act. Thus, "to rule that allegations of parallel anti-competitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is *no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence."[2] That standard, which relies not on the facts alleged but on un-alleged facts that might be proved, would allow virtually any allegation of parallel conduct to proceed to discovery, because it is almost always true that parallel behavior *could* have been the product of agreement. The Second Circuit quickly decided that Twombly's claims could proceed, without examining whether the facts alleged supported to any extent an inference of conspiracy.

The Supreme Court granted certiorari in June.

Giving Courts Tools To Control Abusive Litigation

As a case about pleading standards, *Twombly* will clarify the authority of district judges to insist that plaintiffs plead sufficient facts to show that they have a genuine claim before allowing a potentially massive factual controversy to proceed. For half a century, since *Conley v. Gibson*,[3] the Court has made clear that Rule 8's requirement of a "short and plain statement" showing "that the pleader is entitled to relief" does not demand *evidentiary* detail. At the same time, legal conclusions—that is, bare allegations that the law has been violated—are insufficient. Under Rule 12, a court accepts well-pleaded facts as true in evaluating the sufficiency of the complaint. But it need not accept the inferences that plaintiffs seek to draw from well-pleaded facts. Drawing these lines is critical to ensuring that a complaint serves its basic functions under the Civil Rules. First, only by disregarding merely conclusory allegations and rejecting unwarranted inferences can the district court ensure that the plaintiff has a *factual* basis for some cognizable legal claim: nothing is easier than claiming that a defendant violated some legal standard if the underlying facts are not revealed. Second, only by insisting on pleading of the key material facts can the district court ensure that the complaint

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provides a defendant notice of the nature of the claim against it.

The threshold question in *Twombly* is whether plaintiffs' allegation that defendants "conspired"—combined with allegations of otherwise lawful parallel conduct—is enough to satisfy Rule 8. It is long settled that, under Section 1 of the Sherman Act, parallel but unilateral conduct is lawful, while concerted action is subject to scrutiny if it unreasonably restrains trade. The complaint in *Twombly* alleges in so many words that defendants conspired, but it includes no *direct* allegations that support that claim: it does not identify the time, place, participants, form, or mechanism of the conspiracy. The Second Circuit held that the bare allegation of conspiracy was enough. That puts the line between conclusory allegation and well-pleaded fact in the wrong place. As Judge Michael Boudin of the First Circuit has observed, an allegation of "conspiracy" is "border-line": standing alone—that is, without more specific facts to support it—such an allegation, even if it is "factual" in form, is actually a warning sign that the plaintiff has launched a baseless complaint—a "fishing expedition." For that reason, the court should treat such an allegation as a mere legal conclusion, the invocation of the governing standard that need not, without more, be accepted as true for purposes of evaluating the sufficiency of the complaint. The court can then consider whether the *facts* are sufficient to meet Rule 8.

In all legal contexts, the need for courts to distinguish between factual allegations, on the one hand, and legal conclusions and unwarranted inferences, on the other, is prompted by the most fundamental policies underlying our system of private civil litigation. The aspiration of the Federal Rules is (as Rule 1 says) "to secure the just, speedy, and inexpensive determination of every action." In keeping with that goal, Rule 8(f) directs that "all pleadings shall be so construed as to do substantial justice." Fifty years ago, in *Conley v. Gibson*, the Supreme Court elaborated that pleading should not be treated as a "game of skill" but instead should "facilitate a proper decision on the merits."

These principles do not favor plaintiffs in every case. In *Twombly*, it is the plaintiffs that are treating pleading as a game of skill in which they seek to impose massive discovery costs on defendants through artful pleading. The basis for cases like *Twombly* is not a reasonably grounded actual suspicion of wrongdoing or expectation that a trial on the merits will yield success, but a bet that the thinnest of allegations, with the greatest of legal consequences, will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation—what Judge Henry Friendly, in his book *Federal Jurisdiction*, called "blackmail settlement."[4] Consumer class-action litigation can impose particularly strong pressure in this regard. In such cases, discovery costs are borne disproportionately by defendants, particularly in the early stages of litigation, when compliance with massive document requests can cost a large corporation millions of dollars and distract employees from more productive tasks. And, if a class is certified, even a very low probability of recovery may be enough to force a settlement that is not only unjust, but benefits consumers not at all, serving only to make a few lawyers rich.

The federal rules do not require district courts to countenance such harmful litigation. To the contrary, district judges are authorized, and should be encouraged, to apply pleading standards with sensitivity to the underlying legal standards and policies and practical litigation realities. Yet the Second Circuit in *Twombly* repudiated that approach, even while acknowledging the deleterious consequences.

Protecting Efficient Unilateral Action

What has been said so far is largely independent of the antitrust context, but the *Twombly* case implicates specific antitrust policy issues as well. The Second Circuit's opinion, in recognizing that the "conspiracy" charge in the case is an entirely conclusory label that any plaintiff could attach, effectively treated mere pleading that defendants engaged in parallel conduct as enough to merit discovery. The Second Circuit thus seemed to suggest that there is something inherently suspicious about parallel conduct. That is wrong as a matter of basic economics; and the Second Circuit's mistaken approach threatens to inflict substantial costs on the economy by distorting unilateral business judgments.

The Supreme Court has made clear that, to support a claim of conspiracy under Section 1, a plaintiff must do more than show that conspiracy is one possible explanation for parallel conduct: rather, the Supreme Court held in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*[5] that a plaintiff seeking to prove a conspiracy through circumstantial evidence must "present evidence that tends to exclude the possibility that the alleged conspirators acted independently." Parallel conduct does not, in general, provide a sound basis to infer that defendants are engaged in concerted action. As the district court in *Twombly* correctly noted, "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions."[6] In perfectly competitive markets, economists expect that competing firms will routinely act in parallel with each other, responding similarly to similar market-affecting phenomena. In imperfectly competitive markets as well, firms that are all seeking to maximize profits subject to similar constraints tend to make similar decisions. Of course, firms may also engage in parallel behavior as a result of a conspiracy. But because there are other more common sources of parallel behavior, mere allegations of parallel behavior do not, as a matter of logic, tend to exclude the possibility that defendants acted unilaterally.

Nevertheless to allow mere allegations of parallel conduct to proceed to discovery would impose significant costs on the economy and, thus, on consumers. Plaintiffs could pursue class action cases against companies based only on garden-variety economic behavior such as raising prices in response to higher demand or reducing capacity in response to shrinking demand. The cost of litigating (and settling) such cases is likely to be substantial in the aggregate. But such costs could be just the tip of the iceberg. Expected litigation and settlement costs are one of the factors that businesses consider in making decisions. If allegations of parallel conduct are allowed to proceed to discovery,

businesses will face an effective litigation "tax" in making the same efficient decisions as their competitors. At the margin, this tax will deter businesses from responding efficiently to changes in costs, demand, or technology.

The district court in *Twombly* recognized that in addition to allegations of parallel action, a plaintiff must allege facts that tend to exclude the possibility of unilateral action. In particular, the question is whether the alleged actions would be contrary to the individual self-interest of the defendant *absent* agreement: if it would not be, then, unless there are other facts, there is no reason to think that the defendants' conduct was the result of conspiracy rather than individual self-interest. Courts can draw on the common-law-like development of antitrust in evaluating such allegations. For example, antitrust law recognizes that failure to enter new markets (thus preserving an existing pattern of distribution) is hardly ever suspicious, because new ventures are always risky, capital is scarce, and a business can pursue only a small fraction of available business opportunities. Twombly's allegation that the local telephone companies' failure to compete "meaningfully" as new entrants (relying on a new, unstable, and ultimately fruitless business model) must be evaluated against that backdrop.

The need to protect parallel but unilateral conduct from attack by plaintiffs raising frivolous claims reflects a fundamental trend in the Supreme Court's antitrust jurisprudence, a trend towards protecting freedom of unilateral action. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[7] the Court adopted a rule that was strongly protective of firms' ability to cut prices, even if such price cuts make it more difficult for competitors to survive. In *NYNEX Corp. v. Discon, Inc.*,[8] the Court refused to impose limitations on monopolists' ability to switch suppliers. Most recently, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*,[9] the Court emphasized the positive antitrust importance of allowing firms to invest without facing later obligations to share assets with rivals. These decisions are *categorical*. As the Seventh Circuit, speaking through Judge Easterbrook, recently explained in *Schor v. Abbott Laboratories*,[10] clever economists can always construct models showing potential market harms, but if the circumstances are too rare, it is important to have categorical per se rules of legality anyway. The *Twombly* case fits that mold: by allowing allegations of parallel conduct to proceed under Section 1, the Second Circuit standard risks distorting business judgments and deterring efficient conduct. Such a standard would thus disserve basic antitrust policies, and the Supreme Court should reject it.

Footnotes

[1] Twombly v. Bell Atlantic Corp., 313 F. Supp. 2d 174, 182 (S.D.N.Y. 2003).

[2] Twombly v. Bell Atlantic Corp., 425 F.3d 99, 114 (2d Cir. 2005).

[3] 355 U.S. 41 (1957).

[4] Henry Friendly, Federal Jurisdiction: A General View 120 (1973).

[5] 475 U.S. 574, 588 (1986).

[6] 313 F. Supp. 2d at 179.

[7] 509 U.S. 209 (1993).

[8] 525 U.S. 128 (1998).

[9] 540 U.S. 398 (2004).

[10] 457 F.3d 608, 612-13 (7th Cir. 2006).

United States v. Stein: Unconstitutionality of Prosecutorial Consideration of a Corporation's Advancing Legal Expenses to Employees in Corporate Charging Decisions

*By Robert T. Miller**

In the March issue of *Engage* George J. Terwilliger III and Darryl S. Lew treated at length certain aspects of the Department of Justice's guidelines for prosecuting business organizations.[1] Binding on the various United States Attorneys[2] and embodied in a 2003 memorandum written by Deputy Attorney General Larry D. Thompson entitled *Principles of Federal Prosecution of Business Organizations* (Thompson Memorandum), these guidelines made a business organization's cooperation with federal prosecutors a significant factor in the prosecutor's decision to charge the entity itself and not merely the individual employees or agents responsible. Terwilliger and Lew considered those provisions of the Thompson Memorandum under which prosecutors may demand (and very often receive), as part of a corporation's cooperation with prosecutors, waivers by the corporation of attorney-client and attorney work-product privileges, especially as pertains to documents generated by outside counsel in a special investigation of the underlying wrongdoing.

Related provisions of the Thompson Memorandum state that another factor to be weighed by prosecutors in determining whether a business organization has cooperated with the government is "whether the corporation appears to be protecting its culpable employees and agents," including by its support "to culpable employees and agents . . . through the advancing of attorneys fees."[3] A footnote adds that, when a corporation is legally required to advance such fees, its doing so would not be considered a failure to cooperate.[4] In *United States v. Stein*, Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York held last June that the provisions of the Thompson Memorandum on the advancement and indemnification[5] of legal fees for corporate employees and agents, as well as certain actions by prosecutors in the *Stein* case related thereto, violated the Due Process Clause of the Fifth Amendment and the Right to Counsel Clause of the Sixth Amendment.

I. Factual Background

Stein and his codefendants were partners and employees of KPMG, one of the world's largest accounting firms and a Delaware limited partnership. In 2002, the Internal Revenue Service (IRS) issued summonses to KPMG in connection with its investigation of certain tax shelters that KPGM had designed and marketed. By some accounts, wrongdoing in connection with these shelters amounted to the largest tax fraud in American history,[6] with the United States Treasury having been defrauded of as much as $2.5 billion.[7] KPMG responded to the IRS investigation in part by cleaning its corporate house, including by asking certain senior partners to leave the firm. Stein was one of these partners, and his separation agreement with the firm provided that Stein would be represented, at the firm's expense, in any proceedings against him, KPMG or other KPMG personnel, in connection with KPMG's business. The IRS investigation ultimately led to a federal criminal prosecution of Stein and others by the United States Attorney's Office for the Southern District of New York (USAO).

Prior to the instant case and for as long as KPMG could determine, KPMG had paid the legal fees and expenses, both pre-indictment and post-indictment, without any limitations or conditions, of all its agents and employees in connection with matters within the scope of their employment at KPMG. The court found, however, that even before KPMG's counsel first discussed the matter with the USAO, "the Thompson Memorandum caused KPMG to consider departing from its long-standing policy of paying legal fees and expenses of its personnel in all cases and investigations."[8]

KPMG's desire to satisfy the USAO that it was cooperating with its investigation is easy enough to understand. It had before its eyes the example of Arthur Andersen, LLP, a similar leading accounting firm, which collapsed after being indicted in connection with the Enron scandal (Arthur Andersen's conviction was eventually overturned by the United States Supreme Court).[9] As was the case with Arthur Andersen, any indictment of KPMG would likely trigger additional regulatory investigations, lead to the suspension of licenses, make the firm ineligible to bid for government contracts or participate in many federally funded programs, and scare away key personnel and clients. Indeed, no major financial services firm has ever survived a criminal indictment.[10]

At an early meeting between KPMG's counsel and representatives of the USAO, the USAO representatives "deliberately, and consistent with DOJ policy, reinforced the threat inherent in the Thompson Memorandum," implying that "compliance with legal obligations [to advance legal fees] would be countenanced, but that anything more than compliance with demonstrable legal obligations could be held against the firm"[11] in the USAO's charging decision. After this meeting, KPMG determined that it had no legal obligation to pay legal fees of its agents and employees (a determination that, the court notes, was vitiated by an obvious conflict of interest as between KPMG and its employees and agents), and it decided that it would (a) expressly condition all payment of legal fees for its employees and agents on their cooperation with the

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government to the USAO's satisfaction, including by admitting their own criminal wrongdoing, (b) limit payment of fees and expenses per agent and employee to $400,000, and (c) immediately cut-off all payments of legal fees and expenses to any employee or agent who was indicted. "Absent the Thompson Memorandum and the actions of the USAO," Judge Kaplan concluded, "KPMG would have paid the legal fees and expenses of all its partners and employees both prior to and after indictment, without regard to cost."[12]

Eventually, KPMG convinced the DOJ not to indict the firm, in part because, as KPMG's chief legal officer put it, KPMG was "able to say at the right time with the right audience, [it was] in full compliance with the Thompson Memorandum."[13] Instead, KPMG and the Government entered into a deferred prosecution agreement pursuant to which KPMG agreed to waive indictment, to be charged in a one-count information, admit wrongdoing, pay $456 million in fines, and accept certain restrictions on its practice.[14] For its part, the Government agreed that it would seek dismissal of the information if KPMG abided by the terms of the agreement.[15]

Stein and other indicted former KPMG partners and agents moved to dismiss the indictment and for other relief, alleging that government's pressure on KPMG to cut off advancement and indemnification of their legal fees and expenses violated various provisions of the United States Constitution.

II. The Court's Analysis

Judge Kaplan begins by considering employers' advancement and indemnification of legal fees and expenses generally, noting that it is a common law rule of agency that losses or costs incurred by an agent acting within the scope of employment may be recovered from the agent's principal, including expenses incurred in defending a lawsuit,[16] and observing that all states currently have statutes authorizing, in some form or other, corporations (and, often, other business organizations) to advance legal fees and expenses to their agents and to indemnify them for the same.[17] Although not reaching the question, Judge Kaplan strongly suggests that, whether in contract or under statute, Stein and other defendants in the case would have an enforceable legal right to advancement and indemnification of their legal fees and expenses from KPMG. In any event, he concludes that, based on KPMG's past practice, they had every right to expect that KPMG would advance and indemnify their legal fees and that, as noted above, but for the Thompson Memorandum and the actions of the USAO thereunder, KPMG would have done so.

Judge Kaplan then reviews the Supreme Court's jurisprudence on the right to fairness in criminal process, emphasizing that "the required fairness protects the autonomy of the criminal defendant," including "the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire."[18] A defendant has a right "to use his or her own assets to defend the case, free of government regulation."[19] "The underlying theme," Judge Kaplan says, "is that the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case."[20]

A. Fifth Amendment Substantive Due Process Analysis

Judge Kaplan begins his formal analysis by suggesting that a right to fairness in criminal process is a fundamental liberty interest entitled to substantive due process protection, meaning, in particular, that any government encroachment on that right would be subjected to strict judicial scrutiny,[21] and he notes that a right to fairness in criminal process surely meets the *Washington v. Glucksberg* criterion of being among those "fundamental rights and liberties which are deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty."[22]

It will undoubtedly strike many as odd that a right to *fairness in procedure* is guaranteed by *substantive* due process, and the authorities that Judge Kaplan cites for this proposition are rather meager.[23] In fact, it would seem that the weight of authority is rather against such a proposition. In *Albright v. Oliver*,[24] the Supreme Court considered a § 1983 civil rights action in which the plaintiff alleged that his arrest without probable cause violated his substantive due process rights. The Court affirmed dismissal of the case, and Chief Justice Rehnquist, writing for a plurality of the Court, concluded that the plaintiff would have to allege a violation of his rights against unreasonable seizure under the Fourth Amendment, not a violation of his substantive due process rights. "It was through these provisions of the Bill of Rights," the Chief Justice wrote, "that their Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations. Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims."[25] Following *Albright*, it would seem that the defendants in *Stein* would have to allege that the government violated not their substantive due process rights but their right to counsel under the Sixth Amendment. As explained below, however, there were serious obstacles to such an argument in this case. It is thus understandable that Judge Kaplan would want to find another constitutional basis for his ultimate decision, and the analytic framework of strict judicial scrutiny—a determination of the normative importance of the end that government action serves and the closeness of the connection between that end and the means adopted to effect it—provides useful categories with which to approach the facts in the case. Nevertheless, Judge Kaplan does not discuss *Albright*, or even the more general proposition that substantive due process rights may not be invoked when there are specific guarantees in the Bill of Rights relevant to the case, and this is a serious analytic flaw in the opinion.

In any event, having suggested that fairness in criminal process is a fundamental liberty interest entitled to substantive due process protection, Judge Kaplan nevertheless backs away from this sweeping claim and concludes more modestly that "it is not necessary or, in this

Court's view, appropriate, to go that far in order to decide this case."[26] Rather, "courts should decide no more than is necessary. And the only question now before the Court is whether a criminal defendant has a right to obtain and use in order to prepare a defense resources lawfully available to him or her, free of knowing or reckless government interference."[27] It is this right that Judge Kaplan finds is protected by substantive due process. Of course, this compounds the problem of analyzing the case in terms of substantive due process, for, although a right to fairness in criminal process easily meets the *Glucksberg* criterion of being deeply rooted in the nation's history and tradition, the more limited right that Judge Kaplan describes is not one we find often discussed in the nation's history and tradition (the case, after all, is a novel one), and this entails that the more particularized right is not, at least so obviously, among those meeting the *Glucksberg* criterion.

Note too that, since Judge Kaplan did not reach the question of whether the individual defendants had enforceable legal rights to advancement and indemnification of legal fees and expenses from KPMG, the resources referred to in Judge Kaplan's description of the right are not limited to resources to which the defendant has a legal right. In the full context of the case, the relevant resources include any resources that, but for knowing or reckless government action, would have been available to the defendant. Judge Kaplan never puts it in these terms, but we seem to be left with a fundamental right of criminal defendants, protected against knowing or reckless government interference, to obtain and use in preparing their defense resources that, but for the government's action, could reasonably be expected to be obtainable by such defendants.

Since Judge Kaplan holds that the right in question is a fundamental right, he subjects the Government's actions in the case to strict scrutiny, testing whether such actions served compelling governmental interests by narrowly tailored means.[28] He considers three possible such interests: (a) the making of "just charging decisions concerning business entities by focusing on a consideration pertinent to gauging their degrees of cooperation,"[29] (b) strengthening "the government's ability to investigate and prosecute crimes by encouraging companies to pressure their employees to aid government,"[30] and (c) punishing, in the words of the Thompson Memorandum, "culpable employees and agents"[31] by depriving them of aid from their employers or former employers.[32] Judge Kaplan disposes of this last objective, which seems to be the purpose that looms largest in the Thompson Memorandum itself and in the minds of some prosecutors, with particular rapidity and with a sharp reminder to prosecutors that "[p]unishment is imposed by judges subject to statute. The imposition of economic punishment by prosecutors, before anyone has been found guilty of anything, is not a legitimate government interest—it is an abuse of power."[33]

The Government's other asserted interests Judge Kaplan holds are compelling, but he concludes that the means the government has adopted to advance them are not narrowly tailored. He points out that there is no inconsistency between an entity's cooperating with the government and simultaneously paying defense costs of individual employees,[34] and he suggests several rational objectives a business organization may have in making such payments beyond attempting to thwart the government's investigation, including attracting and retaining competent and honest employees and recognizing that employees may have a just claim on the assistance of the entity even in the absence of a legal right.[35] The government's chosen means here—holding it against a corporation that it is advancing and indemnifying legal fees and expenses, in the absence of a legal duty to do so, to individual employees whom the prosecutors deem culpable—are not narrowly tailored to the objective of fairly investigating and prosecuting crimes. The means would be narrowly tailored, Judge Kaplan suggests, if the government were to take payment of legal fees into account in making charging decisions "only where the payments are part of an obstruction scheme."[36] The USAO in fact asserted that such was its working understanding of the Thompson Memorandum, but Judge Kaplan concluded that if this were so, "it would be easy enough [for the Thompson Memorandum] to say so. But that is not what the Thompson Memorandum says."[37]

B. Sixth Amendment Right to Counsel Analysis

Judge Kaplan next turns to the defendants' Sixth Amendment Right to Counsel claims. He begins by disposing of two preliminary arguments from the USAO. First, the USAO argued that since the Sixth Amendment Right to Counsel attaches only upon initiation of a criminal proceeding, such as at arraignment or indictment, and since the adoption of the Thompson Memorandum and other actions by the USAO complained of occurred prior to the indictment of Stein and the other defendants, the Sixth Amendment Right to Counsel is inapplicable. Admitting that the Right to Counsel "typically attaches at the initiation of adversarial proceedings," Judge Kaplan nevertheless concludes that the DOJ adopted the Thompson Memorandum, and the USAO took related actions, either with the intention that they have, or with the knowledge that they were likely to have, "an unconstitutional effect upon indictment."[38] Although this section of the opinion is not entirely clear, the idea seems to be that if the government acts pre-indictment, either knowingly or recklessly, in a way that impairs the defendant's ability to engage counsel of his or her choice with funds that would, but for the government's action, be available to the defendant, the post-indictment effect of such action is sufficient to implicate the Sixth Amendment Right to Counsel. Apparently, the rule is that the government may not act intentionally or recklessly pre-indictment to produce an effect post-indictment such that, if the government acted post-indictment to produce such effect, the government's action would violate the defendant's Sixth Amendment Right to Counsel. The brevity and lack of complete clarity in this part of the opinion is unfortunate, for to the extent that one concludes, following *Albright*, that the case should have been dealt with under the Sixth Amendment, this Sixth Amendment analysis becomes correspondingly more important, and the argument Judge Kaplan gives here is certainly somewhat novel.

The USAO also argued that the individual defendants "have no right to spend . . . 'other people's money' on expensive defense counsel" and thus in particular no rights under the Sixth Amendment that may have been violated by government action.[39] Here too Judge Kaplan's analysis is not especially convincing. After noting that defendants "had at least an expectation that their expenses" would be paid by KPGM, he says that "the law protects such interests from unjustified and improper interference,"[40] which may well be true, but the question, of course, is whether the Thompson Memorandum and related actions by government actors in fact were "unjustified and improper." Not entering into that question, Judge Kaplan concludes, "Thus,"—it is very difficult to see how any conclusion follows here—"both the expectation and any benefits that would have flowed from that expectation—the legal fees at issue—were, in every material sense, [the defendants'] property."[41] This seems to make matters worse, for whatever else the defendants' interest may be in having KPMG pay their legal fees and expenses, Judge Kaplan chose to decide the case without determining whether the defendants had a legal right to such payment, and absent a legal right, it is hard to see how they might have a *property* interest in such payment.

What Judge Kaplan ought perhaps to have said here was that, even assuming that the defendants had no legal right against KPMG to pay their legal fees and expenses, they did have a right against the government not to interfere with KPMG's decision whether to pay those expenses, at least where the government's interference was not based on KPMG's obstructing the government's investigation. It is perfectly possible for someone to have no right to something but also have a right not to be interfered with in his attempt to obtain it. In the famous example given by H.L.A Hart, a man may have no right to a ten dollar bill lying on the sidewalk, but he does have a right not to be tripped as tries to pick it up.[42] Something similar may be the case here, but Judge Kaplan's analysis does not quite make that clear.

Having disposed of these preliminary arguments and having concluded that the government's actions impinged on the defendants' Sixth Amendment rights, Judge Kaplan holds that government "[i]nterference with these rights is improper if the government's actions are wrongfully motivated or without adequate justification."[43] To determine whether such justification exists, Judge Kaplan notes that courts have looked to the common law of torts concerning interference with prospective economic advantages, and, "[m]aking appropriate adjustments for the fact that this analysis involves the public sector, the dispositive question is whether the government's law enforcement interests in taking the specific actions in question sufficiently outweigh the interests of the [defendants] in having the resources needed to defend as they think proper against these charges."[44] As ought be expected in applying this kind of balancing test, Judge Kaplan describes the interests at stake—the individual's interest in obtaining resources to defend the criminal action, the government's interest in thwarting occasional obstruction schemes—and concludes without further analysis that the former outweighs the latter.[45] This is not especially illuminating, but neither are most applications of balancing tests. They generally involve not so much the balancing of ends whose weights are already known but rather a decision as to which end ought outweigh another.

C. Remedies

Having determined that the defendants were not required to establish prejudice (and, if they were, that it would be present in any case),[46] Judge Kaplan next considers the question of remedies. The defendants had requested dismissal of the indictments, or, in the alternative, an order to either the Government or KPMG to advance and indemnify their legal fees and expenses.[47] Holding that dismissal of an indictment is an extreme and drastic remedy that ought not be considered unless there is no other way to restore the criminal defendant to the position he or she would have been in but for violation of a constitutional right,[48] Judge Kaplan concludes that the defendants "can be restored to the position they would have occupied but for the government's constitutional violation if defense costs already incurred and yet to be incurred are paid,"[49] and thus decides that consideration of dismissal would be premature.

As to the monetary remedy, Judge Kaplan holds that monetary relief against the government is precluded by sovereign immunity,[50] but he allows such relief against KPMG, which, although it was not a party to the action, had been afforded an opportunity to be heard.[51] Judge Kaplan suggests that KPMG ought not lack incentives to advance the fees and expenses because the Government, which has great leverage over KPMG under the deferred prosecution agreement, may well want KPMG to advance and indemnify the fees and expenses "to avoid any risk of dismissal of the indictment or other unpalatable relief."[52] In accordance with Judge Kaplan's decision, the individual defendants have initiated a suit against KPMG for advancement and indemnify.[53]

III. Evaluation and Conclusion

Although the conclusion Judge Kaplan reaches is attractive as a matter of public policy, the constitutional arguments he relies on are problematic. Finding a *substantive* due process right, whether to fairness in criminal procedures generally or to obtain and use resources otherwise available to defendants absent government interference, seems to run afoul of *Albright*, a case that Judge Kaplan never discusses. *Albright* had no majority opinion, but the argument in Chief Justice Rehnquist's plurality opinion, seconded in a concurrence by Justice Scalia, seems essentially right: criminal defendants cannot use substantive due process to create new procedural rights not already guaranteed by the Bill of Rights. Because "the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended,"[54] such defendants must rely on "an explicit textual source of constitutional protection."[55] If we accept that premise, then *Stein* must presumably be understood as a Sixth Amendment Right to Counsel case. As such, the case would surely be novel, but the novelty is unavoidable no matter how the case be understood. Judge Kaplan's inchoate argument that the Government's pre-

indictment actions to deprive the defendants of resources they could have used post-indictment to engage counsel is suggestive, but it is not developed sufficiently in the opinion to justify the result Judge Kaplan reaches in the case.

A factor in this case much more important than appears from Judge Kaplan's opinion was the tremendous power that the USAO had over KPMG. For, if the USAO had indicted KPMG, then KPMG would, in all human probability, have collapsed just as Arthur Andersen had done. Especially for a financial services firm, a criminal indictment is, as many have observed, a corporate death sentence, triggering a virtually unstoppable cascade of regulatory investigations, license suspensions, debarments from bidding on federal contracts or participating in federally funded programs, and defections of key personnel and clients. Such an indictment is, moreover, effectively within the sole discretion of the prosecutor, and from it there is no meaningful appeal. As many people have also noted, this is an anomaly in the law. If the government wants to fine a corporation a trivial amount of money, it must prove its case in court beyond a reasonable doubt, but if the government wants to bankrupt the corporation and permanently end its business, it may do this simply by indicting the firm. The obvious result is that, in extracting deferred prosecution agreements, the bargaining power is almost entirely on the side of the prosecutors. KPMG was thus prepared to do practically anything to avoid indictment.

The issue presented in *Stein* can helpfully be viewed as whether the government ought be allowed to leverage this power over a corporate defendant into additional power over individual defendants in the same case. As Judge Kaplan observed in the decision, defending against charges involving extremely complex financial and tax frauds like those at issue in *Stein* requires prolonged attention from very sophisticated legal counsel, extensive review of documents, participation in exceptionally long trials, and the hiring of expert witnesses.[56] The kinds of firms that engage in activities that may involve such frauds generally have the resources to put on such defenses; with limited exceptions, the individual agents and employees of such firms do not. Since the government's power over the corporate defendant is anomalous and disproportionate in the first place, allowing the government to leverage that power in a way that deprives individual defendants of the only means they likely have to put on a defense adequate to the case seems clearly wrong. It takes an instance in which the imbalance of power between the government and a criminal defendant is already too great and expands the disparity to include other defendants as well. Whatever one may think of the details of Judge Kaplan's reasoning, the result is clearly correct from a policy point of view.

Perhaps the worst aspect of the Government's conduct, first in adopting the Thompson Memorandum and then in implementing it as it did in *Stein*, was a pervasive confusion between, on the one hand, what the interests of justice and the criminal justice system required, and, on the other, what made it easier for prosecutors to obtain convictions and made their individual lives more convenient. The fundamental premise of the Thompson Memorandum was that "a corporation's promise of support to culpable employees and agents . . . through the advancing of attorneys fees" (absent a legal obligation on the part of the corporation to provide such support)[57] tends to imply that the corporation is not cooperating with the government's investigation. But there is an important ambiguity here. Cooperating is always cooperating with respect to some end or other, and the Thompson Memorandum leaves the end unspecified. If the end is merely the attaining of convictions, then by advancing legal fees for its agents and employees, a corporation is indeed not cooperating with the government, for clearly advancing legal fees makes it harder for the government to obtain convictions in the sense that well-represented defendants are harder to convict than poorly-represented or unrepresented ones. Life would be so much easier for prosecutors, of course, if defendants had only cheap and low-quality legal counsel or, better yet, no counsel at all. In this regard, it is telling that prosecutors from the USAO at one point objected to a memorandum KPMG sent to its employees on the basis that the memorandum did not emphasize to the USAO's satisfaction that, in meeting with government investigators, KPMG employees not need to be represented by counsel.[58] If the end that the corporation's cooperation is to serve is the mere attaining of convictions, therefore, its advancing legal fees for its agents and employees amounts to interference with the government, not cooperation.

But the legitimate interest of the government in criminal proceedings "is not that it shall win a case, but that justice shall be done."[59] Hence, if the end towards which the corporation is to be cooperating with the government is doing justice in criminal proceedings, then the corporation's advancing legal fees and expenses for its agents and employees—so far from being a failure to cooperate—is in fact an important act of cooperation towards the relevant end. For, providing criminal defendants with better legal representation makes for a better and sharper adversarial process and so tends to produce more accurate and just results. The provisions of the Thompson Memorandum on a corporation's advancement of legal fees for its agents and employees, therefore, were at best ambiguous. They probably invited prosecutors, who are subject to the same human failings as the rest of us, to confuse the end of doing justice with that of making their own lives more commodious.

Footnotes

[1] George J. Terwilliger III and Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, 7 Engage: J. Federalist Soc'y's Prac. Groups 25 (2006).

[2] *See* United States v. Stein, 425 F. Supp. 2d 330, 338 (S.D.N.Y. 2006) (citing U.S. Dep't Of Justice, Criminal Justice Manual § 163 (2005)).

[3] Thompson Memorandum, ¶ B.

[4] *Id.* ¶ B, n. 3.

[5] Indemnification is usually distinguished from advancement in that a corporate employee or agent's right to be *indemnified* for legal fees and expenses arising out of the agent's employment depends on whether, and so can only be determined after, the defense of the legal action has been successful. Hence, if an employee or agent had a right only to indemnification, he or she would have to finance the entire defense and hope to recover the amounts in indemnification against the employer at the conclusion thereof. To avoid the obvious problems such a system would occasion, many jurisdictions authorize the corporate employer to *advance* funds for the employee or agent's legal fees and expenses, subject to an obligation on the part of the employee or agent to repay them if it is ultimately determined that the employee or agent was not entitled to indemnity. *See generally* 3A Fletcher § 1344.10 at 560-61.

[6] *Stein*, 425 F. Supp. 2d at 363.

[7] Paul Davies and David Reilly, *Executives on Trial: KPMG Ex-Tax Partner Pleads Guilty*, Wall St. J., March 28, 2006, at C3.

[8] *Stein*, at 352.

[9] Arthur Andersen LLP v. United States, 544 U.S. 696 (2005). The DOJ subsequently decided not to try the firm. *Won't Retry Andersen; Duncan Withdraws Plea*, Prac. Acct., Jan. 1, 2006, at 8.

[10] *See* Ken Brown et al., *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question*, Wall St. J., March 15, 2002, at A1 cited by court as appearing in brief of *amicus* The Securities Industry Ass'n *et al. Stein* at 7, n. 11.

[11] *Stein* at 353.

[12] *Id*.

[13] *Id.* at 348.

[14] *Id.* at 349.

[15] *Id.*

[16] *Id.* at 353. *See* Restatement (Second) Of Agency § 438(2) and cmt. (e) (1958).

[17] *Stein* at 354.

[18] *Id*. at 357 (quoting Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624 (1989)).

[19] *Stein* at 357.

[20] *Id.*

[21] *Id.* at 360.

[22] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[23] Judge Kaplan mentions *Quill v. Vacco*, 80 F.3d 716, 724 (2d Cir. 1996), which was reversed on other grounds, 521 U.S. 793 (1997), some district court opinions that he himself says mention the proposition as *dicta*, and "respected commentators," meaning 2 Rotunda & Nowak § 15.7, and a few law review articles.

[24] Albright v. Oliver, 510 U.S. 266 (1994).

[25] *Id.* at 273 (internal quotation marks omitted).

[26] *Stein* at 361 (footnotes omitted).

[27] *Id.*

[28] *Id.* at 360.

[29] *Id.* at 363.

[30] *Id.*

[31] Thompson Memorandum, ¶ B.

[32] *Stein.* at 363.

[33] *Id.*

[34] *Id.* at 364.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 366.

[39] *Id.* at 367.

[40] *Id.*

[41] *Id.*

[42] H.L.A. Hart, *Are There Any Natural Rights?*, The Phil. Rev., Apr. 1955, at 179.

[43] *Stein* at 367 (quoting Via v. Cliff, 470 F.2d 271, 274-75 (3d Cir. 1972)).

[44] *Id.* at 368.

[45] *Id.* at 369.

[46] *Id.* at 369-73.

[47] *Id.* at 373.

[48] *Id.* at 374.

[49] *Id.*

[50] *Id.*

[51] This required some technical maneuvering. After concluding that the court had both subject matter jurisdiction over the defendants' claims against KPMG and personal jurisdiction over KPMG itself, Judge Kaplan implemented the remedy by directing the clerk to open a civil docket number for the claims of the defendants against KPMG and then allowing such defendants to file a complaint against KPMG containing a prayer for declaratory relief in accordance with the decision in the present case. *Id*. at 377-79.

[52] *Id.* at 380.

[53] Paul Davies, *KPMG Ex-Employees Sue for Fees*, Wall St. J., July 13, 2006, at C5.

[54] *Albright* at 272.

[55] *Id.* at 273.

[56] *Stein* at 362, n.163 (estimating legal fees and expenses as between $500,000 and $1,000,000 per defendant).

[57] Thompson Memorandum ¶ VI.B and n. 4.

[58] *Stein* at 349.

[59] Berger v. United States, 295 U.S. 78, 88 (1935).

Criminal Law and Procedure

"Domestic Unlawful Combatants"
A Proposal to Adjudicate Constitutional Detentions

*By George J. Terwilliger, III**

As was perhaps inevitable, the sense of facing an urgent and deadly danger that gripped the country after the events of September 11, 2001 has faded somewhat with the passage of time. With that lessening of an imminent threat to our security, a cycle of recriminations for alleged overreaching in reaction to September 11 has already begun—even though the terror threat remains quite real. This can be seen as an opportunity for sober reflection on some of the more challenging issues presented by the post 9/11 world. Not least among these is the question of how to address the situation of known enemy combatants being present in the United States and, specifically, how to incapacitate them from carrying out domestic terrorist attacks.

A hypothetical, but realistic, scenario can serve to illustrate the problem: Imagine that U.S. intelligence and law enforcement authorities are in receipt of credible information that a medical doctor living and practicing in the United States, along with several of his associates, intend to kidnap, torture and kill a high-ranking federal government official. The doctor is the central member and the guiding hand of a sleeper cell whose members are otherwise unidentified. This information has been obtained by U.S. intelligence agencies from multiple third-country sources. It has been verified in material respects by a former terrorist organization functionary who was privy to a meeting where these plans were initially discussed and approved, and where the doctor's name and geographic location were inadvertently disclosed.

Extensive electronic and physical surveillance of the doctor over a period of months has failed to adduce any evidence verifying the essential aspects of this intelligence information. The investigation has, however, verified that the doctor attends a mosque with many radical members and is in regular contact with other persons known to be members of or associated with this terrorist organization, but about whom little else is known or provable. Even more recent information from a reliable third-country source verifies that the plot is alive and well and, most importantly, that organization approval to proceed with it will not be given if the doctor is not in a position to supervise and direct the mission. Under what authority can this threat be neutralized, and how and under what legal mechanism may this physician be detained in order to render him and his cell incapable of carrying out this mission?

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I. The Existing Legal Framework: Federal Authority to Detain Enemy Combatants

The Framers recognized that the constitutional authority of the federal government with respect to national security must extend to any measures necessary to defend the security of the nation. As Alexander Hamilton wrote in *Federalist* No. 23, the powers of the federal government to provide for the common defense are complete:

> These powers ought to exist without limitation: Because it is impossible to foresee or define the extent and variety of our national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be co-extensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils, which are appointed to preside over the common defense. . . . The means ought to be proportioned to the end; the persons, from whose agency the attainment of any end is expected, ought to possess the means by which it is to be attained.[1]

The Supreme Court affirmed this interpretation of our constitutional structure early in the nation's history. In *Brown v. United States* (1814),[2] the Court recognized that the Constitution vests in the federal government an "independent substantive power" with respect to national security.

Further, "[t]he Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations."[3] For this reason, the President is vested with all the executive power and with the position of Commander in Chief of the armed forces.[4]

Whether this constitutional structure gives executive authority to designate and detain enemy combatants[5] captured within the United States has, historically, not been made as clear as it could be by the Supreme Court. Nevertheless, a review of the relevant case law reveals that such authority does exist.

In *Ex Parte Quirin*,[6] the Supreme Court provided authority for the seizure and detention of unlawful belligerents or combatants, even United States citizens, within the United States. In that case, the Supreme Court

considered habeas petitions by seven German soldiers who had come to the United States to perform acts of military sabotage. The Court denied the petitioners' requests for relief, concluding that they were properly tried before a military tribunal pursuant to an executive order.

Several aspects of the Court's holding in *Quirin* are notable. First, the Court explicitly rejected the argument that a distinction should be drawn between citizens and non-citizens for purposes of determining eligibility to be tried by such a commission: "Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the laws of war."[7]

Second, the Court held that, incidental to his power as Commander-in-Chief, the President has the power to enforce all laws relating to the conduct of war, and "to carry into effect . . . all laws defining and punishing offenses against the law of nations including those which pertain to the conduct of war."[8] This power, the Court held, includes the authority "to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[9] An enemy thus seized, even a citizen, does not enjoy the constitutional rights enjoyed by an accused defendant in the criminal justice system.[10]

The Supreme Court and the lower federal courts have within the last year announced a number of significant decisions relating to the government's authority to detain enemy combatants upon executive designation. Among the most significant of these was the Supreme Court's decision in *Hamdi v. Rumsfeld*,[11] which involved a habeas petition by an American citizen captured in Afghanistan. Hamdi was classified by the Government as an enemy combatant and detained in military custody. The Government contended that Hamdi was captured while fighting with the Taliban against U.S. forces.

Hamdi was initially detained overseas. When the military learned that Hamdi was an American citizen, however, he was transferred from an overseas detention facility to one within the United States. Hamdi's father filed a habeas petition as next friend, alleging, among other things, that the government was detaining his son in violation of the Fifth and Fourteenth Amendments. The habeas petition conceded that Hamdi had been in Afghanistan, but denied that he had engaged in military training or taken up arms against U.S. forces. The district court concluded that the Government's proffered factual basis for Hamdi's detention, which consisted of a declaration by a Defense Department official, could not support the detention and ordered a number of materials to be released for *in camera* review.

On appeal, the Fourth Circuit reversed, holding that because Hamdi was captured in an active combat zone and designated an enemy combatant, the scope of federal judicial review was severely restricted, and that the district court had erred in ordering the release of additional documentation relating to Hamdi's classification. The Fourth Circuit further held that even if congressional authorization for detention of citizen enemy combatants were required (a doubtful proposition, the court suggested), such authorization existed in the Authorization for Use of Military Force[12] passed shortly after September 11, 2001 ("the AUMF"). The Fourth Circuit noted that "capturing and detaining enemy combatants is an inherent part of warfare," and thus "the 'necessary and appropriate force' referenced in the [AUMF] necessarily includes the capture and detention of any and all hostile forces arrayed against our troops."[13]

The Supreme Court vacated and remanded. In an opinion for herself and the Chief Justice, as well as Justices Kennedy and Breyer, Justice O'Connor concluded that Hamdi was appropriately detained as an "enemy combatant." Justice O'Connor's opinion did not reach the question whether the President has "plenary authority to detain" persons in Hamdi's position pursuant to Article II of the Constitution, because she concluded "that Congress ha[d] in fact authorized [such] detention" in the AUMF.[14] "[I]ndividuals who fought against the United States in Afghanistan as part of the Taliban," Justice O'Connor concluded, were clearly covered by the AUMF, which authorized the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks.[15]

Addressing Hamdi's contention that his detention could end up being indefinite and thus not authorized by the AUMF—if premised on the ongoing nature of the "war on terror," Justice O'Connor did not reach the question of the President's authority for such detentions. Because "[a]ctive combat operations against Taliban fighters apparently are ongoing in Afghanistan," she concluded, indefinite detention "is not the situation we face as of this date."[16]

Having concluded that detention of an enemy combatant such as Hamdi is legally authorized, Justice O'Connor considered what process is constitutionally due to a citizen who disputes his enemy-combatant status. As an initial matter, the writ of habeas corpus will remain available in some form to individuals detained within the United States or under the control of United States authorities in places subject to the authorities' dominion and control.[17] As Justice O'Connor noted, the "ordinary mechanism that we use for balancing . . . serious competing interests, and for determining that procedures that are necessary to ensure that a citizen is not 'deprived of life, liberty, or property, without due process of law' is the test . . . articulated in *Mathews v. Eldredge*, 424 U.S. 319 (1976)."[18] Under the *Mathews* test, the process due in a given circumstance is determined by weighing the private interest that will be affected by official action against the government's interest, including the governmental function involved and the burden that providing greater process would place on the government. These concerns are to be balanced by analyzing the risk of erroneous deprivation of the private interest if the procedures were reduced or eliminated, and the probable value of imposing additional or substitute safeguards.[19]

The only substantive characteristics of a procedure that would comport with due process offered by the Court were that (1) "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification," and (2) such a

detainee must receive "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[20] These are, of course, the most fundamental characteristics of due process.[21]

The Supreme Court in *Hamdi* did not reach the question of the President's plenary authority to detain unlawful combatants absent congressional authorization of some sort. At least where Congress has spoken, however—as in the AUMF—the Court accepted that executive authority for such detention exists. Reading the case in conjunction with *Quirin*, the Court's recognition of executive authority to detain such combatants in some circumstances is clear. In other, limited circumstances, the scope of such authority is less clear. For example, when may a citizen captured in the United States be detained as an enemy combatant? These are the circumstances in the case of Jose Padilla, a U.S. citizen captured at O'Hare airport and subsequently designated an enemy combatant on the basis of his alleged participation in a plot to detonate a "dirty bomb" in the United States. The Supreme Court last year addressed a habeas petition filed by Padilla, but ruled only that he had filed it in the wrong district.[22]

While the Supreme Court's decision in *Padilla* is thus not particularly illuminating, the opinion by District Judge Mukasey addressing Padilla's habeas petition is well worth examination, both for its analysis of the instant question and because it notes and effectively rejects several potential objections to the detention of enemy combatants as discussed herein. In a thorough and well crafted opinion, Judge Mukasey concluded, *inter alia*, that "the President is authorized under the Constitution and by law to direct the military to detain enemy combatants" who are citizens and are seized within the United States.[23]

Addressing Padilla's objections to his detention, Judge Mukasey first considered the contention that the President could not exercise the authority to detain Padilla because the United States was not engaged in a war. Judge Mukasey noted that "a formal declaration of war is not necessary in order for the executive to exercise its constitutional authority to prosecute an armed conflict—particularly when, as on September 11, the United States is attacked."[24] Judge Mukasey further rejected the contention that a war against an organization such as al Qaeda cannot trigger the authority to exercise such executive power because the organization lacks clear corporeal definition and the conflict can have no clear end. "So long as American troops remain on the ground in Afghanistan and Pakistan in combat with and pursuit of al Qaeda fighters, there is no basis for contradicting the President's repeated assertions that the conflict has not ended."[25] If at some point in the future "operations against al Qaeda fighters end, or the operational capacity of al Qaeda is effectively destroyed," there might be "occasion to debate the legality of continuing to hold prisoners based on their connection to al Qaeda." Absent such circumstances, however, no "indefinite detention" issue exists.[26]

Importantly for purposes of this paper, Judge Mukasey also rejected Padilla's suggestion that he could not be held because he had not been convicted of a crime. As Judge Mukasey noted, the Supreme Court has in a number of cases the non-retributive commitment of persons likely to commit violence against others. As the Court stated in *United States v. Salerno,*[27] "We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh a person's liberty interest. For example, in times of war and insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous."

As to the specific question of the President's power to detain enemy combatants in Padilla's circumstances, Judge Mukasey found *Quirin* particularly persuasive. He noted that in *Quirin* the Court addressed what it rightly considered a more serious consequence than mere detention—trial by military commission. Given that the Court authorized even that more serious consequence in the analogous circumstances of *Quirin*, the case plainly stands also for the proposition that mere detention is lawful in such circumstances.[29] Like the *Hamdi* Court, Judge Mukasey did not consider whether the President's authority would be more limited absent an authorization from Congress such as the AUMF; where such authorization is present, however, such authority exists.

The case law regarding plenary executive authority for detention of enemy combatants is thus not entirely settled. In particular, the Supreme Court has not addressed specifically the authority underlying the proposal herein—that is, to designate and detain enemy combatants captured within the United States, who may or may not be U.S. citizens. The lack of perfect clarity as to the extent of the authority to designate and detain unlawful combatants who are citizens and found on U.S. soil does not argue for the conclusion that such authority does not exist. Rather, these circumstances call for more explicit definition of that authority and more precise identification of when and how it will be exercised. Establishment of a system to exercise such authority should increase national security by providing a clear structure for detaining such individuals, bring clarity to the question of when such authority will be exercised, and, in turn, aid the courts in determining the validity of such exercise. Identification and definition of such executive authority is also consistent with the position the federal government has adopted in briefing and argument to courts considering the detention of individuals designated as enemy combatants, where it has argued that the President has plenary authority to detain combatants in defense of the nation, wherever they are seized, and whether or not they are citizens.

In sum, recognizing that the President is charged with defending the nation, and that that he has the powers necessary to do so, we must conclude that he has the authority to detain citizen enemy combatants within the United States. As Justice Jackson remarked in *Shaughnessy v. United States ex rel. Mezei*,[30] "the underlying consideration is the power of our system of government to defend itself, and changing strategy of attack by infiltration may be met with changed tactics of defense."[31]

II. The Need for a New Adjudicatory Framework

A review of our constitutional framework and the relevant case law thus reveals that the President would have inherent authority to detain the doctor identified in the initial hypothetical. In certain circumstances where the detention of but a few individuals is necessary, this authority, utilizing an *ad hoc* process, may be sufficient to protect U.S. security and citizens, while at the same time respecting the constitutional protections and rights of the individuals.

The military, with the President as its Commander-in-Chief, retains responsibility and authority to defend the homeland from threats and attacks, particularly those from abroad. In the scenario outlined above, the doctor is the weapon of a foreign authority and power. He infiltrated the homeland for purposes of attacking the United States. Whether he intends to kidnap and torture a government official or to become a suicide bomber, a case can clearly be made that the military, with the President as its Commander-in-Chief, has the responsibility and the authority to defend the homeland from such attacks. As the Supreme Court has indicated, the President and the armed forces are tasked with protecting national security and specifically with resisting attacks by force on American soil:

> If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority . . . Whether the President in fulfilling his duties as Commander-in-Chief, in suppressing an insurrection, has met with such armed hostile resistance . . . is a question to be decided *by him*.[32]

Thus, detention by military authorities and adjudication by a military tribunal would be an appropriate way to adjudicate the justification for this physician's detention. For many reasons beyond the scope of this analysis, however, that paradigm of adjudication is not ideal, and may even be undesirable. Politically, at least, it is hard to imagine that without a great escalation in the scope and intensity of the threat to the homeland, there would be broad political support for a stronger military role in domestic security, particularly involving the detention of U.S. citizens or permanent resident aliens.

The criminal justice system is not the appropriate forum for confronting the particular threat at issue here. Criminal prosecution may, through detention, neutralize the capacity of a convicted defendant to cause further harm, but that is not its primary purpose, and criminal adjudication is not a system conducive to meeting the exigencies of incapacitating unlawful combatants. The purpose of criminal prosecution has traditionally been to punish wrongdoers for acts already undertaken, to deter, and to temporarily incapacitate. The criminal justice system reaches the most troublesome limits of governmental authority to enforce the criminal law when it seeks to punish secret agreements to carry out illegal acts. Indeed, so troubled are the legislatures and courts by conspiracy prosecutions that, under most aspects of federal law, some overt act in furtherance of the conspiracy is required for the prosecution to lie.[33]

The use of criminal prosecutions to incapacitate terrorists is proving to be clumsy, inadequate and, civil libertarians should note, taking law enforcement powers where they have never gone before. Experience in the *Moussaoui* case, and others, already has shown the shortcomings of the use of the criminal justice system in this area. Among other problems, a criminal defendant may seek and receive access to classified information that cannot safely be shared with him. Additionally, the prosecution may need to withhold evidence in order to protect intelligence sources and methods, and it may need the testimony of witnesses who are themselves detained as enemy combatants. Such difficulties may force prosecutors to stop short of pursuing their legal claims to their full extent, as was apparently the case in the prosecution of John Walker Lindh, the American captured while fighting with the Taliban in Afghanistan.[34] More fundamentally, the underlying behavior in the criminal prosecution of an enemy combatant, while it may well be a crime, is more accurately described as the planning or execution of a paramilitary attack on the United States. The criminal code is not designed to be a counter-measure to war. Attempting to so use it produces awkward results and is inadequate to the task. We need a better solution.

The hypothetical scenario with which this paper began is neither farfetched nor difficult to execute. Indeed, it is a much more low-tech operation than many other threats that have received a great deal of attention. It is a core responsibility of government, perhaps the *raison d'etre* for a federal government, to protect the citizens and the smooth functioning of society from foreign attack, whether that attack comes in the form of a guided missile in the sky, or a guided agent woven into the society.[35]

The premise of the next section of this paper is that an effective way to neutralize a ticking time bomb such as the doctor imagined in the hypothetical above is to detain and thereby incapacitate him until we are satisfied that the threat he represents has abated sufficiently to take some lesser action.[36]

III. A New Adjudicatory System

Although a better approach to the problem of terrorist conspirators within our borders is clearly called for, we need not write on a blank slate or create a new adjudicatory regime out of whole cloth to arrive at the appropriate structure and procedures. Rather, two well-developed legal processes can provide us with the foundation for a new paradigm under which the adjudication of the detention of unlawful domestic combatants can be established. One is the existing legal authority to detain those determined through legal process to be mentally ill and dangerous. The other is the statutory process now used to effectuate inherent presidential authority to authorize searches or other surveillance for foreign intelligence purposes.

A. Characteristics of the Proposed Adjudicatory Process

As detailed above, the Supreme Court has strongly indicated that persons who fit the definition of unlawful or irregular combatants and are found in the United States may lawfully be detained under existing presidential authority. The Court has also held that such detainees are entitled to some level of legal review. Yet the Court has offered few specifics to guide the establishment of a regularized adjudicatory process. The following subsections are intended to identify and outline some of the principal characteristics that such a process might have.

i. Evidentiary Provisions

The most significant shortcoming of the civil justice system when it comes to the detention of unlawful combatants are the standard rules of evidence. Our rules of evidence have been defined and refined to achieve exquisite levels of fairness and balance in a legal system that crowns as royalty the combat of the adversary process. Parties compete under the allocated burden of proof and burdens of persuasion. The rules of evidence are designed to level the playing field on which this combat takes place. Yet the Constitution requires no such balance of power between advocates when it comes to governmental actions necessary to protect national security. Thus, the first and foremost characteristic that would differentiate a new method for adjudicating the detention of unlawful combatant would be avoiding the rules of evidence strictures which are customarily employed in the civil courts.

The primary standard for evidence admittance in the new system should be one of fundamental reliability, without confining that concept to the dozens of rules, and reams of cases, which establish the arcane minutia of degrees of reliability and trustworthiness under the law of evidence employed to find justice in the civil courts. Questions about the degree of reliability would instead be used to accord weight to the evidence in the deliberations of the trier of fact, but not to control what the trier may know. In other words, almost nothing would be excluded from being received, but the precise evidentiary weight and value to be given to the evidence would be left up to the sound discretion of the adjudicating officer. Justice O'Connor has recognized the necessity for such tailoring of the rules of evidence in tribunals adjudicating the status of enemy combatants, noting in *Hamdi* that, "[h]earsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding."[37]

Similarly, the burden of proof could be shifted in such proceedings. The "beyond a reasonable doubt" standard imposed on the government in criminal proceedings should be replaced with a burden-shifting regime or a presumption in favor of evidence presented by the government. As Justice O'Connor explained in *Hamdi*, "the Constitution would not be offended by a presumption in favor of the government's evidence, so long as that presumption remained a rebuttable one and a fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." [38]

ii. Adjudicator

Justice O'Connor also noted in *Hamdi* that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive . . . a fair opportunity to rebut the government's factual assertions before a neutral decisionmaker."[39] Such a detainee, however, does not have the right to a decision by jury.[40] Article III judges could be designated to sit in this role in addition to their duties as lifetime appointees to the federal bench. Alternatively, adjudicatory officers could be appointed, under much the same authority as administrative law judges are appointed in various government agencies. These would be persons with background, understanding, and expertise in the underworld of terrorism who might be more capable than the uninitiated to make reasoned and sensible judgments about intelligence information presented as evidence in support of a petition for detention. These adjudicators would provide oversight and review of the executive authority which reposes in the President and is delegated to an inferior official, a common practice in the executive branch.

iii. Right to Counsel

As a society, we have grown accustomed to the notion that anytime persons are faced with a legal difficulty they are entitled to the assistance of counsel, provided free of cost if they cannot afford it themselves. This popular notion, however, is not the law. The Supreme Court has held that the right to counsel attaches only in certain situations, such as at the initiation of a criminal prosecution, not in all legal proceedings.[41] Nonetheless, a system that is designed to meet both the test and the spirit of the due process clause of the Constitution ought to provide for the assistance of counsel to unlawful combatants who are being detained. It may be quite preferable, however, to have a bar of available counsel with the appropriate security clearances and other indicia of trustworthiness that would render the attorneys capable of meaningfully participating in these adjudications.

iv. Secrecy of Proceedings

Proceedings to determine a detained enemy combatant's status should be secret, but on the record. As with other aspects of the procedures discussed in the paper, they should not be sealed forever. Indeed, there should be, for the benefit of public knowledge and assurance that the Government is acting lawfully, a presumption in favor of disclosing such proceedings, so long as, or perhaps as soon as, disclosure can be accomplished without comprising important intelligence objectives.

v. Applicable Substantive Standards

The Government's asserted authority to detain individuals involved in terrorist activity or plots against the United States has turned on its designation of those individuals as "enemy combatants." As noted above, there is some confusion about the precise scope of the term. A

more precise, codified definition could serve to clarify the executive authority to detain such individuals and to establish a substantive standard in the proceedings discussed herein.

The President designated the petitioner in *Padilla* an "enemy combatant" on that grounds that he "(1) is closely associated with al Qaeda, an international terrorist organization with which the United States is at war; (2) that he engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism against the United States; (3) that he possesses intelligence about al Qaeda that would aid U.S. efforts to prevent attacks by al Qaeda on the United States; and finally, (4) that he represents a continuing, present and grave danger to the national security of the United States such that his military detention is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States."[42] The second and fourth of these elements, and perhaps the others in some form as well, could be codified into a standard to be applied in the adjudications envisioned herein.

In short, detention should be permissible where a subject is found to have taken part in preparation for or actual conduct of attacks directed at targets in the U.S. or at U.S. instrumentalities or facilities, abroad or on the high seas. It should also be possible to detain those individuals who provide material support for such undertakings.

An essential aspect of a fair adjudicatory system of this nature would be required showing of a capability to carry out the attack or mission in question. Thus, it should be a required finding that the subject in question had the capability to inflict harm on the United States or, alternatively, that the subject was a member of an organization that had both the intention and capability to inflict harm on the United States. In *Padilla*, for example, a demonstration of the petitioner's ties to al Qaeda would certainly meet this requirement.

vi. Length of Detention

How long should a detention be permitted as a result of this process? The initial determination of status as an enemy combatant should be made by an official to whom the President's authority to make that determination has been delegated. This may require the creation of a new "Assistant Attorney General for Domestic Security" or some similar position. Once that designation is made, the detainee should receive an initial hearing on his status within a reasonable time of being detained, likely to be more than days but less than months. He should receive notice in advance of the hearing, and he should have the right to counsel at this initial hearing. After the initial decision to detain is made, the detainee should have the right to at least an annual review of his status, at which the key question would be whether the threat and the capability to carry it out remain or, that the threat and capability would be rekindled or fostered if the individual were released.

vii. Presidential Review Authority

Finally, in this summary of the procedures, the President has and should retain the ultimate authority to overrule any adjudication that results from such a process. I do not propose that the President should sit as an appellate court, but since it is the President's authority that is being exercised, the President would retain the right in any case brought to his attention by any means to make a different decision than that which resulted from the adjudication. The ultimate check on the exercise of this power is political, not legal, save for a judicial determination in the context of a habeas action.

In that vein, the question arises of how this adjudication would affect habeas review by Article III courts. The Supreme Court has already indicated that habeas in some form must be provided to enemy combatants detained in the United States.[43] Congress could easily make it a part of this process that the adjudication of the legality of the detention of an enemy combatant shall constitute clear and convincing evidence in court that his designation as an enemy combatant is correct and shall create a presumption that his detention is lawful. Thus, in a nutshell, habeas review would be extremely limited. This is not unlike strict limitations that have been placed on habeas review in other contexts. For example, in the Antiterrorism and Effective Death Penalty Act Congress limited the right of prisoners to file successive habeas corpus petitions in the federal courts. This procedural limitation, however, comports with due process.[44]

viii. Additional Features

Finally, a few additional features that this system might entail bear mention. A limited right of action to seek reparations could be authorized for any person subsequently found to have been unlawfully detained in the initial three month period. This would act as a check on the unbridled abuse of this limited detention. It is also logical that the prosecuting officers who present the evidence to the adjudication panel or officer should be Department of Justice attorneys, thus preserving the essential civilian nature of the process, but separating it from the law enforcement functions typically handled by federal prosecutors.

B. Legal Frameworks Providing Precedent for the Proposed Procedures

The model proposed above is not written on a blank slate or created out of whole cloth. Two well-developed legal processes may provide precedent and guidance in the establishment of such a system.

First, state law commonly provides a legal mechanism by which persons adjudged to be mentally ill and a danger to themselves or others may be involuntarily committed to detention in an institution, even for life. Federal statutes likewise permit commitment of criminal defendants unfit to stand trial because of a mental disease or defect. These systems, which constitutionally permit the detention of individuals against their wills who are adjudged to be a danger to society provide a valuable model for the paradigm outlined above.

While civil commitment procedures vary somewhat from state to state, the Supreme Court has announced several baseline principles that such procedures must respect. First, "commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."[45]

Civil commitment proceedings, however, are generally regulatory, not criminal, in nature, and thus the panoply of rights and safeguards that must be provided in a criminal trial need not be provided in such a proceeding.[46] Thus, a state need only demonstrate danger with clear and convincing evidence to justify commitment,[47] and the Sixth Amendment right to jury trial is inapplicable in regulatory commitment proceedings.[48]

In light of the similar governmental ends sought to be achieved in civil commitment proceedings and by the proposed preventive detention regime—ensuring fair procedures, accurate fact-finding, and the safety and security of society—the structure of civil detention regimes is worth consideration in constructing a fair and effective preventive detention regime.

The civil commitment procedures outlined in federal law for criminal defendants deemed mentally incompetent to stand trial are particularly useful in considering the appropriate procedures for adjudicating the status of enemy combatant detainees. The treatment of mentally incompetent defendants under federal law is governed by 18 U.S.C. §§ 4241-4247. Under § 4241(a), when a court has reasonable cause to believe that a defendant is suffering from a mental disease or defect rendering him unable to understand the nature and consequences of the proceedings against him, or to assist in his defense, the court may conduct a hearing to determine the defendant's competency to stand trial. If the court finds by a preponderance of the evidence that the defendant is incompetent, the defendant is to be committed to the custody of the Attorney General for an initial period of hospitalization.[49] The defendant may then be hospitalized, generally up to four months, to determine whether a substantial probability exists that his condition will improve in the foreseeable future to a point that will allow trial to proceed.[50] If at the end of the defendant's hospitalization the court determines that the defendant's condition has not improved sufficiently, the defendant may then be committed for an indeterminate period pursuant to the provisions of § 4246.[51]

Under § 4246(a), the director of the facility in which the defendant is hospitalized may certify that the defendant is "suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another" and that "suitable arrangements for State custody and care of the [defendant] are not available."[52] Once the director of the facility files such a certificate, the court holds a second hearing to assess the accuracy of the director's certification. At the hearing, the court is to determine whether there is clear and convincing evidence that the defendant's condition meets the criteria identified in § 4246(a). Upon such a finding, the defendant is again committed to the custody of the Attorney General until such time as he is determined fit to stand trial. The director of the hospital facility at which the defendant is confined is thereafter to prepare annual reports, to be submitted to the court, concerning the condition of the committed person and containing recommendations concerning the need for his continued hospitalization.[53]

Several aspects of this federal statutory scheme are instructive here. First, the varying burdens of proof provide a good model for a preventive detention regime. The imposition of a low standard, such as reasonable cause, to justify initial detention would permit the Executive to act quickly when a threat becomes apparent. The higher "clear and convincing" standard applicable at the subsequent hearing would provide a heightened safeguard to ensure the accuracy and reliability of the determinations reached earlier. The provision for annual certification of the need for continued detention, and annual review of that certification, would likewise guard against the unnecessary detention of individuals who do not pose a risk.

The purpose of the federal statutory scheme—which has played a large role in the courts' having upheld its restrictions on the right to a jury trial and to other trial rights—is also significant. As Judge Kozinski stated in *Sahhar*, the scheme "protects society by placing in the government's custody certain dangerous individuals. . . . [It] is not intended to address past wrongs, but rather to reduce the risk of future harm to persons and property."[54] These purposes would also be served by a regime of preventive detention of domestic enemy combatants. Indeed, given that the risk posed by an individual detained to prevent his engaging in an act of terrorism will ordinarily be substantially greater, in terms of lives and other potential losses, than that posed by a defendant unfit to stand trial, the justification for detention is all the more compelling.

The second legal basis of support for the new paradigm outlined above is that which is currently employed to exercise the President's constitutional authority to conduct electronic surveillance and to authorize breaking-and-entering for the purpose of achieving the national security objectives of the United States. The Foreign Intelligence Surveillance Act ("FISA") was enacted in 1978 to regulate the government's use of electronic surveillance within the United States to acquire foreign intelligence information, which includes information relating to the ability of the United States to defend itself against international terrorism.

Under FISA, a court of eleven specially assigned federal district court judges is authorized to hear government applications for foreign surveillance and search orders. A three-judge appeals court is designated to hear reviews of application denials. These judges are selected by the Chief Justice of the United States Supreme Court. Yet the FISA court is not a typical Article III court; rather, it serves to regulate and regularize the exercise of inherent executive authority. In its only decision to date, the FISA Review Court noted that the authority for the searches authorized by FISA stems ultimately from the President's inherent authority over foreign affairs and national security.[55] This point is further exemplified by FISA's explicit provision for the use of electronic surveillance without a warrant against any individual or organization for up to seventy-two hours, or the physical search of a location, if the Attorney General determines that an emergency situation exists. In such a

circumstance, the Attorney General exercises the authority delegated by the President directly, without the layer of review imposed by the FISA court.

In light of the inherent executive authority for searches that the FISA court reviews, this process has been challenged on separation of powers grounds. These challenges have been unsuccessful, however. The courts have ruled that the FISA court is not called upon to exercise executive authority by making foreign policy or decisions about national security, but rather to apply statutory language and make findings of fact of the kind frequently made by courts.[56] This characterization of function could apply equally to that outlined for the trier of fact in the instant proposal.

The FISA court thus represents a legal and constitutional system that provides a methodology for inferior officers to exercise the President's authority to conduct national security surveillance activities. The system has the hallmarks and characteristics of a legal process which meets constitutional muster under due process standards, yet at the same time preserves the secrecy necessary to avoid the catastrophic consequences of revealing intelligence sources, methods and the information produced from them.

CONCLUSION

It is apparent that by reposing in the courts the authority to detain and incapacitate mental defectives, we as a society have recognized and lent our support to the credibility of the legal system and the integrity of judges who determine that a fellow citizen should have his or her liberty extinguished, perhaps for life. Similarly, by cloaking the process of determining the justification for intrusive electronic surveillance under the umbrella of national security objectives with the aura and process of court-like proceedings, we have struck a balance between meeting national security needs and entrusting such decision-making merely to a secret process under the control of an individual or to a clandestine bureaucracy. Taking these established legal regimes as models, a scheme to adjudicate constitutionally the need to detain enemy combatants could be fashioned. An incremental surrender of executive authority to a prescribed process that embodies the hallmarks of due process and employs fundamental judicial determinations is preferable to risking curtailment of that authority were it to be abused by its use in an *ad hoc* manner in times of great peril and uncertainty.

Footnotes

[1] Federalist No. 23 (Alexander Hamilton).

[2] 12 U.S. [8 Cranch] 110 (1814).

[3] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2675 (2004) (Thomas, J., dissenting).

[4] U.S. Const. art. II, §§ 1, 2.

[5] The term "enemy combatant," though it has taken on distinct significance in the legal landscape regarding executive authority in this area, does not have a single, precise definition. In this background discussion of case law, it will be used as used by the case under discussion. Later in this paper, a definition will be proposed that could serve as a substantive standard applicable in the adjudicatory hearings proposed herein.

[6] 317 U.S. 1 (1942).

[7] *Id.* at 37.

[8] *Id.* at 26.

[9] *Id.* at 28-29.

[10] *Id.* at 30-31, 37. It is also notable that the Court recognized in *Quirin* that an enemy combatant need not be a regular member of an enemy force. The petitioners in *Quirin* were not members of the German Army, but rather disguised saboteurs who infiltrated the United States. Indeed, it was this aspect of their activities that rendered them *unlawful* combatants under the laws of war and subjected them to trial by military tribunal. *Quirin*, 317 U.S. at 31. Without engaging in an extended review of the laws of war, it may be said with confidence that members of al Qaeda or similar terrorist organizations would not meet the requirements to be considered regular, lawful members of an enemy force, including wearing fixed emblems recognizable at a distance, carrying arms openly, and operating in accordance with the laws and customs of war. *See* David B. Rivkin Jr. & Lee Casey, *Enemy Combatant Determinations and Judicial Review* (Federalist Society White Paper, Washington, D.C.), Feb. 2003, at 3-4.

[11] 124 S. Ct. 2633 (2004).

[12] 115 Stat. 224.

[13] Rumsfeld v. Hamdi, 316 F.3d 450, 467 (4th Cir. 2003); *Id*.

[14] *Hamdi*, 124 S. Ct. at 2639.

[15] *Id.* at 2641-42. Justice O'Connor further noted that Hamdi was captured "in a *foreign* combat zone." *Id.* at 2643.

[16] *Id.*

[17] *See id.*; *see also* Rumsfeld v. Padilla, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

[18] *Hamdi*, 524 U.S. at 21-22.

[19] *Hamdi*, 124 S. Ct. at 2648 (citing *Mathews*, 424 U.S. at 335); *Id*.

[20] *Id.* at 2648-49.

[21] Shortly after the Supreme Court's decisions in *Hamdi*, *Padilla*, and *Rasul*, the Government created a tribunal called the Combatant Status Review Tribunal ("CSRT") to review the status of each detainee held at Guantanamo Bay, Cuba, as an enemy combatant. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 443, 450 (D.D.C. 2005); *see also* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf (link to Order issued by Deputy Defense Secretary Paul Wolfowitz creating CSRT). The CSRT procedures, however, have already been held by at least one district court to fall short of that called for in the Hamdi plurality. *See id.* at 468-78. The district court noted that, among other problems, CSRT detainees were not given access to classified evidence used to demonstrate their enemy combatant status, nor were they permitted to have an advocate review to challenge it on their behalf, or access to counsel. *Id.* at 468-72.

[22] *Padilla*, 124 S. Ct. at 2715.

[23] *See* Padilla v. Bush, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002).

[24] *Id.* at 589-90 (citing, *inter alia*, *The Prize Cases*, 67 U.S. (2 Black) 635 (1862)).

[25] *Id.* at 590.

[26] *Id.*

[27] 481 U.S. 739, 748 (1987).

[28] *Id.* at 748.

[29] *Padilla*, 233 F. Supp. 2d at 595. Judge Mukasey noted that the Quirin Court gave a "narrow reading" to the prior decision in *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the Supreme Court set aside the conviction of a citizen tried before a military commission for a plot involving plans to seize weapons, free Confederate prisoners, and kidnap the governor of Indiana.

[30] 345 U.S. 206 (1953).

[31] *Id.* at 210 (Jackson, J., dissenting).

[32] *The Prize Cases*, 2 Black 635, 668, 670 (1863).

[33] The general federal conspiracy statute, for instance, 18 U.S.C. § 371, requires the commission of an overt act by a conspirator for a prosecution to lie.

[34] *See, e.g.*, Phillip Shenon, *Government Lawyers Fear 9/11 Ruling Threatens Qaeda Cases*, N.Y. TIMES, Oct. 4, 2003 (quoting defense attorney for Lindh as stating that potential disclosure of classified information was an important factor in convincing government to agree to plea bargain with him).

[35] *See, e.g.*, FEDERALIST No. 23, ("The principle purposes to answered by Union are these—the common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks.").

[36] It is worth noting that we have some experience with another approach that might be taken under our system. During the Cold War, a State Department official named Felix Bloch was identified as a spy by the FBI, but they were unable to bring charges against him. To prevent Bloch from conveying information to the Soviet Union, the FBI simply trailed him (often with media in tow) wherever he went. The spectacle of the FBI openly and notoriously trailing Bloch for days and months on end should not be forgotten. If we are dealing with scores of Felix Blochs, even this endgame alternative becomes a practical impossibility. *See, e.g.*, Brian Duffy, *Tinker, Tailor, Soldier, Deputy Chief of Mission: The Felix Bloch Case Raised Questions About U.S. Counterintelligence and Fears of a New Spy Disaster*, U.S. NEWS & WORLD REPORT, Aug. 7, 1989 (describing Bloch's being tailed by FBI, in turn tailed by media).

[37] *Hamdi*, 124 S. Ct. at 2649.

[38] *See id.*

[39] *Id.* at 26.

[40] *See infra* note 48.

[41] The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." McNeil v. Wisconsin, 501 U.S. 171, 175 (1991). That is, it attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.*

[42] *Padilla*, 124 S. Ct. at 2715 n.2 (internal quotation marks omitted).

[43] *See Hamdi*, 124 S. Ct. at 2644; CONST. Art. I § 9 cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless in cases of Rebellion or Invasion the public Safety may require it.").

[44] *See, e.g.,* Graham v. Johnson, 168 F.3d 762 (5th Cir. 1999) (noting that a procedural limitation on habeas relief "is not subject to proscription under the Due Process Clause unless it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental") (quoting Medina v. California, 505 U.S. 437, 445 (1992)).

[45] Addington v. Texas, 441 U.S. 418, 425 (1979).

[46] *See* Allen v. Illinois, 478 U.S. 364 (1986); United States v. Salerno, 481 U.S. 739 (1987).

[47] *See Addington*, 441 U.S. at 431-33.

[48] *See* United States v. Sahhar, 917 F.2d 1197, 1205-06 (9th Cir. 1990).

[49] 18 U.S.C. § 4241(d).

[50] *Id.* § 4241(d)(1)

[51] *Id.*

[52] *Id.* § 4246(a).

[53] *Id.* § 4247(e)(1)(B).

[54] *Sahhar*, 917 F.2d at 1205.

[55] *See In re Sealed Case*, 310 F.3d 717, 719, 746 (Foreign Int. Surv. Ct. Rev. 2002) (noting that searches in question under FISA are authorized pursuant to "the President's inherent constitutional authority to conduct warrantless foreign intelligence surveillance").

[56] *See* United States v. Duggan, 743 F.2d 59, 74 (2d Cir. 1984); United States v. Cavanagh, 807 F.2d 787, 791-92 (9th Cir. 1987); United States v. Nicholson, 955 F. Supp. 588, 592-93 (E.D. Va. 1997); United States v. Megahey, 553 F. Supp. 1180, 1200 (E.D.N.Y. 1982).

Environmental Law and Property Rights

Rapanos v. United States

*By M. Reed Hopper & Damien M. Schiff**

The Supreme Court has ruled in consolidated cases that the assertion of jurisdiction under the Clean Water Act (CWA) by the United States Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) is too broad. The CWA prohibits the discharge of pollutants (which include dredged and fill material) into "navigable waters" without a federal permit. The Act defines the term "navigable waters" as "waters of the United States." That term has been interpreted to cover nearly any area over which water flows, including the shallow "wetlands" on Mr. Rapanos's Michigan lots. Mr. Rapanos was charged with violating the CWA when he filled wetlands on his property without authorization. The district court found Mr. Rapanos liable with respect to one of his properties because the "wetlands" on the site were deemed adjacent to a tributary (i.e., a non-navigable, man-made drainage ditch) that flowed through a series of conduits to a navigable waterway up to twenty miles away. On appeal, the Sixth Circuit Court of Appeals affirmed the district court's determination on the basis of the "hydrological connection" theory. Under this test, CWA jurisdiction exists no matter how remote or insubstantial the connection between a wetland and a navigable-in-fact waterbody. On June 19, 2006, the Supreme Court vacated the judgments of the Sixth Circuit and remanded the cases for further proceedings.

No opinion of the Court garnered a majority of the justices. The judgment of the Court was announced by Justice Scalia, whose opinion was joined by the Chief Justice and Justices Thomas and Alito. The Chief Justice wrote a brief concurring opinion. Justice Kennedy concurred in the judgment only, writing a separate opinion. Justice Stevens wrote the principal dissent, joined by Justices Souter, Ginsburg, and Breyer. Justice Breyer also dissented separately.

Four justices, forming a plurality on the court, determined that the language, structure, and purpose of the CWA required limiting federal authority to "relatively permanent, standing or continuously flowing bodies of water" traditionally recognized as "streams, oceans, rivers and lakes." These Justices (Scalia, Thomas, Alito, and Roberts) would also authorize federal regulation of wetlands abutting these water bodies if they contain a continuous surface water connection such that the wetland and water body are "indistinguishable." The four dissenting justices took the view that, to advance the statutory goal of maintaining the "chemical, physical, and biological integrity of the Nation's waters," the agencies can regulate practically any waters. Justice Kennedy, on the other hand, acted alone and proposed a "significant nexus" test for determining CWA jurisdiction. Under this test, a waterbody is subject to federal regulation only if that waterbody substantially affects a navigable-in-fact waterway. Justice Kennedy would exclude remote ditches and streams with insubstantial flows from regulation and would reject speculative evidence of a "significant nexus."

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Factual Background

The *Rapanos* case concerns three parcels of land, owned by petitioners John and Judith Rapanos and referred to as the Salzburg, Hines Road, and Pine River sites. The nearest traditional navigable waterway to the Salzburg site is some twenty miles away. An intermittent surface water connection exists through a man-made ditch, a non-navigable creek, and a non-navigable river that becomes navigable before flowing into Saginaw Bay. The Hines Road site has an intermittent surface water connection to the Tittabawassee River, a traditional navigable water, by means of a ditch that runs alongside the site. The Pine River site is in undefined proximity and has a surface-water connection to the Pine River, a non-navigable water, which flows into Lake Huron.

The consolidated *Carabell* case concerns one twenty-acre tract of land (part of which is wetland) located about one mile from Lake St. Clair, a traditional navigable water. The tract borders a ditch that flows into a drain that flows into a creek that flows into Lake St. Clair. A four-foot-wide, man-made berm separates the tract from the ditch, such that water rarely if every passes over.

In both cases the federal government deemed the petitioners' lands to be "waters of the United States" under the CWA, thus requiring that petitioners obtain Section 404 "dredge and fill" permits prior to instituting any development activities.

Both petitioners challenged these jurisdictional findings. The Sixth Circuit determined in the *Rapanos* case that the three sites were "waters of the United States" because each was hydrologically connected to navigable waters traditionally understood. As for the *Carabell* case, the Sixth Circuit determined that because the tract was adjacent to a tributary of a navigable water traditionally understood, jurisdiction was present.

The Scalia Plurality

The essential point of Justice Scalia's opinion is that, although the phrase "waters of the United States" contains some ambiguity, the government's interpretation of that phrase is so obviously outside the bounds of plain meaning (as elucidated by canons of construction, intrastatutory

references, precedent, and "common sense") that it is entitled to no deference.[1] The plurality concludes that "waters of the United States" includes "only those relatively permanent, standing or continuously flowing bodies of water forming geographic features that are described in ordinary parlance as streams, oceans, rivers, and lakes."[2]

The plurality rejects the position that CWA jurisdiction extends only to those waters that fit the definition of navigable waters traditionally understood and the wetlands adjacent thereto. Instead the plurality supposes that the CWA must cover some waters not fitting the traditional definition.[3] The plurality reasons that because Section 1362(7) ("the waters of the United States") includes the definite article 'the' as well as the plural 'waters,' the phrase should not be interpreted to mean just "water," but rather permanent, standing, or flowing bodies of water, such as streams, rivers, lakes, and oceans.[4] Restricting the phrase to bodies of water containing permanent or continuously flowing water is consistent with common sense, for the statute simply will not permit a "Land Is Waters" approach to jurisdiction.[5] In the plurality's estimation, *United States v. Riverside Bayview Homes, Inc.*[6] and *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[7] are consistent with this interpretation. Both cases describe CWA jurisdictional waters as "open waters"; that appellation just does not fit dry channels and other land features over which the government asserts jurisdiction.[8] These land features, the plurality notes, are more properly characterized as "point sources" (if anything) under the Act.[9]

The plurality takes issue with the "purposivist" approach to jurisdiction adopted by Kennedy and dissenters that because Congress intended to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[10] the phrase "waters of the United States" should be interpreted as broadly as possible so as to give effect to that purpose. The plurality rejects that position for a variety of reasons, not the least of which because it gives insufficient attention to other congressional purposes expressed in the Act, such as the "policy . . . to recognize, preserve, and protect the primary responsibility and rights of the States to prevent, reduce, and eliminate pollution, [and] plan the development and use . . . of land and water resources."[11]

Canons of construction are also called upon by the plurality. The vast arrogation of state authority to the federal government under an expansive jurisdictional reading of the CWA would create such a significant re-weighing of the federal-state balance that a clear statement to that effect is required of Congress. No such statement is to be found in the CWA.[12] Similarly, because such an expansive reading would raise serious federalism concerns under the Tenth Amendment, the statute should be construed so as to avoid raising those issues.[13]

Addressing the adjacency issue, the plurality interprets *Riverside Bayview* as deferring to the government's ecological judgment that certain wetlands are so bound up with neighboring navigable waterbodies that one cannot discern where the water ends and the wetland begins and that CWA jurisdiction can properly be asserted over such wetlands. Accordingly, the plurality concludes that a wetland is "adjacent" to "waters of the United States," and thus such wetlands are "waters" in their own right, if there is "no clear demarcation between 'waters' and wetlands."[14] But where there is no "boundary problem"—i.e., where one can easily tell where the "waters of the United States" end and the wetlands begin—there can be no adjacency. And to establish adjacency, the government must make two findings. One, the adjacent waterbody must itself be a relatively permanent body of water connected to traditional interstate navigable waters. Two, the wetland must have a continuous surface water connection with that waterbody such that one cannot tell where the water ends and the wetland begins.[15]

The plurality also recognizes the significant malleability of Kennedy's jurisdictional test. The plurality asks provocatively:

> When, exactly, does a wetland "significantly affect" covered waters, and when are its effects "in contrast . . . speculative or insubstantial"? . . . As the dissent hopefully observes, such an unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested. In fact, by stating that "[i]n both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above," Justice Kennedy tips a wink at the agency, inviting it to try its same expansive reading again.[16]

Thus, to recapitulate, the plurality adopts a split waters/wetland jurisdictional view, developing tests peculiar to each. For non-navigable tributaries, the plurality requires that there be a continuous (or at least seasonal) flow in a defined channel, such as a creek or stream but not an irrigation ditch. For wetlands, the plurality requires that the abutting land be so bound up with the jurisdictional water that the two are essentially "indistinguishable."[17]

The Kennedy Concurrence

Justice Kennedy's principal disagreement with the plurality and dissent is in the use of the "significant nexus" criterion, developed in *SWANCC* from the Court's opinion in *Riverside Bayview*. According to Kennedy, jurisdiction under the CWA for a non-navigable waterbody or wetland requires a significant nexus between that waterbody or wetland and a navigable water traditionally understood.[18] Kennedy adopts the premise that Congress intended to regulate some non-navigable waters in enacting the CWA.[19] Kennedy objects to the plurality's position that the CWA does not cover irregular flows. He notes several instances in the western United States of waterways that are generally dry but can at times carry tremendous amounts of water.[20] Because an intermittent flow can constitute a "stream," the government is correct that "waters of the United States"

can be reasonably interpreted to include the paths of such impermanent streams.[21]

Kennedy also takes issue with the plurality's reading of *Riverside Bayview*. That case, in Kennedy's view, stands for the proposition that adjacency can serve as a valid basis for jurisdiction even as to "wetlands that are not significantly intertwined with the ecosystem of adjacent waterways."[22] Thus, Kennedy cannot accept the plurality's position that where the boundary between wetland and adjacent waterway is clear, wetlands beyond that boundary are outside of jurisdiction.[23] Similarly, Kennedy cannot accept that a "continuous flow" connection between a wetland and an adjacent waterbody is necessary to jurisdiction, because such a requirement does not take sufficient account of occasional yet significant flooding.[24] Jurisdiction is possible even without a hydrological connection, "for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme."[25] In short, Kennedy believes that the plurality gives insufficient attention to the interests asserted by the United States.[26]

But equally unsatisfactory to Kennedy is the dissent's approach, for that would read the word "navigable" out of the CWA.[27] To preserve independent significance for the word "navigable," a significant nexus must exist between the non-navigable tributary or wetland and the traditional navigable waterway.

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[28]

This nexus is automatically established for wetlands adjacent to navigable-in-fact waterways.[29] Kennedy opines that the Corps might reasonably conclude that wetlands adjacent to certain classes of tributaries would also automatically have a significant nexus and thus fall within federal jurisdiction.[30] And he suggests that where adjacency and the requisite significant nexus are established for a particular wetland, it may be appropriate to presume jurisdictional status for other similar wetlands in the region.[31]

It is important to note, however, that in the absence of federal regulations, the determination of jurisdictional wetlands adjacent to nonnavigable tributaries must be conducted on a case-by-case basis.[32] Also, contrary to the Scalia plurality, Kennedy appears to accept the agency interpretation of "adjacent" as meaning "contiguous, bordering, or neighboring."[33]

Speaking specifically to the *Rapanos* case, Kennedy warns that "mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood."[34] As for *Carabell*, Kennedy underscores that jurisdiction is not precluded merely because the tract is separated from the adjacent "tributary" by a man-made impermeable berm.

Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands' significance for the aquatic system.[35]

But it is clearly not enough that the wetlands are merely geographically adjacent.[36] Thus Kennedy concludes that remand is appropriate to determine whether a significant nexus exists between the tract and a navigable-in-fact water, notwithstanding (or perhaps because of) the hydrologic barrier.

Is There A Controlling Opinion?

In the 1977 case of *Marks v. United States*[37] the Supreme Court set forth the rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Arguably, this rule would dictate that the "significant nexus" text be followed exclusively. But as recently as 2003, in *Grutter v. Bollinger*,[38] a racial preference case, the Supreme Court did not follow the *Marks* rule and noted that it was unworkable in practice: "It does not seem 'useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.'"[39] The obvious difficulty with the *Marks* rule is that it produces absurd results, for it not only allows one justice to control the entire court, but it also allows that justice to impose his will on the entire nation. The *Marks* rule encourages power plays on the Court to the detriment of the rule-of-law.

Because it has proven unworkable in the past, it is doubtful that the Supreme Court expects *Marks* to be followed by the lower courts.[40] It is noteworthy that the dissent in *Rapanos* does not rely on the *Marks* rule, although the dissent prefers the broader Kennedy test over the narrower plurality test. Instead, Justice Stevens suggests that "the United States may elect to prove jurisdiction under either test."[41]

Instead of relying on the concurring opinion with the least votes, it makes more sense to rely on the winning opinion that garnered the most votes. This would make the plurality the controlling opinion. If the plurality is followed by the courts below, it would substantially curtail federal jurisdiction under the CWA. If, on the other hand, Justice Kennedy's "significant nexus" test is adopted, the limitation on federal authority will vary on a case-by-case basis depending on whether the court gives the test a narrow or a broad reading.

The *Marks* inquiry is also complicated here because the jurisdictional tests offered by Scalia and Kennedy overlap but neither is a subset of the other; and the dissent,

although finding jurisdiction wherever Scalia or Kennedy would, does so on the basis of deference to agency decision-making. Contrast this circumstance with the now-classic *Marks*-type scenario in *Regents of University of California v. Bakke*.[42] In that case, four justices contended that use of race was not permissible in state school admissions; four justices held that it was permissible; and Justice Powell, concurring in the result, held that it was permissible in some instances and not in others.[43] With respect to *Rapanos*, under the Scalia test, jurisdiction obtains if there is a continuous flow in a defined channel. Yet under the Kennedy test, continuous flow (or, for that matter, any flow) is relevant to the jurisdictional inquiry only to the extent that flow is an indicator of significant effect. Where the Kennedy and Scalia tests sharply differ is on hydrological connection: for Scalia, a hydrological connection is a necessary but not sufficient condition to jurisdiction; whereas for Kennedy, a hydrological connection is neither necessary nor sufficient. Thus, Kennedy's opinion, unlike Powell's in *Bakke*, does *not* represent the median-point between the plurality and dissent. Hence, a *Mark*-type inquiry is all the more inapt. Perhaps what we really end up with in a case like *Bakke* or *Rapanos* is simply the result—reversal or sustaining of the opinion below—with no rationale to apply.

What is the *Rapanos* Jurisdictional Rule?

The opinion provides a five-justice majority rejecting the government position, adopted by the Sixth Circuit, that *any* hydrological connection is sufficient to establish Clean Water Act jurisdiction. Both the Scalia plurality and the Kennedy concurrence vote to reverse the lower court. And although the justices part ways on their jurisdictional interpretation, the justices reach other common ground as well.

For example, all the justices appear to agree that *SWANCC* prohibits federal regulation of isolated, non-navigable, intrastate water bodies. This constitutes a tacit recognition that *SWANCC* did more than invalidate the "Migratory Bird Rule" as some lower courts had held, such as the Sixth Circuit in *Rapanos*. *Rapanos*, therefore, is a clarification or affirmation of the *SWANCC* decision.

Also, Justice Kennedy and the Scalia plurality are in agreement that federal jurisdiction does not extend to remote ditches and drains with insubstantial flows. Justice Kennedy expressly excludes the "regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water volumes"[44] while the Scalia plurality expressly excludes man-made ditches and drains with intermittent flows from rain or drainage.[45]

Unfortunately, elucidating any further jurisdictional rule from *Rapanos* will have to await lower court determinations. This may occur rather quickly because there are several jurisdictional cases now pending in the lower courts. And, in fact, a district court in Texas has already applied *Rapanos* to determine the extent of federal authority over remote intermittent drainage ditches and streams.

In *United States v. Chevron Pipe Line Co.*,[46] the company spilled oil into an unnamed drainage ditch that connects to an intermittent stream which flows many miles to a navigable-in-fact waterway.[47] But, at the time of the spill, and during the spill cleanup, the ditch never contained flowing water.[48] The district court ruled that CWA jurisdiction does not extend to the ditch because it is not adjacent to an open body of navigable water and because the oil did not reach "navigable waters of the United States."[49]

The case is noteworthy, and perhaps portentous, because the court refused to apply the Kennedy "significant nexus" test, determining that the test is undefined as well as "vague" and "subjective." Rather than rely on this standardless test, the court concluded that the Scalia plurality and Fifth Circuit precedent determined the outcome of the case.[50]

Whether this reading of *Rapanos* is adopted by the Fifth Circuit and other courts remains to be seen.

What Happens with the *Rapanos* Case Now?

The opinion of the Sixth Circuit has been vacated; now it falls to the district court to make the determination, in the first instance, of whether jurisdiction extends to the Rapanos properties. According to the measure offered by the plurality, the government must establish that Mr. Rapanos's properties are "as a practical matter *indistinguishable*" from "those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams, oceans, rivers and lakes.'" The government is unlikely to meet this test, for at least two reasons. First, two of the three properties are immediately adjacent to man-made drainage ditches, not streams and creeks. Second, the wetlands on all three sites are readily distinguishable from any neighboring stream, river or lake. Should the lower court adopt the Kennedy "significant nexus" standard, the government must establish that the Rapanos properties "either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of navigable-in-fact waters." It is difficult to determine at this time whether the Rapanos properties meet this test. The government expert relied upon to establish jurisdiction conceded that he had never made a site-specific analysis. Based in part on that evidentiary vacuum, Justice Kennedy concluded that the record is currently inadequate to determine whether the requisite significant nexus exists.

CONCLUSION

Although Mr. Rapanos did not get what he had hoped—a bright line rule for federal jurisdiction—he did get what he asked for: invalidation of the "any hydrological connection" standard applied by the government and approved by the Sixth Circuit. This constitutes a significant constraint on federal authority under the CWA. How much of a constraint will depend on the willingness of federal regulators and the lower courts to recognize the fundamental principle affirmed by the majority in *Rapanos* that there are limits to federal power and the means employed to achieve national aims.

Footnotes

[1] *See* Rapanos v. United States, 126 S. Ct. 2208, 2220 (2006) (plurality opinion). The plurality states that the record is not clear as to whether the connections between the three Rapanos sites and the nearby drains and ditches are continuous or intermittent, or whether the flows in the drains and ditches themselves are continuous or intermittent. *Id*. at 2219.

[2] *Id*. at 2225 (internal quotations marks, points of ellipsis, and brackets omitted).

[3] *Id*. at 2220.

[4] *Id*. at 2220-2221.

[5] *Id*. at 2222.

[6] 474 U.S. 121 (1986).

[7] 531 U.S. 159 (2001).

[8] *Rapanos*, 126 S. Ct. at 2222.

[9] *See* 33 U.S.C. § 1362(14).

[10] *Id*. § 1251(a).

[11] *Id*. § 1251(b). *See Rapanos*, 126 S. Ct. at 2223.

[12] *See Rapanos*, 126 S. Ct. at 2224.

[13] *Id*.

[14] *Id*. at 2226.

[15] *Id*. at 2227.

[16] *Id*. at 2234 n.15.

[17] *Id.* at 2234.

[18] *Rapanos*, 126 S. Ct. at 2241 (Kennedy, J., concurring).

[19] *See id*.

[20] *Id*. at 2242.

[21] *Id*. at 2243.

[22] *Id*. at 2244 (quoting *Riverside Bayview*, 474 U.S. at 135 n.9).

[23] *Id*. at 2244.

[24] *Id*

[25] *Id*. at 2245-46.

[26] *Id*. at 2246.

[27] *Id*. at 2247.

[28] *Id*. at 2248.

[29] *Id*.

[30] *See id*.

[31] *Id*. at 2249.

[32] *Id.* at 2249.

[33] *Id.* at 2248.

[34] *Id*. at 2250-51.

[35] *Id*. at 2251.

[36] *Id*. at 2252.

[37] 430 U.S. 188 (1977).

[38] 539 U.S. 306 (2003).

[39] *Id*. at 325.

[40] In this regard it is well to note that the Chief Justice references *Marks* in his *Rapanos* concurrence but gives no direction as to whether its rule should be applied. *See Rapanos*, 126 S. Ct. at 2236 (Roberts, C.J., concurring).

[41] *Id*. at 2265 & n.14 (Stevens, J., dissenting).

[42] 438 U.S. 265 (1978).

[43] *See id*. at 271-72.

[44] 126 S.Ct. at 2249.

[45] *Id.* at 2215.

[46] _ F.Supp. 2nd_, 2006 WL 1867376 (N.D. Texas).

[47] *Id.* at 1.

[48] *Id.*

[49] *Id.* at 7-8.

[50] *Id.* at 9.

Commerce Clause Challenges to the Listings of Intrastate, Non-commercial Species under the Endangered Species Act

*By Robert P. Fowler, Jeffrey H. Wood, & Thomas L. Casey, III**

In the early 1970s, Congress considered a series of bills aimed at instituting a federal system of land use management.[1] These efforts ultimately failed as a result of legitimate fears associated with federal encroachment into this area of traditional state control.[2] As we have since come to learn, the Endangered Species Act of 1973 ("ESA")[3] is a modern-day Trojan horse.[4] Like the Greek's gift to the City of Troy, this species protection program was at first well-received as Congress voted almost unanimously to enact the ESA.[5] After all, it only gave federal agencies control where listed species or their habitats were concerned. Less than 100 species were on the 1973 version of the Endangered Species List—a list that was dominated by megafauna such as the red wolf, bald eagle, and peregrine falcon.[6]

However, with the listing of each additional species—the number is now over 1,300—the reach of federal power has continued to grow. In Hawaii (329 species), California (308 species), Alabama (117 species), and Florida (112 species), the number of listed species has grown so numerous that federal wildlife agencies now influence a wide range of commercial and noncommercial activities.[7] This has led some to question the constitutional basis for this broad exercise of authority, especially with respect to species with no readily apparent relationship to legitimate federal interests.

In defense, the federal agency principally responsible for implementing the ESA, the Fish and Wildlife Service ("FWS"), points to the Interstate Commerce Clause of the Constitution, which grants Congress the authority to make laws which are "necessary and proper" to "regulate Commerce with foreign nations, and among the several states. . . ."[8] Federal courts have so far agreed with FWS, adopting a variety of limitless theories based on "biodiversity" and the "interconnected web of life" or relying upon the commercial nature of the activities affecting the listed species. Thus far, a coherent, consistent constitutional framework justifying the exercise of federal regulatory power under the ESA has not been adopted by the courts.

The Supreme Court has not addressed the constitutionality of the ESA or the narrower question of whether a particular listing decision can be supported by the Commerce Clause. Only three federal appellate courts have weighed in on the constitutionality of the ESA, all of which involved challenges based on particular threatened "takes" associated with commercial activity: the D.C. Circuit in *National Association of Home Builders v. Babbitt* ("*NAHB*") (desert flies)[9] and *Rancho Viejo, LLC v. Norton* (toads);[10] the Fourth Circuit in *Gibbs v. Babbitt* (red wolves);[11] and the Fifth Circuit in *GDF Realty Investments, Ltd. v. Norton* (cave bugs).[12] These cases were all hotly debated, with no fewer than nine circuit court judges voting in dissent.[13] In contrast to these cases, no circuit courts and only a few federal district courts have ever specifically addressed a facial commerce clause challenge to a final rule listing an endangered or threatened species.[14]

After providing a brief overview of federal and state efforts to protect wildlife, the Supreme Court's Commerce Clause jurisprudence, and the circuit courts' opinions addressing challenges to the ESA's take provision, this article addresses the viability of facial Commerce Clause challenges to final rules listing intrastate, noncommercial species, and offers guiding principles and an appropriate framework for determining whether a final rule listing a particular species under the ESA should be vacated as exceeding federal Commerce Clause power.

I. Federal & State Efforts to Protect Imperiled Species

The ESA has been described as the "most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[15] Its stated purpose, among other things, is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species . . . ."[16] To this end, Section 4 of the Act requires FWS to "list" any species found to be either "threatened" or "endangered."[17] The listing process is accomplished pursuant to traditional notice and comment rulemaking.[18] The listing only becomes final upon publication of the final listing decision in the Federal Register. Concurrently with the listing decision, FWS is required to designate the species' "critical habitat."[19]

The ESA defines an "endangered" species as "any species which is in danger of extinction throughout all or a significant portion of its range."[20] The ESA likewise defines a "threatened" species as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."[21] In making a determination as to whether a particular species is either threatened or endangered, FWS is directed to consider: (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) the overutilization for commercial, recreational, scientific, or educational purposes; (3) the effect of disease or predation on the species; (4) the adequacy of existing regulatory mechanisms; and (5) any other natural or manmade factors affecting the species' continued existence.[22] Such a determination is also to be based "solely" on the "best scientific and commercial data available," and FWS is prohibited from considering economic impacts when deciding whether or not to list a species.[23]

Once a listing becomes final, the substantive provisions of the ESA are triggered. Of particular importance are the provisions found under ESA Section 9 and Section 7.

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Section 9 imposes civil and criminal liability for any "take" of an endangered species.[24] "Take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[25] Regulations further define "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[26] The same regulations further define "harm" as "an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering."[27] Read together, the ESA and its implementing regulations thus cover a limitless range of activities including habitat modification.

Under the ESA's enforcement provisions, a violation of Section 9 can incur civil penalties up to $25,000 per violation and criminal sanctions up to one year in prison and $50,000 in fines.[28] Section 10 allows any person to lawfully take a listed species if he first obtains an "incidental take permit." In order to obtain an incidental take permit, however, the landowner must present an acceptable habitat conservation plan that demonstrates that the modification is consistent with the long-term survival of the species. This is an expensive and time-consuming process, and FWS has wide discretion in determining whether to grant such permits.

Section 7 of the ESA requires every federal agency to consult with FWS in order to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of critical habitat.[29] Federal agencies are required to comply with Section 7 strictly, regardless of economic or societal costs.[30] If FWS ultimately concludes the action will result in jeopardy or adverse habitat modification, FWS will issue a biological opinion outlining any "reasonable and prudent alternatives" that FWS believes will avoid those consequences.[31] Though described as "alternatives," FWS' "reasonable and prudent alternatives" are typically mandatory in that they take the form of prescriptive measures. In the words of the Supreme Court, "while the biological opinion theoretically serves an 'advisory function,' in reality it has a powerful coercive effect on the action agency."[32]

Importantly, Section 7 covers any permit or license issued by a federal agency to a private party. Thus, private parties applying for a permit, for example, from the Corps of Engineers to dredge or fill waters of the United States will ultimately bear the brunt of any restrictions placed on the Corps by FWS as a product of Section 7's consultation requirements. If FWS determines that granting a particular federal permit or license will jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of critical habitat, then the applicant's permit will most likely be denied.

States have long played a preeminent role in protecting wildlife found within their borders.[33] While many of these state laws originally focused on protecting wild game and other wildlife of commercial value,[34] sixteen states had already adopted their own statutory programs protecting certain species classified as "endangered" prior to the adoption of the federal ESA.[35] Today, virtually all states have their own statutory or regulatory programs protecting endangered species.[36] Many states even protect species not on the federal ESA list.[37]

II. Federal Jurisdiction under the Interstate Commerce Clause

Congress' power to protect endangered species emanates from the Commerce Clause. Under the Articles of Confederation, a weak central government was given very limited, specific powers, including the authority to declare war, to set weights and measures (including coins), and for Congress to serve as a final court for disputes between states. There was no authority for the central government to regulate commerce. This system of governance led states to adopt protectionist barriers to trade. At the Constitutional Convention, the framers retained the Confederation's concept of a central government with only enumerated powers. However, the framers expanded those enumerated powers in light of the need for centralized control of interstate commerce—hence, the Commerce Clause was born. Wasting no words, Article I, Section 8, Clause 3 of the Constitution gave Congress the power "To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."

A. From Gibbons v. Ogden *to the New Deal Era*

In the years following the adoption of the Constitution, Congress rarely used its Commerce Clause power, providing little opportunity for the Supreme Court to interpret its meaning and define its scope. In fact, the Supreme Court's first meaningful interpretation of the Commerce Clause did not come until 1824 in *Gibbons v. Ogden,*[38] when the Supreme Court struck down a New York law creating a steamship monopoly for traffic between New York and New Jersey. Using somewhat broad language, Chief Justice John Marshall upheld Congress' authority under the Commerce Clause to regulate trafficking of goods between two or more states. Justice Marshall recognized that the enumerated powers given under the Commerce Clause meant that there was at least some *commerce* that Congress could not reach.[39]

During the first part of the twentieth century, the Court further refined the dimensions of the federal government's commerce power, holding that only activities with a "direct effect" on *interstate* commerce could be subject to congressional regulation.[40] In other words, activities that affected interstate commerce directly were within Congress' power; whereas activities that affected *interstate commerce indirectly or intrastate commerce* were outside Congress' power.[41] By issuing these decisions, the Court sought to prevent the development of a "completely centralized government" with "virtually no limit to the federal power."[42]

This allegiance to limited federal powers would eventually give way to political necessity. To help alleviate the misery of the Great Depression, President Franklin Roosevelt proposed sweeping social programs, many of which involved vast expanses in federal authority that were

eventually rejected as unconstitutional by the Supreme Court.[43] President Roosevelt did not take these defeats lying down. Rather, in the mid-1930s, he instituted his Court-packing scheme, and in response, the Supreme Court voluntarily "reformed" its view of the Commerce Clause power and other issues of importance to the President's social and economic agenda. Starting in 1937, the Court began blurring the former distinctions between local manufacturing/production and interstate commerce and the distinction between direct and indirect impacts.[44]

In *NLRB v. Jones & Laughlin Steel Corp*, the Court rejected the production versus commerce distinction and upheld legislation that simply "affect[ed] commerce,"[45] which was very different from the previous standard of a "close and substantial relation to interstate commerce."[46] In 1941, in *United States v. Darby*,[47] the Court retreated from the production versus commerce distinction and the directness test, finding that Congress could regulate intrastate activities that "so affect interstate commerce or the exercise of the power of Congress over it."[48] Then, in *Wickard v. Filburn*, the Court issued its "cumulative impact doctrine," upholding Congress' authority to set quotas for the amount of wheat one farmer could harvest.[49] Even though one farmer's personal impact on the price of wheat was minuscule, the Court reasoned that Congress could regulate his activities because the cumulative impact on interstate commerce of all farmers in that farmer's situation was significant.[50] For the next fifty years, the Court applied a "rational basis" test for concluding the regulated activity sufficiently affected interstate commerce.[51]

Finally, in *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court upheld the Surface Mining Control and Reclamation Act as a proper exercise of the commerce power, finding that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State."[52] In light of the Court's broad interpretation of federal Commerce Clause power, Congress began to push the envelope of its power even further.

B. Revival of Federalism: Lopez, Morrison, and SWANCC

In a 1995 landmark decision, *United States v. Lopez*,[53] the Supreme Court reminded Congress of its limited powers and articulated a more coherent framework for determining whether particular federal actions fall within Congress' power to regulate "Commerce . . . among the several states."[54] That decision was followed by *United States v. Morrison*,[55] which re-enforced the *Lopez* analysis and gave further content to the limitations on federal power. Congress' unbridled power to enact environmental laws was eventually questioned in dicta in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"). [56]

In *Lopez*, the Court addressed whether the Gun-Free School Zones Act of 1990 ("GFSZA"), which made it a federal offense to knowingly possess a firearm in a school zone, exceeded Congress' authority to regulate interstate commerce.[57] After navigating through its prior precedents, the Court succinctly provided the relevant analysis—one that recognizes the limited nature of federal power under our dual system of government.[58] Under *Lopez*, Congress may regulate (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce;" and (3) "those activities having a substantial relation to interstate commerce."[59] After deciding that possession of a handgun did not fall within the first two categories of Commerce Clause regulation, the Court held that under the third category the GFSZA exceeded congressional authority to regulate commerce, reasoning that Congress failed to demonstrate that guns in a school zone had a "substantial effect" on interstate commerce.[60]

At the outset, the *Lopez* Court revived a fundamental principle of our federal system: "[T]he Constitution creates a Federal Government of enumerated powers." From there, the Court rejected the idea that the Commerce Clause gave Congress the power to regulate *intrastate* activities with only a *tenuous* connection to interstate commerce.[61] The Court observed that GFSZA had "nothing to do with commerce or any sort of economic enterprise."[62] The Court distinguished its prior cases, such as *Wickard*, *Darby*, and *Heart of Atlanta Motel* by recognizing that those cases involved regulated activities which were economic in nature.[63] Specifically, the Court stated that "[e]ven *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not."[64] The Court also noted that the GFSZA lacked a "jurisdictional element"—meaning that the statute lacked any provision limiting its application to contexts where a significant nexus to interstate commerce existed, such as requiring proof that the defendant purchased or transported the gun in interstate commerce.[65] Finally, the Court noted that Congress failed to make adequate findings demonstrating a link between gun possession in a school zone and interstate commerce.[66] The Court concluded by finding that the link between gun possession in a school zone and interstate commerce was too "attenuated" to pass constitutional muster.[67]

Five years later, in *United States v. Morrison*,[68] the Court reaffirmed its holding in *Lopez* and provided additional guidance. In *Morrison,* the Court struck down the Violence Against Women Act ("VAWA"), rejecting the "argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[69] With respect to the third *Lopez* category, the *Morrison* Court identified at least four factors that should be considered when determining whether an activity has a substantial relationship to interstate commerce: (1) whether the regulation involves economic activity; (2) whether the link between the regulated activity and interstate commerce is direct or attenuated; (3) whether the regulation includes an express jurisdictional element; and (4) whether Congress has made findings regarding the regulated activity's effect on commerce.[70]

Perhaps the most important of these three factors is the economic or commercial nature of the activity in question. Although the *Morrison* Court did not adopt a

"categorical rule against aggregating the effects of any noneconomic intrastate activity," it recognized that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only* where the activity is economic in nature."[71] Importantly, the Court rejected congressional findings that gender-based violence had significant effects on interstate commerce because the connection between those crimes and their economic consequences were too indirect and attenuated.[72] Simply because Congress says a regulated activity has a substantial relationship to interstate commerce does not make it so.

For many, an important question after *Lopez* was whether this revival of federalism would extend to environmental statutes. The answer came in 2001 when the Supreme Court issued its ruling in *SWANCC*.[73] The Court held that the Corps of Engineers lacked jurisdiction under the Clean Water Act to require a municipal solid waste landfill to obtain federal approval before disturbing isolated, intrastate wetlands, even though those wetlands provided important habitat for migratory birds. Though beyond the case's central holding, the Court provided guidance on how to interpret *Lopez*'s third category.[74] The *SWANCC* Court suggested that the object or activities which are the focus of the regulation are the only activities that may properly be aggregated under *Lopez's* third category.[75] The government argued that economic value of the migratory birds and the commercial activities being prohibited could justify federal action under the Commerce Clause. However, the Court rejected that argument, finding that the precise object of the statute was the wetlands themselves and that they must substantially affect interstate commerce. The Court suggested that it would not necessarily focus on the commercial activities causing the environmental harm; rather, it would consider whether there was some close relationship between the object of the regulation and the commercial activities.[76]

C. Gonzales v. Raich and As-Applied Commerce Clause Challenges

After *SWANCC*, many wondered if the Court would take any further steps to limit federal power, possibly by expressly overruling *Wickard*—the Court's most far-reaching endorsement of federal Commerce Clause power. The opportunity to review the *Wickard* analysis came recently when, in *Gonzales v. Raich,*[77] the Supreme Court upheld the constitutionality of the Controlled Substances Act as-applied to the intrastate possession and consumption of marijuana for medical purposes. This 2005 opinion began by reiterating that Congress may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[78] Although the *Raich* Court failed to provide clear reasoning on how the *possession* and *consumption* of marijuana is "economic," it claimed to follow the principles of *Lopez* and *Morrison* without expressly analyzing *Morrison's* four factors. The outcome of this case is not surprising. After all, *Raich* is perhaps best understood as the twenty-first century's version of *Wickard* as it only recognizes the federal government's authority to regulate intrastate activities involving fungible (i.e., interchangeable) goods for which a substantial interstate market currently exists.[79] In fact, the Court explained, "[l]ike the farmer in *Wickard,* respondents are cultivating, for home consumption, a *fungible* commodity for which there is an *established*, albeit illegal, *interstate market*."[80] The lower courts are currently deciphering *Raich* and deciding how it affects the applicable Commerce Clause analysis.[81]

III. Commerce Clause Challenges to the Application of the ESA

While the Supreme Court has not addressed the constitutionality of the ESA as a whole, three circuit courts have issued decisions concerning the ESA's take provision as-applied to particular species. Although all three circuits rejected the Commerce Clause challenges at issue, nine circuit court judges went on record to argue that, at the very least, the application of the ESA to intrastate, noncommercial species raised serious constitutional problems in light of *Lopez* and *Morrison*.

A. Desert Flies, Toads & the D.C. Circuit

The first case in which a U.S. Court of Appeals addressed a challenge to the ESA's take provision was *National Association of Home Builders v. Babbitt*.[82] That case involved a challenge brought by land developers and local governments to Section 9 of the ESA's application to the Delhi Sands Flower-Loving Fly, a fly found only in a limited section of Southern California. The plaintiffs sought declarative and injunctive relief against any application of Section 9 by FWS to the construction of a hospital in Riverside County, California, which FWS concluded involved the destruction of fly habitat. In reviewing the constitutionality of Section 9 to the fly, the panel split three ways—Judges Wald and Henderson concluded that the application of Section 9 under the facts of the case was constitutional (although on different grounds), while Judge Sentelle dissented.

Judge Wald concluded that Section 9 of the ESA fit within *Lopez's* first and third categories. Judge Wald believed that the regulation fit within the first category, as the regulation of the channels of interstate commerce, on two grounds: (1) the prohibition against takings of an endangered species is necessary to enable the government to control the transportation of endangered species in interstate commerce; and (2) the prohibition on takings of endangered animals is necessary "to keep the channels of interstate commerce free from immoral and injurious uses."[83] Judge Wald likened Section 9's "take" prohibition to federal laws which prohibited the possession of machine guns. "[I]t is necessary to regulate the possession of machine guns in order to effectively regulate the interstate traffic in machine guns. . . ."[84] Similarly, Judge Wald noted that "the prohibition on 'taking' endangered species is properly classified as a first category regulation because one of the most effective ways to prevent traffic in endangered species is to secure the habitat of the species from predatory invasion."[85] Additionally, like *Heart of Atlanta*, in which the Court upheld a federal prohibition on racial discrimination in places of public accommodation serving interstate travelers, "Congress used this authority [under the ESA] to prevent

the eradication of an endangered species by a hospital that is presumably being constructed using materials and people from outside the state and which will attract employees, patients, and students from both inside and outside the state."[86] Therefore, "like regulations preventing racial discrimination . . . regulations preventing the taking of an endangered species prohibit interstate actors from using the channels of interstate commerce to promot[e] or spread[] evil. . . ."[87]

Judge Wald also concluded that Section 9's "take" prohibition was justified as the regulation of activities "substantially affecting interstate commerce," under *Lopez*'s third category. Judge Wald again relied on two different grounds for this conclusion, finding first that Congress has an interest in biodiversity. "Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes."[88] Judge Wald noted that this value was "uncertain"—its *possible* future value was enough. "To allow even a single species whose value is not currently apparent to become extinct . . . deprives the economy of the option value of that species."[89] Second, Judge Wald concluded that Section 9 properly regulated activity substantially effecting interstate commerce because many species' extinct status was *produced* by "destructive interstate competition."[90] Judge Wald likened the case to the Surface Mining Act of 1977, which required mine operators to restore the land after mining to its prior condition. Judge Wald reasoned that like the Surface Mining Act, upheld by the Supreme Court in *Hodel v. Virginia Surface Mining & Reclamation Association*,[91] Section 9 of the ESA properly regulated environmental activity closely associated with commercial activity.

Judge Henderson disagreed, in part. Judge Henderson did not think Section 9 involved the regulation of the channels of interstate commerce under *Lopez*'s first category. The Delhi flies "are entirely *intra*state creatures. They do not move among states either on their own or through human agency. As a result . . . the statutory protection of the flies 'is not a regulation of the use of the channels of interstate commerce.'"[92] Nor did Judge Henderson believe that the regulation of the fly under Section 9 fit under *Lopez*'s third category on the grounds that such species *might* be of economic value in the future. "It may well be that no species endangered now or in the future will have any of the economic value proposed. Given that possibility, I do not see how we can say that the protection of an endangered species has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value."[93] However, Judge Henderson did agree that the regulation of the flies under Section 9 fit within *Lopez*'s third category because of the "interconnectedness" of all species. "Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce."[94]

Judge Sentelle, in dissent, would have none of it. The question before the Court as to whether Congress could regulate the "taking" of purely intrastate species reminded Judge Sentelle of the following old chestnut: "If we had some ham, we could fix some ham and eggs, if we had some eggs. . . . Similarly, the chances of validly regulating something which is neither commerce nor interstate under the heading of the interstate commerce clause power must likewise be an empty recitation."[95] Judge Sentelle agreed with Judge Henderson that *Lopez*'s first category was not in play and added that Judge Wald's reliance on *Heart of Atlanta* was entirely misplaced. "The fact that activities like the construction of a hospital might involve articles that have traveled across state lines cannot justify federal regulation of the incidental effects of every local activity in which those articles are employed."[96] Judge Wald's conclusion, in Judge Sentelle's opinion, would improperly extend *Lopez*'s third category "to anything that is *affected by* commerce."[97]

Judge Sentelle disagreed with Judge Wald's and Judge Henderson's varying biodiversity/ecosystem justifications for federal regulation of the desert fly under *Lopez*'s third category. Relying on *Lopez*, Judge Sentelle gave three specific responses to this type of argument. First, "the regulation does not control a commercial activity, or an activity necessary to the regulation of some commercial activity. Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense."[98] Second, like the statute at issue in *Lopez*, the ESA contained no jurisdictional provision which would ensure, on a case-by-case basis, that the activity at issue "affects interstate commerce." Third, both Judge Wald and Judge Henderson relied on wholly speculative connections between the regulation of the desert fly and commerce—something prohibited by *Lopez*. Judge Sentelle also rejected the theory that *Lopez*'s third category granted Congress the authority to regulate purely intrastate noncommercial activities where the *regulation* enacted might itself affect interstate commerce.[99]

The D.C. Circuit once again addressed the constitutionality of federal regulation of a purely intrastate noncommercial species in *Ranch Viejo, LLC v. Norton*.[100] That case involved the Arroyo Toad, an endangered species of toad found only in southern California. The court, finding that the case was governed by *NAHB v. Babbitt*, affirmed the district court's dismissal of a developer's challenge to the ESA as applied to the toad. In discussion, the court focused on the particular activity in which the plaintiff was engaged. "The regulated activity is Ranch Viejo's planned commercial development, not the arroyo toad. . . ."[101] The Court left open the question whether a similar commerce clause challenge would succeed if the alleged "taking" involved purely noneconomic activity, such as a "casual walk in the woods."[102] Thus, the panel opinion in *Rancho Viejo* made an adjustment to the scope of an as-applied challenge to a particular application of the ESA's take provision. Unlike *NAHB v. Babbitt*, which characterized the appellant's claim as a challenge to the ESA's take provision *as applied to the Delhi Sands Loving Fly*, the *Rancho Viejo*

court focused on the constitutionality of the ESA's take provisions *as applied to the particular activity in which the appellants were engaged*. Framing the question thusly, the focus naturally shifted from the species to the commercial activity of the appellants.

In *Rancho Viejo*, the plaintiffs petitioned for rehearing en banc. Both Judges Sentelle and then-Circuit Judge John Roberts dissented from the Court's denial of the petition.[103] Judge Sentelle dissented on many of the same grounds expressed in his dissent in *NAHB v. Babbitt*. For his part, Judge Roberts also took issue with the court's focus on the effect of the *regulation*, rather than on the particular activity regulated. Judge Roberts noted the seeming inconsistency between this approach and *Lopez* and *Morrison*. "Under the panel's approach in this case . . . if the defendant in *Lopez* possessed the firearm because he was part of an interstate ring and had brought it to . . . sell it, or the defendant in *Morrison* assaulted his victims to promote interstate extortion, then clearly the challenged *regulations* in those cases would have substantially affected interstate commerce . . ."[104]

B. Red Wolves & the Fourth Circuit

The Fourth Circuit took up a challenge involving Section 9 of the ESA in *Gibbs v. Babbitt*.[105] That case specifically involved the application of the "take" provision by regulation to the red wolf, which had been released into North Carolina under the ESA's experimental population program. *Gibbs* is thus notably different than either *NAHB v. Babbitt* or *Rancho Viejo*. *Gibbs* involved what appears to be a facial challenge to a final FWS rule—i.e., the final rule governing the experimental red wolf release program codified at 50 C.F.R. § 17.84(c). A group of plaintiffs challenged the federal government's authority under the Commerce Clause to regulate the "take" of a red wolf on private property pursuant to this regulation.

Judge Wilkinson, writing for the majority, upheld the regulation, concluding that it fit within *Lopez*'s third category. In so holding, Judge Wilkinson first focused his analysis on the red wolf, concluding that the taking of a red wolf implicated certain interstate activities. "The relationship between the red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf tourism, no scientific research, and no commercial trade in pelts."[106] Judge Wilkinson noted that many tourists traveled to North Carolina simply to hear the red wolves howl in the evening. The record specifically included one report predicting that North Carolina might see an increase of between $171 and $538 million per year based on red wolf-related tourism.[107] Judge Wilkinson similarly noted the interstate scientific draw to the wolves, the experimental release of which was seen as a model for other experimental release programs. Judge Wilkinson also observed that the trade in red wolf pelts was once rather substantial. Beyond the wolves themselves, Judge Wilkinson thought the regulation of "takings" was also related to commerce simply because the appellant farmers saw the wolves as an economic threat to their livestock. Ultimately, because the prohibition on "taking" a red wolf was part of Congress' broader goal of recovering the species as a whole, and the entire species *qua* species was of concrete commercial interest, the regulation was a constitutional exercise of Congress' Commerce Clause authority.[108]

Judge Luttig dissented, concluding that the majority opinion was flatly inconsistent with *Lopez* and *Morrison*. Judge Luttig was particularly concerned, as the author of the original Fourth Circuit *Morrison* opinion affirmed by the United States Supreme Court.[109] Judge Luttig looked at the four justifications outlined above and concluded that they were "not even arguably sustainable under *Lopez* [and] *Morrison* . . . much less for the reasons cobbled together by the majority. . . ."[110] In comparing the case to *Lopez*, Judge Luttig concluded that the number of inferential leaps relied upon by the majority was "exponentially greater" than the inferential leaps rejected by the Supreme Court in *Lopez*.[111]

C. Cave Bugs & the Fifth Circuit

In *GDF Realty Investments, Ltd. v. Norton*,[112] the Fifth Circuit was asked whether Section 9's "take" provision was constitutional as-applied to six species of subterranean cave bugs found only within two counties in Texas. The challenge was characterized in a manner akin to *NAHB v. Babbitt*'s challenge to section 9's take provision *as-applied to the desert fly*. The key issue to the panel was whether, in order to demonstrate that the regulation had substantial effects on interstate commerce, cave bug "takes" could be aggregated with takes of all other endangered species for purposes of *Lopez*'s third category.[113] Finding that the court could do so, the panel affirmed the decision of the district court dismissing the appellants' claim.

As a preliminary matter, Judge Barksdale, writing for the majority, disagreed with the district court's focus on the appellants' commercial activities underlying any threatened "takes." "[T]he *effect* of regulation of ESA takes may be to prohibit . . . development in some circumstances. But, Congress, through the ESA, is not directly regulating commercial development."[114] In contrast, Judge Barksdale concluded that "the scope of inquiry is primarily whether the *expressly regulated activity* substantially affects interstate commerce. . . ."[115] Moreover, unlike the red wolves in *Gibbs*, the court recognized that the cave bugs did not have any species-specific economic impacts on interstate commerce. However, in Judge Barksdale's opinion, the aggregate effects analysis could take into account not only the regulation of cave bug takes, but the regulation of all possible endangered species takes. Thus, because the take of a particular species could threaten the "interdependent web" of all species (which presumably would ultimately have some effect on interstate commerce), the regulation of cave bugs was necessary to fulfill the broader federal goal of maintaining the viability of the ecosystem in general.[116]

Six judges of the Fifth Circuit dissented from the Fifth Circuit's denial of a petition for en banc review.[117] Judge Edith Jones authored a vocal dissent on behalf of the six dissenting judges. "The panel holds that because 'takes' of the Cave Species ultimately threaten the 'interdependent web' of all species, their habitat is subject to federal regulation. . . . Such unsubstantiated reasoning offers but a remote, speculative, attenuated, indeed more than improbable

connection to interstate commerce."[118] Judge Jones argued that the "interconnected web" argument was fundamentally inconsistent with *Lopez* and *Morrison*, observing that there was arguably a greater interconnectedness between humans, and that "the panel's 'interdependent web' analysis of the [ESA] gives these subterranean bugs federal protection that was denied the school children in *Lopez* and the rape victims in *Morrison*."[119]

Judge Jones noted that the only sort of legitimate aggregation under the ESA would be on a species-specific basis as employed in *Gibbs* or perhaps across certain species lines where some rational category could be crafted. However, unlike the red wolves in *Gibbs*, the record in *GDF Realty* provided no basis for the conclusion that the cave bug species, aggregated on a species-specific basis (or together) had any effect on interstate commerce. In conclusion, "[M]any applications of the ESA may be constitutional, but this one goes too far."[120]

These decisions were handed down prior to the Supreme Court's opinion in *Raich*. As discussed above, *Raich* (like *Wickard*) merely recognizes the federal government's authority to regulate intrastate activities involving fungible goods for which a substantial interstate market currently exists.[121] All of the species at issue in *NAHB v. Babbitt*, *Rancho Viejo*, and *GDF Realty* are purely *intrastate* species for which there is *no* current market. The objections raised by the dissenters in this regard remain a substantial criticism of the majority opinions. Moreover, there is nothing "fungible" about endangered species. While a red wolf may be fungible with another red wolf, it is not fungible with an arroyo toad. And even conceding, as Judge Jones has, that some distinct category of species like the six species of cave bugs may be interchangeable with each other to a certain degree, they are not fungible broadly with all other endangered species. Additionally, *Raich's* as-applied analysis focused on the particular "class of activities" regulated by the ESA—i.e., the intrastate possession and consumption of marijuana. The majority opinion in *GDF Realty* and the dissenting opinions in all of these cases were right to question any over-emphasis on the plaintiffs' particular activities. As such, *Raich* does not provide any grounds for the majority holdings in these cases. The majority opinions, with the possible exception of *Gibbs*, thus go well beyond not only *Lopez* and *Morrison*, but the outer limits of constitutional authority delineated by *Raich*.

IV. "Facial" Challenges to Listing Decisions

Purely facial challenges to the validity of the ESA *as a whole* have not been vigorously pursued, in large part due to the perception that such a claim would only succeed upon a showing that there is no set of facts upon which the statute could be constitutional.[122] One could imagine any number of listed species the protection of which could have a substantial relationship to interstate commerce. For instance, in *Raich*, the Supreme Court footnoted that 16 U.S.C. § 668(a), a federal statute protecting the bald eagle, was a constitutionally permissible example of a statute "[p]rohibiting the intrastate possession . . . of an article of commerce [that] is a rational (and commonly utilized) means of regulating commerce in that product."[123] On the other hand, as discussed above, challenges to the ESA *as-applied to a particular application* of Section 9's take prohibition tend to become bogged-down (rightly or wrongly) in an analysis of the relationship between the commercial development at issue and interstate commerce.

An entirely different question is whether a facial Commerce Clause challenge to the validity of a *federal regulation* listing a specific intrastate, noncommercial species could succeed. The closest circuit case to address such a challenge is *Gibbs*, although that case involved a challenge to the final rule implementing an experimental release of red wolves rather than a listing decision. Federal courts routinely entertain facial challenges to the constitutionality of specific final rules apart from the underlying statute.[124] Yet, similar challenges under the ESA have seldom been pursued.[125] Admittedly, this is where the distinction between facial and as-applied challenges begins to blur. Some might even classify the claim as a challenge to the ESA *as-applied to a particular species* (as opposed to challenges to the ESA *as-applied to a particular "take"*). However, the ESA imposes no obligations on its own and instead operates on a species-by-species basis through the promulgation of separate final rules. Each final rule must stand on its own merits—statutorily and constitutionally. As a result, a facial Commerce Clause challenge to a listing decision ultimately depends upon the unique facts of the particular species at issue, just as the constitutionality of the statutes in *Lopez* and *Morrison* rested on the unique facts of the particular subjects of regulation in those cases. Notably, even under a facial challenge, the actor's specific economic motivations are irrelevant to the analysis.[126]

A. Governing Principles

The *Lopez* and *Morrison* analysis (which involves the evaluation of three categories and, with respect to the third category, four factors) is not a "precise formulation[]" although it should "point the way to a correct decision" in Commerce Clause cases.[127] This analysis should be informed by those principles underlying our Nation's "dual system of government."[128] At least five of these principles are especially relevant to the consideration of a facial challenge to the listing of an endangered or threatened species.

The first principle is that federal agencies can only possess those powers enumerated by the Constitution, nothing more and often much less. The "Constitution creates a Federal Government of enumerated powers."[129] Every Commerce Clause analysis should start here. James Madison famously noted in *The Federalist* No. 45: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite." Justice Marshall, in turn, explained that this "enumeration presupposes something not enumerated."[130] In our own day, the Supreme Court has noted: "[T]he grant of authority to Congress under the Commerce Clause, though broad, is not unlimited."[131] This maxim of limited powers is especially true for federal agencies asserting jurisdiction at the fringes of congressional authority.

Second, any Commerce Clause analysis should focus on the *subject* of the regulation and not the variety of activities somehow affected by the regulation.[132] If the Supreme Court had looked to the aggregate effects of the actors' general conduct in *Lopez* and *Morrison* rather than the subject of the regulation itself, it would have been an easy task indeed for the Court to find some relationship between the regulatory programs at issue and interstate commerce.[133] The regulatory impositions of the ESA are triggered not by commercial activities as such.[134] Instead, federal involvement is triggered by the *need to protect listed species*, which is primarily for non-economic reasons. It is the protection of a listed species (from takes or otherwise) that should form the basis of the Commerce Clause analysis.[135] In the ESA context, this means that the relevant Commerce Clause analysis should focus on whether the listed species, which is the object of the listing decision, has a substantial relationship to interstate commerce and not on whether the commercial activities affecting that species have such a relationship. Looking beyond the regulated activity would "effectually obliterate" any limitation on federal Commerce Clause power.[136]

Third, courts should refrain from employing the "cumulative" impacts or "aggregate" effects analysis unless the object of regulation (in this case, the listed species) is "economic" or "commercial" in nature.[137] The Supreme Court has held that federal power may properly extend to the regulation of various "intrastate" activities including intrastate coal mining, intrastate extortionate credit transactions, restaurants utilizing substantial interstate supplies, and hotels catering to interstate guests.[138] However, all of these involved "economic" activities.[139] The only time the Court has permitted the aggregation of *noneconomic intrastate* activities is where the regulation of such activities is a necessary part of a broad interstate, economic regulatory scheme which could be undercut unless the intrastate activity was also regulated.[140] For example, in *Wickard v. Filburn* and *Gonzales v. Raich*, the Supreme Court held that Congress could regulate the intrastate cultivation of wheat and marijuana, respectively, because the intrastate cultivation of such "fungible" agricultural goods could undermine Congress' ability to regulate the interstate market for those goods.[141] However, this marks the absolute limit of the federal government's authority under the Commerce Clause.[142] Indeed, the activities regulated in *Wickard* and *Raich* could properly be characterized as "economic activity."[143] To reach intrastate, noneconomic objects of regulation such as certain listed species lacking this necessary connection to economic regulation would render the central holding in *Lopez* and *Morrison* meaningless.[144]

That is not to say that the aggregation analysis could never be used in the ESA context. The bald eagle, for instance, is fungible with other bald eagles and a substantial interstate market exists for eagles and eagle parts. Therefore, federalism concerns are not necessarily implicated by federal protection of this species.[145] Aggregation analysis might also apply to other commercial species with known interstate markets, including certain migrating birds, red wolves, and a variety of other species. Still, a great number of federally listed species lack this kind of relationship to interstate commerce.

Fourth, speculative or attenuated theories should not be employed. For example, in *Lopez*, it was argued that the "costs of crime" and the impact of guns in a school zone on "national productivity" justified the federal regulation.[146] Rejecting those theories, the Court explained that such attenuated theories would justify federal regulation of *any* activity—a result contrary to the concept of a limited federal government.[147] Similarly, in *Morrison*, the Court rejected the argument that "but-for" gender-motivated violent crimes the victims would travel interstate conducting business or would otherwise impact the national economy.[148] Any theory that piles "inference upon inference" is simply insufficient to establish a substantial relationship to interstate commerce.[149] Unfortunately, many courts addressing Commerce Clause-based challenges in the ESA context ignore this well-established principle.

A fifth principle is that courts should look for current, not historic, connections to interstate commerce. The critical question under *Lopez* and *Morrison* is not whether an activity *had* a substantial relation to interstate commerce sometime in the past; rather, the relevant inquiry is whether Congress is regulating something "*having* a substantial relation to interstate commerce."[150] Commercial connections which are remote in time are simply insufficient to support federal jurisdiction.

B. Searching for a Substantial Relationship to Interstate Commerce

With the preceding principles in mind, a federal regulation establishing protections for an endangered species must, in order to be constitutional, fall within at least one of the three categories of activities which Congress may regulate pursuant to its Commerce Clause powers, as set forth in *Lopez* and *Morrison*. It is relatively well settled that federal protection of intrastate, noncommercial species does not fall within the first category of the *Lopez* analysis because it is not the regulation of "the use of the channels of interstate commerce."[151] Likewise, with respect to *Lopez's* second category, such federal regulations do not constitute the regulation of "instrumentalities of interstate commerce, or persons or things in interstate commerce."[152] In fact, courts addressing Commerce Clause-based ESA challenges have never held that federal protection of endangered species fits within either of *Lopez*'s first two categories.[153] Thus, a final rule listing a threatened or endangered species must fall within the third category of the *Lopez* analysis if it is to survive constitutional scrutiny, and at least some listings may not, as the following analysis of *Morrison's* four factors reveals.

Morrison's first factor requires courts reviewing a facial challenge to a final rule listing a species as threatened or endangered to determine whether the final rule concerns commerce or economic activity. The relevant inquiry is whether the listed species has a substantial relationship to interstate commerce, not whether, for instance, land development affecting that species has such a

relationship.[154] For the most part, federal protection of listed species cannot be said to concern commerce.

The second factor requires courts to consider whether the link between the subject of the federal regulation and interstate commerce is direct or attenuated. The fourth principle, articulated above, comes into play here and demands that the "biodiversity," "genetic heritage" and "interconnected web" theories be rejected. These arguments are far too attenuated and speculative to provide a constitutional basis for any court to conclude that a listing decision has a "direct" link to interstate commerce.[155] Such an absolutely speculative connection to commerce is precisely the sort of inferential leap prohibited by *Lopez* and *Morrison*.[156] In fact, FWS' "genetic heritage" and "interconnected web" theories are strikingly similar to the "costs of crime" and "national productivity" theories rejected by the Court in *Lopez* and the "but-for" gender-motivated violent crime argument rejected in *Morrison*.[157] And, as the Court observed in *Lopez*, "[I]f we were to accept [such] arguments . . . we are hard pressed to posit any activity by an individual that Congress is without power to regulate."[158]

Nor can the prohibition on taking one listed species be aggregated with takes of all other listed species in an attempt to fabricate a direct connection to commerce. Judge Edith Jones, in her dissent from rehearing en banc in *GDF Realty*, made a similar observation concerning the cave bugs at issue in that case:

> [T]he panel is unable to refute the attenuation concern of *Lopez* and *Morrison* because its analysis rests on the false implication that all takes of all species necessarily relate to an ecosystem, which by its very grandiosity must at some point be "economic" in actuality or in effect. This is precisely the reasoning rejected by the Supreme Court. . . . The Commerce Clause does not regulate crime [*Lopez*], sexual inequity [*Morrison*], or ecosystems as such—it regulates commerce.[159]

For many listing decisions, the link between the species at issue and interstate commerce is nonexistent.

The third factor set forth in *Morrison* requires courts to consider whether the federal regulation at issue includes an express jurisdictional element that can serve to "limit its reach to a discrete set" of activities that substantially affect interstate commerce.[160] Other federal environmental statutes enacted in the 1970s included jurisdictional hooks of one kind or another. The National Environmental Policy Act, for example, only applies to "major Federal actions significantly affecting the quality of the human environment."[161] Likewise, jurisdiction under the Clean Water Act is limited to regulating discharges of pollutants into "navigable waters," i.e., the "waters of the United States."[162] The ESA has no such "hooks." In turn, listing decisions never include an express jurisdictional element, and as a result, the regulatory restrictions imposed on individuals engaging in activities in the vicinity of the listed species apply regardless of whether there is any interstate or commercial nexus.[163] This factor should weigh heavily in favor of striking down final rules listing intrastate, noncommercial species, since those listing decisions cannot be limited in application to constitutional uses of federal power.[164]

Finally, the fourth factor set forth in *Morrison* requires courts to consider whether the regulation possesses any specific jurisdictional findings regarding the listed species' effect on interstate commerce. The ESA lacks findings of this nature.[165] Such findings are also generally non-existent in final rules listing new species. In fact, FWS often goes to great lengths to explain how federal protection of a particular species will *not* impact commercial activities in order to alleviate concerns among the regulated community of significant economic impacts related to the listing decision.[166]

CONCLUSION

With each new listing decision, the reach of federal control over land use, water resources, and other activities continues to expand. At least some listing decisions, especially those concerning intrastate, noncommercial species, lack the "substantial" relationship to interstate commerce required by the Supreme Court's decisions in *Lopez* and *Morrison*. Vacating listing decisions without this requisite nexus would not (as some fear) wreak havoc on imperiled species. State laws already protect many, if not most, of these species. In addition, Congress has other constitutional means available.[167] In other words, faithfully applying the principles of federalism in the ESA context will not be a death knell for intrastate, noncommercial species. Instead, it would preserve an endangered species of a different sort: the Constitutional principle that the "powers delegated by the . . . Constitution to the federal government are few and defined."[168]

Footnotes

[1] *See generally* Jayne E. Daly, *A Glimpse of the Past—A Vision for the Future: Senator Henry M. Jackson & National Land-Use Legislation*, 28 Urban Lawyer 7, 8 (1996).

[2] One of the more prominent proposals, the National Land Use Policy Act, was adopted overwhelmingly by the U.S. Senate and supported by the "Environmental President," Richard Nixon, but the bill (and others like it) ultimately died in the House of Representatives. *Id.*

[3] 16 U.S.C. § 1531 *et seq*.

[4] We are not the first to refer to the ESA in this manner. *See* Congressman Bill Thomas, *What is the Most Compelling Environmental Issue Facing the World on the Brink of the Twenty-First Century?*, 8 Fordham Envtl. L.J. 171, 174-75 (1996).

[5] The Senate and the House passed the ESA 92-0 and 355-4. *See* John C. Nagle & J.B. Ruhl, The Law of Biodiversity and Ecosystem Management 118-19 (2002).

[6] *See* Environmental Defense, The Endangered Species Act: Facts vs. Myths, *available at* http://www.environmentaldefense.org/article.cfm?contentid=1158 (last visited Aug. 31, 2006). In fact,

during the first ten years of the ESA, relatively few species were added to the list. By 1982, the list still only included 224 species. *See* FWS, Number of U.S. Listed Species Per Calendar Year, *available at* http://endangered.fws.gov/stats/cy_count2002.pdf#search=%22FWS%20listed%20species%20per%20calendar%20year%22 (last visited Aug. 31, 2006).

[7] *See* U.S. Fish & Wildlife Service, Listings by State, *available at* http://ecos.fws.gov/tess_public/StateListing.do?state=all (last visited Aug. 28, 2006).

[8] U.S. Const. art. I, § 8, cl. 3, 18.

[9] 130 F.3d 1041 (D.C. Cir. 1997).

[10] 323 F.3d 1062 (D.C. Cir. 2003).

[11] 214 F.3d 483 (4th Cir. 2000).

[12] 326 F.3d 622 (5th Cir. 2003).

[13] *See* GDF Realty Investments, Ltd. v. Norton, 362 F.3d 286, 287 (5th Cir. 2004) (Jones, J., dissenting from denial of rehearing *en banc*, and joined by Circuit Judges Jolly, Smith, DeMoss, Clement, and Pickering); Rancho Viejo, LLC v. Norton, 334 F.3d 1158 (D.C. Cir. 2003) (Sentelle, J., dissenting from denial of rehearing *en banc*); *id*. at 1160 (Roberts, J., dissenting from denial of rehearing *en banc*); *Gibbs*, 214 F.3d at 506 (Luttig, J., dissenting); *NAHB*, 130 F.3d at 1060 (Sentelle, J., dissenting).

[14] *See, e.g.,* Building Indus. Ass'n of Superior Cal. v. Babbitt, 979 F. Supp. 893 (D.D.C. 1997) (overruling facial Commerce Clause challenge to listing of fairy shrimp as endangered); Palila v. Hawaii Department of Land and Natural Resources, 471 F. Supp. 985, 994-95 (D. Haw. 1979) (holding that the listing the Palila bird did not exceed Congress' Commerce Clause power).

[15] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).

[16] 16 U.S.C. § 1531(b).

[17] *Id*. § 1533.

[18] *Id*. §§ 1533(b)(1), (4), (5) & (6).

[19] *Id.* § 1533(a)(3)(A).

[20] *Id*. § 1532(6).

[21] *Id*. § 1532(20).

[22] *Id*. § 1533(a)(1).

[23] *Id.*

[24] *Id*. § 1538(a)(1).

[25] *Id*. § 1532(18).

[26] 50 C.F.R. § 17.3.

[27] *Id*.

[28] 16 U.S.C. § 1540(a) & (b).

[29] *Id*. § 1536(a)(2).

[30] *See Hill*, 437 U.S. at 172-73.

[31] 16 U.S.C. § 1536(b)(3)(A).

[32] Bennett v. Spear, 520 U.S. 154, 169 (1997) (internal citation omitted).

[33] *See* Baldwin v. Fish and Game Commission of Montana, 436 U.S. 371, 386-87 (1978); *see also* Susan George, William J. Snape, III & Michael Senatore, *State Endangered Species Acts: Past, Present and Future*, Defenders of Wildlife, *available at* http://www.defenders.org/pubs/sesa01.html (Feb. 1998) [*hereinafter* George & Snape].

[34] George & Snape at § 1.

[35] *Id*. § 3 Part 1.

[36] *Id*. § App. A. Florida, for instance, has a comprehensive regulatory program protecting 118 species considered by that state to be imperiled. *See* Florida Fish & Wildlife Conservation Comm'n, Florida's Imperiled Species, *available at* http://myfwc.com/imperiledspecies/ (last visited Aug. 29, 2006).

[37] *Id*. § 3 Part 1. For example, as of 1998, New Mexico had a comprehensive regulatory program protecting almost 100 species under the state ESA that are not listed under the federal ESA. *Id.*

[38] 22 U.S. (9 Wheat.) 1 (1824).

[39] *See* The Heritage Guide to the U.S. Constitution at 102 (Edwin Meese ed., 2005).

[40] *See*, *e.g.*, United States v. E.C. Knight Co., 156 U.S. 1, 12 (1895) (holding that the Sherman Act did not reach a sugar monopoly because the Constitution did not allow Congress to regulate manufacturing); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating the Federal Child Labor Act of 1916 as having only an indirect affect on commerce); Carter v. Carter Coal Co., 298 U.S. 238, 304 (1936) (invalidating a portion of the Bituminous Coal Conservation Act that forced collective bargaining of labor because it did not have a direct effect on interstate commerce).

[41] *See* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 550 (1935) (striking down federal regulations that fixed the hours and wages of employees of an intrastate business because the activities being regulated only indirectly affected interstate commerce).

[42] *Id.* at 548.

[43] *See e.g.,* Railroad Retirement Board v. Alton R. Co., 295 U.S. 330 (1935) (holding 5-4 that the Railroad Retirement Act of 1934 exceeded federal commerce power).

[44] *See e.g.,* West Coast Hotel Co. v. Parrish, 300 U.S. 379; NLRB v. Jones and Laughlin Steel Corp, 301 U.S. 1 (1937).

[45] 301 U.S. at 36.

[46] *See* Houston, East & West Texas Railway Co. v. United States, 234 U.S. 342, 355 (1914) (holding that the Interstate Commerce Commission could set rates for train routes from Dallas to Marshall, Texas even though the route was in one state).

[47] 312 U.S. 100 (1941).

[48] *Id.*

[49] 317 U.S. 111 (1942).

[50] *See id.* at 124-26 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce. . . .").

[51] *See H*eart of Atlanta Motel v. United States, 379 U.S. 241, 255-58 (1964); Katzenbach v. McClung, 379 U.S. 294, 298-305 (1964).

[52] 452 U.S. 264, 276-82 (1981) (upholding a federal law requiring mine operators to restore the land after mining to its prior condition).

[53] 514 U.S. 548 (1995)

[54] *Id.* at 551.

[55] 529 U.S. 598 (2000).

[56] 531 U.S. 159, 174 (2001).

[57] *Lopez,* 514 U.S. at 551.

[58] *See id*. at 558-59.

[59] *Id.* (citations omitted).

[60] *Id.* at 559-68.

[61] *Id.* at 552.

[62] *Id.* at 561.

[63] *Id.* at 560.

[64] *Id.*

[65] *Id.* at 563.

[66] *Id.*

[67] *Id.* (finding that one had to "pile inference upon inference" to get from handgun possession to substantial effects upon interstate commerce).

[68] 529 U.S. 598 (2000).

[69] *Id*. at 617.

[70] *Id.* at 610-12.

[71] *Id*. at 613.

[72] *Id*. at 615-16.

[73] 531 U.S. 159, 174 (2001).

[74] *Id.* at 173.

[75] *Id.* at 173-74.

[76] *See* Mank, Bradford C., *Can Congress Regulated Intrastate Endangered Species Under the Commerce Clause?,* 69 BROOKLYN L. REV. 924 (2003-04).

[77] 125 S. Ct. 2195 (2005).

[78] *Id*. at 2205 (citing Perez v. United States, 402 U.S. 146 (1971)).

[79] *Id.* at 2206.

[80] *Id.*

[81] In *United States v. Maxwell*, the Eleventh Circuit upheld a provision of the Child Pornography Prevention Act of 1996, which prohibited the knowing possession of child pornography. The Eleventh Circuit found "very little to distinguish Maxwell's claim from Raich's." 446 F.3d 1210, 1216-17 (11th Cir. 2006). As recognized by that court, like marijuana, child pornography has become part of "[a] highly organized, multimillion dollar industr[y] that operate[s] on a nationwide scale." *Id*. at 1217 (quoting legislative history). As the Fourth Circuit found in *United States v. Forrest*, which was relied upon by the Eleventh Circuit in *Maxwell*, child pornography is essentially a "fungible commodity." 429 F.3d 73, 78 (4th Cir. 2005).

[82] 130 F.3d 1041 (D.C. Cir. 1997).

[83] *Id*. at 1046 (quoting Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 256 (1964)).

[84] *Id.* at 1047.

[85] *Id.*

[86] *Id.* at 1048.

[87] *Id*. (internal quotations omitted).

[88] *Id.* at 1053.

[89] *Id.*

[90] *Id.* at 1054.

[91] 452 U.S. 264 (1981).

[92] *NAHB*, 130 F.3d at 1058.

[93] *Id.*

[94] *Id.* at 1059.

[95] *Id.* at 1061.

[96] *Id.* at 1063.

[97] *Id.*

[98] *Id.* at 1064.

[99] *Id.* at 1067 ("Nowhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect.").

[100] 323 F.3d 1062 (D.C. Cir. 2003).

[101] *Id.* at 1072.

[102] *Id.* at 1077.

[103] 334 F.3d 1158 (D.C. Cir. 2003).

[104] *Id.* at 1160.

[105] 214 F.3d 483 (4th Cir. 2000).

[106] *Id.* at 492.

[107] *Gibbs*, 214 F.3d at 494.

[108] *See id.* at 497-98.

[109] *See* Brzonkala v. Virginia Polytechnic & State Univ., 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom*, United States v. Morrison, 529 U.S. 598 (2000).

[110] *Id.* at 507.

[111] *Id.* at 507.

[112] 326 F.3d 622 (5th Cir. 2003).

[113] *Id*. at 624.

[114] *Id.* at 634.

[115] *Id.* at 633.

[116] *Id.* at 640.

[117] 362 F. 3d at 286 (5th Cir. 2004).

[118] *Id.* at 287.

[119] *Id.*

[120] *Id.* at 293.

[121] *See Raich*, 125 S. Ct. at 2206 ("Like the farmer in *Wickard*, respondents are cultivating, for home consumption, a *fungible commodity* for which there is an established, albeit illegal, interstate market." (emphasis added)).

[122] *See* Reno v. Flores, 507 U.S. 292, 301 (1993).

[123] 125 S. Ct. at 2211 n. 36. The Bald Eagle Protection Act, 16 U.S.C. § 668(a), is directed at eliminating the existing interstate trade in bald eagle parts. *See* United States v. Lundquist, 932 F. Supp.

1237, 1244-45 (D. Or. 1996).

[124] *See, e.g.*, *Reno*, 507 U.S. at 300 (involving facial challenge to INS regulations).

[125] *See supra* note 14.

[126] *See* United States v. Lopez, 2 F.3d 1342 (5th Cir. 1993). The Fifth Circuit's *Lopez* opinion makes it clear that the defendant had, in fact, brought a gun to school to sell it. "Lopez stated that 'Gilbert' had given him the gun so that he (Lopez) could deliver it after school to 'Jason,' who planned to use it in a 'gang war.' *Lopez was to receive $40 for his services*." *Id*. at 1345 (emphasis added). The Supreme Court did not even recognize this fact as relevant to its analysis.

[127] *Lopez*, 514 U.S. at 567.

[128] *See id*. at 557.

[129] *Id.* at 552.

[130] *Gibbons*, 22 U.S. at 195.

[131] *SWANCC*, 531 U.S. at 174.

[132] *See Lopez*, 514 U.S. at 567 (focusing on the subject of the GFSZA—*i.e.*, the "possession of a gun in a local school zone").

[133] *See GDF Realty*, 326 F.3d at 634-35.

[134] *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 411 (2004).

[135] *Id.*

[136] *See Lopez*, 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937)).

[137] *See Morrison*, 529 U.S. at 610.

[138] *See id*.

[139] *See Lopez*, 514 U.S. at 560.

[140] *See id.* at 561.

[141] *See Raich*, 125 S. Ct. at 2206-07.

[142] *See Lopez*, 514 U.S. at 560.

[143] *Id.* at 559.

[144] Some have interpreted *Raich* as establishing a "broader scheme doctrine" where Congress is able to regulate noncommercial activity so long as it is part of a broad regulatory scheme. *See* Alex Kreit, *Rights, Rules, and Raich*, 108 W. Va. L. Rev. 705, 720-21 (2006). That cannot be so as it would allow Congress to regulate virtually any activity so long as the statutory program was drafted broadly enough to encompass at least some commercial activities. This would also require one to believe that the Supreme Court overruled *Lopez* and *Morrison sub silentio*.

[145] *See Raich*, 125 S. Ct. at 2211 n. 36.

[146] 514 U.S. at 563-65.

[147] *Id*.

[148] 529 U.S. at 615-16.

[149] *Lopez*, 514 U.S. at 567.

[150] *Morrison*, 529 U.S. at 609 (emphasis added); *see also* Jones v. United States, 529 U.S. 848, 859 (2000) (interpreting a federal arson statute to cover "only property *currently* used in commerce," where a contrary interpretation would have raised serious constitutional problems under *Lopez* (emphasis added)).

[151] *See Morrison*, 529 U.S. at 609; *see also* United States v. Lopez, 514 U.S. at 558; *Gibbs*, 214 F.3d at 491; United States v. Rybar, 103 F.3d 273, 288-89 (3d Cir. 1996) (Alito, J., dissenting) (explaining that Lopez's first category simply "concerns Congress's power to regulate, for economic or social purposes, the passage in interstate commerce of either people or goods."). *See* also Jonathan H. Adler, *Is* Morrison *Dead? Assessing a Supreme Drug (Law) Overdose*, 9 Lewis & Clark L. Rev. 751, 755 (2005) ("The first two categories are rather unambiguous. If an item is used or sold in interstate commerce, it may be regulated, as may the channels though which such items flow.")

[152] *See Lopez*, 514 U.S. at 558; *Gibbs*, 214 F.3d at 491; *Rybar*, 103 F.3d at 290 (Alito, J., dissenting).

[153] While Judge Wald concluded in *NAHB*, 130 F.3d at 1046, that such regulation fit within *Lopez*'s first category, that conclusion was rejected by Judge Henderson in her concurrence, *id*. at 1057-58, and Judge Sentelle in his dissent, *id*. at 1062-63, and thus, it was not adopted by that circuit.

[154] *See Morrison*, 529 U.S. at 613.

[155] *See NAHB*, 130 F.3d at 1064 (Sentelle, J., dissenting).

[156] *See Lopez*, 514 U.S. at 564-66; *Morrison*, 529 U.S. at 615-15.

[157] *See Lopez*, 514 U.S. at 563-66; *Morrison*, 529 U.S. at 615-16.

[158] *Lopez*, 514 U.S. at 564.

[159] *GDF Realty*, 362 F.3d at 293 (Jones, J., dissenting from denial of petition for rehearing *en banc*).

[160] *Morrison*, 529 U.S. at 612.

[161] *See* 42 U.S.C. § 4332.

[162] *See* 33 U.S.C. § 1342.

[163] *See NAHB*, 130 F.3d at 1064-65 (Sentelle, J., dissenting).

[164] *See Gibbs*, 214 F.3d at 508 (Luttig, J., dissenting).

[165] *See* Omar N. White, *The Endangered Species Act's Precarious Perch: A Constitutional Analysis under the Commerce Clause and the Treaty Power*, 27 Ecology L. Q. 215, 253 (2000) (concluding that Congress should amend the ESA to include findings regarding the relationship between endangered species and commerce). Congressional findings concerning the "incalculable value" of the "genetic heritage" of endangered species and similar theories lack any rational basis in law or fact, and should be afforded little or no deference by the courts. *See Lopez*, 514 U.S. at 557 n.2; *Morrison*, 529 U.S. at 614.

[166] *See, e.g.*, 65 Fed. Reg. 26,438, 26,460 (2000) (FWS asserting that the listing of the Alabama sturgeon would not impact commercial navigation, ports or marinas, bridge or road construction, and other types of commercial activities).

[167] The "spending power," for example, which empowers the federal government to support federal, state, local, and private conservation programs aimed at protecting and restoring these species. *See* U.S. Const. art. I, § 8. *See* Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 Iowa L. Rev. 377, 437-46 (2004) (discussing constitutional limitations on the Spending Power and its impact on federal environmental laws).

[168] *Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45 (1788)).

FEDERALISM AND SEPARATION OF POWERS

THE SPENDING CLAUSE IMPLICATIONS OF *RUMSFELD V. FORUM FOR ACADEMIC AND INDIVIDUAL RIGHTS*

*BY WILLIAM E. THRO**

In *Rumsfeld v. Forum for Academic & Institutional Rights*,[1] the Supreme Court of the United States upheld the constitutionality of the Solomon Amendment,[2] which mandates that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters,[3] the *entire* institution would lose certain federal funds.[4] "Because Congress could require law schools to provide equal access to military recruiters without violating the schools' freedoms of speech or association" the Solomon Amendment is consistent with the First Amendment.[5] Indeed, the Court chastised the Forum for Academic and Institutional Rights for attempting "to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect. . . . [T]he law schools' effort . . . plainly overstates the expressive nature of their activity and the impact of the Solomon Amendment on it, while exaggerating the reach of our First Amendment precedents."[6] Yet, while *Rumsfeld* is significant for its discussion of the interplay between the First Amendment and the Armed Forces Clauses,[7] its greater significance is its pronouncements about the Spending Clause.[8]

Quite simply, *Rumsfeld* represents a fundamental shift in the Court's Spending Clause jurisprudence. The Court, in an opinion written by Chief Justice Roberts and joined by every participating Justice,[9] announced a new bright line rule—if the Constitution prohibits Congress from accomplishing an objective *directly*, the Constitution also prohibits Congress from using the Spending Clause to accomplish the objective *indirectly*.[10] Put another way, Congress' power under the Spending Clause is no greater than its authority under other Article I powers or its powers to enforce the Constitution.[11] In effect, *Rumsfeld* adopts the "Madisonian view" of the Spending Clause while implicitly rejecting the "Hamiltonian view" of the Spending Clause, which has dominated for the past seventy years.[12]

The purpose of this article is twofold. First, it seeks to explain how the Court adopted a new rule for evaluating Spending Clause statutes. Second, it seeks to explore the implications of that new rule.

I. *RUMSFELD*'S ADOPTION OF THE MADISONIAN INTERPRETATION OF THE SPENDING CLAUSE

Seventy years ago, in *United States v. Butler*,[13] the Court declared, "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[14] In other words, as the Court observed in 1987 in *South Dakota v. Dole*,[15] "objectives not thought to be within Article I's 'enumerated legislative fields' may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."[16] Thus, the Spending Clause was "limited only by Congress' notion of the general welfare [and] the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.'"[17] Indeed, Congress had "a seemingly easy end run around any restrictions the Constitution might be found to impose on its ability to regulate the states. Congress need merely attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states."[18]

Rumsfeld repudiates this reasoning. Instead of recognizing that Congress could use the Spending Clause to accomplish whatever it desired, the Court declared:

> Other decisions, however, recognize a limit on Congress' ability to place conditions on the receipt of funds. We recently held that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit." Under this principle, known as the unconstitutional conditions doctrine, *the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students*.

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The views expressed in this article are entirely those of the author and do not necessarily represent the views of the Attorney General of the Commonwealth of Virginia.

> This case does not require us to determine when a condition placed on university funding goes beyond the "reasonable" choice offered in [*Grove City Coll. v. Bell*] becomes an unconstitutional condition. *It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly. Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds*.[19]

Thus, when confronted with a claim that a Spending Clause statute is unconstitutional, federal courts must focus on whether Congress could enact the legislation *directly* using one of its other constitutional powers.[20] If Congress could have enacted the measure directly, then the Spending Clause statute is constitutional. Alternatively, if Congress could not have enacted the measure directly, then it cannot enact the measure using the Spending Clause. Put another way, the Spending Clause is not an independent source of congressional authority, but merely an indirect way for Congress to exercise authority conferred elsewhere in the Constitution.

The Court's adoption of the Madisonian view of the Spending Clause is not dicta. Rather, it is an essential part of the analytic framework for resolving the constitutionality of the Solomon Amendment—it establishes that the critical inquiry is whether Congress could use the Armed Forces Clauses to compel universities to accept military recruiters. Although the Court did not explicitly overrule or limit those decisions suggesting that Congress could use the Spending Clause to achieve objectives indirectly that it could not achieve directly using its other constitutional powers,[21] the Court did explicitly rely on an obscure decision limiting the government's power to achieve a result indirectly.[22] While the Court has emphasized that its decisions cannot be overruled by implication,[23] the Court recently has adopted new constitutional rules that substantially limited or overturned previous decisions without explicitly stating that it was doing so.[24]

Furthermore, there is circumstantial evidence that Chief Justice Roberts, who has a reputation for using precise language and excluding extraneous material, intended to change the Court's Spending Clause jurisprudence. As a young lawyer, John Roberts co-authored an amicus brief on behalf of the National Beer Wholesalers' Association in *Dole*.[25] The amicus brief urged the Court to reject "an intrusion on state authority by Congress simply because Congress proceeds *indirectly under the Spending Clause*."[26] Indeed, "Congress is not free to impose its will on the States, either *directly or through conditions on the receipt of funds* the States cannot do without."[27] During deliberations in *Rumsfeld*, the Chief Justice revived his idea that if Congress cannot act directly, then it cannot use the Spending Clause to act indirectly. Although the Court was unpersuaded by Roberts the lawyer, it was persuaded by Roberts the Chief Justice.

II. The Implications of the Madisonian Interpretation

Rumsfeld's bright line rule—if Congress cannot enact a measure *directly* using its other constitutional powers, then Congress may not enact the measure *indirectly* using the Spending Clause—does not mean that the Spending Clause is eviscerated or that Congress may not impose non-discrimination requirements on recipients of federal funds. For example, Congress, in the exercise of its powers under the Fourteenth Amendment Enforcement Clause,[28] may compel the States to comply with the Constitution.[29] Thus, Congress, in the exercise of its powers under the Spending Clause, may enact Title VI[30] and Title IX,[31] both of which are co-extensive with the Equal Protection Clause.[32] Similarly, Congress, in the exercise of its powers under the Interstate Commerce Clause, can prohibit disability discrimination throughout society by enacting the Americans with Disabilities Act.[33] Consequently, Congress, in the exercise of its powers under the Spending Clause, may prohibit disability discrimination by recipients of federal funds through Section 504[34] of the Rehabilitation Act of 1973.[35] Moreover, Congress may abrogate sovereign immunity for federal statutory claims *that are also constitutional claims*.[36] Therefore, Congress may use the Spending Clause to exact a waiver of sovereign immunity for statutory claims *that are also constitutional claims*.[37]

Yet, although *Rumsfeld* does not eviscerate Congress' Spending Clause powers, it does impose significant limitations on the Spending Clause powers. Prior to *Rumsfeld*, the States were "at the mercy of Congress so long as Congress is free to make conditional offers of funds to the states that, if accepted, regulate the states in ways that Congress could not directly mandate."[38] As Professors Baker and Berman explained:

> [A]llowing Congress to spend for objectives that it could not pursue under its other enumerated powers at least partially undermines the limitations upon those other powers. Indeed, this was obvious to the Court back in *Butler* when it first confronted the need to choose between the Madisonian and Hamiltonian views of the spending power, and even explains the schizophrenic character of that decision—nominally adopting the Hamiltonian conception, but ruling in seeming accord with the Madisonian. But during the sixty years following *Butler* this observation had more academic than practical significance. The steady expansion of Congress's commerce power rendered the spending power's circumventionist potential relatively inconsequential. For this reason, *Dole* was of no great moment back in 1987.
>
> Its true importance became plain, though, as soon as the Rehnquist Court started to impose constraints. Indeed, mere days after the Court announced its decision in *Lopez*, the *New York Times* already reported that President Clinton was considering conditioning federal education

> funds on each state's enactment of a state gun-free school zone law that would replicate the provisions of the newly invalidated federal law. Congress ultimately decided against this strategy but only because it happened upon an even more attractive means of circumvention: adding a "jurisdictional element" to the statute.[39]

Rumsfeld removes the possibility that Congress can use the Spending Clause to circumvent limitations on its other powers. In other words, it aligns the scope of the Spending Clause power with the scope of the other powers. The Spending Clause power is no greater—and no less—than any other congressional power. Constitutional symmetry has been achieved. This constitutional symmetry manifests itself in three important ways.

First, Congress may not use the Spending Clause to circumvent the textual and structural restrictions on its powers.[40] Most obviously, because Congress may not use the Interstate Commerce Clause[41] to regulate activities that do not substantially affect interstate commerce,[42] it may not use the Spending Clause to regulate purely local matters.

A further illustration is provided by Congress' responses to the Supreme Court's decision in *Employment Division v. Smith*,[43] which significantly narrowed the scope of the Free Exercise Clause.[44] For its initial response to *Smith*, Congress enacted the Religious Freedom Restoration Act ("RFRA")[45] by relying on its powers to enforce the Fourteenth Amendment.[46] However, in *City of Boerne v. Flores*,[47] the Supreme Court rejected that argument and invalidated RFRA as it applies to the States and local governments.[48] After *Flores* and for its second response to *Smith*, Congress used the Spending Clause to enact the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[49] In other words, Congress believed that it could use the Spending Clause to circumvent a constitutional holding of the Supreme Court.[50] Yet, under the logic of *Rumsfeld*, RLUIPA is unconstitutional insofar as it requires the States to provide a religious accommodation that is not required by the Constitution.[51] If Congress cannot use its Fourteenth Amendment Enforcement Clause to circumvent *Smith*,[52] then Congress cannot use the Spending Clause to circumvent *Smith*.[53]

Second, Congress may not use the Spending Clause to interfere with the States' sovereign authority.[54] Recognizing that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"[55] and that "the erosion of state sovereignty is likely to occur a step at a time,"[56] the Supreme Court has declared that the National Government may not require state officials to enforce federal law,[57] compel the States to pass particular legislation,[58] change the qualifications of state judges,[59] or dictate the location of the State Capitol.[60] Thus, Spending Clause statutes that force States to enforce federal law, pass particular legislation, change the qualifications of judges, or move the State Capitol would be unconstitutional.[61] Similarly, to the extent that Spending Clause statutes regulating K-12 education[62] could not be enacted using the Interstate Commerce Clause or the Fourteenth Amendment Enforcement Clause, those statutes are unconstitutional.

Third, because Congress may not abrogate sovereign immunity for statutory claims *that are not also constitutional claims*,[63] Congress may not use the Spending Clause to exact a waiver of sovereign immunity for statutory claims that *are not also constitutional claims*.[64] As a practical matter, this means that Congress' attempt to exact a waiver for all Spending Clause statutes that prohibit discrimination[65] is unconstitutional *as applied to statutory claims that are not also constitutional claims*.[66]

CONCLUSION

Our Constitution "secures the blessings of Liberty"[67] by creating a National Government of enumerated, hence limited, powers.[68] In the two centuries since the Constitution was ratified, the Court has often lost sight of this principle. Indeed, the Court's Spending Clause jurisprudence practically invited Congress to use the lure of money to circumvent the constitutional limits on its power. *Rumsfeld*, by adopting a bright line rule against Congress using the Spending Clause to circumvent the textual and structural limits on its powers, restores the "Madisonian Balance" while still permitting Congress to exercise vast, yet limited, power.

FOOTNOTES

[1] 126 S. Ct. 1297 (2006).

[2] Under federal law, a person generally may not serve in the United States Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex. 10 U.S.C. § 654. Consequently, military recruiters *must* engage in sexual orientation discrimination. A homosexual recruit is automatically rejected while a heterosexual recruit is considered on his own merits. Because sexual orientation discrimination offends the values of many colleges and universities, many institutions object to the presence of military recruiters on campus. Indeed, many institutions—particularly law schools—sought to exclude or limit access of military recruiters because of disagreement with the military's policy of sexual orientation discrimination. In response, Congress passed the Solomon Amendment, which "forces institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive specified federal funding." *Rumsfeld*, 126 S. Ct. at 1303. Although this choice of doing what Congress demands or forfeiting all federal funds may seem draconian, it is essentially the same choice imposed by many non-discrimination statutes.

[3] 10 U.S.C. § 983. Specifically, the statute denies federal funding to an institution of higher education that "has a policy or practice . . . that either prohibits, or in effect prevents" the military "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." *Id.* § 983(b). The statute provides an exception for an institution with "a longstanding policy of pacifism based on historical religious affiliation." *Id.* § 983(c)(2).

[4] The Solomon Amendment is limited to funding from the Departments of Defense, Homeland Security, Transportation, Labor,

Health and Human Services, and Education, the Central Intelligence Agency and the National Nuclear Security Administration of the Department of Energy. *Id.* § 983(d)(1). Although the statute does not apply to funds provided for student financial assistance, *id.* § 983(d)(2), the loss of funding applies institution wide, *id.* § 983(b).

[5] *Rumsfeld*, 126 S. Ct. at 1313.

[6] *Id*.

[7] U.S. CONST. art. I, § 8, cls. 12-13.

[8] *Id.* § 8, cl. 1.

[9] Justice Alito did not participate, as he was not a member of the Court at the time of argument. Justice O'Connor had departed by the time the decision was announced.

[10] *Rumsfeld*, 126 S. Ct. at 1307 ("Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students."); *id.* ("It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly."); *id*. ("Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.").

[11] *Cf.* United States v. Am. Library Ass'n, 539 U.S. 194, 210 (2003) ("'[T]he government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit.'" (quoting Bd. of Comm'rs, Wabaunsee County v. Umbehr, 518 U.S. 668, 674 (1996) (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972))) (second alteration in original); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("The government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government . . . ."); Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 594 (1926) ("If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.").

[12] *See* Litman v. George Mason Univ., 186 F.3d 544, 556 & n.* (1999) (discussing the difference between the "Hamiltonian view" of the Spending Clause and the "Madisonian view" of the Spending Clause).

[13] 297 U.S. 1 (1936).

[14] *Id*. at 66.

[15] 483 U.S. 203 (1987).

[16] *Id.* at 207 (quoting *Butler*, 297 U.S. at 65).

[17] *Id.* at 217 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S. at 78).

[18] Lynn A. Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 101-02 (1998).

[19] Rumsfeld v. Forum for Academic & Institutional Rights, 126 S. Ct. 1297, 1306-07 (2006) (emphasis added) (alterations in original) (citations omitted).

[20] *See id.*

[21] S*ee Dole*, 483 U.S. at 207; *Butler*, 297 U.S. at 66.

[22] *See* Speiser v. Randall, 357 U.S. 513, 526 (1958).

[23] Agostini v. Felton, 521 U.S. 203, 237 (1997).

[24] *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951, 1961-62 (2006) (holding that a speech made by public employees in the course of their duties is not constitutionally protected); Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1002 (2006) (holding that states surrendered their sovereign immunity for bankruptcy claims necessary to effectuate the *in rem* jurisdiction of the bankruptcy courts); Ayotte v. Planned Parenthood, 126 S. Ct. 961, 969 (2006) (holding that federal courts' injunctive power is limited to the unconstitutional applications of a statute).

[25] Brief of Amici Curiae the National Beer Wholesalers' Association et al. in Support of Petitioner, South Dakota v. Dole, 483 U.S. 203 (1987) (No. 86-260).

[26] *Id*. at 4 (emphasis added).

[27] *Id.* at 25.

[28] U.S. CONST. amend. XIV, § 5.

[29] *See* City of Boerne v. Flores, 521 U.S. 507, 536 (1997).

[30] 42 U.S.C. § 2000d.

[31] 20 U.S.C. § 1681.

[32] U.S. CONST. amend. XIV, § 1; *see* Grutter v. Bollinger, 539 U.S. 306, 342 (2003); Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003) (finding Title VI to be coextensive with the Equal Protection Clause). Although *Grutter* and *Gratz* were addressing only Title VI, the reasoning is equally applicable to Title IX. Title VI and Title IX "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

[33] 42 U.S.C. §§ 12101–12213.

[34] 29 U.S.C. § 794.

[35] *See* Garcia v. S.U.N.Y. Health Sci. Ctr., 280 F.3d 98, 113 (2d Cir. 2001) (recognizing that Title II of the ADA and Section 504 of the Rehabilitation Act should be treated identically); Reickenbacker v. Foster, 274 F.3d 974, 977 n.17 (5th Cir. 2001) (same).

[36] United States v. Georgia, 126 S. Ct. 877, 881 (2006); *see also* William E. Thro, *Toward A Simpler Standard for Abrogating Sovereign Immunity*, 6 ENGAGE: J. FEDERALIST SOC'Y'S PRAC. GROUPS 65 (Oct. 2005) (advocating that the Court adopt a standard where the issue of abrogation depends upon whether the plaintiff has stated a constitutional claim).

[37] *See* Sandoval v. Hagan, 197 F.3d 484, 493-94 (11th Cir. 1999) (Title VI claims), *rev'd on other grounds sub nom*. Alexander v. Sandoval, 532 U.S. 275 (2001); Litman v. George Mason Univ., 186 F.3d 544, 554-55 (4th Cir. 1999) (Title IX claims). As explained above, Title VI and Title IX are coextensive with the Equal Protection Clause. Thus, conduct that violates Title VI or Title IX also violates the Constitution. Because Congress can abrogate sovereign immunity for constitutional claims and because all Title VI and IX claims are constitutional claims, *Sandoval* and *Litman* are fully consistent with *Rumsfeld*.

[38] Lynn A. Baker, *Conditional Federal Spending and State's Rights*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 104, 105 (2001).

[39] Lynn A. Baker & Mitchell N. Berman, *Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 499-501 (2003) (footnotes omitted); *see also* William E. Thro, *Immunity or Intellectual Property*: *The Constitutionality of Forcing the States to Choose*, 173 EDUC. L. REP. 17 (2003) (arguing that the States cannot be

forced to surrender their sovereign immunity as a condition of receiving intellectual property rights).

[40] *Cf.* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("[T]hat those limits may not be mistaken, or forgotten, the constitution is written.").

[41] U.S. CONST. art. I, § 8, cl. 3.

[42] United States v. Morrison, 529 U.S. 598, 617-19 (2000); United States v. Lopez, 514 U.S. 549, 561 n.3 (1995); *cf.* Gonzales v. Oregon, 126 S. Ct. 904, 925 (2006) (holding that the National Attorney General may not shift "authority from the States to the Federal Government to define general standards of medical practice in every locality.").

[43] 494 U.S. 872, 890 (1990).

[44] U.S. CONST. amend. I. In *Smith*, the Supreme Court effectively overruled *Sherbert v. Verner*, 374 U.S. 398, 402-03 (1963), and held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). In other words, "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993).

[45] 42 U.S.C. §§ 2000bb-1 to -4.

[46] U.S. CONST. amend. XIV, § 5.

[47] 521 U.S. 507 (1997).

[48] *Id.* at 532-36.

[49] 42 U.S.C. §§ 2000cc to -5.

[50] In enacting RLUIPA, Congress also relied upon the Interstate Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. However, the Commerce Clause can justify RLUIPA only whenever the burden on religion or its removal affects "commerce with foreign nations, among the several States, or with Indian tribes." 42 U.S.C. § 2000cc-1(b)(2). In those circumstances where the burden on religion does not affect commerce, the Commerce Clause cannot justify RLUIPA.

[51] Of course, Congress can enact statutes that create private remedies for violations of the Constitution. *See* United States v. Georgia, 126 S. Ct. 877, 881 (2006). Thus, to the extent that RLUIPA requires the States to provide a religious accommodation that is *also required* by the Constitution, it is constitutional.

[52] *See Flores*, 521 U.S. at 532-36.

[53] *See* College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683-84 (1999) (stating that because Congress may not use its Fourteenth Amendment enforcement powers to abrogate the State's sovereign immunity, it may not use its Article I powers to exact constructive waivers of sovereign immunity).

[54] Nevertheless, Congress may use the Fourteenth Amendment Enforcement Clause to diminish the States' sovereignty. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

[55] Gregory v. Ashcroft, 501 U.S. 452, 461 (1991).

[56] South Carolina v. Baker, 485 U.S. 505, 533 (1988) (O'Connor, J., dissenting).

[57] Printz v. United States, 521 U.S. 898, 919 (1997).

[58] New York v. United States, 505 U.S. 144, 162 (1992).

[59] *Gregory*, 501 U.S. at 460.

[60] Coyle v. Smith, 221 U.S. 559, 579 (1911).

[61] Of course, there are dicta in *New York* suggesting that Congress could use the Spending Clause to require the States to pass particular legislation. *See New York*, 505 U.S. at 195 (White, J., concurring in part, dissenting in part); *see also Printz*, 521 U.S. at 936 (O'Connor, J., concurring). However, the Supreme Court is "not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 996 (2006); *see also* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.").

[62] *See, e.g.*, 20 U.S.C. §§ 1401–1450 (Individuals with Disabilities Education Act); 20 U.S.C. §§ 6301–6339, 6421–6472, 6751–6777, 6811–6871, 7101–7165, 7201–7217e (No Child Left Behind Act).

[63] *See generally* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 364 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 78 (2000); Alden v. Maine, 527 U.S. 706, 748 (1999); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 636 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996). The Court held in all of these cases that the States were immune from statutory claims that did not involve constitutional violations.

[64] *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683-84 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe.* Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin."); *see also Kimel*, 528 U.S. at 79 ("Indeed, in *College Savings Bank*, we rested our decision to overrule the constructive waiver rule . . . in part, on our *Seminole Tribe* holding.").

[65] 42 U.S.C. § 2000d-7.

[66] In other words, the required waiver is effective for Title VI or Title IX claims, all of which are constitutional claims, and for Section 504 claims and Age Discrimination Act claims that involve constitutional claims. However, the waiver is ineffective for Section 504 claims and Age Discrimination Act claims that do not involve constitutional claims.

[67] U.S. CONST., pmbl.

[68] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819).

Splitting the Ninth Circuit: Why Chief Judge Schroeder and Split Opponents Should Swap a Broad Circuit for a Broader Perspective

*By Diarmuid F. O'Scannlain**

One month after the opening article[1] in this series appeared in the October 2005 issue of *Engage*, the U.S. House of Representatives passed legislation to split the Ninth Circuit.[2] More recently, Senator Arlen Specter, Chairman of the Senate Judiciary Committee, scheduled for "markup" a Senate version[3] to be reported to the Senate floor for action, possibly before this rebuttal article appears in print.[4]

Objective observers recognize that the Ninth Circuit is an anomaly in the federal court system. Although but one of twelve circuits, its jurisdiction subsumes nearly one-quarter of the nation's population and one-fifth of all federal cases.[5] An objective witness to this staggering reality will find unsatisfactory the arguments expressed by Chief Judge Schroeder and joined by thirty-two of my colleagues in the March 2006 issue of *Engage*.[6] Chief Judge Schroeder fails to offer any persuasive reason for maintaining such disparity. An objective witness will appreciate that even the strongest convictions of thirty-three judges of the Ninth Circuit cannot lighten the staggering caseload of this Court nor diminish its unequal apportionment within the federal judicial system.

The arguments of Chief Judge Schroeder and many of my colleagues lack grounding in relevant facts. Accusing me of "selective use of statistics," they argue that no split is necessary because the Ninth Circuit functions with exceptional efficiency and "people and institutions [can] adapt to inevitable changes in a complex world."[7] While I share my colleagues' view that our Circuit does the best it can given its relentlessly increasing caseload, these efforts cannot compensate litigants for the extreme costs imposed by an overburdened Circuit. Statistics bear out these costs.[8] In citing them, I select no more than one must when confronted with a body of supporting evidence too voluminous to repeat in whole. The fact remains that claims of unusual efficiency are cold comfort to litigants who must prosecute their appeals in the slowest circuit in the nation.[9]

I. Congress Has Regularly Realigned Federal Circuits To Address Demographic Strains

Circuit splits historically have been used in response to demographic expansion and shifts.[10] The process should be careful and deliberative, and the record indicates that Congress's approach to this issue has been just that, until now. Chief Judge Schroeder argues against a split of the current Ninth Circuit based on a tempting but ultimately dangerous claim. She argues that Congress never has split a circuit contrary to the wishes of that circuit's judges. Not only does she fail to cite any situation where circuit judges opposed a split effectively, but she seems to suggest that judicial preference should guide Congress's response to the extreme demographic strains our Circuit now endures. I disagree. Mere judicial resistance does not constrict the authority and duty of Congress to create an adequate system of federal courts.

Chief Judge Schroeder's argument is unprecedented and does not reflect the separation of powers embodied in our Constitution. According to Article III, Congress has the authority to "ordain and establish" inferior federal courts.[11] There is no requirement that Congress give recalcitrant judges the right to "advise and consent" or to submit the plan for the judiciary's approval. For judges to presume to demand congressional action or inaction, in my view, is inconsistent with our system of government. Alexander Hamilton in his first *Federalist* paper warned of the natural tendency for government officials "to resist all changes which may hazard a diminution of the power, emolument, and consequence of the offices they hold."[12]

For two centuries, Congress has consistently relied upon circuit realignment to ensure that the federal judiciary is not overwhelmed by population growth and caseload increases. Congress should respond to the long manifest demographic shift in the West by dividing the overburdened Ninth Circuit into smaller circuits, more proportional to the circuits in the rest of the country, that will be able to administer justice more effectively.

II. Congressional Commissions Have Called for Ninth Circuit Restructuring To Achieve Judicial Effectiveness and Legal Consistency

Although splits of the Ninth Circuit were proposed as early as 1955,[13] the Ninth Circuit received most congressional attention when scrutinized by two commissions to study the federal courts, led by Senator Roman Hruska in 1973 and retired Supreme Court Justice Byron White in 1998. The Hruska Commission ultimately recommended splitting both the Ninth and the Fifth Circuits.[14] The Fifth Circuit was split, but the Ninth Circuit resisted change and continued to suffer from its size. In 1997, Congress authorized the White Commission to take another look.[15] The White Commission recommended reorganizing the Ninth Circuit into three semi-autonomous divisional courts comprised of seven to eleven active circuit judges (with California apportioned between two such divisions).[16]

Curiously, split opponents such as Chief Judge Schroeder emphasize that the White Commission stopped short of recommending a Circuit split. They ignore that the White Commission considered restructuring *mandatory*. Indeed, the White Commission's proposed structural changes

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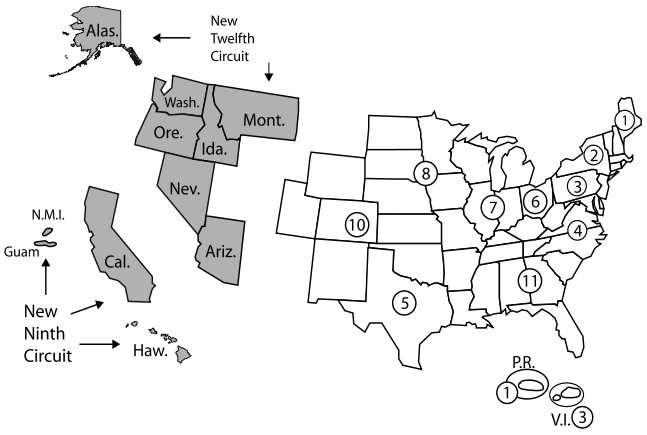
This article is the final installment in a three-part series: "Ninth Circuit Split: Point/Counterpoint."

were intended to *avoid* the necessity of a split. Despite this critical message, the Ninth Circuit's leadership rejected the entire proposal and did nothing.

Indeed, split opponents attempt to use the White Commission's call for restructuring to argue against the more dramatic—and effective—remedy of a formal split into two or three circuits. They act like someone who receives a report from her doctor that she does not need immediate open heart surgery, but that she *must* make serious lifestyle changes to avoid surgery in the future. Rather than change her lifestyle, this person celebrates that immediate surgery is unnecessary. When reminded to make the prescribed changes to her lifestyle, she contentedly responds that she does not need open heart surgery. Such an approach would be extremely foolish. Yet that is essentially the tack taken by my colleagues. The 1998 White Commission's report, like the 1973 Hruska Commission's, diagnosed certain problems with the Ninth Circuit, but split opponents ignore them, focusing instead on the almost irrelevant fact that the Commission stopped short of recommending an outright split. As the health of the Circuit deteriorates, this false confidence undermines its prospect of rejuvenation.

EXHIBIT 1: HOUSE-PASSED, SENATE-PENDING SPLIT CONFIGURATION



III. THE NINTH CIRCUIT'S LIMITED EN BANC PROCESS CREATES INCONSISTENT LAW

The problems illuminated by the White Commission have grown worse with the population increases in this Circuit and the spike in immigration appeals.[17] For example, when the White Report was issued, the Ninth Circuit's population was 51.5 million[18] and its caseload approximately 8,600 filings;[19] today the population is near 59 million with approximately 16,000 filings.[20] Especially problematic remains the en banc process, originally intended to enable a panel of *all* judges of the Circuit to meet and harmonize the Circuit's law.

In response to the impracticality of convening all judges of our massive Circuit, our en banc process was limited in 1980 to require only eleven (now fifteen) judges.[21] Unfortunately, under this streamlined approach, an en banc panel still does not represent the court as a whole. Witnessing the failings of the limited en banc system seventeen years after it was established, the White Commission concluded: "[T]he law-declaring function of appellate courts requires groups of judges smaller than the present Ninth Circuit Court of Appeals . . . ."[22] Supported by the reports of the White Commission and the Hruska Commission before it, I argue that only a realignment into two or three smaller circuits can achieve the consistency our federal system requires.

IV. OUR COURT HAS BEGUN TO RESEMBLE A LEGISLATIVE BODY

In addition to hindering legal consistency, the Ninth Circuit's vast size creates the danger that its deliberations will resemble those of a legislative—rather than a judicial—body.

The numbers bear out this concern. While the average state senate consists of thirty-nine senators,[23] the Ninth Circuit contains *fifty-one* total judgeships (twenty-eight authorized judgeships and twenty-three senior judgeships).[24] With seven additional judgeships slated for addition to the Circuit, the number of judges deciding cases soon could rise to sixty (and thirty-five in the en banc pool—including active judges only). A court of such size begins to look astonishingly like a legislative body, and has little choice but to act like one.

A court of appeals is not a legislature. Legislators promote the interests of their parties and their constituents; appellate judges, on the other hand, serve the non-partisan commands of justice. Guided not by their own interests but by circuit law, judges attempt to discern the applicable legal principles and to reach fair and faithful determinations based on the facts of each case. In this endeavor, the critiques of differently-minded colleagues can help check judges whose analyses of the law might become influenced—consciously or unconsciously—by personal preferences. Frequent contact among circuit colleagues keeps judges focused on the circuit's law, rather than their isolated interests. Smaller circuits keep judges from becoming like legislators by enabling colleagues to monitor one another's work more closely and to remain attuned to circuit precedents.[25]

V. A CIRCUIT SPLIT WOULD ENHANCE COLLEGIALITY AND HARMONIZE DECISIONS

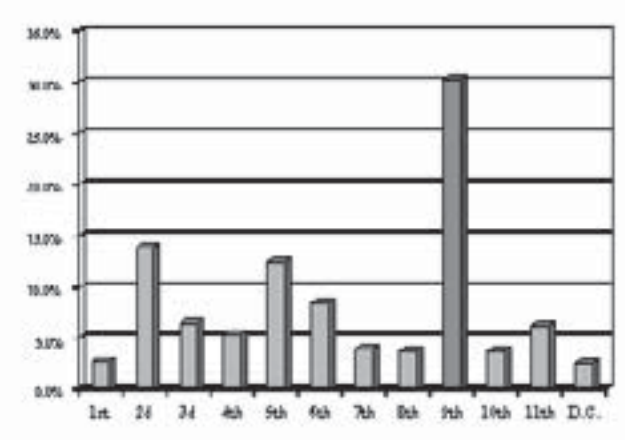
Less expansive courts foster closer working relationships and personal contact among judges. Frequent panel deliberation can help reduce the potential for misunderstandings based upon unfamiliarity among judges. The White Commission stated: "One reason judges in larger decisional units have difficulty maintaining consistent law is that as the size of the unit increases, the opportunities the court's judges have to sit together decrease."[26] Even in an internet age, panel deliberations remain essential to collegiality and consistency.

Chief Judge Schroeder appears to mistake my desire for collegiality and consistency with a prediction of homogeneity in smaller circuits. On the contrary, neither I

nor the White Commission has suggested that judges would be more disposed to group-think if placed in smaller circuits. Rather, I argue that circuits produce more doctrinal consistency when judges are familiar with the perspectives of their diverse colleagues. Lack of familiarity—and not difference of views—is the core problem with a large circuit.

My colleagues argue that the small size of the Supreme Court during the past eleven years undercuts my argument. According to this riposte, disagreements among the nine justices of the Supreme Court during Chief Justice Rehnquist's tenure should have been rare. But this again misstates my argument. I do not claim that a smaller court will always be unanimous or will always agree, only that it will be less likely to suffer from misinformation and misunderstandings. The members of the Rehnquist Court were, without question, intimately familiar with one another's reasoning, and I would wager that misinformation and misunderstanding were rare occurrences during the past eleven years.

Exhibit 2: Backlog of Pending Appeals—All Circuits

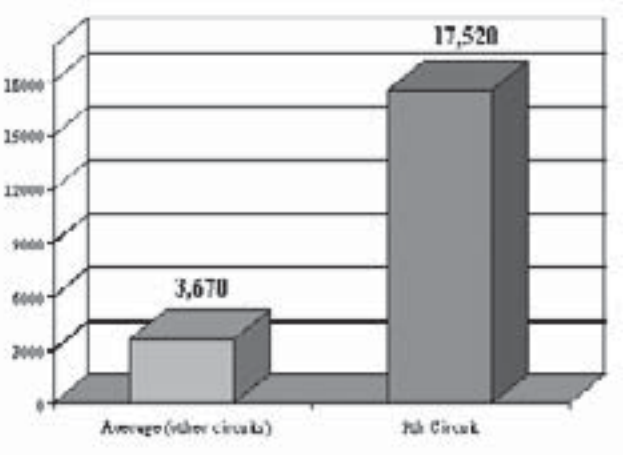


VI. A Bearable and Proportional Caseload Would Not Be a "Luxury"

The caseload numbers also weigh in favor of splitting the Ninth Circuit. During 2005, litigants filed over 16,000 cases in the Ninth Circuit, more than triple the average of all other circuits.[27] Bogged down by this overload, the Ninth Circuit is the slowest circuit in the disposition of appeals; it now takes over sixteen months from the filing of a notice of appeal until the appeal is resolved.[28] No end is in sight: The Ninth Circuit's backlog is nearly five times larger than that of the average circuit,[29] and now comprises thirty percent of all pending federal appeals.[30] My colleagues point out that we are prompt in deciding a case once it is submitted to the judges. But the only measure *litigants* care about is the total length of time it takes to have *their* appeals resolved.

Opponents argue that a split would give judges in the new Twelfth Circuit "the luxury of a reduced caseload," while requiring the addition of many more California-based judgeships to the new Ninth.[31] Yet a reduction would hardly

Exhibit 3: Backlog: Average Circuit Compared to Ninth Circuit



be a luxury. Under the currently pending proposal, S. 1845, circuit judges in the new Twelfth would bear a caseload larger than that of their counterparts in the First, Third, Sixth, Tenth, and D.C. Circuits. Any reduction would simply alleviate the strain on court procedures and resources. Such restructing would aid judges on the new, smaller Ninth Circuit as well. With the proposed additional judgeships those judges who continue in the Ninth would enjoy smaller workloads than those handled by judges on the Second, Fifth, and Eleventh Circuits. They too would be able to function with greater resources and less strained procedures. Indeed, the redistributed workloads would be an improvement for everyone involved—most importantly for the litigants, who would benefit from judges with more time to dedicate to prompt disposition of their cases.

Chief Judge Schroeder and my colleagues blame judicial vacancies for the delays. Yet the mere two new judges[32] who would fill the remaining vacancies, added to our current forty-nine total judges, cannot tackle the staggering backlog or stem the tide of cases inundating this Court. More drastic change is necessary.

VII. Efforts To Lessen the Burden of Immigration Appeals Have Met Neither Enthusiasm Nor Success

One more drastic change would be to reduce the influx of immigration appeals into the Ninth Circuit. In the past five years, due to the U.S. Department of Justice's decision to streamline its Board of Immigration Appeals ("BIA") process, the number of immigration appeals explosively rose to forty percent of the Ninth Circuit's docket.[33] Even my colleagues who oppose a split recognize that Congress should consider "providing a more effective administrative appeal process" for immigration cases.[34]

Yet my colleagues have not translated their concerns into action. They have not supported actual proposals to reduce immigration appeals. For example, when Majority Leader Frist offered a bill that would have transferred all immigration appeals to the Federal Circuit, following a GAO recommendation,[35] Chief Judge Schroeder rejected Majority

Leader Frist's proposal out of hand, without offering any alternative. It is time for the Ninth Circuit's leadership to join in productive efforts to strengthen the Circuit and re-balance the federal judicial system to improve the administration of justice in the West, rather than intransigently resist all suggestions for change.[36]

VIII. "A Number of Ninth Circuit Judges" Cannot Speak for the Federal Judiciary as a Whole

A substantial number of federal judges support restructuring the Ninth Circuit. Eight other Ninth Circuit judges join me in publicly supporting a circuit split: Judges Sneed, Hall, and Fernandez from California, Beezer and Tallman from Washington, T.G. Nelson and Trott from Idaho, and Kleinfeld from Alaska. Thirteen district court judges from states throughout the Circuit joined Ninth Circuit appellate judges in a letter of support to Chairman Specter. Moreover, Judge Rymer (California), who served on the White Commission, is on record as stating that our Court of Appeals is too large to function effectively.

But these numbers are not dispositive. Indeed, no number of Ninth Circuit judges should dictate the future well-being of our larger federal judicial system. As former Justice Sandra Day O'Connor said in writing to the White Commission in 1998 in support of a circuit split, "[i]t is human nature that no circuit is readily amenable to changes in boundary or personnel. We are always most comfortable with what we know, and it is unrealistic to expect much sentiment for change from within any circuit."[37] More persuasive than the views of circuit judges are the views of the Supreme Court justices, who enjoy a broader perspective of the court system. Importantly, Justices Stevens, O'Connor, Scalia, and Kennedy each wrote to the White Commission, stating that they were, as the White Commission summarized, "all of the opinion that it is time for a change."[38] The justices shared no common judicial philosophy: They merely recognized the harms caused by the Ninth Circuit's unmanageable size. The White Commission reported:

> [T]he Justices expressed concern about the ability of judges on the Ninth Circuit Court of Appeals to keep abreast of the court's jurisprudence and about the risk of intracircuit conflicts in a court with an output as large as that court's. Some expressed concern about the adequacy of the Ninth Circuit's en banc process to resolve intracircuit conflicts.[39]

In addition, the late Chief Justice Rehnquist endorsed the White Commission's restructuring proposal, stating that he shared the concerns of the other justices. Among the justices who favor a change in the Ninth Circuit's configuration are two from the West: Retired Justice O'Connor from Arizona and Justice Kennedy, who served on the Ninth Circuit from California. The other five justices are also familiar with the Ninth Circuit's problems: The Supreme Court has reversed the Ninth Circuit in written opinions *fifty times* in the past three years.[40] Over thirty of the reversals were unanimous and, in all but one case, these decisions were never reviewed en banc.[41]

Chief Judge Schroeder suggests that a split could harm the Supreme Court by requiring it to reconcile additional circuit splits. However, avoiding circuit splits would not remedy the erroneous decisions that stem from a sprawling and inconsistent court—decisions that also require Supreme Court attention and correction—particularly in light of the failure of the limited en banc process to correct the circuit's errors on its own.

CONCLUSION

As the preceding arguments demonstrate, support for a Ninth Circuit split depends neither on partisan politics nor on unhappiness with the decisions of this Court. Rather, the argument for a split is grounded in the need for effective judicial administration and consistent caselaw.

Almost every conceivable split configuration has been offered, including a number of bills in this congressional session. The onus falls now upon split opponents. My colleagues must offer something more productive than sheer resistance to any form of change. So far they have offered no judicially devised remedy that removes the need for a congressionally designed split.

Opposition to a split simply prolongs the life of a circuit that has long since exceeded its capacity, imposing unacceptable and unnecessary burdens on our federal system and on litigants before our Court.

I surmise that Chief Judge Schroeder and some of my colleagues will never be willing to split the Ninth Circuit. They will never be willing to admit that the Circuit can be out of proportion with the rest of the twelve regional circuits in the federal judicial system. But with Congress carefully addressing our Court's problems, even a majority of the judges of the Ninth Circuit should not impede these timely and constructive legislative efforts.

Footnotes

[1] *See* Diarmuid F. O'Scannlain, *Ten Reasons Why the Ninth Circuit Should Be Split*, 6 Engage: J. Federalist Soc'y's Prac. Groups 58 (2005).

[2] Deficit Reduction Act of 2005, H.R. 4241, 109th Cong. §§ 5401-13 (as passed by House, Nov. 18, 2005).

[3] The Circuit Court of Appeals Restructuring and Modernization Act of 2005, S. 1845, 109th Cong. (2005). For a map of the configuration of circuits proposed in S. 1845 and earlier passed in H.R. 4241, see Exhibit 1.

[4] *See* S. Judiciary Comm., Executive Business Meeting: Official Business Meeting Notice and Agenda (July 27, 2006), *available at* http://judiciary.senate.gov/meeting_notice.cfm?id=801.

[5] *See* H.R. Rep. No. 109-373, at 15 (2006) ("The Ninth's enormity dominates over the other regional circuits. The Ninth is 25 times larger than the smallest of the circuits, the First. The Committee believes that a regional court of appeals system that places one in five Americans and 40 percent of the Nation's geographic area in a single regional circuit with the ten remaining regional courts of appeals

dividing 60 percent of the Nation's land mass is unwieldy and inefficient."); *see also id.* at 17 (discussing the number of appeals filed per circuit for the 12-month period ending September 2004).

[6] *See* Mary M. Schroeder et al., *A Court United: A Statement of a Number of Ninth Circuit Judges*, 7 ENGAGE: J. FEDERALIST SOC'Y'S PRAC. GROUPS 63 (2006).

[7] *Id.* at 63.

[8] *See* Exhibit 2 (showing each circuit's portion of the backlog of federal cases).

[9] *See* discussion *infra* note 29 and accompanying text.

[10] The first revision of circuit lines occurred in 1802 and has continued regularly ever since. *See* RUSSELL R. WHEELER & CYNTHIA HARRISON, FED. JUDICIAL CTR., CREATING THE FEDERAL JUDICIAL SYSTEM 9-10 (2d ed. 1994). In 1925, the American Bar Association called for circuit realignment because changes in population and economic conditions, as well as in jurisdiction and volume of litigation, had resulted in unequal burdens among the several circuits. Congress answered the call in 1929 when it carved the Tenth Circuit out of the Eighth. *See* COMM'N ON STRUCTURAL ALTERNATIVES FOR THE FED. COURTS OF APPEALS, FINAL REPORT 17-18 (1998) [hereinafter WHITE COMMISSION REPORT]. The Hruska Commission sounded another alarm nearly fifty years later when it called in 1973 for creating the Eleventh Circuit out of the Fifth and the Twelfth Circuit out of the Ninth. *See id*. at 20; *see also* COMM'N ON REVISION OF THE FED. COURT APPELLATE SYSTEM, THE GEOGRAPHICAL BOUNDARIES OF THE SEVERAL JUDICIAL CIRCUITS: RECOMMENDATIONS FOR CHANGE (1973), *reprinted in* 62 F.R.D. 223, 228 (1973) [hereinafter HRUSKA COMMISSION REPORT]. Congress acted on the Fifth in 1981, *see* WHEELER & HARRISON, *supra*, at 26, and hopefully will finally act on the Ninth later this year.

[11] U.S. CONST. art III, § 1.

[12] THE FEDERALIST NO. 1, at 28 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

[13] In 1955, Senator Warren Magnuson and Senator Henry Jackson introduced S. 2174, 84th Cong. (1955), which would have split the Ninth Circuit into a Pacific Northwest Circuit and a Pacific Southwest Circuit.

[14] The Hruska Commission believed that this restructuring could diminish the delays in resolving appeals, the unwieldy number of Ninth Circuit judges (even at that time), and the inconsistent resolution of appeals by different Ninth Circuit panels. *See* HRUSKA COMMISSION REPORT, *supra* note 10, at 234-35.

[15] Congress authorized the Commission in late 1997, but the report was not completed until 1998. WHITE COMMISSION REPORT, *supra* note 10, at ix.

[16] *Id.* at iii, 41.

[17] *See infra* Part VII.

[18] *See* WHITE COMMISSION REPORT, *supra* note 10, at 27 tbl.2-9.

[19] *See id.* at 32.

[20] Current statistics for the Ninth Circuit were obtained from the Ninth Circuit AIMS database and are on file with the author.

[21] Congress authorized the use of limited en banc procedures in the Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. Pursuant to that congressional authorization, the Ninth Circuit adopted Circuit Rule 35-3, which now requires en banc panels to include the Chief Judge and fourteen other judges.

[22] WHITE COMMISSION REPORT, *supra* note 10, at 47.

[23] Six states have fewer than thirty senators, and twenty-two states have thirty-five or fewer. Forty-five states have fewer state senators than the Ninth Circuit has total judges. *See* National Conference of State Legislatures, *Current Number of Legislators, Terms of Office and Next Election Year* (Dec. 2003), *at* http://www.ncsl.org/programs/legman/about/numoflegis.htm.

[24] *See* 28 U.S.C. § 44 (2000). The Federal Judicial Center maintains a list of the active and senior judges currently serving on the Ninth Circuit. *See* Federal Judicial Center, *History of the Federal Judiciary: Courts of the Federal Judiciary*, *at* http://www.fjc.gov/history/home.nsf (last visited Sept. 14, 2006).

[25] Indeed, the White Commission found that "[t]he volume of opinions produced by the Ninth Circuit's Court of Appeals and the judges' overall workload combine to make it impossible for all the court's judges to read all the court's published opinions when they are issued." WHITE COMMISSION REPORT, *supra* note 10, at 47. The Commission added: "[C]oherence and consistency suffer when judges are unable to monitor the law of their entire decisional unit or correct misstatements of the court's decisional law." *Id.*

[26] *Id*.

[27] *See supra* note 20.

[28] *See id.*

[29] *See id.*; *see also* Exhibit 3.

[30] *See supra* note 20; *see also* Exhibit 2.

[31] Schroeder, *supra* note 6, at 63.

[32] At the time Chief Judge Schroeder wrote her article, four vacancies remained. On June 30, 2006, Judge Milan D. Smith, Jr., was appointed to our Court. On June 23, 2006, Judge Sandra S. Ikuta joined the Court as well, bringing the number of active judges to twenty-six of twenty-eight authorized judgeships and the number of total judges (including senior judges) to forty-nine of fifty-one authorized judgeships.

[33] *See supra* note 20.

[34] Schroeder, *supra* note 6, at 66.

[35] *See* S. 2454, 109th Cong., § 501(b)(1) (introduced March 16, 2006) (deflecting immigration appeals to the Federal Circuit).

[36] History reveals a strange, counterproductive resistance by the chief judges of this Circuit to congressional remedies: chief judges of the Ninth Circuit rejected the recommendations of the Hruska Commission (1973) and the White Commission (1998), which were designed to limit and to equalize the burdens of the circuit courts. Chief Judge Schroeder rejected Chairman Specter's solution (2006), which would have spared us the immigration appeals that have grown to dominate our docket. Remedies have been rejected one by one; unsurprisingly, the problems of this Circuit have continued to grow.

[37] Letter from Justice Sandra Day O'Connor to Retired Justice Byron R. White (June 23, 1998) (copy on file with author).

[38] WHITE COMMISSION REPORT, *supra* note 10, at 38; *see also id.* at 38 n.90.

[39] *See id.* at 38; *see also* O'Scannlain, *supra* note 2, at 62.

[40] *See supra* note 20. The Supreme Court reversed the Ninth Circuit fifteen times in 2005-2006; sixteen times in 2004-2005; and nineteen times in 2003-2004. *See id*.

[41] *See id*. Supreme Court votes were tallied by reference to the slip opinions.

Financial Services and E-Commerce

Judicial Valuation Behavior: Some Evidence from Bankruptcy

*By Keith Sharfman**

Valuation litigation is notoriously unpredictable.[1] When the value of a legal entitlement is in dispute, one party typically will ask for a high valuation, the other for a low one, and each will offer evidence in support of its position. The trier of fact may in the end agree with one side or the other, but could just as easily settle upon a third value of its own choosing. The valuation inquiry is thus inherently imprecise, a discretionary exercise that depends largely on the whims and predispositions of the factfinder. Given this imprecision, conventional legal scholarship has been unable to articulate a convincing theory of legal valuation.[2] Rather than theorize about which valuation methodologies courts can, should, and do employ, the favored approach has been to shift away from valuation method and to focus instead on process reforms that would lead to more predictable outcomes in valuation litigation.[3]

Behavioral analysts of law, however, have yet to give up searching for a viable theory of legal valuation. They are unsatisfied by the failure of conventional scholarship to go beyond the "inherent imprecision" thesis and have sought ambitiously through both theory and data to offer a more robust account.[4] The behavioral approach seeks first to understand how individuals handle questions of valuation and then to extrapolate from insights about individuals to an analysis of legal institutions.[5] Rather than accept the claim that there is no rhyme or reason to legal valuation, behaviorists have sought to explain legal valuation outcomes that seem irrational, inconsistent, or unpredictable in light of cognitive limitations and biases to which judges and juries are systematically (and hence predictably) subject.[6] In particular, behaviorists claim that legal decisionmakers value losses more highly than gains and that apparent anomalies in legal valuation may best be understood in terms of "loss aversion" or "status quo preservation" biases in legal institutions that are analogous to similar biases observed in individuals.[7] According to this view, judges and juries will tend, other things being equal, to undervalue the legal entitlements of plaintiffs[8] and overvalue the legal entitlements of defendants relative to some "objective" valuation benchmark such as market value.

A general critique of the behavioral approach to law (that also applies specifically in the valuation context) is that while it may succeed in explaining apparent behavioral irrationalities and inconsistencies *ex post*, it does not offer more predictive value *ex ante* than the competing analytic frameworks (such as wealth maximization and rational choice theory) that it debunks and seeks to replace.[9] A somewhat weaker version of this critique is that behaviorist explanations of legal phenomena, while useful for identifying new variables that help to explain the behavior of actors in the legal system, are nevertheless incomplete. Knowing, for example, that judges and juries are biased in a particular way (against losses, say) does not really end the search for a theory of legal valuation. At most, identification of loss aversion as a bias helps to understand legal valuation better than it was previously, but it still cannot (and indeed does not purport to) explain the legal valuation phenomenon in its entirety. Behaviorists themselves appear to agree with their critics that more data and more theories are always useful and that identification of new variables merely advances but does not end the behaviorist inquiry.[10]

The empirical approach taken in this article should therefore be welcomed by both behaviorists and their critics. If the loss-aversion theory of legal valuation is incorrect, empiricism can usefully provide evidence to negate it. Conversely, if behaviorists are right that loss-aversion bias is a significant explanatory variable for legal valuation, the effect ought to be empirically demonstrable not only in experimental settings but also in the "real world" of valuation litigation. With a stronger empirical foundation, the loss-aversion theory of legal valuation would become less conjectural and more convincing.

To these ends, this article identifies and studies a doctrinal area in which loss aversion bias is likely at work and endeavors to document empirically its manifestation and effects. The doctrinal area identified and examined is bankruptcy valuation litigation,[11] and the study's main empirical finding is that outcomes in bankruptcy valuation litigation are consistent with a hypothesis of loss-aversion bias. In addition to providing empirical evidence consistent with the loss-aversion theory of legal valuation, the study also confirms anecdotal evidence that bankruptcy judges are "pro-debtor,"[12] contradicting the findings of another recent study.[13]

More specifically, the study found that in cases where the bankruptcy judge reached a valuation in between those contended for by the parties (1) bankruptcy judges on average allocated 65.2% of the value in controversy to debtors (that is, loss-averse parties opposing a wealth transfer) and only 34.8% to secured creditors (that is, risk-neutral or relatively less loss-averse parties seeking a wealth transfer); and (2) bankruptcy judges were more than three times as likely to allocate most of the value in controversy to debtors as they were to secured creditors.

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The Study

A. Motivation

The study undertaken here tests for empirical support for the loss-aversion theory of legal valuation generally and for the more specific claim that bankruptcy judges are "pro-debtor." There is already considerable anecdotal evidence suggesting that bankruptcy judges are "pro-debtor,"[14] and loss-aversion bias provides a theory to explain why they might be. But more than anecdotal evidence is needed to conclude that bankruptcy judges are in fact pro-debtor, particularly since a recent empirical study has cast some doubt on the claim.[15]

Why look at valuation specifically in the bankruptcy context? Because if there is anything to the loss-aversion theory of legal valuation, one surely would expect loss aversion bias to find expression in the valuation decisions of bankruptcy judges. Bankruptcy valuation disputes typically pit a highly risk-averse party (the debtor or unsecured creditors) against a risk-neutral or relatively less risk-averse party (secured creditors). If loss aversion indeed affects judicial valuation behavior, one would expect bankruptcy judges to tilt their valuation decisions in favor of loss-averse debtors and unsecured creditors and against risk-neutral secured creditors.[16] Consider the following very common situation. Debtor, an individual with regular income, faces a temporary economic setback (due, say, to a fire that destroyed her uninsured home). Unable to pay her bills, she petitions for relief under Chapter 13 of the Bankruptcy Code.[17] Most of Debtor's creditors are unsecured. But one of them is GMAC, which previously had financed Debtor's purchase of a GM car and had secured the loan by taking a security interest in the vehicle. GMAC's claim against Debtor will be allowed as a secured claim "to the extent of the value" of the car.[18] If Debtor elects to retain rather than surrender the car, GMAC would have the right to insist that Debtor's Chapter 13 adjustment plan provide for full payment of GMAC's allowed secured claim.[19] How the bankruptcy court values the car could thus affect the size of Debtor's scheduled payments under the plan. The higher the valuation of the secured creditor's collateral, the higher must be the Debtor's payments.[20]

In her plan, Debtor will likely propose a low but plausible valuation. If GMAC objects to Debtor's plan, it will likely propose in support of its objection a higher but also plausible value. What the bankruptcy court will do is difficult to predict. It might accept Debtor's valuation, or GMAC's, or pick some number in between. The Supreme Court has tried to give bankruptcy judges some guidance on how to make valuations of this sort, instructing them to value debtor-retained collateral under a "replacement-value standard"—that is, "the cost the debtor would incur to obtain a like asset for the same 'proposed . . . use.'"[21] But bankruptcy courts continue to be all over the map in applying the replacement-value standard,[22] which is nearly as slippery as the statutory language it sought to clarify.[23]

A non-behaviorist looking at this frequently recurring bankruptcy valuation problem might say that valuation is inherently imprecise, that bankruptcy judges are making factual determinations as best they can, and that there is little else that legal scholarship can say about how bankruptcy judges are likely to handle the valuation problem. A behaviorist, however, might say that bankruptcy judges are likely, other things being equal, to tilt in favor of loss-averse debtors and give the collateral a relatively low valuation within the zone of plausibility, rather than tilt in favor of risk-neutral secured creditors who are seeking a higher valuation in order to obtain higher payments. The study here attempts to assess the accuracy of this behaviorist intuition.

B. Framework

Like valuation disputes generally, every bankruptcy valuation dispute involves a high proposed valuation, a low proposed valuation, and an adjudicated outcome. So the key variables in assessing bankruptcy valuation judgments are (1) the debtor's proposed valuation ("*D*"); (2) the secured creditor's proposed valuation ("*C*"); and (3) the adjudicated value ("*J*"). A fourth relevant variable, the value in controversy, or "stakes" ("*S*"), may be obtained by subtracting the low proposed valuation from the high proposed valuation (which in the case of disputes over the value of debtor-retained collateral means subtracting the debtor's valuation from the creditor's—that is, $S = C - D$).[24] And finally, a fifth relevant variable ("*P*") is the percentage share of the value in controversy allocated to the debtor, which may be calculated by subtracting the adjudicated value from the creditor's proposed valuation and then dividing the sum by the value in controversy (that is, $P = (C - J)/S$).[25]

This framework has two main advantages. First, calculating the debtor's allocation not as a raw number but rather as a percentage share normalizes the variable across cases with stakes of varying sizes and thereby facilitates meaningful comparison across cases. Using percentages in this way to facilitate cross-case comparison is a common technique in legal valuation scholarship.[26] Second, assessing what valuation litigants obtain in court in relation to what they have asked for is a useful way to cut through the bewildering fog of rhetoric and valuation methodologies that courts employ in valuation litigation and focus instead on what courts actually do rather than on what they say.[27]

Historically, a results-oriented focus was not the usual approach in studies of bankruptcy valuation, which tended to emphasize valuation doctrines and methods rather than the systematic study of valuation results.[28] Some recent work has focused more on results than has been done in the past, but has considered valuation outcomes not in relation to what the parties have asked for but rather in comparison to objective indicators of market value.[29] Other recent bankruptcy valuation scholarship has recognized the role and importance of party differences in valuation disputes but has focused on contractual mechanisms for resolving such differences rather than on their relationship to litigation outcomes.[30]

In contrast to earlier and contemporaneous work, the approach taken here is to examine how judges allocate the value in controversy in valuation litigation. That is, the valuations that litigants contend for are considered in relation to the adjudicated valuation outcomes they later obtain. Analysis of how courts allocate the value in controversy among valuation litigants is an approach to legal valuation scholarship that, so far as I know, originates with me.[31] And the study undertaken here is the first empirical application of that approach.

C. Data Selection

With a sensible set of variables to look for, two questions remained: What data should be collected, and which of the collected data should be kept rather than discarded? My thought was to search for recent bankruptcy opinions addressing valuation disputes where each side's proposed valuation was reported along with the adjudicated outcome. I therefore searched the Westlaw bankruptcy case database for cases containing a word with the root "valu!" within close range of a word with the root "propos!"and looked at cases digested by West in its annotated version of the United States Code following 11 U.S.C. § 506(a) (the provision of the Bankruptcy Code concerning the valuation of collateral), as well as cases citing the *Rash* decision (the leading Supreme Court decision on valuing collateral in bankruptcy).

The search was, inevitably, both over- and under-inclusive. Many of the cases did not involve valuation disputes at all, or involved valuation disputes but did not report all three of the variables necessary for the study. Cases falling in these categories were discarded. Other cases containing the necessary variables were surely missed.

A further category of disregarded cases merits special mention and explanation. Some of the cases generated by the search that reported data for all three variables necessary for the study (*D*, *C*, and *J*) were nevertheless discarded. This was done where the adjudicated value (*J*) was found to be equal to one of the party valuations rather than determined to be an amount in between. The reason for discarding these one-sided cases, some of which were won by the creditor[32] and others by the debtor,[33] was that the judicial valuations reported in them were less likely to be products of the exercise of judicial discretion than cases where *J* fell between *D* and *C*. This is so because complete adoption of one side's valuation suggests that the judge felt constrained in some way (either factually or legally) and thus was not exercising judicial discretion when making the valuation. A frequent example of this occurs when one party fails to back its valuation with any credible evidence. In such a case, the judge will usually feel constrained to adopt the other side's valuation, even if the judge might otherwise have been inclined to choose a compromise figure if the party failing to offer evidence in support of its valuation had actually presented a plausible valuation. The study was thus limited to only the clearest examples of discretionary judicial valuation—that is, cases where the judge imposed a compromise figure in between those contended for by the parties. If bankruptcy judges are motivated by loss aversion, that aversion is most likely evident in this category of cases.

In the end, after appropriately discarding cases to ensure that the sample studied would be representative, only a relatively small number (twenty-four) were left on which to perform the study. But a sample of twenty-four valuation disputes is probably large enough for the study to still be useful.[34] And if more cases meeting the study's criteria are found, the sample could always be enlarged in subsequent research.

D. Results

The results obtained in the study are summarized in Table 1 below. The main findings are that in the bankruptcy valuation disputes studied (1) bankruptcy judges on average allocated 65.2% of the value in controversy to debtors and only 34.8% to secured creditors; and (2) bankruptcy judges were more than three times aslikely to allocate most of the value in controversy to debtors as they were to secured creditors.[35] [FOOTNOTE 36 IN TABLE 1.]

E. Analysis and Implications

The results reported here suggest that when bankruptcy judges are faced with a plausible choice between competing valuations, they are three times more likely than not to exercise discretion in favor of the debtor and on average do so in a substantial way (by the margin of 65.2% to 34.8%). The data do not themselves reveal *why* bankruptcy judges favor debtors in valuation disputes; just that they do. But loss-aversion supplies a plausible explanation for the pro-debtor tilt that we observe in the cases: namely, that bankruptcy judges implicitly value debtor losses (that is, the cost of making payments to the secured creditor) more highly than creditor gains (that is, the benefit of receiving payments from the debtor).[37]

Suppose it is true that bankruptcy judges favor debtors in valuation disputes and that loss aversion bias explains this behavior. Still it would not be clear what, if anything, should be done about it. It may be entirely sensible as a matter of bankruptcy policy to respect a judicial preference that losses should count for more than gains of equal financial size. While such a policy approach would be inconsistent with the goal of wealth maximization in the Kaldor-Hicks sense,[38] it would hardly be the first instance of a policy departure from that ideal. Moreover, sensitivity to loss aversion could well be utility-maximizing even if wealth-reducing. Finally, if bankruptcy judges have pro-debtor biases, non-bankruptcy judges (and juries) are likely to have them too—and so restraining pro-debtor bias in the bankruptcy area exclusively would encourage forum shopping and violate the basic principle of respecting non-bankruptcy entitlements in bankruptcy.[39]

While this study does not suggest any need to reassess bankruptcy policy, its findings do have implications for reform of the procedures generally used to resolve valuation disputes. In previous work I have argued that

SHARE OF VALUE IN CONTROVERSY ALLOCATED TO DEBTOR IN SELECT BANKRUPTCY VALUATION DISPUTES[36]

CASES	DEBTOR'S VALUE	CREDITOR'S VALUE	ADJUDICATED VALUE	VALUE IN CONTROVERSY	DEBTOR'S SHARE
In re Stark, 311 B.R. 750 (Bankr. N.D. Ill. 2004)	14,500	24,850	17,475	10,350	71.3%
In re Washington, 2003 WL 22119519 (Bankr. E.D. Ark.)	29,500	37,825	30,000	8,325	94.0%
In re Boise, 2003 WL 1955759 (Bankr. D. Vt.)	8,000	8,750	8,250	750	66.7%
In re Gonzalez, 295 B.R. 584 (Bankr. N.D. Ill. 2003)	1,000	7,495	2,411	6,495	78.3%
In re Stembridge, 287 B.R. 658 (Bankr. N.D. Tex. 2002)	9,540	13,475	12,825	3,935	16.5%
In re Gray, 285 B.R. 379 (Bankr. N.D. Tex. 2002)	4,640	6,850	5,745	2,210	50.0%
In re Cline, 275 B.R. 523 (Bankr. S.D. Ohio 2001)	15,000	26,500	18,500	11,500	69.6%
In re Marquez, 270 B.R. 761 (Bankr. D. Ariz. 2001)	11,000	15,500	13,674	4,500	40.6%
In re Ballard, 258 B.R. 707 (Bankr. W.D. Tenn. 2001)	7,925	9,820	8,025	1,895	94.7%
In re Richards, 243 B.R. 15 (Bankr. N.D. Ohio 1999)	6,000	10,350	7,850	4,350	57.5%
In re Getz, 242 B.R. 916 (6th Cir. B.A.P. 2000)	7,500	8,825	7,937	1,325	67.0%
In re Winston, 236 B.R. 167 (Bankr. E.D. Pa. 1999)	9,150	15,280	9,537	6,130	93.7%
In re Renzelman, 227 B.R. 740 (Bankr. W.D. Mo. 1998)	11,272	12,950	11,471	1,678	88.1%
In re Lyles, 226 B.R. 854 (Bankr. W.D. Tenn. 1998)	12,375	15,650	14,450	3,275	36.6%
In re McCutchen, 224 B.R. 373 (Bankr. E.D. Mich. 1998)	4,000	8,025	6,150	4,025	46.6%
In re Glueck, 223 B.R. 514 (Bankr. S.D. Ohio 1998)	12,350	14,100	12,925	1,750	67.1%
In re Oglesby, 221 B.R. 515 (Bankr. D. Colo. 1998)	7,700	8,400	8,050	700	50.0%
In re Younger, 216 B.R. 649 (Bankr. W.D. Okla. 1998)	11,988	14,575	12,200	2,587	91.8%
In re Franklin, 213 B.R. 781 (Bankr. N.D. Fla. 1997)	14,000	17,000	15,418	3,000	52.7%
In re McElroy, 210 B.R. 833 (Bankr. D. Or. 1997) (truck)	5,600	8,603	5,950	3,003	88.3%
In re McElroy, 210 B.R. 833 (Bankr. D. Or. 1997) (car)	1,200	2,315	1,570	1,115	66.8%
In re Sharon, 200 B.R. 181 (S.D. Ohio 1996)	23,500	26,250	24,737	2,750	55.0%
In re Duggar, 1996 WL 537837 (Bankr. S.D. Ga.)	7,500	11,325	9,500	3,825	47.7%
In re Angel, 147 B.R. 48 (Bankr. D. Idaho 1992)	6,075	11,000	7,375	4,925	73.6%
AVERAGE SHARE ALLOCATED TO DEBTOR: 65.2%					

"valuation averaging"—a process whereby valuation disputes are resolved by averaging parties' valuation proposals with each other and (if they are far enough apart) with that of a neutral expert—would be a useful measure to adopt.[40] Although suggested as a substantive enactment rather than a procedural rule,[41] the proposal was intended to be substantively neutral on average with respect to outcomes. A background assumption underlying the proposal was that factfinders in valuation disputes tend on average to "split the difference" roughly *equally* between the parties (though the split is not necessarily equal in any given case).[42] For valuation disputes of the type in which factfinders tend on average to split differences equally, a fifty-fifty weighting of the respective plaintiff and defendant valuations would achieve substantive neutrality relative to average current outcomes. But for particular litigation contexts where empirical research shows that factfinders do not on average split the difference equally (for example, the sixty-five to thirty-five average allocation found here for bankruptcy valuation disputes with respect to debtor-retained collateral), valuation averaging could be implemented with substantive neutrality only by attaching weights to the party values used in the valuation averaging process that approximate the average results that courts reach outside it.

This is not to say that substantive neutrality is an absolute must. Rather, the point is that while substantive neutrality may or may not be something that policymakers would wish to achieve when shifting from current valuation processes to a valuation averaging-type process, the substantive impact of such a shift (if any) is something that they probably will wish to (and at any rate should) take into account. Further empirical studies of the sort undertaken here would help policymakers to do that.

CONCLUSION

This article presents an empirical study of the valuation behavior of bankruptcy judges in disputes between debtors and secured creditors over the value of debtor-retained collateral. The motivation for conducting the study was to find empirical support for what a behaviorist might call the loss-aversion theory of legal valuation, which is the idea that legal decisionmakers tend

to value losses more highly than gains of equal financial size. An implication of the theory is that bankruptcy judges will tend to favor loss-averse debtors over gain-seeking secured creditors in disputes with potential loss consequences for the debtors (such as disputes concerning the value of debtor-retained collateral)—which is just another way of stating the conventional wisdom that bankruptcy judges tend to be pro-debtor.

Empirical support was found for both the loss aversion theory of legal valuation and the pro-debtor bias intuition. The study's main findings were that in the bankruptcy valuation disputes studied (1) bankruptcy judges on average allocated 65.2% of the value in controversy to debtors and only 34.8% to secured creditors; and (2) bankruptcy judges were nearly three times as likely to allocate most of the value in controversy to debtors as they were to secured creditors. These findings suggest that bankruptcy judges may indeed have a pro-debtor orientation. And they are consistent with, and indeed may best be explained by, the loss-aversion theory.

As a normative matter, the study's findings likely do not have important implications for bankruptcy policy. While evidence of pro-debtor bias among bankruptcy judges may seem to cry out for reform, the reality is that a pro-debtor judicial tilt could well be sensible bankruptcy policy, given the widespread preference among individuals to value losses more highly than gains of equal financial value. It is true that allowing loss-aversion to find expression in bankruptcy policy is at odds with considerations of wealth maximization and Kaldor-Hicks efficiency. But public policy often subordinates efficiency to other concerns, and concern about loss-aversion could well justify bankruptcy valuation outcomes that depart from efficiency.

The empirical study here and other potential studies of a similar nature may, however, have normative implications beyond the bankruptcy context for general reform of the processes by which valuation disputes are resolved. The study here demonstrates that party valuation differences are not on average split equally in bankruptcy valuation disputes, and similarly asymmetric difference splitting may be the norm for valuation disputes in other contexts as well. The possibility of systematically non-equal difference splitting means that shifting to more mechanical valuation procedures such as "valuation averaging" would in some contexts not be achievable with substantive neutrality absent the attachment of asymmetric weightings to the parties' respective positions. Finding the appropriate calibration of these weightings for particular contexts will require further, context-specific empirical study.

Footnotes

[1] *See, e.g.*, Christopher P. Bowers, *Courts, Contracts, and the Appropriate Discount Rate: A Quick Fix for the Legal Lottery*, 63 U. Chi. L. Rev. 1099, 1126-29 (1996) (likening the arbitrariness of legal valuation to a "lottery").

[2] The leading treatise on the subject simply describes the law's incoherence with respect to valuation without offering any theory to explain it. James C. Bonbright, The Valuation of Property: A Treatise on the Appraisal of Property for Different Legal Purposes 3, 7-9 (1937) (describing "the problem of judicial valuation" and "the major task of developing the theory of legal valuation"); *see also* James C. Bonbright, *The Problem of Judicial Valuation*, 27 Colum. L. Rev. 493, 518 (1927) (concluding "that many differences in judicially accepted property values are quite unwarranted . . . and their presence can be accounted for only by favoritisms, confusions, and ineptitudes").

[3] *See* Keith Sharfman, *Valuation Averaging: A New Procedure for Resolving Valuation Disputes*, 88 Minn. L. Rev. 357 (2003) (proposing a valuation dispute resolution process that recognizes the plausibility of competing valuation methodologies). For similar shifts in focus from method to process in particularized contexts, see Barry E. Adler & Ian Ayres, *A Dilution Mechanism for Valuing Corporations in Bankruptcy*, 111 Yale L.J. 83 (2001). *See also* Douglas G. Baird, *The Uneasy Case for Corporate Reorganizations*, 15 J. Legal Stud. 127, 136-38 (1986) (proposing to replace judicial valuation of reorganizing firms with an auctions-based reorganization process); Lucian Arye Bebchuk, *A New Approach to Corporate Reorganizations*, 101 Harv. L. Rev. 775, 785 (1988) (proposing to replace judicial valuation of reorganizing firms with the issuance of options to the firm's stakeholders); Christian J. Henrich, *Game Theory and* Gonsalves*: A Recommendation for Reforming Stockholder Appraisal Actions*, 56 Bus. Law. 697, 722-29 (2001) (proposing to replace judicial valuation of corporate appraisal with a final offer arbitration process); Mark J. Roe, *Bankruptcy and Debt: A New Model for Corporate Reorganization*, 83 Colum. L. Rev. 527, 559 (1983) (proposing to replace judicial valuation of reorganizing firms with valuations based on market sales of the reorganizing firm's securities); Jay A. Soled, *Transfer Tax Valuation Issues, the Game Theory, and Final Offer Arbitration: A Modest Proposal for Reform*, 39 Ariz. L. Rev. 283, 304-10 (1997) (proposing to replace judicial valuation in tax litigation with a final offer arbitration process).

[4] *See, e.g.*, David Cohen & Jack L. Knetsch, *Judicial Choice and Disparities Between Measures of Economic Values*, 30 Osgoode Hall L.J. 737 (1992), *reprinted in* Choices, Values, and Frames 424-50 (Daniel Kahneman & Amos Tversky eds., 2000).

[5] *Id.*

[6] *Id.*; *see also* W. Kip Viscusi, *Do Judges Do Better?*, *in* Punitive Damages: How Juries Decide 186, 206 (Cass R. Sunstein et al. eds., 2002) ("Judges are human and may reflect the same kinds of irrationalities as other individuals.").

[7] Cohen & Knetsch, *supra* note 4, at 749-69 (using the notion of loss aversion to explain such diverse legal phenomena as adverse possession, recovery of lost profits for breach of contract, enforceability of contractual modification, gratuitous promises, and repossession). On loss aversion bias more generally, see Daniel Kahneman et al., *The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. Econ. Persp., Winter 1991, at 193.

[8] I use the terms *plaintiffs* and *defendants* somewhat loosely here. By plaintiffs I mean parties who seek to gain wealth through assertion of a legal entitlement, and by defendants I mean parties seeking to avoid a loss of wealth by disputing a legal claim. In the case of counterclaims, these labels are reversed.

[9] *See* Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 Stan. L. Rev. 1551 (1998) (critiquing behavioralist approaches to law, such as Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471 (1998), on this ground). More generally on the similarities and differences between the two fields, see Rational Choice: The Contrast Between Economics and Psychology (Robin M. Hogarth & Melvin W. Reder eds., 1987).

[10] On the limits and pitfalls of empirical legal scholarship, see Symposium, *Exchange: Empirical Research and the Goals of Legal Scholarship*, 69 U. Chi. L. Rev. 1 (2002); *Symposium: Empirical and Experimental Methods in Law*, 2002 U. Ill. L. Rev. 791 (2002); Gregory Mitchell, *Empirical Legal Scholarship as Scientific Dialogue*, 83 N.C. L. Rev. 167 (2004).

[11] On bankruptcy valuation generally, see Lucian Arye Bebchuk & Jesse M. Fried, *A New Approach to Valuing Secured Claims in Bankruptcy*, 114 Harv. L. Rev. 2386 (2001); Jean Braucher, *Getting It for You Wholesale: Making Sense of Bankruptcy Valuation of Collateral After* Rash, 102 Dick. L. Rev. 763 (1998); Chaim J. Fortgang & Thomas Moers Mayer, *Valuation in Bankruptcy*, 32 Ucla L. Rev. 1061 (1985); David F. Heroy & Adam R. Schaeffer, *Valuation in Bankruptcy*, *in* 26th Annual Current Developments in Bankruptcy & Reorganization 153 (PLI Commercial Law & Practice Course, Handbook Series No. 3076, 2004); and Harold S. Novikoff & Beth M. Polebaum, *Valuation Issues in Chapter 11 Cases*, SJ082 ALI-ABA 239 (2004).

[12] On the alleged pro-debtor biases of bankruptcy judges, see David A. Skeel, Jr., Debt's Dominion: A History of Bankruptcy Law in America 194 (2001); Mechele Dickerson, *Approving Employee Retention and Severance Programs: Judicial Discretion Run Amuck?*, 11 Am. Bankr. Inst. L. Rev. 93, 105 & n.66 (2003) (noting a widespread belief that "bankruptcy judges are . . . biased in favor of debtors"); Lynn M. LoPucki, *The Debtor in Full Control—Systems Failure Under Chapter 11 of the Bankruptcy Code?*, 57 Am. Bankr. L.J. 99, 247, 272-73 (1983); Greg Zipes, *Securitization: Challenges in the Age of* LTV Steel Co., Inc., 2002 Ann. Surv. Bankr. L. 105, 116 (2002) ("Bankruptcy judges try to give debtors every advantage because they may be criticized if the reorganization case were to fail."); and Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 Mich. L. Rev. 2016, 2017 (2003).

[13] *See* Edward R. Morrison, Bankruptcy Decision-Making: An Empirical Study of Small-Business Bankruptcies (Columbia Law Sch., Ctr. for Law & Econ. Studies, Working Paper No. 239, 2003), *available at* http://papers.ssrn.com/abstract_id=461031(last visited Sept. 8, 2004) (finding that the actual behavior of bankruptcy judges in Chapter 11 cases contradicts the conventional wisdom that they are pro-debtor). While Professor Morrison's study concerns the issue of liquidating business debtors and the study here deals with valuing the collateral of individual debtors, the studies are nevertheless in some tension because *a priori* one would expect bankruptcy judges to be just as averse to the losses experienced by the owners, managers, and employees of business debtors as they are to those faced by individual debtors.

[14] *See* sources cited *supra* note 12.

[15] *See* Morrison, *supra* note 13 (finding, contrary to the conventional wisdom, that bankruptcy judges efficiently liquidate debtor firms rather than allow them to operate in financial distress indefinitely).

[16] For a useful description of the intuition behind possible pro-debtor bias in connection with the valuation of collateral, see Theodore Eisenberg, *The Undersecured Creditor in Reorganizations and the Nature of Security*, 38 Vand. L. Rev. 931, 948 (1985)("A reorganization court dealing with a financially distressed debtor might err, even subconsciously, on the side of undervaluing collateral. Undervaluing collateral enables the debtor to use the collateral at a lower cost and, therefore, enhances the chances for successful reorganization. Erroneous overvaluation of collateral may increase a debtor's costs to the point of endangering the reorganization. Thus, a bankruptcy court with an inclination towards a reorganization might naturally err on the side of undervaluing collateral."). *Cf.* Alan Schwartz, *The Enforceability of Security Interests in Consumer Goods*, 26 J.L. & Econ. 117 (1983) (recognizing that debtors may value the right to retain collateral more highly than the collateral's market value and thus more highly than would a repossessing creditor).

[17] 11 U.S.C. §§ 1301-1330 (2000).

[18] *See id.* § 506(a) ("An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property. . . .").

[19] *See id.* § 1325(a)(5).

[20] For useful descriptions and discussions of this type of Chapter 13 valuation litigation, see Braucher, *supra* note 11; and David Gray Carlson, *Car Wars: Valuation Standards in Chapter 13 Bankruptcy Cases*, 13 Bankr. Dev. J. 1 (1996). A similar valuation issue arises when individual debtors in Chapter 7 exercise their right to redeem property under 11 U.S.C. § 722. *See* David Gray Carlson, *Redemption and Reinstatement in Chapter 7 Cases*, 4 Am. Bankr. Inst. L. Rev. 289 (1996).

[21] Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 965 (1997) (quoting 11 U.S.C. § 506(a)).

[22] For a sense of the range of possibilities, compare *In re Smith*, 307 B.R. 912, 921 (Bankr. N.D. Ill. 2004) (adopting a judicial presumption to set retail price minus ten percent as a starting point for determining the replacement value of debtor-retained collateral), with *In re Tripplett*, 256 B.R. 594, 597-98 (Bankr. N.D. Ill. 2000) (declining to apply *Rash* in Chapter 7 cases and adopting a liquidation valuation standard instead). *See also* Kathryn R. Heidt & Jeffrey R. Waxman, *Supreme Court's* Rash *Decision Fails to Scratch the Valuation Itch*, 53 Bus. Law. 1345, 1359-75, 1380 (1998) (discussing post-*Rash* valuation cases and concluding that bankruptcy valuation remains uncertain in the wake of *Rash*).

[23] *See Assocs. Commercial Corp.*, 520 U.S. at 965 n.6 ("[T]he replacement-value standard . . . leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented.").

[24] Note that in other contexts, the secured creditor might well favor a low rather than high valuation—*e.g.*, cases where the debtor surrenders the collateral; reorganization cases where the value in issue is the reorganizing entity itself such that the secured creditor's share would be greater the less the court decides the reorganizing entity is worth.

[25] The idea here is that the debtor's percentage share of the value in controversy is captured by the distance between the valuation the creditor asks for and the valuation it obtains in proportion to the distance between the parties. If the court agrees entirely with the creditor's valuation (*i.e.*, if $J = C$), then the debtor's allocated share of the value in controversy is zero. Conversely, if the court entirely agrees with the debtor's valuation (*i.e.*, $J = D$), then the debtor's share is 100% (*i.e.*, $(C - J) = (C - D) = S$; therefore, $(C - J)/S = (C - J)/(C - J) = 1$). And so forth.

[26] *See, e.g.*, Joel Seligman, *Reappraising the Appraisal Remedy*, 52 Geo. Wash. L. Rev. 829, 850-51 (1984).

[27] As Seligman explains, valuation results, rather than doctrine or method, ought to be the focus of legal valuation scholarship. *Id.* at 855 (advocating empirical analysis of corporate valuation "results themselves" rather than a "focus on how results are obtained").

[28] *See, e.g.*, Fortgang & Mayer, *supra* note 11.

[29] For example, a recent bankruptcy valuation study compared

"negotiated reorganization values" agreed to by parties in Chapter 11 proceedings with various indirect measures of market or "intrinsic" value, such as the reorganized entity's post-reorganization market capitalization. *See* Marcus Bernard Butler III, Valuation Conflicts in Corporate Bankruptcy (2003) (unpublished Ph.D. dissertation, University of Chicago Graduate School of Business), *available at* http://www.ssb.rochester.edu/fac/Butler/chithesis_final.pdf (last visited Sept. 8, 2004).

[30] Douglas G. Baird & Donald S. Bernstein, Relative Priority in An Absolute Priority World (Am. Law & Econ. Ass'n Annual Meetings, Working Paper No. 59, 2004) (describing and discussing the use of options contracts to resolve valuation disputes, as in the recent Conseco bankruptcy), *available at* http://law.bepress.com/alea/14th/art59 (last visited Sept. 8, 2004).

[31] *See* Sharfman, *supra* note 3, at 370-71 (focusing analysis on the amount of value in controversy rather than on the overall value of the entitlement in question).

[32] Identified cases allocating 100% of the value in controversy to the creditor include *Evabank v. Baxter*, 278 B.R. 867 (N.D. Ala. 2002); and *In re Russell*, 211 B.R. 12 (Bankr. E.D.N.C. 1997).

[33] Identified cases allocating 100% of the value in controversy to the debtor include *In re Weathington*, 254 B.R. 895 (B.A.P. 6th Cir. 2000); *Consumer Portfolio Services, Inc. v. Martina*, No. 01 C 50424, 2002 WL 449283 (N.D. Ill. Mar. 21, 2002); *In re Bouzek*, 311 B.R. 239 (Bankr. E.D. Wis. 2004); *In re Barse*, 301 B.R. 404 (Bankr. W.D.N.Y. 2003), *aff'd*, 309 B.R. 109 (W.D.N.Y. 2004); *In re Podnar*, 307 B.R. 667 (Bankr. W.D. Mo. 2003); *In re Zell*, 284 B.R. 569 (Bankr. D. Md. 2002); *In re Ard*, 280 B.R. 910 (Bankr. S.D. Ala. 2002); *In re Duggins*, 263 B.R. 233 (Bankr. C.D. Ill. 2001); *In re Dunbar*, 234 B.R. 895 (Bankr. E.D. Tenn. 1999).

[34] Compare Seligman, *supra* note 26, at 855-56 & n.115, which analyzed a data set of only twelve corporate valuation cases—a sample deemed representative enough for use in a later study. *See* Kenton K. Yee, *Judicial Valuation and the Rise of DCF*, Pub. Fund Dig., 2002, at 76, 81-82 (performing further tests on the Seligman sample).

[35] The "more than three times as likely" figure is based on the fact that the debtor's allocated share exceeded 50% in seventeen of the disputes studied and was less than 50% in only five of the cases studied. Seventeen is more than three times as many as five.

[36] The figures reported here are rounded to the nearest dollar or tenth of a percent. The overall result reported at the bottom of the table is based on an equally weighted average of the figures in the "Debtor's Share" column.

[37] To be sure, it is possible to explain the data without resort to a bias theory. It may well be that secured creditors, perhaps because they are repeat players who wish to establish reputations as tough valuation litigants, are systematically more aggressive than debtors in the valuation positions that they take. But it is difficult to see why debtors (whose lawyers are repeat players even if their clients are not) would not have just as powerful an incentive to litigate aggressively.

[38] On wealth maximization and Kaldor-Hicks efficiency as criteria of social choice, see Richard A. Posner, Economic Analysis of Law § 1.2, at 13 (6th ed. 2003).

[39] The policy of protecting non-bankruptcy entitlements in bankruptcy is often referred to as "the *Butner* principle" after the case that established the doctrine. *See* Butner v. United States, 440 U.S. 48, 55 (1979); Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 Yale L.J. 857 (1982).

[40] Sharfman, *supra* note 3, at 370-79.

[41] *See id.* at 370 n.46.

[42] *Id.* at 359 & nn.6-7.

Free Speech and Election Law

(Pre)Clarifying The Muddy Red Waters of The Texas Redistricting War

*By Ronald Keith Gaddie & Charles S. Bullock, III**

The fight for political preeminence in the Texas congressional map unfolded amidst upheaval in governing election law by the United States Supreme Court. In this uncertain environment, the creativity exhibited by lawyers seeking victory paralleled the creativity of the maps themselves and touched on every element of election law related to redistricting. Despite the best machinations of lawyers to craft new law, and of politicians to seize political advantage, the courts navigated a restrained course that limited the political and constitutional impact of the Court's intervention.

At base, the Texas redistricting was a partisan enterprise, designed to undo the consequences of the 1991 Democratic congressional map and then to subsequently do to the Democrats what the previous map had done to Republicans: deny them political power. Hopes for Republicans were dashed in their failure to take full control of Texas government in the 2000 legislative elections, leaving the state with divided government and a hopeless deadlock on the design of the new congressional districts. The subsequent takeover of the entire Texas government in 2002 afforded Republicans an opportunity to redo the congressional district maps.

The effort was not so easily pursued as the Republican gerrymander of Pennsylvania. As a (VRA) Section 5 state with a large minority population, Texas had to take steps to ensure that it did not retrogress against existing minority access to the political process, while also walking a tightrope of not unduly considering race in the crafting of districts.[1] The product was a congressional district map that would create eight majority-Hispanic and three black-access districts. Ten of these districts elected Democrats and nine elected members of the predominant racial or ethnic minority (including eight who were representatives of choice of the relevant minority). The plan shifted a net of six seats out of thirty-two from the Democrats to the Republicans, and introduced a pro-Republican electoral bias approaching the bias introduced to the favor of Democrats in 1991.

By the time the Texas redistricting reached the U.S. Supreme Court in early 2006, the litigation encompassed virtually every controversy in redistricting: The districts were challenged because they allegedly constituted an illegal partisan gerrymander.[2] The gerrymander was in evidence because of the mid-decade nature of the redistricting.[3] The mid-decade redistricting was unreliable because population growth allegedly made it impossible to comply with the one-person, one-vote requirement.[4] The districts were racially packed and violated Section 2 of the VRA, and constituted retrogression because of the lack of protection for "influenced" and coalitional districts, which numbered as many as eight out of thiry-two total districts, in addition to the existing minority-majority and minority-access districts.[5] The new minority districts were allegedly insufficiently compact, and united disparate and distant communities of interest due to ethnic considerations. In sum, in the view of the plaintiffs, everything was wrong with this map.

The Supreme Court decision and the subsequent actions of federal district court panel in responding to the various judicial challenges in remapping Texas are instructive. The Texas decision is the first to deal with issues of minority opportunities in redistricting subsequent to the *Georgia v. Ashcroft* decision. The case demonstrates the limited willingness of the Court to intervene in issues of partisan gerrymandering or to indulge creative legal shadow arguments in order to justify overturning unsavory, unpleasant, but otherwise legal political power plays. And, in Texas, a federal district court was twice called on to revise boundaries as a consequence of the inability of the legislature to craft a legal map, and the court did so in a restrained and circumspect manner that left intact all of the damaging elements of the Texas remap.

I. The 2003 Remap

The Republican-dominated state legislature elected in 2002 undertook to redraw the congressional map of Texas with an eye toward maximizing Republican opportunities and eliminating or inconveniencing as many of the seventeen Democratic incumbents as possible. This remap was aggressively pushed by Texas legislative leadership in the state House and also by Republican House majority whip Tom DeLay, and had as its primary goals the displacement of as many incumbent Democrats as possible from their constituencies, and particularly the elimination of noted urban liberal Democrats Martin Frost (D-Texas 24) and Lloyd Doggett (D-Texas 10). The reaction of minority Democrats to the proposals are well-known and need only be briefly recounted: On May 6, 2003, fifty-three Texas House Democrats fled to Ardmore, Oklahoma, in an effort to prevent a quorum for the conduct of business in the Texas House of Representatives. In another special session later that summer, eleven Senate Democrats fled to Albuquerque, and remained there through the expiration of one special session and only returned for a third special session when it was evident that a ruling by the lieutenant governor regarding the rules governing the taking up of legislation had been changed to nullify the Democrats abstention policy. On

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October 12, 2003, Plan 1374C (HB-3) passed out of the legislature and was signed into law by Republican Governor Rick Perry the following day.

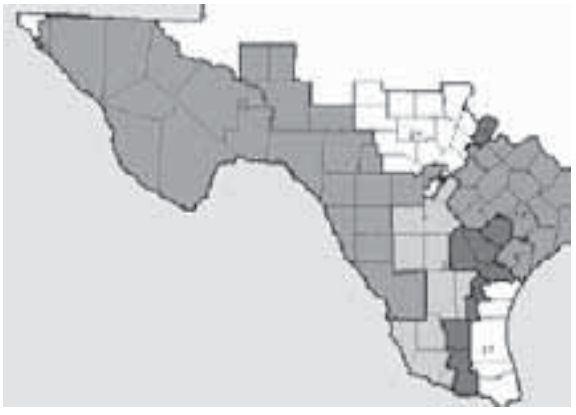
The redistricting was guided by two principles: (1) maximizing Republican electoral opportunities; (2) ensuring non-retrogression of minority opportunities. To this end, care was taken in ensuring a continuity of minority districts in Dallas County, Harris County, and in South Texas from El Paso to Gulf of Mexico. The maps created by Republican mapmakers fell into two general categories, dubbed the "7-2-2" maps and the "8-3" maps.

The "7-2-2" maps did little to disrupt the design of congressional districts in Harris, Tarrant, and Dallas Counties and in South Texas, in order to make no disturbance of the retrogression baseline. The seven referred to the seven majority-Hispanic districts in the map—six in South Texas, one in Harris County. The first two referred to the performing black majority districts in Harris and Dallas Counties. The second "two" referred to then district 24 and 25, held by Democrats Martin Frost and Chris Bell, respectively.[6] Their districts had no ethnic or racial majority, but contained largely non-voting Hispanics together with fewer, politically-active blacks who were potentially dominant in Democratic Party primaries.[7] Other changes to the remaining districts largely scrambled the constituencies of Anglo Democratic congressmen in an effort to shift the majority of the congressional delegation to the GOP.

The "8-3" maps more dramatically redrew the districts of the state. These maps altered the boundaries of every district, save congressional district 16 in El Paso. The eight refers to eight majority-Hispanic congressional districts, seven in South Texas and one in Harris County. The "three" refers to two existing black majority districts of Harris and Dallas Counties (districts 18 and 30) plus another new, black plurality district in south Harris and Fort Bend Counties that would definitely elect a black candidate of choice. The "8-3" maps substantially increased the black population in a successor to Chris Bell's district 25 (now numbered "9") and cracked Martin Frost's district 24. The 8-3 maps also busted

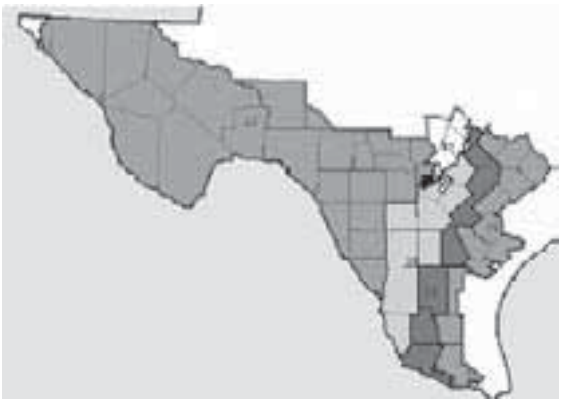
Map 1

South Texas Under Plan 1151C,
Balderas Court-Ordered Map 2001



Map 2

South Texas Under Plan 1374C,
HB-3 Texas Legislature Map, 2003



apart the liberal Democratic district 10 in Travis County (Austin) held by Democrat Lloyd Doggett, in order to facilitate a new, elongated district 25 that ran from heavily Hispanic southern Travis County to the Rio Grande, and which would become the eighth majority-black district. It was a variant of the "8-3" map, Plan 1374C, that became law.

The new 25th district was a necessary consequence of the redistricting process. Representative Bonilla, the only Hispanic Republican in the Texas congressional delegation, had initially defeated scandal-plagued incumbent Albert Bustamante in 1992 while garnering an estimated 40% of the Hispanic vote. Bonilla's Hispanic percentages had fallen with each subsequent election, and in 2002 he managed just 8% of the Hispanic vote against Henry Cuellar.[8] Bonilla's political security depended on making his district more Republican. By pulling the Hispanic percentage of the CVAP significantly down, the partisan polarity of this relatively low Hispanic turnout district shifted to Bonilla's advantage, and his reelection margin in 2004 was 40 points, compared to just four points in 2002.[9]

The overall partisan impact of the new map was evident to any observer. Where the court-drawn districts used in 2002 had a high degree of responsiveness and relatively little partisan bias in potentially translating votes into seats, plan 1374C introduced a dramatic political bias to the favor of Republicans. Justice Stevens would note in his dissent the analysis of both plaintiffs' and state's expert, who found that a 52% GOP vote share statewide would probably translate into over two-thirds Republican seats. Of the nine white Democrats who represented non-minority-majority districts in 2003, only two would make it back to Congress, and one of those would run in the new Latino majority district 25. The political goals of the mapmakers were efficiently realized.

The state's voting rights analysis submission to the Department of Justice asserted an enhancement of minority representation as a consequence of the pursuit of the creation of safe party constituencies.[10] The state's analysis argued for the creation of additional Latino and African-American districts based on the desire of several parties in

the 2001 redistricting trial to do so (an argument ignored by the court) and because the court signaled that such an initiative would have to constitute legislative policy rather than a judicial remedy.[11]

In establishing the benchmark for Texas, the state asserted that an "ethnic 'divide and conquer' strategy [results in] a majority-minority district in which no single minority dominates can be and often are meaningless for minorities."[12] Therefore, "coalition" districts 24 and 25 had no meaning relative to the benchmark, an argument accepted by the federal three-judge panel in subsequent litigation, when they noted that there was neither an obligation to draw or preserve a coalition district, because such districts functioned for the purpose of partisanship rather than racial or ethnic representation purposes.[13]

The state instead argued that the previous baseline of seven Hispanic-majority districts and two black districts was enhanced by the new 8-3 map. "In Texas, no party has contended that minorities actually have an opportunity to elect candidates of choice in as many as 11 districts" under the court-ordered map.[14] Under the 8-3 map, they attempted to certify the enhanced minority representation of eight Hispanic majority districts, though one of these was just 50.9% Hispanic voting age population and less than a majority citizen VAP, a reduction of twelve points from its predecessor, which had not actually performed for twelve years. The state's expert disagreed with the preclearance report in his trial report and expert testimony in deposition, but also pointed to the new district 25 which ran from Austin to the Rio Grande as an offset for the alteration of the configuration of the historic district 23.[15] Congressional district 9, which located itself in the same geography of south Harris County as the old district 25, was clearly a performer for minority voters, did subsequently elect a candidate of choice for the black community. At trial that winter, the district court did not agree with the assessment that seven performing districts were drawn in South Texas, but rather only six, which it deemed to be the maximum possible to draw. However, the court had not accepted the previous district 23 as a currently performing district, and it also refused to consider preclearance issues, which were outside its jurisdiction.[16]

This perspective was generally challenged by the Department of Justice's Voting Rights division. The "Section 5 Recommendation Memorandum" of December 12, 2003 recommended against the preclearance of the Texas congressional maps.[17] The rationale for the denial was that the proposed plan retrogressed relative to the Department of Justice's measurement of the benchmark plan. Professional staff attorneys identified eleven minority majority districts for the purpose of measuring the benchmark: seven majority-Hispanic VAP districts (six majority-CVAP), and four districts with no one racial majority, but two of which have black populations approaching majority status and two others (districts 24 and 25). In other words, the benchmark identified the districts of the 7-2-2 plan. The preclearance report verified the enhancement of black "ability to elect" districts from two to three with the creation of new district 9.

The consequences of the map for minority representation were generally a net-sum gain. The additional black-access district elected an African-American candidate who defeated a white incumbent in the primary. But Ciro Rodriguez, the freshman incumbent from district 28, was defeated in a Democratic primary by another Hispanic, while in the new Hispanic-majority district 25, Anglo Democrat Lloyd Doggett decisively defeated an Hispanic candidate from the southern end of the district.

II. In the Supreme Court

The U.S. Supreme Court, in taking up the Texas redistricting, was confronted with a host of legal and constitutional issues. They reduced it to three: (1) the legality of performing the remap; (2) the motivation and intent of the remap with regard to partisanship; and (3) the racial and ethnic consequences of the remap. In the end, the majority only agreed on one rather narrow illegality—that the creation of district 23 violated Section 2 of the VRA, and that district 25 was an insufficient offset in the context of the entire map and of racially polarized voting in west Texas. Even in this narrow context of legality, the decision cleared some of the thicket away in terms of clarifying what can and cannot be done in redistricting.

A. Legality of Performing the Remap

Subsequent to the ruling in Colorado that the mid-decade redistricting violated the state's constitution, there was much unfounded speculation regarding the legality of the Texas remap. While the legal precedent had no application in Texas, the logic underlying the argument against mid-decade redistricting was advanced. Plaintiffs in Texas attempted to advance arguments against mid-decade redistricting in the trial court, arguing that such an approach could not be undertaken because the census data would be sufficiently dated as to not ensure satisfaction of the one-person, one-vote condition.[18]

Neither the district court judges nor the majority for the Supreme Court accepted the argument. Census data had been used mid-to-late decade to redraw legislative boundaries for four decades by federal courts. In doing so, the courts accepted the notion of a "legal fiction" that the census data were accurate for the purposes of satisfying one-person, one-vote.[19] A separate argument, that because the map had been redrawn by the court it could not be replaced by the legislature, did not find footing either. Indeed, Justice Kennedy goes so far as to state that "if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act,"[20] and reiterates the district court's correct observation that state legislatures are free to replace court-mandated remedial plans. If mid-decade redistricting is a concern, it is a political concern rather than a legal concern, and it will require political means to eliminate the practice. The Court has effectively closed the door on the issue of mid-decade remaps and endorsed the "legal fiction" that census data are valid for redistricting throughout the course of a decade.

B. Partisan Gerrymandering

The issue of partisan gerrymandering was very much in question during the 2003 litigation over the Texas remap. Lawyers for plaintiffs in Texas were arguing the Pennsylvania case before the Supreme Court even as they fought the Texas remap in district court. So there was great uncertainty as to the receptiveness of the Court to arguments regarding partisan gerrymandering claims and also uncertainty regarding what arguments or evidence the Court would consider in support of such a claim. By the time the Texas remap arrived at the Supreme Court in 2006, the *Veith* case had not determined that partisan gerrymandering was non-justiciable, as the Court continued to be divided on the issue.[21] And, in *Veith*, plaintiffs had failed to establish a measurable standard for determining what was an illegal partisan gerrymander. What was at issue in Texas was whether a manageable and reliable measure of fairness existed and was offered by the appellants for determining if partisan gerrymandering is unconstitutional.

Appellants' legal team had not been able to establish a legitimate claim to partisan gerrymandering in Pennsylvania, where a minority of votes made a decisive majority of seats for the advantaged party. They now turned to Texas, where the Supreme Court instructed the federal district court to consider the 2003 remap in light of the *Veith* decision. The second bite at establishing a justiciable partisan gerrymandering standard rested on the notion that a mid-decade redistricting with partisanship as its sole purpose was a violation of equal protection and the First amendment.

The Court rejected this argument on two dimensions: while partisan gain was the "sole motivation for the decision to replace Plan 1151C," partisan gain did not dictate the plan in its entirety; and the application of the mid-decade condition would leave untouched beginning-of-decade gerrymanders such as *Veith* and the 1991 Texas Democratic gerrymander.[22] Further, Kennedy again reiterated a conclusion from the majority in *Veith*, that a plaintiff must demonstrate a burden on their representational rights as measured by a reliable standard.

Every line of the Texas map was not dictated by party. However, most of the lines were determined by partisan and political goals, and the techniques used in the Texas redistricting are eerily similar to those used in the Georgia state legislative districts[23] drawn in 2001: unequal treatment of incumbents, displacement of incumbents in one party, the packing of voters from the party targeted by the redistricting. The districts also become less compact compared to the baseline. The critical difference between the legal Texas maps and the illegal Georgia maps are two, and both are recognized by the Court. First, in Georgia the redistricting made a minority of votes into a majority of seats to perpetuate a declining party. In this respect, the Georgia actions were like that of the Texas majority in 1991. In Texas in 2003, the redistricting had the purpose of "making the party balance more congruent to statewide party power."[24] Second, the redistricting in Georgia was illegal not because of partisan gerrymandering per se, but because "the objectives of the drafters, which included partisan interests along with regionalist bias and inconsistent incumbent protection" did not justify the population deviations exhibited in the plan.[25] This distinction also undercut the second of the appellants' arguments that relied on midterm redistricting as an equal population violation, which the Court contends was "not established" by the appellants.[26]

C. Minority Opportunity

Throughout litigation surrounding the Texas remap, Democratic lawyers made great efforts to get districts with no predominant minority in majority certified as effective minority districts. In 2001, during the initial *Balderas* trial, Democratic lawyers sought to have Martin Frost's district advanced as a "performing" district for minority voters.[27] During the 2003 hearings before the state senate, plaintiff's expert Dr. Allan Lichtman testified that as many as seventeen districts constituted majority-minority or influenced districts and could not be altered against the minority will under the *Ashcroft* decision.[28] Significant effort was made to certify both the Martin Frost district (24) and the Chris Bell district (25) as performing minority districts.[29]

During the preclearance process, Justice Department professional staff recommended against preclearing the Texas map because "influenced" districts such as the predominantly-Anglo district 10 were fractured, and districts where a degree of minority control in coalition such as former districts 9, 24, and 25 of the old map were not sufficiently offset by newer, more safely minority districts.[30] Justice also found the set of Hispanic districts advanced by Texas to include two potential retrogressions in districts 23 and 15, but only one offset in the new district 25.[31] Arguments were made in favor of all of the old minority-majority, coalitional, and influenced districts at trial, but these arguments were rejected by the District Court, which agreed with state's expert with regard to coalitonal districts, that because there is no obligation to draft such a district, there is no obligation to protect one either.[32] The District Court also rejected the notion that old district 23 was a performing minority district, since for a dozen years it had not performed on behalf of minority voters.[33]

To the extent that any racial fairness defect was found in the Texas map, it was in the narrow context of congressional district 23, which stretched from El Paso to San Antonio. Justice Kennedy, writing for the majority, observed that the revised district 23, which had its Hispanic VAP lowered 12 points and which was no longer a majority CVAP district, constituted a violation of Section 2 in that it diminished or diluted the voting rights of the minorities remaining in the district:

> It is evident that the second and third *Gingles* preconditions—cohesion among the minority group and bloc voting among the majority population—are present in District 23 . . . the first *Gingles* factor requires that a group be "sufficiently large and geographically compact to constitute a majority in a single district" . . . the Latino majority in the old District 23 did possess electoral opportunity protected by Section 2.[34]

Kennedy goes on to note that "to the extent the District Court suggested that District 23 was not a Latino opportunity district in 2002 simply because Bonilla prevailed was incorrect. The circumstance that a group does not win elections does not resolve the issue of vote dilution."[35] The revised District 23, according to Kennedy and concurring with the judgment of the district panel, "is unquestionably not a Latino opportunity district," a conclusion reached by everyone examining the district except the state's Voting Rights report for preclearance submission.

Neither the three-judge panel nor the Supreme Court accepted the argument that districts 25 and 9 were illegal racial gerrymanders per se, though the Court held that the district 25 remedy was deficient in part because it was not a compact district and therefore did not satisfy the *Shaw II* requirement that a Section 2 remedy be compact.[36] District 25's ability to perform in elections was not in question; rather, it was its shape and its appropriateness to the nature of the voting rights problem in Texas. Justice Kennedy wrote further that "The District Court's general finding of effectiveness cannot substitute for the lack of finding on compactness."[37]

So what do we learn as district drawers? First, we are reminded that Section 2 remedies are generally local remedies, and even if a remedy is not functioning, even for a period as long as a decade, the creation of a performing offset in other geography does not compensate for the reduction of a non-performing Section 2 asset. For Texas, this means that the congressional districts of the South Valley are essentially a "lock-in" at redistricting time, and their composition cannot be easily changed.

Second, we learn that the "ability to perform" is different for an existing asset than a proposed asset. District 23 had not performed since 1990, though it showed progress towards performing and held out the potential. The remedial plan of district 25 definitely was an effective district and had an ability to perform, but because that ability was diminished for minorities in one region of the district, it was thrown out. The presence of an Anglo incumbent who could dominate the district also diminished the ability to be a truly effective district in the view of Justice Kennedy, though Rep. Bonilla's decade-long presence in the existing non-performing asset (District 23) presented no such problem. The court also reminds us that it is permissible to identify disparate communities of interest within the same ethnic or racial group, and that analysis which can prove the existence of such communities can undercut the creation of a minority-majority district that is also non-compact. This further reinforces the "lock-in" of south Texas districts and may result in packed Hispanic districts, if community of interest and compactness prevail as Texas' Latino population continues to grow.

Third, with regard to minority-majority, coalitional, and minority-influenced districts, the Court rejected the arguments for the restoration of coalitional and influenced districts held by Anglo incumbents. The absence of evidence opposing an Anglo incumbent in a circumstance where black voters potentially controlled the election of consequence is insufficient in the eyes of the Court to establish that incumbent as a candidate of choice or to prove an ability to perform. But the Court also advances a succinct test for how influence districts might be treated post-*Ashcroft*:[38]

> That African-Americans had influence in the district . . . does not suffice to state a §2 claim in these cases. The opportunity 'to elect representatives of their choice,' 42 U. S. C. §1973(b), requires more than the ability to influence the outcome between some candidates, none of whom is their candidate of choice. There is no doubt African-Americans preferred Martin Frost to the Republicans who opposed him. The fact that African-Americans preferred Frost to some others does not, however, make him their candidate of choice. Accordingly, the ability to aid in Frost's election does not make the old District 24 an African-American opportunity district for purposes of §2. If §2 were interpreted to protect this kind of influence, it would unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions.[39]

If one wishes to certify a non-single-minority-majority district as a "performing" district and grant to it special protections under the law, then the district needs to be electing a minority candidate who is preferred by the minority community and the minority community must have a high degree of influence or control over the outcome of consequence. If one seeks to certify a district electing an Anglo white candidate, there must be evidence that the Anglo is the candidate of choice that goes beyond a lack of objection. Instead, that candidate must be the choice of minority voters, in the election of consequence, in opposition to attractive alternatives such as a candidate from the same racial or ethnic group as the minority of interest.

So, from a Section 2 perspective, establishing or retaining non-minority-majority and coalitional districts just had its parameters defined: while coalitional districts can contribute to access under Section 5, the failure to create a coalitional district is not a violation of Section 2. The question of influence districts as part of the Section 5 baseline is unresolved, but other than making a sideward allusion toward Section 5, the Court remained silent on the issue of preclearance and the treatment of coalitional and influence districts of the Texas map.

The logic of the Court led it to conclude that the elimination of district 24 did not constitute a Section 2 violation, and, implicitly, that the district did not merit special consideration. The Court also observed that to interpret Section 2 to "protect this kind of influence" infused race too deeply into the politics of redistricting. Implicit in this conclusion is a recognition that politics must be allowed to work at some level, and that to mandate the protection of district designs that maintained minority influence when the minority population is very small is to give race too much weight in the overall redistricting process.

CONCLUSION:

Redistricting Doctors and the Hippocratic Courts

In remanding the case back to the Eastern District Court of Texas, the Supreme Court gave the judges involved their fourth turn in five years to consider what to do about congressional representation in Texas.

The judges received nineteen different map proposals from nine different parties and also a proposal from the state of Texas. Most of the proposals advanced similar remedies to the problem, by increasing the Hispanic VAP percentage in district 23. Two solutions were typically advanced, either restoring Webb County to district 23 or increasing the portion of Bexar County (San Antonio) placed in district 23. Then, various map makers would reconcile the population loss of district 28 by shifting the district east to take in portions of district 25 in Hidalgo County, while also moving district 15 west to pick up other southern portions of district 25. By pulling district 15 south, district 25 again centers on southeastern Travis county and also captures either counties to the east or south, depending on the scope of adjustment to district 15. This counterclockwise movement ensured that the first step in the process was to remedy the legal defects of district 23 while minimizing the effects on other districts in the legislature's map.

During the initial Texas redistricting trial in 2001, the district court was inundated with requests of various parties to engage in affirmative measures to advance the goals of various parties to the litigation. At that time, the Court observed that the undoing of partisan gerrymanders and the enhancement of minority representation, while noble, were also beyond the pale of the court to address. The judges felt constrained to remedy legal defects and nothing more. To that end, they followed the logic of first addressing the superior redistricting principles of racial fairness by maintaining existing minority opportunities, then placing new districts in areas of growth, and then filling in the map with compact and equally populated districts that maintained continuity of representation.

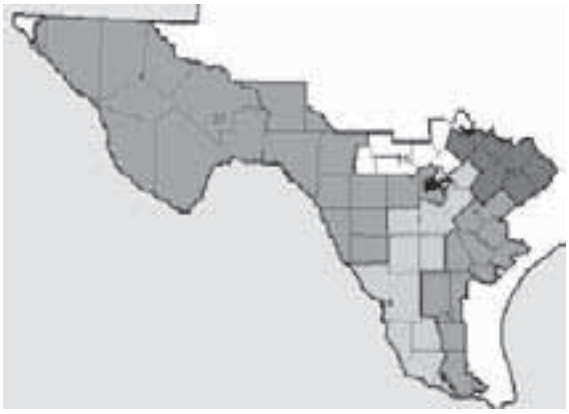
The same parties that aggressively pursued judicial correction in 2001 again inundated the district court with remedial proposals to the state's Plan 1374C, and were rebuked because there was no prospect of the court adopting their remedial solutions. At best, the district court would reject the state's plan and reinstate the last, legal map which it had crafted. By July of 2006, parties to the litigation had generally learned their lesson. The Jackson plaintiffs had resubmitted the Plan 1151C as a statewide remedy, but all of the other submissions confined changes to four to seven districts in south Texas. The most economical plan, Jackson plaintiff's submission Plan 1406, actually corrected the defect of district 23 and made Webb County whole, as implicitly directed by the Supreme Court, while also maintaining a performing district 28 and relocating district 25 in and around Austin.

The district court remedy reflected this thinking, which it had first articulated in 2001. Judges Higgenbothan, Rosentahl, and Ward rearticulated their minimalist approach, stating that "our task is narrow: we must do no more than necessary to correct the flaws the Supreme Court found in Plan 1374 C . . . the Supreme Court found that District 23 in Plan 1374C violated Section 2 of the Voting Rights Act."[40] Citing the effort to protect Republican Congressman Bonilla by moving Hill Country Republicans into his district, Kerr, Kendall, Bandera and Real counties were moved east into heavily-Republican congressional district 21. Webb County is made whole and became the anchor for congressional district 28 which also takes in the southern parts of old district 25. District 25 then migrates north to anchor center southern Travis County. The product, as described by the District Court judges, results from an effort to make "as few [changes] as possible consistent with conscientious partisan neutrality, is not the product of aggressive remediation. Rather, it is the consequence of an aggressive map, which resulted in the Section 2 violation the Supreme Court found."[41]

Map 3

South Texas Under Plan 1448C,

Lulac Court-Ordered Map, 2006



Footnotes

[1] Shaw v. Hunt 517 US 899.

[2] Sessions v. Perry 2:03-VC-354, Eastern District of Texas; LULAC v. Perry (05-204 US); J. Alford Testimony, *Sessions v. Perry* trial transcript 12/15/2003 AM at 109.

[3] *LULAC.*

[4] Brief for Appelants, *LULAC v. Perry,* 2006.

[5] United States Justice Department (2003) Section 5 Recommendation Memorandum, typescript December 12; Allan Lichtman (2003) "Expert Report of Allan Lichtman," *Sessions v. Perry* 2:03-VC-354, Eastern District of Texas; Statement of Allan Lichtman, Texas Senate Committee on Jurisprudence, July 24 2003.

[6] It was unclear to some mapmakers as to whether the two urban districts held by white incumbents should count toward the baseline of the map. *See* R.G. Ratcliffe and Janet Elliott, *Redistricting Ball in GOP's Court; With Dems Defeated, Republicans Free to Iron Out Their Differences*, Houston Chronicle, Sept. 25, 2003.

[7] Statement of Allan Lichtman, op cit.; Statement of Ronald Keith Gaddie Texas Senate Committee on Jurisprudence, July 24 2003.

[8] Allan Lichtman, (2003), op cit. expert report; Jonathan N. Katz, "Report on Texas Congressional Redistricting: Minority Opportunities and Partisan Fairness," submitted in *Del Rio v. Perry,* 2001; Charles S. Bullock III and Ronald Keith Gaddie, *An Assessment of Voting Rights Progress in Texas (*Washington, DC: American Enterprise Institute) (2003).

[9] Congressional Quarterly, Politics in America, 1011 (2006).

[10] A. Taylor and Associates, P.C. 2003. "28 CFR 51.27 (m) and (n): Voting Rights Analysis." Submitted to the United States Justice Department, October 20 2003.

[11] Balderas v. Perry, (6:01-CV-158, Eastern US District of Texas).

[12] "Voting Rights Analysis," page 7.

[13] It is worth noting that Texas sought to craft new minority districts without triggering the strict scrutiny of the *Shaw* cases by doing so in the context of partisan gerrymandering. The state of Texas asserted that the new districts, which enhanced minority representation, were in fact safe Democratic constituencies. The application of a *Cromartie* border comparison test performed by the authors of this article to the districts demonstrated that party, rather than race or ethnicity, better-explained the shape of the districts. *See* Hunt v. Cromartie*,* 526 US 541 (1999).

[14] "Voting Rights Analysis," at 14.

[15] R. K. Gaddie (2003) "Expert Report of Ronald Keith Gaddie, Ph.D." Submitted in *Sessions v. Perry*, November 21; Plaintiff's Appendix I, *LULAC v. Perry* op cit.

[16] *Sessions v. Perry*, op cit.

[17] United States Department of Justice, op cit..

[18] LULAC v. Perry, op cit.

[19] *Id*.

[20] *Id*. at 9.

[21] Veith v. Jubelirer*,* 541 US 267 (2004)*; LULAC v. Perry,* at 7.

[22] *LULAC* at 11.

[23] Cox v. Larios 542 US 947 (2004).

[24] *LULAC* at 12.

[25] *See LULAC* at 16.

[26] *Id*.

[27] *Del Rio v. Perry*, GN003665 353d Judicial Circuit of Texas, 2001 (trial transcript); *Balderas v. Perry,* op cit., (trial transcript).

[28] Statement of Allan Lichtman, Texas Senate Committee on Jurisprudence.

[29] *Balderas v. Perry,* op cit.

[30] United States Department of Justice, "Section 5 Recommendation."

[31] *Id*.

[32] *Sessions* at 46n.

[33] *Id*. at 54.

[34] *LULAC* at 21.

[35] *LULAC* at 22.

[36] It is worth noting that district 25 in Plan 1374C is more compact than neighboring Hispanic-majority district 15 on the Perimeter to Area measure and is nearly as compact as Houston-based minority-majority districts 18 and 29, all of which were sustained by the court.

[37] *LULAC* at 26

[38] This discussion may be academic. The extension of the Voting Rights Act in 2006 includes a provision to legislatively correct the *Ashcroft* decision to the pre-*Ashcroft* retrogression standard.

[39] *LULAC* at 38. This reasoning is consistent with the District Court's analysis of district 24 and the application of the Voting Rights Act. Sessions v. Perry _____.

[40] LULAC v. Perry, civ. 2:03-CV-354-TJW, page 1 (August 4 2006).

[41] *Id*. at 7.

Constitutional Rights of the Boy Scouts

*By Scott H. Christensen**

For the past quarter century, Boy Scouts of America has been defending itself against legal attacks for educating boys to do their "duty to God" and keep "morally straight." Until 2000, most litigation was brought by adults or youth seeking membership. The decision of the Supreme Court of the United States in *Boy Scouts of America v. Dale*[1] extinguished the membership cases but sparked a new round of litigation. Following *Dale*, the cases have challenged Boy Scouts' relationship with government entities. In a few instances, Boy Scouts has sued the government to protect its constitutional rights.

This article summarizes the legal landscape that Boy Scouts have been hiking since the success before the Supreme Court.[2] From San Diego to Connecticut, Boy Scouts has been defending its right to equal treatment in government forums. A disturbing trend has emerged, however, in which the Ku Klux Klan appears to be given greater constitutional protections than some lower courts have been affording Boy Scouts. This trend is part of the ever-expanding application of state and local antidiscrimination laws to encroach on the federal constitutional rights of organizations with traditional values.

Before surveying the recent Boy Scouts litigation, I will begin with some background to put those cases in context.

As the U.S. Supreme Court recognized, Boy Scouts is "a private, not-for-profit organization engaged in instilling its system of values in young people."[3] More than three million youth members and one million adult leaders are active in the traditional programs of Cub Scouts, Boy Scouts, and Venturing.

The national Boy Scouts organization charters approximately 300 Councils nationwide to administer the Scouting program at the local level. The national organization also charters local community organizations to operate Cub Scout Packs, Boy Scout Troops, and Venturing Crews by identifying leaders and providing a meeting space. The center of gravity in the Scouting organization is at the local Pack and Troop level, where boys meet weekly with volunteer adult leaders in private homes, community centers, public schools, and church basements.

The mission of Boy Scouts is "to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values of the Scout Oath and Law."[4] The Scout Oath includes the obligations to do one's "duty to God" and to be "morally straight"[5] and the Scout Law requires being "reverent" and "clean."[6] In addition to agreeing to live according to the Oath and Law, adult volunteer leaders also subscribe to the Declaration of Religious Principle, which states that "no member can grow into the best kind of citizen without recognizing an obligation to God."[7] Boy Scouts is "absolutely nonsectarian,"[8] however, and virtually every religion in America is represented in Scouting—from the Armenian Church of America to Zoroastrians. In adhering to the values of the Oath and Law, Boy Scouts does not accept as members atheists or agnostics,[9] or avowed homosexuals.[10]

For many years, Boy Scouts defended lawsuits challenging its membership standards. The typical plaintiffs were homosexual adults,[11] atheist or agnostic youth or their parents,[12] and girls seeking youth membership.[13] The basic claim common to these cases was that a Cub Scout Pack or Boy Scout Troop is a place of public accommodation, like a gas station or movie theater, and must admit anyone who applies. Most cases were brought under state law, although one relied on the federal public accommodations statute.[14]

Boy Scouts defended itself by appealing to its constitutionally protected freedoms of speech and association. The values of the Scout Oath and Law form the core of Boy Scouts' speech protected by the First Amendment.[15] Scouting is an expressive association because all members agree to adhere to the Oath and Law.[16] Scouting also is an intimate association because the traditional programs are administered in small groups, at the Pack or Troop level.[17] Finally, Boy Scouts used statutory defenses available in the public accommodations laws, such as exemptions for private clubs or religious organizations.[18]

Boy Scouts successfully defended itself in eight states and the District of Columbia—including five of their highest courts[19]—and one federal court of appeals.[20] The only state supreme court to rule against Scouts was New Jersey,[21] and that decision was overturned by the Supreme Court.[22] The Supreme Court victory in *Boy Scouts of America v. Dale* confirmed that Boy Scouts has the right under the First Amendment to select leaders who agree to live according to the Scout Oath and Law.[23] That decision brought membership challenges to a close.[24]

Following Boy Scouts' widely-publicized success before the Supreme Court, the attacks turned to the relationships between Boy Scouts and government. For example, in Madison, Wisconsin, the City Council voted to exclude Boy Scouts from any charitable proceeds raised during the annual Fourth of July fireworks charity, although Boy Scouts continued to volunteer to collect charitable donations for other organizations.[25] In Norwalk, Connecticut, Scouts had to fight for permission to hold a meeting in a public park after members of the City's Parks Committee told a Scoutmaster it would not grant a permit because of Boy Scouts' stance before the Supreme Court.[26] In Philadelphia, Pennsylvania, the City threatened to terminate Boy Scouts' use of City-owned property.[27]

Several other cases, discussed below, have resulted in litigation. These cases fall into two basic categories: (1) taxpayers suing the government because of the relationship the government has with Boy Scouts and (2) the government

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itself terminating or changing the terms of a relationship with Boy Scouts. The first kind of suit largely has been pursued under the Establishment Clause and may or may not include Boy Scouts as a defendant. The second kind of case largely falls under the Supreme Court's viewpoint discrimination and unconstitutional conditions jurisprudence.

In the past six years, the American Civil Liberties Union has funded lawsuits seeking to sever Boy Scouts' relationships with government. Two months after the Supreme Court decided *Dale*, a lesbian couple, an agnostic couple, and their respective minor sons represented by the ACLU sued the City of San Diego and Boy Scouts to terminate two leases between the City and Boy Scouts.[28] Under one lease, the local Boy Scouts council operates a $2.5 million aquatic center built with Boy Scout funds for the use and benefit of all youth groups in San Diego; under the other lease, Boy Scouts constructed and operates a campground open for use by the public. The leases require Boy Scouts to make the properties available to the community on a first-come-first-served basis at no expense to the City.[29] The leases are part of a City program in which the City leases property to over 100 secular and religious nonprofits in return for community service.[30] In *Barnes-Wallace v. Boy Scouts of America*, the district court described Boy Scouts' lawful and constitutionally protected values as an "anti-agnostic and anti-atheist stance,"[31] repeatedly referred to Boy Scouts as "discriminatory,"[32] and declared that "lawsuits like this are the predictable fallout from the Boy Scouts' victory before the Supreme Court."[33] The district court acknowledged that the City leased "publicly-owned land to 'well over 100 nonprofit groups to advance the educational, cultural and recreational interests of the City' without regard to whether the lessees are religious."[34] Even though the leasing processes followed were public and typical, the district court concluded that exclusive negotiations with Boy Scouts violated the Establishment Clause because they were not equally open to "the religious, areligious and irreligious."[35] The district court ultimately declared that both leases were unconstitutional, but Boy Scouts may remain on the properties while appeals are pending. The Ninth Circuit heard oral argument earlier this year.[36]

Another district court immediately applied *Barnes-Wallace* to declare military support for the National Scout Jamboree unconstitutional.[37] The Jamboree is a national, civic, patriotic event held every four years for a ten day period. Since 1981, the Jamboree has been held at Fort A.P. Hill in Fredericksburg, Virginia. The military lends logistical support because it views the Jamboree as a unique and valuable opportunity to practice skills in constructing, supporting, and dismantling a temporary "tent city" that will sustain 40,000 people. In *Winkler v. Rumsfeld*, a group of taxpayers represented by the ACLU sued the Departments of Defense and Housing and Urban Development over federal support for Scouting programs, asserting that the support violates the Establishment Clause.[38] The district court granted summary judgment in the government's favor on the claims against HUD and all but the Jamboree claim against DOD. The court relied primarily on the decision in *Barnes-Wallace* that Boy Scouts' nonsectarian "duty to God" requirement rendered Boy Scouts a religious organization and the Jamboree could not be supported under the Establishment Clause as a result.[39] Boy Scouts was not a party to the case but provided evidence used before the district court and participated as an amicus curiae at the Seventh Circuit, including at oral argument earlier this year.[40]

In spite of success before the Seventh Circuit thirteen years ago,[41] Boy Scouts remains the subject of litigation over recruiting in public schools. An atheist parent of a child in Mt. Pleasant Public Schools in Michigan brought suit against Boy Scouts and the school district challenging the district's policy of allowing Boy Scouts equal access to school meeting space and literature distribution systems, alleging that this policy constitutes religious discrimination against atheist students under the Michigan Constitution and the Elliott-Larsen Civil Rights Act.[42] The trial court's dismissal was affirmed by the Michigan courts, and the Supreme Court denied a petition for a writ of *certiorari* earlier this year.[43] In another pair of cases, an atheist mother represented by the ACLU asserted that allowing Boy Scouts to recruit at her son's school on the same basis as other groups violated state law prohibiting establishment of religion. The Oregon circuit court dismissed the case, the Oregon Court of Appeals affirmed, and the Oregon Supreme Court denied review.[44] Undeterred, the mother challenged the same Boy Scout activities in a second suit alleging that the recruiting discriminated against her son on the basis of religion. The superintendent found no probable cause for the claim, but the state circuit court concluded that the plaintiff presented sufficient evidence to warrant remand to the superintendent for further proceedings. The school and state appealed that decision, and the Oregon Supreme Court heard oral argument earlier this year.[45]

In all of these cases, there is no dispute that the government had a secular and neutral purposes behind its relationship with Boy Scouts, so the only question is whether, under *Lemon v. Kurtzman*[46] and its progeny, the government relationship had the primary effect of advancing religion.[47] In each case, a "reasonable observer" taking into account the history and context of the relationship, would conclude there is no advancement of religion because there is no evidence of government endorsement of Boy Scouts' values.[48] A reasonable observer would not consider Boy Scouts "religion" for purposes of the Establishment Clause in light of the totality of the Scouting program because to "[f]ocus exclusively on the religious component of any activity would inevitably lead to its invalidation."[49] Boy Scouts' private speech encouraging members to fulfill their "duty to God" cannot be attributed to the government in any event because "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[50]

In order to protect its constitutional rights, Boy Scouts has had to sue government entities. Boy Scouts in Broward County, Florida, like numerous other local groups, had been permitted for many years to use public school facilities after

hours.[51] Other groups that used the facilities included churches, a youth orchestra, a service agency for senior citizens, and an African-American sorority. But after the decision in *Dale*, the school board revoked Scouts' permission to use school facilities "because the Scouts' membership policies discriminate on the basis of sexual orientation, and therefore violate the School Board's anti-discrimination policy."[52] Boy Scouts sued, and the district court concluded that Boy Scouts was excluded from school facilities because it exercised its "First Amendment right to freedom of expressive association."[53] The district court preliminarily enjoined the school board's actions as discrimination based on Scouting's viewpoint.[54] The school board agreed to settle by turning the preliminary injunction into a permanent injunction and paying Boy Scouts' attorneys fees.

Meanwhile, the State of Connecticut excluded Boy Scouts from a state employee charitable campaign, in which 900 different groups participate, solely because of the values Boy Scouts defended in *Dale*.[55] Connecticut concluded that state antidiscrimination law precluded Boy Scouts' participation in the charitable campaign. Nevertheless, the campaign continued to include a wide variety of other groups that discriminate in membership and services on the basis of sex, ethnicity, age, or sexual orientation. The district court upheld the State's actions, and the Second Circuit affirmed, in a decision that squarely conflicts with the Supreme Court precedent in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc*.[56] The Second Circuit upheld removal of the Scouts from the charity list on the ground that Connecticut did not "require" the Boy Scouts to change its "constitutionally protected" views, but merely required the Boy Scouts to "pay[] a price" for "exercising its First Amendment rights."[57]

On the other side of the country, the City of Berkeley revoked free berthing space used by Sea Scouts in the City marina in retaliation for the position Boy Scouts defended in *Curran v. Mount Diablo Council of the Boy Scouts of America*,[58] a case factually similar to *Dale* decided under state law. City Council members "made clear" that they wanted to take "'punitive actions' against the Sea Scouts in an 'attempt to overturn [Boy Scouts'] national policies.'"[59] City officials stated that they were excluding the Sea Scouts "to discourage BSA from maintaining its disfavored policies and to retaliate for BSA's expulsion of Timothy Curran . . . pursuant to those policies."[60] The City relied on a City law that use of the marina "will not be predicated on a person's race, color, religion, ethnicity, national origin, age, sex, sexual orientation, marital status, political affiliation, disability or medical condition."[61] But the City also granted free berthing to the Cal Sailing Club, which runs a "women teaching women" program that limits access based on "sex,"[62] and the Nautilus Institute, which operates a program for "teenage public school students" that predicates access on "age."[63] The individual Sea Scouts represented by a sole practitioner sued (Boy Scouts was not a party), and the California Supreme Court ultimately rejected their First Amendment challenge on the ground that the Sea Scouts remained free to exercise their constitutional rights at the full price of berthing in the marina.[64] A petition for a writ of certiorari is pending presently.

The Second Circuit and California Supreme Court decisions upholding actions by Connecticut and Berkeley, respectively, are inconsistent with Supreme Court decisions prohibiting viewpoint discrimination and unconstitutional conditions in government programs. The government cannot exclude an otherwise eligible organization from participation in a government program because of membership policies that form the organization's expression.[65] Nor may government condition access to government benefits on the relinquishment of constitutional rights.[66]

In response to the repeated discrimination against Boy Scouts by state and local government, Congress crafted two legislative solutions. The Boy Scouts of America Equal Access Act, part of the No Child Left Behind Act of 2001, requires public schools to provide Boy Scouts with equal access to benefits and services provided other outside youth and community groups, including meeting space, recruiting opportunities, and literature distribution.[67] The regulations make clear that this access must be "on terms that are no less favorable than the most favorable terms provided to one or more outside youth or community groups."[68] If a school fails to comply, the Department of Education may terminate the federal funds that the school receives.[69] The Boy Scouts of America Equal Access Act has effectively ended the need for litigation against schools.

In response to challenges to Boy Scouts' participation in government programs beyond access to public schools,[70] Congress enacted the Support Our Scouts Act of 2005.[71] This legislation accomplishes two basic goals. First, the Support Our Scouts Act protects federal government relationships with Scouting, including the ability to host the Jamboree on federal property.[72] Second, the Act prohibits state or local governments that receive federal Community Development Block Grant ("CDBG") funds from discriminating against Boy Scouts in government forums or denying Boy Scouts access to facilities equal to that provided other groups.[73] If a state or local government fails to comply, HUD may terminate the CDBG funds it receives. The Support Our Scouts Act, like the Boy Scouts of America Equal Access Act on which it was based, requires state or local governments to treat Boy Scouts at least as well as other community organizations participating in government programs on pain of losing CDBG funds.

The irony of the recent assaults on Boy Scouts is that many of the cases have been funded by the American Civil Liberties Union. Throughout the history of the litigation discussed above, the ACLU has either directly filed the claims against Boy Scouts or filed an amicus curiae brief in support of the attack on Scouts.[74] In the last twenty-five years, the ACLU has contributed to no fewer than fourteen lawsuits against Boy Scouts, for a total of over 100 years worth of litigation—longer than Boy Scouts of America has existed.

The ACLU has been so fervent in suing Boy Scouts that it is litigating positions directly contrary to pro-civil liberties positions it has taken in other cases. For example,

the ACLU persuaded a district court and then the Eighth Circuit that Missouri may not exclude the Ku Klux Klan from the State's "Adopt-A-Highway" program based on the Klan's viewpoint.[75] The Eighth Circuit concluded that whether analyzed under the First or Fourteenth Amendments, "viewpoint-based exclusion of any individual or organization from a government program is not a constitutionally permitted means of expressing disapproval of ideas . . . that the government disfavors."[76] The State violated the Klan's constitutional rights because it "simply cannot condition participation in its highway adoption program on the manner in which a group exercises its constitutionally protected freedom of association."[77]

But while the ACLU was litigating in Missouri to include the Klan in government programs, the ACLU was suing in California and Illinois to exclude Boy Scouts from government programs.

CONCLUSION

The constitutionally dubious treatment of Boy Scouts by some lower courts following *Dale* is part of a growing pattern of state agency actions and judicial opinions that have excluded groups from government programs because of their traditional religious commitments or have sought directly to regulate their internal practices.

Several religious groups have been denied recognition, and commensurate benefits, at public law schools, universities, and high schools. The Christian Legal Society is litigating exclusion from law schools at public universities in California and Illinois.[78] Other on-campus Christian student groups were denied recognition by the California State University system because their internal membership policies require members to adhere to a Christian statement of faith and code of conduct.[79] In Washington State, a public high school denied recognition to an on-campus Christian club whose membership was limited to Christians.[80]

A variety of religious organizations are suffering from the application of state anti-discrimination laws to their employment and other internal decisions. California and New York have deemed Catholic Charities insufficiently religious to avail itself of religious exemptions from state laws requiring that employee health insurance include coverage for prescription contraceptives,[81] and Catholic Charities of Boston was pressured to cease adoptions rather than change policies to permit same-sex couples to adopt in violation of Catholic doctrine.[82] The Salvation Army in New York[83] and a Baptist children's home in Kentucky[84] are litigating over their religious employment criteria, and a United Methodist children's home in Georgia[85] settled a case by abandoning its religious requirements for employment.

This pattern will likely intensify as legalization of same-sex marriage is debated in legislatures and courts across the country.[86] The Supreme Court ultimately will need to take another case—perhaps from among the percolating suits discussed above—to resolve the limitations on state and local anti-discrimination laws when they interfere with federal constitutional rights of organizations with traditional values.

FOOTNOTES

[1] 530 U.S. 640 (2000).

[2] For a useful analysis of contemporary litigation against Boy Scouts, see Erez Reuveni, Note, *On Boy Scouts and Anti-Discrimination Law: The Associational Rights of Quasi-Religious Organizations*, 86 B.U. L. REV. 109, 114-20 (2006) (*available at* http://www.bu.edu/law/lawreview/v86n1/Reuveni.pdf).

[3] *Dale*, 530 U.S. at 644.

[4] http://www.scouting.org.

[5] The Scout Oath states that "On my honor I will do my best/to do my duty to God and my country/and to obey the Scout Law;/to help other people at all times;/To keep myself physically strong,/mentally awake, and morally straight." *Dale*, 530 U.S. at 649.

[6] The Scout Law states that a Scout is "Trustworthy, Loyal, Helpful, Friendly, Courteous, Kind, Obedient, Cheerful, Thrifty, Brave, Clean, Reverent." *Dale*, 530 U.S. at 649.

[7] Boy Scouts of America Bylaws art. IX, § 1, cl. 1.

[8] *Id.*

[9] *See* Welsh v. Boy Scouts of America, 993 F.2d 1267, 1268 (7th Cir.), *cert. denied*, 510 U.S. 1012 (1993); Randall v. Orange County Council, Boy Scouts of America, 952 P.2d 261, 264-65 (Cal. 1998).

[10] *See Dale*, 530 U.S. at 653-54; Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218, 224-25 (Cal. 1998).

[11] *See* Boy Scouts of America v. District of Columbia Commission on Human Rights, 809 A.2d 1192 (D.C. 2002).

[12] *See* Randall v. Orange County Council, Boy Scouts of America, 952 P.2d 261 (Cal. 1998).

[13] *See* Yeaw v. Boy Scouts of America, 64 Cal. Rptr. 2d 85 (Cal. Ct. App. 1997) (depublished), *review dismissed*, 960 P.2d 509 (Cal. 1998).

[14] *See Welsh*, 993 F.2d 1267.

[15] *See Dale*, 530 U.S. at 655-56.

[16] *See id.*

[17] *See generally* Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984). *See* Kiwanis Int'l v. Ridgewood Kiwanis Club, 806 F.2d 468, 476 n.14 (3d Cir. 1986) ("as our focus must necessarily be on Kiwanis Ridgewood, a club with but twenty-eight members, it is apparent that evidence dealing with the whole of the Kiwanis International complex is irrelevant"), *cert. dismissed*, 483 U.S. 1050 (1987).

[18] *See Welsh*, 993 F.2d at 1276-77.

[19] Randall v. Orange County Council, Boy Scouts of America, 952 P.2d 261 (Cal. 1998); Curran v. Mount Diablo Council of the Boy Scouts of America, 952 P.2d 218 (Cal. 1998); Quinnipiac Council, Boy Scouts of America, Inc. v. Comm'n on Human Rights & Opportunities, 528 A.2d 352 (Conn. 1987); Boy Scouts of America v. District of Columbia Commission on Human Rights, 809 A.2d 1192 (D.C. 2002); Chicago Area Council of Boy Scouts of America v. City of Chicago Commission on Human Relations, 748 N.E.2d 759 (Ill. App. Ct.), *appeal denied*, 763 N.E.2d 316 (Ill. 2001); Seabourn v. Coronado Area Council, Boy Scouts of America, 891 P.2d 385, 387 (Kan. 1995); Department of Human Rights v. Boy Scouts of America, No. MX 92-07717 (Minn. Dist. Ct. Aug. 6, 1992); Downey-Schottmiller v. Commonwealth of Pennsylvania, Human Relations

Commission, No. 2291 CD 1999 (Pa. Commw. Ct.); Schwenk v. Boy Scouts of America, 551 P.2d 465 (Or. 1976); Powell v. Bunn, 59 P.3d 559 (Or. Ct. App. 2002), *review denied*, 77 P.3d 635 (Or. 2003).

[20] *See Welsh*, 993 F.2d 1267.

[21] Dale v. Boy Scouts of America, 734 A.2d 1196 (N.J. 1999).

[22] Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

[23] *Id*. at 655-56.

[24] *See, e.g.*, *District of Columbia Commission*, 809 A.2d at 1203.

[25] Lesley Rogers Barrett, *"Booms" Fund Can't Give to Scouts; Groups Can't Discriminate, Council Says*, Wis. St. J., June 2, 2004, at B1.

[26] *See Council Approves Use of Park by Boy Scouts*, Associated Press, Sept. 29, 2004; *Norwalk Weighs Whether to Deny Permit for Boy Scouts*, Associated Press, Sept. 20, 2004.

[27] *See* Tina Moore, *City Poised to Evict Boy Scouts Council*, Philadelphia Inquirer, July 23, 2006.

[28] Barnes-Wallace v. Boy Scouts of America, 275 F. Supp. 2d 1259, 1287 (S.D. Cal. 2003), *argued*, Nos. 04-55732, 04-56167 (9th Cir. Feb. 14, 2006).

[29] 275 F. Supp. 2d at 1284.

[30] *See id*. at 1274.

[31] *Id*. at 1263.

[32] *Id.* at 1263, 1264, 1274, 1278, 1281, 1282, 1283, 1285, 1286, 1287, 1288.

[33] *Id*. at 1263.

[34] *Id.* at 1274.

[35] *Id.* at 1275; *see id*. at 1274-75.

[36] The oral argument is available on the Ninth Circuit's website, http://www.ca9.uscourts.gov, under "Audio Files." Boy Scouts was supported before the Ninth Circuit by amici curiae including the U.S. Department of Justice Civil Rights Division, which shared oral argument time with Boy Scouts, and the States of Texas, Alabama, Kansas, Oklahoma, South Dakota, and Virginia, among many others. The briefs filed by Boy Scouts and its amici curiae may be found at http://www.bsalegal.org.

[37] Winkler v. Chicago School Reform Board of Trustees, No. 99C2424, 2005 WL 627966, at *14-15, *20, *22 (N.D. Ill. Mar. 16, 2005) ("*Winkler II*"). The same plaintiff, also represented by the ACLU, had litigated an earlier case against the City of Chicago over the City's sponsorship of Scouting groups, which settled when the City agreed to end its sponsorship. Winkler v. City of Chicago, No. 97C2475 (N.D. Ill. dismissed Feb. 4, 1998) ("*Winkler I*").

[38] Winkler v. Chicago School Reform Board of Trustees, No. 99C2424, 2005 WL 627966 (N.D. Ill. Mar. 16, 2005), 382 F. Supp. 2d 1040 (N.D. Ill. 2005), *argued sub nom.* Winkler v. Rumsfeld, No. 05-3451 (7th Cir. Apr. 6, 2006). The briefs filed by Boy Scouts and its *amici curiae* may be found at http://www.bsalegal.org.

[39] 2005 WL 627966, at *22.

[40] The oral argument is available on the Seventh Circuit's website, http://www.ca7.uscourts.gov, under "Oral Arguments."

[41] Sherman v. Community Consolidated School District *21*, 8 F.3d 1160 (7th Cir. 1993), *cert. denied*, 511 U.S. 1110 (1994).

[42] Scalise v. Boy Scouts of America, 692 N.W.2d 858 (Mich. Ct. App.), *aff'd*, 700 N.W.2d 360 (Mich. 2005), *cert. denied*, 126 S. Ct. 2330 (2006).

[43] 126 S. Ct. 2330 (2006).

[44] Powell v. Bunn, 59 P.3d 559 (Or. Ct. App. 2002), *review denied*, 77 P.3d 635 (Or. 2003) ("*Powell I*").

[45] Powell v. Bunn, 108 P.3d 37 (Or. Ct. App. 2005), *argued*, Nos. S52657, S52659 (Or. May 3, 2006) ("*Powell II*").

[46] 403 U.S. 602 (1971).

[47] *See*, *e.g.*, Agostini v. Felton, 521 U.S. 203, 222-23 (1997).

[48] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 655 (2002); Good News Club v. Milford Central School, 533 U.S. 98, 119 (2001). The plaintiffs in *Barnes-Wallace* and *Winkler* instead advocate what has been called a "heckler's veto," a "ignoramus's veto," or an "obtuse observer" standard. *See* Elk Grove Unified School District v. Newdow, 542 U.S. 1, 35 (2004) (O'Connor, J., concurring); Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc); Doe v. Small, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring).

[49] Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

[50] Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990).

[51] Boy Scouts of America v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001).

[52] *Id.* at 1297.

[53] *Id.* at 1308.

[54] *Id.* at 1310-11.

[55] Boy Scouts of America v. Wyman, 335 F.3d 80 (2d Cir. 2003), *cert. denied*, 541 U.S. 903 (2004).

[56] 473 U.S. 788 (1985).

[57] 335 F.3d at 95 n.8.

[58] 952 P.2d 218 (Cal. 1998).

[59] Evans v. City of Berkeley, 129 P.3d 394, 407 n.10 (Cal. 2006).

[60] *Id*.

[61] Resolution No. 58,859 N.S.

[62] *See* Cal Sailing Club, The Floating Bottle, http://cal-sailing.org/bottle/2002/Aug.html (last visited Sept. 6, 2006).

[63] *See* Nautilus Institute, Youth/Pegasus Program, http://nautilus.org/archives/pegasus/ (last visited Sept. 6, 2006).

[64] 129 P.3d at 403-04.

[65] *See* Rosenberger v. Rector & Visitors of University of Virginia, 515 U.S. 819, 829 (1995); Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 806 (1985).

[66] *See*, *e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542, 548 (2001); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707, 716 (1981); Speiser v. Randall, 357 U.S. 513, 518 (1958).

[67] 20 U.S.C. § 7905 (2006).

[68] *See* Equal Access to Public School Facilities for the Boy Scouts of America and Other Designated Youth Groups, 71 Fed. Reg. 14994, 15003 (Mar. 24, 2006) (to be codified at 34 C.F.R. § 108.6(b)(4)).

[69] *See* 20 U.S.C. § 7905(c).

[70] *See* 151 Cong. Rec. S8603 (daily ed. July 21, 2005) (In response to Boy Scouts' "relationships with government at all levels" being targeted, the Act "makes clear that the Congress regards the Boy Scouts to be a youth organization that should be treated the same as other national youth organizations.") (statement of Sen. Frist); *see also* 151 Cong. Rec. S2853 (daily ed. Mar. 16, 2005) (statement of Sen. Frist).

[71] Pub. L. No. 109-148, § 8126, 119 Stat. 2728, 2730 (2005).

[72] *See*, *e.g.*, 5 U.S.C. app. § 301 (2006).

[73] *See* 42 U.S.C. §§ 5309(e)(2) (2006).

[74] The ACLU filed amicus curiae briefs against Boy Scouts in *Dale*, *Evans*, and *Wyman*, and represented plaintiffs in *Barnes-Wallace*, *Chicago Area Council*, *Curran*, *District of Columbia Commission*, *Downey-Schottmiller*, *Powell I*, *Powell II*, *Randall*, *Winkler I*, *Winkler II*, and *United States ex rel. Goodwin v. Old Baldy Council, Boy Scouts of America*, No. 02-CV-696 (RT) (C.D. Cal. dismissed Mar. 31, 2005), *appeal docketed*, Nos. 05-55684, 05-55708 (9th Cir. May 12, 2005). In *Old Baldy Council*, an ACLU board member filed a complaint alleging that Boy Scouts violated the federal False Claims Act by accepting a $15,000 grant of HUD funds to provide disadvantaged youth with the opportunity to participate in Scouting. Boy Scouts' motion to dismiss the complaint was granted by the district court, and the case is now awaiting argument before the Ninth Circuit.

[75] Cuffley v. Mickes, 208 F.3d 702 (8th Cir. 2000), *cert. denied*, 532 U.S. 903 (2001); *see also* Robb v. Hungerbeeler, 370 F.3d 735 (8th Cir. 2004), *cert. denied*, 543 U.S. 1054 (2005); Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5th Cir. 1978) (a school board could not exclude the Klan from after-hours use of school facilities).

[76] 208 F.3d at 712; *see id.* at 706 n.3.

[77] *Id*. at 709.

[78] Christian Legal Soc'y v. Walker, 453 F.3d 853 (7th Cir. 2006); Christian Legal Soc'y Chapter of University of California, Hastings College of the Law v. Kane, No. C 04-4484 JSW, 2006 WL 997217 (N.D. Cal. Apr. 17, 2006), *appeal docketed*, No. 06-15956 (9th Cir. May 23, 2006).

[79] Every Nation Campus Ministries at San Diego State University v. Reed, No. 05-CV-2186 LAB (S.D. Cal. filed Nov. 28, 2005).

[80] Truth v. Kent School District, No. 03-cv-00785 MJP (W.D. Wa. Sept. 22, 2004), *argued*, No. 04-35876 (9th Cir. July 27, 2006).

[81] Catholic Charities of Sacramento, Inc. v. Superior Court, 85 P.3d 67 (Cal. 2004), *cert. denied*, 543 U.S. 816 (2004); Catholic Charities of the Diocese of Albany v. Serio, 808 N.Y.S.2d 447, 28 A.D.3d 115 (N.Y. App. Div. 2006).

[82] *See* Maggie Gallagher, *Banned in Boston: The Coming Conflict Between Same-Sex Marriage and Religious Liberty*, WEEKLY STANDARD (May 15, 2006).

[83] Lown v. Salvation Army, Inc., 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

[84] Pedreira v. Kentucky Baptist Homes for Children, Inc., No. 00-cv-0210-CRS-JDM (W.D. Ky. filed Apr. 17, 2000).

[85] Bellmore v. United Methodist Children's Home, Civ. No. 2002CV56474 (Ga. Super. Ct. Fulton County).

[86] For a thoughtful analysis of the effect of same sex marriage on religious liberties, see the collection of papers assembled by The Becket Fund for Religious Liberty for a conference on the issue at http://www.becketfund.org/index.php/article/494.html.

INTELLECTUAL PROPERTY

THE *BLACKBERRY* CASE—AN ALTERNATE ENDING

*BY LAWRENCE S. EBNER**

For more than six months I have been ruminating about the *BlackBerry* patent infringement case and how it could have ended less abruptly and a lot more equitably. I am referring to the litigation that NTP, Inc., a Virginia-based "patent troll" (i.e., company in the business of acquiring and licensing patents rather than practicing them), filed against Research In Motion, Ltd. ("RIM"), the innovative Canadian firm that independently developed and operates the immensely popular BlackBerry® handheld wireless email and data transmission system. The legal proceeding that last winter caused more than three million Americans—including a multitude of federal, state, and local government officials—to worry about suddenly losing their BlackBerry service. The suit that RIM, confronted with (i) anxiety-ridden customers, (ii) an antiquated U.S. patent law, (iii) ruthless plaintiff, (iv) adverse jury verdict, (v) unsympathetic federal judge, and (vi) threat of a permanent injunction against sale and use of BlackBerry devices, agreed to settle in March 2006 for $612.5 million even though the Patent and Trademark Office (PTO), upon reexamination, had issued final office actions (or their equivalent) fully and finally *rejecting* as unpatentable all of the claims upon which NTP's patents were based.

My partners and I were among the lawyers who represented RIM in the latter stages of the litigation.[1] Jim Balsillie, RIM's Chairman and Co-Chief Executive Officer, described the case in a *Wall Street Journal* op-ed piece as "one of the most flagrant abuses of the patent system . . . not about legitimacy [or] the government's interests [or] the public interest," but instead, "about greed . . . a willingness to abuse the overburdened patent system for personal gain."[2] In fact, according to the *Journal*, "[t]he incentive to file patent lawsuits has increased in the wake" of the suit,[3] which came to a head on February 24, 2006 at a hearing, attended by a throng of finance and technology reporters, in U.S. District Judge James R. Spencer's Richmond, Virginia courtroom. For more than three hours Chief Judge Spencer sat in almost complete silence during the parties' arguments on the appropriate amount of patent infringement damages due NTP, and more ominously, on whether he should issue an injunction to shut down the BlackBerry system in the United States. The hearing featured an unprecedented presentation by the Department of Justice, which had intervened on behalf of the United States in this private patent infringement case in order to address the vital need to protect from the effects of any injunction, approximately one million federal, state, and local government personnel, federal government contractors and subcontractors, private first responders, and other BlackBerry users who would be either exempt by law or otherwise excluded from an injunction.

Without acknowledging anything that RIM had to say, Judge Spencer concluded the hearing by reading to the assembled mass of lawyers and reporters a rebuke that he had prepared in advance. He took the injunction and damages issues under advisement, but only after reminding RIM that "in this very courtroom . . . a jury . . . decided that RIM had infringed NTP's patent," and that "[t]he jury consisted of . . . tried and true citizens of this district and the Commonwealth of Virginia [who] are not foolish or frivolous when it comes to the matter of fixing legal liability."[4] Judge Spencer then offered the following admonition:

> I must say I am surprised, absolutely surprised, that you have left this incredibly important and significant decision to the Court. I've always thought that this, in the end, was really a business decision. And yet you have left the decision in the legal arena, and that's what you're going to get, a legal decision . . . a Court imposed solution [that] will be imperfect . . . in plain words the case should have been settled. But, it hasn't. So I have to deal with that reality.[5]

The case was settled one week later, on March 3, 2006.

The following month Mr. Balsillie testified about the case and settlement before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary. Among other things, he explained that "RIM faced the very real possibility of an injunction being imposed by the District Court . . . NTP further leveraged this threat by hiring a public relations firm to instill fear amongst RIM's customers and shareholders by way of a publicity campaign, effectively threatening millions of American customers in order to put additional pressure on a public company to capitulate to excessive demands."[6] Mr. Balsillie indicated that "[d]espite clear evidence that the Patent Office had rejected the NTP patents and was very likely to declare these patents invalid, RIM was effectively forced to pay one of the largest settlements in U.S. history in order to end NTP's highly publicized threats and the associated uncertainty felt by RIM's U.S. partners and customers."[7] Thus, as Mr. Balsillie told the *Wall Street Journal*, "[t]here's 'no question [RIM] took one for the team.'"[8]

RIM did what it had to do in view of Judge Spencer's position. Indeed, the premise of this article is that Judge Spencer was too impatient, too eager to issue an injunction, award damages, and get the *BlackBerry* case off his docket. Instead of strongly implying at the conclusion of the February 24 hearing that if the case were not settled he would be issuing an injunction against RIM, he *should have*

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announced that before making any decision he would await the Supreme Court's then-forthcoming opinion in *eBay Inc. v. MercExchange, L.L.C.* (rejecting the Federal Circuit's general rule requiring virtually automatic issuance of patent infringement injunctions, and holding that courts instead must apply traditional equitable principles in deciding, under the circumstances of each case, whether such an injunction is warranted).[9] In addition, Judge Spencer *should have* announced that no damages would be awarded to NTP unless and until the PTO Board of Patent Appeals and Interferences and/or a reviewing court reverses the PTO reexamination unit's determination that all of the NTP patents-in-suit (i.e., the patents that the jury found RIM "willfully"—but not knowingly—infringed) are invalid.

BlackBerry Case Background

Alleging that it held several valid patents infringed by the highly complex BlackBerry system, NTP filed suit against RIM in November 2001 in the United States District Court for the Eastern District of Virginia (a court whose reputation as the "rocket docket" makes it a favorite venue for patent plaintiffs). In August 2003, following a jury trial and verdict in favor of NTP, the court awarded NTP $54 million in compensatory and enhanced damages, prejudgment interest and attorney fees. The court also entered a permanent injunction enjoining sale and use of BlackBerry handheld devices in the United States, but simultaneously issued a stay pending appeal on the ground that "the stay is in the public interest, as the public has a demonstrated and increasing use of the products and services involved in this litigation."[10]

The *Wall Street Journal* aptly described the BlackBerry as "a cultural phenomenon."[11] But as discussed below, BlackBerry handheld devices are much more than a convenience for mobile professionals. The BlackBerry system is an essential tool for both urgent and routine communications in connection with national defense, homeland security, public health and safety, and operation and maintenance of the nation's critical infrastructures and essential industries.

RIM's appeal to the United States Court of Appeals for the Federal Circuit raised several legal issues challenging the district court's judgment of infringement. One of the key questions was whether the decades-old express territorial limitation of § 271(a) of the Patent Act precluded claims for "use" infringement of the *transnational* BlackBerry system. Under § 271(a), "use" infringement is expressly limited to use of a patented invention "within the United States."[12] But one of the BlackBerry system's crucial operational components, the Network Operations Center (or "Relay"), which (in conjunction with wireless carriers) electronically routes all email to or from BlackBerry handheld devices, is located *outside* the United States, at RIM's corporate headquarters in Ontario, Canada.

A three-judge Federal Circuit panel struggled with this Internet Age extra-territoriality issue, first answering "no," and then, after RIM filed a petition for rehearing, ultimately issuing a revised opinion in August 2005 that drew an artificial and illogical distinction between NTP's "method" (i.e., process) claims and "system" (i.e., apparatus) claims. As to the method claims, the court of appeals held that "a process cannot be used 'within' the United States as required by section 271(a) unless each of the steps is performed within this country;" that "each of the asserted method claims . . . recites a step . . . which is only satisfied by the use of RIM's Relay located in Canada;" and "[t]herefore, as a matter of law, these claimed methods could not be infringed by use of RIM's system."[13] Regarding NTP's "system" claims, however, the court held that "[t]he use of a claimed system under section 271(a) is the place at which the system as a whole is put into service, i.e., the place where control of the system is exercised and beneficial use of the system obtained;" that "RIM's customers located within the United States controlled the transmission of the originated information and also benefited from such an exchange of information;" and "[t]hus, the location of the Relay in Canada did not, as a matter of law, preclude infringement of the asserted system claims in this case."[14]

We filed a petition for a writ of certiorari on behalf of RIM, urging the Supreme Court to review the question of whether the BlackBerry system is used "within the United States" for purposes of § 271(a) even though components crucial to the system's operation are located outside the United States. The Court had not addressed § 271(a)'s territorial limitation since *Deepsouth Packing Co. v. Laitram Corp.*,[15] a 1972 case involving manufacture and export of an unassembled shrimp deveining machine. In January 2006 the Supreme Court denied RIM's petition, thus leaving unresolved the important and recurring question of how courts should apply § 271(a) to Internet-based systems, such as the BlackBerry system, that operate with vital components located outside the United States.

Because the Federal Circuit had not affirmed the district court's judgment of infringement as to construction of one claim term (the "originating processor" claim), the court of appeals vacated the original damages award and injunction and remanded the case to the district court for further proceedings. As a result, in January 2006, after the Supreme Court declined to hear the case, the question of whether to issue a permanent injunction, as well as the amount of damages due NTP, was back before Judge Spencer.

The Supreme Court's Opinion In *eBay*

Meanwhile, in November 2005 the Supreme Court granted review in *eBay Inc. v. MercExchange, L.L.C.* on the *precise* and *most transcendent* legal question confronting Judge Spencer—what standards govern the issuance of patent infringement injunctions, especially where (as in both the *eBay* and *BlackBerry* cases), the plaintiff is merely a patent assertion company and does not practice its patents.

eBay is a patent infringement case involving that Web site's method for conducting on-line sales. After MercExchange, a patent assertion company, filed suit in the U.S. District Court for the Eastern District of Virginia (the same district where the *BlackBerry* suit was filed), a jury found that its business method patent for an electronic market was valid (even though the validity of that patent was being reexamined by the PTO); that eBay and its subsidiary

Half.com had infringed the MercExchange patent; and that an award of damages was appropriate.[16] The district court (Judge Jerome Friedman), however, applying traditional equitable factors, denied MercExchange's motion for permanent injunctive relief on the ground that "a 'plaintiff's willingness to license its patents' and 'its lack of commercial activity in practicing the patents' would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue."[17]

On appeal, the Federal Circuit reversed. As the Supreme Court subsequently explained, the court of appeals "articulated a 'general rule,' unique to patent disputes, 'that a permanent injunction will issue once infringement and validity have been adjudged.'"[18] According to the Federal Circuit, "injunctions should be denied *only in the 'unusual' case*, under '*exceptional circumstances*' and '*in rare instances* . . . to protect the public interest'" (emphasis added).[19]

On May 15, 2006, (less than three months after Judge Spencer signaled his intention to enter an injunction in the *BlackBerry* case), the Supreme Court rejected the Federal Circuit's "exceptional circumstances" test, unanimously holding in *eBay* that the "well-established principles of equity," specifically the traditional four-factor test that a plaintiff seeking a permanent injunction must satisfy, "apply with equal force to disputes arising under the Patent Act."[20] Under that test, "[a] plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."[21] The Court emphasized in this regard that § 283 of "the Patent Act expressly provides that injunctions 'may' issue '*in accordance with the principles of equity*'" (emphasis added).[22]

Writing for the Court, Justice Thomas indicated that "[n]either the District Court nor the Court of Appeals below fairly applied these traditional equitable principles in deciding respondent's motion for a permanent injunction."[23] More specifically, "[a]lthough the District Court recited the traditional four-factor test . . . it appeared to adopt certain expansive principles suggesting that injunction relief could not issue in a broad swath of cases . . . But *traditional equitable principles do not permit such broad classifications*" (emphasis added).[24] The Court indicated that the district court's "analysis cannot be squared with the principles of equity adopted by Congress [in § 283 of the Patent Act]," and that its "categorical rule is also in tension with *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 422-430 [1908], which rejected the contention that a court of equity has no jurisdiction to grant injunctive relief to a patent holder who has unreasonably declined to use the patent."[25]

Even more important, the Court also held in *eBay* that "[j]ust as the District Court erred in its categorical denial of injunctive relief, the Court of Appeals *erred in its categorical grant of such relief*" (emphasis added).[26] Thus, the Court held "that the decision whether to grant or deny injunctive relief rests within the equitable discretion of the district courts, and that such discretion must be exercised *consistent with traditional principles of equity*, in patent disputes no less than in other cases governed by such standards."[27]

In a concurring opinion, Chief Justice Roberts, with whom Justices Scalia and Ginsburg joined, indicated that although the "historical practice" of granting injunctive relief "upon a finding of infringement in the vast majority of patent cases . . . does not *entitle* a patentee to a permanent injunction or justify a *general rule* that such injunction should issue . . . there is a difference between exercising equitable discretion pursuant to the established four-factor test and writing on an entirely clean slate."[28] According to Chief Justice Roberts, "[w]hen it comes to discerning and applying those standards, in this area as others, a page of history is worth a volume of logic."[29]

Prompted by the new Chief Justice's observations about the historical practice of granting injunctions in patent infringement cases, Justice Kennedy also wrote a concurring opinion, in which Justices Stevens, Souter, and Breyer joined. Justice Kennedy's pointed observations are particularly relevant to the *BlackBerry* case:

> In cases now arising trial courts should bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases. *An industry has developed in which firms use patents not as a basis for producing and selling goods, but, instead, primarily for obtaining licensing fees.* . . . For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed *as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.* . . . When . . . the threat of an injunction is employed *simply for undue leverage in negotiations*, legal damages may well be sufficient to compensate for the infringement and *an injunction may not serve the public interest*.[30] (Emphasis added.)

Despite the debate between Chief Justice Roberts and Justice Kennedy over the significance of the historical practice of issuing patent infringement injunctions, the Court's principal *eBay* opinion is elegantly straightforward, and it represents a *major* and *stunning* setback for the patent troll industry. Permanent injunctions against continuing patent infringement no longer will be virtually automatic, or even the general rule. As a result, the threat of an injunction now is much less of a weapon for patent assertion companies to use when attempting to exact outrageous licensing fees from successful innovators. Although the fact that a plaintiff is a patent assertion company does not preclude entry of a permanent injunction, each prong of the traditional, four-part equitable test must be satisfied in order for an injunction to be issued.

eBay Applied

A June 14, 2006 opinion by the U.S. District Court for the Eastern District of Texas in *z4 Technologies, Inc. v. Microsoft Corporation*[31] followed *eBay* and illustrates how a federal district court is supposed to utilize and apply the four-part test for permanent injunctive relief in patent infringement cases. The plaintiff, z4, alleged that Microsoft infringed patents for online, software activation methods. The jury agreed, finding that Microsoft's Office and Windows software products infringe the patents-in-suit, and awarded $115 million in damages against Microsoft. z4 also asked the court "to enjoin Microsoft from making, using [or] selling . . . its current software products that use product activation, i.e., Windows XP products since 2001 and Office products since 2000 [and] order Microsoft to deactivate the servers that control product activation for Microsoft's infringing products and to re-design its Windows and Office software products to eliminate the infringing technology."[32]

After applying the facts of the case to each of the four equitable factors identified in *eBay*, the district court denied z4's motion for an injunction:

Irreparable Harm

Explaining that "in *eBay,* the Supreme Court warned against the application of categorical rules when applying the traditional principles of equity," the district court rejected z4's contention that a finding of infringement and validity raises a rebuttable presumption of irreparable harm.[33] The court then found that because "Microsoft's continued infringement does not inhibit z4's ability to market, sell, or license its patented technology to other entities in the market . . . [i]n the absence of a permanent injunction against Microsoft, z4 will not suffer lost profits, the loss of brand name recognition or the loss of market share."[34]

Adequacy of Remedies Available at Law

Citing *eBay*'s holding that "the right to exclude alone is not sufficient to support a finding of injunctive relief," the district court rejected z4's argument "that a violation of the right to exclude under the patent act can never be remedied through money."[35]

The Balance of Hardships

Microsoft argued "that the repercussions of 'turning off' its product activation system are incalculable particularly in the likely event that the public became aware of the fact that the activation servers were deactivated."[36] The court found that "[a]lthough the arguments presented by Microsoft may be hypothetical . . . the potential hardships Microsoft could suffer if the injunction were granted outweigh any limited or reparable hardships that z4 would suffer in the absence of an injunction."[37]

The Public Interest

Microsoft also argued that an injunction requiring the redesign of its Windows and Office products would adversely affect the public. Noting that "Microsoft's Windows and Office software products are likely the most popular software products in the world," the district court indicated that although "[i]t is impossible to determine the actual effect that the implementation of such a re-design might have on the availability of Microsoft's products . . . it is likely that any minor disruption . . . could occur and would have an effect on the public due to the public's undisputed and enormous reliance on these products."[38] The court found that under the proposed permanent injunction "there is a risk that certain sectors of the public might suffer some negative effects [but] the Court is unaware of any negative effects that might befall the public in the absence of an injunction."[39]

For these reasons, the district court in *z4 Technologies*, applying the "principles of equity" required by § 283 of the Patent Act and the four-part test mandated by the Supreme Court's opinion in *eBay*, denied z4's motion for a permanent injunction. This is exactly the type of full-fledged, equitable-factors analysis that Judge Spencer would have had to conduct in the *BlackBerry* case if the case had not been settled and he had awaited *eBay.*

The *BlackBerry* Injunction Issue Revisited

Based on his comments at the close of the February 24 hearing and his promise to "issue a decision as soon as reasonably possible,"[40] it seems quite unlikely that Judge Spencer was inclined to await *eBay* and defer issuing a permanent injunction under what was then the Federal Circuit's "general rule" in patent infringement cases. To be sure, Judge Spencer asserted that he had not decided whether to order an injunction.[41] In my view, however, his statement should have gone considerably further. The district court was well aware that the Supreme Court was considering in *eBay* the very question of what standards govern issuance of patent infringement injunctions, including where the plaintiff, like NTP, does not practice its patents and seeks an injunction solely to enhance its bargaining position. As a result, Judge Spencer *should have* unequivocally announced to the parties at the February 24 hearing that he was going to wait for the *eBay* opinion.

Under this "alternate ending" to the litigation, the district court would have been compelled by *eBay* to apply fully the traditional four-part test for determining whether NTP was entitled to permanent injunctive relief. Under that scenario, it is difficult to imagine that the court could have, or would have, entered an injunction, which in the words of the *Wall Street Journal*, "would have wreaked havoc on the lives of the device's three million American users."[42] This is particularly true given the insurmountable public interest in ensuring that use of the BlackBerry system by the large and complex, interconnected web of public and private sector BlackBerry users involved with national defense, homeland security, and public health and safety would continue undisrupted and undiminished.

The Public Interest

When considering whether to issue a permanent injunction, most courts save the public interest factor for last. But in the *BlackBerry* case, the public interest against

issuance of an injunction was so overwhelming it dwarfed the three other equitable factors. (Indeed, RIM contended that the public interest even would have satisfied the Federal Circuit's pre-*eBay* "exceptional circumstances" standard for avoiding an otherwise virtually automatic patent infringement injunction.)

The BlackBerry system is a *vital* communications tool upon which millions of Americans depend for both routine and urgent communications. This includes federal, state, and local government personnel, government contractors, and industries and professions essential to the nation's economy and well being. Judge Spencer had before him a wealth of undisputed, third-party declarations and other evidence, summarized in RIM's legal briefs, establishing that a multitude of U.S. BlackBerry users, in both the public and private sectors, rely upon the BlackBerry system to facilitate national defense, homeland security, emergency preparedness and crisis management, law enforcement and public safety, health care, government services, and the operation and maintenance of the nation's critical infrastructure industrial sectors (such as transportation, energy, telecommunications, and banking and finance).

As just one example, John Halamka, M.D., Chief Information Officer of Harvard Medical School and Beth Israel Deaconess Medical Center, explained in a declaration that BlackBerry devices not only "are often the only means of communicating in an emergency" and "a crucial part of . . . disaster preparedness," but also that "any injunction . . . would cause severe damage to . . . the national healthcare system, and create[] a significant risk of harm [to] the ability of hospitals across the country to care for their patients." Along the same lines, Robert Liscouski, former Assistant Secretary for Infrastructure Protection, U.S. Department of Homeland Security (DHS), stated in a declaration that the BlackBerry system "plays a special role" in "safeguarding of the critical infrastructure of the United States," in part because of its reliability in enabling "effective and efficient communication, not only within the public sector but also within the private sector and between the two sectors" during emergency situations. For example, on September 11, 2001, "BlackBerrys worked, cell phones didn't."[43]

Probably the most compelling, and palpable, demonstration of the tremendous disservice that an injunction would have imposed upon the public interest was the fact that the United States, through the Department of Justice, took the extraordinary steps of filing with the district court a sharply worded Statement of Interest, and then formally intervening in the case, in order to convey directly to the court the Federal Government's grave concerns about whether it would be feasible to issue an injunction that would not interfere with BlackBerry communications to, from, and among federal, state, and local government personnel, federal government contractors, and others, who would be legally exempt, or otherwise should be excluded, from any injunction that was issued. Such communications probably account for as much as one third of BlackBerry usage within the United States and in and of themself establish the public interest. In its Brief Regarding Injunctive Relief, the Justice Department explained that "the government's principal interest lies in assuring that federal government entities and their contractors are able to continue using BlackBerry™ devices and service . . . *There is a public interest in these uses, and indeed, many of them relate directly to national defense, security and law enforcement*" (emphasis added).[44]

"The United States (government) is a major user of BlackBerry™ devices and technology."[45] In fact, RIM's "biggest customer in the United States is the federal government," and includes the Departments of Defense and Homeland Security, among many others.[46] As the United States emphasized to the court, "an injunction entered pursuant to 35 U.S.C. § 283 cannot enjoin use of a patented invention by the federal government because the exclusive remedy for any such unauthorized use of a patented invention is the award of compensation pursuant to 28 U.S.C. § 1498(a)."[47] Further, because Federal Government departments and agencies use BlackBerry devices "to communicate in real-time with private parties, including government contractors," any federal government contractor, subcontractor, or other corporation or person using BlackBerry devices "with the authorization or consent of the Government" would have been legally exempt from an injunction under § 1498(a). Moreover, the Justice Department noted that state governments are immune from patent infringement injunctions under the Eleventh Amendment.[48] Even NTP eventually conceded that it was not seeking to enjoin federal, state, and local government personnel, or "first responders," from using BlackBerry devices.

It was evident that the issue was not whether the public had an interest in continued availability and usage of the BlackBerry system (including for personal and family security, as well as for official and business use). Instead, the question was whether it would have been feasible to create, implement, and maintain a "white list" of more than *one million* BlackBerry users who would have been legally exempt, or otherwise should have been excluded, from the scope of an injunction. RIM contended that it would have been virtually impossible to issue an injunction without discontinuing, disrupting, or diminishing BlackBerry service to the substantial percentage of U.S. BlackBerry users who should have been protected from the effects of an injunction. The United States expressed its significant concern to the court that "there are still a number of serious questions to be answered as to how an injunction can be implemented so as to continue BlackBerry™ service for governmental and other excepted groups . . . questions that we feel must be answered before any injunction should be issued."[49] The Justice Department advised the court that:

> . . . in the formulation of any injunction, it is imperative that some mechanism be incorporated that permits continuity of the federal government's use of BlackBerry™ devices . . . Since the federal government does not maintain any central agency for purchasing and deploying BlackBerry™ devices, the procedure for supplying information to identify

> government-owned BlackBerry™ devices may require a time-consuming inventory of every agency within the federal government, including the legislative branch and the judicial branch, in order to assure that service to those devices is not terminated as part of any injunction.[50]

Confirming its true motives for seeking an injunction—to force an extravagant settlement by inflicting as much pain and pressure as possible, as quickly as possible, upon RIM—NTP's hasty and inequitable solution to the daunting "white list" problem was to go after the "low hanging fruit" identified on a BlackBerry testimonial section of RIM's Web site. More specifically, NTP proposed that the court initially enter an injunction against what was tantamount to a "blacklist" of RIM's major law firm and corporate customers (including many federal government contractors who would have been exempt under § 1498(a)).

In his closing pronouncement at the February 24 hearing, Judge Spencer appears to have acknowledged the incredibly difficult problem of fashioning and implementing an injunction that would not affect exempted users when he said that "if an injunction is ordered by the Court, I want to make very sure that these exclusions and exemptions are appropriate. That the government and its needs are met."[51] It is reasonable to assume that the legal, logistical, and technological challenges of identifying with specificity the vast number of individual BlackBerry users who would have had to be excluded from any injunction, and ensuring that their use of the BlackBerry system would have been unimpaired, was the principal, if not the only, reason that the court did not enter an injunction on February 24.

In the *z4 Technologies* case discussed above, the district court found that the public interest would be disserved by a permanent injunction because there was "a risk that certain sectors of the public might suffer some negative effects" and there was no indication "of any negative effects that might befall the public in the absence of an injunction."[52] By comparison, the unavoidable adverse effects of entering an injunction in the *BlackBerry* case, particularly on more than a million "exempt" users, would have been far more devastating to the public interest and a legally sufficient if not ample reason to deny NTP's injunction request.

Other Equitable Factors

In applying *eBay*, the district court would have been required to consider, in addition to the public interest, the three other equitable factors, which will not be discussed in detail here. Suffice it to say, there were compelling reasons why NTP, which made or sold no products, and whose handful of patents (even if valid) covered only a tiny fraction of the multi-faceted BlackBerry system, could not have met its burden of demonstrating (i) that without an injunction it would have suffered irreparable harm; (ii) that monetary damages would have been an inadequate remedy for future infringement (assuming, for the sake of discussion, that its patents are valid); and (iii) that the hardships of depriving NTP of an injunction would have been greater than imposing one upon RIM. The parties briefed these points, and in light of *eBay*, the district court not only would have had to consider them fully, but also view them as further confirmation that no injunction should be issued.

THE PTO

As noted above, the district court also had to deal on remand with the issue of what monetary damages to award NTP for infringement of its putative patents. By the time of the February 24 hearing, and despite NTP's concerted efforts to slow down the patent reexamination process, a team of highly experienced examiners within the PTO's Central Reexamination Unit had exhaustively reviewed, and fully and finally rejected as unpatentable, all of the claims upon which the patents underlying NTP's infringement suit were based. As RIM Co-Chairman Balsillie observed in his *Wall Street Journal* article, "the idea of paying for invalid patents [is] philosophically offensive."[53] This seemingly indisputable matter of fundamental fairness, however, did not deter either NTP or the district court.

Congress established the PTO more than 200 years ago as the agency responsible for fulfilling the Federal Government's responsibility under Article I, § 8 of the Constitution "to promote the progress of science and the useful arts." Despite the PTO's experience and expertise regarding the validity of patents, and the broad public interest in allowing the PTO to do its job and correct its own errors, the district court afforded that federal agency's reexamination of NTP's patents no deference whatsoever. For example, at a November 9, 2005 status conference, Judge Spencer stated that "it is highly unlikely that I am going to stay these proceedings waiting on the reexamination of the Patent Office. *I don't run their business and they don't run mine.*"[54] And when NTP's attorneys indicated at the February 24 hearing that they wanted to respond briefly to RIM's arguments regarding the PTO, Judge Spencer said "If you must. *I think that's a waste of time*."[55] Although nothing in the current patent law apparently required the court to defer to the PTO, or wait for NTP to pursue administrative and judicial appeals rather than awarding damages on patents that the PTO's reexamination unit has determined are *invalid*, nothing prohibited the court from abating the proceeding in order avoid such an inequitable result.[56]

But do not despair—my "alternate ending" to the *BlackBerry* patent infringement saga has one more chapter: Judge Spencer not only awaits *eBay* and then denies NTP's request for an injunction, *but also* holds the question of damages in abeyance until NTP exhausts (unsuccessfully) its administrative and judicial appeals of the PTO's full and final rejection of the patents-in-suit. *And then* Judge Spencer finally gets to purge his docket of NTP's ill-conceived suit. He issues an order dismissing the *BlackBerry* case with prejudice, sending NTP (and its lawyers) home with no RIM check in their pocket.

FOOTNOTES

[1] Gordon Giffin, Herb Fenster, Kurt Hamrock, and Ray Aragon, and our associate, James Thayer, of McKenna Long & Aldridge LLP.

[2] Jim Balsillie, *Patent Abuse*, WALL ST. J., Dec. 19, 2005.

[3] Shawn Young, *Internet-Calling Disputes Create Static*, WALL ST. J., Aug. 10, 2006, at B3.

[4] Tr. at 56 (Feb. 24, 2006).

[5] *Id.* at 56-57 (Feb. 24, 2006).

[6] *Patent Quality: Before the Subcomm. on Courts, the Internet and Intellectual Property of the H. Comm. on the Judiciary,* 12, 13 (Apr. 5, 2006) (statement of James Balsillie, Chairman and Co-Chief Executive Officer, Research In Motion).

[7] *Id.* at 2.

[8] Mark Heinzl and Amol Sharma, *Getting the Message—RIM to Pay $612.5 Million To Settle BlackBerry Patent Suit*, WALL ST. J., March 4, 2006, p. A1.

[9] 126 S. Ct. 1837 (2006).

[10] No. Civ.A. 3:01CV767, 2003 WL 23325540 (E.D. Va. Aug. 5, 2003).

[11] Heinzl and Sharma, *supra* note 8.

[12] 35 U.S.C. § 271(a).

[13] NTP Inc. v. Research In Motion, Ltd., 418 F.3d 1282, 1318 (Fed. Cir. 2005).

[14] *Id.* at 1317.

[15] 406 U.S. 518 (1972).

[16] *eBay*, 126 S. Ct. 1837, 1839 (2006).

[17] *Id.* at 1840 (quoting MercExchange, L.L.C. v. eBay Inc., 275 F.Supp.2d 695, 712 (E.D. Va. 2003)).

[18] *Id.* at 1841 (quoting MercExchange, L.L.C. v. eBay Inc., 401 F.3d 1323, 1338 (Fed. Cir. 2005)).

[19] *Id*. (internal quotation marks omitted).

[20] *Id.* at 1839.

[21] *Id.*

[22] *Id.* (quoting 35 U.S.C. § 283).

[23] *Id.* at 1840.

[24] *Id.*

[25] *Id*. at 1840-41.

[26] *Id.* at 1841.

[27] *Id.*

[28] *Id.* at 1841 (Roberts, C.J. concurring).

[29] *Id.* at 1842 (Roberts, C.J. concurring) (internal quotation marks omitted).

[30] *Id*. (Kennedy, J. concurring) (emphasis added).

[31] 434 F.Supp.2d 437 (E.D. Tex. 2006).

[32] *Id.* at 439.

[33] *Id.* at 440.

[34] *Id.*

[35] *Id. at* 441 (citing *eBay*, 126 S.Ct. at 1840).

[36] *Id.* at 443.

[37] *Id.*

[38] *Id.* at 444.

[39] *Id.* at 444.

[40] Tr. at 57 (Feb. 24, 2006).

[41] *Id.*

[42] Christopher Rhoads, *Mixed Messages In BlackBerry Case, Big Winner Faces His Own Accusers*, WALL ST. J., Aug. 23, 2006, p. A1.

[43] Elaine Grossman, *Keating Might Issue Messaging Devices For Disaster Response*, HOMELAND DEFENSE WATCH, Oct. 6, 2005 (quoting Northern Command Chief Adm. Timothy Keating).

[44] The United States Brief Regarding Injunctive Relief at 5, *NTP v. Research In Motion, Ltd.*, No. 3:01CV767 (E.D. Va. Feb. 1, 2006).

[45] The United States' Statement of Interest at 1, *NTP v. Research In Motion, Ltd.*, No. 3:01CV767 (E.D. Va. Nov. 8, 2005).

[46] Statement of James Balsillie, *supra* note 2, at 2.

[47] The United States' Statement of Interest, *supra* note 45, at 2.

[48] *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank,* 527 U.S. 627 (1999).

[49] The United States Brief Regarding Injunctive Relief, *supra* at 2.

[50] The United States' Statement of Interest, *supra* note 45, at 2, 5, 6.

[51] Tr. at 57 (Feb. 24, 2006).

[52] *z4 Technologies*, 434 F.Supp.2d at 444.

[53] Balsillie, *supra* note 2.

[54] Tr. at 3 (Nov. 9, 2005).

[55] Tr. at 53 (Feb. 24, 2006).

[56] In a similar situation, the Federal Circuit directed a district court "to stay the imposition of the permanent injunction" in order "[t]o preserve the status quo pending finality of the [PTO reexamination] action." Standard Havens Prods. Inc. v. Gencor Indus. Inc., 27 U.S.P.Q.2d 1959, 1960 (Fed. Cir. 1993) (unpublished).

Supreme Court in *eBay*: Permanent Injunctions are not Automatic, but Decided by Traditional Test in Equity

*By Kenneth Godlewski, Tom Corrado & Eric Sophir**

In *eBay, Inc. v. MercExchange, LLC*, the Supreme Court rendered a highly anticipated decision holding unanimously that the decision to enjoin "is an act of equitable discretion by the district court." The Court vacated the Federal Circuit's application of a "general rule that courts will issue permanent injunctions against patent infringement absent exceptional circumstances"(401 F.3d 1323, 1339 (Fed. Cir. 2005)). The Court held that, according to the traditional principles of equity, the patent owner must demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction."

The Court recognized the developing industry where patent owners do not provide goods or services, but instead, use the patents primarily for obtaining licensing fees. These patent owners, often referred to as "patent trolls," have prompted debate regarding whether it is appropriate for them to pursue permanent injunctions. In the majority opinion, written by Justice Thomas, the Court explained that the "willingness to license its patents" and "lack of commercial activity" are not sufficient to categorically deny a permanent injunction, especially in view of university researchers or self-made inventors, who might not undertake the efforts to secure the necessary financing for such activity.

In a concurring opinion, Justice Kennedy, joined by Justices Stevens, Souter, and Breyer, recognized that the threat of an injunction is often employed as leverage in negotiations, but an injunction may not serve the public interest. Additionally, injunctive relief may have different consequences for many business method patents, but the "potential vagueness and suspect validity" of some of these patents may "affect the calculus under the four-factor test." A concurring opinion by Chief Justice Roberts, joined by Justices Scalia and Ginsburg, emphasized that the right to "exclude," granted by the Constitution, is difficult to protect if infringers are allowed to use an injunction against the patent holder's wishes.

The Court's decision, which does not actually take a position on a permanent injunction against infringer eBay, takes a middle ground rather than favoring the patent owner or infringer. At one end of the spectrum in favor of the infringer, permanent injunctions will not issue as a matter of course upon a finding of infringement and the district court has some discretion in applying the four-factor test of equity principles. When applying this test, patent owners may have difficulty proving irreparable harm, especially if they already licensed the patent. At the other end of the spectrum, the Court's reliance on traditional notions of equity leaves the door open for courts to continue the historical practice of granting permanent injunctions in the vast majority of patent disputes.

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International Law & National Security

The President's Wiretap *IS* Constitutional

*By Gerald Walpin**

> The needs of the Executive are so compelling in the area of foreign intelligence . . . that a uniform warrant requirement would . . . 'unduly frustrate' the President in carrying out his foreign affairs responsibilities. . . . [A]ttempts to counter foreign threats to the national security require the utmost stealth, speed and secrecy. A warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations.

The quotation above sounds as though it might have come from President Bush or one of his spokespersons, defending the warrantless wiretapping program of telephone calls on which one of the parties in conversation is abroad. The words, at least, well explain the reason for the President's program. But they were not authored by any partisan. No, these words were part of a 1980 opinion of a federal appellate court, explaining why it was upholding an espionage conviction based in part on warrantless searches and wiretapping surveillances.[1]

Opposing politicians and the media attacked the Bush Administration for authorizing the National Security Agency (NSA) to intercept communications into and out of the United States, without a warrant, where there is reasonable basis to believe that one party to the communication may be linked to al Qaeda or another terrorist organization—although, in fact, law and history justify the President's actions. Political demagoguery appears to be at its worst (and most harmful to the nation's security) in the response to revelations about the program. Instead of applauding the President's execution of his constitutionally delegated duty to protect the homeland against foreign enemies, his critics have likened him to King George III,[2] and even to Hitler,[3] and proposed his impeachment.[4] Why? Because President Bush, faced with a danger this country has never before experienced, utilized an intelligence tool employed by every other President, including Franklin D. Roosevelt (and many before), exercising power expressly recognized by both the courts and Congress?

Political opponents and the media have generally utilized short-form slogans, invoking the specter of secret police invasion of personal telephone calls. Some opponents point to the statute which Congress enacted, purportedly as a compromise with the President, allowing a limited period of surveillance without warrants. Under that statute, the President may authorize emergency surveillance for up to seventy-two hours, although application for a warrant is still eventually required.[5] This period expands to fifteen days in the case of a declaration of war.[6] Was this compromise, accepting Congress' power over the President's intelligence activities, consistent with America's needs or the Constitution? Not according to a detailed examination of controlling law and history, which demonstrates the constitutionality, propriety, and necessity of the President's surveillance program, considering the danger to America to which the President is responding in performance of his duties.

I. The Danger To America

As when Hitler candidly telegraphed his threatening intentions to the world, initial Islamic militants' threats left the world unmoved. In 1998, Osama bin Laden declared a religious war against the United States, calling on all Muslims to assume the moral obligation to kill U.S. civilians and military personnel.[7] Even al Qaeda's implementation of that crusade in the bombing of the U.S.S. Cole in Yemen[8] and the U.S. embassy in Nairobi[9] did little to awaken our country from its lethargy. The result was the 9/11 devastation, killing over 3,000 innocent U.S. civilians.[10]

As the bipartisan 9/11 Commission's Report later found, our "institutions charged with protecting our . . . national security did not understand how grave this threat could be, and did not adjust their policies, plans and practices to deter or defeat it," but rather continued to follow practices used "in a different era to confront different dangers."[11]

The threat has not dissipated, but increased, since 9/11. In 2003, Osama bin Laden promised to "continue to fight" America and to "continue martyrdom operations inside and outside the United States."[12] His cohort, al-Zawahiri, declared war "in the crusaders' own homes."[13] And, true to their word, their large-scale attacks in various parts of the world have resulted in the death and serious injury of large numbers of innocent people in Madrid,[14] London,[15] Amsterdam,[16] Indonesia,[17] Egypt,[18] and Iraq.[19] More recently, both bin Laden[20] and al-Zawahiri[21] have repeated their purpose to inflict devastation on the United States and other western democracies.

Has the reality of this threat shaken this country from its complacency? Immediately after 9/11, important steps were taken to strengthen our defense against terrorism. Congress enacted the Patriot Act, which removed many of the handcuffs imposed on our intelligence capabilities:[22] the most famous example being a still-difficult-to-understand prohibition against law enforcement agencies working with intelligence agencies in full cooperation.[23]

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But the success of our country in yet preventing another 9/11 has re-invigorated those who believe that civil liberties must always trump action needed to protect national security. For a period these individuals thwarted continuation of the Patriot Act, in favor of short-term extensions with the promise of changes.[24] And then came the *New York Times* disclosure of top secret information relating that, not surprisingly, our President had ordered surveillance in the United States of communications from or to destinations abroad, where one party is linked to al Qaeda or a related terrorist organization.[25] Although 9/11 involved a failure of intelligence—which might have been avoided if international telephone calls had been surveilled before 9/11—a hue and cry followed, with attacks on the President for engaging in unconstitutional activities.

In fact, the law and the consistent practice of prior presidents establish the legality (not to say, the logic) of what the President ordered.

II. The President's Inherent Powers

Article II of the Constitution makes the President Commander-in-Chief of the Armed Forces, with the obligation to defend this country. Almost every federal appellate court that has considered the issue has declared that the Constitution vests in the President inherent authority to conduct searches, including surveillance of telephonic communications, for foreign intelligence purposes, without obtaining a warrant. One such appellate court holding is quoted at the beginning of this article to the effect that, "the President does have" the "inherent authority to conduct warrantless searches to obtain foreign intelligence information." The appellate court which Congress created as part of the Foreign Intelligence Act of 1978 ("FISA"), in overruling a lower court's limitations on the President's eavesdropping powers, likewise took "for granted" that the President does have that authority.[26]

Even Congress, in its Authorization For Use of Military Force Against Iraq Resolution of 2002, expressly recognized that "the President has authority under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States."[27]

U.S. Presidents have utilized this inherent power for warrantless surveillance of communications since the invention of electronic communication. Our government engaged in telegraph wiretapping during the Civil War.[28] President Wilson ordered telephone calls to foreign locations eavesdropped during World War I.[29] And FDR, during World War II, ordered surveillance of all communications—by mail, cable, radio or other means—between the U.S. and any foreign country.[30]

Since FDR, every President has utilized warrantless surveillance of phone conversations between this country and any foreign country. During Jimmy Carter's presidency, the phone of a Vietnamese named Truong living in the United States was tapped and his apartment bugged from May 1977 to January 1978.[31] No warrant had been previously obtained. Instead, as the court which approved this conduct stated, the Carter Administration "relied upon a 'foreign intelligence' exception to the 4th Amendment's warrant requirement."[32] The Carter Administration further declared that "the President may authorize surveillance without seeking a judicial warrant because of his constitutional prerogatives."[33] The Administration's reasoning was essentially duplicated by a federal appellate court:

> . . . because of the need of the executive branch for flexibility, its practical experience, and its constitutional competency, the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance.[34]

The Clinton Administration took the same position when its Department of Justice announced its belief, which "the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes."[35]

This view of the President's constitutional power is consistent with the framers' intentions, as expressed in *Federalist* No. 64: "[H]e will be able to manage the business of intelligence in such manner as prudence may suggest."[36] In the same vein, the Supreme Court in 1874 declared that the "President alone" is "constitutionally invested with the entire charge of hostile operations."[37]

Those who deny the constitutionality of President Bush's surveillance program invariably cite Justice Jackson's concurring opinion rejecting then President Truman's order to seize the steel industry, in which Justice Jackson stated:

> When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.[38]

This statement in fact supports the President's inherent authority to maintain his wiretap program. It clearly does *not* say that any statute adopted by Congress automatically nullifies inherent presidential authority to the contrary. Rather, it recognizes that, even in such a circumstance, the President can still rely on his inherent powers as long as the Constitution does not provide Congress with power over the same matter. The Constitution does not give Congress power over the defense of this country; that power is vested solely in the President. And the Supreme Court has held that "no governmental interest is more compelling than the security of the Nation,"[39] which translates into the highest constitutional authority for the President. Thus, we are left with simple arithmetic: the lowest ebb of the President's highest Constitutional power minus zero Congressional power leaves a net sum of power in the President.

The meaning of Justice Jackson's language as applied to this current surveillance program is made express in subsequent words in the opinion, where Jackson "sustain[s]" the President's "exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."[40]

And those words are consistent with the FDR directive, which Jackson, then Attorney General, carried out, "to secure information by listening devices direct[ed] to the conversation or other communications of persons suspected of subversive activities against the Government of the United States. . . ."[41]—very similar to, but more expansive than the current President's surveillance program.

III. Congress' Enactment of FISA Doesn't Reduce the President's Constitutional Powers

Critics of President Bush's foreign intelligence surveillance program point to the language in the 1978 FISA statute which states that procedures in that statute "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire and oral communications may be conducted."[42] This FISA statute statement does not alter the constitutionality of the President's exercise of his power for two reasons: Congress by statute cannot rescind powers vested in the President by the Constitution. And Congress, subsequent to enacting FISA, enacted legislation in response to the 9/11 attack which confirmed the surveillance power of the President.

A. The President's Constitutionally Vested Power Cannot Be Revoked by Statute

In adopting FISA, the House Conference Report recognized that the "exclusivity" language might not withstand Constitutional muster by admitting that it "does not foreclose a different decision by the Supreme Court."[43] Surely this was a recognition that Congress could not impede the President's inherent powers granted by the Constitution —obviously in recognition of judicial decisions so holding.

That recognition of Congress' inability to withdraw or impede the President's power granted to him by the Constitution was expressly conceded in Congress' 1968 adoption of the Omnibus Crime and Safe Streets Act of 1968,[44] when the statute included the disclaimer that "nothing contained in this" statute "shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack . . . to obtain foreign intelligence information deemed essential to the security of the United States."[45] The Constitution didn't change between 1968 and 1978, when Congress enacted FISA. Congress merely sought in 1978 to flex its muscles unconstitutionally.

In the analogous Presidential power over negotiation of foreign treaties—which, as with national security, the Constitution vests in the President—the Supreme Court decades ago held: "Into this field of negotiations the Senate cannot intrude; and Congress is powerless to invade."[46] A similar rule was expressed by then Chief Justice Chase in mid-1800s. Although Congress has authority to legislate to support the prosecution of a war, the Chief Justice said Congress may not "interfere[] with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-chief."[47]

As noted above, appellate courts expressly recognized that "FISA could not encroach on the President's constitutional power."[48] Justice Jackson, when he was FDR's Attorney General, similarly opined that the President "has certain powers and duties with which Congress cannot interfere."[49] President Lincoln's Attorney General voiced the same view in 1860: "Congress could not, if it would, take away from the President, or any wise diminish the authority conferred upon him by the Constitution."[50]

The unworkability of the formula in the FISA statute, which Congress sought to impose on the President, to frustrate his ability to obtain a warrant to tap international calls, provides practical reason why Congress is prohibited from interfering with the President's inherent power over national security. Under the FISA formula, in order to obtain a warrant, the Government is required to provide "a statement of the facts and circumstances relied upon . . . to justify [the President's] belief that (A) the target of the electronic surveillance is a foreign power or an agent of a foreign power; and (B) each of the . . . places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power."[51]

This is a formula obviously taken from the requirement for domestic search warrants in connection with ordinary crimes under the Fourth Amendment, changing only the probable cause standard to a reasonable belief standard—an irrelevant difference. But there is a meaningful difference between intelligence gathering, needed to protect our country from attack, and criminal investigations. The Fourth Amendment properly precludes use of wiretapping without a pre-existing factual basis for homing in on a suspect. Foreign threat intelligence gathering to prevent a foreign terrorist strike does not necessarily start with spotlighting a specific target. Rather, the purpose of intelligence gathering is just that—to discover who is planning what. This country has two alternatives in this regard: it can wait until an attack to proceed against the attackers, or it can attempt to learn in advance whether persons abroad (where the terrorist leaders are located) are instructing their agents in this country to inflict devastation on the United States. Electronic surveillance is a critical tool in this defensive endeavor.

The circumstances which led Congress to enact the FISA statute explain both its limitations and its non-applicability to the current foreign terrorist threat. In the mid-1970s, the public had learned that the Nixon Administration had employed national intelligence services, in breach of the civil rights of several citizens, to uncover private information about Nixon's "enemies" and others who had incurred his disfavor.[52] In response to that clear misuse of surveillance tools, Congress created the Church Committee to investigate such misuse, and to propose rules for the intelligence services which would protect the civil rights of citizens and respect the powers of the three branches of government.[53]

Among that Committee's many recommendations was that the President have no inherent power to search without a warrant.[54] As related to Nixon's undisputably illegal domestic wiretapping for political purposes, that finding was unexceptional. Never discussed was that, as against foreign enemies, Congress had no power to declare non-existent the power vested in the President by the Constitution. The

mission to protect civil rights was incorporated in the structure the Committee recommended—that a warrant be required in every case, and that to obtain the warrant there had to be probable cause that a crime had been committed.[55] No more digging up dirt on one's personal enemies.

Thus, in 1978, Congress understandably saw the FISA statute as the proper response to Nixon's domestic political misuse of intelligence tools. But it is no response to the terrorist threat America faces twenty-eight years later. In the current situation, we have to deploy every effort to protect our citizens and our infrastructure, containers, tunnels, bridges, water supply . . . everything and everyone. And we must recognize that, in that context, we have to win every time, whereas the enemy can triumph with but one success. To attempt to avoid any single explosive success in this country by our enemy, we must employ our vast capacity to tap into world-wide communications, and, with algorithms, to fish out of billions of tid-bits of information what we need to lead us to the terrorists who threaten us.

Those who cavalierly assert that our government can obtain all the foreign intelligence needed by abiding by the FISA statute formula either are ignorant of good intelligence methods or will say anything to bash President Bush. No one has ever explained how intelligence gathering—trying to discover if unidentified persons in the U.S. are planning an attack—can be done if it were to require a demonstration that the unidentified person in this country is a foreign agent. That is what the President's program seeks to allow our intelligence agencies to learn through electronic surveillance.

Our intelligence agencies are able to do this by preparing a list of words and phrases likely to be used in terrorist instructions, and to create a computerized algorithm of those words applied to overheard calls involving a party abroad. And when the "bell" rings, the substance of the call can be scrutinized. Does this guarantee discovery of a terrorist plot? Of course not. But it is better than doing nothing, which is the practical consequence of the FISA statute's pre-condition of obtaining a warrant to eavesdrop. And given our 20-20 hindsight of communications preceding the 9/11 attack, if the President's surveillance program had been in place then, it is reasonable to conclude that we would have obtained intelligence about the plot. It certainly would have been better than the proverbial chicken soup, and clearly better than the impossible FISA formula which would require the Government to have identified the terrorists in this country before obtaining a warrant.

The courts have previously recognized the impracticality of handcuffing the executive branch of the government with procedures held applicable to prosecution of domestic crimes. The appellate court whose opinion provided the epigraph to this piece, explained:

> The executive possesses unparalleled expertise to make the decision whether to conduct foreign intelligence surveillance, whereas the judiciary is largely inexperienced in making the delicate and complex decisions that lie behind foreign intelligence surveillance.[56]

Finally, that Court pointed out that because the Constitution designates the President "as the pre-eminent authority in foreign affairs . . . the courts should not require the executive to secure a warrant each time it conducts foreign intelligence surveillance," as "few, if any" courts "would be truly competent to judge the importance of particular information to the security of the United States or the 'probable cause' to demonstrate that the government in fact needs to recover that information from one particular source."[57]

Such judicial deference in favor of the President on national security is nothing new. The Supreme Court in 1981 declared that "matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[58] Unlike the Bush-critics, such as the *New York Times*, who proclaim that they know more than our intelligence experts about what tools are needed to try to remain ahead of the terrorists, our courts recognize that they should not second-guess them.

Given the Courts' deference to the Executive's decision on foreign policy and national security, Congress' enactment of the FISA statute, withdrawing this power from the President and giving the ultimate decision to the courts, cannot be upheld.

B. In Fact, Congress Agreed That The President Should Have this Power

On September 18, 2001, Congress overwhelming enacted the Authorization For the Use of Military Force ("AUMF"),[59] which authorized the President to "use all necessary and appropriate force [in order to prevent] any future acts of international terrorism against the United States."

It is indisputable that Congress, by enacting that subsequent legislation can, and did, alter and revoke provisions of the prior FISA legislation. Opponents of President Bush's surveillance program, however, argue that the Congressional resolution authorizing "all" force to prevent terrorist attacks did not specifically mention the use of warrantless wiretapping. But "all" force clearly means "all." From time immemorial, intelligence gathering has been an essential ingredient of using force—indeed it often directs how force is used. Thus, even the Hague Regulations Concerning the Laws and Customs of War on Land of 1907 recognizes as "permissible" governmental "measures necessary for obtaining information about the enemy."[60] Hence, intelligence gathering is a necessary ingredient of using force, as much as the movement of soldiers—also not expressly mentioned in the AUMF, but the use of which no one can doubt.

In addition to that simple logic, the Supreme Court in 2004 ruled, in *Hamdi v. Rumsfeld*, that the absence of an express mention in the AUMF of conduct inherent in the use of force did not alter the clear inclusive meaning of the statutory words "all . . . force."[61] In that case, Hamdi, an American citizen, was detained by the Government after fighting with the Taliban in Afghanistan. He sought release on the basis of a statute, previously enacted by Congress, which prohibited the detention of U.S. citizens "except pursuant to an act of Congress."[62] The Government defended

the continued detention in purported violation of that statute by relying on the AUMF which authorized the President to use all necessary force. Hamdi responded, like those who attack the President's foreign surveillance program, that the AUMF contains no express authorization of detention by Congress. The Court found "[i]t is of no moment that the AUMF does not use specific language of detention," given that detention of prisoners is a recognized part of using force, which Congress authorized.[63] Likewise, intelligence gathering—a much less invasive part of using force than lengthy detention—is a recognized part of using force, providing the necessary implication that Congress authorized it.

Even if it were not required as a matter of logic and precedent, this construction of the AUMF's supplement to the FISA statute is necessary under court decisions, which mandate that, if one construction of a statute would raise serious constitutional problems, but it is "fairly possible" to construe that statute to avoid such problems, the latter construction should be accepted.[64] Any interpretation of FISA as impeding the President's power as Commander-In-Chief of the Armed Forces would, as discussed above, render the FISA statute unconstitutional for invading the President's powers. Construing the subsequent Force Act as affirming the President's power to collect intelligence avoids any Constitutional problem. It therefore should be accepted.

CONCLUSION

Today's threat to America is clear. Those who object to the President's program to gain intelligence against another attack rewrite our Constitution into a suicide pact. As both former Supreme Court Justices Jackson and Goldberg stated, however, the Constitution is not such a pact.[65] To construe the Constitution as prohibiting our government from using modern intelligence methods to obtain information on our enemy can only make more likely devastating attacks within this country. We cannot ignore that the ultimate objective of these terrorists is to destroy our democracy—which would mean the obliteration of all freedoms prescribed in the Constitution.

Footnotes

[1] United States v. Truong Dinh Hung, 629 F.2d 908, 913 (4th Cir. 1980).

[2] Joseph D. Becker, *Bush is President, Not King*, 235 N.Y.L.J. at 2, col. 3 (Feb. 17, 2006); *see also* Jon Green, *Defending our Way of Life*, 183 N.J.L.J. 215 (Jan. 23, 2006).

[3] Eric Lichtblau & James Risen, *More Attacks and Meetings on a Program Under Fire*, N.Y. Times, Jan. 21, 2006, at A8 (describing a comment by Jerrold Nadler).

[4] Green, *supra* note 2.

[5] 50 U.S.C. § 1805(f) (2006).

[6] Authorization During Time of War, 50 U.S.C. § 1811 (2006).

[7] Donna Bryson, *America's Enemy: Determined, Wealthy, Saudi Dissident with AM-US Bombings*, Associated Press, Aug. 20, 1998.

[8] *Six Dead in Apparent Terror Attack on U.S. Navy Ship in Yemen*, UPI News, Oct. 12, 2000.

[9] *3 Rescued in Nairobi, at least 190 Dead*, Sinocast, Aug. 9, 1998.

[10] Anne Barnard & Liz Kowalczyk, Globe Staff, *Reign of Terror Concerted Acts Hit World Trade Center and the Pentagon; Thousands are Feared Dead*, Boston Globe, Sept. 11, 2001, at A1.

[11] The 9/11 Commission Report xvi (2004).

[12] *Bush Defiant over 'Bin Laden Tape,'* Tehran Times, Oct. 20, 2003.

[13] *NSA and Domestic Spying—Part 1: Congressional Testimony before the Senate Judiciary Committee* (Feb. 6, 2006) (statement of Alberto Gonzalez, Att'y Gen. of the U.S.), 2006 WLNR 2190370 (Westlaw).

[14] *At Least 190 Dead, 1,200 Injured in Spanish Bomb Blasts*, ABC Premium News, Mar. 11, 2004.

[15] Jane Wardell, *Explosions Rock Double-Decker Bus, London Subway in What Blair Calls 'Barbaric' Terrorist Attack*, Associated Press DataStream, July 7, 2005.

[16] *The Threat of Terrorist Attack in Netherlands 'Substantial,' Government Says*, AP Alert—Crime, Dec. 2, 2005.

[17] *Chronology of Recent Terrorist Attacks in Indonesia*, AP Alert—Business, Oct. 3, 2005.

[18] Stephen Farrell, *Hope Dies for Egypt Families; Terrorist Attacks*, Times (UK), July 27, 2005, *available at* 2005 WLNR 11768559 (Westlaw).

[19] *Nine Die, 30 Injured in Northern Iraq Terrorist Attacks*, Itar-Tass, Feb. 20, 2006.

[20] *Tapes from Osama bin Laden Since September 11, 2001*, AP DataStream, May 23, 2006 (including a tape from Apr. 23, 2006, where bin Laden urged his followers to go to Sudan to fight a proposed UN force).

[21] Robert H. Reid, *Al-Zawahri Issues New Video; April is Deadliest Month This Year for U.S. Forces in Iraq*, AP Alert—Automotive, Apr. 29, 2006.

[22] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

[23] USA Patriot Act §§ 203, 504; 115 Stat. at 278-82; 364-65.

[24] Charles Hurt, *Senate Ends Filibuster of Patriot Act 96-3 Vote Clears the Way for Renewal of 2001 Law*, Washington Times, Feb. 17, 2006; Charles Hurt, *Senate Extends Patriot Act Provisions House GOP Backing Uncertain*, Washington Times, Dec. 22, 2005.

[25] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times, Dec. 16, 2005.

[26] *In re: Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002); *accord*, United States v. Brown, 484 F.2d 418 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974); United States v. Buoenko, 494 F.2d 593 (3d Cir. 1974), *cert. denied sub nom,* Ivanov v. United States, 419 U.S. 881 (1974).

[27] Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, 1500; *see also* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224.

[28] *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892, 1901 (1981) (citing S. DASH, R. SCHWARTZ & R. KNOWLTON, THE EAVESDROPPERS 23 (1959); A. HARLOW, OLD WIRES AND NEW WAVES 264-65 (1936); W. PLUM, THE MILITARY TELEGRAPH DURING THE CIVIL WAR IN THE UNITED STATES 69 (1882)).

[29] William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 19-20 (2000).

[30] *Id.* at 28-29.

[31] United States v. Truong, 629 F.2d 908, 912 (4th Cir. 1980).

[32] *Id.*

[33] *Id.* Former President Carter's diatribe against President Bush for engaging in similar warrantless surveillance, voiced by President Carter at the funeral service for Mrs. Corretta Scott King, appears to represent the pinnacle of convenient political amnesia. *Former Presidents Jimmy Carter, George H. W. Bush and Bill Clinton Speak at Coretta Scott King's Funeral*, CQ TRANSCRIPTS WIRE, Feb. 7, 2006.

[34] Truong, 629 F.2d at 914.

[35] *Searches and Seizures by U.S. Intelligence Agencies Before the Permanent Select Comm. on Intelligence*, 103d Cong. (July 14, 1994) (statement of Jamie S. Gorlick, Deputy Att'y Gen. of the U.S.).

[36] THE FEDERALIST NO. 64, at 327 (John Jay) (Bantam Classics ed., 1982).

[37] Hamilton v. Dillon, 88 U.S. 73, 87 (1874).

[38] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

[39] Haig v. Agee, 453 U.S. 280, 307 (1981) (citing Aptheker v. Secretary of State, 378 U.S. 500, 509 (1964)).

[40] *Youngstown*, 343 U.S. at 645.

[41] U.S. v. U.S. Dist. Ct., 444 F.2d 651, 670 (6th Cir. 1971) (including in an Appendix instructions from FDR to the Att'y Gen's office).

[42] Interception and Disclosure of Wire, Oral, or Electronic Communications Prohibited, 18 U.S.C. § 2511(2)(f) (2006).

[43] H.R. REP. NO. 95-1720, at 35 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4048, 4064.

[44] Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 2711 (1968).

[45] 18 U.S.C. § 2511(3) (1968), *section repealed by* Pub. L. No. 95-511, 92 Stat. 1783 (1978).

[46] U.S. v. Curtiss–Wright Export Corp., 299 U.S. 304, 319 (1936).

[47] *Ex Parte Milligan*, 71 U.S. 2, 139 (1866).

[48] *In re: Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002).

[49] Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61 (1941).

[50] Memorial of Captain Meigs, 9 Op. Att'y Gen 462, 468 (1860).

[51] Application for Court Orders, 50 U.S.C. § 1804(a)(4).

[52] Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 349 (2005).

[53] *Id.* at 349-52.

[54] S. Rep. No. 95-604(I), at 6 (1977), *reprinted in* 1978 U.S.C.C.A.N 3904, 3908.

[55] *Id.* at 16, 1978 U.S.C.C.A.N. at 3917.

[56] United States v. Truong, 629 F.2d 908, 913 (4th Cir. 1980).

[57] *Id.* at 914.

[58] Haig v. Agee, 453 U.S. 280, 292 (1981).

[59] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

[60] Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land art. 24, Oct. 18, 1907, T.S. No. 539, 1 Bevans 631.

[61] 542 U.S. 507, 519 (2004).

[62] Limitation on Detention; Control of Prisons, 18 U.S.C. § 4001(a).

[63] Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

[64] 16A Am. Jur. 2d Constitutional Law § 172 (2005) (citing Zadvydas v. Davis, 533 U.S. 678, 689 (2001); I.N.S. v. St. Cyr, 533 U.S. 289, 299-300 (2001)).

[65] Terminiello v. City of Chicago, 337 U.S. 1, 37 (Jackson, J., dissenting); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963).

In The Name Of Human Security: UNESCO and the Pursuit of Global Governance

*By James P. Kelly III**

Recently, the United Nations has been promoting a human security agenda. On January 1, 2001, in response to the outcome of the United Nations Millennium Summit, the government of Japan initiated the formation of an independent Commission on Human Security (the "Commission"). The over-arching mission of the Commission is to secure "freedom from fear" and "freedom from want."

On May 1, 2003, Mrs. Sadako Ogata, former United Nations High Commissioner for Refugees, and Professor Amartya Sen, Nobel laureate in economic science, presented the report of the Commission to the United Nations Secretary-General, Kofi Annan. The Commission's report is titled "Human Security Now: Protecting and Empowering People."[1]

The report proposes a new security framework that centers directly and specifically on people. The Commission concentrates on a number of distinct but interrelated issues concerning conflict and poverty: protecting people in conflict and post-conflict situations; shielding people forced to move; overcoming economic insecurities; guaranteeing essential health care; and ensuring universal education.[2] In its report, the Commission formulates recommendations and follow-up activities.

In the Commission's opinion, although the state remains the primary source of security, it often fails to fulfill its security obligations and, at times, has even become a source of threat to its own people. In the Commission's view, human security complements state security by enhancing human rights and strengthening human development. By enhancing human rights, human security seeks to protect people against a broad range of threats to individuals and communities. By strengthening human development, human security seeks to empower them to act on their own behalf.[3]

The Commission's findings and recommendations regarding the pursuit and realization of human security raise important questions regarding the interplay between global governance and state sovereignty. To the extent that multilateral institutions and non-governmental organizations perceive that a state is not adequately meeting the human security needs of its citizens, what powers should they have to intervene in the situation?

In recent years, officials from the United Nations, World Bank, International Monetary Fund, and Organization for Economic Co-operation and Development have become more focused on the human rights and development agendas of their client states. However, their efforts have been limited to improving the capacity of their client states to improve the lives of their citizens. By articulating an all-encompassing right to human security that focuses exclusively on the protection and empowerment of individuals and does not rely exclusively on the state for solutions, the Commission opens the door to a model of global governance that reserves the right to ignore state sovereignty.

This article will explain that, while the Commission's report merely opened the door to a new model of global governance, the United Nations Educational, Scientific and Cultural Organization ("UNESCO") has walked through the door by implementing three programs designed to promote the UN's human security agenda. These programs include the Management of Social Transformations, the Coalition of Cities Against Racism, and the Ethics of Science and Technology. These UNESCO programs, the implementation of which has gone virtually unnoticed by globalization and global governance experts, will heighten the debate over whether multilateral organizations or states will have ultimate control over meeting the human security needs of individuals.

Human Security

The Commission provides the following definition of human security:

> To protect the vital core of all human lives in ways that enhance human freedoms and human fulfillment. Human security means protecting fundamental freedoms— freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.[4]

In the opinion of the Commission, human security encompasses all human rights, including civil and political rights, which protect people, and economic, social and cultural rights, which empower people. Protection strategies, set up by states, international agencies, NGOs and the private sector, shield people from menace. Empowerment strategies enable people to develop their resilience to difficult conditions. According to the Commission, both strategies are required in nearly all situations of human insecurity, though their form and balance will vary tremendously.[5]

In May 2004, the United Nations established the Human Security Unit ("HSU") within the UN's Office for the Coordination of Humanitarian Affairs. The overall objective of the HSU is to place human security in the mainstream of UN activities. The HSU is also responsible for managing the United Nations Trust Fund for Human Security ("UNTFHS"), which was initially funded by Japan. For the most part, the UNTFHS provides emergency relief and development assistance grants in war-torn or post-conflict areas.[6]

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While the UNTFHS provides short-term human security through financial aid in emergency situations, the HSU attempts to promote long-term human security solutions through activities within the United Nations system. UNESCO is at the forefront of these HSU efforts.

UNESCO Human Security Agenda and Paradigm

UNESCO has pursued the UN human security agenda by sponsoring international conferences on human security in different regions, including the Arab, Latin America, and East Asia regions.

For instance, the International Conference on Human Security in the Arab Region brought together experts from the Arab region and the international community, including ministers from Jordan; government officials from the Middle East and North Africa region; local and international civil society organizations, non-governmental organizations and academics; and members of United Nations agencies and programs.

The participants discussed the merits and the shortcomings of the human security concept in the Arab region and determined that:

> 1. At a minimum, every citizen should enjoy access to education, health services and income-generating activities. Citizens who are unable to meet their basic needs through their own efforts should have public support.
> 2. The concept of human security and its underlying values of solidarity, tolerance, openness, dialogue, transparency, accountability, justice and equity should be widely disseminated in societies. To that effect, human security should be incorporated at all levels of education.
> 3. Civil society should be mobilized to participate in the promotion of human security. Special efforts should be made to mobilize women's associations, academics, professional organizations and the private sector.
> 4. Human security should be achieved especially at the local and at the community levels. However, resources are not always available in sufficient amounts. Therefore, the State has a role to play in mobilizing resources and allocating them among those who need them.
> 5. Many aspects of human security are deeply rooted in the Arab culture and Islam. Therefore, there should be no difficulty in adopting or implementing them in the Arab region.[7]

At the end of the meeting, the HSU agreed to continue to work in partnership with UNESCO and to promote a broader acceptance for human security among the member states of the League of Arab States.

In addition to convening regional conferences for the specific discussion of human security, UNESCO is implementing several programs that advance a UNESCO Human Security Paradigm that the author of this article has constructed in the form of Exhibit 1. The UNESCO Human Security Paradigm consists of a brief narrative that shows how a series of independent terms and phrases adopted by UNESCO Member States or officials, in fact, form part of a coherent programmatic roadmap for the pursuit of human security. The UNESCO Management of Social Transformations ("MOST") Program, Cities Against Racism Program, and Ethics of Science and Technology Program implement different parts of the UNESCO Human Security Paradigm.

Exhibit 1

UNESCO SOCIAL AND HUMAN SCIENCES
Human Security Paradigm

HUMAN RIGHTS are understood through PHILOSOPHICAL DIALOGUES which shape HUMAN RIGHTS EDUCATION which prepares people for DIALOGUES AMONG PEOPLES which give rise to a GLOBAL CONSCIOUSNESS which inspires ETHICAL VALUES which serve as a foundation for UNIVERSAL NORMS which include SOCIAL RESPONSIBILITY which prompts SCIENTIFIC RESEARCH which produces KNOWLEDGE which generates POLICY and INTELLECTUAL PROPERTY which are disseminated through the SHARING OF BENEFITS which encourages CAPACITY BUILDING which enables SUSTAINABLE DEVELOPMENT which produces SOCIAL TRANSFORMATIONS which further HUMAN SECURITY which leads to a CULTURE OF PEACE.

Social Science Research and Policy Linkage: The UNESCO MOST Program

Created in 1994, the UNESCO MOST Program was established to promote international, comparative and policy-relevant research on contemporary social transformations and issues of global importance.[8]

To achieve its goals, the MOST Program aims to:

> 1. Promote a further understanding of social transformations;
> 2. Establish sustainable links between social science researchers and decision-makers;
> 3. Strengthen scientific, professional and institutional capacities, particularly in developing countries; and
> 4. Encourage the design of research-anchored policy.

MOST National Liaison Committees are active in fifty-nine countries. The MOST Program also incorporates seventeen international research networks. The priority areas of the MOST Program are:

1. Globalization and governance;
2. Multicultural and multi-ethic society;
3. Urban development and governance;
4. Poverty eradication;
5. Sustainable development and governance; and
6. International migration.

UNESCO has a goal to make the MOST Program an acknowledged and respected international resource for improving the relation between policy-making and social science in identified regions of the world and by serving as a clearinghouse for the undertaking of social science research that enhances the activities in policy areas relating to the themes of the UNESCO Social and Human Sciences sector.

In short, the unstated goal for the MOST Program is to spread the influence of the UNESCO Social and Human Sciences sector throughout the world by having it identify areas of social transformation concern and having it convene and coordinate the work of cooperative regional social science research institutions and policy think-tanks.

In February 2006, UNESCO sponsored a MOST conference in Buenos Aires, Argentina the purpose of which was to bring together social scientists from around the world to help the UNESCO Social and Human Sciences Sector ("UNESCO SHS") develop an online clearinghouse of evidence-based social science research that can be relied upon by UNESCO SHS in promoting policies that produce "social transformations."

The key outcome of the final document adopted at the Buenos Aires MOST conference was a call for the creation of sustainable networks at the national and regional level to link social science research efforts with policy outcomes desired by UNESCO SHS:

> With due respect for the autonomy of social science research, we encourage the establishment of new networks and the strengthening of existing ones at the national and regional level to bring together social scientists, policy-makers, and non-governmental and grassroots organizations around their shared concern for the urgent demands of social and economic development.
>
> We call attention to the existence of fora of Ministers for Social Development at regional as well as subregional levels in developing countries and suggest the creation and consolidation of permanent nexuses between the latter and the above-mentioned networks.
>
> We therefore suggest that the *International Forum on the Social Science—Policy Nexus*, otherwise known as the *Buenos Aires Process*, be organized regularly in order to formalize and promote this linkage between both types of networks at the international level.[9]

In evaluating the impact of the Buenos Aires MOST conference on the economic development aspect of human security, one needs to appreciate that there are critics of the first two phases of global capital development: neoliberalism and Washington Plus. The neoliberal policy framework (a.k.a. the Washington Consensus) prescribes that the contemporary growth of global relations should be approached with laissez-faire market economics through privatization, liberalization, and deregulation. In the second, Washington Plus phase, "core neoliberal policies are undertaken in tandem with more measures that address corruption, transparency, financial codes and standards, unsustainable debt burdens, the timing and sequencing of capital control removal, social safety nets, poverty reduction, corporation citizenship and so on."[10] The World Bank and IMF are viewed as the primary sponsors of these two phases of global capital development.

During the Buenos Aires MOST conference, critics of neoliberalism and Washington Plus expressed their desire for a reorientation away from neo-liberalism in the direction of a "reformist" re-distributive global social democracy that promotes economic human security.

In essence, without expressly stating its intentions or the evidence upon which it is basing its actions, UNESCO SHS has unilaterally rejected the neo-liberal or Washington Plus approach to global capital development in favor of a reformist re-distributive global social democracy. By forming and relying upon a network of regional experts who share UNESCO's enthusiasm for social democracy and wealth redistribution, UNESCO SHS will be able to solicit and secure research that will support re-distributive economic policies and legislative proposals. UNESCO SHS will partner with international civil society and non-governmental organizations to lobby for the adoption of such policies and proposals in representative countries, with or without the cooperation of government officials.

Human Rights Education and Dialogues Among Peoples: The UNESCO International Coalition of Cities against Racism

The International Coalition of Cities against Racism is an initiative launched by UNESCO SHS in March 2004 to establish a network of cities interested in sharing experiences in order to improve their policies to fight racism, discrimination and xenophobia.[11]

In its practical manifestations, racism includes "racist ideologies, prejudiced attitudes, discriminatory behavior, structural arrangements and institutionalized practices resulting in racial inequality . . . it is reflected in discriminatory provisions in legislation or regulations and discriminatory practices as well as in anti-social beliefs and acts."[12]

The ultimate objective is to involve the interested cities in a common struggle against racism through an international Coalition. In order to take into account the specificities and priorities of each region of the world, regional Coalitions are being created with their respective programs of action (i.e., Africa, North America, Latin America and the Caribbean, Arab States, Asia-Pacific and Europe). Under the coordination of a "Lead City" which is to be identified, each regional coalition will have its own Action Plan. The cities

that become signatories to the Coalition agree to integrate the Action Plan into their municipal strategies and policies.[13]

The European Coalition of Cities against Racism was announced in a common Declaration, adopted at the closure of the Fourth European Conference of Cities for Human Rights, which was held in Nuremberg in December 2004. The Coalition already has some of Europe's major cities among its initial membership: Barcelona, London, Lyon, Nuremberg, Paris, and Stockholm.

The procedure for becoming a Coalition City is a two-stage process that takes into account the requirements of the decision-making processes of the various municipalities:

> 1. Signature of a Declaration of Intent conveying the strong interest of the municipality in membership of the Coalition and its Ten-Point Plan of Action; and
> 2. Signature of an Act of Accession and Commitment by which the municipality fully adheres to the Coalition and its Ten-Point Plan of Action. Signing municipalities agree to implement the Plan of Action by incorporating the Plan into their municipal policies and strategies and to allocate the financial and human resources necessary to accomplish the contemplated actions.

The finalized Ten-Point Plan of Action is composed of ten commitments covering the various areas of competence of city authorities such as education, housing, employment and cultural activities.

In the case of the European Coalition of Cities Against Racism, the Ten-Point Plan of Action includes:

> 1. To set up a monitoring, vigilance and solidarity network against racism at city level;
> 2. To initiate, or develop further the collection of data on racism and discrimination, establish achievable objectives and set common indicators in order to assess the impact of municipal policies;
> 3. To support victims and contribute to strengthening their capacity to defend themselves against racism and discrimination;
> 4. To ensure better information for city dwellers on their rights and obligations, on protection and legal options and on the penalties for racist acts or behavior, by using a participatory approach, notably through consultations with service users and service providers;
> 5. To facilitate equal opportunities employment practices and support for diversity in the labor market through exercising the existing discretionary powers of the city authority;
> 6. The city commits itself to be an equal opportunities employer and equitable service provider, and to engage in monitoring, training and development to achieve this objective;
> 7. To take active steps to strengthen policies against housing discrimination within the city;
> 8. To strengthen measures against discrimination in access to, and enjoyment of, all forms of education; and to promote the provision of education in mutual tolerance and understanding, and intercultural dialogue;
> 9. To ensure fair representation and promotion for the diverse range of cultural expression and heritage of city dwellers in the cultural programs, collective memory and public space of the city authority and promote inter-culturality in city life; and
> 10. To support or establish mechanisms for dealing with hate crimes and conflict management.[14]

Every two years, Coalition members must send to UNESCO and the Coalition Secretariat a report on their implementation of the Ten-Point Plan of Action.

The UNESCO International Coalition of Cities Against Racism, Discrimination and Xenophobia enables UNESCO SHS to directly promote the UN human security agenda at the local level, with the assistance of mayors and city officials whose constituents may believe that government officials at the state and national level are not adequately providing for their human security needs.

Social Responsibility and the Sharing of Benefits: The UNESCO Ethics of Science and Technology Program

The UNESCO SHS Ethics of Science and Technology Program addresses bioethics, particularly regarding genetics, as well as other forms of applied ethics. It aims to strengthen the ethical link between scientific advancement and the cultural, legal, philosophical and religious context in which it occurs. UNESCO's strategy in this area is to act as a standard-setter on emerging ethical issues, to disseminate information and knowledge and to help UNESCO member states build their human and institutional capacities.[15]

UNESCO's first major success in bioethical standard-setting was the Universal Declaration on the Human Genome and Human Rights, adopted by UNESCO's General Conference in 1997 and subsequently endorsed by the United Nations General Assembly in 1998.[16] The International Declaration on Human Genetic Data was adopted in 2003.[17] On October 19, 2006, UNESCO's 33rd General Conference adopted a third standard-setting text, the Universal Declaration on Bioethics and Human Rights.[18]

The International Bioethics Committee ("IBC"), the Intergovernmental Bioethics Committee, and the World Commission on the Ethics of Scientific Knowledge and Technology advise UNESCO's actions in ethics of science and technology. UNESCO provides the secretariat for these bodies as well as for the Inter-Agency Committee on Bioethics, established by the Secretary-General of the United Nations in 2001.

To a significant extent, UNESCO SHS staff and independent experts on the IBC, not representatives of UNESCO member states, produced the three UNESCO standards-setting documents in the field of bioethics.

Additionally, at the behest of UNESCO SHS, independent experts will be providing interpretative commentary on the articles contained in the Universal Declaration on Bioethics and Human Rights. Finally, UNESCO SHS staff and independent experts, not representatives of UNESCO member states, will be responsible for drafting model legislation based on the provisions contained in the three standards-setting instruments.

The emphasis on UNESCO staff and independent experts, rather than UNESCO member state representatives, in drafting and implementing the provisions of the standards-setting declarations in the field of bioethics dilutes national sovereignty. Considering the scope of the provisions of the declarations, especially in connection with "social responsibility" and the "sharing of benefits," this is a dramatic human security development with far-reaching implications for global governance.

Article 14 of the Universal Declaration on Bioethics and Human Rights, titled "Social Responsibility and Health," sets a high standard for governments with respect to the promotion of health and social development and articulates the purposes to which scientific and technological progress should be directed.

Article 14 contains two important principles. First, that the promotion of health and social development for their people is a central purpose of governments for which all sectors of society share responsibility. Second, that progress in science and technology should advance:

> 1. Access to quality health care and essential medicines, especially for the health of women and children;
> 2. Access to adequate nutrition and water;
> 3. Improvement of living conditions and the environment;
> 4. Elimination of the marginalization and the exclusion of persons on the basis of any grounds; and
> 5. Reduction of poverty and illiteracy.[19]

Together, the two principles expressed in Article 14 set the foundation for compelling states and their corporate citizens to prioritize scientific research and development in a manner that promotes human security. Although, unlike a binding treaty, the Declaration is non-binding, the adoption of the Declaration by UNESCO member states and its promotion through commentary and model legislation convey an international interest in ensuring that the human security, rather than commercial, aspects of scientific research and development should take priority.

The Declaration's Article 15, titled "Sharing of Benefits," is similarly demanding. The core principle of the Sharing of Benefits clause is that benefits resulting from any scientific research and its applications should be shared with society as a whole and within the international community, in particular with developing countries. According to the Declaration, benefits may take any of the following forms:

> 1. Special and sustainable assistance to, and acknowledgement of, the persons and groups that have taken part in the research;
> 2. Access to quality health care;
> 3. Provision of new diagnostic and therapeutic modalities or products stemming from research;
> 4. Support for health services;
> 5. Access to scientific and technological knowledge; and
> 6. Capacity-building facilities for research purposes.[20]

In the interest of human security, Article 14 subjects states and their corporate citizens to international standards regarding the development and ownership of scientific research and products. Although non-binding, these standards encourage the production of commentary and model legislation that could have the effect of discouraging scientific research and product development.

CONCLUSION

UNESCO's pursuit of the United Nations human security agenda raises important considerations regarding global governance in an age where globalization makes it possible for multilateral institutions to direct their efforts at individuals with minimum regard for state sovereignty. Through its human security paradigm, which includes the creation of regional social science research and policy networks, the promotion of human rights education and dialogues at the local municipality level, and the adoption and promotion of bioethical standards that call for social responsibility and the sharing of benefits, UNESCO has created a mechanism for pursuing human security, regardless of the competencies or desires of individual states.

Footnotes

[1] "Human Security Now: Protecting and Empowering People." 1 May 2003. Commission on Human Security. 3 Sept. 2006, *available at* http://www.humansecurity-chs.org/finalreport/English/FinalReport.pdf.

[2] "Press Release." 1 May 2003. Commission on Human Security. 3 Sept. 2006, *at* http://www.humansecurity-chs.org/finalreport/pressrelease.html.

[3] "Human Security Now: Protecting and Empowering People," p. 2.

[4] *Id.* at 4.

[5] *Id.* at 10.

[6] "Assistances Through the Trust Fund for Human Security." The Ministry of Foreign Affairs of Japan. 3 Sept. 2006, *available at* http://www.mofa.go.jp/policy/human_secu/assistance.html.

[7] "International Conference on Human Security in the Arab Region." United Nations Office for the Coordination of Humanitarian Affairs. 3 Sept. 2006, *available at* http://ochaonline.un.org/webpage.asp?.Page=1957.

[8] "Management of Social Transformations Programme." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=3511&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[9] "International Forum on the Social Science-Policy Nexus Final Document." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=9004&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[10] Scholte, Jan Aart, "The Sources of Neoliberal Globalization." 1 Oct. 2005. United Nations Research Institute for Social Development. 3 Sept. 2006.

[11] "International Coalition of Cities Against Racism." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=3061&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[12] "Declaration on Race and Racial Prejudice." 27 Nov. 1978. United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://www.unhchr.ch/html/menu3/b/d_prejud.htm.

[13] "International Coalition of Cities Against Racism." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006.

[14] "Implementation of the Ten-Point Plan of Action." United Nations Educational, Scientific and Cultural Organization. 3 Sept 2006, *available at* http://portal.unesco.org/shs/en/file_download.php/3617cc7bdd4fa9f314453d6dbdf8e919accession_commitment.pdf

[15] "Ethics." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=1837&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[16] "The Universal Declaration on the Human Genome and Human Rights." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=1881&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[17] "International Declaration on Human Genetic Data." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=1882&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[18] "Universal Declaration on Bioethics and Human Rights." United Nations Educational, Scientific and Cultural Organization. 3 Sept. 2006, *available at* http://portal.unesco.org/shs/en/ev.php-URL_ID=1883&URL_DO=DO_TOPIC&URL_SECTION=201.html.

[19] *Id.*

[20] *Id.*

Labor and Employment Law

Pre-Recognition Agreements: Can Employers Lawfully Acquire Contractual Control Over the Future Representative of their Employees under § 8(a)(2) of the NLRA?

*By William Messenger**

Consider a hypothetical. An attorney enters into contract with a company. The company agrees to assist the attorney with recruiting new clients. In exchange, the attorney agrees to settle disputes between newly retained clients and the company pursuant to prearranged terms favorable to the company. Is the attorney's arrangement with the company ethical?

If you are an attorney (even if you're not), your answer should be "no." The company controlling how the attorney can represent clients *vis a vis* itself creates a conflict of interest for the attorney. An attorney subject to the contractual control of an opposing party cannot satisfy his fiduciary obligation to solely represent the interests of his clients. Any legal proceedings between the company and a person the attorney represents would be a farce, as the company would be on both sides of the dispute.

The National Labor Relations Board ("Board") is currently considering the propriety of an arrangement similar to this hypothetical in *Dana Corp. (Int'l Union, UAW)*, 7-CA-46965 *et seq*. At issue is an agreement between the International Union, United Automobile and Agricultural Implement Workers of America ("UAW") and Dana Corporation ("Dana"), an employer in the automotive industry. In this agreement, Dana agreed to assist the UAW with becoming the representative of its employees. In exchange, the UAW agreed that the collective bargaining agreements it negotiates for future-represented employees will include prearranged terms favorable to Dana. The question presented is whether the UAW's commitment is lawful under the National Labor Relations Act, ("NLRA" or "Act").[1]

The answer to this question should also be "no."[2] An employer having contractual control over how a union can represent employees *vis a vis* the employer creates a conflict of interest in violation of § 8(a)(2) of the NLRA.[3] The UAW cannot satisfy its fiduciary duty to represent the interests of employees when subject to the contractual control of their employer. Collective bargaining negotiations between Dana and the UAW would be a sham, as Dana would be sitting on both sides of the table.

The Board's decision in *Dana Corp*. will determine whether collective bargaining under the NLRA, which heretofore has been permitted only after a union is lawfully recognized as the representative of employees,[4] can occur prior to such recognition (i.e., "pre-recognition bargaining"). The Board's ultimate disposition on this issue will have significant ramifications for employee rights and labor policy.

I. Pre-Recognition Bargaining and "Bargaining to Organize" Agreements

Organizing new members and dues-payers is a priority for organized labor. The strategy most unions currently favor is to organize pursuant to "organizing agreements" with employers (sometimes called "recognition" or "neutrality" agreements).[5]

The terms of organizing agreements vary, but common provisions include an employer's commitment to: (1) recognize the union as the exclusive representative of employees based on a "card check," and without a secret-ballot election; (2) prohibit speech by management that is unfavorable to the union; (3) issue communications favorable to the union; (4) grant union organizers access to company property; (5) provide the union with personal information about employees; and (6) conduct captive audience meetings in support of the union.[6]

A pre-requisite of this top-down organizing strategy is that employers enter into organizing agreements. Most employers are understandably loathe to hand over their employees to a union and balk at entering into organizing agreements. Therefore, unions utilize a variety of tactics to coerce or induce employers to enter into organizing agreements.

One prevalent union tactic is "bargaining to organize," in which a union makes bargaining concessions at the expense of employees the union already represents in exchange for an organizing agreement concerning other employees. A variation of this tactic is "pre-recognition bargaining," in which a union commits to make bargaining concessions at the expense of the employees it seeks to represent in return for an organizing agreement concerning those employees.

An example of these tactics is the agreements between the UAW and Freightliner Corporation, a truck manufacturer. In 2002, the UAW exclusively represented employees at a Freightliner facility in Mt. Holly, North Carolina, and sought to represent the employees of other Freightliner facilities. To organize the latter, the UAW entered into an organizing agreement (called the "Card Check" agreement) and a pre-recognition agreement (called the "Preconditions" agreement) with Freightliner.[7]

In the "Card Check" agreement, Freightliner committed to recognize the UAW as it employees' representative pursuant to a card check, to prohibit negative comments about the UAW, to grant union organizers access to its

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facilities, and to hold joint captive audience meetings at which UAW authorization cards would be distributed to employees.

As a quid pro quo, the UAW committed in the "Preconditions" agreement to make bargaining concessions at the expense of any Freightliner employees it organized with regard to transfer rights, severance pay, strikes, pattern agreements, subcontracting, overtime scheduling, grievances, benefits costs, and wage adjustments. In addition, the UAW agreed to a wage freeze, an increase in health benefit costs, and the cancellation of profit sharing bonuses for UAW-represented employees at Freightliner's Mt. Holly facility.[8] In short, the UAW "bargained" with the wages, benefits, and terms of employment of current and future represented employees in order to "organize" new members and dues payers.[9]

Another example of "bargaining to organize" is the so-called "Side Letter" and "Framework" agreements between the Steelworkers union and Heartland Industrial Partners ("Heartland"), an investment firm.[10] Heartland agreed that companies in which it invested would support Steelworker organizing campaigns with access to company facilities, information about employees, and certain control over company communications. In exchange, the Steelworkers agreed to limits on the wages and benefits of future-organized employees and waived their right to strike in support of bargaining demands.[11]

Dana Corp. involves a "bargaining to organize" agreement between Dana and the UAW called the "Letter of Agreement."[12] In this agreement, Dana committed to assist the UAW with becoming the representative of its employees by: conducting captive audience meetings on company time and property for the UAW; providing UAW organizers access to Dana facilities; providing the UAW personal information about employees; informing employees that the UAW will help Dana secure business; forbidding supervisors from saying anything negative about the UAW; and recognizing the UAW without a secret-ballot election.

In exchange, the UAW made several commitments governing its conduct as the future representative of Dana employees. The UAW agreed not to seek employee health insurance coverage superior to that implemented by Dana on January 1, 2004; to several mandatory contract terms; to cap total wages and benefits to those of an organized facilities' competitors and comparable Dana facilities; and, not to strike in support of bargaining demands in the first contract. In addition, the UAW agreed that it could not organize the employees of certain Dana facilities if the collective bargaining agreements it negotiated for organized employees materially harmed the financial performance of their facilities.

At issue in *Dana Corp*. is whether § 8(a)(2) of the NLRA is violated by those portions of the Letter of Agreement that govern the terms of employment that the UAW can seek for Dana employees upon becoming their exclusive representative. In short, is pre-recognition bargaining lawful under the Act?

On April 8, 2005, Administrative Law Judge William G. Kocol found the pre-recognition agreements between Dana and the UAW to be lawful.[13] The Charging Parties and General Counsel filed exceptions to this decision with the Board.[14] On March 30, 2006, the Board recognized the importance of *Dana Corp*. by inviting interested parties to file amicus briefs.[15] Ten entities subsequently filed amicus briefs with the Board.[16] The case is now fully briefed and pending before the Board.

III. Section 8(a)(2) of the NLRA

Section 8(a)(2) makes it an unfair labor practice for employers "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."[17] The statute was enacted to prevent employers from controlling their employees' bargaining agent, for Congress found such control incompatible with exclusive representation and the collective bargaining process.

Section 9 of the NLRA empowers unions to act as the "exclusive representative" of a unit of employees with respect to their wages, benefits, and other terms of employment.[18] The Supreme Court has found this agency relationship akin to that between attorney and client,[19] with the union owing a fiduciary duty of complete loyalty to represented employees.[20]

A union's duties as an exclusive representative require that it be independent of the employer with which it deals for employees.[21] Congress found that a "company-dominated union is one which is lacking in independence, and which owes a dual obligation to employers and employees. It is an agent which possesses two masters."[22] Section 8(a)(2)'s prohibitions "against the participation of management in any labor organization . . . are predicated on the principle that an agent cannot serve two masters."[23]

Collective bargaining under the Act involves a union negotiating with an employer as its employees' exclusive representative with respect to wages, hours, and other terms of employment.[24] Congress recognized that "[c]ollective bargaining is a sham when the employer sits on both sides of the table by supporting a particular organization with which he deals."[25] Thus, § 8(a)(2) protects the integrity of collective bargaining by prohibiting employers from controlling the unions with which they bargain.

IV. Pre-recognition Bargaining and § 8(a)(2) of the Act

A. Pre-Recognition Bargaining Should Be Held Unlawful Under § 8(a)(2)

An employer enjoying contractual control over how a union can represent employees *vis a vis* that employer violates the letter and spirit of § 8(a)(2). Pre-recognition agreements inherently give employers control over what unions can bargain for on behalf of future-represented employees. As such, the agreements are unlawful under § 8(a)(2).

The Letter of Agreement at issue in *Dana Corp.* grants Dana contractual authority, enforceable through binding arbitration[26] and potentially § 301 of the Labor Management

Relations Act,[27] over the UAW's conduct as an exclusive representative of Dana employees. Dana has the power to prohibit its employees' future agent from negotiating for several terms of employment, such as improved healthcare benefits or voluntary overtime, or from striking in support of any bargaining demands.[28]

Dana's authority over the UAW "interfere[s] . . . with the . . . administration of any labor organization" within the meaning of § 8(a)(2). Indeed, Dana controlling what the UAW may negotiate for during collective bargaining far exceeds the degrees of interference that have previously been found unlawful under § 8(a)(2), such as supervisors merely participating in union negotiating efforts.[29]

Pre-recognition agreements are incompatible with § 8(a)(2)'s legislative purposes. The UAW cannot satisfy its fiduciary obligations as an exclusive representative of Dana employees under the Letter of Agreement because the union "owes a dual obligation to employers and employees."[30] For example, if Dana employees organized by the UAW wanted their union representative to bargain for health insurance superior to that implemented by Dana January 1, 2004, Dana could prohibit the UAW from doing so.[31]

Dana's contractual authority over what the UAW can seek when negotiating with Dana for employees is incompatible with the collective bargaining process, as Dana is effectively "on both sides of the table."[32] As Senator Wagner cogently stated when moving the Senate to consider the bill that would become the NLRA, "[c]ollective bargaining becomes a mockery when the spokesmen of the employee is the marionette of the employer."[33]

In *Dana Corp.*, Dana and the UAW argue that pre-recognition agreements are lawful because unions can lawfully enter into agreements governing employees' terms of employment after becoming their representative (i.e., collective bargaining agreements).[34] However, pre-recognition agreements differ from collective bargaining agreements in that they grant employers control over the internal "administration" of a union—the relationship between union and represented employees—within the meaning of § 8(a)(2).

Unions enter into collective bargaining agreements as the proxy of exclusively represented employees. By contrast, unions enter into pre-recognition agreements solely for themselves. A union that enters into a pre-recognition agreement cannot negotiate for terms of employment that differ from those specified in the agreement, regardless of what represented employees desire. A pre-recognition agreement therefore governs the future relationship between agent (the union) and principal (represented employees).

Analogously, an attorney entering into contract with a third-party as the proxy of a client does not interfere with the attorney-client relationship. But an attorney entering into contract with a third party on his own behalf, which governs how the attorney can represent future clients, does interfere with the attorney-client relationship. The distinction between collective bargaining agreements and pre-recognition agreements is much the same.

B. Prior Board Precedents: Majestic Weaving and Kroger

The legality of pre-recognition bargaining is not an issue of first impression for the Board. In *Majestic Weaving*,[35] the Board considered the propriety of an employer and a union bargaining over terms for a collective bargaining agreement that would become effective when the union gained majority employee support.[36] The Board found this conduct unlawful, holding "that the [employer's] contract negotiation with a nonmajority union constituted unlawful support within the meaning of Section 8(a)(2) of the Act."[37]

In *Dana Corp.*, the UAW and Dana argue that the *Majestic Weaving* Board did not find pre-recognition bargaining to be unlawful, but rather that the employer violated the Act by recognizing the union as the exclusive representative of its employees prior to the union enjoying majority employee support.[38] This contention cannot be squared with *Majestic Weaving*, which overruled a prior precedent that held pre-recognition bargaining lawful:

> We hereby overrule our decision in *Julius Resnick, Inc.*, 86 NLRB 38 [1949] . . . to the extent that it holds that an employer and a union may agree to terms of a contract before the union has organized the employees concerned, so long as the union has majority representation when the contract is executed.[39]

Indeed, the AFL-CIO's General Counsel recognized in 1996 that "[n]egotiations over non-Board recognition procedure often spill over to discussing the terms of a future collective bargaining agreement, should the union demonstrate majority support. Under *Majestic Weaving*, however, this is an unfair labor practice."[40]

Dana and the UAW also cite *Kroger*, in which the Board found that an employer violated § 8(a)(5) of the NLRA by failing to enforce an "after acquired store clause" that applied the terms of a current collective bargaining agreement to other workplaces organized by the union.[41] Dana and the UAW aver that *Kroger* permits agreements regarding the terms of employment of future-organized employees.[42]

Kroger's applicability to the issue of pre-recognition bargaining is questionable. The collective bargaining agreement in *Kroger* was entered into by the union for currently represented employees. *Kroger* did not involve an agreement that solely affects the terms of employment of employees that the union did not yet represent.

If *Kroger* is considered applicable to the issue of pre-recognition bargaining, it should be overruled as inconsistent with § 8(a)(2). *Kroger* and its progeny involved alleged failures to bargain in violation of § 8(a)(5) of the NLRA, not whether "after acquired store clauses" violate § 8(a)(2).[43] As established above and in *Majestic Weaving*, pre-recognition agreements violate § 8(a)(2) of the Act. Because employers and unions cannot bargain in violation of § 8(a)(2), *Kroger* must be overruled if in conflict with § 8(a)(2) and *Majestic Weaving*.

C. Is Pre-Recognition Bargaining Favored By Labor Policy?

In *Dana Corp*., the UAW argues that employees and employers benefit from pre-recognition agreements.[44] Employees can make a more informed choice regarding union representation if they know what it will entail, and employers will be less apt to resist union organizing if assured that unionization will not adversely affect their business interests.

Employees, unions, or employers ostensibly favoring pre-recognition agreements is no defense under § 8(a)(2). In fact, the incentive of employers and unions to satiate their respective self-interests at employees' expense by "bargaining to organize" is a compelling reason for the Board to bar pre-recognition bargaining.

The Supreme Court has long recognized that employee preference for unions controlled or supported by their employer is not exculpatory under § 8(a)(2).[45] When enacting the NLRA, "Congress heard extensive testimony from employees who expressed great satisfaction with their employee representation plans and committees," but "nonetheless enacted a broad proscription of employer conduct in Section 8(a)(2)."[46] Congress recognized that employer control over the agent of its employees is fundamentally incompatible with exclusive representation and collective bargaining, irrespective of potential employee support for the arrangement.

That pre-recognition agreements further union organizing objectives does not legitimize the practice under § 8(a)(2).[47] First, the NLRA protects only the rights of employees, not the self-interests of unions.[48] Second, far from being exculpatory, a union's complicity in an employer's domination, interference, or support is itself an unfair labor practice under § 8(b)(1)(A) of the NLRA.[49] The UAW's willingness to submit to Dana's control during future collective bargaining negotiations only proves that the union has violated the Act.

That pre-recognition agreements further employer interests in securing favorable terms for future collective bargaining agreements is certainly no defense under § 8(a)(2). The desire of employers to make unions subservient to their business interests by means of domination, interference, or support is the very threat that § 8(a)(2) exists to curb.

The incentive that unions and employers have to "bargain to organize" is a compelling reason for holding pre-recognition bargaining unlawful under the Act. In pre-recognition bargaining, unions and employers can each satiate their perceived self-interests (in organizing and securing favorable collective bargaining agreements, respectively) by imposing all costs on a vulnerable third-parties: employees.

Employees are not privy to pre-recognition negotiations. Their interests are not represented during these negotiations, for unions owe no fiduciary duty to employees that they do not (yet) represent. Indeed, employees are usually unaware that their interests are being bartered over, as unions and employers often conceal their pre-recognition agreements from employees.[50] Other than the NLRA's prohibitions, there is nothing to stop a union from trading away the wages, benefits, and terms of employment of unrepresented employees for the organizing agreement it desires. If not unlawful under the Act, the incentive that both unions and employers have to "bargain to organize" at employee expense means that the practice will only proliferate.

The NLRA's very purpose is to protect the rights of employees from the machinations of employers and unions.[51] Section 8(a)(2) in particular is aimed at preventing collusion between employers and unions that could work to the detriment of employees. The Board has been entrusted by Congress to enforce these provisions of law, and it should do so by unequivocally prohibiting employers and unions from "bargaining to organize" at the expense of employees.

Footnotes

[1] 29 U.S.C. §§ 151 *et. seq.*

[2] The analogy is apt, for a union's relationship with exclusively represented employees is akin to that "between attorney and client." Air Line Pilots v. O'Neill, 499 U.S. 65, 74-75 (1991).

[3] 29 U.S.C. § 158(a)(2) ("It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it").

[4] 29 U.S.C. § 158(d); Majestic Weaving Co., 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds,* 355 F.2d 854 (2nd Cir. 1966).

[5] *See e.g.,* Joseph A. Barker, *Keeping Neutrality Agreements Neutral*, 84-AUG. Mich. B.J. 33 (2005); A. Eaton & J. Kriesky, *Union Organizing Under Neutrality And Card Check Agreements*, 55 Ind. & Lab. Rel. Rev. 42 (2001).

[6] *See supra* note 5.

[7] The agreements are online at http://www.nrtw.org/neutrality/freightliner.php.

[8] This arrangement is online at http://www.nrtw.org/20050215freightliner.pdf.

[9] The "Preconditions" agreement and portions of the "Card Check" agreement were nullified as a result of a settlement agreement reached in *Thomas Built Buses*, Case Nos. 11-CA-20338 and 11-CB-3455 (2004). A civil action filed by Freightliner employees under the Racketeer Influenced and Corrupt Practice Act, 18 U.S.C. §§ 1961-1968, for damages they suffered as a result of these agreements is currently pending in *Adcock v. Int'l Union, UAW*, Case No. 3:06-CV-32-MU (W.D.N.C. 2006). A copy of the Complaint in *Adcock* can be found online *at* http://www.nrtw.org/pdfs/20060124rico_complaint.pdf.

[10] The agreements are available at http://www.nrtw.org/neutrality/Patterson_Exhibit_1.pdf.

[11] Employees are challenging the legality of certain portions of the "Side Letter" and "Framework" agreements under 29 U.S.C. § 186 in *Patterson v. Heartland Industrial Partners*, 428 F.Supp.2d 714 (N.D. Ohio 2006), *appeal pending*, Case Nos. 06-3791, and under § 8(e) of the NLRA, 29 U.S.C. § 158(e), in *United Steelworkers of America (Heartland Industrial Partners)*, Case No. 34-CE-9. *At* http://www.nrtw.org/neutrality/heartland.php.

[12] The "Letter of Agreement" can be found online at http://www.nrtw.org/20050215letter.pdf.

[13] The decision is online at http://www.nlrb.gov/nlrb/about/foia/DanaMetaldyne/JD-24-05.pdf.

[14] All briefs filed with the Board in *Dana Corp.* are available on the NLRB's website under "Hot Docs," *at* http://www.nlrb.gov/nlrb/about/foia/FrequentlyRequestedDocuments.asp.

[15] *Id.*

[16] *Id.*

[17] 29 U.S.C. § 158(a)(2).

[18] 29 U.S.C. § 159.

[19] Air Line Pilots v. O'Neill, 499 U.S. 65, 75 (1991).

[20] Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); Air Line Pilots, 499 U.S. at 74-75.

[21] NLRB v. Brown Paper Mill Co., 108 F.2d 867, 870-71 (5th Cir. 1970); Nassau & Suffolk Contractors Ass'n., 118 NLRB 174, 187 (1957); *see also* 78 Cong. Rec. 3444 (March 1, 1934) (Sen. Wagner), *reprinted in* 1 NLRB Legislative History of the National Labor Relations Act 1935, at 16 1935) (hereinafter "LHNLRA") ("only representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees").

[22] 79 Cong. Rec. 2332 (February 20, 1935) (Rep. Boland), *reprinted in* 2 LHNLRA at 2443*; see also* Brown Paper Mill, 108 F.2d at 870-71.

[23] *Hearing on S. 2926 Before the Senate Comm. on Educ. & Labor*, 73d Cong. (1934) (statement of NLRB General Counsel Milton Handler), *reprinted in* 1 LHNLRA at 68.

[24] 29 U.S.C. §§ 158(d), 159.

[25] NLRB v. Penn. Greyhound Lines, 303 U. S. 261, 268 (1938) (*quoting* H.R. Rep. No. 74-1147 (1935), *reprinted in* 2 LHNLRA at 3066-68); *see also* H.R. Rep. No. 74-969 (1935), *reprinted in* 2 LHNLRA at 2925-26 (same); H.R. Rep. No. 74-972 (1935), *reprinted in* 2 LHNLRA at 2971-73 (same).

[26] Letter of Agreement, *supra* note 12, § 5.1.2.4 (binding arbitration procedures); § 4.2.5 - 4.2.7 (interest arbitration procedures).

[27] International Union, UAW v. Dana Corp., 278 F.3d 548 (6th Cir. 2002).

[28] Letter of Agreement, *supra* note 12, § 4.2.1 (healthcare limitation); § 4.2.4 (mandatory overtime); § 6.1 (waiver of right to strike).

[29] *See* General Steel Erectors, 297 N.L.R.B. 723 (1990), *enforced,* 933 F.2d 568 (7th Cir. 1991); Vanguard Tours, 300 N.L.R.B. 250 (1990), *enforced in part*, 981 F.2d 62 (2nd Cir. 1992); Nassau & Suffolk Contractors Ass'n., 118 N.L.R.B. 174, 187 (1957).

[30] *See supra* note 22.

[31] Letter of Agreement, *supra* note 12, § 4.2.4 ("the Union commits that in no event will bargaining between the parties erode current solutions and concepts in place or scheduled to be implemented January 1, 2004, at Dana's operations which include premium sharing, deductibles, and out-of pocket maximums").

[32] *See supra* note 25.

[33] 79 Cong. Rec. 7483 (March 15, 1935) (Sen. Wagner), *reprinted in* 2 LHNLRA at 2334; *see also* 79 Cong. Rec. 9329 (1935) (Rep. Marcantonio), *reprinted in* 2 LHNLRA at 3152.

[34] UAW's Brief in Opposition to Exceptions, 35-36 ("UAW Brief"); Dana's Answering Brief to Exceptions ("Dana Brief"), 19-20.

[35] 147 N.L.R.B. 859 (1964), *enforcement denied on other grounds* 355 F.2d 854 (2nd Cir. 1966).

[36] *Id.* at 860, 866-67.

[37] *Id.* at 860.

[38] UAW Brief at 8-18; Dana Brief at 24-29.

[39] 147 N.L.R.B. at 860 n.3.

[40] Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77 (1996).

[41] Houston Division, Kroger Co., 219 N.L.R.B. 388 (1975).

[42] UAW Brief at 27-35; Dana Brief at 32-37.

[43] *See* Amicus Brief of National Alliance for Worker and Employer Rights, 23-26.

[44] UAW Brief at 14-16, 28-34.

[45] NLRB v. Newport News, Shipbuilding & Dry Dock Co., 308 U.S. 241, 250-51 (1939); *accord* NLRB v. Link Belt Co., 311 U.S. 584, 588 (1941); *see also* Ladies Garment Workers v. NLRB, 366 U.S. 731, 736 (1961) (employer recognizing and bargaining with non-majority union violates § 8(a)(2) because it provides it with "a deceptive cloak of authority with which to persuasively elicit additional employee support").

[46] Electromation Inc. v. NLRB, 35 F.3d 1148, 1164 (7th Cir. 1994).

[47] Duane Reade, Inc., 338 N.L.R.B. 943 (2003) (employer support of union organizing efforts unlawful under § 8(a)(2)); Famous Castings Corp., 301 N.L.R.B. 404 (1991) (same); NLRB v. Windsor Castle Healthcare Facility, 13 F.3d 619, 623 (2nd Cir. 1994) (same); *see also* Connell Construction Co. v. Plumbers & Steamfitters Local No. 100, 421 U.S. 616, 625 (1975) (union organizing tactics not immune from anti-trust laws although organizing is a legitimate goal).

[48] Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on employees, not on unions"); MGM Grand Hotel, Inc., 329 N.L.R.B. 464, 475 (1999) (Brame, dissenting) ("Unions represent employees; employees do not exist to ensure the survival or success of unions").

[49] Duane Reade, Inc., 338 N.L.R.B. 943 (2003); Sav-On Drugs, Inc., 267 N.L.R.B. 639 (1983); Welsbach Electric Corp., 236 N.L.R.B. 503, 516 (1978); Sweater B. by Banff Ltd., 197 N.L.R.B. 805 (1972). It is difficult to conceive how an employer could dominate, interfere with, or support a union under § 8(a)(2) without that union's willing complicity.

[50] Letter of Agreement, *supra* note 12, § 12.1 ("Neither party can disclose this agreement, or its content or any actions taken hereunder, without the consent of the other"); *see also* Complaint in Adock v. Int'l Union UAW, *supra* note 9, ¶¶ 29, 35, 55-57 (UAW / Freightliner "Card Check" and "Preconditions" agreements concealed from employees); Heartland/Steelworkers "Side Letter," supra note 10, § 15 (agreements "will be treated as non-public by all parties").

[51] *See* 29 U.S.C. §§ 158(a) - (b).

The Unanticipated Consequences of Employment At Will: Proving Damages in Restrictive Covenant Enforcement Cases

*By J. Gregory Grisham & Larry R. Wood, Jr.**

The employment at-will doctrine is a creature of the common law that has long protected the right of employers and employees to end the employment relationship "without breach of contract for good cause, bad cause or no cause at all."[1] The employment at-will doctrine recognizes and protects the freedom of employers to make judgments about employees and business decisions without judicial interference.[2] While the employment at-will rule is subject to statutory and judicial exceptions, the rule has retained its vitality.[3] Despite the presumption of employment at-will, employers ordinarily include disclaimers of contractual intent and statements of at-will employment in employment applications, employee handbooks and other company publications such as policy manuals.[4]

While employers find it important to embrace employment at-will and create a protective paper trail disclaiming contractual intent, many employers also have an interest in protecting themselves from the post-employment activities of former employees, particularly those with important customer/client relationships or proprietary information. Post-employment restrictive covenants contained in employment agreements typically limit competition, solicitation of customers, and the disclosure of confidential information. In general, courts will enforce restrictive covenants as long as such covenants are reasonable in geographic scope and time, where the employer demonstrates that it has a protectible interest, supported by valid consideration, and not contrary to the public interest.[5] Commonly recognized protectible interests include specialized training, access to trade secrets and customer relationships.[6] Employment Agreements that contain post-employment restrictive covenants often include a statement of at-will employment. In appropriate cases, employers seek to enforce restrictive covenants against former employees by seeking injunctive relief and damages.[7]

Two recent cases suggest that the otherwise beneficial employment at-will rule may be a double-edged sword for employers when they seek damages in post-employment restrictive covenant enforcement actions. The employment at-will doctrine likely will be particularly problematic where the employer tries to establish damages based solely on historical revenue numbers based on the former employee's efforts during employment.

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In *Saks Fifth Avenue, Inc. v. James Ltd.*,[8] the plaintiff, James Ltd., ("James") sued a former employee, Douglas Thompson ("Thompson"), and Thompson's subsequent employer, Saks Fifth Avenue ("Saks"), *inter alia*, for breach of fiduciary duty, intentional interference with contractual relations, intentional interference with prospective business and contractual relations, as well as a claim under a Virginia statute prohibiting conspiracies to injure another in business.[9] Thompson was also sued individually for breach of his restrictive covenant.[10] Thompson had worked with James, a "high-end men's clothing store," for seventeen years and was James' best salesperson working out of the Tysons Galleria Store.[11] In 1998, James issued a handbook to all employees which provided that all of James' employees were "at-will" employees, and also included a "memorandum of understanding on confidentiality" and a "covenant not to compete."[12] In May 1998, Thompson signed a document agreeing to all handbook provisions, including the confidentiality provisions and the restrictive covenant and acknowledged that employment was "at-will."[13]

Saks, a national retailer, operated a store in Tysons Galleria, but the store was less profitable than company projections.[14] Therefore, in 2003, Saks' management devised a plan to improve profits, which included a plan to "attract top salesmen to the men's department who would expand selection and sales."[15] Saks made contact with Thompson and another James' employee, Ray Ybarme, in the summer of 2003 to see if they could be persuaded to come to work for Saks.[16] Thompson and Ybarme both shared their concerns over their James' covenant not to compete, since the Saks store was within the geographic area where competition was prohibited.[17] The Saks' legal department reviewed the covenant not to compete and gave the opinion that it was not enforceable.[18] Thompson was given a letter by Saks' management that Saks would provide "any legal defense and costs necessary to accept and continue employment at Saks should [he] be challenged by James on the non-compete provision."[19] Thompson resigned his employment at James and went to work for Saks.[20] He took his customer listings and later notified his customers that he had moved to the Saks store in the Tyson Galleria.[21]

At trial, James presented Bruce G. Dubinsky, a certified public accountant, as an expert witness on damages.[22] Dubinsky relied on a "but-for" analysis which he also called a "lost volume method" calculating damages over an eleven year, three month period.[23] Dubinsky's damages analysis assumed that "every customer Thompson had served at James who did not purchase something at James after Thompson left was gone due to the actions of Mr. Thompson and Saks."[24] In sum, Dubinsky testified that "but for Thompson's departure to work at Saks, James would have had sales equal to the amount if Mr. Thompson had remained."[25] At the close of the plaintiff's case, the defendants moved to strike James' evidence on the proof

of damages as speculative and on the ground that Dubinsky's calculations "ignore[d] James' burden of proving causation," but the motion was denied by the trial court.[26] The trial court adopted Dubinsky's calculations and awarded three years of damages running from Thompson's October 2003 resignation date and the appeal followed.[27]

The Virginia Supreme Court, in considering the appeal, set forth the law on damages noting that "James had the burden of proving with reasonable certainty the amount of damages and the cause from which they resulted; speculation and conjecture cannot form the basis of the recovery."[28] The court further noted that "James bore the burden of proving that its damages were 'proximately caused by wrongful conduct."[29] The court disagreed with the trial court, concluding that "by relying solely on Dubinsky's opinion evidence as to damages, James failed to carry its burden of proving that the wrongful conduct of Saks and Thompson proximately caused those damages."[30] The court, in finding the plaintiff's proof inadequate to establish causation, noted Thompson's status as an at-will employee and the lack of proof showing a loss of profits related to Thompson's employment at Saks:

> Dubinsky failed to connect the lost profits he claimed James incurred after Thompson's departure to anything other than the mere fact that Thompson was no longer working at James. This fact alone cannot be a basis for recovering damages, however, because Thompson was an at-will employee who was free to stop working at James at any time.

Rather than being connected to Thompson's employment at Saks, solicitation of James' customers, or removal of James' confidential information, Dubinsky's calculation of damages focuses solely on a "but-for" model of what James' profits would have been had Thompson remained employed there. Under Dubinsky's analysis, James' damages were the same regardless of whether Thompson left to work at the Saks store in the same shopping mall or simply retired. Having neglected to show that its lost profits corresponded to the defendants' wrongful conduct, James failed to show that its lost profits corresponded to the defendants' wrongful conduct, James failed to show the necessary factor of proximate causation and thus did not carry its necessary burden of proof as to damages.[31]

The court also rejected the plaintiff's reliance on cases where the defendant's failure to fulfill a contractual obligation to remain employed over the period in which damages were calculated might show proximate cause.[32] The court again noted that Thompson was an "at-will" employee; therefore, reliance on this line of cases was not appropriate.[33] The court reversed the trial court's judgment finding the defendants jointly and severally liable in damages for breach of fiduciary duty and violation of Code §§18.2-499 and -500 and entered judgment in favor of the defendants.[34]

In *Blasé Industries Corporation d/b/a Wilson Solutions v. Anorad Corporation*,[35] a Texas case involving the hiring of an at-will employee in violation of a limited restrictive covenant, the Fifth Circuit Court of Appeals affirmed summary judgment in favor of the defendant, upholding the district court's finding that the plaintiff had failed to prove damages.[36] The plaintiff, Wilson Solutions ("Wilson"), a computer software consulting company, hired Jason Schwartzman in April 1997 to work as a consultant.[37] A year later, Wilson entered into an agreement with defendant Anorad, a manufacturer, to provide consulting services.[38] The agreement contained a "no-hire" provision in which both parties agreed, during the term of the agreement and for a period of one year thereafter, not to "solicit, employ or hire any person who is or who has been an employee of either party unless otherwise consented to in writing."[39] Schwartzman was placed with Anorad by Wilson as a consultant, but was not aware of the "no-hire" provision and did not consent to it.[40] A year later, Schwartzman resigned his employment with Wilson.[41] Anorad approached Wilson and asked for permission to hire Schwartzman, but permission was denied.[42] Despite that, Anorad offered Schwartzman employment as the company's director of information systems, which Schwartzman accepted.[43] Wilson sued seeking lost profit damages for the first year that Schwartzman worked at Anorad, namely, the amount of fees generated by Schwartzman at Wilson the year before he became employed by Anorad, minus his salary and overhead expenses.[44]

The district court granted summary judgment in favor of Anorad finding that the "no-hire" agreement was unreasonable and, therefore, unenforceable.[45] The court of appeals affirmed the district court's decision on another basis, specifically, that Wilson failed to prove its lost profits damages. Recognizing the legal standard, the court of appeals stated: "In Texas, lost profit damages must be established with 'reasonable certainty' [and] [l]ost profit damages may not be based on evidence that is speculative, uncertain, contingent, or hypothetical."[46] The court of appeals found that Wilson could not meet its burden to show, to a reasonable certainty, that it was damaged by Anorad's breach of the no-hire provision.[47] The aourt of appeals concluded that Schwartzman's status as an at-will employee was fatal to Wilson's claim for damages, explaining that "an at-will employee can be terminated at any time for any lawful reason."[48] Therefore, since an at-will employee has no guarantee of future employment, there is no way to prove an entitlement to future earnings.[49] The court of appeals opined that, since Schwartzman was an at-will employee, "any consulting fees Schwartzman would have potentially received are too uncertain to serve as the basis for Wilson Solution's request for damages."[50]

There is no question that, absent a liquidated damages provision, employers often face a difficult and uphill battle in proving damages in restrictive covenant enforcement cases.[51] Courts have struggled to provide a framework for determining when an employer has established a reasonable causative link between damages it has suffered and the defendant's (typically, the former employee's) conduct. The measure of damages recoverable under this situation varies from jurisdiction to jurisdiction. However, the general rule is that the defendant is responsible for all consequences stemming from the wrongful act.[52]

Courts typically apply a two-part test for evaluating causation issues: (1) causation in fact and (2) proximate cause. The first element is analyzed under the "but-for" test which asks whether the injury claimed would have occurred if the defendant had not engaged in the conduct at issue.[53]

The plaintiff has the burden of proving by a preponderance of the evidence the causal link between the plaintiff's injuries and the defendant's conduct. This evidence should show that more probable than not the defendant's conduct caused the plaintiff's harm. It is important to remember that causation need not be established by mathematical proof or beyond all doubt.[54]

In *Blasé*, the court noted that, "[w]hile some uncertainty as to the amount of damages is permissible, uncertainty as to the fact of damages will defeat recovery."[55] While damages can not be based on mere speculation, sufficient proof likely will exist where "a reasonable basis for computation and the best evidence which is obtainable under the circumstances of the case" is offered by the plaintiff to enable the trier of fact to arrive at a fair approximate estimate of loss.[56]

The lesson from *Saks* and *Blasé* is that a causation model based on continued employment assumptions about a former at-will employee will be deemed too speculative by courts to support a claim for damages in a restrictive covenant enforcement/tortious interference case. Rather, plaintiffs who seek to recover damages in addition to, or in lieu of, injunctive relief, must develop proof to connect their purported damages to the unfairly competitive actions of the former employee such as diversion of business, solicitation of customers or use of confidential information taken from the plaintiff.[57] As noted above, appropriate liquidated damages clauses in restrictive covenants may be an ideal way for employers to avoid the anticipated difficulty in proving damages based on such a breach.[58]

Footnotes

[1] Clanton v. Cain-Sloan Company, 677 S.W. 2d 441, 443 (Tenn. 1984) (citing Payne v. Railroad Company, 81 Tenn. 507 (1884).

[2] The Tennessee Court of Appeals in *Whittaker v. Care-More, Inc*., 621 S.W.2d 395, 396 (Tenn. Ct. App. 1981), noted the importance of the employment at-will doctrine to employers and to the free enterprise system: "It is not the province of this court to change the law as plaintiffs assert. That prerogative lies with the supreme court or the legislature. However, based upon our review of this area of the law we are compelled to note that any substantial change in the "employee-at-will" rule should first be microscopically analyzed regarding its effect on the commerce of this state. There must be protection from substantial impairment of the very legitimate interests of an employer in hiring and retaining the most qualified personnel available or the very foundation of the free enterprise system could be jeopardized."

[3] *See, e.g*., Dore v. Arnold Worldwide, Inc., 39 Cal. 4th 384, 2006 Cal. LEXIS 9288 (August 3, 2006).

[4] *See. e.g.*, Rose v. Tipton County Public Works Dept., 953 S.W. 2d 690, 695 (Tenn. Ct. App. 1997)("employee handbook provided that its policies were "subject to change by the Tipton County Public Works Department Committee without notice."); Claiborne v. Frito-Lay, Inc., 718 F. Supp. 1319, 1321 (E.D. Tenn. 1989) (handbook reserved to employer "the right to make changes to the material contained in this guide from time-to-time to meet changing conditions and business needs"); *see, e.g.,* Smith v. Morris, 778 S.W.2d 857, 858 (Tenn. App. 1988) (handbook's language clearly showed "that modifications were anticipated"); Bringle v. Methodist Hosp., 701 S.W.2d 622, 624 (Tenn. App. 1985) (handbook reserved to employer "right to change and abolish policies, procedures, rules and regulations"); *see also* Gregory v. Hunt, 24 F.3d 781, 786 (6th Cir. 1994) (handbook provided that policies were "subject to change by management, unilaterally and without notice"); Davis v. Connecticut Gen. Life Ins. Co., 743 F. Supp. 1273, 1279 (M.D. Tenn. 1990) (handbook reserved to employer "the right to change any or all such policies, practices and procedures in whole or in part at any time, with or without notice to you").

[5] Mark R. Filipp, Covenants Not to Compete, § 2.01 (3d ed. 2005).

[6] *Id*. at § 3.01; *see also* Vantage Tech., LLC v. Cross, 17 S.W. 3d 637, 644-47 (Tenn. Ct. App. 1999).

[7] Filipp, *supra* note 5, § 11.02-.03.

[8] 272 Va. 177, 630 S.E.2d 304 (2006).

[9] 272 Va. at 182, 630 S.E. 2d at 307-08.

[10] *Id*.

[11] 272 Va. at 180, 630 S.E. 2d at 306.

[12] *Id*.

[13] 272 Va. at 181, 630 S.E. 2d at 307.

[14] *Id*.

[15] *Id*.

[16] *Id*.

[17] *Id*.

[18] *Id*.

[19] 272 Va. at 182, 630 S.E. 2d at 307.

[20] *Id*.

[21] *Id*.

[22] 272 Va. at 182, 630 S.E. 2d at 308.

[23] *Id*.

[24] 272 Va. at 183, 630 S.E. 2d at 308.

[25] *Id*.

[26] 272 Va. at 184, 630 S.E. 2d at 309.

[27] 272 Va. at 185, 630 S.E. 2d at 309. The trial court also found that Thompson breached his restrictive covenant with James and enjoined Thompson from working at Saks' Tysons Galleria store for a 3-year period.

[28] 272 Va. at 188, 630 S.E. 2d at 311 (quoting Shepherd v. Davis, 265 Va. 108, 125, 574 S.E.2d 514, 524 (2003); (Carr v. Citizens Bank & Trust Co., 228 Va. 644, 652, 325 S.E.2d 86, 90 (1985)).

[29] 272 Va. at 189, 630 S.E. 2d at 311.

[30] 272 Va. at 189, 630 S.E. 2d at 312.

[31] 272 Va. at 188, 630 S.E. 2d at 311.

[32] 272 Va. at 190, 630 S.E. 2d at 312.

[33] *Id*.

[34] 272 Va. at 191, 630 S.E. 2d at 313.

[35] 442 F. 3d 235 (5th Cir. 2006).

[36] *Id*. at 240.

[37] *Id*. at 237.

[38] *Id*.

[39] *Id*.

[40] *Id*.

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] *Id*.

[45] *Id*.

[46] *Id*. at 238 (citing Tex. Instruments Incorp. v. Teletron Energy Mgmt., 877 S.W.2d 276, 281, 37 Tex. Sup. Ct. J. 676 (Tex. 1994); Carter v. Steverson & Co., 106 S.W.3d 161, 165-66 (Tex. App. Houston [1st Dist.] 2003, pet. denied).

[47] 442 F. 3d at 238.

[48] *Id*. at 239.

[49] *Id*.

[50] *Id*. The Court of Appeals noted that liquidated damages provisions are often included in restrictive covenants because of the difficulty of calculating damages in these cases. *Id*. at 38. The Court of Appeals further noted that no-hire agreement in the case before it did not have such a provision. *Id*. *See also* Filipp, *supra* note 5, §11.02[B].

[51] Filipp, *supra* note 5, § 11.02[A].

[52] International Minerals and Resources, S.A. v. Pappas, 96 F.3d 586, 1997 A.M.C. 1214 (2d Cir. 1996).

[53] W. Page Keeton Symposium on Tort Law, *The Common Sense of Cause in Fact*, 75 Tex. L. Rev. 1765 (1997) (suggests the five steps for approaching but-for questions are (a)identify the injuries in suit; (b) identify the wrongful conduct; (c) mentally correct the wrongful conduct to the extent necessary to make it lawful; (d) ask whether the injuries would still have occurred had the defendant been acting correctly in that sense; and (e) answer the question).

[54] *Id.*

[55] 422 F. 3d at 239 (citing Davis v. Small Bus. Inv. Co., 535 S.W. 2d 740, 743 (Tex. Civ. App.-Texarkana 1976).

[56] Par Industries, Inc. v. Target Container Co., 708 So. 2d 44, 50 (Miss. 1998).

[57] *Saks*, 272 Va. at 189, 630 S.E. 2d at 312. *See also* R. Dunn, *Recovery of Damages for Lost Profits*, §§2.25, 3.9 (1981).

[58] Filipp, *supra* note 5, § 11.02[B].

"Public Interest" Led, Judge-Made Law: The Case of the Tree Planters

*By Elizabeth K. Dorminey**

In a concerted and well-funded litigation effort, a *soi-disant* public interest law firm is conducting a campaign against America's reforestation industry. It managed to persuade a court to rewrite a section of the Fair Labor Standards Act concerning the obligation of an employer to reimburse nonimmigrant agricultural guest workers for certain expenses related to their accepting seasonal employment in the U.S. and is seeking, through litigation, to expand that holding to cover guest workers hired pursuant to other visa programs. That they are doing so at the expense of an entire industry, not to mention their clients' livelihood, seems beside the point. Their goal, plainly, is to use the courts to rewrite the law to their liking. And they are making great progress.

In *Arriaga v. Florida Pacific Farms*,[1] the Eleventh Circuit applied the Fair Labor Standards Act ("FLSA"),[2] to hold that an employer of legal foreign agricultural guest workers engaged pursuant to the H-2A visa program[3] must reimburse those workers for the entire cost of their inbound transportation and visa processing costs to the U.S. within their first week's pay. The rules for the H-2A visa program require reimbursement of the worker's inbound transportation costs after the contract is half-complete, and payment for outbound costs at the end of the contract.[4]

The visa program also provides that employers are subject to other State and Federal laws, such as the FLSA, regarding their workers, absent an explicit conflict.[5] The FLSA requires, *inter alia*, that employers must provide workers' weekly wages "in cash or in facilities," "free and clear" of improper deductions, at a rate no lower than the minimum wage rate ($5.15 per hour since 1997).[6] The only statutory exception to this requirement allows an employer to count as wages the reasonable cost "of furnishing [an] employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees."[7]

In *Arriaga* the Eleventh Circuit accepted the plaintiffs' argument[8] that the visa processing and transportation costs —costs incurred by the workers before they arrive for their first day of work—were "primarily for the benefit of the employer." As such, these costs could not be counted against wages as "facilities" under the FLSA, and thus were due to be reimbursed to the employees. This was thematically consistent with the H-2A regulations, which required reimbursement of inbound expenses after an employee completes one-half of the contract. However, the Eleventh Circuit went a step further, and ruled that because the FLSA requires more prompt reimbursement than the H-2A regulations, the employer must reimburse the workers for their inbound expenses (which the court reasoned were *de facto* improper deductions from their first week's pay, because incurred in advance of the work start date) in their first paycheck.[9] "If the FLSA mandates that employers reimburse certain expenses at an earlier time than the H-2A regulations, requiring employers to do so would satisfy both statutes."[10]

Before the district court, the employer had contended that this could result in the reimbursement of inbound transportation costs to a worker who works only one day, an argument that the district court had found persuasive. However, the Eleventh Circuit, reversing the district court, held that:

> This [wa]s not a legal argument but instead a policy-based argument that cannot guide our construction of these statutes . . . The fact that this risk exists is not an excuse for failure to comply with the FLSA; employers must reimburse employees for the cost of uniforms promptly, even though there is some risk that the employees may quit soon thereafter.[11]

This was a pious sentiment indeed for a court that had just accelerated a reimbursement requirement far beyond what a reasonable employer might expect from naively reading the H-2A regulations.

Central to the court's ruling in *Arriaga* was a reversal of longstanding FLSA decisions and regulations concerning transportation. In ruling that such costs were "primarily for the benefit of the employer," the Eleventh Circuit effectively reversed a long line of cases that had held, in the domestic context, that transportation, like meals and lodging, was primarily for the employee's benefit.[12] It is significant that the Eleventh Circuit resorted to the dictionary, and not the FLSA's regulations and case law, in reaching this conclusion.[13] Thus distancing its rationale from the H-2A regulations and tying it more closely to the FLSA, the Eleventh Circuit opened the door for other courts to bootstrap this holding into a requirement for reimbursement of transportation expenses for workers *other than* H-2A workers. This is exactly what is going on in the tree planter cases.

In the tree planter cases, the Southern Poverty Law Center ("SPLC")[14] seeks to expand *Arriaga* to require reimbursement of transportation expenses incurred by H-2B (non-agricultural)[15] foreign guest workers in their first week's pay as well, notwithstanding the fact that the H-2B visa program, unlike the H-2A, imposes on employers *no* duty to reimburse transportation costs. SPLC has sued four tree planting companies in nearly identical lawsuits seeking class action status under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA),[16] and collective, representative actions under the FLSA.[17] The four

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companies sued represent more than half of the reforestation industry in the United States. SPLC asks to represent every individual who has planted trees in the U.S. for one of these four defendant companies during the past six years.

Large paper companies rely on contractors to replant their land after timber is harvested. This is physically demanding, seasonal labor that U.S. citizens who have other employment options generally refuse. Contractors therefore utilize the H-2B visa program to procure short-term visas for foreign workers, mostly from Central America, who are willing to do the work. Contractors must comply with the rules for procuring visas, the Migrant and Agricultural Worker Protection Act ("AWPA"), and the FLSA, all of which prescribe requirements and conditions for the recruitment, employment, and pay of these workers.

These regulations prescribe, *inter alia*, that the workers receive not less than the "prevailing wage" determined by the Department of Labor (DOL) for that work, generally in the range of $6.50-8.50 per hour, that working conditions and pay must be disclosed in advance; and that overtime must be paid (forestry does not qualify for the FLSA's agricultural worker overtime exemption). Most workers are paid on a piece-rate basis, and if their piece-rate earnings do not meet or exceed the prevailing wage rate, their hourly pay is supplemented to that level. The planting season lasts from approximately December to March. During that period the tree planters can earn substantially more than what twelve months of steady labor in their home communities would give them.

In *Arriaga* the Eleventh Circuit concluded that, for purposes of the FLSA, that transportation and visa processing expenses primarily benefit the employer.[18] The court's reasoning is questionable. The Wage & Hour regulation on this issue states:

> (a) "Other facilities," as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term . . . transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.[19]

Apparently ignoring this language, the Eleventh Circuit in *Arriaga* held that:

> Transportation charges are an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of the employment of H-2A workers. When a grower seeks employees and hires from its locale, transportation costs that go beyond basic commuting are not necessarily going to arise from the employment relationship.

Thus the court appears to conclude that transportation costs are primarily for the benefit of the employee when incurred by domestic workers, but primarily for the benefit of the employer in the case of foreign guest workers. This is a novel reading of the FLSA, to say the least.

In most domestic cases under the FLSA transportation costs are considered primarily to benefit the employee, and are routinely included in the definition of "facilities," along with meals and lodging, for which the FLSA allows costs to be counted towards an employee's wages. The FLSA allows employers to treat some expenses as wages, if they are primarily for the benefit of the employee and not the employer. An uncontroversial example would be taxes: tax withholding amounts can be deducted from an employee's earnings even if they cause the employee's pay to drop below minimum wage because they primarily benefit the employee—the taxes are applied to the employee's tax bill, not the employer's.[20] On the other hand, expenses that are primarily for the benefit of the employer, such as the cost of employer-required uniforms, cannot be deducted from an employee's earnings if it would cause those earnings to drop below minimum wage.[21] Transportation costs are sometimes deductible and sometimes not deductible: it depends on whether they are determined to be primarily for the benefit of the employer (in which case they are not deductible), or the employee (in which case deductions may be made).[22]

In the tree planter cases, SPLC argues that the employers must reimburse their H-2B workers for the costs of recruitment, visa processing, and transportation on the theory that these expenses were incurred "primarily for the benefit of the employer," under the FLSA, which arguably makes them chargeable to the employer, not the employee. However, there is a serious question whether these costs—which the *Arriaga* court concluded were "primarily for the benefit of the employer" at least in part because their reimbursement was required by the H-2A regulations—should be considered the same way in the context of the H-2B visa, which does not mention transportation costs at all. This is boot-strapping at its best.

There also is the larger question whether transportation costs can properly be regarded as "primarily for the benefit of the employer." A well-reasoned analysis concluding that the benefit of such expenses is at least mutual to both employer and employee appears in *Alvarado v. R& W Farms*.[23] In that decision, which was overruled by *Arriaga*, the H-2A worker plaintiffs sought reimbursement for travel expenses from their home villages to the employer's farm. The *Alvarado* court analyzed the question of who benefits from travel in considerable depth:

> Arguing that the travel primarily benefits the employer, Plaintiffs also point out that the employer "badly needed the Plaintiffs to travel" to fill a labor shortage, and that Plaintiffs would have no desire to travel over 1000 miles from their homes absent the offer of employment. The Court acknowledges these to be logical premises, but also notes that the Plaintiffs apparently were

> so in need of employment that they voluntarily traveled such extended distances to obtain work. Essentially, Plaintiffs' logic runs both directions; it appears that Defendants needed Plaintiffs no more than Plaintiffs needed Defendants. The travel benefited the workers at least as much as it benefited the employer.[FN]5
>
> [FN5: The Court also notes that to adopt Plaintiffs' reasoning would require employers to reimburse travel costs such as these at the very moment work commenced to avoid violating the FLSA. The FLSA balances the protection of the employee with that of the employer. In this case, the employer must have some guarantee that the worker whose travel costs have been paid will remain at Defendants' farm and perform labor under the terms of the contract. Delaying reimbursement until half of the contract has been performed provides exactly that protection.]
>
> Since the Court concludes that the travel expenses do not principally benefit the employer, the expenses should not be factored into an analysis of the workers' wages. If the travel expenses are not subtracted from the wages earned, it is undisputed that the plaintiffs were paid in excess of minimum wage at all times during their employment with defendants. It is also undisputed that the Defendant adhered to the H-2A regulations regarding travel expenses. As a result, this Court finds that Defendants were not in violation of the FLSA by waiting until half of the contract period elapsed prior to reimbursing the workers' expenses for travel to Hillsborough County.[24]

Arriaga's judge-made change in the law raises a host of practical problems. Although the *Arriaga* court gave a passing nod to the policy argument behind the two-stage reimbursement schedule in the H2-A visa, acknowledging the risk that a worker who recoups his entire travel expense in his first paycheck might not stick around for the second. However, the court fastidiously stated that policy arguments were beyond its competence as a court of law. Nonetheless, the H-2A rules reflected a legitimate and genuine concern that foreign workers brought to the U.S. might be tempted to walk away from the employer who procured their visas and seek greener (if illegal) pastures elsewhere, departing after the first fat paycheck is received.

Arriaga also makes it considerably more expensive for employers to recruit labor in countries such as Guatemala and Honduras, from which transportation is considerably more expensive than it is from Mexico. Plaintiffs' counsel argue that the solution is simply for the paper companies to pay more for tree planting to cover the contractors' higher costs, but this argument does not hold up in the marketplace. If *Arriaga* prevails, visa-holding foreign guest workers already cost the price of transportation more than their unavailable domestic counterparts. Still higher costs for legal foreign workers will mainly encourage activity in the black market, where employers flout all laws and disappear rather than defend when sued. Although the four tree planting companies sued in these actions represent the majority of the reforestation contractors in the U.S., all are essentially mom-and-pop businesses. As such, they are hard-pressed to bear the cost of defense, not to mention potential liability for statutory damages that, given the size of the putative class of plaintiffs would be many times greater than their annual profits.

SPLC is litigating these cases very aggressively (the mere mention of *Alvarado* in a brief gave rise to a motion for contempt in one case, and motions for contempt and sanctions and to compel discovery fly thick and fast) and seems intent on changing the law in other ways through the courts. SPLC recently won a default judgment in Florida, *Avila-Gonzalez v. Barajas*, which appears to hold that an employer may not make otherwise legitimate deductions for "facilities" that primarily benefit the employee (e.g., meals and housing) from an H-2A worker's pay if those deductions cause the worker's hourly wage to fall below the prevailing wage, rather than the minimum wage.[25] This is another dramatic, judge-made expansion of the FLSA and yet another instance of clever boot-strapping by litigators to persuade a judge to expand the FLSA from the bench. SPLC already has cited *Barajas* in briefs in other cases in an apparent effort to broaden its application.

A further example is *Morante-Navarro v. T&Y Pine Straw, Inc.*,[26] another victory against a non-participating opponent, which applied *Arriaga* to hold that fees paid to labor recruiters could not be counted as "facilities" and credited against minimum wage under the FLSA. And in *De Luna-Guerrera v. North Carolina Growers Ass'n, Inc.*,[27] the same team of lawyers attempted to persuade a District Court in the Fourth Circuit to follow *Arriaga* and hold not only that H-2A workers must be reimbursed transportation costs in their first paycheck, but that the employers' failure to do so was a willful violation of the FLSA, subjecting them to a three-year period of liability instead of the usual two-year period that applies to non-willful violations. Although the argument was unsuccessful, the damages awarded included two years' back pay, doubled for liquidated damages, plus attorneys' fees.

So, what does all this mean? First, these cases serve as a reminder that despite efforts to ensure that only judges who will apply existing law, not forge new laws from the bench, are appointed, the latter are already well-represented (frequently, with life tenure) in the federal and the state judiciaries, and an astute lawyer with an agenda will often seek them out when they can choose venue. Judicial activism is not dead. In some courts, it is just waiting to happen.[28]

Second, the public interest bar is not to be underestimated. Aggressive litigation, often in tandem with profit-oriented plaintiffs' firms, has yielded substantial monetary awards that organizations like the SPLC, which does not benefit from federal funding and its restrictions on damages, are perfectly free to collect. Unlike most laws, the FLSA specifically allows for the award of "reasonable attorneys' fees," which are substantial and make FLSA collective action lawsuits particularly attractive to entrepreneurial plaintiffs' attorneys. With fat war-chests, seasoned professionals, assisted by idealistic and motivated

graduates from top law schools, they have the means to bring about the legal changes they seek. They can afford to distribute slick, comic-book style brochures (in Spanish) to recruit suitable clients, and to pay their expenses, even procure visas for depositions.

Defendants, on the other hand, often are hard-pressed to maintain the cost of defense, and the ruinous prospect of liability often forces them into a pragmatic settlement and capitulation even where good legal defenses exist. It is noteworthy that in both *Barajas* and *T&Y Pine Straw* the lawyers representing the workers argued their way to victory against empty chairs. Those defendant employers may have simply lacked the resources to continue to fight.

Third, these cases exemplify the urge to achieve through litigation ends that more properly should be sought through legislation. It is not likely, given the current overheated political environment, that legislation designed to expand entitlements to foreign guest workers would be successful in Congress. For those who advocate such changes, litigation provides an avenue to achieve real change. Ultimately, the judiciary is our last line of defense against those who would subvert the constitutional processes by which laws are supposed to be made, but one cannot always count on judges to do the right thing.

There is no neat conclusion: the tale of the tree planters is still unfolding.

Footnotes

[1] 305 F.3d 1228 (11th Cir. 2002).

[2] 29 U.S.C. § § 201-219.

[3] *See* Pub.L. No. 99-603, 100 Stat. 3359, Immigration Reform and Control Act of 1986 ("IRCA"), codified as amended in scattered sections of 8 U.S.C. Agricultural employers are permitted to hire nonimmigrant aliens as workers under the H-2A program if they first obtain from DOL certification that (1) there are insufficient domestic workers who are willing, able, and qualified to perform the work at the time and place needed; and (2) the employment of aliens will not adversely affect the wages and working conditions of domestic workers. *See id.* 8 U.S.C. §§ 1184(c)(1), 1188(a)(1). In addition to searching for domestic workers before gaining DOL certification, agricultural employers must hire any qualified domestic worker who seeks employment, under the terms of the work contract, during the first fifty percent of the work contract period. *See id.* § 1188(c)(3)(B)(i). An H-2A worker may be displaced in this situation and the agricultural employer is then relieved from its obligations to that worker under the work contract. *See id.* § 1188(c)(3)(B)(vi). An employer seeking the services of H-2A workers must compensate them at a rate not less than the federal minimum wage, the prevailing wage rate in the area, or the "adverse effect wage rate," whichever is highest. *See* 20 C.F.R. § 655.102(b)(9).

[4] The H-2A visa rules require an employer to pay an H-2A worker for inbound transportation and subsistence costs, if the worker completes 50 percent of the contract work period, unless the employer has previously done so. *See* 20 C.F.R. § 655.102(b)(5)(I). If the worker completes the contract work period, the employer is generally responsible for the payment of outbound transportation and subsistence costs. *See id.* § 655.102(b)(5)(ii).

[5] 29 C.F.R. § 655.103(b).

[6] 29 U.S.C. § 206(a)(1); 29 C.F.R. §§ 531.35, 776.4.

[7] 29 U.S.C. § 203(m).

[8] The plaintiffs in *Arriaga* were represented by Thomas Julian Page, A. Stephen Hut, Jr., and Robin A. Lenhart, of Wilmer, Cutler & Pickering in Washington, DC; Edward Tuddenham of Austin, TX; and Gregory S. Schell of the Migrant Farmworker Justice Project, Lake Worth, FL.

[9] "When employment statutes overlap, we are to apply the higher requirement unless the regulations are mutually exclusive." *Arriaga*, 305 F.3d at 1235, (citing Powell v. U.S. Cartridge Co., 339 U.S. 497, 519, (1950).

[10] *Id.* at 1235-36.

[11] *Arriaga*, 305 F.3d at 1236, n.8, (citing Marshall v. Root's Rest., Inc., 667 F.2d 559, 560 (6th Cir.1982)).

[12] *See* 29 C.F.R. § 531.32(a) (emphasis added): "'Other facilities,' as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas furnished for the noncommercial personal use of the employee**;** *transportation furnished employees between their homes and work* where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment."

[13] "We hold that this transportation cost is 'an incident of and necessary to the employment' of H-2A workers. Dictionary definitions of 'incident' and 'necessary' bear this out. Incident is defined as 'dependent on, subordinate to, arising out of, or otherwise connected with' something else. Black's Law Dictionary 765 (7th ed.1999); *see also* Black's Law Dictionary 762 (6th ed.1990) ('Used as a noun, ["incident"] denotes anything which inseparably belongs to, or is connected with, or inherent in, another thing, called the "principal."'). 'Necessary' means 'of an inevitable nature: inescapable.' Merriam-Webster's Collegiate Dictionary 776 (10 ed.1995). Transportation charges are an inevitable and inescapable consequence of having foreign H-2A workers employed in the United States; these are costs which arise out of the employment of H-2A workers. When a grower seeks employees and hires from its locale, transportation costs that go beyond basic commuting are not necessarily going to arise from the employment relationship. Employers resort to the H-2A program because they are unable to employ local workers who would not require such transportation costs; transportation will be needed, and not of the daily commuting type, whenever employing H-2A workers." *Arriaga*, 305 F.3d at 1241.

[14] Information about the SPLC and these cases on SPLC website, at www.splcenter.org.

[15] For reasons lost in the mists of history, forestry work is not considered agricultural work within the meaning of the FLSA, and forestry workers must have H2-B visas rather than H2-A visas.

[16] 29 U.S.C. §1801-1871.

[17] The four cases are *Escolastico de Leon-Granados v. Eller & Sons Trees, Inc.*, No. 1:05-CV-1473-CC (N.D. Ga., Atlanta Division): *Federico Salinas-Rodriguez v. Alpha Services, LLC*, No. 3:05-CV-

440-WHB-AGN (S.D. Miss., Jackson Division): *Hugo Martin Recinos Recinos v. Express Forestry LLC*, No. 05-1355 (E.D. La., New Orleans Division): and *Jose Rosiles-Perez v. Superior Forestry Services, Inc*., No. 1:06-CV-00006 (M.D. Tenn., Columbia Div.)

[18] *Arriaga*, 305 F.3d at 1237.

[19] 29 C.F.R. § 531.32.

[20] *See* 29 C.F.R. §531.38.

[21] *See*, *e.g.*, Marshall v. Root's Restaurant, 667 F.2d 559 (6th Cir. 1982).

[22] *See* 29 C.F.R. §531.32.

[23] 2001 WL 34103833 (M.D. Fla. 2001) (not published in F. Supp.).

[24] *Alvarado*, 2001 WL 34103833 at *4-*5.

[25] 2006 WL 643297 (M.D. Fla., March 2, 2006) (Covington, J.).

[26] 350 F.3d 1163, 1166 (11th Cir. 2003).

[27] 370 F. Supp. 2d 386 (E.D.N.C. 2005).

[28] On August 16, 2006 the Southern Poverty Law Center filed a lawsuit against the Decatur Hotels in New Orleans, making nearly identical claims of violations of the FLSA (including the *Arriaga* claim) on behalf of Central and South American H-2B workers who were recruited to work in New Orleans hotels after Hurricane Katrina. *See* Castellanos-Contreras v. Decatur Hotels LLC, No. 2:06-4340 (E.D. La.).

LITIGATION

PREMISES OWNER LIABILITY FOR SECONDHAND ASBESTOS EXPOSURE: THE NEXT WAVE?

*BY MARK A. BEHRENS & FRANK CRUZ-ALVAREZ**

Asbestos litigation has evolved over the years as plaintiffs' lawyers have raised new theories of liability in the attempt to reach new types of defendants. In earlier years, asbestos litigation was focused mostly on the manufacturers of asbestos-containing products, often called "traditional defendants." Most of those companies have been forced to seek bankruptcy court protection. As a result, plaintiffs' lawyers began to sue "peripheral defendants," including premises owners for alleged harms to independent contractors exposed to asbestos. Plaintiffs' lawyers are now targeting property owners for alleged harms to secondarily exposed "peripheral plaintiffs." These claims involve workers' family members who have been exposed to asbestos off-site, typically through contact with an employee or that person's soiled work clothes.

Since the beginning of 2005, several courts have decided whether premises owners owe a duty to "take home" exposure claimants. Recent decisions suggest that this well may prove to be dry in many states, but not all. Premises owner liability for secondhand asbestos exposures was rejected by the highest courts in Georgia and New York and a Tennessee trial court. On the other hand, the New Jersey Supreme Court and a Louisiana appellate court opened the door to such claims. At the time of this writing, the issue was pending before a Texas appellate court.

I. CASES FINDING NO LIABILITY

In January 2005, the Georgia Supreme Court in *CSX Transportation, Inc. v. Williams,*[1] became the first state court of last resort to consider the liability of an employer for off-site, exposure-related injuries to nonemployees. The court unanimously held that "Georgia negligence law does not impose any duty on an employer to a third-party, non-employee, who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace."[2] The appeal involved a wrongful death action on behalf of a woman and negligence claims by three children who were exposed to asbestos emitted from the clothing of family members employed at the defendant's facilities. The claims were initially filed in federal court and reached the Georgia Supreme Court on a certified question from the United States Court of Appeals for the Eleventh Circuit.

The court held that the duty of employers to provide their employees with a reasonably safe work environment does not extend to individuals who were neither employees nor exposed to any danger in the workplace; there would have to be a basis for extending the employer's duty beyond the workplace. The court noted that "mere foreseeability" of harm had been rejected as a basis for creating third-party liability in previous cases.[3] The court also cited New York law for the proposition that duty rules must be based on policy considerations, including the need to limit the consequences of wrongs to a controllable degree. The court concluded, "we decline to extend on the basis of foreseeability the employer's duty beyond the workplace to encompass all who might come into contact with an employee or an employee's clothing outside the workplace."[4]

In October 2005, New York's highest court, with one justice abstaining, unanimously reached the same conclusion and reversed an appellate court in *In re New York City Asbestos Litigation* (*Holdampf v. A.C. & S., Inc.*).[5] The action was brought by a former Port Authority employee and his wife after the wife developed mesothelioma from washing her husband's asbestos-soiled work clothes.

The court said that, under New York law, a defendant cannot be held liable for injuries to a plaintiff unless a specific duty exists. That duty, the court said, is not defined by the foreseeability of harm. Rather, courts must balance a variety of factors, including the reasonable expectation of parties and society generally, the likelihood of unlimited or insurer-like liability, and public policy. "[O]therwise, a defendant would be subjected 'to limitless liability to an indeterminate class of persons conceivably injured' by its negligence acts."[6]

The court then explained that a duty could not be imposed on the defendant for failing to protect the decedent from harms resulting from off-site exposure to asbestos unless the defendant's relationship with the plaintiff or with a third-party under its control put the defendant in the best position to protect against the risk of harm. In these circumstances, the court explained, the "specter of limitless liability is not present because the class of potential plaintiffs to whom the duty is owed is circumscribed by the relationship."[7] Plaintiffs alleged that the defendant's status as an employer and as a landowner supported a duty running from the defendant to the decedent.

The court found that the duty of an employer to provide a safe workplace does not extend to individuals who are not employees.[8] The court added that the subject litigation did not involve the defendant's failure to control the conduct of a third-party tortfeasor, because there was no third-party tortfeasor in the case, nor was there a relationship between the defendant and the decedent that

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required the defendant to protect the decedent from contact with either her husband or his work clothes.

Next, the court considered the defendant's status as a landowner and, again, found no duty ran to the decedent. The court said that the facts before it were "far different" from cases that have recognized a landowner's duty to prevent the negligent release of toxins into the ambient air.[9] The decedent's exposure came from handling her husband's work clothes; none of the defendant's activities released "asbestos into the community generally."[10]

Finally, the court concluded that the duty rule sought by plaintiffs would be unworkable in practice and unsound as a matter of policy. The court expressed skepticism that a new duty rule could be crafted to avoid potentially open-ended liability for premises owners. For example, the new duty rule could potentially cover anyone who might come into contact with a dusty employee or that person's dirty clothes, such as a babysitter or employee of a local laundry. The court also rejected plaintiffs' contention that the incidence of asbestos-related disease caused by secondhand exposures is rather low, candidly observing that "experience counsels that the number of new plaintiffs' claims would not necessarily reflect that reality."[11]

Earlier this year, a Tennessee trial court reached the same conclusion in *Satterfield v. Breeding Insulation Co.*,[12] arising from the death of a child from secondhand asbestos exposure. The court held that Tennessee law "does not stand for the broad extension of the duty of an employer to third parties as argued by the Plaintiffs in this case." Accordingly, the court granted the defendant's motion for summary judgment, "leaving it to consideration by the Tennessee legislature as to whether it is wise to establish the duty sought by Plaintiffs in the case at bar."

II. A Foreseeability Analysis May Invite Claims

In April 2006, the New Jersey Supreme Court reached a different conclusion in *Olivo v. Owens-Illinois, Inc.*,[13] involving an independent contractor who worked as a union welder at a refinery owned by Exxon Mobil. During the course of his employment, the plaintiff was exposed to asbestos, and his late wife developed mesothelioma as a result of handling his work clothes. The court held that "to the extent that Exxon Mobil owed a duty to workers on its premises for the foreseeable risk of exposure to [asbestos], similarly, Exxon Mobil owed a duty to spouses handling the workers' unprotected work clothing based on the foreseeable risk of exposure from asbestos brought home on contaminated clothing."[14] The court emphasized that, unlike other states such as New York, New Jersey law attaches "significance" to the foreseeability of risk in deciding duty questions.[15] The court even referred to forseeability as "determinant" in establishing the defendant's duty of care.[16] The court then remanded the case for further consideration, concluding that there were "genuine issues of material fact about the extent of the duty that Exxon Mobil owed to [the plaintiff], and whether Exxon Mobil satisfied that duty."[17]

The Louisiana case, *Zimko v. American Cyanamid*,[18] involved a plaintiff who claimed he developed mesothelioma from household exposure to asbestos fibers that clung to his father and his father's work clothes. Plaintiff also attributed his disease to exposures at his own place of employment. The court, without engaging in an independent analysis, concluded that the father's employer owed a duty of care to the son. In recognizing this duty, the court said it found the New York intermediate appellate court's decision in *Holdampf* to be "instructive."[19] As explained, the New York Court of Appeals overturned the intermediate appellate court's ruling in *Holdampf* after *Zimko* was decided.

Recently, the validity of *Zimko* was called into question in a concurring opinion from a Louisiana appellate court in *Thomas v. A.P. Green Indus., Inc.*[20] The case did not involve secondhand asbestos exposure, but was a typical premises owner liability case brought by an exposed worker. Judge Tobias explained in his concurring opinion:

> *One must clearly understand the factual and legal basis upon which Zimko was premised and its history.*
>
> *Zimko* was a 3 to 2 decision of this court. [The father's employer] was found liable to the plaintiff and [plaintiff's' employer] was found not liable to the plaintiff. Neither [company] sought supervisory review from the Louisiana Supreme Court, but the plaintiff did on the issue of the liability of [his employer]. . . . Thus, the Supreme Court was not reviewing the correctness of the majority opinion respecting [the liability of the father's employer]. . . . *Any person citing Zimko in the future should be wary of the majority's opinion in Zimko in view of the Louisiana Supreme Court never being requested to review the correctness of the liability of American Cyanamid.*
>
> The Court of Appeals of New York (that state's highest court) briefly alluded to the problem in *Zimko* in the case of *In re New York City Asbestos Litigation* . . . and chose not to follow *Zimko*.[21]

III. The Texas Case

The Fourteenth Court of Appeals in Houston is considering an appeal in *Exxon Mobil Corp. v. Altimore*,[22] involving plaintiff's claim that she developed mesothelioma from exposure to asbestos at home through handling the clothes of her husband, who worked at defendant's facility. The case was tried to a jury, and resulted in a verdict for the plaintiff. The Texas Supreme Court has not yet ruled on the question whether an employer owes a duty of care to an employee's spouse who claims an asbestos injury.

IV. Policy Implications of Potentially Unlimited Liability

In 1997, the United States Supreme Court in *Amchem Prods. Inc. v. Windsor*,[23] said that this country was experiencing an "asbestos-litigation crisis." As claims poured in at an extraordinary rate, scores of employers were

forced into bankruptcy and payments to the sick became threatened.[24]

Recent studies have shown that up to ninety percent of the claimants who file asbestos claims today are not sick. Those who are sick face a depleted pool of assets as asbestos lawsuits have bankrupted at least seventy-eight companies. Plaintiffs' lawyers have responded to these bankruptcies by dragging more defendants into the litigation. The *Wall Street Journal* has reported that "the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing."[25] The number of asbestos defendants now includes over 8,500 companies, affecting many small and medium size companies in industries that cover 85% of the economy. Plaintiffs' attorney Richard Scruggs has called the litigation an "endless search for a solvent bystander."[26]

Premises owner liability for "take home" exposure injuries represents the latest frontier in asbestos litigation. These actions clearly involve highly sympathetic plaintiffs. Yet, as several leading courts have appreciated, the law should not be driven by emotion or mere foreseeability. Broader public policy impacts must be considered, including the very real possibility that imposition of an expansive new duty on premises owners for off-site exposures would exacerbate the current "asbestos-litigation crisis." Plaintiffs' attorneys could begin naming countless employers directly in asbestos and other mass tort actions brought by remotely exposed persons such as extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker when he or she was wearing dirty work clothes. Current filing trends indicate that the vast majority of these plaintiffs would have no present asbestos-related physical impairment.

Furthermore, adoption of a new duty rule for employers could bring about a perverse result: nonemployees with secondary exposures could have greater rights to sue and potentially reap far greater recoveries than employees. Namely, secondarily exposed nonemployees could obtain noneconomic damages, such as pain and suffering, and possibly even punitive damages; these awards are not generally available to injured employees under workers' compensation.

CONCLUSION

The level of recent activity in litigation brought by peripheral plaintiffs against premises owners suggests that more courts will be asked to decide cases involving secondhand asbestos exposures. As more courts confront this issue, they would be wise to follow the sound reasoning of the New York and Georgia high courts and rule that premises owners do not owe a duty of care to remote plaintiffs injured off-site through secondhand exposure to asbestos or other hazards on the property.

Footnotes

[1] 608 S.E.2d 208 (Ga. 2005).

[2] *Id*. at 210.

[3] *Id.* at 209.

[4] *Id*. at 210.

[5] 840 N.E.2d 115 (N.Y. 2005).

[6] *Id*. at 119 (quoting Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1060 (N.Y. 2001) (declining to impose liability on handgun manufacturers for harms caused by criminal misuse of firearms)).

[7] *Id*.

[8] *See also* Widera v. Ettco Wire & Cable Corp., 204 A.D.2d 306 (N.Y. App. Div. 2d Dep't 1994) (refusing to recognize a cause of action against an employer for injuries suffered by its employee's family member as a result of exposure to toxins brought home on the employee's work clothes).

[9] *Id*. at 121.

[10] *Id*.

[11] *Id*.

[12] No. L-14000 (Tenn. Cir. Ct. Blount County Mar. 21, 2006).

[13] 895 A.2d 1143 (N.J. 2006).

[14] *Id*. at 1149.

[15] *Id*. at 1148.

[16] *Id*.

[17] *Id*. at 1151.

[18] 905 So. 2d 465 (La. Ct. App. 2005), *writ denied*, 925 So. 2d 538 (La. 2006).

[19] *Id*. at 483.

[20] No. 2005-CA-1064 (La. App. Ct. May 31, 2006).

[21] *Thomas,* slip op. at 2 (Tobias, J., concurring) (emphasis added).

[22] No. 14-04-01133-CV.

[23] 521 U.S. 591, 597 (1997).

[24] *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

[25] Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.

[26] *Medical Monitoring and Asbestos Litigation—A Discussion with Richard Scruggs and Victor Schwartz*, 17:3 Mealey's Litig. Rep.: Asbestos 5 (Mar. 1, 2002) (quoting Mr. Scruggs).

"Class" Arbitration? What About the Rights of Absent "Class" Members?

*By Edward C. Anderson & Kirk D. Knutson**

During the past two decades, in response to the cost, risk and inefficiency of the litigation system, an increasing number of attorneys have been turning to arbitration as a preferred means of resolving disputes.[1] As one result, arbitration clauses are now regularly included in form contracts governing millions of relationships that drive the United States economy. This trend has caused courts to examine the relationship between arbitration and class actions under Rule 23 of the Federal Rules of Civil Procedure.[2]

Three years ago, in *Green Tree Financial Corp. v. Bazzle*,[3] the Supreme Court considered whether a particular arbitration clause prohibited "class" arbitration. This article begins by discussing that decision and identifying the several questions remaining in its wake. One of those questions—whether there are any limitations on class action "waivers"[4] in arbitration—has engendered a substantial body of case law. The second part of this article examines some of those decisions.

The third part of this article discusses the distinctions between arbitration and class actions as procedural mechanisms. Finally, the article concludes by considering the impact of the nature of arbitration and the contractual rights of the parties, among other things, on any "class arbitration" rules. To accommodate the rights of absent "class" members, "class" arbitration must follow the traditional affirmative "opt-in" procedure rather than the "opt-out" procedure applicable under Rule 23.[5]

The Supreme Court Visits the Issue of Class Arbitration and Leaves Most Questions Unanswered

In *Bazzle*, the Supreme Court divided on the issue of whether the arbitration clause at issue prohibited class arbitration, leaving the more universal questions without direct answers. *Bazzle* combined two related cases from the South Carolina state courts. In each case, the plaintiff brought a putative class action against Green Tree Financial Corporation ("Green Tree"), a commercial lender, alleging that Green Tree failed to provide the borrowers with a legally required document in connection with their purchase of a mobile home.[6]

Green Tree maintained that the arbitration clause in its contracts with the plaintiffs precluded the lawsuits and required individual arbitration. In one case, the trial court compelled arbitration but certified an arbitration class.[7] In the other, the arbitrator followed the lead of the trial court and certified an arbitration class.[8] The same arbitrator heard both cases and awarded $10,935,000 in damages to one class and $9,200,000 to the other.[9]

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In appealing the trial court's subsequent confirmation of those awards, Green Tree argued that by imposing class arbitration, the trial court and arbitrator failed to enforce the arbitration agreement in accordance with its terms as required by the Federal Arbitration Act ("FAA").[10] The South Carolina Supreme Court disagreed, holding that Green Tree's contracts were silent on the issue and that South Carolina law permitted class arbitration.[11]

The United States Supreme Court granted *certiorari*. In a plurality opinion authored by Justice Breyer and joined by Justices Scalia, Souter and Ginsburg, the Court held that, in deciding that the agreement did not bar class arbitration, the lower courts had usurped the arbitrator's authority since an arbitration contract necessarily delegates such questions of interpretation to the arbitrator.[12] The Court remanded the case to allow the arbitrator to decide the question of whether the agreement prohibited class arbitration because the trial court decided the question in one case and the arbitrator had followed the court's lead in the other case.[13]

Beyond that narrow holding, the Court was splintered. Justice Stevens concurred in the result solely to effectuate a controlling judgment. Chief Justice Rehnquist authored a dissenting opinion, joined by Justices O'Connor and Kennedy, which concluded that the contracts at issue actually did bar class arbitration and, accordingly, South Carolina's imposition of class arbitration ran afoul of the FAA.[14] Justice Thomas dissented in adherence to his continuing belief that the FAA does not apply to state court proceedings.

In the wake of *Bazzle* there remain several unanswered questions. For example, what language is sufficient to forbid class arbitration, triggering the FAA requirement that an arbitration agreement be enforced in accordance with its terms? A related question is the degree to which courts will review an arbitrator's determination that an arbitration clause does or does not prohibit class arbitration.

These questions, along with *Bazzle* itself, will eventually become moot, as attorneys drafting arbitration clauses fulfill Justice Steven's prediction that all future clauses will explicitly prohibit class arbitration.[15] However, these questions are of continuing significance for the many preexisting arbitration clauses that are silent or ambiguous on the issue of class arbitration.

The Court's divergent interpretations of the Green Tree language imply that when an arbitration clause is silent or inartful on the issue of class arbitration, it is necessarily ambiguous on that issue.[16] Ambiguity effectively forecloses meaningful review of the arbitrator's determination because the meaning of an ambiguous contract is generally considered a question of fact,[17] and an arbitrator's findings of fact are virtually unassailable.[18] Given the far-reaching import of an arbitrator's decision to certify a class, the absence of any meaningful review of a "class" certification is one dramatic result of *Bazzle*.

Even Where the Clause Prohibits "Class" Arbitration, Some Courts Refuse to Honor the Prohibition

As predicted by Justice Stevens,[19] attorneys have responded to *Bazzle* by drafting arbitration clauses that explicitly bar class arbitration, usually by including a class action "waiver."[20] *Bazzle* implies class action "waivers" in arbitration agreements are permissible because, on remand, the arbitrator was free to determine that the arbitration clause prohibited class arbitration. Moreover, three of the dissenting Justices found that the clause in question actually prohibited class arbitration and therefore, that the FAA required enforcement of the arbitration clause as written, thus further establishing the effectiveness of class action "waivers" in arbitration agreements.[21]

Because of the impact of these class action waivers on the class action industry,[22] their validity remains the subject of vigorous litigation, generally under the rubric of "unconscionability." The vast majority of jurisdictions enforce class action "waivers" in arbitration agreements, holding that such "waivers" must be given effect under the FAA.[23] The majority rule recognizes that the exclusion of "certain litigation devices is part and parcel of arbitration's ability to offer simplicity, informality, and expedition, characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims."[24]

In those rare cases where a "waiver" has been found unconscionable, the matter is still referred to arbitration, where the arbitrator conducts all subsequent proceedings.[25] In *Discover Bank v. Superior Court*,[26] the California Supreme Court held that a class action "waiver" in an arbitration clause was unconscionable under California law where the plaintiff alleged that the "waiver" was part of "a scheme to deliberately cheat large numbers of consumers out of individually small sums of money."[27]

The New Jersey Supreme Court adopted a similar analysis in *Muhammad v. County Bank of Rehoboth Beach*,[28] holding that a particular class action "waiver" in an arbitration clause was unconscionable under New Jersey law. In reaching this holding, the Court reasoned that enforcement of that "waiver" would "functionally exculpate wrongful conduct by reducing the possibility of attracting competent counsel to advance the cause of action."[29] However, on the same day it decided *Muhammad*, the court held that, under New Jersey law, such "waivers" were not generally unconscionable.[30]

A third, and particularly interesting, exception to the majority rule is *Kristian v. Comcast Corp.*,[31] in which the First Circuit Court of Appeals held that a class action "waiver" was unenforceable because without a class action, plaintiffs would be unable to vindicate their statutory rights.[32] As in *Muhammad*, the court found that the "waiver" would insulate the defendant from privately enforced antitrust liability because the prospect of a substantial recovery was a necessary incentive to justify the difficulty and expense of proving an antitrust violation.[33]

However, instead of ruling that the class action "waiver" was unconscionable under state law, the First Circuit concluded that enforcement would result in prohibitive costs and thus prevent the plaintiffs from vindicating their statutory rights in the arbitral forum.[34] Barring settlement, *Kristian* may be a good candidate for Supreme Court review, since it is arguably inconsistent with the Supreme Court's ruling in *Gilmer*[35] and presents the important question whether the FAA allows any limitations on class action "waivers".

One district court has already carried *Kristian* beyond the orbit of its reasoning. In *Wong v. T-Mobile USA, Inc.*,[36] the United States District Court for the Eastern District of Michigan relied on *Kristian* in holding that a class action "waiver" was unenforceable because it prevented the plaintiff from vindicating his statutory rights under the Michigan Consumer Protection Act.[37] Despite relying on *Kristian* and acknowledging that it represented a minority position, the court completely neglected the *sine qua non* of that decision —namely, the difficulty and expense of proving an antitrust violation.

These few courts have not been alone in their refusal to honor class arbitration "waivers." In November 2004, arbitration administrator JAMS announced that it would not honor class waivers, asserting that "the inclusion of such clauses is an unfair restriction on the rights of the consumer."[38] This disregard for party agreements was met by a barrage of criticism, and JAMS subsequently abandoned the policy.[39] JAMS now requires arbitrators to decide on a case-by-case basis whether an arbitration clause "permits the arbitration to proceed on behalf of or against a class."[40]

Enforceability Often Turns on Choice of Law

Although these outposts of minority law are limited by geography and narrow circumstances, they are not insignificant. Accordingly, "choice-of-law" will often dictate the enforceability of the "waiver." In *Discover Bank*, the class action prohibition was reinstated on remand because the cardmember agreement provided for the application of Delaware law and, under Delaware law, class action "waivers" in arbitration agreements are enforceable.[41] In *Muhammad*, the agreement also provided for the application of Delaware law, but the court did not address application of state law because the defendants had not properly raised the issue.[42] It is unclear which law will apply on remand or at arbitration. These cases underscore the importance of choice-of-law provisions and the importance, for all parties, of addressing the issue at each stage of arbitration or litigation.

Arbitration and Rule 23 Class Actions are Distinct Procedural Mechanisms That Cannot Practically Be Merged.

In federal court, class actions are authorized and governed by Rule 23 of the Federal Rules of Civil Procedure.[43] The drafters of Rule 23 envisioned class actions as a way to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."[44]

The class action device was intended partly to facilitate the prosecution of minor claims that, standing alone, are not economically feasible, given the costs of litigation and the American Rule, which ordinarily prevents a prevailing party from recovering its attorney fees.[45] It was also intended to free courts from the burden of having to try multiple suits on the same subject matter.[46]

Arbitration has the same purpose and achieves the same goals. It directly reduces the burden on the court system by removing cases to a different forum. Moreover, the streamlined procedures of arbitration are naturally conducive to the prosecution of minor claims.[47] As the Fifth Circuit Court of Appeals observed in upholding a class arbitration "waiver," the exclusion of "certain litigation devices," such as the class action, "is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition,' characteristics that generally make arbitration an attractive vehicle for the resolution of low-value claims."[48] Arbitration is suitable for "low-value" or "consumer" claims because the corporate party typically bears the cost of arbitration and an arbitrators have the authority to award attorneys' fees.[49]

Some class action advocates have argued in support of class actions by portraying class counsel as "private attorneys general" who punish and deter wrongdoing where the public authority has failed to act.[50] However, the history and substance of Rule 23 do not support this theory of class actions.[51] Many states have enacted private attorney general statutes authorizing a private party to sue on behalf of large groups or the general public,[52] which indicates that Congress, legislatures and courts are perfectly capable of conferring such authority when they intend to do so.

Since arbitration and class actions are distinct means of achieving similar purposes, it should come as no surprise that there is inherent friction between the two procedures. Generally speaking, this friction derives from the "attempt to combine the streamlined procedures of an informal dispute resolution mechanism with the complexity of resolving the individual claims of large numbers of individuals, in some cases tens of thousands or more."[53] One commentator offers this evocative description of class arbitration: "half fish and half fowl, and about as pretty as that image suggests."[54]

By infusing arbitration with the complexity and numerosity of class actions, thereby eviscerating its "simplicity, informality, and expedition,"[55] merger with class action procedure would deprive arbitration of the attributes that make it friendly and feasible to the individual consumer.[56] As the Supreme Court has observed, "arbitration's advantages often would seem helpful to individuals . . . who need a less expensive alternative to litigation."[57]

The merger of arbitration and class actions is also troubling because it would extinguish the contractual rights of the absent "class members" to elect and enforce dispute resolution procedures. In other words, procedural rules would eclipse substantive rights.[58] The *Bazzle* plurality avoided these issues by simply referring the entire issue to the arbitrator, but the three dissenting Justices explained how the "class" mechanism would deprive the parties of their contractual rights.[59] Specifically, these Justices observed that applying the "class" mechanism in arbitration destroys at least two distinct rights: (1) the right to participate in selecting the arbitrator; and (2) the right to have individual claims decided by different arbitrators.[60]

Further, "class" arbitration carries much greater risk than a Rule 23 action. Rule 48 of the Federal Rules of Civil Procedure requires a unanimous verdict by a jury of no fewer than six members.[61] Accordingly, in a Rule 23 class action, the risk of an unfavorable outcome is diffused by delegating independent fact finding authority to at least six separate individuals. Moreover, the judge operates as another constraint, first by deciding whether to certify a class action and later by guarding against a settlement or verdict unsupported by the evidence.

In "class" arbitration, by contrast, all of that power is likely to be concentrated in the hands of a single arbitrator.[62] Moreover, under some arbitration regimes, the arbitrator is not constrained by any objective standard.[63]

Because an arbitrator's decisions, unlike a verdict, is subject to very limited review,[64] the concern inherent in giving one person such far-reaching authority is even greater than it would be in traditional litigation. In an attempt to mitigate this concern, some arbitration administrators have adopted rules that allow parties to seek judicial review of an arbitrator's decision to certify an arbitration class.[65] However, given the limited grounds for review, it would be exceedingly difficult to challenge an arbitrator's decision on class certification, especially since class certification is a fact-intensive inquiry.[66] These factors combine to make class arbitration fraught with the potential for irreparable error. This increases the probability of widely criticized "blackmail" settlements.[67]

"Class" Arbitration—What Rules?

Of those courts that have declined to uphold class action waivers, the New Jersey Supreme Court was the to directly acknowledge that Rule 23 does not apply in arbitration and to note that arbitration administrators or the contracting parties must create the "class" rules on their own. That court also suggested that in drafting "class" arbitration rules, arbitration administrators could cure some of the abuses inherent in current Rule 23 practice.[68]

Many procedural rules are somewhat arbitrary. However, the rules pertaining to absent "class" members are not. The rights of absent class members are demonstrably at risk in a Rule 23 action and far more so, in a "class" arbitration. In theory, absent class members are represented by the named plaintiffs and their attorneys,[69] but a large number of reported cases cast doubt on that assumption, because class counsel is so frequently the largest beneficiary.[70] "Class" arbitration greatly increases those risks while reducing judicial review. Additionally, absent "class" members in arbitration have more rights than Rule 23 class members and need more protection.

Prior to 1966, class actions used a voluntary "opt-in" procedure whereby members affirmatively joined the class.[71] Absent class members were not presumed to be part of the class by reason of ignorance or inaction. The 1966

amendments to Rule 23 reversed this longstanding procedure and created the "opt-out" procedure whereby absent members are bound by any judgment, unless they affirmatively request exclusion. Rule 23 does not even require actual service of process.[72] The constitutionality of the "opt-out" procedure rests on the legal fiction that class counsel and the named plaintiffs represent the interests of absent class members, so that actual notice is not essential.[73]

That fiction underlay the Supreme Court's holding in *Phillips Petroleum Co. v. Shutts*[74] that a forum state could exercise jurisdiction over the claims of absent class members despite the absence of the minimum contacts otherwise necessary for personal jurisdiction.[75] The Court posited that an absent class member "is not required to do anything" because "[h]e may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection."[76]

The Supreme Court revisited the rights of absent class members in *Amchem Products, Inc. v. Windsor*.[77] In *Amchem*, the Court held that class certification requirements intended to protect absent class members "demand undiluted, even heightened, attention" when a class is being certified for settlement purposes only.[78] In reality, these safeguards meant to protect absent class members are decidedly flimsy, as illustrated by the famous remark of prominent class action attorney William Lerach: "I have the greatest practice of law in the world . . . I have no clients."[79]

Since *Amchem*, courts have increasingly subjected class certifications to heightened scrutiny. For example, in *Mirfasihi v. Fleet Mortgage Corp.*, [80] the Seventh Circuit Court of Appeals rejected a settlement giving class counsel a "generous fee" because the settlement "sold . . . 1.4 million claimants down the river."[81] Similarly, in *Smith v. Sprint Communications Co., L.P.*,[82] the Seventh Circuit vacated a settlement-only class certification because the nationwide class settlement did not satisfy the Rule 23 requirement that the representative parties "fairly and adequately protect the interests of the class."[83] These cases reflect growing concern over the efficacy and fairness of the "opt-out" procedure in Rule 23 class actions.

In "class" arbitration, the "opt-out" procedure is untenable for at least six additional reasons. First, as the New Jersey Supreme Court observed, Rule 23 does not apply to "class" arbitration.[84] Accordingly, in arbitration there is no authority for the legal fictions that underlie Rule 23.

Second, the jurisdiction of the arbitrator over each arbitration litigant depends upon the arbitration contract. An arbitrator is not a judge in a court of general jurisdiction. The arbitrator has no authority, *sua sponte*, to assert jurisdiction over a contracting party who has never appeared or agreed to an arbitration proceeding or a modification of his or her contract. In fact, the FAA and state arbitration laws lay out specific statutory mechanisms to compel non-parties to arbitrate disputes.[85] These processes do not remotely resemble Rule 23 procedures.

Third, absent class members in a class arbitration have specific contractual rights that have no analogue in a Rule 23 class action. Chief Justice Rehnquist's dissenting opinion in *Bazzle* touched on two of those rights—the right to participate in selecting the arbitrator and the right to a separate decision—in recognizing that each "class" member must consent to the chosen arbitrator.[86] Absent affirmative waiver of those rights, there is no authority for a "representative" to exercise them for the absent class members.

The overarching contractual right at stake is the class member's right to an individual arbitration. For consumer and employee claimants, the right to an individual arbitration offers tangible benefits because the business is required to pay most or all of the expense of arbitration[87] and arbitration rules provide for the recovery of costs and fees.[88] "Class" arbitration contains no such assurance. In fact, the courts that have voided "class" prohibitions have assumed that class members must bear significant costs.

Fourth, arbitration has general contractual and statutory attributes that preclude use of the passive "opt-out" procedure in class arbitration. Foremost, "the less formal procedures in arbitration, which are designed for and work well in individual arbitrations, may raise concerns about whether the rights of absent class members are sufficiently protected."[89]

Fifth, if an "opt-out" procedure is used, confirmation of the award would be virtually impossible, unless the court chose to ignore the statutory requirements of the FAA or Revised Uniform Arbitration Act ("RUAA"),[90] which demand specific notice and delivery of awards, set time limitations for challenge and enforcement, and set forth the procedure for confirmation. Confirmation of a "class" arbitration award is different from entering judgment in a Rule 23 class action, which requires only "the best notice practicable under the circumstances."[91] As previously noted, Rule 23 and its attendant legal fictions do not apply to arbitration.

Finally, the confidentiality of arbitration is at odds with the public nature of the Rule 23 "opt-out" procedure, which, in part, relies on mass media to disseminate notice to absent class members.

Of course, an "opt-out" procedure does not require actual notice or a response, by which a "class" member could conceivably waive any or all of these rights. Given the panoply of rights these absent "class" members must surrender, only an "opt-in" procedure, with an affirmative waiver or consent, can ensure that arbitration parties who become "class" members have agreed to the proceeding, consented to the modification of the original arbitration clause, and effectively waived all of the statutory and contractual rights that flow from an arbitration agreement.

CONCLUSION

In conclusion, the streamlined procedures of arbitration make it a viable forum for the prosecution of minor claims, such that the merger of arbitration and the class action is both unnecessary and unwise, as well as frequently prohibited by a contract enforceable under the FAA. In the vast majority of jurisdictions, this is the law.

If one were to posit the desirability of "class" arbitration, Congress and the various states may choose to change the FAA and state arbitration laws to include "class-like" procedures. Alternatively, parties could contract to

waive the various procedural rights built into current arbitration statues and procedural rules. In the absence of these changes, only an "opt-in" procedure ensures that absent participants consent to the modification of their own arbitration contracts and participation in this hybrid litigation.

Footnotes

[1] *See* Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: Current Trends and Developments*, 53 Bus. Law. 1075, 1075 (1998).

[2] Following 1996 amendments, most states adopted class action rules modeled on Rule 23. *See* Carol Rice Andrews, *The Personal Jurisdiction Problem Overlooked in the National Debate About "Class Action Fairness,"* 58 SMU L. Rev. 1313, 1319 n. 34 (2005). One example is Rule 42 of the Texas Rules of Civil Procedure. Subsequent references to Rule 23 also refer to its state court progeny.

[3] U.S. 444 (2003).

[4] The term "class action waiver" is something of a misnomer because waiver generally denotes the relinquishment of a right, but there is no right to pursue a class action. *See, e.g.,* Blaz v. Belfer, 368 F.3d 501, 504 (5th Cir. 2004) (noting there is no "substantive right to pursue a class action, in either Texas state or federal court"). Granted, Rule 23 of the Federal Rules of Civil Procedure creates a procedural right to seek class certification, *see*, *e.g.*, Deposit Guaranty Nat. Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 100 S.Ct. 1166 (1980) (noting "the right of a litigant to employ Rule 23 is a procedural right only"), but a party necessarily relinquishes Rule 23 when he agrees to arbitrate and waives his right to sue in court. Nevertheless, since the "waiver" terminology is widely familiar, this article will use the term to avoid confusion.

[5] The "opt-out" provision of Rule 23 provides: "The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, *and who have not requested exclusion*, and whom the court finds to be members of the class." Fed. R. Civ. P. 23 (c)(3) (emphasis added).

[6] *Bazzle*, 539 U.S. at 540.

[7] *Id.* at 449.

[8] *Id.* at 449, 454.

[9] *Id.* at 449.

[10] Bazzle v. Green Tree Financial Corp., 569 S.E.2d 349, 356 (S.C. 2002).

[11] *Bazzle*, 539 U.S. at 450.

[12] *Id.* at 451-53.

[13] *Id.* at 454.

[14] *Id.* at 455-60.

[15] During oral argument in *Bazzle*, Justice Stevens inquired of counsel for the Respondents: "Does this case have any future significance, because isn't it fairly clear that all the arbitration agreements in the future will prohibit class actions?" Transcript of Oral Argument at 55, Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (No. 02-634), *available at* 2003 WL 1989562 [hereinafter *Bazzle Transcript*].

[16] There was nothing exceptional about the arbitration clause in the Green Tree contracts. The plurality found that the arbitration clause was silent (i.e., ambiguous) on the issue of class arbitration, whereas the three dissenting Justices found that the arbitration clause prohibited class arbitration by virtue of its procedure for selecting an arbitrator.

[17] *See, e.g.*, Dill v. Blakeney, 568 So. 2d 774, 778 (Ala. 1990); Clark v. St. Paul Prop. and Liab. Ins. Cos., 639 P.2d 454, 455 (Idaho 1981); Plambeck v. Union Pacific R. Co., 509 N.W.2d 17, 20 (Neb. 1993); Amusement Bus. Underwriters v. Am. Int'l Group, 489 N.E.2d 729, 732 (N.Y. 1985); Gibson v. Bentley, 605 S.W.2d 337, 339 (Tex. Ct. App. 1980); Pilling v. Nationwide Mut. Fire Ins. Co., 500 S.E.2d 870, 872 (W. Va. 1997).

[18] *See* Cytyc Corp. v. DEKA Prods. Ltd. P'ship, 439 F.3d 27, 34 (1st Cir. 2006) ("With certain exceptions . . . we are duty-bound to give effect to an arbitrator's findings of fact."); Westerbeke Corp. v. Daihatsu Motor Co., Ltd., 304 F.3d 200, 214 (2d Cir. 2002) ("The arbitrator's factual findings and contractual interpretation are not subject to judicial challenge, particularly on our limited review of whether the arbitrator manifestly disregarded the law."); Cunningham v. Pfizer Inc., 294 F.Supp.2d 1329, 1333 (M.D. Fla. 2000) (noting the defendant "has improperly asked the Court to reconsider findings of fact and interpretation").

[19] *Bazzle Transcript*, *supra* note 15, at 55.

[20] *See* Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But Not All) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements*, 60 Bus. Law. 775, 775 (2005).

[21] *See* Alan S. Kaplinsky & Mark J. Levin, *Arbitration Update: Green Tree Financial Corp. V. Bazzle—Dazzle for Green Tree, Fizzle for Practitioners*, 59 Bus. Law. 1265, 1272 (2004). As the authors note, one may surmise that seven of the nine Justice deciding *Bazzle* would have ruled that the FAA does not allow a state to single out and invalidate a class action waiver in an arbitration clause. *See id.* at 1270-72.

[22] *In re: Fine Paper Antitrust Litig.*, 98 F.R.D. 48, 68 (E.D. Pa. 1983) (referring to "the widely-held and mostly unfavorable impressions of the plaintiffs' class action bar, sometimes referred to as the class action industry").

[23] *See* Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868 (11th Cir. 2005); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004); Carter v. Countrywide Credit Indus., Inc., 362 F.3d 294 (5th Cir. 2004); Livingston v. Assocs. Fin., Inc., 339 F.3d 553 (7th Cir. 2003); Lloyd v. MBNA Am. Bank, N.A., 27 Fed. Appx. 82 (3d Cir. 2002); Snowden v. CheckPoint Check Cashing, 290 F.3d 631 (4th Cir. 2002); Gipson v. Cross Country Bank, 294 F. Supp. 2d 1251 (M.D. Ala. 2003); Edelist v. MBNA Am. Bank, 790 A.2d 1249 (Del. Super. Ct. 2001); Hutcherson v. Sears Roebuck & Co., 793 N.E.2d 886 (Ill. App. Ct. 2003); Tsadilas v. Providian Nat. Bank, 786 N.Y.S.2d 478 (App. Div. 2004); Ranieri v. Bell Atlantic Mobile, 759 N.Y.S.2d 448 (App. Div. 2003).

[24] *Iberia Credit Bureau, Inc.*, 379 F.3d at 174 (internal quotations and citations omitted).

[25] *See, e.g.*, Skirchak v. Dynamics Research Corp., Inc., 432 F. Supp. 2d 175, 181 (D. Mass. 2006).

[26] 113 P.3d 1100 (Cal. 2005).

[27] *Id.* at 1110.

[28] 2006 WL 2273448 (N.J. Aug. 9, 2006).

[29] *Id.* at *9.

[30] Delta Funding Corp. v. Harris, 2006 WL 2277984 (N.J. Aug. 9, 2006).

[31] 446 F.3d 25 (1st Cir. 2006).

[32] *Id.* at 60.

[33] *Id.* at 57-61.

[34] *Id.* at 57-64.

[35] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991). *Gilmer* rejected the idea that there was a right to bring a class action while observing that the regulatory agency retained authority to seek class-wide relief. *Id.* at 32.

[36] No. 05-73922, 2006 WL 2042512 (E.D. Mich. July 20, 2006) (unpublished).

[37] *Id.* at *5.

[38] Meredith Nissen, AAA v. JAMS*: Different Approaches to a New Concept*, Disp. Resol. Mag., Summer 2005, at 19, 20.

[39] *Id.*

[40] JAMS Class Action Procedures Rule 2, *at* http://www.jamsadr.com/rules/class_action.asp; *see also* Nissen, *supra* note 39, at 20.

[41] Discover Bank v. Superior Court, 36 Cal. Rptr. 3d 456, 459-62 (Ct. App. 2005).

[42] Muhammad v. County Bank of Rehoboth Beach, 2006 WL 2273448, *6 n. 2 (N.J. Aug. 9, 2006).

[43] Fed. R. Civ. P. 1, 23.

[44] Amendments to Rules of Civil Procedure, Advisory Committee's Notes, 39 F.R.D. 69, 102-03 (1966) (quoted in Buford v. Am. Finance Co., 333 F. Supp. 1243, 1251 (D. Ga. 1971)).

[45] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) ("Class actions also may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.").

[46] Buford v. H & R Block, Inc., 168 F.R.D. 340, 345 (S.D. Ga. 1996).

[47] Kirk D. Jensen, *Can Financial Institutions Be Required to Arbitrate on a Class-Wide Basis Notwithstanding Provisions That Prohibit Class Arbitration*, 122 Banking L.J. 328, 336-37 (2005) (discussing the "manifold benefits" that arbitration provides consumers).

[48] Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004) (quoting Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991)).

[49] *See, e.g.*, National Arbitration Forum Code of Procedure Rule 37C, *available at* http://www.arb-forum.com/.

[50] *See, e.g.*, John H. Beisner, *et al.*, *Class Action "Cops": Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441, 1451 (2005).

[51] *See* Martin H. Redish, *Class Actions and the Democratic Difficulty: Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 74 (2003) (explaining that "the class action was never designed to serve as a free-standing legal device for the purpose of 'doing justice,' nor is it a mechanism intended to serve as a roving policeman of corporate misdeeds").

[52] Cal. Bus. & Prof. Code §§ 17200-17208 (West 2006) is one example.

[53] Jensen, *supra* note 48, at 329-30.

[54] Eric Mogilnicki, *Courts Undermine Arbitration When They Grant Class Status*, Am. Banker., Feb. 14, 2003, at 9 (quoted in Jensen, *supra* note 48, at 330).

[55] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

[56] *See* Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 Ga. St. U. L. Rev. 761, 765-68 (2003) (explaining how individuals benefit from arbitration's streamlined procedures). The article also discusses studies indicating that individuals are more likely to prevail in arbitration than in court. *Id.* at 763-65. One of the authors, Mogilnicki, was recently named Chief of Staff for Senator Edward M. Kennedy of Massachusetts. *See Kennedy Names New Chief of Staff*, Boston Globe, Jan. 9, 2006, *available at* http://www.boston.com/news/local/massachusetts/articles/2006/01/09/kennedy_names_new_chief_of_staff/.

[57] Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 280 (1995).

[58] *See* Leonard v. Terminix Int'l Co., 854 So.2d 529, 542-43 (2002) (Woodall, J., dissenting).

[59] Green Tree Financial Corp. v. Bazzle, 539 U.S. 444, 459 (2003).

[60] *Id.*

[61] Fed. R. Civ. P. 48.

[62] National Arbitration Forum Code of Procedure R. 22 (providing for a single arbitrator unless parties agree otherwise); AAA Supplementary Rules for Class Arbitrations R. 2(b) (providing that "the dispute shall be heard by a sole arbitrator unless the AAA, in its discretion, directs that three arbitrators be appointed"), *available at* http://www.adr.org/sp.asp?id=21936; JAMS Comprehensive Arbitration Rules and Procedures R. 7 (providing for a single arbitrator unless parties agree otherwise), *available at* http://www.jamsadr.com/rules/comprehensive.asp.

[63] Rule 43(a) of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures provides that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable. . . ." By contrast, Rule 20D of the National Arbitration Forum Code of Procedure requires the arbitrator to "follow the applicable substantive law."

[64] There are only a few statutory bases for challenging an arbitrator's award. *See* 9 U.S.C. §§ 10-11 (2006). None require the arbitrator to follow the law. An arbitration award may be vacated for "manifest disregard of the law," which is generally regarded as a common law, non-statutory basis for vacating an arbitration award. *See, e.g.*, Patten v. Signator Ins. Agency, Inc., 441 F.3d 230, 234 (4th Cir. 2006). *But see* Wise v. Wachovia Sec., LLC, 450 F.3d 265 (7th Cir. 2006) (noting "we have defined 'manifest disregard of the law' so narrowly that it fits comfortably under the first clause of the fourth statutory ground – 'where the arbitrators exceeded their powers'"). However, as the D.C. Circuit Court of Appeals recently observed, "[t]he 'manifest disregard of the law' standard for overturning an arbitration award is manifestly difficult to satisfy." To ensure that an arbitrator's determinations, such as the decision to certify a class, are legally sound, parties may agree that the arbitrator must follow the law. For example, Rule 20E of the National Arbitration Forum Code of Procedure requires the arbitrator to "follow the applicable substantive law." If an arbitration agreement or the designated rules require the arbitrator to follow the law, an arbitrator who fails to follow the law has exceeded his powers, which is a statutory basis for vacating an arbitration award. *See* 9 U.S.C. 10(a)(4) (2006).

[65] AAA Supplementary Rules for Class Arbitrations R. 5 (requiring the arbitrator to issue a "partial final award" subject to judicial review);

JAMS Class Action Procedures R. 3(c) (giving the arbitrator discretion to enter "a partial final award subject to immediate court review").

[66] *See, e.g.*, Reed v. Bowen, 849 F.2d 1307, 1309 (10th Cir.1988).

[67] *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1391-92 (2000) (discussing criticism of "blackmail" settlements"); *see also In re: Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) ("They might, therefore, easily be facing $25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.")

[68] Muhammad v. County Bank of Rehoboth Beach, 2006 WL 2273448, at *10 (N.J. Aug. 9, 2006) ("The drafters of arbitration agreements and forum rules, as well as the arbitrators themselves, may allow for the development of innovative class-arbitration procedures that address some of the perceived inadequacies with the current system.").

[69] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-12 (1985).

[70] *See* Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 993 n. 2 (2002).

[71] *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 310 (2001).

[72] *See* Fed. R. Civ. P. 23(c)(2)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.").

[73] *See, e.g.*, Wolfert ex rel. Estate of Wolfert v. Transamerica Home First, Inc., 439 F.3d 165, 169 n. 4 (2d Cir. 2006) (noting that "constructive notice" is "sufficient to satisfy due process,").

[74] 472 U.S. 797 (1985).

[75] *Id.* at 809 (noting "[t]he court and named plaintiffs protect [the] interests" of an absent class member).

[76] *Id.* at 810.

[77] 521 U.S. 591 (1997).

[78] *Id.* at 620.

[79] William P. Barrett, *I Have No Clients*, FORBES, Oct. 11, 1993, at 52 (quoted in Steven B. Hantler & Robert E. Norton, *Coupon Settlements: The Emperor's Clothes of Class Actions*, 18 GEO. J. LEGAL ETHICS 1343, 1345 (2005)).

[80] 356 F.3d 781 (7th Cir. 2004).

[81] *Id.* at 785.

[82] 387 F.3d 612 (7th Cir. 2004).

[83] Fed. R. Civ. P. 23(a)(4).

[84] Muhammad v. County Bank of Rehoboth Beach, 2006 WL 2273448, at *10 (N.J. Aug. 9, 2006) (noting that "in the context of class arbitration, contracting parties and the various arbitration forums can fashion procedural rules specific to class arbitration").

[85] *See* 9 U.S.C. § 4 (2006) ("A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement."); CAL. CIV. PROC. CODE. § 1281.2 (West 2006).

[86] *Bazzle*, 539 U.S. at 459 (noting that "petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer").

[87] *See* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 (D.C. Cir. 1997) (ruling that "arbitrators' fees should be borne solely by the employer"); Armendariz v. Foundation Health Psychcare Servs., Inc., 24 Cal. 4th 83, 113 (2000) (holding that agreement "impliedly obliges the employer to pay all types of costs that are unique to arbitration").

[88] *See, e.g.*, National Arbitration Forum Code of Procedure R. 37D.

[89] Jensen, *supra* note 48, at 341.

[90] The Federal Arbitration Act requires that notice of an application to confirm an arbitration award be served on an "adverse party." 9 U.S.C. § 9 (2006); *see also* Revised Uniform Arbitration Act §§ 23-24 (giving a party 90 days after "receiv[ing] notice of the award" to challenge the award).

[91] Fed. R. Civ. P. 23(c)(2)(b).

PROFESSIONAL RESPONSIBILITY

COSTING "EARLY OFFERS" MEDICAL MALPRACTICE REFORM: TRADING NON-ECONOMIC DAMAGES FOR PROMPT PAYMENT OF ECONOMIC DAMAGES

*BY JEFFREY O'CONNELL, JEREMY KIDD & EVAN STEPHENSON**

In personal injury cases, the current system of tort liability has long been unworkable, especially because the insured event is extremely complex.[1] Under the current system, a plaintiff must prove two difficult elements: the defendant's fault and the economic value of noneconomic damages, mostly pain and suffering.[2] In medical malpractice cases, determining not only the value of pain and suffering, but particularly fault, is an especially complex process.[3] As a result, the system is fraught with uncertainties, which in turn cause excessive costs and delay for both sides.[4] In the end, we do not have a sensible insurance system that results in prompt payment to needy victims. Rather, we have a system that results in prolonged, expensive fights over whether claimants are deserving. This system operates to the great detriment of both patients and health care professionals.[5]

I. A SOLUTION TO THE PROBLEM

A previously published description of the reform proposed herein reads as follows:

> As a cure for much of this sad tale, [we focus on a proposed] statute which gives a defendant . . . an incentive to an "early offer," defined as a sum large enough to recompense injured victims for their net economic losses, including attorneys' fees. If such an early offer is tendered, the injured victim will normally forfeit the opportunity in a negligence action of winning full common-law damages for both economic and noneconomic damages at trial . . .
>
> Under this system, a defendant . . . has the option—not the obligation—to offer the claimant, within 180 days after a claim is filed, periodic payment of the claimant's net economic losses as they accrue. Economic losses under an early offer statute must cover medical expenses, including rehabilitation, plus lost wages, to the extent that all such costs are not already covered by collateral sources [i.e., other insurance], plus attorney's fees.[6] Therefore, a defendant cannot make a lesser or "low ball" offer and still earn the advantage of foreclosing a full-scale tort claim. If the defendant decides not to make an early offer, the injured victim can proceed with a normal tort claim for both economic and noneconomic damages. Alternatively, if the claimant declines the early offer in favor of litigation, (1) the standard of [misconduct is raised], allowing payment only where "wanton misconduct" is proven; and (2) the standard of proof is [also] raised, requiring proof of such misconduct beyond a reasonable doubt . . . Because of the uncertainty and cost of determining both liability and noneconomic damages under present tort law, it is likely that defendants in . . . medical malpractice . . . cases will promptly make early offers in many claims, even when liability is unclear. [William Ginsburg, a] leading malpractice defense lawyer has predicted that if [an early offers statute] were in effect, he would advise making the defined early offer in 200 of the 250 cases that his large [interstate offices were] then litigating.
>
> The opposing fear of potential higher costs under this early offers scheme is avoided in that no defendants need make an offer if they would not do so without this [statute]. Thus, defendants will make an offer only when it makes economic sense for them to do so. Moreover, this statute would not disadvantage victims as a class. [True, injury] victims would lose their recourse to full-blown tort litigation—with all its uncertainty, delays, and transaction-costs but *only* when they are guaranteed prompt payment of their actual economic losses, plus attorney's fees.
>
> Thus, the uncertainty of determining both liability and damages for noneconomic damages is the key to understanding the malfunctioning of tort law—and to framing a [balanced] solution. Because the existence of pain and suffering is indeterminate and highly volatile, under [an early offer] system the fear of an award of pain and suffering damages can serve (1) to deter [providers of medical] services from exposing themselves to liability for such damages by indulging in anything close to [what could be seen by a jury as serious] misconduct and (2) as an incentive to make early offers of economic losses, which will provide prompt compensation to victims for many more (admittedly not all) of

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the inevitable injuries that accompany the delivery of [medical] services in an advanced technological society.

Because personal injury claims—alone among all other damage claims—routinely entail damages for both economic and noneconomic losses, defendants are uniquely positioned not only to make, but also to enforce, socially attractive settlements under the [early offers] system. As stated above, this system [encourages] a claimant's acceptance of a defendant's prompt offer of payment of the claimant's net economic losses in return for a waiver of noneconomic damages, along with statutory sanctions that impose [both that higher] standard of [misconduct] and [that] higher burden of proof if the offer is refused. In non-personal injury claims, in which only economic damages are at stake, no such equitable means are available to sanction a claimant who refuses to accept an offer of only a portion of the total damages claimed.

Note that it is not feasible to provide a full-scale no-fault solution for [medical services] because of the difficulty of defining the "no-fault insured event" for injuries that arise from . . . medical treatment . . . Under no-fault auto insurance policies, an accident victim is compensated for an injury arising out of the ownership, maintenance, or use of a motor vehicle. Under workers' compensation laws, an industrial accident victim is compensated for an injury arising out of, and in the course of, employment. [It is not feasible, however,] to force all health care providers to pay patients for any and all injuries arising in the course of medical treatment. After all, it is often impossible to determine whether a patient was injured by the treatment rendered or whether the adverse condition after treatment was just a normal extension of the condition which prompted treatment in the first place. A health care provider certainly could not be expected to pay every patient whose condition worsens after treatment . . . Because such a comprehensive no-fault solution is unworkable, and therefore unavailable, for . . . [medical accidental injuries] the proposed [early offers system] is the most—and perhaps the only—workable, [economical,] equitable, and simplifying solution.

. . . Such a [statute] well serves the goals of both internalization and compensation of losses in comparison to present tort law, and thus results in (1) appropriate deterrence; (2) less overdeterrence; (3) lower insurance costs; (4) less delay in the payment of losses; [(5) more payment of essential losses;] and (6) lower transaction costs [read legal fees on both sides].[7]

II. How an Early Offers Statute Will Be More Effective Than Other Proposed Reforms in Encouraging a Healthy Settlement Process for Claimants and Defendants

According to Patricia Danzon, "the economic criterion for evaluating a proposed [medical malpractice] reform is thus, Is it likely to . . . improve the efficiency of deterrence and compensation, recognizing that the practical choice is between imperfect alternatives?"[8]

The most common tort reform proposals—including damage caps, changes in the collateral source rule, and regulation of claimants' attorney contingent fees—lack an early offers law's ability to structure and encourage early and adequate pretrial settlement. As Patricia Danzon notes in the medical malpractice context, "most actual tort reform proposals aim primarily to reduce measurable claim costs and liability insurance premiums or budgetary costs to health care providers. This budget focus is likely to result, at best, in simply shifting costs from medical providers to patients and taxpayers."[9]

Another reason for preferring an early offers law to other tort reforms is that the burden of the latter's reductions falls more on the worst injured or most legitimate tort victims (whom these reforms presumably do not intend to harm) than on claimants' lawyers' fees and less-than-valid claims (which these reforms do clearly intend to affect). An early offers law is superior to these other proposals because it avoids unintentionally disadvantaging the most needy, and arguably legitimate, claimants.

III. Early Offers Laws Will Avoid Burdening Health Care Providers and Claimants, Especially Legitimate Needy Claimants

Early offers statutes will reduce litigation-induced waste by causing more cases to be resolved much earlier. Early offers laws will also enhance the tort compensation mechanism by conditioning advantages offered to defendants only on the extension of a binding offer to pay an adequate sum: claimants' uncompensated economic losses. Since early offers take claims out of the current system only after the claimant is assured of adequate payment, the worst-injured claimants, who have the most need of prompt and significant payment, will not be short-changed as a group by an early offers statute. Finally, the positions of insurance companies and other defendants cannot be much worsened by early offers.[10] Even if they conclude that early offers are making them worse off, they can simply stop making early offers—and return to the current system.

IV. Early Offers Can Reduce the Differences Between Claimants and Defendants

Recall that under an early offers law, every dispute begins in the current system. Within 180 days of a claim, the defendant insurance company may make an early offer,

defined in the statute to include all of the claimant's uncompensated economic loss as it accrues. If the defendant insurance company makes an early offer and the claimant rejects the offer, the standard of liability in the claimant's upcoming tort action changes from negligence to, in effect, criminal misconduct (termed "quasi-criminal"), and the burden of proof heightens from "more likely than not" to "beyond a reasonable doubt."

Assuming that the claimant was not injured by quasi-criminal misconduct, after an early offer is made the claimant's probability of winning a full-scale tort suit diminishes drastically and the expected value of the tort claim drops with it. How steeply does the claim's expected value decline? The example below creates a hypothetical early offer scenario that quantifies this point and illustrates the types of trade-offs expected by early offers wherein there is an impasse between claimants and defendants.

For both the early offer and post-early offer scenarios, our model adjusts future jury awards to their net expected present value. The phrase "net expected present value" bundles together four adjustments of nominal future jury awards. These four adjustments account for: (1) probability in outcome; (2) timing of outcome, and specifically a positive rate of time preference by individual actors; (3) the claimant's lawyer's contingent fee; and (4) other litigation-induced costs. Together, these adjustments return a figure for the value claimants should attach to their claims. A future nominal jury award must first be adjusted twice for probability: once for the probability that the jury will find the defendant liable, and again for the probability of various damage awards. We conflate these two adjustments into one weighted average probability of a damage verdict.

Example 1: Claimant P files a claim against defendant D. If the claim is not settled, a trial is expected to commence within a few months and continue for the typical time from injury to payment, three years.[11] P estimates the probability that D will be found liable at 85% (line 1A, Table 1). But D is much more optimistic about its chances. D's estimate of this probability is twice P's estimate, or initially 42.5% (line 1B, Table 1). D also estimates the damages likely to be awarded in case of liability as being significantly lower than P does—specifically estimating damages at 80% of P's estimate (lines 2, 4, 6 A&B, Table 1). P and D both adjust their respective expected payoff/payout estimates for the cost of hiring lawyers and adjust for time spent using the same inflation-adjusted annual discount rate at 2% (lines 1, 4 A&B, Table 1).[12] P's minimum acceptance or reservation price of about $400,000 (408.50, line 15A, Table 1) is higher than D's maximum paying (or reservation) price of about $280,000 (279.78, line 15B, Table 1), as also described in Table 1.[13] The parties fail to bargain out a settlement because their respective prices are out of range of each other.

Assume an early offers statute is in effect. Within the statute's prescribed period, D makes an early offer to pay P's uncompensated economic loss as it accrues. The present value of this offer, as noted in Table 2, is estimated at about $175,000 (173.40, line 1A, Table 2), versus D's last offer in tort of about $280,000 (279.78, line 15B, Table 1). As also set forth in Table 2, after D makes the early offer of about $175,000

Table 1: Net Present Expected Value of Example Tort Claim in the Current System

		CURRENT SYSTEM (pre-early offer) (dollars in thousands)	
	Trial Amounts / Probabilities	**A Plaintiff's Mind**	**B Defendant's Mind**
1.	Probability of Liability	85.0%	42.5%
2.	Expected Judgment 1	$ 1,000.00	$ (800.00)
3.	Probability of Judgment 1	10.0%	10.0%
4.	Expected Judgment 2	$ 800.00	$ (640.00)
5.	Probability of Judgment 2	80.0%	80.0%
6.	Expected Judgment 3	$ 250.00	$ (200.00)
7.	Probability of Judgment 3	10.0%	10.0%
8.	Weighted Avg. Expected Judgment	$ 650.25	$ (260.10)
	Total Expected Direct Trial Costs		
9.	Pl. (cont. fee, 33%); Def. (fixed rate)	$ (216.75)	(34.68)
10.	Probability Claimant Will Sue	100.0%	100.0%
11.	Expected Litigation Costs	$ (216.75)	(34.68)
	Adjustments for the Value of Time		
12.	Net Expected Judgment	$ 433.50	$ (294.78)
13.	Time Until Judgment (years)	3.00	3.00
14.	Discount Rate (i-adjusted)	0.02	0.02
15.	Real Net Present Value of Exp. Judgment	$ 408.50	(279.78)

(plus 10% for the claimant's lawyer),[14] P's estimate of the probability that D will be found liable at trial has decreased by over 80% (line 15A, Table 2) to a mere 2% (line 2A, Table 2).[15] This is a result of the post-early offer heightened standard of both misconduct and burden of proof. The value P attaches to the claim is then so low that no rational lawyer would work on it contingently. If P hired an hourly lawyer equivalent to D's to go forward with trial under the higher standard of liability and burden of proof, P would expect a loss from suit (see line 14A, Table 2).

(**Note:** the Change in Real Net Present Value of the Expected Judgment, listed below in Table 2, is found by subtracting the Table 2 Real Net Present Value of the Expected Judgment from the same figure for Table 1. Precisely: (20.26) [line 14A, Table 2] - 408.50 [line 15A, Table 1] = (428.76) [line 16A, Table 2]. And, for the defense: (39.83) [line 14B, Table 2] B (279.78) [line 15B, Table 1] = 239.95 [line 16B, Table 2].)

Table 2: Effect of a Hypothetical Early Offer on the Value of Table 1 Claim

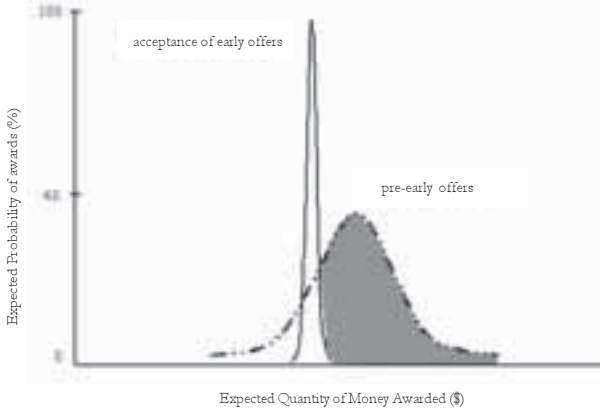
		EARLY OFFER SYSTEM (post-offer) (dollars in thousands)	
	Trial Amounts/Probabilities	**A Plaintiff's Mind**	**B Defendant's Mind**
1.	Estimated Value of the Early Offer	$ 173.40	$ (190.74)
2.	Probability of Liability	2.0%	1.0%
3.	Expected Judgment 1	$ 1,000.00	$ (800.00)
4.	Probability of Judgment 1	10.0%	33.3%
5.	Expected Judgment 2	$ 800.00	$ (640.00)
6.	Probability of Judgment 2	80%	33%
7.	Expected Judgment 3	$ 250.00	(200.00)
8.	Probability of Judgment 3	10.0%	$ 33.3%
9.	Weighted Avg. Expected Judgment	$ 15.30	$ (5.47)
	Total Expected Direct Trial Costs		
10.	Pl. (fixed rate); Def. (fixed rate)	$ (34.68)	$ (34.68)
	Adjustments for the Value of Time		
11.	Time Until Judgment (years)	3.00	3.00
12.	Discount Rate (i-adjusted)	0.02	0.02
13.	Present Value of Exp. Judgment	$ 14.42	$ (5.15)
14.	Real Net Present Value of Exp. Judgment	$ (20.26)	$ (39.83)
	Significant Changes from Table 1		
15.	Reduction in Probability of Liability	83.0%	41.5%
16.	Change in R Net Present Value of Exp. Judg.	$ (428.76)	$ 239.95

Table 2 does not show the effect of an early offer on the variance of expected awards, i.e., awards as a group. Figure 1 illustrates this aspect of early offers graphically. Figure 1, not limited to the specific case represented by Tables 1 and 2, does assume a normal distribution of possible damage awards as a group. The weighted average of all possible jury awards in Figure 1 returns a single payoff for claimants as a group, adjusted for the probability of recovery.

In Figure 1 below, we assume this normal distribution of possible expected jury awards as a group, before and after early offers.[16] Claimants' initial expected jury awards are represented by the "pre-early offers" curve. The expected reward from early offers is in turn represented by the "acceptance of early offers" curve. The acceptance of early offers curve differs from the pre-early offers curve in two ways: first, it has the shape of a spike, rather than a bell; second, the center of the acceptance of early offers curve is located to the left of the center of the pre-early offers curve. The acceptance of early offers curve is shaped like a spike because, if early offers are accepted, the amount of money to be paid is statutorily set and therefore largely certain. The pre-early offers curve is shaped as a bell, instead of a spike, because the amounts to be paid are highly uncertain, varying from little or nothing to the almost unlimited. The center of the acceptance of early offers curve is located to the left of the pre-early offers curve's center on the horizontal axis because early offers will have a lower expected payoff than regular lawsuits (see, for example, Tables 1 and 2).

Put another way, Figure 1 illustrates that early offers provide claimants to whom early offers are made with compensation with negligible variance[17] (illustrated by its spike shape) and hence little or no risk. Furthermore, the shaded area of the pre-early offers curve can be seen as representing the expected payments foreclosed by the early offer—a chance in the current system to obtain noneconomic damages and amounts already covered by collateral sources. The unshaded area of the pre-early offers curve roughly can be seen as representing uncompensated economic loss. The acceptance of early offers curve represents roughly the same level of uncompensated economic loss, but with negligible variance and hence little or no risk.

Figure 1: Early Offers' Effect on Distribution of Expected Jury Awards, Versus Acceptance of Early Offers



To go back to the hypothetical examples of the individual case shown in Tables 1 and 2, the early offer there reduces P's probability of winning any award in that case by 83% (line 15A, Table 2). The probability in this example is now only about 2% (lines A&B, Table 2), because it is difficult to prove gross negligence beyond a reasonable doubt. Consequently, the net expected present value of the judgment after an early offer is probably worth less than the cost of litigating. P in that case loses a possible $430,000 (428.76, line 16A, Table 2) of the net present expected value of the judgment, while D gains $239,950 (line 16B, Table 2) in value. But if an early offer is made and accepted, D must pay only $190,740 (line 1B, Table 2), or the estimated discounted value of the early offer itself plus ten percent extra for the claimant's attorney's fee (also determined by statute),[18] and P receives an expected guarantee of about $175,000 (line 1A, Table 2) promptly as uncompensated economic losses accrue.

One might ask what P is getting that makes the trade-off of a certain $175,000 for a pre-offer chance (but only a chance) at $408,500 (line 15A, Table 1) advantageous for claimants. The answer, of course, is *reduced risk plus prompt payment.* The acceptance of early offer "spike" in Figure 1 illustrates this reduction of risk. *A risky dollar is worth much less than a dollar without risk* especially for the seriously injured. As emphasized above, the claimant in Table 2 has received an early offer-binding guarantee of about $175,000 for uncompensated losses as they accrue. The claimant will actually receive more or less depending on the claimant's actual accrual of net economic loss. But the variance of the acceptance of early offer curve is determined by the claimant's medical progress, not by uncertainty surrounding potential jury deliberations. The defendant assumes the risk associated with the claimant's medical fortunes. In return for bearing little or no risk in litigation—a highly valuable benefit to suffering and injured tort victims—a claimant in the example gives up the amount already covered by insurance, as well as the possibility of pain and suffering or punitive damages.

The risk-shifting mechanism of early offers, most importantly, shrinks the difference between claimants and defendants (i.e., the "Wedge," and also as a corollary, the variance of possible awards)[19] and decreases litigation-induced costs. This concept of reducing the Wedge between the parties is absolutely crucial to the success of early offers.[20] Because rational claimants will not go to trial post-early offer when the probability of prevailing is so low and *when a socially adequate and binding offer is open,* many more cases will be settled quickly. In terms of the Priest-Klein litigation model,[21] the small post-early offer expected outcome of the trial is reasonably clear to both parties absent quasi-criminal misconduct: the claimant will almost certainly lose. The early offer itself cannot be the subject of comparatively much controversy; its value is significantly pre-set.[22] Judge Richard Posner's insight that a wide range of possible bargaining outcomes increases the likelihood of litigation comes into play.[23] Early offers leave relatively few realistic bargaining issues and thus reduce the likelihood of litigation. Moreover, since early offers will encourage

disputes to be resolved quickly, before trials can begin, parties avoid incurring a large portion of the usual litigation-induced costs.[24]

Since early offers will encourage disputes to be resolved quickly, before trials can begin, parties avoid incurring a large portion of the following litigation-induced costs:

Trial expenses in addition to lawyers' fees. There is much less need, for example, to hire expert witnesses, generate reams of documents for discovery, or perform extensive jury research and mock trials if the claim has been settled within the first 180 days.

Lost beneficial reliance. Since claimants and defendants will quickly resolve cases except for the few involving quasi-criminal conduct, they can better predict their liabilities and assets, plan for the future based on those predictions, and enjoy the benefits of certain reliance on those plans.[25]

Opportunity Cost of Trial. When an early offer has been made, claimants and defendants need not allocate time and resources to protracted trials and pretrial negotiations. Their most valuable opportunities in lieu of trying a case are free for the taking. A claimant may use the time that would have been spent on a trial much more advantageously, e.g., with family or working. For an insurance company or other defendant that need not litigate, resources that would have been needlessly spent on litigation will be freed for much better alternative uses.

Peace of mind. Perhaps the greatest benefit to claimants and many defendants from an early offer is the peace of mind that comes from no longer having to face the emotional ordeal of a trial. At an earlier point, if an early offer is tendered, claimants may rest assured that much of their risk has been assumed by the defendant. Defendant insureds may also rest at ease that they will not be dragged through ugly, prolonged litigation or otherwise publicly stigmatized. Just as important, with an early offer already on the table, provisions under the early offers statute provide defendants with an incentive to apologize and make information available to claimants and others without fear of additional tort exposure. Greater information about the causes of an injury and hearing some defendants apologize can not only increase the parties' peace of mind but can make for more frequent and prompter communication between health care providers leading to more effective safety programs.[26] Also, it is crucial to note that a recent study by the Harvard School of Public Health indicates that increased malpractice litigation under the tort system raises the prospect not of better health care but of "lower quality and availability of health [care]."[27]

Finally, it should be noted that the efficacy of the early offer as indicated by Figure 1 is not limited to the example in Tables 1 and 2. Rather, an early offer will likely be made whenever the value of an early offer exceeds the defendant's forecast of its liability in tort (based on the amount the defendant sets aside early as a reserve to pay the claim).

V. Claimants and Defendants are Inhibited from Reaching the Early Offer Result through Pretrial Bargaining

If early offers benefit both claimants and defendants, why don't they reach the early offers result in the current system through pretrial bargaining? Given the adversarial nature of bargaining over the many highly indeterminate variables that make up malpractice litigation, if they made such offers in the current system, defendants would fear sending a signal of weakness that would thereby encourage claimants to demand a much higher payment than originally sought.[28] Claimants and their counsel similarly dread that an early offer to settle for only net economic loss will be seen as a lack of confidence in their case, risking clearly inadequate payment.[29] As a result, the parties today fail to settle promptly for a claimant's net economic loss even when it would be seemingly advantageous to both.[30]

VI. Why Binding Early Offers by Defendants Only

If an early offers system benefits both parties, why should it be the *defendant* under early offers who has the power to bind the claimant?[31] Shouldn't claimants have the power to make a binding early offer for payment of net economic loss by the defendant? The simple answer is that claimants and their counsel would "lack sufficient incentives to weed out frivolous or non-meritorious claims under such a plan."[32] If claimants had the power to unilaterally bind defendants, there would be "a perverse incentive to exploit the system with marginal claims or worse."[33]

But defendants, as the entity making payment, when confronted with clearly meritless claims will pay nothing and make no early offer—as they should.[34] On the other hand, when faced with potentially meritorious claims, defendants will test whether "the statutorily defined early offer involves less exposure than a fullscale tort suit with all its uncertainty and transaction costs."[35] Only defendants have the appropriate incentives to "distinguish carefully between arguably meritorious and clearly non-meritorious claims" in order to reduce costs by promptly paying the required minimum benefits in suitable cases.[36]

VII. Why Redistribute Income from Payment for Noneconomic Damages to Focus on Economic Damages

It is important to note that medical malpractice law is a form of state mandated insurance, growing out of state mandated medical malpractice liability under the common law. Anyone buying health care services must in effect pay for it. Thus, the state is more justified in dictating not only its presence, but also its structure, especially compared to insurance that, like most life insurance, is purely voluntary. When the state mandates workers' compensation coverage, it is redistributing from those with good tort claims to those without. The justification for such a transfer derives from the theory of diminishing marginal utility of money with its concomitant use of the concept of "interpersonal utility comparisons."

The theory of diminishing marginal utility, when coupled with the proposition of interpersonal utility comparisons, is used here to justify spreading dollars differently among malpractice victims, i.e., to pay promptly those with otherwise heavy losses rather than imparting relatively large amounts to others.[37] Thus, the theory supports the early offers proposal insofar as it transfers some dollars from those eligible for payments for reimbursed economic loss and for noneconomic loss to effect more certain and prompter payment to those with otherwise large unreimbursed economic losses (with the added result of lower overall medical malpractice premiums).

The theory of interpersonal utility comparisons is of course highly controversial. Its critics rebut that policies designed to redistribute incomes can be said to increase public welfare.[38]

Nonetheless, the early offers plan is premised on the admittedly controversial proposition that public welfare *is* advanced when insurance thus diverts dollars from, say, payment of noneconomic losses to emphasize coverage of large amounts of serious economic losses. Economic losses of substantial magnitude, if unreimbursed, long delayed or subject to large transaction costs, can lead to lack of medical care, rehabilitation, and subsistence wages. Such losses are in the realm of what Lord Keynes called "absolute" needs, "in the sense that we feel them whatever the situation of our fellow human beings may be."[39] Granted that defining "absolute" needs can be difficult and that redistribution of income may be justified only for absolute needs, succor in the form of otherwise unavailable or long delayed payment for medical services and wage losses of the seriously injured would seem clearly to fall within that category.[40]

Finally, note that the early offer program can be applied either more narrowly to, say, only natal injuries or more broadly to all personal injury claims, including, for example, those alleging product liability.[41]

Footnotes

[1] *See generally* Jeffrey O'Connell, *Statutory Authorization of Nonpayment of Noneconomic Damages as Leverage for Prompt Payment of Economic Damages in Personal Injury Cases,* 71 Tenn. L. Rev. 191 (2003).

[2] *Id.*

[3] *Id.*; *see also* Comm. for Econ. Dev., Breaking the Litigation Habit: Economic Incentives for Legal Reform 5-14 (2000), *available at* http://www.ced.org/docs/report/report_legal.pdf [hereinafter CED].

[4] O'Connell, *supra* note 1, at 192.

[5] *Id.*

[6] The attorney's fees are assumed to be ten percent of the present value of the early offer. Payment of attorneys' fees by defendants, in addition to net economic losses, is necessary to reimburse the victim's economic losses, assuming no damages for pain and suffering are to be paid.

[7] O'Connell, *supra* note 1, at 193-97. Professor O'Connell originally set forth the idea of early offers in *Offers That Can't Be Refused: Foreclosure of Personal Injury Claims by Defendants' Prompt Tender of Claimants' Net Economic Losses,* 77 NW. U. L. Rev. 589 (1982). *See also* CED, *supra* note 3, at 17-22; Henson Moore & Jeffrey O'Connell, *Foreclosing Medical Malpractice Claims by Prompt Tender of Economic Loss*, 44 La. L. Rev. 1267 (1984). For more thorough discussion of early offers, *see* Jeffrey O'Connell and Patrick B. Bryan, *More Hippocrates, Less Hypocrisy: "Early Offers" as a Means of Implementing the Institute of Medicine's Recommendations on Malpractice Laws*, 15 J. L. & Health 23, 44-51 (2000-01), and Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 Neb. L. Rev. 858, 865-67 (1999). As an example of one federal bill that applies the early offers plan in the medical malpractice area, *see* 131 **Cong. Rec.** 36, 870-76 (1985) (presenting and discussing the proposed Medical Offer and Recovery Act). For more statutory drafts of legislation incorporating the early offer idea, *see* S. 1861, 104th Cong. § 101 (1996); H.R. 3084, 99th Cong. § 2 (1985); H.B. 5700, 174th Gen. Ct., 2d Sess. (Mass. 1986). Regarding the way punitive damages interact with pain and suffering damages in the context of an early offer proposal, *see* Jeffrey O'Connell, *Two-Tier Tort Law: Neo No-Fault & Quasi-Criminal Liability,* 27 Wake Forest L. Rev. 871, 885B86 (1992).

For support for the proposition that a no-fault liability system would be unworkable in the medical malpractice area, see Paul C. Weiler et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation 23-24 (1993) (noting that no simple method can separate adverse medical outcomes from non-adverse outcomes); *id.* at 55 (noting that 18% of a Harvard study's after-the-fact determinations that health care provider negligence had occurred were "close-call cases").

Finally, in analyzing this or any other tort reform, it should be noted that evidence as to the deterrent effects of tort litigation, at least in the medical malpractice context, is not all that convincing. *See* Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 Tex. L. Rev. 1595, 1598 (2002) Indeed *see infra* note 27 and accompanying text (observing that excessive litigation seems to reduce the quality of medical care). *See also* Weiler et al., *supra*, at 75 ("Malpractice litigation appears, then, to be sending as confusing a signal as would our traffic laws if the police regularly gave out more tickets to drivers who go through green lights than to those who go through red lights."); *see also id.* at 113 ("A special problem [with believing that tort litigation deters medical malpractice] . . . is the low probability that any one negligent injury . . . will produce a tort claim. . . . To the extent that injured victims systematically underutilize their tort rights, there is a corresponding reduction in actors' incentives to adopt socially optimal precautions against such injuries."). *But see id.* at 129 (noting that there is statistically insignificant evidence that the more malpractice suits brought against doctors in a particular hospital, the fewer the number of negligent medical injuries that will be suffered by patients in that hospital); *id.* at 133. *See generally* Harv. Med. Practice Study Group, Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York (1990).

[8] Patricia Danzon, *Liability for Medical Malpractice*, *in* 1b Handbook of Health Economics 1339, 1371 (Anthony J. Culyer & Joseph P. Newhouse eds., 2000). Danzon also mentions reduction in deadweight losses.

[9] *Id.*

[10] Interview with William Ginsburg, Esq., in Durham, N.C. (Apr. 1986).

[11] *See* Weiler et al., *supra* note 7, at 5 ("In the nation as a whole, the *median* time from injury to claim is 13 months, and from claim to payment 23 months, for a total of three years.").

[12] D's discount rate applies only to the weighted average expected judgment, not to D's total expected direct trial costs, because D's costs are not a lump sum at the end of the trial. For simplicity, we assume that all of D's court costs are paid up front, with no discounting. Discounting D's total expected direct trial costs would only make D and P *less* likely to settle, because such discounting would reduce the real net present value of the expected judgment in D's mind, thus making D's maximum price *further* below P's minimum price.

[13] For the derivation of the defense attorney's fee, see Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 691 (2003) ("[C]ontingency-fee plaintiff lawyers and hourly rate defense lawyers devote roughly equal amounts of time to the same tort cases . . . [C]ontingency-fee lawyers' effective hourly rates of return in auto accident cases are approximately two-and-one-half times that of (hourly rate) defense lawyers."). Thus, if the defense attorneys value the claimant's suit at $260,100 (260.10, line 8B, Table 2), and expect the claimant's attorney to receive one-third or $86,700, they should expect at least $34,680 (or $86,700/2.5). *Cf.* WEILER ET AL., *supra* note 7, at 17 ("Malpractice insurers in New York now spend an average of well over $10,000 to defend every malpractice claim . . . ").

[14] This estimate for the early offer was reached by dividing the average weighted expected value by 2.5 to factor out noneconomic damages (which generally are a multiple of economic damages). This figure was then conservatively adjusted downward by 1/3; the example assumes that P's own insurance covers 1/3 of compensatory damages.

[15] In our example, the claimant's post-early offer belief in a 2% likelihood of victory on the issue of liability is extremely optimistic. In the current system, data indicates that a tiny fraction of 1 percent (0.16%, to be precise) of total medical malpractice cases brought to trial result in punitive damage awards against defendants. The type of egregious behavior that calls for punitive damages is roughly equivalent to gross negligence, but after a statutory early offer has been made and the claimant rejects the offer, the claimant must satisfy the higher beyond a reasonable doubt standard of proof. Thus the percentage of cases resulting in post-early offer awards would likely be lower than the percentage awarding punitive damages—or less than 0.16%. NICHOLAS M. PACE ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, CAPPING NON-ECONOMIC AWARDS IN MEDICAL MALPRACTICE TRIALS: CALIFORNIA JURY VERDICTS UNDER MICRA 60 & n.6 (2004) ("[T]he effective rate of punitive awards for all medical malpractice cases that go to a jury is 0.16%.").

[16] We do not here include a distribution for post-early offer expected jury awards, because, as shown in Table 2 (line 14A), any value therefrom would on average be negative, given the rarity of success coupled with transaction costs (lines A2, A10, Table 2).

[17] For information about how often early offers may be made, see *supra* note 10, and accompanying text.

[18] Recall that the early offer is paid as losses accrue. *See supra* Sec.B.

[19] *See supra,* O'Connell et al. 35 N. MEX. L. REV. 259, 293-95. *See id.* comparing Figure 3 at 282 with Figure 6 at 294, and accompanying text.

[20] *See supra* note 19.

[21] *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

[22] Health and disability insurance, which the early offer mirrors, do not lead to all that much litigation compared to litigating fault and the value of pain and suffering.

[23] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 21.5, at 523 (3d ed. 1986).

[24] For a full discussion of the litigation-induced costs that can be avoided by an early offers statute, see *supra* O'Connell et al., note 19, at 277-84.

[25] On beneficial reliance, see generally Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1266-76 (1980).

[26] "Early Offers would work to calm the animosities of the parties in an accident claim rather than inflaming them, as the current litigation culture now does. It accomplishes this by giving defendants a healthy incentive to promptly acknowledge any problems and even to discuss what happened. Under the current adversarial tort regime, claimants rarely receive an apology, admission of fault, or even an explanation of the adverse event. Many times a simple apology or explanation by the defendant can assuage the emotions of an injured party more effectively than a mammoth, long-delayed monetary award for pain and suffering damages. Such open and candid discussions could provide the accident victim with another form of valuable compensation often overlooked by the judicial system—peace of mind. In fact, researchers report that feelings of forgiveness and compassion have been proclaimed as therapeutic for accident victims because they reduce the anxiety and stress associated with continuing anger and resentment. The Early Offers plan induces the parties to discuss what happened rather than forcing them to engage in the combat of the current "blame game" of tort litigation. In so doing, Early Offers thus promotes understanding, cooperation and swift compensation rather than contentious, hostile, and dilatory legal proceedings [in addition to the greater patient safety accompanying open and prompt exchanges between health care providers after an adverse event.]" Jeffrey O'Connell, *A Proposed Remedy for Mississippi's Medical Malpractice Miseries*, 22 MISS C. L. REV. 1, 6-7 (2002) (footnotes omitted).

[27] Michelle M. Mello et al., *Caring for Patients in a Malpractice Crisis: Physician Satisfaction and Quality of Care*, HEALTH AFF., July/Aug. 2004, at 42, 51.

[28] Jeffrey O'Connell & Evan Stephenson, *Binding Statutory Early Offers by Defendants, Not Plaintiffs, in Personal Injury Suits*, 54 DEPAUL L. REV. 233, 237 (2005).

[29] *Id.*

[30] *See supra*, Sec. IV.

[31] *See generally* O'Connell & Stephenson, *supra* note 28.

[32] *Id.* at 238.

[33] *Id.* at 239.

[34] *See id.*

[35] *Id.*

[36] *Id.*

[37] *Cf.* RICHARD A. POSNER, ECONOMICS OF JUSTICE 55-56 (1983) We cite Posner to illustrate the basic principle discussed, while remaining mindful of his disdainful attitude towards redistribution.

[38] For an attack on programs based on the principle of the diminishing marginal utility of money, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 344-46 (2d ed. 1977). For a defense of such programs, see PAUL SAMUELSON, ECONOMICS 425-29 (10th ed. 1976), and J. Simon, *Interpersonal Welfare Comparisons Can Be Made—and Used for Redistribution Decisions*, 27 INT'L REV. SOC. SCI. 63 (1974).

[39] John Maynard Keynes, *Economic Possibilities for Our Grandchildren* (1930), *in* 9 The Collected Writings of John Maynard Keynes: Essays in Persuasion 321, 326 (1972); John Maynard Keynes, *Economic Possibilities for Our Grandchildren*, *in* Essays in Persuasion 358-73 (1963), *available at* http://www.eco.utexas.edu/Homepages/Faculty/Cleaver/368keynesgrandchildren.html; Friedrich A. Hayek, The Non Sequitur of the "Dependence Effect," *at* http://www.mises.org/etexts/HayNonseq.pdf (quoting John Maynard Keynes).

[40] For an indication that pain and suffering damages were historically limited to egregious conduct in much the way the early offers plan limits them, see generally Jeffrey O'Connell, *A Proposal to Abolish Defendants' Payment For Pain and Suffering in Return For Payment of Claimants' Attorneys' Fees*, 1981 U. Ill. L. Rev. 333.

[41] A more thorough empirical study of the costs of the early offer program (as opposed to the economic model above) is forthcoming in the *Journal of Legal Studies*, authored by Joni Hersch and Kip Viscusi, in addition to O'Connell. This empirical study is based on an extensive examination of the voluminous closed claims data, required to be filed in Texas, supplemented by similar data from Florida. A similar study of the cost of the early offers program for product liability claims, funded by the Kauffman Foundation, based on the same Texas and Florida data is being conducted by O'Connell and Patricia Born.

RELIGIOUS LIBERTIES

"PLAY IN THE JOINTS BETWEEN THE RELIGION CLAUSES" ... AND OTHER SUPREME COURT CATACHRESES

*BY CARL H. ESBECK**

Even when the U.S. Supreme Court reaches the right result in a matter involving church-state relations, the Justices too often do so for the wrong reasons. *Cutter v. Wilkinson*[1] is illustrative. Decided during the Court's last term, *Cutter* reversed a lower court decision that had struck down as unconstitutional the Religious Land Use and Institutionalized Persons Act.[2] Known by the clunky acronym RLUIPA, this relatively new congressional statute tempers the impact of zoning decisions on religious organizations, as well as assisting those individuals of faith who are incarcerated in our country's jails and penitentiaries. In these two quite distinct arenas where regulation is pervasive, RLUIPA requires that laws having a disparate impact on a religious organization or a particular religious observance must yield to the needs of the religious liberty claimant. This means that the religious claimant is exempt from the strictures of a law generally binding on others. The exemption holds unless officials can show that the claimant should not be excused—even in just this one circumstance—because of likely serious public harm such as a traffic hazard or a prison security breach.

In *Cutter*, the three judge panel of the United States Court of Appeals for the Sixth Circuit reasoned that RLUIPA's specific exemption for religious observance constituted a preference for religion, and that the no-establishment command in the First Amendment did not permit legislation to prefer religion over nonreligion. That is not the law, and there was little doubt that the Sixth Circuit's decision would not stand up on appeal. From a certain perspective, however, one has to empathize with the confused judges of the circuit court. In the Supreme Court's decision in *Kiryas Joel Bd. of Education v. Grumet*, Justice Souter did say in oft-quoted *obiter dictum* that the Establishment Clause prohibits government from "favoring . . . religious adherents collectively over nonadherents."[3] But the High Court, in its high-handed fashion, does not always mean what it says. In this instance, it is a good thing. At the time of the *Cutter* appeal there were no less than three prior cases (and none to the contrary) where the Court held four-square in favor of a congressional statute that exempted religious practices from legislative burdens that others had to bear. It is instructive to bring them to mind. In *Arver v. United States*, exemptions from the military draft for clergy and seminarians were found not to violate the Establishment Clause.[4] In *Gillette v. United States*, an exemption from conscription into military service for those who oppose war in all circumstances was upheld.[5] Finally, in *Corporation of the Presiding Bishop v. Amos*, the Court approved a broad statutory exemption in a civil rights employment nondiscrimination act for religious organizations making staffing decisions based on religion.[6]

The rationale behind *Arver*, *Gillette*, and *Amos* is simple enough: For regulatory legislation to exempt a religious practice is for Congress to leave religion alone. One does not establish religion by leaving it alone.[7] Indeed, for government to leave religion alone reinforces a separation between those two centers of authority—state and church—that is good for individual religious liberty, good for the autonomy of religious organizations, and good for the state.

The upholding of RLUIPA in *Cutter* should have been easy for the Supreme Court, just another increment in a lengthening line of precedent. It was not to be. In an opinion by Justice Ginsburg, a unanimous Court charted the task before it as "find[ing] a neutral course between the two Religion Clauses," which by their nature "tend to clash."[8] Thus its assignment, as the Court saw it, was to determine if RLUIPA fell safely in the narrows where "'there is room for play in the joints' between the Clauses" and thus there still remained "space for legislative action neither compelled by the *Free Exercise Clause* nor prohibited by the *Establishment Clause*."[9] Clearly the Court contemplates that the free-exercise and no-establishment principles run in opposite directions, and indeed will often conflict. It is as if the Court envisions free-exercise as pro-religion and no-establishment as, if not anti-religion, then at least tasked to hold religion in check. Such a view—wrongheaded, as I shall point out below—places the nine Justices in the power seat, balancing free-exercise against no-establishment, in whatever manner a five to four majority deems fair and square on any given day. Such unguided balancing accords maximum power to the Court (or worse, power to one "swing" Justice), while trenching into the power of the elected branches.

The view that the First Amendment's text, free exercise and no-establishment, are frequently in tension, and at times are in outright war with one another, is quite impossible. The full powers of the national government are enumerated and limited, an original understanding later made explicit in the Tenth Amendment. When ratified in 1791, the Bill of Rights did not vest more power in the national government. Rather, the fears of the Anti-Federalists, who were prominent in the First Congress, drove them to just the opposite objective: to deny to the central government the power to interfere with essential liberties (for example, speech, press, jury trial) that might otherwise be implied from the more

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open-ended delegations of power in the Constitution of 1787. The Federalists, in turn, gave little resistance to this enterprise because their position all along was that the national government had not been delegated such powers in the first place. Indeed, James Madison, Jr., a Federalist at this time in his career and the principal theorist behind the 1787 Constitution, led the charge for a Bill of Rights. The Federalists harbored a different anxiety, namely, to avoid a second constitutional convention as sought by Patrick Henry and others favoring state sovereignty. Adding a Bill of Rights would sap whatever popular support Henry had behind his effort. So Congress settled on the text of the proposed articles of amendment in mid-September 1789 with little more than the usual give-and-take. Twelve articles were submitted to the states, but only ten were ratified. The successful articles (numbers 3 through 12) were thought to alter very little the status quo, but the Bill of Rights did calm the anxieties of many citizens over the concentration of power at the national level, while serving as a useful hedge against possible future encroachments.

Most pertinent for present purposes, each substantive clause in the first eight amendments (the Ninth and Tenth read as truisms) was designed to anticipate and negate the assumption of certain powers by the national government—a government already understood to be one of limited, enumerated powers. Thus, for example, the free-speech provision in the First Amendment further limited national power—or, from the Federalists' perspective, merely made clear that the central government had never been delegated power to abridge freedom of speech in the first place. Likewise, the free-press provision further limited national power. These two negations on power—the speech and press clauses—can reinforce one another but they cannot conflict. Simply put, it is impossible for two denials of power to conflict. Similarly, the free-exercise provision further restricted national power and the no-establishment provision likewise restrained national power. These two negations—the Free Exercise Clause and the Establishment Clause—can overlap and thereby doubly deny the field of permissible governmental action, but they cannot conflict.[10] Moreover, the clauses-in-conflict fallacy would attribute to the drafters, the founding Congress of 1789-1790, the error of placing side by side two constitutional clauses that work against one another. That is just too implausible to take seriously.

The Court's wrong turn has its origin, as best I can determine, in *Widmar v. Vincent*.[11] *Widmar* is yet another result that is rightly decided but for the wrong reason. The case involved a state university that allowed student organizations to use classroom buildings to hold their meetings. When a religious student organization sought to schedule space to conduct meetings that included worship, the university balked, citing the need for strict separation of church and state as required by the Establishment Clause. The Court, relying on a long line of precedent that prohibited the government from discriminating based on the content of one's speech, had little trouble ordering the state university to give equal access to all student organizations without regard to religion.[12]

If only the Justices had stopped right there. Alas, having explained that the no-establishment principle did not justify the university's hostility on these precise facts, the Court fatefully went on to leave open the possibility that on a different set of facts, no-establishment could override the student's right to freedom of speech. Once again, this is logically impossible: two negations on governmental power can overlap but they cannot conflict. What the Court should have said—had it been thinking—is something the Justices thought pivotal to the result in *Widmar*. Namely, that the speech in question was private, not government speech. Private speakers have speech rights; the government does not have speech rights. If the worship service had been conducted at the behest of the university (hence government speech), then no-establishment rather than free-speech would have been the relevant restraint.[13] Instead, the *Widmar* Court asked if the Establishment Clause conflicted with, and thus overrode, the Free Speech Clause. Taking that wrong path has made all the difference.[14]

One might further crowd the Court with this inquiry: When two First Amendment provisions conflict, why do the Justices choose no-establishment to override free-speech or free-exercise, rather than vice versa? Is there a sliding scale of rights in the Constitution, some more valuable than others? Where are we to find this hierarchy of constitutional rights, or is that, too, to be trusted to the balancing of nine unelected Justices?

The Free Exercise Clause and the Establishment Clause do not conflict. Instead, they do different work, each in its own way protecting religious liberty and properly ordering church-state relations.[15] When circumstances are such that their labors overlap, the Religion Clauses necessarily compliment rather than conflict. Thus the Court's imagining these two negations on governmental power as frequently clashing—two bones grinding one upon the other at an arthritic joint that has lost its "play"—is a dangerously misguided metaphor.

FOOTNOTES

[1] 544 U.S. 709 (2005).

[2] *Id.* at 724-25 (upholding the constitutionality of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006)).

[3] 512 U.S. 687, 696 (1994).

[4] 245 U.S. 366, 389-90 (1918).

[5] 401 U.S. 437, 460 (1971).

[6] 483 U.S. 327, 334-40 (1987).

[7] The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. By the literal text, for Congress to enact a law about religion generally is not prohibited. Rather, what is prohibited is a law about, more narrowly, an "establishment" of religion. For example, it is fully consistent with the Establishment Clause for Congress to enact

comprehensive legislation requiring employers to provide unemployment compensation to their employees, but to then exempt religious organizations from the act. Such a religion-specific exemption is certainly to "make [a] law respecting" religion, but more narrowly the exemption does not establish religion. *See* Rojas v. Fitch, 127 F.3d 184, 187-89 (1st Cir. 1997) (holding that a religion-specific exemption for faith-based organizations from unemployment compensation tax did not violate the Establishment Clause).

[8] 544 U.S. at 719 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970)).

[9] *Id.* (italics in original).

[10] In candor, there is one exception to the "no conflict" logic, *i.e.*, government-provided religion in prisons and the armed forces. The rationale is that the free exercise rights of a prisoner or soldier overrides the duty on government to not establish religion. This occurs because of the unusual situation where government has removed individuals from general society (prison or posting at a military base), thereby preventing them from freely securing their own access to spiritual resources. This singular exception for government-employed chaplains is *sui generis*; hence it does not disprove the rule that the Religion Clauses do not conflict.

[11] 454 U.S. 263 (1981). One could attribute the slip earlier in time to *Walz*, where the Court wrote that it "has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." 397 U.S. at 668-69. But *Walz* stopped short of saying that the solution, in the event of a conflict, was that one clause should trump the other. *Widmar* took that fatal step.

[12] 454 U.S. at 276.

[13] Concededly, on altogether different facts it can be a close call whether the speech in question is private or government. An example of the private versus government question being difficult is student-initiated prayer at the opening of a public high school football game. In *Santa Fe Independent School District v. Doe*, a divided Court attributed the student's prayer to the government. 530 U.S. 290, 315-17 (2000). That seems rightly decided.

[14] This pseudo clash-of-the-clauses can cause all sorts of mischief. For example, in the logical desire to not have no-establishment in conflict with free exercise some argue that there is but one Religion Clause, not two. *See, e.g.*, Richard John Neuhaus, *A New Order of Religious Freedom*, 60 Geo. Wash. L. Rev. 620, 627-29 (1992) (maintaining that the no-establishment text is merely instrumental to the free exercise text); John T. Noonan, Jr., *The End of Free Exercise?*, 42 DePaul L. Rev. 567, 567 (1992) (same). Grammatically this is correct. Up to the first semicolon, there is one clause with two participial phrases modifying the object ("no law") of the verb ("shall make"). But the aim of the one-clause argument is not to correct the Court's grammar, but to keep no-establishment and free-exercise from conflicting and thus working at cross-purposes. The objective of these commentators is right-minded but their proposed solution is wrong. There is a far more plausible and historically grounded way of keeping the two participial phrases from conflicting while giving each essential, independent work to do in the service of religious freedom. *See generally* Carl H. Esbeck, *Differentiating the Free Exercise and Establishment Clauses*, 42 J. Church & St. 311 (2000).

[15] *Id.* at 323-25 (explaining that the clauses-in-conflict problem is avoided by a rights-based free-exercise clause and a structural no-establishment clause, each in its own way protecting religious freedom).

The First Amendment and Sunday

*By David K. Huttar**

The First Amendment says, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Many people will wonder whether anything new can be said regarding this provision and in particular about the Establishment Clause. And that assessment may indeed be correct. Be that as it may, this article seeks to explore a facet of the question that is not frequently brought into the discussion.

We will look first at some aspects of the background to the current religious establishment issue. Secondly, we will examine a clause contained in the Constitution that may shed some light on how we should interpret the Establishment Clause. Then, we will seek to draw some appropriate conclusions from this examination of the Constitution's "Sunday Clause." Finally, we will ask what might be further implications of our analysis for the work of the courts, as they seek to interpret and apply the Establishment Clause for today's needs.

I. Background to the Issue

For a century and a half there seemed to be little challenge to the idea that the First Amendment's words regarding "an establishment of religion" were intended to prohibit a state-sponsored church, that is, an established church. At first this must have been understood as a prohibition of any *federally* established church rather than a prohibition that individual *states* could have established churches. In fact, some states did have established churches. In time, however, the principle was extended to prohibit even states from having established churches,[1] and eventually this led to the dis-establishment of churches by those states that still had such establishments. But in spite of this development in interpretation of the Establishment Clause, it is important to note that the widespread understanding was that the First Amendment forbade the establishment of a church that would be supported by public money derived from broadly based taxation.

The situation shifted, however, in the mid-twentieth century, when the Establishment Clause was interpreted in terms of its requiring "a wall of separation" between church and state.[2] Since that time there have been a number of decisions that have progressively limited the ways in which the government or other public entities can be involved in religious questions. In fact, although the 1947 decision that introduced the wall terminology into court decisions did so in terms of *church* and state,[3] subsequent interpretation of the wall, if not by the courts, at least in public opinion, has tended to define the separation as one between *religion* and state.

Perhaps the most extreme version of this concept of separation (which I will refer to as the radical view) is that which holds that the First Amendment requires the government to be involved in no religious expression whatsoever. An argument that has been used to support this position is the observation that the First Amendment forbids "an establishment of *religion*," not an establishment of *a religion*. Michael Newdow, for example, has made this point in some public statements. Whether this argument is valid or not, it serves to illustrate this radical view of the Establishment Clause. The view argues that if the Framers had meant merely to forbid the establishment of a state-sponsored church, they would have better chosen the words "an establishment of *a religion*." At any rate, the radical interpretation understands the clause to forbid all expressions of religiosity, including the government use of the motto "In God We Trust" and the inclusion of "under God" in the Pledge of Allegiance.[4]

Those who hold that the First Amendment does not go nearly this far in forbidding expressions of religion have responded to the radical interpretation in a variety of ways. One common response is to place the phrase "establishment of religion" in its historical context by seeking to marshal evidence that the concept of religious establishment in late eighteenth century America referred to setting up an established church rather than to a wall of separation between church and state. Generally speaking, academic historians such as Daniel Driesbach[5] and Philip Hamburger[6] take this approach.

In a somewhat similar way, there are some who draw on the historical context of the Establishment Clause by quoting the words of the Framers and other early American statesmen that underline the value of religion for a democratic society. In this way they try to show that the prohibition of an establishment of religion was never intended to be the radical understanding that has come about in the late twentieth century.[7] Along the same lines are references to religious sentiments inscribed on national buildings and monuments.[8]

Another possible response is more philosophical in nature. It would claim that to interpret the amendment as ruling out government involvement in religion is, paradoxically, to rule out its involvement in irreligion as well. If such atheistic belief systems as Buddhism, Confucianism, and Ethical Humanism are still considered religious systems, there does not seem to be any convincing reason why any philosophical belief system cannot also be considered religious.[9] Accordingly, government support of a thoroughgoing secularism would be just as much a violation of the Establishment Clause as would government acknowledgement of more traditional religious belief or practice.

Yet another type of response is that approach cultivated in much of the legal and judicial community. This method partially accepts the road to radical interpretation but seeks to provide rules designed to control such interpretation so that the radical conclusion is not actually reached but a middle ground is established. These controls consist of principles such as compelling state interest and undue burden. The creation and application of such principles

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as these have tended to produce extremely convoluted argumentation and contradictory results, as seen in Justice Rehnquist's dissenting opinion in *Wallace*.[10] Similarly, Justice Thomas referred to "inconsistent guideposts" in his *Van Orden* concurring opinion,[11] and Justice Scalia likewise expressed despair in his *McCreary* dissenting opinion.[12]

However effective these responses may or may not be, this paper seeks to strike out in a different direction and to explore one of the few religious expressions in the Constitution itself with a view to determining what impact that expression might have on a good, valid, and workable interpretation of the Establishment Clause. The effect of this argument will, it is hoped, demonstrate that the grounds for holding the radical interpretation are decidedly, if not decisively, mitigated.

II. Analysis of the Sunday Clause

The Constitution's Article I, Section 7 includes discussion of the President's right to veto bills passed by Congress and Congress's right to override the Presidential veto. In the course of this discussion we find the following provision: "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

Our concern here is solely with the words "Sundays excepted." What are the implications of this wording for a proper understanding of the First Amendment's Establishment Clause? And in particular, can any light be shed on this issue by a consideration of Madison's *Notes of Debates in the Federal Convention of 1787*[13] or of the *Federalist Papers*?[14]

Although the reason for the specific requirement of the Sundays Clause is not addressed in Madison's *Notes*, it may be useful to trace in his record the development of the broader issue of the presidential veto and its override as these were discussed in the Convention.

The subject of the presidential veto was put before the assembly as early as the first day of substantive discussion (May 29),[15] when Edmund Randolph of Virginia set forth his 15 resolutions, but the resolution that contained the veto was not taken up until June 4.[16] These early discussions of the qualified negative, as it is usually called, were limited to questions of 1) whether such a presidential right was advisable, 2) whether the right should be shared with the judiciary or exercised by the executive branch alone, 3) whether this negative should be absolute or qualified, that is, with the possibility of being overridden by the legislative branch, and 4) whether such an override should require a 2/3 or 3/4 vote by each of the houses of the legislature.[17] But there is nothing in all this discussion that pertains to a time limit for the President to exercise the veto power.

However, on August 6 the Convention received the Report of the Committee of Detail, in which the proposal is put into this provisional form. "If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return; in which case it shall not be a law."[18]

Consideration of the Report of the Committee of Detail was delayed until the following day, when the report was debated point by point from its beginning. It was not until August 15, therefore, that the Convention considered the issue cited above.[19] On that occasion the proposal was changed so as to replace the words "seven days" with the words "ten days (Sundays excepted)" and in that form the section was approved, nine states agreeing, New Hampshire and Massachusetts dissenting, with New York and Rhode Island absent.[20] But there is no record of any discussion surrounding the inclusion of the words "Sundays excepted." It almost seems to have come out of nowhere. No committee or person is even associated with its introduction into the "debate." Not even a motion for its inclusion is mentioned. Madison simply wrote: "'Ten days (Sundays excepted)' instead of 'seven' were allowed to the President for returning bills with his objections."[21] It does seem, however, that the clause was introduced into the Constitution's text on that August 15 session, since it was not part of the text that came from the Committee of Detail to the full deliberative body.

On September 12 the entire text of the Constitution, with a few points left open to discussion, was presented to the Convention. The wording of the sentence containing the Sunday Clause is identical to that which had been approved on August 15.[22] The whole document was not immediately approved. Rather, there were various motions to improve it so that it could be finally voted on and submitted to the states for ratification.[23]

On the following day (September 13) a rather insignificant clarifying motion by Madison to add the words "the day on which" between "after" and "it" was defeated as being unnecessary.[24] Thus the section on the presidential veto had reached its final form that is presently in the Constitution.

Although the Sunday Clause itself has no clear or obvious antecedent, the idea of putting a limit on the number of days the Executive has to return a vetoed bill does have some earlier expressions. Two state constitutions had employed that device in one way or another: New York (1777)[25] allowed ten days and Massachusetts (1780)[26] allowed five. But neither of these provisions said anything about excepting Sunday from the count of days.

On the other hand, at least two state documents have something to say about excepting Sunday from a counting of days, although not in the context of the return of a vetoed bill. Thus Delaware's 1776 Constitution provided that "if any of the said 1st and 20th days of October should be Sunday, then, and in such case, the elections shall be held, and the general assembly meet, the next day following."[27] Similarly, the Pennsylvania Constitution of 1696, although not the one of 1776, stipulated:

> Be it further enacted by the authority aforesaid, that as oft as any days of the month, mentioned in any article of this act, shall fall upon the first day of the week, commonly called the Lord's

> day, the business appointed for that day, shall be deferred till the next day, unless in cases of emergency.[28]

In light of this background for concern over Sunday, it seems most likely, as speculative as it is, that the Sundays Clause came into the federal Constitution through the suggestion of one of the delegates from Delaware or Pennsylvania. Indeed, the most likely source appears to be one or more of the Delaware delegation (Richard Bassett, Gunning Bedford, Jacob Broom, John Dickinson, and George Read), any one of whom would likely have been familiar with and convinced of the value of the provisions of their own state constitution. Read was the President of the convention that wrote the Delaware Constitution and Dickinson was frequently influential in the Philadelphia Convention.

Perhaps the main outcome of this review is the observation that we have no record from Madison's *Notes* of any debate on the words "Sundays excepted." No extant account from this source explains why these words were inserted or what specifically they were intended to convey.

On the other hand, one aspect of the Convention's activities may be thought to shed some light on the participants' attitudes toward at least one aspect of governmental involvement in religion. That is the inferred motive for the apparent reluctance to bring to a vote Benjamin Franklin's motion to begin the Convention's sessions each morning with prayer for Divine assistance.[29]

On June 28, addressing General Washington, President of the Convention, Franklin bemoaned the fact that after several weeks of intensive debate there had been so little progress or agreement:

> How has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? . . . I therefore beg leave to move that henceforth prayers imploring the assistance of Heaven and its blessing on our deliberations be held in this assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service.[30]

The motion was seconded by Roger Sherman,[31] who would later be part of the committee that would author the Establishment Clause.

Several, including Hamilton, "expressed their apprehensions that however proper such a resolution might have been at the beginning of the Convention, it might at this late day . . . lead the public to believe that the embarrassments and dissensions within the Convention had suggested this measure."[32]

After Sherman and others responded that, "the past omission of a duty could not justify a further omission,"[33] Madison next reports that Hugh Williamson, a future member of the First Congress's House of Representatives, "observed that the true cause of the omission could not be mistaken. The Convention had no funds."[34] This remark appears to be an attempt to speak against Hamilton's caution and thus to support the suggestion of Dr. Franklin.

There was a second motion much to the same effect as Dr. Franklin's.[35] Then, Madison relates, "after several unsuccessful attempts for silently postponing the matter by adjournment the adjournment was at length carried, without any vote on the motion."[36] Nor was either of the seconded motions taken up the following day.

What should be made of the apparent suppression of these motions? Some in the Convention may indeed have been uncomfortable with what had been suggested in the motions, even though that sentiment was not ever actually expressed, or at least not reported by Madison. On the other hand, some men of influence (Sherman, Williamson, Randolph) apparently spoke in favor of the motions and therefore would not have seen any improper governmental involvement in religion with their execution.[37]

In any case, it is at least as speculative to infer a separation-between-government-and-religion motive for the suppression of the motions as to infer a limited-government-involvement-in-religion motive for the inclusion of the Sunday Clause. It is therefore difficult to use this incident to minimize the effect of the Sunday Clause's inclusion in the Constitution.

If an examination of the *Notes* does not reveal the reasoning behind the Sunday Clause, we are no better off when we turn to the *Federalist Papers*. Naturally, Hamilton was concerned to defend the reasonableness of having the qualified negative, that is, the presidential veto with the power of Congress to override it (No. 73).[38] But as to the number of days the President had in order to implement the veto—let alone the Sunday Clause—the *Papers* makes no mention.

Nor do we obtain a more successful result from examining discussions of the Sunday Clause in the state ratifying conventions. There are simply not enough materials extant from those conventions to be of much help. We are left then to consider the meaning and implication of these words from a broader perspective. And as in many historical questions, we can expect at best a conclusion in terms of probability rather than certainty.

In this discussion I use the term "provision" to speak of the mere fact that Sundays were not to be counted, as distinct from the purpose of this provision—whatever we determine that to be—and from its result. We cannot be confined solely to the provision and seek to escape asking about purpose and result or effect. The law does not operate apart from issues of purpose and result.

What were the alternatives available to the Convention? The delegates could, of course, have simply left the words "Sundays excepted" out of the Constitution entirely, as was the case with the form in which the section came from the Committee of Detail. The effect of this non-inclusion would have been to shorten by one or two days the time period the President had to issue a veto. This would have posed no real burden on his effectiveness and could actually have been compensated for by increasing the "ten days" to "twelve days." The Clause's non-inclusion could also have required the President and one of the houses of

Congress to act on Sunday if the President chose to take advantage of the full ten days. Or the Convention could have changed the seven days referred to in the Report of the Committee of Detail directly to twelve or fifteen or any other suitable number. They also could have selected another day of the week, say, Monday, to be the exception.

The fact that they did none of these things raises some interesting questions. Why did they insert the words "Sundays excepted" or retain them once they had been inserted but before final approval of the document? And even if we may not be able to determine conclusively the intent of their inclusion, we still have to contend with the resulting fact that these words are a part of the Constitution.

It will be easier to start with the matter of the provision's result. The immediate and perhaps primary *result* of the Sundays excepted clause is that it protects the President's free exercise of religion, to use the phrase later adopted in the First Amendment. That is, it relieves the President (and the house that would be the recipient of his returning a bill) from having to do a certain kind of "work" on Sunday, if it should happen that the tenth day falls on a Sunday and if the President wishes to take advantage of the full ten days and if the President should consider doing that work an infringement on his religious liberty or on that of the members of the respective house.

The clause, apparently, does not prohibit the President from acting on a Sunday. Nor without the clause would the President be forced to act on a Sunday; he could return the bill on the ninth day instead of the tenth. The clause simply guarantees that Sundays not be counted in determining the *full extent* of time allotted for the President to act. It allows him the full extent without requiring him or the house of Congress involved to violate any religious scruple regarding Sunday observance they might have.

It should also be noted that the clause does not result in protecting a Sabbatarian from the need to compromise his religious scruples in the same way that it results in protecting a non-Sabbatarian.

It apparently also has a secondary result of reinforcing the recognition that Sunday was commonly commemorated as a Christian day of worship and rest from work. The idea that some sort of Sunday observance was the common practice is strengthened by the fact that this concession is all of a piece with the Convention's own practice of not scheduling any formal or general meetings on Sunday, as is clear from the days of meeting entered in Madison's *Notes*.[39]

We turn now to the provision's purpose. Were these results also part of its purpose? What we have above called the primary result of protecting the President's and Congress's free observance of religious scruples seems also legitimately to be considered part of the provision's purpose. But can we go further than this? Is the aforementioned secondary result also a part of the provision's purpose? This question is not easily answered.

On the one hand, it may well be that its incidental *ad hoc* nature in the context of a totally different subject (the presidential veto) and the lack of clear indication in the sources as to its purpose restrain the conclusion that its design was positively to promote the Christian practice.

On the other hand, it is possible to see this reference, brief as it is, as a conscious attempt to insure that the new republic would not go the way France at the time was tending and become a purely secular state. As early as 1785 there were measures afoot in France to revise the Gregorian calendar, in order specifically to de-Christianize that nation.[40] It makes entirely good sense, then, to see the proposers of the Sunday Clause, whoever they were, as wanting to guide the new government in a different direction. Without more evidence, this suggestion must remain only a possibility, but with a further connection between these movements in France and the American experiment it may rise to the level of probability.

It is unlikely that the clause had a merely secular purpose in the way that Sunday closing laws were later deemed by the Supreme Court to be consistent with the Establishment Clause on the basis that their purpose was secular. In the very decision in which this point was made the Court admitted that *originally* the Sunday closing statutes were primarily religious (sectarian) in nature.[41] In view of this context for Sunday closing laws we probably ought not to assume that the Constitution's Sunday Clause was intended to achieve merely some secular end.

A possible criticism of this approach is that it is too intentionalist in its interpretive stance, rather than being textualist by restricting the investigation to the plain meaning of the text and ignoring its legislative history.[42] However, textualism must surely have its limitations when we are dealing with a two-word text ("Sundays excepted") without much grammatical context to use for guidance. In such a case we are forced to go beyond the text to explore legislative history.

Of course, the difference between the two approaches is not that intentionalism pays attention to the question of purpose and textualism does not. The law cannot escape the issue of purpose. Rather, the difference is in the way the two approaches go about determining the purpose—whether from the words alone or from the words in light of their legislative history. Because of the brevity of this text, strict textualism is not workable.

III. Implications of the Analysis for Understanding the Establishment Clause

Having examined the Sunday Clause in its context in the Constitution, we need to raise the question of the relationship between this idea and the ideas expressed in the First Amendment, particularly the Establishment Clause.

This issue of the relationship between the two sections of the Constitution is complicated by the fact that the Framers (and Ratifiers) of the First Amendment were a somewhat different group from the Framers (and Ratifiers) of the body of the Constitution. We are also, of course, dealing with two different temporal points.[43]

However, we must not exaggerate the matter of the two sets of Framers being different. After all, twenty of the fifty-five delegates (36%) to the Constitutional Convention were either Representatives or Senators in the First Congress at the time of the approval of the First Amendment.[44] Or put

the other way around, twenty of the eighty-one members (25%) of the First Congress had previously been participants in the Constitutional Convention. And some of these (Oliver Ellsworth, Elbridge Gerry, Rufus King, James Madison, Roger Sherman, Hugh Williamson) were among the most vocal contributors at the Convention.[45] Others (Pierce Butler, Daniel Carroll, William Paterson, George Read) were somewhat less influential but still contributed substantially to the debates.[46] Moreover, four of these influential Convention delegates (Ellsworth, Madison, Sherman, Paterson) were on the six-member joint House-Senate conference committee that wrote the final form of the Establishment Clause.[47]

It is important to acknowledge that the Sunday Clause and its apparent accommodation to Christian practice are part of the Constitution itself. We have, of course, similar expressions of religiosity in other important documents. The Declaration of Independence, for example, has four references in various ways to belief in God. Those who wish to maintain the radical view that all state expressions of religiosity are violations of the Establishment Clause are quick to point out that the Declaration is not the document that constitutes the nation in the way that the Constitution is such a document. Now that we have identified a similar, perhaps even more specific, expression of religion in the Constitution itself, the supreme law of the land, that objection can no longer stand.

We could hardly expect that the Framers of the Constitution would have had the First Amendment in mind when they voted in favor of including the words "Sundays excepted." Even the Representatives and Senators comprising the First Congress scarcely knew what the First Amendment would say until rather late in the debating process. So the question of the relationship between the two sections must be posed in terms of whether the Framers of the First Amendment would have had in mind the specific detail involved in the Presidential veto power.

How then should the Establishment Clause and the Sundays clause be related? There seem to be only four possible ways of relating the two clauses: (1) The members of the First Congress did not reflect on the Sunday Clause at all and therefore it is inappropriate to raise the question of consistency or inconsistency; (2) The First Congress reflected on the Sunday Clause, recognized an inconsistency but allowed it to stand; (3) The First Congress reflected on the Sunday Clause, recognized an inconsistency and purposely desired it to stand; (4) The First Congress reflected on the Sunday Clause and did not see any inconsistency. Let us consider each of these four ways of relating the clauses and their respective probabilities.

A. No Reflection on the Sundays Clause

This possibility does not seem very likely for several reasons. First, we have already pointed out the considerable overlap of personnel between the Constitutional Convention and the First Congress. And if the members of the Constitutional Convention are rightly described as the conscientious and intellectually well-endowed giants that they were, this would be only slightly, if at all, less true of the members of the First Congress.

Moreover, even for those members of the First Congress who did not participate in the Constitutional Convention the Constitution was in their possession and we have every right to assume that, as Representatives or Senators, they would have known its contents thoroughly. This would especially be the situation in the case of the very first Congress under the new Constitution, knowing as it did its unique place in the founding of the nation. It is not for naught that those original eighty-one individuals and their replacements are thought of as the greatest Congress.

To these considerations we may add, at least in reference to the twenty members who were also delegates to the Constitutional Convention, that according to Madison's *Notes* a number of them gave significant attention to all sorts of details of wording and concept, sometimes moving to add a clarifying word or phrase, sometimes suggesting the deletion of an unnecessary or misleading element.[48] And no one was more prone to this attention to detail than Madison.[49] We could, therefore, certainly expect this attitude toward detail in general to carry over into the writing of the Amendments in the form of recalling the details in the Constitution.

To be sure, there is no evidence in the records of the First Congress of specific reflection on the Sunday Clause. But this may be largely due to the fact that there was apparently no specific reflection on it during the Constitutional Convention itself.

On the other hand, if there is no evidence of reflection on the Sunday Clause as such, there is evidence that some members of the First Congress had shown during the Constitutional Convention a clear interest in the Presidential veto question in general. Early on, Elbridge Gerry and Rufus King gave several speeches each on the question of whether the veto should be exercised by the President alone or in connection with some other body.[50] And later in the discussion, when the issue concerned the margin by which the Senate and House might override a presidential veto, a speech by Gerry was accompanied by speeches or motions from Madison and Hugh Williamson.[51]

Thus there was definite interest in the Executive veto power that forms the context of the Sunday Clause on the part of those at the Convention who were later, as members of the First Congress, to participate in the formation of the Establishment Clause. Accordingly, it does not seem very likely that there was no recollection of the Sunday Clause as the First Congress went through the laborious process of formulating the Establishment Clause.

B. Inconsistency Allowed to Stand

Regarding this second possible resolution of the relationship between the Sunday Clause and the Establishment Clause we must ask what the purpose would be to let stand such an inconsistency as is contemplated by this theory. Perhaps the Congress viewed the alleged inconsistency as what after the fact was perceived to be an unfortunate blemish in the product of the Convention that would eventually work itself out either through the

amendment process or through the judicial process. However, there is no concrete evidence that this was their attitude.

Furthermore, even if this way of relating the Establishment Clause and the Sunday Clause is correct, we are still left with the question of how they interact with one another. In other words, the supposed inconsistency needs somehow to be smoothed out.

One model for doing this would be to resolve the difficulty through seeing the true attitude of the Framers as a compromise position. That is, the true understanding of the Constitution would be something in-between the prohibition of an establishment of religion and the allowance for some public expressions that are concessions to a prevailing religiosity. But this resolution of the supposed difficulty is not really all that different from the claim that there is no inconsistency to begin with. Furthermore, this approach results in a resolution that is quite different from the radical reading of the Establishment Clause that is espoused by some today. This resolution does not sustain the conclusion that the First Amendment forbids all government involvement in religious expression.

The only other model for resolving an inconsistency between the two clauses, assuming that such an inconsistency really does exist, would be to claim that one side of the inconsistency takes precedence over the other side. This procedure, of course, will be more successful than the option just discussed, since it will be clear to most that the Establishment Clause is principial, whereas the Sunday Clause appears to have been more incidental. Still, this method of treatment assumes rather than demonstrates a difficulty of inconsistency in the first place. It has not borne the burden of proving the inconsistency, as it should have done.

C. Inconsistency Intended

This position is simply a more radical version of the previous one and suffers from the same defects as that one does. Someone trying to hold this explanation might appeal to the idea that there may be a few places in the Constitution where the Framers intentionally left language that is ambiguous. But that hardly appears to be the situation in this case. After all, an ambiguity is not quite the same as an inconsistency. Typically an ambiguity involves a word or phrase that may have more than one meaning or construction. An inconsistency, on the other hand, usually involves two statements or concepts that are at variance. It is therefore difficult to see how an appeal to intended ambiguity, if such in fact exists in the Constitution, can be successfully used to support an alleged intentional inconsistency. Certainly the burden of proof rests on the theory that there is inconsistency rather than on the view that the Framers were at least relatively consistent in their work.

D. Consistency

If we are left then with the view that the Framers of the First Amendment saw consistency between the Establishment Clause and the Sunday Clause, the consistency they must have seen between the two clauses flows from the idea that state accommodation to some religious practices of the majority in the population does not violate the Establishment Clause precisely because it is not an establishment of religion. Such concessions may be made because the state is not thereby setting up or sponsoring a state church. In other words, this line of argumentation supports the idea that the prohibition involved in the Establishment Clause is the prohibition of a state-sponsored church. It is not the prohibition of all religious activity on the part of the state.

IV. Implications For the Court's Application of the Establishment Clause

Although the main focus of the paper has been to show that the radical interpretation of the Establishment Clause is unlikely to have been intended by the Framers, it may be useful to extend the discussion to include any implications this analysis may have for the work of the Supreme Court.

As far as is ascertainable, the Court has rarely, if ever, brought a consideration of the Sunday Clause into its Establishment Clause decisions or commented on it in any other way or for any other purpose.[52] Although it may be somewhat hazardous to put forth the negative statement that the Sunday Clause has not been used in relation to Establishment Clause issues, that situation appears to be the case. Even Story appears not to discuss the Clause.[53]

True, a relatively uncritical writer seems to have claimed that the Sunday Clause was commented on by the Senate Judiciary Committee in a January 19, 1853 report to the full Senate.[54] But this claim is unfounded. The report does have a lot to say about the role of Sunday in American life of that time and in the years leading up to it.[55] However, there is nothing in the report that specifically mentions the Sunday Clause or purports to interpret it.

Even the cases dealing with the Sunday closing laws seem not to have appealed to the Constitution's Sunday Clause in arriving at their conclusions. Although local Sunday closing laws have largely been eliminated because of the increasing secularization of American society, the Court held them constitutional when it confronted the issue. For example, in *McGowan v. Maryland* the Court argued that such closing laws had a secular purpose and were therefore constitutional.[56] *Braunfeld v. Brown* took essentially the same approach, ruling that Saturday observers were placed under no undue burden by being required to close on Sunday, even though they had also closed on Saturday.[57]

Rulings such as these do not really exhibit much increased understanding of the Sunday Clause itself. On the other hand, they do show a tendency to preserve the day, while at the same time secularizing the original significance of the day. They preserve Sunday by "de-Sundayizing" it.

In fact, it may be questioned whether the Sunday closing rulings and the Sunday Clause are analogous at all. Whatever the resemblance might superficially be, there are some significant differences. First, these rulings concern local statutes, whereas the Sunday Clause is a federal rule. Second, the Sunday closing statutes upheld by the Court as

constitutional prohibit operating businesses on Sunday or at least a part of it. The Sunday Clause, on the other hand, does not prohibit the President from acting on Sunday. If it prohibits anything, it prohibits forcing the President to relinquish his free exercise rights in order to carry out his duties. Finally, the closing of business on Sunday has a far greater potential impact on society than does the permission granted to the President not to be compelled to act on Sunday. In fact, it is this last factor (impact of Sunday business on society) that enables the Court to see Sunday closings as primarily secular in nature.

If we receive no particular help for understanding the place of the Sunday Clause in Establishment Clause jurisprudence either from specific comment on it or from Sunday closing rulings, we must next turn to the vast body of Establishment Clause cases.

Obviously, this is not the place for a comprehensive overview of such a vast literature. Rather, my more modest goal is to examine a number of Establishment Clause cases to understand the tests that have been employed to determine constitutionality or unconstitutionality. I am not concerned here even with the correctness of these principles or with the correctness of the conclusions drawn from them. My only concern is to understand the tests so that we might be able to raise the question as to how well the Sunday Clause would stand up to them.[58]

A. Recent Tests for Establishment/ Non-Establishment

For the most part, Establishment Clause cases fall into two series, one dealing with government financing in education where religious schools are at least indirect beneficiaries, the other addressing "ceremonial" issues such as display of religious symbols (Ten Commandments, crèches) on or near government property or under government auspices and having prayers in a similar relationship to governmental entities. Although the former series appears to have less bearing on the Sunday Clause, we will cite some examples before giving most of the effort to the second series. Even so, the tests employed in each series are substantially the same.

A good place to begin the first series is with *Lemon*, with its three-pronged test that a statute, in order to be constitutional, must be secular in its purpose, religiously neutral in its effect, and free from excessive entanglement of government and religion.[59] Justice Burger for the Court not only enunciated these tests, but also applied them in the *Lemon* decision. The Pennsylvania and Rhode Island statutes did not offend the constitution in either the first prong[60] or the second.[61] They ran afoul, however, in the third.[62]

The *Lemon* test is used with almost no modification in *Committee for Public Education and Religious Liberty v. Regan*, in which Justice White wrote for the Court: "Grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect;"[63] and "On its face, therefore, the New York plan suggests no excessive entanglement."[64] The same use of the *Lemon* test is true of *Mueller v. Allen*.[65] Writing for the Court, Rehnquist made it clear that a Minnesota statute passed *Lemon's* first,[66] second,[67] and third[68] prongs.

A shift from the use of the *Lemon* criteria to the newly-introduced endorsement test becomes evident in *Witters*.[69] While O'Connor's endorsement test had been suggested in a previous concurring opinion, Justice Marshall, writing for the Court, here applied it to a financial aid case: "On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion."[70]

This shift did not, of course, mean that *Lemon* had been abandoned. In *Edwards v. Aguillard*, Justice Brennan relied on a first-prong *Lemon* argument to hold a law requiring balanced treatment of creation science and evolution unconstitutional: "The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose."[71]

Chief Justice Rehnquist authored the opinion of the Court in *Zobrest v. Catalina Foothills School District*.[72] He had elsewhere expressed hesitation about using the *Lemon* criteria,[73] and perhaps that is why he seems reluctant to use explicit *Lemon* terminology here. Nevertheless, his argument sounds very much like the second prong approach:

> The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign language interpreter there in order to facilitate his education.[74]

Even Justice O'Connor, champion of the endorsement test that she was, reverted to the second and third prongs of *Lemon* in her *Agostini* opinion of the Court:

> To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.[75]

Finally, Chief Justice Rehnquist summarized the school funding program at issue in *Zelman* in broad terms: "[T]he Ohio program is entirely neutral with respect to religion."[76] But he earlier in the opinion used more specific terminology:

> The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government,

> whose role ends with the distribution of benefits.[77]

Furthermore, he writes:

> We have repeatedly recognized that no reasonable observer would think that a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. . . . Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.[78]

We turn now to the second series of Establishment cases, presumably closer in concept to the Sunday Clause issue, having to do with similar "ceremonial" expressions of religion in public life. And we begin with *Marsh v. Chambers*,[79] which, although it has a financial component similar to the ones we have been looking at, still belongs primarily in this second series. Chief Justice Burger delivered the opinion of the Court. Many claim that *Marsh* stands as an anomaly, completely bypassing the *Lemon* tests—indeed, Chief Justice Burger himself adhered to this view[80]—and pre-dating the endorsement test introduced in *Lynch v. Donnelly*.[81] It is certainly true that the main thrust of his argument is on the long and consistent history of Nebraska's practice of opening its legislative sessions with prayer and on his answer to various objections. Nevertheless, there may be an oblique reference to one or more of the *Lemon* prongs in Chief Justice Burger's statement that "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[82]

Lynch is so known for Justice O'Connor's introduction of endorsement in her concurring opinion[83] that we may tend to forget that Chief Justice Burger's opinion for the Court was along the lines of *Lemon*'s first,[84] second,[85] and third[86] prongs. Burger concluded by saying:

> "We are satisfied that the city has a secular purpose for including the crèche, that the city has not impermissibly advanced religion, and that including the *crèche* does not create excessive entanglement between religion and government."[87]

Wallace v. Jaffree[88] is oriented to *Lemon's* first prong. Justice Stevens wrote for the Court that "[t]he statute had *no* secular purpose."[89] On the other hand, *County of Allegheny v. ACLU*[90] focuses on the effects prong of *Lemon* in the form of the endorsement test. In Justice Blackmun's opinion for the Court we read:

> Government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the *crèche* in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City-County Building, however, does not have this effect, given its particular physical setting.[91]

Public prayer cases illuminate another distinct analysis—the coercion test. The Court first adopted this analysis in *Lee v. Weisman*.[92] The Court employed this mode in *Santa Fe Independent School District v. Doe*.[93] *Santa Fe* also appeals to purpose and endorsement, relying on the objective observer's perception of effect.[94] Thus, the purpose and effect prongs of *Lemon* are essentially retained.[95]

The plurality opinion in *Van Orden v. Perry* once again does not use the exact terminology generally associated with the *Lemon* test for constitutionality.[96] Indeed, Chief Justice Rehnquist in fact denies the usefulness of the *Lemon* test for this case.[97] Yet, the importance of *Lemon's* purpose prong still remains important to the Court. While *Van Orden* had no evidence of any impermissible religious purpose in erecting the Ten Commandments on the Texas Capitol Grounds, the Court reached the opposite conclusion as to the constitutionality of the Ten Commandments display in *McCreary County v. ACLU*.[98] There, the purpose analysis was critical to the Court's finding the display unconstitutional: "Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction."[99]

Thus, *Lemon*'s purpose prong remains important to the Court's analysis of "ceremonial" Establishment Clause cases, as does the effect of the government's act—whether that act is coercive or whether a reasonable observer would find that it endorses religion.

B. Application of the Tests to the Sunday Clause

If these tests were applied to the Sunday Clause, would the result be that the Sunday Clause would thereby be declared unconstitutional?

First, however, is the question whether and how such an application could come about. Would it require someone with standing to bring a suit, someone injured by the presence of the Sunday Clause? And if so, what might the circumstances be that would result in an injury from its presence. While we cannot discuss here this matter in detail, we may note that if Mr. Van Orden could claim injury from the passive display of the Ten Commandments, it is not beyond the bounds of reason to suppose that someone might attempt a similar claim in regard to the Sunday Clause.

We begin the question of applicability with the first prong of the *Lemon* test—secular legislative purpose. If we consider what we have called the primary purpose, the Sunday Clause would perhaps be unconstitutional, because it appears that the purpose of the Clause was not secular but religious—the protection of the free exercise of religion rights of the President and members of Congress. On the other hand, the phrase might survive this scrutiny on the assumption that the religious goal was very narrow, affecting

only a few specified individuals. Furthermore, such a purpose would seem to have the support of the Free Exercise Clause.

If we were to analyze the Sunday Clause in terms of a merely secular purpose, it would, of course, withstand the purpose test. Such a secular purpose would presumably be to standardize for society as a whole a weekly day of cessation from work, which happened to be in line with the then accepted Christian practice. But it seems quite out of the question that this secular purpose of the clause was in mind, given the restricted context in which the Sunday Clause occurs and the prevailing sentiments regarding Sunday observance in the generation of the Framers.

If we consider what we have called above the Clause's secondary purpose and if our speculation concerning that purpose is well founded, the Sunday Clause would probably fail the first prong of *Lemon.*

In terms of the second prong of the *Lemon* test the Sunday Clause would be unconstitutional if its primary effect is either to advance or inhibit religion. It seems that the primary effect of the Sunday Clause is the protection of the President's and Congress's free exercise of religion. The Clause then seems to advance religion, and under this test that may be unconstitutional. But again, the fact that this result is restricted to a few specified individuals may rescue the Clause from a strict application of the effects test.

The Clause may, of course, have the secondary effect of reinforcing the Christian observance of Sunday practice, but this should be irrelevant to the *Lemon* test, which speaks only of principal and primary effect. The Court, however, may very well reverse what it considers primary and secondary. If so, the Sunday Clause could be unconstitutional based on relevant Supreme Court precedent.

In terms of the endorsement principle, the Sunday Clause might also be held to be unconstitutional. It is not difficult to envision a Court decision that maintained that a reasonable observer would conclude that the presence of the Sunday Clause might cause some to feel like second class citizens.

On the other hand, it is hard to envision how the Sunday Clause could be stuck down as a result of the coercion test. Nobody is being religiously coerced, not even the President or members of Congress. The only coercion involved is very minor, in that the public may have to wait a couple of extra days in order to learn the President's decision in regard to a veto, and even this is not a religiously oriented coercion. Furthermore, this consideration cannot have had much meaning in the days in which the Sunday Clause was approved, since at that time many citizens living at a distance from the seat of government would have to wait many more than one or two days to hear of the President's decision to veto or not to veto.

Thus, it appears that applying the Supreme Court's Establishment Clause precedents may well invalidate the Sunday Clause. It should also be mentioned that if the clause protects the rights of non-Sabbatarians but not those of Sabbatarians, it may also run into problems with the Equal Protection Clause of the 14th Amendment. But that is a matter for another study.

C. Implications of the Sundays Clause's Unconstitutionality

Let us deal first with the idea that a part of the Constitution may be declared unconstitutional. This may happen, of course, through amendments, and amendments have rendered earlier portions of the Constitution invalid. However, the first ten amendments are not amendments in exactly the same way the other amendments are. These did not change anything in the Constitution, but only added to or reinforced elements that were already present. Thus, it seems there is no easy way to substantiate a claim that the First Amendment's Establishment Clause set aside the Sunday Clause, making it unconstitutional.

Can the Court make a part of the Constitution unconstitutional? It may appear that such is the case. Take, for example, the recent ruling regarding eminent domain that appears to set aside the last clause of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."

But this analogy is not an apt one. Contrary to popular perception, the Court did not nullify the amendment. Rather, it defined "public" in a way that was not done previously.

Since it is curious in the extreme to hold that a part of the Constitution is unconstitutional, that stance suggests that the fundamental principles used by the Supreme Court to determine constitutionality under the Establishment Clause need to be re-examined. Alternatively, if one wants to integrate the Sundays Clause, that is by definition constitutional, into the current interpretative standards, one must conclude that it does not advance religion, since that is what is required by the second *Lemon* criterion. But then, if the Sundays Clause does not advance religion, neither would a number of other items that are now claimed to be advancements of religion.

CONCLUSION

If, as we have shown, a constitutional deference to the Christian religion in the matter of acknowledgement of Sunday does not establish religion and therefore is not in conflict with the Establishment Clause, how can other similar items be said to establish religion? Specifically, to cite issues that are current, how can the use of "under God" and "In God We Trust" be seen as establishing religion? It appears that the radical interpretation of the Establishment Clause has gone too far and has not been faithful to the Constitution it professes to uphold. To be consistent, the radical interpreters should seek to amend the Constitution so as to eliminate the Sunday Clause. Without such a move the radical understanding cannot stand and constitutional interpretation should return to a less radical position.

Actually, even this move of amending the Constitution, while it may remove the current constitutional reference to Sunday, cannot obliterate the fact that in the generation of the Framers, the Constitution allowed the accommodation to Sunday to exist side by side with the prohibition against establishing religion. The impact of this fact on the Framers' understanding of an establishment of religion can never be erased, not even by constitutional amendment.

Footnotes

[1] Most scholars hold that the Fourteenth Amendment made the prohibition applicable to the states.

[2] Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947). Actually, the wall of separation had been mentioned as early as *Reynolds v. U.S.* 98 U.S. 145 (1878). Chief Justice Waite, writing for the Court, cited Thomas Jefferson's words to the Danbury Baptist Association: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." *Id.* at 164. However, although the wall of separation was thus referred to in *Reynolds*, Waite did not build his conclusion specifically on them but on the broader sense of Jefferson's words. Waite said, "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* Thus Waite did not specifically depend on the wall terminology. That step was taken in Everson.

[3] Everson v. Board of Education of Ewing Township, 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.").

[4] While the Supreme Court has not treated the issue substantively, the Ninth Circuit's ruling in *Newdow v. United States Congress* reflects this radical approach. 292 F.3d 597, 611-12 (9th Cir. 2002).

[5] Daniel L. Driesbach, Real Threat and Mere Shadow: Religious Liberty and the First Amendment (1987).

[6] Philip Hamburger, Separation of Church and State (2002).

[7] Among many examples, one of the most straightforward is that contained in Washington's Farewell Address published September 19, 1796. "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." James D. Richardson, ed., *Compilation of Messages and Papers of the Presidents, 1789-1897*, I, 213, 220 (1907). Similarly, and even closer in time to the point of framing the Constitution and the First Amendment, the Northwest Ordinance at Section 14, Article 3, passed by the Second Continental Congress on July 13, 1787 (*Journals of the Continental Congress*, XXXII, 340 (1936) and by the First Congress on August 7, 1789 says, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *(Public Statutes at Large of the United States of America*, I, 52, (1845)).

[8] An interesting expression of religiosity from the general period of the Framers is found in the Journals of Congress under the date of June 20, 1782, when the Second Continental Congress approved the great seal of the United States, the reverse of which contained: "a pyramid unfinished; in the zenith, an eye in a triangle, surrounded with a glory proper; over the eye these words, 'Annuit Coeptis'." *Journals of the Continental Congress,* XXXII, 339 (1914). These were explained in the Journal as follows: "The Pyramid signifies strength and duration. The eye over it and the motto allude to the many signal interpositions of providence in favour of the American cause." *Id.* The words "*annuit coeptis*" are thus understood as meaning that divine Providence has looked with favor on the deeds of the nation. These words are an adaptation of similar words from Vergil's Anneid (Book 9, line 625 or 857, depending on whether the edition is critical or pre-critical), in which Ascanius prayed to Jove/Jupiter for favor on his venture.

[9] *See, e.g.,* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."); *see also* Washington Ethical Society v. District of Columbia, 249 F.2d 127 (1957).

[10] Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.").

[11] Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) ("This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause.").

[12] McCreary County v. ACLU, 125 S. Ct. 2722, 2751 (2005) ("Today's opinion . . . admits that it does not rest upon consistently applied principle."); *id.* at 2756 n.8 ("Nothing so clearly demonstrates the utter inconsistency of our Establishment Clause jurisprudence.").

[13] Adrienne Koch, ed., *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Washington, 1965). References are by date so that any edition may be consulted, as well as by page in this edition, hereafter cited simply as *Notes*.

[14] The Federalist Papers (Clinton Rossiter, ed. 1961).

[15] *Notes*, *supra* note 13, at 32.

[16] *Id.* at 61.

[17] *Id.* at 66.

[18] *Id.* at 389.

[19] *Id.* at 465.

[20] *Id.* at 465.

[21] *Id.* at 465.

[22] *Id.* at 619.

[23] For the sake of completeness I mention a rather confusing discussion that took place on September 12 (*Id.* at 627-29), in which Williamson moved successfully to change the 3/4 vote required to override a veto back to 2/3. What is confusing is that Madison's record of the form that had come on that day before the Convention from the Committee of Style did not consistently reflect the 3/4 requirement that had previously been passed on August 15 (*Id.* at 465). In any case, none of this has any bearing on the Sundays clause question.

[24] *Id.* at 633-34.

[25] Benjamin Perley Poore, ed., The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States 1332 (1924) ("And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.").

[26] *Id.* at 960 ("And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of law.").

[27] *Id.* at 277.

[28] *Id*. at 1536.

[29] *Id.* at 210.

[30] *Id.*

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *Id.*.

[35] *Id.* at 210-11.

[36] *Id.* at 211.

[37] *Id.* at 210-11.

[38] Federalist Papers, *supra* note 14, at 442-47.

[39] Madison's record is arranged chronologically by date and day of the week. Normally, the Convention met from Monday through Saturday, with some days occasionally off for things like committee work and the celebration of the anniversary of independence. There is no example of the convention meeting on Sunday.

[40] 15 Encyclopaedia Britannica 447 (2003).

[41] McGowan v. State of Maryland, 366 U.S. 420, 433-34 (1961) ("But, despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor.").

[42] For a recent discussion of intentionalism and textualism as well as purposivism, *see* Joel Schellhammer, *Defining the Court's Role as Faithful Agent in Statutory Interpretation*, 29 Harv. J. L. & Pub. Pol'y 1119, 1119-31 (2006).

[43] The body of the Constitution was framed in the summer of 1787 by 55 delegates (39 signers) and ratified in state conventions 1787-1790. The First Amendment was framed in September 1789 by the First Congress and ratified in state conventions from 1789 to 1791.

[44] The twenty included eleven Senators (Bassett, Butler, Ellsworth, Few, Johnson, King, Langdon, Robert Morris, Paterson, Read, and Strong) and 9 Representatives (Baldwin, Carroll, Clymer, Fitzsimons, Gerry, Gilman, Madison, Sherman, and Williamson).

[45] By a rough count of the number of pages the delegates are referenced in Koch's Index To Delegates I obtain the following numbers: Ellsworth, 74; Gerry, 124; King, 82; Madison, 162; Sherman, 134; Williamson, 90.

[46] My count for these is: Butler, 64; Carroll, 30; Paterson, 13; Read, 32. In addition, Paterson had put forth the New Jersey Plan, by which act he exercised considerable influence at the Convention.

[47] The two who had not been present at the Convention were Senator Charles Carroll (Maryland) and Representative John Vining (Delaware).

[48] For example on June 23, Sherman moved to insert the words "and incapable of holding" after the words "[in]eligible to offices" in Randolph's third proposition. *Notes, supra* note 13, at 180. Again, on August 8, Sherman moved to strike out the word "resident" and insert "inhabitant," as less liable to misconstruction. *Id.* at 406.

[49] Some examples of Madison's attention to detail include his motion on August 17 to strike the words "and punishment" from the proposed right of the Legislature to declare not only the law but also the punishment of piracies, felonies, counterfeiting, etc. *Id.* at 472. On September 7, he moved to substitute "until such disability be removed, or a President shall be elected" for "until the time for electing a President shall arrive." *Id.* at 594. We have already noted his motion on September 13 to insert the words "the day on which" into the provision of the ten day period for the President's return of a veto. *Id.* at 633. On September 14, Madison moved to replace the word "annually" with the words "from time to time." *Id.* at 641.

[50] These speeches took place on June 4 and June 6. *Id.* at 61, 80.

[51] September 12, *id.* at 627-29.

[52] The existence of the clause is mentioned without further comment in McGowan v. Maryland, 366 U.S. 420, 452 n.22 (1961).

[53] Joseph Story, Commentaries on the Constitution of the United States (1833).

[54] David Barton, The Myth of Separation 110 (1989).

[55] The report in question is No. 376 of the 32nd Congress, second session. It is interesting in many ways in shedding light on the attitudes of the Judiciary Committee and of the full Senate that implicitly adopted the report. But it is not a direct comment on the Sundays Clause, as appears to be claimed by Barton. The report is mentioned by Chief Justice Burger in Marsh v. Chambers 463 U.S. 783, 788 n.10 (1983).

[56] *McGowan*, 366 U.S., at 444 ("In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.").

[57] Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.").

[58] A similar restricted focus in reviewing judicial decisions is found in Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 Harv. J. L. & Pub. Pol'y 442-61 (2006), although the particular focus of her discussion is different from mine, dealing with the development of the Court's use of the objective observer concept.

[59] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such test may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster an excessive government entanglement with religion.") (internal citations omitted). Of course, as the quote shows, *Lemon* did not invent these tests but simply summarized them.

[60] *Id*. at 613 ("Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statues affords no basis for a conclusion that the legislative intent was to advance religion.").

[61] *Id*. at 613 ("We need not decide whether these legislative precautions restrict the primary effect of the programs to the point where they do not offend the Religion Clauses.").

[62] *Id*. at 614 ("We conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.").

[63] Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 657 (1980).

[64] *Id.* at 660.

[65] Mueller v. Allen, 463 U.S. 388 (1983).

[66] *Id.* at 394 ("Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose.").

[67] *Id.* at 402 ("Thus we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.").

[68] *Id.* at 403 ("Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not 'excessively entangle' the State in religion.").

[69] Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).

[70] *Id.* at 488-89.

[71] Edwards v. Aguillard, 482 U.S. 578, 597 (1987).

[72] 509 U.S. 1 (1993).

[73] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 108-114 (1985) (Rehnquist, J., dissenting).

[74] *Zobrest*, 509 U.S. at 13-14.

[75] Agostini v. Felton, 521 U.S. 203, 234 (1997).

[76] Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

[77] *Id.* at 652.

[78] *Id.* at 354.

[79] 463 U.S. 783 (1983).

[80] *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting that *Marsh* did not apply the *Lemon* test).

[81] *See id.* at 688-89 (O'Connor, J., concurring).

[82] *Marsh*, 463 U.S. at 794-95.

[83] *Lynch,* 465 U.S. at 688 ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

[84] *Id.* at 681 ("The narrow question is whether there is a secular purpose for Pawtucket's display of the *crèche*. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.").

[85] *Id.* at 682 ("We are unable to discern a greater aid to religion deriving from inclusion of the *crèche* than from these benefits and endorsements previously held not violative of the Establishment Clause.").

[86] *Id.* at 683 ("The District Court found that there had been no administrative entanglement between religion and state resulting from the city's ownership and use of the *crèche*.").

[87] *Id.* at 685.

[88] 472 U.S. 38 (1985).

[89] *Id.* at 56.

[90] 492 U.S. 573 (1989).

[91] *Allegheny,* 492 U.S. at 621 (internal quotation marks omitted). The endorsement test was again emphasized, and limited, in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 769 (1995) ("But the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.").

[92] 505 U.S. 577, 599 (1992) ("No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.").

[93] 530 U.S. 290, 312 (2000) ("[T]he delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.").

[94] *Id.* at 317 ("The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."), 308 ("An objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.").

[95] The *Newdow* cases involving the constitutionality of "under God" in the Pledge of Allegiance has not been substantively addressed by the United States Supreme Court. *See* Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004) (dismissing the case on standing grounds). However, the Ninth Circuit found that the recitation of the pledge in public schools violated the *Lemon* test. Newdow v. U.S. Congress 292 F.3d 597, 611 (9th Cir. 2002) ("Therefore, the policy fails the effects prong of *Lemon*, and fails the *Lemon* test. In sum, both the policy and the Act fail the *Lemon* test as well as the endorsement and coercion tests.").

[96] 125 S. Ct. 2854 (2005).

[97] *Id.* at 2864.

[98] 125 S. Ct 2722 (2005).

[99] *Id.* at 2745. Bowman argues that *McCreary* engages in a significant extension of the objective observer principle from being an objective observer of result to being one of purpose. *See supra* note 58, at 457. However, I believe Bowman has overreached in handling the evidence and that the Court has not [yet] relinquished its right as the arbiter of legislative purpose. As I read Souter's argument, he is not contrasting a role of an observer of legislative purpose who stands exterior to the Court with the role the Court has as an observer of legislative purpose. Rather, he is contrasting the Court's psychoanalytical attempt to determine legislative purpose with a more objective method, one that "takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act and looks to plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history and the historical context of the statute and the specific sequence of events leading to its passage" (internal marks and cites omitted). What is objective, then, in the observation is not being external to the Court, but applying more-or-less objective standards of determination of purpose, rather than the subjective approach presumed to be attached to a psychoanalyzing of the legislator. After all, Souter concludes the paragraph by saying, "there is, then, nothing hinting at an unpredictable or disingenuous exercise when a *court enquires into purpose* [emphasis mine] after a claim is raised under the Establishment Clause." *See McCreary*, 125 S. Ct. at 2733. It appears that Scalia has succumbed to the same misreading of Souter. *Id.* at 2757.

TELECOMMUNICATIONS

INFRINGING FREE SPEECH IN THE BROADBAND AGE: NET NEUTRALITY MANDATES

*BY RANDOLPH J. MAY **

There are many reasons why Congress should not adopt laws mandating so-called "net neutrality" for broadband Internet service providers (ISPs). But an often overlooked and underappreciated one is that such mandates would likely violate the free speech rights of the ISPs. This is a case where greater paid sensitivity to constitutional values, if not constitutional dictates, will lead to sound policy.

While at this writing several different net neutrality proposals have been put forward in the House of Representatives and the Senate, all have this in common: One way or another, they propose to restrict directly, or give the Federal Communications Commission ("FCC") the authority to restrict, broadband ISPs from taking any action to "block, impair or degrade" consumers from reaching any website or from "discriminating" against any unaffiliated entity's content. For example, one of the most fulsome expressions of restrictions, a bill drafted by Senators Olympia Snowe (R-ME) and Byron Dorgan (D-ND), felicitously called the "Internet Freedom Preservation Act," states that ISPs shall not "block, interfere with, discriminate against, impair, or degrade the ability of any person to use a broadband service to access, use, send, post, receive, or offer any lawful content . . . made available over the Internet."[1] A bill passed by the House of Representatives contains a provision that grants the FCC the authority to enforce a net neutrality mandate, stating that "consumers are entitled to access the lawful Internet content of their choice."[2]

It is generally agreed that except for a few isolated and quickly remedied incidents,[3] neither the cable operators nor the telephone companies providing broadband Internet services to date have blocked, impaired or otherwise restricted subscriber access to the content of unaffiliated entities. This is not surprising because the broadband Internet access market is rapidly becoming more competitive.[4] It is unlikely that ISPs like Verizon and Comcast, or for that matter broadband providers using other technological platforms such as wireless or satellite operators, will take any action that meets with consumer objection or resistance. As a matter of policy, Congress should be very hesitant to pass a law in anticipation of conjectured harms that may never materialize. This is especially so with regard to a technologically dynamic area. As the Internet continues to evolve, such a law, with open-ended terms such as "interfere with," "impair" and "degrade" at its core, almost certainly would turn out to be overly broad in application. This vagueness inevitably would act to restrict efficient business arrangements that otherwise would allow ISPs to make available services demanded by consumers at lower costs. Moreover, the vague terms of the neutrality mandates would be grist for the litigation mills for years to come.

Even if they made good policy sense, which they do not, there is another, more fundamental reason why net neutrality mandates should not be adopted. They impinge on the ISPs' constitutional rights. The First Amendment's language is plain: "Congress shall make no law . . . abridging the freedom of speech." ISPs like Comcast and Verizon possess free speech rights just like newspapers, magazines, movie and CD producers or the man preaching on a soapbox. They are all speakers for First Amendment purposes, regardless of the medium used. And under traditional First Amendment jurisprudence, it is just as much a free speech infringement to compel a speaker to convey messages that the speaker does not wish to convey as it is to prevent a speaker from conveying messages it wishes to convey. In *Miami Herald Publishing Company v. Tornillo*,[5] the Supreme Court held unanimously that a Florida statute, requiring a newspaper that published an editorial critical of a political candidate to print the candidate's reply, violated the First Amendment. In doing so, the Court noted—and rejected—Tornillo's argument that the Florida mandatory access statute does not amount to a restriction of the newspaper's right to say whatever it pleases:

> Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because "the statute in question here has not prevented the *Miami Herald* from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers.[6]

Neutrality laws mandating an ISP to "post," "use" or "send" all lawful content are for all practical purposes compelled access mandates, akin to the Florida right to access statute at issue in *Tornillo*. Even though these mandates do not literally "restrict" an ISP from publishing content of its own choosing, they compel the ISP to convey content it otherwise, for whatever reason, may choose not to convey.

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Relying expressly on *Tornillo*, a federal court in Florida held unconstitutional, under the First Amendment, a county ordinance requiring a cable operator to allow competitors access to its cable system on terms at least as favorable as those on which it provides such access to itself.[7] The court declared: "Under the First Amendment, government should not interfere with the process by which preferences for information evolve. Not only the message, but also the messenger receive constitutional protection."[8] And in language directly pertinent to the current net neutrality debate, the court proclaimed: "Compelled access like that ordered by the Broward County ordinance both penalizes expression and forces the cable operators to alter their content to conform to an agenda they do not set."[9]

In *Tornillo*, Chief Justice Burger painstakingly took note of claims by proponents of the compelled access statute that newspapers had come to exercise monopolistic control over the dissemination of information in their communities. For example, he summarized the proffered "concentration of control" justification for compelled access this way:

> The result of these vast changes has been to place in a few hands the power to inform the American people and shape public opinion. Much of the editorial opinion and commentary that is printed is that of syndicated columnists distributed nationwide and, as a result, we are told, on national and world issues there tends to be a homogeneity of editorial opinion, commentary, and interpretive analysis. The abuses of bias and manipulative reportage are, likewise, said to be the result of the vast accumulations of unreviewable power in the modern media empires. In effect, it is claimed, the public has lost any ability to respond or to contribute in a meaningful way to the debate on issues.[10]

In other words, according to the Court: "The First Amendment interest of the public in being informed is said to be in peril because 'the marketplace of ideas' is today a monopoly controlled by the owners of the market."[11]

No matter. For purposes of First Amendment protection, the Court said: "However much validity may be found in these arguments [concerning concentration of control], at each point the implementation of a remedy such as an enforceable right of access necessarily calls for some mechanism, either governmental or consensual. If it is governmental coercion, this at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that Amendment developed over the years."[12]

Although the *Tornillo* Court emphasized the result would have been the same even if the mandated right to reply was costless to the newspaper, it pointed out that the Florida statute necessarily imposes penalties and burdens on the newspaper required to print a reply: "The first phase of the penalty resulting from the compelled printing of a reply is exacted in terms of the costs in printing and composing time and materials and in taking up space that could be devoted to other material that the newspaper may have preferred to print."[13] Similarly, in the Broward County case, the court observed that the equal access provision applicable to cable operators "distorts and disrupts the integrity of the information market by interfering with the ability of market participants to use different cost structures and economic approaches based on the inherent advantages and disadvantages of their respective technology."[14]

To put the matter of free speech rights starkly, a mandate—and all the net neutrality proposals contain similar ones—that prevents an ISP from "blocking" access by its subscribers to any lawful website would mean the ISP could not choose to restrict access to material that in its view is, say, "indecent," "homophobic," or "unpatriotic." (I am not suggesting that an ISP should adopt practices restricting access to any content or that such a restriction would be a successful business strategy. The examples simply illustrate the free speech interests at stake.)

To be sure, freedom of speech under the First Amendment is not absolute. For example, the Supreme Court, in a 1994 5-4 decision in *Turner Broadcasting System v. FCC*,[15] rejected the argument that, at least on its face, a law requiring cable operators to carry the signals of local broadcast stations violated the cable operators' First Amendment rights. But the Court relied very heavily on Congress' judgment that local stations providing free television deserved special protection. It also assumed that cable operators possessed a bottleneck that allowed them to play a "gatekeeper" role controlling programming that entered subscribers' homes. Net neutrality mandates have nothing to do with the protection of local broadcast stations. And in today's competitive environment, it cannot be contended seriously that cable operators any longer have control of the video content that enters consumers' homes, if they ever did.

The proposed neutrality nondiscrimination mandates are eerily reminiscent of the Federal Communications Commission's Fairness Doctrine, which it jettisoned two decades ago in light of the new media proliferating even then. The Fairness Doctrine required that broadcasters present a balanced view of controversial issues. When the Supreme Court upheld this form of compelled access regulation against First Amendment challenge in 1969 in *Red Lion Broadcasting Co. v. FCC*,[16] it did so on the basis that it considered broadcasters different from other speakers because they use the radio spectrum, which the Court characterized as a scarce public resource. Apart from whether the Court today would reach the same result regarding broadcasters' free speech rights, it has refused to extend such scarcity-based reasoning to other media. We certainly do not want to import Fairness Doctrine-type speech restrictions into the newly-competitive environment of broadband ISPs.

In effect, what the current crop of net-neutrality proposals really seeks to do, without saying so directly, is to reverse the Supreme Court's 2005 decision in *National Cable & Telecommunications Assoc. v. Brand X Internet*

Services[17] by turning ISPs into common carriers required to carry all messages indifferently and to grant compelled access to all comers. It may well be that, as a matter of law, Congress or the FCC itself has the authority consistent with the Constitution to impose common carrier or common carrier-like obligations on the broadband ISPs—although there is doubt about the extent of the authority to do so in a competitive communications environment such as that which presently exists.[18]

The main point here is that largely unexplored but nevertheless significant First Amendment interests are at stake in the raging net-neutrality debate. The *Broward County* court put it well back in 2000, when competition among broadband ISPs, although beginning to flourish, was not nearly as robust as it is today:

> It is ironic that a technology, which is permitting citizens greater ease of access to channels of communication than has existed at any time throughout history, is being subjected to the same arguments rejected by the Supreme Court in *Tornillo*.[19]

Ironic indeed. This is an instance in which greater appreciation for free speech values not only will be consistent with our constitutional heritage, but also will lead to sounder communications policy.

Footnotes

[1] S. 2917, "Internet Freedom Preservation Act," introduced May 19, 2006.

[2] H.R. 5252, "Consumer Opportunity, Promotion, and Enhancement Act of 2006," as passed in the House of Representatives on June 8, 2006, granting the FCC the authority to enforce the neutrality principles that the agency had promulgated in a Policy Statement (FCC 05-151; CC Docket No. 02-33) released on September 23, 2006.

[3] *See*, *e.g.*, Consent Decree between Madison River Communications, LLC and the FCC (under which the Madison River Telephone Company agreed to cease blocking ports used by Voice over Internet Protocol applications that competed with Madison River's traditional local telephone service offerings). Madison River Communications, LLC, DA 05-543, File No. EB-05-IH-0110.

[4] In its most recent report tracking penetration of high-speed broadband services, the FCC found that, as of December 31, 2005, on a nationwide basis at least 94% of the country's zip codes had available two or more broadband providers. Indeed, approximately 88% of the nation's zip codes had available three or more competitors. This does not mean the competition was available ubiquitously in the zip code, but it is a good indication of the extent to which competition is proliferating. (The figures are approximate because of rounding errors. *See* FCC Report, "High-Speed Services for Internet Access: Status as of December 31, 2005," released July 2006, at Table 17.

[5] 418 U.S. 241 (1974).

[6] *Id*. at 256.

[7] Comcast Cablevision of Broward County, Inc. v. Broward County, Florida, 125 F. Supp. 2d 685 (S.D. FL. 2000).

[8] *Id*. at 693.

[9] *Id*. at 694.

[10] 418 U.S. at 250.

[11] *Id*. at 251.

[12] *Id*. at 254.

[13] *Id*. at 256.

[14] 125 F. Supp. 2d at 694.

[15] 512 U.S. 622 (1994).

[16] 395 U.S. 367 (1969).

[17] 125 S. Ct. 2688 (2005).

[18] In *Turner Broadcasting*, Justice Kennedy stated, "The First Amendment's command that the government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas." 512 U.S. at 657. Even assuming this is an accurate statement of existing First Amendment jurisprudence, and note that it is at odds with the Court's unanimous rejection of the relevance of the "monopoly" control argument in *Tornillo*, in today's communications environment there is no one ISP that can be said to control a critical pathway of communication.

[19] 125 F. Supp. at 694.

BOOK REVIEWS

Trapped: When Acting Ethically is Against the Law

BY JOHN HASNAS

*REVIEWED BY DAN SULLIVAN**

From Enron to Martha Stewart, white-collar crime has been big news in recent years. Many Americans understandably think that the federal government's efforts to combat white-collar crime will cause businesspeople to behave more ethically. After all, acting ethically simply requires acting in accordance with the law and its incentives . . . right?

Not always, asserts John Hasnas the author of *Trapped: When Acting Ethically is Against the Law*. Hasnas makes a compelling case in his new book that, "the current federal campaign against white-collar crime frequently undermines, rather than enhances, the efforts of businesspeople to behave ethically."

Hasnas, an attorney with a Ph.D. in legal philosophy, is auspiciously qualified to comment on the intersection of business, crime and ethics. He is as an Associate Professor at Georgetown University's McDonough School of Business, where he teaches courses in ethics and law. He has also taught criminal law at George Mason University and worked as assistant general counsel for Koch Industries, Inc.

Trapped grabs the reader's attention by beginning like a "Choose Your Own Adventure" book. Its introduction includes a multiple-choice quiz that presents the reader with three hypothetical, yet realistic, situations in which a corporation employee has allegedly engaged in illegal behavior. The reader must choose the ethically appropriate course of action for each corporation's CEO. At the end of the book, Hasnas reveals the results of each course of action. Shockingly, the reader learns that the law encourages or mandates an unethical course of action in all three situations. Choosing ethical behavior leads to indictment and crippling fines that may ruin a corporation, while choosing unethical behavior avoids these negative consequences.

The main body of *Trapped* is as engaging as the introduction and conclusion. In less than 100 pages, Hasnas clearly and concisely explains the current state of white-collar criminal law, and the ethical dilemmas that the law creates for conscientious businesspeople.

The first part of the book describes the development of white-collar crime law, which Hasnas defines as "the law designed to police the behavior of those parties involved in business for honest dealing and regulatory compliance." According to Hasnas, the liberal safeguards of traditional criminal law made it difficult for the federal government to effectively combat white-collar crime. These safeguards included substantive protections, such as the ban on vicarious criminal liability, the mens rea requirement, and the principle of legality; as well as procedural protections, such as the presumption of innocence, the requirement of proof beyond a reasonable doubt, the attorney-client privilege, and the Fifth Amendment privilege against self-incrimination.

The development of white-collar criminal law, as told by Hasnas, is the story of how Congress, the courts, and federal law enforcement agencies overcame the challenges to combating white-collar crime created by traditional criminal law. Hasnas identifies three major innovations that allowed the government to circumvent the liberal safeguards of traditional criminal law: (1) the concept of corporate criminal responsibility, which holds organizations strictly liable for the offenses of their employees, (2) the legislative creation of new offenses, such as mail fraud and obstruction of justice, and (3) the U.S. Sentencing Commission's Sentencing Guidelines for Organizations, which effectively penalizes organizations for, among other things, maintaining their innocence or asserting the attorney-client privilege.

Hasnas argues, for instance, that the creation of new offenses, such as money laundering, false statements, and obstruction of justice, allowed prosecutors to overcome the difficulty of proving a defendant's guilt beyond a reasonable doubt "by providing, in the words of two federal prosecutors, 'the ability to prosecute a wrongdoer when there is insufficient evidence of the underlying criminal conduct or insufficient evidence connecting the wrongdoer to the underlying criminal conduct.'" Hasnas cites the Martha Stewart prosecution as a case in point. Although the federal government could not have convicted Stewart of insider trading, they were able to convict her of making false statements and obstructing justice.

The second part of the book examines why these developments in the law of white-collar crime matter. Hasnas concedes that the effective enforcement of white-collar criminal law would not be possible without the innovations that developed to circumvent the liberal safeguards of traditional criminal law. But he asserts that these innovations also created difficult ethical dilemmas for conscientious businesspeople. In particular, that the current campaign against white-collar crime "make[s] it more difficult for businesses to realize organizational justice, to properly respect employees' privacy, to maintain needed confidentiality, to engender trust within the organization, and to engage in ethical self-assessment."

The U.S. Sentencing Commission's Sentencing Guidelines for Organizations and the Department of Justice's (DOJ) implementing policies virtually force corporate managers to choose between abandoning their employees and saving their corporations from indictment and devastating fines. They reward corporations that cooperate with government investigations of alleged employee wrongdoing and punish those that do not. What qualifies as 'cooperation' is up to the government. Under the DOJ's current policy, cooperation "amounts to a corporation's willingness to waive attorney-client privilege, to refrain from paying its employees' legal fees, and to refuse to enter into joint defense agreements with its employees."

The current policy thus makes the corporation an offer it cannot refuse. By cooperating with the government, the corporation must unethically renege on its promises of

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employee confidentiality, trust, and loyalty, an employee who may very well be innocent. But doing so reduces its chances of being indicted, fined, and put out of business. Unsurprisingly, most corporations comply because the financial risks of not cooperating are simply too high. This situation is just one example among many Hasnas presents in demonstrating that, "compliance is not ethical and ethical behavior is not compliance," in the context of federal criminal law.

Since the federal government's campaign against white-collar crime encourages unethical behavior among businesspeople, Hasnas considers its success in combating crime a Pyrrhic victory. ". . . [I]n order to use the criminal law to raise the ethical level of business behavior among those parties given to unscrupulous action," he writes, it appears "we must incentivize unethical behavior on the part of those who are conscientious."

Rather than continuing this campaign, Hasnas suggests the government abstain from combating white-collar crime that does not directly harm or violate the rights others. This idea is certainly provocative and may be a bridge too far for some readers. But it does not undermine Hasnas' powerful foray into the ethical dilemmas created by contemporary white-collar criminal law. Even if Hasnas' proposed treatment for the problem misses the mark, his diagnosis does not.

The Limits of International Law

BY JACK GOLDSMITH AND ERIC A. POSNER

Law without Nations? Why Constitutional Government Requires Sovereign States

BY JEREMY A. RABKIN

*REVIEWED BY VINCENT J. VITKOWSKY**

International law is rather less useful than many would proclaim. For one thing, the existing framework is inadequate to address the central danger of this generation: the threat from terrorists and their rogue state collaborators. Germane legal principles are only now being developed, slowly and against much resistance, through emerging norms of customary international law in areas such as the right to use force in anticipatory self-defense and the detainment and neutralization of captured belligerents. For the most part, these norms will likely be created through derogation of past ones which prove ill-suited to present-day challenges. In the interim, the operative concept is that some things are just too fundamentally important to be left to abstractions.

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The best way to understand international law is as a species of international politics. This is the central thesis of two important recent books.

In *The Limits of International Law*, distinguished law school professors Jack Goldsmith and Eric Posner seek to move international law scholarship away from what they call "an improbable combination of doctrinalism and idealism" into a more pragmatic, experienced-based realm. To this end, they turn to a tool traditionally used by political scientists: rational choice theory (as developed through classical game theory). They argue, with considerable success, that "international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power." The truth of this conclusion is manifest in the European response to virtually any conflict. Great emphasis is placed on international institutions and law, in a phenomenon sometimes referred to as "juridicized discourse." It makes sense for Europeans to seek to influence events through soft tools, because most often they lack both the strategic consensus and the means for other effective options. Robert Kagan explained this succinctly in his classic *Of Paradise and Power* (2003). Responding to the old adage, "When you have a hammer, all problems start to look like nails," Kagan observes "nations without great military power face the opposite danger: when you don't have a hammer, you don't want anything to look like a nail."

The analysis in *The Limits of International Law* is workmanlike and comprehensive. And realistic, because it factors in the effects of transaction costs and imperfect information. The authors also acknowledge that human mistakes and institutional failures often result in states acting in ways that cannot be fitted to any construct that could reasonably be called "rational choice." As in their past work, they spend little time in the purely conceptual, and much in the world we actually inhabit. This approach cannot be taken for granted, as it remains all too rare in the international legal academy.

Goldsmith and Posner demonstrate throughout that there is no evidence that compliance with international law arises from exogenous influences. Here they differ profoundly with those who believe "international law" must be followed in any conflict, for its own sake—even if one's adversary ignores it—as a kind of Kantian categorical imperative. Rather, they see adherence to international law as a reflection of self-interest in complex and shifting factual scenarios.

This is especially relevant in considering customary international law, a concept which traditionally refers to legal "rules" resulting from widespread state practice, followed out of *opino juris*, i.e., a sense of legal obligation. To Goldsmith and Posner, this description gets the causation wrong. Rules of customary international law reflect behavioral regularity. But it is not the rule, motivated by *opino juris*, that gives rise to the behavioral regularity. Rather, it is the behavioral regularity, reflecting a measure of rational choice, which comes to be characterized as a "rule" of customary international law.

Goldsmith and Posner explain and interpret customary international law by noting that states often find themselves in one of four strategic positions: coincidence of interest, coercion, cooperation, or coordination. Using game theory models such as the "prisoner's dilemma" and the "battle of sexes," they identify the point, or points, of equilibrium in these positions. When a state's self-interest accords with the most rational conduct in one of these four strategic positions, the result is designated a rule of customary international law. Goldsmith and Posner demonstrate that much of this is best understood as coincidence of interest.

Turning to treaties, Goldsmith and Posner explain, these clarify and facilitate the conduct of states in strategic cooperation and coordination. In an analysis corporate lawyers can embrace, they argue that the comparison of treaties to domestic contracts, or legislation, is inapt. The better analogy is to nonbinding letters of intent, with force and effect depending ultimately on retaliation and reputation, rather than external implementation. Continuing the corporate analogy, they note that although a CEO may instruct its counsel to comply with contracts as a general matter, in a sufficiently important case the CEO may withdraw that authority and make a decision to breach a given contract when it would be in the corporation's best interest. Nations do the same. The authors extend this analysis to the logic of compliance with human rights treaties and international trade agreements.

They conclude the book by weighing the extent to which international law can be considered a moral argument. In this portion, they review the common assumptions of international legal scholars—principle among them that states have "a moral obligation" to comply with international law, that this moral obligation arises from consent, and that it benefits citizens when their states comply. Systematically they examine the premises behind these assumptions, the counter-arguments, and the responses thereto. Their review of how states actually act leads them to conclude that "the norms of international law are different from morality. They are more precise and reflect positions where moral principles run out." Thus, they characterize international law as a "special kind of politics," one that uses legal constructs like precedent and interpretation, but is only taken seriously to the extent it is consistent with national interests. (Nevertheless, the two believe that the legal rhetoric of international relations, however cheap, may nonetheless be valuable—principally, and similarly to treaties, by improving cooperation and coordination.)

Goldsmith and Posner write that their purpose in presenting this book was to help put international law scholarship on a more solid foundation. They succeed in showing the way.

Jeremy Rabkin has a broader purpose. In *Law Without Nations? Why Constitutional Government Requires Sovereign States*, he seeks to demonstrate the historical, philosophical, and practical reasons why many aspects of a broad, overarching system of public international law is unworkable and misguided, as well as inconsistent with American constitutional traditions. Implicitly, he seeks to inspire others to promote more realistic policies. In both efforts he succeeds.

Rabkin is a Professor of Government at Cornell University, focused on international law and American constitutional history. He is a political historian and theorist of the first order, applying those skills to the issues of the day. His book connects important concepts on several subjects. First, it explains the differences between European and American thought, in terms of expectations for supranational legal structures and rules, and the willingness to relinquish individual sovereignty in pursuit of transnational economic and social objectives. He suggests a link between the views of many Europeans and a longing for a return to *Pax Romana*. The essence of his conclusion is that "traditional American views may change over time. But Americans are likely to prove less malleable than the docile peoples of Europe."

Next, Rabkin exposes the inherent weaknesses of any supranational legal structure or rule that is not ultimately supported by sovereignty, which necessarily depends on the capacity for real enforcement. On the academic embrace of "global governance" in the 1990s, he reminds the reader that "the evasiveness of the term enhanced its charm. Ambiguity was central to its logic. The most obvious difference between government and governance is that governments deploy force."

Rabkin presents a broad and penetrating overview of the development of the idea of sovereignty, beginning with early modern times. The overview includes a review of the work of Jean Bodin, John Locke, William Blackstone, Hugo Grotius, Emmerich de Vattel, Jean-Jacques Rousseau, and David Hume. He shows how and why sovereignty was the essential building block of theories of classic liberal government, or, as he has said elsewhere, "the first fruit of the Enlightenment."

Rabkin's fourth—and really central—undertaking is to analyze how and why American ideas of constitutional government make it hard for Americans to embrace schemes of global governance. As one might expect, he focuses on James Madison and the Founders, and the constitutional system they created. Their guiding principle was that even in one country most people do not agree on many things. Conflict is inevitable, but healthy, and the genius of the Founders was to create a system that institutionalized and organized that conflict in a stable and functioning framework, without the benefit of historical precedent. As Rabkin puts it, "taken as a whole, American society is the most successful self-conscious construction in human history." He does not say, but well could have, that any review of the great works of political theory that does not focus intensely on *The Federalist Papers* is entirely inadequate.

Rabkin presents an insightful review of *The Federalist*, the Founders, and their intellectual lights. He identifies their assumptions and understandings, and especially their respect for both the potential of international law and its limits. He reminds the reader of how remarkable it is that, alone in the western world, U.S. political leaders and courts routinely cite the Founders and their eighteenth- and nineteenth-century authorities in support of positions in today's constitutional controversies.

Against this background, Rabkin addresses several current aspects of the international legal system, including

the prospects for Eurogoverance (both within Europe and as a model elsewhere), the utility of the human rights crusade, and the role and effect of trade agreements. He debunks many common assumptions.

As a special bonus, he is a gifted and entertaining stylist. His work is replete with the deft turn of phrase, the elegantly-crafted insight, and the dry formulation exposing the folly of analysis based on wishful thinking, rather than experience. These delights appear every few pages. Some I have quoted above. Here are just a few more:

> "Calls for improving global governance were a stock theme of political discussion in the 1990s—as if governing the world were quite a straightforward project."
>
> On the WTO protests in 1999: "The protestors were so passionate that they finally turned to mob violence—in, of all places, the latte capital of America: prosperous, progressive Seattle."
>
> In discussing the failures of the United Nations: "It is not even easy to understand why American action would be assured legitimacy if submitted to the approval of France, a nation not famed for its selfless devotion to humanity."

Both books are admirably brief and direct, and each repays the reader's investment of time and attention. Goldsmith and Posner explain how international law really works. Rabkin explains why this is inevitable and desirable.

Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and their Legacy

BY WILLIAM J. WATKINS, JR.

*REVIEWED BY SORAYA RUDOFSKY**

During the summer of 1798, ostensibly in response to the threat of French invasion, Congress passed some of the most illiberal legislation of the early republic. Naturalization and Alien laws limited the availability of naturalized citizenship and authorized the President to order deportation of foreigners upon mere suspicion of a threat to national security. The Sedition Act criminalized criticism of the national government as well as conspiracy to oppose any of its measures, with penalties of up to five years in prison and $5,000 in fines. President John Adams' Federalist Party had pushed each bill through the legislature over objections that they exceeded constitutional limits on federal legislative authority; then looked to party loyalists in the federal judiciary to see to their enforcement. Although the voluntary mass exodus of foreigners that followed passage of the Alien laws effectively precluded the need for their enforcement, Sedition prosecutions went forward, targeting leading members of the opposition press. With liberty grievously threatened by expanding federal power, the state legislatures of Kentucky and Virginia each passed resolutions, secretly authored by Thomas Jefferson and James Madison, respectively, protesting the constitutionality and validity of this political persecution.

In his insightful and captivating book, *Reclaiming the American Revolution: The Kentucky and Virginia Resolutions and their Legacy*, William Watkins considers state-federal relations through the prism of the Kentucky and Virginia Resolutions. With a passion and candor like that of Jefferson and Madison themselves, he invites the reader to examine and compare even the most fundamental institutions of our federal government against the principles of dual sovereignty and limited government asserted in these important texts.

In the early chapters, Watkins presents an engaging history of early federalism. Using rich anecdotes to paint the characters and controversies of the period, Watkins describes the political turmoil that led to the passage of the Alien and Sedition Acts, and the persecution that followed. By recounting the trials of Vermont congressman Matthew Lyon, Philadelphia attorney Thomas Cooper, and journalists Benjamin Franklin Bache and James Thomson Callendar, he captures the arbitrary and pernicious character of the sedition prosecutions that inflamed the passions and rhetoric of the resolution authors.

Watkins' treatment of the actual texts is equally articulate. He examines both the draft and published versions of the resolutions within their historical context and extracts five "principles of 1798": 1) that the Constitution is a compact; 2) that through this compact the states only delegated to the national government enumerated powers, reserving to themselves the remainder; 3) that broad construction of the constitution improperly allows the national government to assume undelegated powers; 4) that the Alien and Sedition acts were unconstitutional overreaches by the national government; 5) and that the proper remedy for national government overreach is nullification or interposition by the states. Central to the compact theory of the Constitution, and espoused by the resolutions, is the notion that, as equal sovereign parties to the compact "with no judge between them," the States retain an "equal right to judge" for themselves the constitutionality of federal legislation. As Watkins reminds us, judicial review was not established until *Marbury v. Madison* (decided in 1803—two years after the expiration of the Sedition Act) and, in 1798, Madison and Jefferson made no mention of the Supreme Court in this role.

Watkins argues that the resolutions' constitutional commentary represents a revival of the "spirit of 1776." Like the Declaration of Independence, however, the States

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proffered remedy was likely to result in political instability. Indeed, Watkins' account illustrates the rocky history of the nullification doctrine. In the case of the resolutions, neither Kentucky nor Virginia actually nullified any federal laws, and instead emphasized that the resolutions were only protests. Later recourses to the doctrine also obtained mixed results. Northeastern states' unwillingness to federalize the militias in the period leading up to the War of 1812 left them unprepared for the British invasion. In 1832 South Carolina successfully used the threat of nullification to pressure Congress into lowering federal import duties, but the tactic brought the nation to the brink of war.

The crisis of Southern secession and its outcome seem to put to rest questions concerning nullification's viability and potential advantages. Yet, Watkins takes on and ultimately refutes the idea that such support for states' rights is necessarily linked with slavery and segregation. Quoting the arguments of William Lloyd Garrison, editor of the abolitionist newspaper *Liberator*, organizer of the American Anti-Slavery Society and secession advocate, Watkins even goes so far as to hypothesize that Northern secession might have lead to peaceful abolition. While abandoning the practical reality of secession to history, Watkins emphasizes the conceptual and procedural importance of nullification to a complete understanding of constitutional federalism, and questions whether the Supreme Court's role as final arbiter of disputes between the states and national government is compatible with the people's position as ultimate sovereign.

Watson decries the consolidation of federal legislative power that took place during the twentieth century. Although he notes the Supreme Court's complicity with federal overreaching, in its expansive interpretation of the Commerce and Spending Clauses, Watkins identifies the Seventeenth Amendment as the origin of national consolidation. The popular election of Senators, instead of their appointment by state legislatures, diluted state government influence and at the same time deprived states of the guardians of their reserved powers. He argues that this fundamental change, together with the rise of ideological political parties and popular reliance on national government to address primarily local problems, has effectively erased constitutional divisions of legislative sovereignty. To restore his notion of the proper balance of state and federal power, Watkins' proposes creation of a Constitutional Commission (popularly elected to brief terms from among candidates nominated by the state legislature) charged with passing on the constitutionality of any federal action. This thought-provoking proposal demonstrates the "revolutionary" spirit with which Watkins pursues solutions that he finds consistent with the principles of limited government.

Reclaiming the American Revolution revives the principles of federalism and limited government so potently asserted in 1776 and 1798. This powerful book is a quick read and provides illuminating historical information linking problems of foreign policy, commercial interest, and political parties with debates over dual sovereignty and constitutional construction. Williams Watkins makes a convincing case that the resolutions ought to enjoy a privileged place in the pantheon of classic American political texts.

The Fallacy of Campaign Finance Reform

BY JOHN SAMPLES

*REVIEWED BY ALLISON HAYWARD**

In the "democracy-enhancing," apparent-corruption fighting, regulation-propounding cant of scholarship comprising most of the writing about campaign finance, several recent books have fanned fresh, contrarian air into this otherwise stuffy room. The latest in this series, by Cato scholar John Samples, is *The Fallacy of Campaign Finance Reform*.

Samples, a political scientist and expert on political regulation, places the campaign finance debate in historic context. This is essential, since it is easy to look at specific reforms today without understanding the larger philosophical visions behind them. Samples demonstrates the roots of conventional "reform" thinking in the social engineering ideals of the Progressive movement. By contrast, the preference for leaving political activity free from governmental control has its roots in Madisonian views about individual political liberty and the Founding. Samples shows that the Progressive vision holding individuals subservient to larger social goals is fundamentally at odds with the vision upon which our country was founded, of protecting individuals—and their political liberties—from governmental control.

Yet today prominent scholars and even some members of the Supreme Court argue that controlling individual political activity is somehow necessary to further a larger constitutional democracy-enhancing "purpose." But one has to play semantic Twister with the Constitution and the stated views of its framers to force modern campaign finance regulation into a constitutional construct.

Even were campaign finance regulations such as contribution limits, disclosure requirements, and bans on expenditures by certain entities an easy constitutional fit, Samples deploys his skills as a political scientist to demonstrate that they are also a *bad idea*. He debunks the notion that private political giving pulls officeholders away from valid "public interest" views on legislation into a cesspool of private interest favor-swapping. Samples does not deny that bribery can occur, only that it is wrong to assume that private financial support to politicians inevitably pulls them away from a naturally "good" position to an unnatural "corrupt" one. The weight of the evidence, Samples reports, is that campaign contributions are a weak influence upon policy positions. Moreover, the canard that campaign spending is "out of control" is accurate only if one buys the argument that, as society becomes more wealthy, spending on everything else is similarly "out of control."

Yet "reform" (read: elimination) of private influence in politics as a central tenet of Progressive ideology will not be

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dissuaded. As Samples writes, "Once aspiration is confounded with reality, any policy outcome contrary to their political agenda becomes not merely a disappointment but a corruption of political representation."

That conventional reform agenda also unfairly maligns the political participation of donors, and seeks to repress activity like negative advertising and campaign spending that studies show correlate with increased voter participation. Conventional reform advocates also try to claim an egalitarian purpose. Their arguments make much of statistics showing that donors are wealthier than the population generally—but that is not surprising, since just about any activity involving spending money will enjoy the disproportionate participation of . . . people with money. When examined more rigorously, the real difference between donors and *similarly situated* nondonors is that they *care more about politics*. We should not want to burden the political participation of those citizens who are more motivated to participate.

The problem with seeing money corruption as the explanation for political ills is not just that it is not correct, but that it obscures the real corruption of *power*. Officeholders take power and influence for granted when elections are insufficiently competitive to provide that necessary check on abuse of office. Samples admits that incumbents have always enjoyed high re-election rates, but observes that since 1946 those rates have consistently trended upward. Samples concludes that incumbency itself is worth about ten points in an election, generally, but also notes that rising soft money expenditures in the 1990 correlate with declining rates of incumbent success in the short run. This data suggests that spending might *enhance* competition, or at least that when there is more competition we can expect there to be more spending from one quarter, if not another. In either case, suppressing spending does not serve the goal of competition.

But the overall trends indicate that campaign reforms can reduce competition. A similar point is made in Rodney A. Smith's *Money, Power & Elections*. Smith, a fundraising and political finance expert with years of research and experience, examines data from 1920 to the present to show that incumbent margins of victory have increased since the passage of campaign finance laws in the 1970s. So, not only are incumbents winning more (Samples's point), but they are winning *by more*. Without material changes in the existing laws, the implication is that we should expect these trends to continue.

Samples's most engaging chapter traces the origins of modern reform laws. He shows how modern campaign finance reform, as originally designed by the Democratic legislative majority in the late 1960s, was "the perfect crime," in his words. "Those who create such restrictions do well by doing good: they serve the special interests of incumbents and parties while being praised as foes of corruption and noble defenders of the integrity of government." As Samples relates it, reform started on this path in the Federal Election Campaign Act of 1971 by protecting establishment Democrats from Republican spending—especially on television—and from primary threats from upstart and outsider challengers within the Party. The changes made in 1971, Samples shows, would have prevented another Eugene McCarthy-type threat. Samples explains that reforms did not (apparently) hamper McGovern, because McGovern took advantage of novel direct-mail techniques, and his campaign mastered the Democratic Party's new post-1968 delegate selection rules. Watergate, of course, provided wind in the sails for more comprehensive (and invasive) regulation in 1974. In its wake, the incumbent party in Congress retained control for another twenty years.

As Samples sees it, the reform coalition behind BCRA similarly served the interests of establishment politicians (vulnerable Republicans in marginal districts and Democrats) by hampering the ability of groups to run ads against them, providing increased contributions limits should they be challenged by wealthy self-funding opponents, and raising the hard-dollar limits—an area where incumbents enjoy a natural advantage.

Samples's suggested remedy is dramatic deregulation of campaign finance. He would eliminate contribution limits, since "the evidence suggests that contributions do not corrupt policymaking but rather merely complicate challenges to the status quo . . ." He would also permit corporations and unions to give directly to campaigns, rather than participate in an attenuated way through PACs and lobbying. Samples allows for the fact that these entities may be subject to extortion by officeholders, but does not believe that the risk some will abuse their office is sufficient reason to thwart the political activity of all corporations and unions.

Samples is also skeptical of the good disclosure does, a position that places him apart from many "deregulators," such as Rodney Smith, who call for no limits with *full* disclosure. Samples argues that there is scant evidence how voters use disclosed information, so its benefits are uncertain, while the costs to individuals in terms of lost privacy, and the chilling effect disclosure has on supporters of unpopular causes are easy to identify. Anyone who has even been close to a campaign knows that a certain body of supporters desire, for whatever reason, to remain below the itemization threshold. If the threshold is $200, there will be donors determined to donate $199 and not a cent more, who would give more if they could keep their identity non-public.

Samples asks, Why not a system of voluntary disclosure—or in any case, demand disclosure as a higher threshold than the $200 itemization level prescribed in current federal law? One unaddressed issue with voluntary disclosure involves candidates who make selective disclosure. Samples asserts, "If a candidate does not disclose contributions or only discloses some of them, the public will also know that." One wonders how the public would know whether a candidate is pretending to disclose fully, reaping whatever benefits he can from that, but keeping hidden certain controversial supporters.

"Campaign finance reform is a delusion. It purports to reform the world for the better but in reality affirms the status quo for better or worse,"[8] Samples concludes. Whether "reform" goals are sincere or cynical, an increasing body of evidence indicates that regulatory policy coming out of conventional reform thinking is bad for politics.

Unfortunately, conventional reform is an article of faith, resilient to offers of proof. The area deserves study and argument, but it is unlikely that any conclusions, however well-researched and explained, will sway the beliefs of those already committed to that vision or those who benefit politically from their abiding faith.

Cornerstone of Liberty: Property Rights in 21st Century America

BY TIMOTHY SANDEFUR

*REVIEWED BY STEVEN J. EAGLE**

The Supreme Court's decision last summer to uphold the condemnation of homes in unblighted neighborhoods for private urban redevelopment has triggered an outpouring of popular indignation. In the aftermath of *Kelo v. City of New London*, the time seems auspicious for the publication of a lively and full-throated defense of the importance of property rights, and how those rights are undermined by government. Timothy Sandefur's new *Cornerstone of Liberty* fills that need. It is an informative and lively account of the classic sources of American property rights and how individuals suffer substantial pain when those rights are disregarded by elected officials.

For readers not familiar with natural law bases of property rights, the *Cornerstone of Liberty* provides an excellent summary. Sandefur's work as a attorney at the Pacific Legal Foundation, probably the most active litigator for private property rights in the country, gives him a view from the trenches.

For readers who are familiar with rights theory, and with the Supreme Court's repudiation in the 1930s of its earlier view that property was a fundamental right, the book gives many insights into the procedural problems that stymie plaintiffs. Arcane judicial doctrines make it almost impossible for takings claims based on the Constitution to be heard in federal court. Some state courts, notably those of California, use similar doctrines to thwart property owners. Sandefur sketches how some of these procedural traps work.

The author also has a keen eye for the human dimensions of what property, and its loss, means to affected individuals. As U.S. Circuit Judge Richard Posner once wrote, "just compensation" in a constitutional sense is not "full compensation." One reason for this is that the uncompensated financial costs of locating and moving to a new home or business location often pale when compared with the non-pecuniary costs to individuals ripped from their familiar homes and neighborhoods. Legal theorists and bureaucrats are apt to loose sight of these. Sandefur does not. He weaves into his constitutional and legal narratives the stories of the real people behind the cases and the pain they suffer.

The book is a straightforward exposition of the libertarian view of property. It is civil in tone and not marked by the shrillness that is often accompanies ideologically-based works about property rights and the role of the State.

Cornerstone of Liberty is divided into four parts: why property rights are important, the place of property rights in the American Constitution, the state of property rights today, and "what can be done" about their decline. In each of these areas, Sandefur takes an unqualifiedly libertarian approach in defining and applying constitutional doctrine.

Property rights are important, Sandefur explains, because inherent in human nature is the desire to possess things of one's own and to project one's personality through possessions. Beyond that, individual property ownership provides a source of wherewithal that makes people correspondingly independent of the state. Sandefur quotes the almost-obligatory sources, such as John Locke and James Madison. He also cites more contemporary writers very effectively, especially when their words seem to cast them against type. "A child's 'awareness of his own property rights,'" he quotes Dr. Benjamin Spock as noting, "comes naturally 'because it fits with his growing sense of self and assertion of self.'"

Sandefur might well have matched the pediatrician of permissiveness, Dr. Spock, with the troubadour of the *Greening of America*, Charles Reich. In his more serious work as a Yale law professor, Reich argued for recognition of government licenses and entitlements as "the new property." Only by treating occupational licenses and entitlements to government largess such as pubic housing and welfare payments as "property," Reich argued, could their possessors be free of the whims of government officials and have tenure in their benefits in a form cognizable in courts.

The difference between John Locke and Charles Reich, of course, is that Locke claimed that one has ownership of one's self, and hence ownership of what one produces by his or her own labors. Reich, on the other hand, drew moral authority not from an individual's production, but rather from his needs. Locke's perspective involved what Isaiah Berlin later termed "negative liberty," the freedom to be left alone. Reich's contrasting perspective involved "positive liberty," the freedom to fulfill one's potential through having received nurturance. The right of one person to be left alone does not impinge on the right of others to enjoy the same right. However, the right to nurturance necessarily implies claims that others are obligated to fulfill.

As it turned out, American property law in the late 20th century largely has leveled the distinction between "property" and "entitlements," as suggested by Reich. However, the process has not involved converting entitlements into property, but rather converting property into entitlements. The classic illustration in real property law was the conversion of residential leasing, which had been about the transfer of property for a term, into what was termed the agreement for residential services. The lease now is deemed a contract containing numerous "implied" terms benefiting tenants. The falsity of that construct is apparent from the fact that the parties are forbidden to explicitly disclaim the "implied" rights.

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Likewise, land use regulation has morphed from a set of rules supporting private property rights to a set of fiats overwhelming them. The genesis of such regulation is in the law of nuisance. Private nuisance involves the use of one's land in such a manner as to interfere with the reasonable use of the land of another. Common law actions against nuisance, like common law actions against trespass more generally, protected private property rights. Public nuisance is simply an extension of private nuisance. Where a nuisance affected an entire community, or many residents instead of a few, the State could bring an action to protect the aggregate rights of residents.

Comprehensive zoning started out as preventative of nuisance, by attempting to designate districts for all legitimate activities in the community, so that commercial and industrial uses could not interfere with residential ones. So long as a landowner complied with existing use, height, bulk, setback, and similar restrictions, he was assured a building permit. After World War II, government increasingly offered flexibility, but at the price of exhaustive governmental review. Owners are now free to build almost anything—but not as of right. Negotiations with planning and other city officials last for years, and developers are coerced to make "offerings" of road improvements, schools, and cash in exchange for development permission.

Kelo v. City of New London, in its broadest sense, is the culmination of the movement by which landowners were stripped of the right to engage in all but harmful activities, restricted by zoning to ensure that their lands were used only for what government deemed good activities, and finally, subject to condemnation if not used for what localities regard as the best activities—or, at least, those generating the highest tax revenues. No one disputed that Mrs. Kelo and her neighbors used their non-blighted homes for the good of themselves and of society. Rather, the City of New London determined, the land could be used for a better purpose by private redevelopers and that the public would derive its share of the benefit.

Sandefur points out that many bills have been introduced in Congress and state legislatures in the year since *Kelo* to crack down on eminent domain abuse, but that few have passed. Even these often are much more symbolic than effective.

For those in full agreement with the libertarian position, little has to be done to vindicate the rights Sandefur discusses beyond keeping the federal government to its limited powers enumerated in the Constitution and requiring states and localities to compensate for all restrictions beyond those enforcing citizens' rights against trespass and those absolutely necessary to protect public health and safety.

For those who do not completely subscribe to the libertarian agenda, or who seek pragmatic rationales to repel attacks on property rights, in the expectation that the Supreme Court will not soon overthrow the New Deal, many questions remain. Noted libertarians such as Richard Epstein agree, for instance, that there is a need for eminent domain in some situations. These include strategic holdouts who, for instance, refuse to sell land in a mountain pass necessary for completion of an interstate highway, unless they are awarded the lion's share of the gains to be generated by the road. Libertarians like Epstein also recognize that owners often receive implicit compensation for restrictions through what Justice Holmes called "reciprocity of advantage." The setback requirement that requires one landowner to build his home some distance from the sidewalk, for instance, compensates burdened owners by providing them with the benefit derived from the same restriction being placed on all other houses along the avenue.

One of the limitations of a short book expositing fundamental rights is that it does not have the scope to grapple with difficult practical problems and incremental solutions. Except fleetingly in his final chapter on "what is to be done," Sandefur does not discuss how one draws defensible limits on the use of eminent domain when the courts are not about to restore property rights to the top tier of "fundamental" rights, and when the electorate is ideologically against big government, but operationally in favor of the benefits it might bestow upon them.

In September 2005, Professor Thomas Merrill and I testified before the Senate Judiciary Committee on proposed legislation that would prohibit federal funds from being used for state or local projects involving condemnation for private redevelopment. Sandefur's book quotes Merrill, an expert on "public use" issues at Columbia University Law School, as saying that he was taken aback by the "moral significance" that the American people invest in property, as measured by the reaction to *Kelo*. I believe that Merrill, and others who thought the case a routine extension of existing Supreme Court doctrine, are somewhat chastised.

However, the lesson they have learned is that government agencies should not take people's homes when it can be avoided, and that politicians who want to be reelected and judges who want not to be reversed, should pay more attention when agencies do. There is little indication, however, that the ire engendered by *Kelo* extends to the taking of small business property for private redevelopment, which is far more common.

More broadly, Merrill's view, shared by Justice Stevens in *Kelo*, is that government always has supported economic development. Given that drawing bright-line rules with respect to the primacy of "public" and "private" benefit is almost impossible, the political process should be allowed to operate. At the oral argument in *Kelo*, Institute for Justice lawyer Scott Bullock took the opposite approach, urging that condemnation for redevelopment be forbidden. Several Supreme Court Justices asked Bullock to suggest a rule separating permissible from impermissible takings. Given the Institute for Justice's staunch libertarian position, he declined.

In *Cornerstone of Liberty*, Timothy Sandefur has written an excellent short treatment of the importance of property rights and their denigration by the State. In the assumption that the Roberts Supreme Court will be sympathetic to property rights, but not soon inclined to fundamental alteration of the status quo, the challenge now will be to nudge the Court towards adopting limits on takings for redevelopment that over time might bloom into its prohibition.

America's Constitution: A Biography
By Akhil R. Amar

*Reviewed by Michael S. Paulsen**

Akhil Amar's *America's Constitution: A Biography* is the second-best book ever written about the U.S. Constitution.

The best, of course, is *The Federalist*. Originally a series of newspaper essays, *The Federalist* was produced at dazzling speed by the most brilliant composite political-constitutional writer and theorist America has ever produced: *"Publius"* (Alexander Hamilton and James Madison, with a modest assist from John Jay). Taken as a whole, and even though it addresses only the pre-amended Constitution, *The Federalist* is the most important, single exposition of the Constitution ever penned. It is masterfully written, clear, insightful, and bitingly witty. (Hamilton remains the undisputed reigning champion of the elegant, barbed put-down of one's opponents.) *The Federalist* is authoritative, or nearly so, in its treatment of just about every topic it touches. It has influenced all subsequent understanding, interpretation, and application of the Constitution—and rightly so. Even where *Publius* goes wrong (which is seldom, but it does occur) his arguments have set the standard against which rebuttals must be measured.

A work of such caliber comes along, it seems, about once every two hundred years. Amazingly, the second-best book on the Constitution ever written was published in fall of 2005: Amar's *America's Constitution*. Fall 2006 marks the one-year anniversary of Amar's *America's Constitution* and the launch of its first paperback edition. It is, I believe, destined to become a classic of constitutional law.

Before I go on, an obligatory disclaimer: I was Akhil's law school roommate for a year at Yale, and we remain close friends. I may reasonably be accused of bias based on friendship. But I plead innocent: I have attacked Amar, in print, viciously and intemperately, when I thought he deserved it (which is more than occasionally) and would have done so again here if given the opening. Some of Amar's other work can be criticized, justly, as too-clever-by-half, valuing the nifty insight for niftiness's sake and not for its soundness, writing in too self-congratulatory a tone, and trimming his sails to (certain) political winds.

Not *America's Constitution*. This is the best thing Amar has written, by a considerable margin. It is also the most important. *America's Constitution* is a must-read for any serious student of the Constitution. It is a spectacular work of constitutional scholarship and original insight, bearing many of the same features as *The Federalist*. Like *The Federalist*, it is marvelously well-written, clear and incisive. Like *The Federalist*, it is comprehensive in its treatment of the Constitution—now a somewhat larger document—treatise-like in coverage, but un-treatise-like in its readability. Amar's narrative is a better treatise than Joseph Story's treatise, and whips all other treatises by a mile. Like *The Federalist*, it is, I believe, destined to become a standard reference for constitutional scholars for many, many years. On several topics, Amar's discussion is the best constitutional analysis I have ever read. His treatment of the constitutional position and powers of the presidency is among the best ever, exceeding even Hamilton in its clarity and insights. His treatment of the original Constitution's supine accommodation of slavery is devastating. On subject after subject, Amar's analysis is remarkable and insightful. Even where he goes wrong—which is seldom, but does occur—Amar's arguments set the standard against which rebuttals must be measured.

For purposes of this review for *Engage*, I will make three further short points by way of elaboration. (For those interested in a longer analysis, from which I draw certain of the points made here, see Paulsen, *How to Interpret the Constitution (and How Not To)*, 115 Yale L.J. 2037 (2006) (reviewing Amar's *America's Constitution* and another recent book)).

First, part of what makes *America's Constitution* so successful, and part of what makes it possible to make the large claim that it is the second-best book ever written about the Constitution, is that Amar's book is *actually about the Constitution*. It is *not* about what Courts have said about the Constitution. It is *not* about high constitutional "theory" or "doctrine." It is *not* about moral philosophy. It employs no novel "hermeneutic" and never mentions theories of language, meaning, or understanding. It does not descend into "deconstruction." It is refreshingly free of jargon and academic-ese. Best of all, it is not yet another of those here-is-my-list-of-the-results-I-like-and-some-made-up-academic-theory-to-justify-that-list-that-has-little-or-nothing-to-do-with-the-actual-language-of-the-Constitution books.

None of that. Rather, *America's Constitution* is about the meaning of the words and phrases used in the Constitution. What an astonishingly refreshing and—ironically—*original* thing to do! The book is about the Constitution itself—the document, not the doctrine. It is about the words and original meaning of the text. Historical events, background premises, and judicial decisions provide illustrations and furnish occasional insights. But the book itself is about the document.

Think about this for a moment. How many books about constitutional law are really about the Constitution? Not even all treatises about the Constitution are about *the Constitution*. They are more about "constitutional law," the body of judicial case decisions and doctrines that most modern scholars conflate with the Constitution. Not to take anything away from Amar, but it is easy to come in second in a category that has so few credible entrants. (For my own personal Top Ten list, keep reading.)

My second point concerns the book's subtitle: *America's Constitution: **A Biography***. Amar's book tells the "life story" of the Constitution as a written text. But do not be misled. Amar's methodology is thoroughly *originalist*. It would be a grave mistake to confuse Amar's approach to the document with the texts-as-springboards-for-interpretive-license "living constitution" approach of most political liberals. There is always a danger that a book will be cited,

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lazily, for its title (or, here, its subtitle), rather than studied carefully and faithfully for its content. The slovenly may try to substitute a distorted, shorthand "theme," more to their liking for *America's Constitution*'s actual content. (Isn't that pretty much what liberal activists have done to the America's Constitution, the document, too?)

Don't be fooled. Anyone who actually reads *America's Constitution*—just like anyone who actually reads America's Constitution—will never make this mistake. Amar's book is originalist-textualist in its methodology, not at all a brief for roving interpretive updates. Members of The Federalist Society should love and embrace this book. Amar, although a political liberal, is a true constitutionalist—a man after Federalists' own heart. Amar does not let his politics drive his constitutional interpretation. We have found our one honest liberal constitutional interpreter. Hallelujah!

That does not mean, however, that conservatives will always like Amar's conclusions. My third point about *America's Constitution* (and America's Constitution) is one that may come as a mild reprimand to some members of the Federalist Society: As Amar convincingly demonstrates, faithful original-meaning textual interpretation does *not* invariably yield conservative, small-government political outcomes. Often it does. But it also yields readings supportive of broad national government powers, clear national supremacy over state powers, a Tenth Amendment that plainly does not operate as an independent substantive restriction of national power, a Fourteenth Amendment that grants broader yet national legislative powers, and an Eleventh Amendment that says nothing about state sovereign immunity.

Conservatives will take from *America's Constitution* the lesson that principled original-meaning textualism will not necessarily support their preferred substantive outcomes. Similarly, liberals should learn that original-meaning textualism is no mere cover for conservative political preferences and cannot fairly be reduced to such caricature. As Amar's work shows by example, originalist methodology can produce some surprisingly liberal, big-government results; and often furnishes a range of possible fair interpretations that will leave room for reasonable differences among persons equitably struggling with its premises.

I end with a point of sharp criticism. On one issue—my only major substantive quarrel with a 628-page masterpiece—Amar completely misfires. Amar offers a tentative, ambiguous interpretation of the Ninth Amendment as perhaps protecting rights that "might not be inferable from the Constitution's text and structure but that nevertheless might deserve constitutional status." This is the one place where Amar commits treason against his own textualist principles. As I have written elsewhere, the text of the Ninth Amendment supports no such principle. ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.") The text states, quite plainly, a rule of non-preemption: The enumeration of rights does not work a repeal of any other existing body of legal rights (such as, for example, are contained in state constitutions). The text of the amendment plainly does not *grant* "unenumerated rights" (a phrase that does not appear). In historical context, this is abundantly clear. The Ninth Amendment, like the Tenth, was included to avoid any improper inference concerning the effect that adding a Bill of Rights would have on the Constitution's original plan of allocation of rights and powers. Such amendments might not have been necessary had the Federalists (like Hamilton in *The Federalist* No. 84) not argued so vigorously—and unsoundly, in my view—that adding a bill of rights would not only be unnecessary, but affirmatively dangerous, in that it might be thought to assign all rights into the hands of the national government or imply that the national government was one of general, rather than only enumerated powers.

This is Amar's one major error, but it is a doozy. It is interesting that this one serious mistake of the second-best book ever written about the Constitution flows from one of the rare breakdowns in analytic rigor in the best book ever written about the Constitution. Obviously, neither *America's Constitution* nor *The Federalist* is infallible scripture. But they are the best things going, by a long stretch, in terms of faithful exposition of the document that is The Constitution of the United States.

Best Books on the Constitution

1. The Federalist (Alexander Hamilton, John Jay, James Madison, 1787-88).

2. America's Constitution: A Biography (Akhil Amar, 2005).

3. Commentaries on the Constitution of the United States (Joseph Story, 1833).

4. Democracy in America (vol. I) (Alexis de Toqueville, 1838).

5. Commentaries on American Law (vols. I & II) (James Kent, 1826).

6. The Constitution in the Supreme Court (vols. I & II) (David Currie, 1985, 1990).

7. The Constitution in Congress: The Federalist Period 1789-1801 (David Currie, 1997).

8. The Dred Scott Case: Its Significance in American Law and History (Don Fehrenbacher, 1978).

9. Original Meanings: Politics and Ideas in the Making of the Constitution (Jack Rakove, 1997).

10. American Constitutional Law (Laurence Tribe, 2d & 3d eds. 1988, 2000).

Honorable Mention:

* Alexander Bickel, *The Least Dangerous Branch (1962).*

* John Hart Ely, *Democracy and Distrust (1980).*

* Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (1994).

* Harry Kalven, Jr., *A Worthy Tradition* (1988).

* *Processes of Constitutional Decisonmaking: Cases and Materials* (Brest, Levinson, eds. 2d ed. xxx).