Volume 17, Issue 2

The Federalist Society Review

June 2016

fedsoc.org

Letter from the Editor

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Sincerely,

Katie McClendon

The Federalist Society Review

Volume 17, Issue 2 June 2016

Evenwel v. Abbott: The Court Shanks Its Punt on "One Person, One Vote"

By Ilya Shapiro & Thomas A. Berry

Note from the Editor:

This article criticizes the Supreme Court's recent decision in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016) on originalist grounds.

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• Garrett Epps, *One Person, One Vote?*, The Atlantic (May 31, 2015), *available at* http://www.theatlantic.com/politics/archive/2015/05/one-person-one-vote/394502/.

• David H. Gans, *A Major Test of Equal Representation for All*, Constitutional Accountability Center: Text & History Blog (May 27, 2015), *available at* http://theusconstitution.org/text-history/3286/major-test-equal-representation-all.

• Joseph Fishkin, *Of People, Trees, Acres, Dollars, and Voters*, Balkinization (May 27, 2015), *available at* http://balkin.blogspot.com/2015/05/of-people-trees-acres-dollars-and-voters.html.

• David H. Gans, *Counting All Persons is the "Theory of the Constitution" When It Comes to Representation*, Balkinization (April 5, 2016), *available at* http://balkin.blogspot.com/2016/04/counting-all-persons-is-theory-of.html.

• Rick Hasen, *Breaking/Analysis: Big Victory for Voting Rights as #SCOTUS Rejects Plaintiffs' Claim in Evenwel One Person, One Vote Case*, Election Law Blog (April 4, 2016), *available at* http://electionlawblog.org/?p=81460.

• Robert Thomas, *What Does Evenwel v. Abbott Mean For "One Person, One Vote"?*, Casetext (April 5, 2016), *available at* https://casetext.com/posts/what-does-evenwel-v-abbott-mean-for-one-person-one-vote.

About the Authors:

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I. Introduction

In a democracy where some may vote and others may not—with various perfectly legitimate restrictions regarding age, citizenship, and domicile, let alone more controversial rules—what does it mean to achieve "equality" in the voting process? That is the profound question that the Supreme Court took up in *Evenwel v. Abbott*.[1] Alas, the Court did not resolve it.

In *Evenwel*, the Court decided that it is acceptable for a state to ignore the distinction between voters and nonvoters when drawing legislative district lines. According to the Court, a state may declare that equality is simply providing representatives to equal groups of *people*, without distinction as to how many of those people will actually *choose* the representative. A state may use this constituent-focused view of equality because "[b]y ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation."[2]

But ignoring the distinction between voters and nonvoters achieves a false picture of equality at the expense of producing far more serious inequalities. Rather than placing nonvoters and voters on anything approaching an equal political footing, it instead gives greater power to those voters who happen to live near more nonvoters, and less power to those who do not.

As we argued before the decision came down, the framers of the Fourteenth Amendment recognized that granting such extra voting power runs the risk of harming the very nonvoters to whom it ostensibly grants representation.[3] This recognition manifested itself in the enactment of the Fourteenth Amendment's Penalty Clause. In both ignoring that clause and oversimplifying the debates over the Fourteenth Amendment, the Court's opinion paints an incomplete picture of constitutional history.

II. Background

In the 1960s, four Supreme Court cases established a seemingly simple equal-protection principle: "one person, one vote."[4] After first ruling that unconstitutional election schemes could be remedied by the judicial branch,[5] the Court went on to strike down the use of "electoral college" systems in elections for statewide offices,[6] congressional districts of unequal populations

1 136 S. Ct. 1120 (2016).

2 *Id.* at 1132.

3 *See* Brief of the Cato Institute & Reason Foundation as Amici Curiae Supporting Appellants, *Evenwel*, 136 S. Ct. 1120 (No. 14-940); Thomas A. Berry, *The New Federal Analogy:* Evenwel v. Abbott *and the History of Congressional Apportionment*, 10. N.Y.U. J. L. & Liberty 208 (2016).

4 This phrase first appeared in Gray v. Sanders, 372 U.S. 368, 381 (1963).

5 Baker v. Carr, 369 U.S. 168, 207–08 (1962).

6 *Gray*, 372 U.S. at 379.

within a state,[7] and state legislative districts of unequal populations.[8] The last of these cases, *Reynolds v. Sims*, is where the Court pronounced that:

> the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.[9]

Although it appeared at first that these cases had settled the constitutional question of electoral equality once and for all, a new complication soon emerged. When eligible voters are distributed evenly throughout a state, drawing legislative districts with equal total populations results in an equal number of eligible voters per district.[10] But when the proportion of eligible voters varies by region, equalizing total populations will no longer equalize voter populations. And when the population of eligible voters is no longer equal across districts, the number of people actually choosing a representative will vary, thereby giving voters in different districts different voting strengths.[11]

This problem first arose in Hawaii, where thousands of military members living on local bases were counted in the census but not eligible to vote because they were citizens of another state. As a court noted at the time, "if Hawaii's reapportionment year had been 1944, when the civilian population was 464,250 and the military population was 407,000, then areas which normally might have a total population entitling them to but a small percentage of the total number of legislators would suddenly find themselves controlling over 90% of the legislature—for the following ten years."[12]

To avoid this problem, Hawaii drew legislative districts to equalize registered voters—as a proxy for eligible voters—rather than to equalize total population. This plan was challenged in the courts, but in *Burns v. Richardson* the Supreme Court held it to be permissible.[13] The Court noted that when it spoke of equalizing populations in *Reynolds v. Sims*, its "discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population."[14] The Court suggested that both were, at least as far as it could see then, permissible.[15]

Since *Burns*, other states have faced issues similar to Hawaii's, most often because of increases in immigration that have resulted in large noncitizen populations.[16] Unlike Hawaii, however, these states have almost always chosen to use total population—rather than any measure of voting population—in equalizing districts.[17] Over the years, several vote-dilution lawsuits were brought by voters in districts with large numbers of other voters, arguing that it is time to close the option "carefully left open" in *Reynolds* and *Burns* and require states to apportion on the basis of equal numbers of voters.[18] Before *Evenwel*—which came up on direct appeal from a special three-judge district court—the Supreme Court had declined to review these challenges after they were rejected by the lower courts. Only in *Evenwel*, 40 years after such unequal voter populations were first challenged, did the issue finally reach the Supreme Court.

III. Ginsburg's Majority Opinion

A. The Framers and Federalist 54

Evenwel's majority opinion was authored by Justice Ginsburg, writing for six of the eight justices on the Court after Justice Scalia's passing. Ginsburg inauspiciously introduces her analysis with an all-too-quick assumption that, "[a]t the time of the founding, the Framers confronted a question analogous to the one at issue here: On what basis should congressional districts be allocated to States?"[19] In fact, determining whether apportionment at the federal level (*inter*state apportionment) is

7 Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

8 Reynolds v. Sims, 377 U.S. 533, 568 (1964).

9 *Id.*

10 *Cf.* Kent D. Krabill & Jeremy A. Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 Tex. Rev. L. & Pol. 275, 276 (2012) ("[U]nder ordinary demographic conditions where noncitizen populations are relatively small and spread more or less proportionately throughout the electoral area, total population is a reliable proxy for voter population.").

11 "[A]ssume that there are two equally populated electoral districts within a state—district A and district B—each with fifty thousand people and each entitled to one representative because the allocation is based on total district population. District A, however, has twenty thousand eligible voters and thirty thousand ineligibles, while district B has forty thousand voters and ten thousand ineligibles. The franchise is then distributed between the voters of A and B unequally. Each of A's voters has twice the ability of B's voters to influence electoral outcomes." Robert W. Bennett, *Should Parents be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 Nw. U. L. Rev. 503, 512 (2000).

12 Holt v. Richardson, 238 F. Supp. 468, 474–75 (D. Haw. 1965), *vacated sub nom.* Burns v. Richardson, 384 U.S. 73 (1966).

13 *Burns*, 384 U.S. at 91.

14 *Id.* (citing, inter alia, the *Reynolds* Court's use of the phrase "an identical number of residents, or citizens, or voters." *Reynolds*, 377 U.S. at 577).

15 "The decision [of a state] to include or exclude [nonvoters in the apportionment base] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 92.

16 *See* Krabill & Fielding, *supra* note 10, at 276 ("With the dramatic influx of concentrated illegal immigration in the late 1980s and 1990s, however, an increasing number of cities and counties began to face the unusual demographic circumstance where the ordinary correlation between total population and voter population began to break down.").

17 *See id.* ("For many years, with the notable exception of *Burns v. Richardson*, the issue of which apportionment base to use in redistricting remained non-controversial. It was nearly always total population.").

18 *See, e.g.*, Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000); Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996); Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990); Calderon v. City of Los Angeles, 481 P. 2d 489 (Cal. 1971). *See also* Lepak v. City of Irving, 453 F. App'x 522 (5th Cir. 2011) (unpublished) (relying on *Chen* to reject argument that Equal Protection Clause requires equalizing districts based on citizens-of-voting-age (CVAP) as opposed to total population).

19 *Evenwel*, 136 S. Ct. at 1127.

actually analogous to apportionment at the state level (*intra*state apportionment) is—or should have been—the crux of the entire case. As we have in the past, we will call this supposed analogy the "federal analogy."[20]

Ginsburg begins to lay out the federal analogy by reminding us that the Constitution apportions federal representatives "among the several States which may be included within this Union, according to their respective Numbers."[21] In other words, interstate apportionment is indeed based on a total-population rule; voters and nonvoters alike increase the number of representatives allocated to a state. But why was this rule chosen, and are the reasons for it equally applicable at the intrastate level?

The most extensive contemporary discussion of why this rule was chosen appears in Federalist 54. Ginsburg quotes James Madison's assertion that "it is a fundamental principle of the proposed constitution" that representatives be allocated based on the states' "aggregate number of inhabitants," and at the same time that "the state itself may designate" who is eligible to vote for those representatives.[22]

From this quotation, Ginsburg concludes that the choice at the Constitutional Convention to use total population affirmed that "the Framers understood that [nonvoting] citizens were nonetheless entitled to representation in government."[23] Yet in the next sentence of Federalist 54, which Ginsburg does not quote, Madison goes on to explain that this "fundamental principle" was chosen not to provide "representation" to nonvoters, but because "the qualifications on which the right of suffrage depend" are different in every state.[24]

What is the connection between suffrage laws and interstate apportionment? To answer this question, we must keep in mind that states, then as now, controlled voter-eligibility rules (as Madison reminds us by saying "the state itself may designate" who will choose its representatives). Suffrage laws differed from colony to colony before the Revolution,[25] and these differences remained after the colonies became independent states.[26] When Gouverneur Morris proposed to the Constitutional Convention that suffrage in the House be based on a uniform national standard, rather than up to the states, Oliver Ellsworth quickly responded that "[t]he States are the best Judges of the circumstances and temper of their own people,"[27] and the proposal was ultimately voted down.[28] Instead, the Framers simply made federal House suffrage identical to suffrage in state house elections, over which each state already had full control.[29]

The Framers knew, then, that each state would be left to make its own choices regarding every aspect of the franchise. These included minimum-property qualifications, when immigrants could vote, and even whether to enfranchise women, as New Jersey did until 1807.[30] The Framers likewise knew that the choices states made could have a huge effect on their own number of eligible voters. Thus, assigning states political power based on their voter populations would have incentivized them to enfranchise as many residents as possible, distorting the intended federalist system in which each state would be free to choose suffrage rules based solely on the "temper of their own people," without federal interference one way or the other.

This explanation for the total-population rule, rather than Ginsburg's, accords with Madison's full argument in Federalist 54. As he goes on to explain succinctly (in a passage which Ginsburg again does not quote), "the [total-population] principle laid down by the convention required that no regard should be had to the policy of particular States towards their own inhabitants" regarding suffrage.[31] Madison himself thus confirms that the principle was chosen because it neither incentivized nor disincentivized any particular state's suffrage policy.

Yet further evidence that this was the main reason for the selection of the total-population rule comes from the similar reasoning behind the Convention's choice of an electoral college to elect the president, rather than a direct popular vote. As Madison explains in his Notes on the Convention:

> There was one difficulty however of a serious nature attending an immediate choice [i.e. popular vote] by the people [for president]. The right of suffrage was much more diffusive [i.e. widespread] in the Northern than the Southern States; and the latter could have no influence in the election on the score of the Negroes. The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections.[32]

Madison again recognized that a national popular vote would have encouraged states to enfranchise as many people as possible, so as to contribute more votes to the national total. The Electoral College, in which states are allocated a number of electors based

20 *See* Brief of the Cato Institute & Reason Foundation, *supra* note 3, at 2; Berry, *supra* note 3, at 220; Ilya Shapiro, *Why Texas Is Wrong in the 'One Person, One Vote' Case*, Wash. Post, Oct. 15, 2015, *available at* www.washingtonpost.com/news/in-theory/wp/2015/10/20/why-texas-is-wrong-in-the-one-person-one-vote-case.

21 *Evenwel*, 136 S. Ct. at 1127 (quoting U.S. Const. art. I, §2, cl. 3).

22 *Id.*, quoting Federalist No. 54 (James Madison).

23 *Id.* at 1127 n.8.

24 Federalist No. 54 (James Madison).

25 "[A]side from property qualifications, there were no firm principles governing colonial voting rights, and suffrage laws accordingly were quite varied." Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 5 (revised ed. 2009).

26 "[D]eclaring independence from Britain compelled the residents of each colony to form a new government, and the process of forming new governments inescapably brought the issue of suffrage to the fore. . . . [H]ow broad should suffrage be in a republic? The answers . . . varied from one state to the next." *Id.* at 13.

27 2 The Records of the Federal Convention of 1787, at 201 (Max Farrand ed., 1911) [hereinafter 2 Farrand].

28 *Id.* at 206.

29 "[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. Const. art. I, §2, cl. 1.

30 *See generally* Judith Apter Klinghoffer & Lois Elkis, *"The Petticoat Electors": Women's Suffrage in New Jersey, 1776-1807*, 12 J. Early Republic 159 (1992).

31 Federalist No. 54 (James Madison).

32 2 Farrand at 57.

on their total populations rather than their voter populations, again obviated this problem.

If this is the true reason the total-population rule was chosen for interstate apportionment, it presents a serious problem for the federal analogy. Unlike the states in our federal system, municipalities and counties within a state do *not* control their own suffrage laws. Eligibility to vote in elections for the state legislature is a matter of state law, not local law. If state senators were apportioned on the basis of eligible voters, one county could not lower its voting age to 16 in a bid to gain an extra state senator. The reason for choosing the rule at the interstate level simply does not exist at the intrastate level, and the federal analogy breaks down.

Ginsburg is aware of this argument; it was submitted to the Court in our own amicus brief.[33] Though Ginsburg does not mention that brief by name, she acknowledges and accurately summarizes its argument: "[Appellants and their amici] draw a distinction between allocating seats *to* States, and apportioning seats *within* States. The Framers selected total population for the former, [they] argue, because of federalism concerns inapposite to intrastate districting. These concerns included the perceived risk that a voter-population base might encourage States to expand the franchise unwisely, and the hope that a total-population base might counter States' incentive to undercount their populations, thereby reducing their share of direct taxes."[34]

Justice Ginsburg's response to this argument comes in two parts, which we consider in turn.

B. The Federal Analogy in Wesberry, Reynolds, and Gray

The first part of Ginsburg's response is a defense, based on Court precedent, of the legitimacy of federal analogies to answer apportionment questions (at least when those analogies are made to the House). The heart of her claim is that "*Wesberry* [*v. Sanders*] . . . rejected the distinction appellants now press" between intrastate and interstate apportionment, and thus provides precedent for collapsing that distinction in *Evenwel*.[35]

In *Wesberry*, the Court declared that all *federal* congressional districts must be of equal populations within a state. Of the four original "one person, one vote" cases, *Wesberry* is unusual for being the only one not to rely on the Equal Protection Clause. Instead, the *Wesberry* Court rested its holding on the Apportionment Clause of Article I (the same clause with which Ginsburg began her opinion), which allocates representatives to the states "according to their respective numbers."[36] Ginsburg quotes this part of *Wesberry* at length:

> "The debates at the [Constitutional] Convention," the Court explained, "make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people,' they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of inhabitants." "While it may not be possible to draw congressional districts with mathematical precision," the Court acknowledged, "that is no excuse for ignoring our Constitution's plain objective of making equal representation for *equal numbers of people* the fundamental goal for the House of Representatives."[37]

The *Wesberry* Court thus decided that because members of Congress are awarded *to* the states on the basis of population, congressional districts must be drawn *within* the states on the basis of population. For Ginsburg, this is sufficient precedent for accepting an analogy between interstate and intrastate apportionment. Yet it is not so straightforward, because in the very same term *Wesberry* was decided, the Court was also presented with a federal analogy in *Reynolds.* And in *Reynolds*, the Court's attitude toward such analogies could not appear more different.

Reynolds involved a challenge to an Alabama plan that allocated one state senator to each county without regard to county populations. Alabama argued that its system was constitutional because of its similarity to the *federal* Senate, which allocates two senators to each state without regard to state populations.[38] The state contended that it had simply implemented a "little federal system"[39] that was "framed after the Federal System of government—namely one senator in each county of the state."[40] But the *Reynolds* Court rejected this analogy in strident terms, writing that "the federal analogy [is] inapposite and irrelevant to state legislative districting schemes,"[41] because "[t]he system of representation in the two Houses of the Federal Congress . . . [arose] from unique historical circumstances,"[42] and "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted."[43]

Similarly in *Gray v. Sanders*, decided only a year before *Wesberry*, the Court rejected Georgia's analogy to the federal Electoral College in its attempt to justify a state electoral college that over-weighted votes from less populous counties. "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns . . ." the Court wrote, "implied nothing about the use of an analogous system by a State in a statewide election."[44]

Why did the same Court that so forthrightly rejected a federal analogy in *Reynolds* and *Gray* seem to accept one in *Wesberry*? Is there a way these federal analogies can be distinguished and, if so, which is closer to the one used in *Evenwel*? Ginsburg has one answer, which is that, unlike *Wesberry*, "*Reynolds* and *Gray* . . . involved features of the federal electoral system that contravene

33 *See* Brief of the Cato Institute & Reason Foundation, *supra* note 3, at 7–15.

34 *Evenwel*, 136 S. Ct. at 1129.

35 *Id.*

36 *See* Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964).

37 *Evenwel*, 136 S. Ct. at 1129, quoting *Wesberry*, 376 U.S. at 13, 18 (alterations and emphasis in original) (citations omitted).

38 *See* U.S. Const. art. I, §3, cl. 1.

39 Brief for Appellant Reynolds at 14, *Reynolds*, 377 U.S. 533 (Nos. 23, 27, 41).

40 *Id.* at 35.

41 *Reynolds*, 377 U.S. at 573.

42 *Id.* at 574.

43 *Id.* at 573.

44 *Gray*, 372 U.S.at 378.

the principles of both voter and representational equality to favor interests that have no relevance outside the federal context."[45] For Ginsburg, it is inappropriate to use a federal analogy to the Senate or Electoral College, but appropriate to use one to the House, because "the constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting."[46]

But this reasoning too quickly conflates the questions at issue in *Wesberry* and *Evenwel*, which in fact were quite different. In *Wesberry*, the Court was presented with a conflict between apportionment based on *people* and apportionment based on *geography*. Georgia had drawn its congressional districts in 1931 so that each would be coextensive with pre-existing county boundaries. As populations shifted and grew, Georgia kept its congressional boundaries the same, since the boundaries of its counties remained the same. By 1960, the population of the Fifth District—which was coextensive with Fulton, DeKalb, and Rockdale counties (Atlanta and environs)—had grown to more than twice that of the average Georgia district.[47]

The *Wesberry* Court quite reasonably held that drawing congressional districts based only on political boundaries was inconsistent with the Constitutional Convention's plan, because "those [at the Convention] who wanted both houses to represent the people had yielded on the Senate, [but] they had not yielded on the House of Representatives."[48] In other words, the *Wesberry* Court was correct in saying that the House (as opposed to the Senate) was designed to give political power to people rather than political units. This particular aspect of apportionment, at least, was indeed chosen for reasons that apply at both the interstate and intrastate level.

But once it is settled that congressional districts ought to be drawn on the basis of people rather than counties, it is an entirely separate question whether they ought to be based on *total* population or *voter* population. It would be anachronistic to suggest that the *Wesberry* Court even considered this distinction; all evidence instead indicates that it was not brought to the Court's attention until two years later in *Burns*.[49] And so after *Wesberry*, it remained an open question whether, as Ginsburg claims, the federal total-population rule "rest[ed] in part on the same representational concerns" that exist at the state level.

In sum, there can be no universal answer to the question of whether federal analogies are apposite. Each analogy must be examined on its own terms, to see if the same concerns relevant to the particular question at hand exist at the state and federal level. Since the analogy in *Evenwel* had never previously been presented to the Court, precedent alone cannot justify it. It is the second part of Ginsburg's argument, then, on which this particular analogy must stand or fall.

C. The Fourteenth Amendment Debates: Three Types of Nonvoters

"Even without the weight of *Wesberry*," Ginsburg transitions, "we would find appellants' distinction unconvincing."[50] This, she asserts, is because "[o]ne can accept that federalism—or, as Justice Alito emphasizes, partisan and regional political advantage[]—figured in the Framers' selection of total population as the basis for allocating congressional seats. Even so, it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters."[51]

This argument could be called the Hodgepodge View of the permissibility of federal analogies: if a federal rule was chosen for a hodgepodge of reasons, a similar state rule is permissible so long as it shares just one of those justifications. Or put another way, the most important qualifier in Ginsburg's claim about the total-population rule is that it rested "in part" on concerns relevant to the states. For her, this is enough.

We do not need to consider whether the Hodgepodge View is legitimate as an argument to support federal analogies generally. In *Evenwel*, the flaw is that Ginsburg oversimplifies the number of dimensions in the choice of the federal rule. As she frames it, both the original Framers and the framers of the Fourteenth Amendment faced a single binary choice—to count everyone or to count only voters. And so any justifications that were made for counting *any* nonvoter, Ginsburg assumes, must have been a justification for counting all nonvoters.

But as the debates surrounding the Fourteenth Amendment show, all nonvoters were not regarded as identical. In fact, nonvoters were divided into three distinct categories: women and children, aliens, and disenfranchised adult-male citizens. The Fourteenth Amendment's framers ultimately enacted a rule that counted the first two groups in interstate apportionment but not the third. The hard work of translating this political theory to present-day circumstances requires understanding the theory behind each of these three categories.

1. Women and Children

Justice Ginsburg collects four quotations from the Fourteenth Amendment debates that support the legitimacy of counting some nonvoters. Across these four quotations, wives and children are the only specific examples of counted nonvoters used.[52] This is not a coincidence. Because of the close familial

45 *Evenwel*, 136 S. Ct. at 1130.

46 *Id.*

47 *See Wesberry*, 376 U.S. at 2.

48 *Id.* at 13.

49 The language Justice Ginsburg quotes from *Wesberry* could be read to endorse a total-population view as opposed to a voter-population view. *See Evenwel*, 136 S. Ct. at 1129 (emphasizing *Wesberry*'s reference to "our Constitution's plain objective of making equal representation for *equal numbers of people* the fundamental goal for the House of Representatives." (emphasis added by Ginsburg)). But just as in the other pre-*Burns* cases, the *Wesberry* Court spoke interchangeably of equal numbers of people and equal voting weight, without acknowledging the potential conflict between the two. *See, e.g.*, *Wesberry*, 376 U.S. at 7–8 ("We hold that . . . as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").

50 *Evenwel*, 136 S. Ct. at 1129.

51 *Id.*

52 *See, e.g.*, *id.* at 1128 (quoting Rep. Roscoe Conkling's argument "that [the] use of a voter-population basis 'would shut out four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and

relationship between wives and children and one particular voter (the husband/father), those who enacted the Fourteenth Amendment were much more comfortable espousing a theory of "virtual representation" for these nonvoters than for others.

Sen. William Fessenden, for example, emphasized the influence which nonvoting wives have on their voting husbands, remarking that "I could hardly stand here easily if I did not suppose I was representing the ladies of my State. I know, or I fancy I know, that I have received considerable support from some of them, not exactly in the way of voting, but in influencing voters."[53] Sen. Luke Poland similarly limited his argument to the context of family members. "The right of suffrage . . . is given to [a particular class] as fair and proper exponents of the will and interests of the whole community, and to be exercised for the benefit and in the interest of the whole. The theory is that the fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own."[54]

The framers of the Fourteenth Amendment knew that any nonvoters counted in apportionment would increase the number of representatives assigned to a state and chosen by its voters. But when this could be framed as a husband "voting for" his wife and children, such an increase in voter weight was viewed as more legitimate.

2. Aliens

The Fourteenth Amendment retained not only women and children in each state's apportionment total, but also nonvoting aliens. Conspicuously missing from the debates over counting aliens, however, are the same virtual representation arguments that were repeatedly made regarding women and children.[55] To understand why aliens were counted, it is important to understand how the 1860s were different from today in relevant ways.

During the 19th Century, states would often grant voting rights to aliens before they obtained federal citizenship, with at least 22 states or territories having some form of alien suffrage during the era.[56] Different states took different approaches in making their own rules of enfranchisement—some imposed a five-year waiting period, some imposed a state-run test akin to the federal citizenship test, and some merely accepted a "declaration of intent" to become a citizen.[57] It was not idle speculation, then, to worry that a federal policy allocating representation based on the number of voters in a state would be particularly likely to influence a state's policy toward alien suffrage, and this is indeed where such concern was frequently directed.

"There would be an unseemly scramble in all the States during each decade to increase by every means the number of voters," Rep. James G. Blaine worried, "and all conservative restrictions, such as the requirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils. Foreigners would be invited to vote on a mere preliminary 'declaration of intention.'"[58]

Rep. Roscoe Conkling similarly predicted that "[i]f voters alone should be made the foundation of representation . . . [o]ne State might let women and minors vote. Another might—some of them do—give the ballot to those otherwise qualified who have been resident for only ten days. Another might extend suffrage to aliens. This would lead to a strife of unbridled suffrage."[59]

Moreover, the usual lapse of time from arrival in the country to suffrage was much shorter in 1866 than it is today. In justifying the established rule that nonvoting aliens would be counted for state apportionment, Conkling remarked that the question of "how [aliens] should be treated during the interval between their arrival and their naturalization, during their political nonage . . . was disposed of in the liberality in which the Government was conceived. The political disability of aliens was not for this purpose counted at all against them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment."[60] It was universally understood that five years was the longest most aliens would wait for the vote.[61]

This certain and regular progress toward becoming a voter was put forward by Senator John Henderson as the justification for counting aliens *in contrast to* the virtual representation rationales for counting women. "The road to the ballot is open to the foreigner; it is not permanently barred. It is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother."[62] Since enumerations were taken every 10 years, it was assumed that most aliens would become voters before the next census. Rep. William Kelley asked rhetorically "whether it is not possible that the male minor may come to an age that will secure him the right to vote; and whether it is not possible for the unnaturalized foreigner also to

who are, and always have been, represented'").

53 Cong. Globe, 39th Cong., 1st Sess. 705 (1866) [hereinafter Globe].

54 *Id.* at 2962.

55 One scholar lists 12 separate discussions of the issue of aliens in apportionment; in *none* of these instances is it suggested that aliens' political concerns were represented by the voters who lived in their states. *See* George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 Western Pol. Q. 829, 851 n.146 (1970).

56 *See* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1397 (1993).

57 *See id.* at 1399–1417.

58 Globe at 141.

59 *Id.* at 357.

60 *Id.* at 356 (emphasis added).

61 *See id.* at 2987 ("Nearly all the men who come to this country are naturalized in five years. The exceptions are very rare.") (statement of Sen. Sherman); *id.* at 2535 ("The foreigner who comes to our shores . . . is put upon five years' probation before we admit him to citizenship.") (statement of Rep. Eckley); The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865–1867 299 (Benj. B. Kendrick ed., 1914) [hereinafter Journal] ("We seclude minors from political rights, not because they are unworthy, but because, for the time, they are incapable. So of foreigners; we grant them the privileges of citizenship only after five years' probation.") (Robert Dale Owen to Thaddeus Stevens, quoted from Robert Dale Owen, *Political Results from the Varioloid*, Atlantic Monthly, June, 1875).

62 Globe at 3035.

acquire that right; and whether inasmuch as both may acquire it in the current decade, they should not be included in the basis of representation[?]"[63] Kelley explicitly contrasted the position of the nonvoting alien with that of the "freeman [a permanently disenfranchised former slave] who can *never* vote [and who] should not be counted among voters *and possible voters* in fixing the basis of suffrage."[64]

Finally, concerns of political pragmatism were also at their most explicit in the realm of counting aliens. Rep. Thaddeus Stevens admitted that "there are from fifteen to twenty Representatives in the northern States founded upon those who are not citizens of the United States. . . . I do not think it would be wise to put into the Constitution or send to the people a proposition to amend the Constitution which would take such Representatives from those States, and which therefore they will never adopt."[65] Rep. Conkling also admitted, bluntly, that "many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these states are to pass upon the amendment. It must be made acceptable to them."[66]

Distinguishing women and children from aliens reveals the weakness of the Hodgepodge View. Though a theory of virtual representation was indeed one of the arguments made to justify counting the former, this does not automatically mean that it was also used to justify counting the latter. Indeed, such arguments would have been highly implausible. Why should we assume that the voters in a state will take particular care that they vote along with the interests of the disenfranchised noncitizens in their state, even though they may have no personal relationship to those nonvoters? Can the hope that they will do so justify increasing the weight of their votes? There is no evidence that any of the Fourteenth Amendment's framers believed so. Were it not for the concerns of incentivizing suffrage and political pragmatism—the two concerns that do *not* find analogy at the state level—and the certainty that all aliens would be enfranchised before the next census—which no longer holds true—aliens would likely have been removed from apportionment. The strongest evidence for this inference is the rule created for the third category of nonvoter, which *did* remove them from the apportionment total.

3. Disenfranchised Adult-Male Citizens

Although Justice Ginsburg states flatly that the Fourteenth Amendment "retained total population as the congressional apportionment base,"[67] this is only half-true. While the amendment retained total population as the baseline for calculating apportionment, it also introduced the first exception to the total-population rule, the Penalty Clause (which Ginsburg never mentions).[68] This clause, which effectively removed disenfranchised adult-male citizens from a state's apportionment total—by far the largest such group of whom were newly freed slaves—expressed a rejection of the view that voters will always vote with the interests of their disenfranchised neighbors at heart.

The Penalty Clause was heartily opposed by some Democratic allies of the southern states, who made "the startling claim that members of Congress elected by white voters provided virtual representation for blacks, and thus a failure to provide representation for the black population would be taxation without representation."[69] Rep. Phillip Johnson declared that the clause would "limit the class of persons who shall be represented [in Congress] to the white male adults" and "take away from the entire negro population, now all free alike, all representation whatever."[70] Johnson continued on to make an appeal to a theory of virtual representation similar in tone to the ones Ginsburg herself makes:

> A faithful member of Congress represents the whole population of his district, male and female, black and white . . . If he relies wholly upon the voters of his district for the expressed wish of his whole constituency he may err, but not unless the voters are unfaithful representatives of the population behind them. And this is not likely to happen, because men's wishes, when intelligibly made, are found to be with their interests. The vote of the husband is supposed to represent the interests of his wife, and so the father those of his children, and these aggregated make up the public weal, commonwealth, or *res publica*.[71]

Rep. Andrew Rogers similarly conflated counting disenfranchised persons with granting them representation: "What is there more democratic and republican in the institutions of this country than that the people of all classes, without regard to whether they are voters or not, white or black, who make up the intelligence, wealth, and patriotism of the country, shall be represented in the councils of the nation?"[72] Rogers declared that reducing southern representation would "violate the great principle of democracy, that all the population in a country ought to be represented, although not allowed to exercise the elective franchise."[73]

The true attitude of those who passed the Fourteenth Amendment toward the concept of virtual representation for independent adults is revealed in their responses to these argu-

63 *Id.* at 354.

64 *Id.* (emphasis added).

65 *Id.* at 537.

66 *Id.* at 359.

67 *Evenwel*, 136 S. Ct. at 1128.

68 "But when the right to vote at any election for . . . Representatives in Congress . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. amend. XIV, § 2.

69 Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. House Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 Ala. L. Rev. 783, 842 (2009).

70 Globe app. at 55; *cf.* Globe at 3029 ("[Under the proposed amendment,] the poor black man, unless he is permitted to vote, is not to be represented, and is to have no interest in the Government.") (statement of Sen. Johnson).

71 Globe app. at 55.

72 Globe at 353.

73 *Id.* at 354.

ments. Rep. Ignatius Donnelly remarked that "if men have no voice in the national Government, other men should not sit in this Hall pretending to represent them."[74] Sen. John Sherman similarly declared that "[i]f there is any portion of the people of this country who are unfit to vote for themselves, their neighbors ought not to vote for them."[75]

Had the Penalty Clause been written to apply only to the South, its precedential value as a principle would be less strong, and it could be written off as only another instance of Civil War Era factionalism. But these arguments were not limited to the case of disenfranchised former slaves—even though it presented a particularly stark repudiation of virtual representation principles when, as Rep. Broomall put it, "the negro of the South . . . has his vote cast for him . . . by his white and hardly more loyal neighbor."[76]

The first draft of the Penalty Clause, which only eliminated adult males from apportionment "whenever the elective franchise shall be denied or abridged in any State on account of race or color,"[77] was indeed written to apply specifically to the South. Yet this earlier version of the clause was ultimately replaced by one that "adopt[ed] a general principle applicable to all the states alike."[78] The final version universally rejected virtual representation for adult-male citizens, mandating "that where a State excludes any part of its male citizens from the elective franchise, it shall lose Representatives in proportion to the number so excluded . . . appl[ying] not to color or to race at all, but simply to the fact of the individual exclusion."[79] Northern states that denied large numbers of male adults the right to vote did so for reasons other than race, such as the reading and educational requirements of Massachusetts and Connecticut.[80] Nonetheless, an amendment put forward by northern Republicans to create an exception for intelligence or property tests was rejected.[81]

Disenfranchised former slaves were unlikely to become voters by the next census; incentivizing their enfranchisement was actually desired; and removing them from apportionment was politically feasible. With all of these pieces in place, the framers of the Fourteenth Amendment—the same people who enacted the Equal Protection Clause—removed them from apportionment. This is the strongest evidence that these framers' concerns for representational equality and virtual representation were limited to the family and extended no further.

Examining these three classes of nonvoters shows that Justice Ginsburg simplified things far too much in declaring that "the Framers of the Constitution and the Fourteenth Amendment comprehended [that] representatives serve all residents, not just those eligible or registered to vote."[82] On the one hand, the framers of the Fourteenth Amendment lived in a country in which half of the population relied on its close familial ties with the other half for political protection. On the other hand, they also witnessed the disenfranchised freed slave "ha[ving] his vote cast for him . . . by his white and hardly more loyal neighbor."[83] The difference between these two types of nonvoters, which was clear 150 years ago, has evidently now become obscured in our election-law jurisprudence. But the resulting hodgepodge is of the Court's own making.

IV. The Question of Present-Day Aliens

With that fuller picture of the historical debates in mind, Justice Ginsburg should have applied its principles to the nonvoters most at issue in *Evenwel*. As noted above, the disparities in eligible voters now seen across Texas districts are largely a result of varying populations of nonvoting aliens, and so in effect the question at the heart of *Evenwel* was whether *this* group of nonvoters should be counted for state apportionment. Which of the three classes of 1860s nonvoters presents the closest analogy to the nonvoting aliens of today?

As we have already suggested, none of the justifications for counting nonvoting aliens at the federal level in 1866 exist at the state level in 2016. Retaining aliens in apportionment is not politically necessary to achieve some other overriding goal (like passage of the Fourteenth Amendment). Unlike at the federal level, state sub-jurisdictions do not control their own suffrage rules, and so an intrastate system that only counted voting aliens could not incentivize a city or county to enfranchise its aliens. And unlike in the 1860s, for good or ill, a significant number of aliens will remain nonvoters through the next census.

The closest analogy is instead between the aliens of today and the disenfranchised former slaves of the 1860s. Without any overriding reason to count them, we are left only with the hope that a district's voters will vote with the interests of their nonvoting neighbors. But the framers of the Fourteenth Amendment rejected that dubious justification for independent adult nonvoters in 1866, and it is no less dubious a claim today.

V. After *Evenwel*

Since the Court declined to require that states apportion on the basis of eligible voters—or at the very least remove aliens from apportionment—the next question is how state legislatures will react. The issues seen in Texas, where nearly 50% of the populations of some districts are ineligible to vote, will not go away. And even if apportioning is always a contentious issue potentially affecting political balances of power, there are some

74 *Id.* at 377.

75 *Id.* at 2986.

76 *Id.* at 2498.

77 *Id.* at 351.

78 *Id.* at 2767 (statement of Sen. Howard). Howard stresses the point, continuing: "[T]his Amendment does not apply exclusively to the insurgent States, nor to the slaveholding States, but to all States without distinction. . . . It holds out the same penalty to Massachusetts as to South Carolina, the same to Michigan as to Texas." *Id.*

79 *Id.* For the first appearance of this apportionment method as a proposal, see Journal at 102.

80 *See id.* at 2769 ("I believe the constitution of [Massachusetts] restricts the right of suffrage to persons who can read the Constitution of the United States and write their names.") (statement of Sen. Wade); *see generally* George H. Haynes, *Educational Qualifications for the Suffrage in the United States*, 13 Pol. Sci. Q. 495 (1898).

81 *See* Globe at 2768.

82 *Evenwel*, 136 S. Ct. at 1128.

83 Globe at 2498 (statement of Rep. Broomall).

consensus principles that people on both sides of the aisle can agree on, and that might lead to actual reform.[84]

Ideally, everyone in a political community should either be a voter or on the path—however long and arduous that path may be—to enfranchisement; this was the expectation of those who passed the Fourteenth Amendment.[85] A state could reach a political compromise, perhaps, by removing nonvoting aliens from apportionment but enfranchising noncitizen residents who are fully qualified to vote: for example, those who have been in the country for 10 years and can pass the equivalent of a citizenship test, but who have been denied U.S. citizenship due to nationality-based waiting lists or other administrative delays. We do not endorse any particular compromise here, but we encourage states to move away from the precarious mechanism of *virtual* representation and toward *actual* representation.

The next burning question is, if states do attempt such compromises, could the Court go even further and declare that states *must* apportion on a total-population basis? The six justices in the majority declined to give any explicit indication on how they might rule if such a question were presented. Any prediction will depend on how seriously we should take the test upon which Ginsburg appears to rely: that a state apportionment scheme is constitutionally valid so long as it is based on concerns that "figured prominently in the decision"[86] to create the federal rule of apportionment and upon which therefore "the constitutional scheme for congressional apportionment rests in part."[87] Because there is just as ample a quantity of statements from the framers of the Fourteenth Amendment criticizing virtual representation in the context of expressing support for the Penalty Clause as there are statements supporting virtual representation in the context of wives and children, a state scheme built around a similar skepticism would have just as much claim to a tradition that "figured prominently" in the creation of the Fourteenth Amendment and upon which our federal system "rests in part." The question is whether the majority will be just as generous in acknowledging that part.

Among the two concurring justices, Justice Alito also does not tip his hand. "Whether a State is permitted to use some measure other than total population is an important and sensitive question," he writes, "that we can consider if and when we have before us a state districting plan that, unlike the current Texas plan, uses something other than total population as the basis for equalizing the size of districts."[88]

Alito, unlike the majority, rejects the use of the federal analogy, primarily on the ground that much of the debate over the passage of the Fourteenth Amendment took place against the backdrop of a fight for relative political gain, both between the parties and between regions of the country.[89] Alito's support of the judgment comes from more pragmatic concerns, such as the lack of thorough census data on eligible voters.[90] Thus if a state were to collect more thorough data as part of a move to voter-based apportionment, Alito's fears could well be allayed.

Finally, the one justice whose position on the constitutionality of voter-based apportionment can be predicted with certainty is Justice Thomas. "The Constitution does not prescribe any one basis for apportionment within States," he declares. "It instead leaves States significant leeway in apportioning their own districts to equalize total population, to equalize eligible voters, or to promote any other principle consistent with a republican form of government."[91] Thomas, agreeing with Alito, finds in the Fourteenth Amendment debates only partisanship.[92] Since it is in the Equal Protection Clause that the one-person, one-vote principle is grounded, it is not surprising that this leads him to deny its force altogether. It is possible that Thomas's only real difference with Alito is greater forthrightness about where such a complete rejection of the Fourteenth Amendment as a guidepost for redistricting must lead.

VI. Conclusion

The late Justice Scalia once asked rhetorically, with more than a little self-deprecation, "Do you have any doubt that this [Supreme Court] system does not present the ideal environment for entirely accurate historical inquiry? Nor, speaking for myself at least, does it employ the ideal personnel."[93] *Evenwel* will go down in history as one of the cases where Scalia voted in conference but did not live to see an opinion issued, meaning that his vote—and any opinion he may have started to write—is lost to history. Justice Scalia's death could not have changed the outcome of a case that was ultimately 8-0 on the judgment, but there is a chance that it deprived us of some deeper insight or more thorough research on the history that we have presented. Perhaps, even if only in a concurrence or dissent, it would have provided greater clarity to courts going forward, as we all wonder about the fate of voter-based apportionment after *Evenwel*. As it is, reading the opinions in *Evenwel* left us with a feeling we have had quite often since February: something's missing.

84 It should be noted that, in the 1860s, aliens were retained in apportionment largely to help *Republican* members of Congress hold on to their seats in northeastern states like New York. In other words, things change and no one can predict how a rule will affect politics in the long run. Even today, counting nonvoting prison inmates in suburban districts where their prisons are located likely benefits Republicans more than Democrats.

85 At least in regards to the male half of the population, and we have no doubt that if the leaders of 1866 were transported to the present, they would easily translate that principle to the full population.

86 *Evenwel*, 136 S. Ct. at 1129.

87 *Id.* at 1130.

88 *Id.* at 1143–44 (Alito, J., concurring in the judgment).

89 *Id.* at 1144–49. While we do not deny that factionalism played a large role in these debates, as we have argued above we nonetheless believe there is a principle to be found in the rule that resulted, especially in the Penalty Clause.

90 *Id.* at 1142.

91 *Id.* at 1133 (Thomas, J., concurring in the judgment).

92 *See id.* at 1140.

93 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861 (1989).

Racial Mirroring

By Dawinder S. Sidhu

Note from the Editor:

This article argues that attempts to engineer public work forces to match the racial makeups of the communities they serve violate the Equal Protection and cause social harm.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African-American Staff Attorneys*, 18 Cornell J.L. & Pub. Pol'y 1 (2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1298440.

• Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 Berkeley J. Emp. & Lab. L. 1 (2005), *available at* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1344&context=bjell.

• Tara Lai Quinlan and Deborah Ramirez, *A Blueprint for Local Police Reform to Improve Legitimacy*, The Huffington Post (Dec. 24, 2014), *available at* http://www.huffingtonpost.com/tara-lai-quinlan/a-blueprint-for-local-pol_b_6369706.html.

• Emily Badger, Dan Keating and Kennedy Elliott, *Where minority communities still have overwhelmingly white police*, Washington Post (Aug. 14, 2014), *available at* https://www.washingtonpost.com/news/wonk/wp/2014/08/14/where-minority-communities-still-have-overwhelmingly-white-police/.

• Batya Ungar-Sargon, *Lessons For Ferguson In Creating A Diverse Police Department*, Five Thirty Eight (Jan. 5, 2015), *available at* http://fivethirtyeight.com/features/lessons-for-ferguson-in-creating-a-diverse-police-department/.

• *Martin v. Blessing*, 134 S. Ct. 402 (2013) (Statement of Alito, J.), *available at* http://www.supremecourt.gov/opinions/13pdf/13-169_197d.pdf.

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Introduction

In response to police shootings and broader calls for criminal justice reform, public officials, commentators, activists, and former police commissioners have proposed that police departments, particularly those in predominantly African-American areas, should reflect the racial demographics of the communities they serve. Their argument may be restated in general terms: Trust is the touchstone of effective policing.[1] In communities of color, that trust has been undermined by the legacy and persistence of actual and perceived racial discrimination in law enforcement. Accordingly, a community of color confronted by a predominantly white police force may assume that the police force is biased and that such bias will work its way into discriminatory law enforcement decisions. This view erodes confidence in the police that, in turn, makes communities of color less inclined to communicate with and support law enforcement. By contrast, communities of color may be more receptive to police forces that look like them, as the assumption of bias is absent. A shared racial makeup may thereby help foster trust that, in turn, may facilitate cooperation between law enforcement and people of color. In other words, the matching of racial identity may yield better policing outcomes.

This argument is based on the "external legitimacy" doctrine, under which employers may give special consideration to job applicants of the same race as the clients that the employer serves on the theory that employees of the same race will be able to generate trust and cooperation between the employer and its clients and thus boost the external legitimacy of the employer.[2] Federal appeals courts have endorsed this doctrine in the police[3] and prison[4] contexts. While circuit courts have declined to extend the argument to additional areas,[5] other courts and scholars contend that the external legitimacy rationale applies to other areas in which trust is relevant, including class representation,[6]

1 Bureau of Justice Assistance, U.S. Dep't Justice, Understanding Community Policing: A Framework for Action, at vii (1994), *available at* http://www.ncjrs.gov/pdffiles/commp.pdf ("A foundation of trust will allow police to form close relationships with the community that will produce solid achievements. Without trust between police and citizens, effective policing is impossible.").

2 The term "external legitimacy" in this context may be attributed to Professor Cynthia Estlund's important article in this area. Cynthia L. Estlund, *Putting* Grutter *to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 Berkeley J. Emp. & Lab. L. 1, 22 (2005).

3 Petit v. City of Chi., 352 F.3d 1111, 1115 (7th Cir. 2003), *cert. denied*, 541 U.S. 1074 (2004); Talbert v. City of Richmond, 648 F.2d 925, 931 (4th Cir. 1981); Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 695-96 (6th Cir. 1979); Patrolmen's Benevolent Ass'n v. New York, 310 F.3d 43, 52 (2nd Cir. 2002); *cf.* Cotter v. City of Boston, 323 F.3d 160, 172 n.10 (1st Cir. 2003).

4 Wittmer v. Peters, 87 F.3d 916 (7th Cir. 1996).

5 Lomack v. City of Newark, 463 F.3d 303 (3rd Cir. 2006); Knight v. Nassau Cnty. Civil Serv. Comm'n, 649 F.2d 157, 162 (2nd Cir. 1981).

6 Blessing v. Sirius XM Radio Inc., No. 09-CV-10035, 2011 WL 1194707, at *12 (S.D.N.Y. Mar. 29, 2011); Public Employees' Retirement Sys. of Miss. v. Goldman Sachs Group, Inc., No. 09 CV 1110, 280 F.R.D. 130, 142, n.6 (S.D.N.Y. Feb. 3, 2012); N.J. Carpenters Health Fund v. Residential Capital, LLC, Nos. 08 CV 8781, 08 CV 5093, 2012 WL

municipal services,[7] public agencies,[8] and legal services,[9] among many others.[10]

The external legitimacy doctrine is seemingly sensible and intuitively appealing, but it is unconstitutional and counterproductive. The external legitimacy doctrine, as practiced in policing and other contexts, is itself part of what I call "racial mirroring," which attempts to ensure that the racial composition of one defined group reflects that of another group.[11] In what follows, I will suggest that racial mirroring violates the Equal Protection Clause,[12] perpetuates harmful racial stereotypes, and produces significant legal and social costs.

While the Supreme Court has addressed the constitutionality of racial balancing,[13] it has never squarely confronted the constitutionality of racial mirroring. This essay may be useful to the bench and the bar in considering challenges to the practice of racial mirroring. In light of calls for racial mirroring in the policing context, the moment seems ripe for such guidance.

I. Problems with Racial Mirroring

A running hypothetical may be helpful in conceptualizing the harms that counsel against racial mirroring. Let us assume that an urban elementary school in a predominantly African-American neighborhood has an opening for a second-grade teacher. The school has two qualified applicants—an African-American and an Asian-American. The threshold requirements to be qualified are a college degree and an active teaching certificate. The school principal and the rest of the hiring committee want to hire the African-American candidate for reasons that amount to the external legitimacy argument. The concern over external legitimacy stems from the school officials' perception that there has not been enough cooperation between parents and the school. The officials believe that the African-American candidate will increase parental engagement, and that this will yield enhanced educational outcomes in two respects. First, they have a strong sense that parental engagement will enhance the possibility that parents—most of whom are African-American—will trust the educational choices of the teachers, become more involved in school governance and policy development, and enrich the educational and extra-curricular activities of the school (e.g., through volunteering to coach sports teams or advise student clubs). Second, they assume that parental engagement will cause parents to implement teachers' suggestions for supporting students at home, to invest in creating optimal educational conditions for students, and to actively assist students with their daily assignments.[14] The school officials contend that parental engagement, presumably to be facilitated by the African-American candidate, will enable the school to do its job more effectively. Accordingly, the African-American candidate is hired. The employer's action is problematic for a number of reasons.

A. The Racial Presumptions Problem

First, the school officials presume, solely on the basis of race, that the African-American candidate will generate trust and cooperation from African-American parents. Hiring her on the basis of that presumption is inconsistent with prevailing Supreme Court equal protection doctrine. In the seminal case of *Shaw v. Reno*, the Supreme Court considered the constitutionality of a North Carolina reapportionment plan that would have included two majority-black congressional districts.[15] The plan was designed to give voting strength to African-American voters in North Carolina, who were otherwise dispersed throughout the

4865174, at *5, n.5 (S.D.N.Y., Oct. 15, 2012); In re Gildan Activewear Inc. Sec. Litig., No. 08 Civ. 5048 (S.D.N.Y. Sept. 20, 2010)). Justice Samuel A. Alito issued a statement on the denial of certiorari in *Blessing*. Martin v. Blessing, 134 S. Ct. 402 (2013) (Statement of Alito, J.). Justice Alito signaled to Judge Baer—and all other federal judges—that the class certification order was both unjustifiable and impractical. Unjustifiable as Justice Alito stated that he was "hard-pressed to see any ground on which Judge Baer's practice can be defended," *id*. at 403, and he found it "quite farfetched to argue that class counsel cannot fairly and adequately represent a class unless the race... of counsel mirror[s] the demographics of the class." *Id*. Justice Alito cautioned that, if the order was not sufficiently addressed on remand, "future review may be warranted." *Id*. at 405.

7 Ivan E. Bodensteiner, *Although Risky After* Ricci *and* Parents Involved*, Benign Race-Conscious Action is Often Necessary*, 22 Nat'l Black L.J. 1, 28 (2009).

8 David Orentlicher, *Diversity: A Fundamental American Principle*, 70 Mo. L. Rev. 777, 804-05 n.145 (2005).

9 Shani M. King, *Race, Identity, and Professional Responsibility: Why Legal Services Organizations Need African-American Staff Attorneys*, 18 Cornell J.L. & Pub. Pol'y 1 (2008).

10 *See* Jerry Kang and Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of "Affirmative Action,"* 94 Calif. L. Rev. 1063, 1076 n.67 (2006) ("military as well as the business worlds"); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. Rev. 95 (1997) (state trial court judges); Stuart J. Ishimaru, *Fulfilling the Promise of Title VII of the Civil Rights Act of 1964*, 36 U. Mem. L. Rev. 25, 39 (2005) ("law enforcement, the judiciary, the media, and education"); Angela Brouse, *The Last Call for Diversity in Law Firms: Is it Legal?*, 75 UMKC L. Rev. 847 (2007) (private law firms).

11 "Racial mirroring" is distinct from "racial balancing." In racial balancing, the racial composition of two groups is adjusted so as to achieve an acceptable range of racial diversity within the two groups. In contrast, racial mirroring occurs when the racial composition of only one side is adjusted to reflect the racial composition of some other, ostensibly static group (e.g., a company's clients, a neighborhood's residents). Further, the purpose is usually to derive some benefit from the racial identities being in lockstep.

12 U.S. Const. amend. XIV § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The Equal Protection Clause applies only to state actors, see Civil Rights Cases, 109 U.S. 3, 11 (1883), and therefore this analysis focuses on governmental actors, such as city police departments and public schools. However, this analysis applies with some force to private actors given the relevance of equal protection jurisprudence to civil rights statutes governing private employment. See Ricci v. DeStefano, 557 U.S. 557, 582 (2009) ("Our cases discussing constitutional principles can provide helpful guidance in th[e] statutory context," even though statutory protections may not "parallel in all respects" constitutional protections.").

13 *See* Grutter v. Bollinger, 539 U.S. 306, 330 (2003) ("racial balancing . . . is patently unconstitutional.").

14 The school officials' assumptions are not uncommon. At least historically, school districts believed that "minority teachers were better teachers for minority students." Wendy Parker, *Desegregating Teachers*, 86 Wash. U. L. Rev. 1, 13 (2008).

15 509 U.S. 630 (1993).

state; thus, the plan was meant to benefit African-Americans.[16] The Court held that the redistricting, which produced oddly-shaped districts in order to encompass prospective African-American voters "who are otherwise widely separated by geographical and political boundaries,"[17] gave rise to a valid claim of improper racial gerrymandering under the Equal Protection Clause.[18] The Court reasoned that the majority-minority redistricting plan "reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."[19] "[S]uch perceptions," the Court continued, must be rejected "as impermissible racial stereotypes."[20] Indeed, the Court explained, "racial bloc voting and minority-group political cohesion never can be assumed...."[21] The Court made clear that, "the individual is important, not his race, his creed, or his color."[22]

Two years later in *Miller v. Johnson*, the Court assessed the constitutionality of a Georgia redistricting plan that would have created three majority-black voting districts.[23] The Court struck down the plan, applying and reaffirming the rule announced in *Shaw*.[24] According to the *Miller* Court, "[w]hen the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[25] Further, the Court noted, "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'"[26] More directly, the Court explained that "[t]he idea is a simple one: 'At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.'"[27] *Shaw* and *Reno* are examples of a constitutional rule that recognizes the diversity of viewpoints within a race and that therefore rejects the notion that there are monolithic racial views, attitudes, or behaviors.[28] This rule applies, as *Shaw* and *Reno* demonstrate, even in situations in which the monolithic view is considered "positive" for the relevant racial group.

What of the Asian-American applicant? The school officials are seeking a second-grade teacher who, among other things, will be able to produce trust and cooperation between the school and predominantly African-American parents. The employer presumes that an African-American candidate will be able to generate such trust and cooperation from the parents by virtue of traits she is presumed to have based on her race. The employer presumes at the same time that the Asian-American applicant, again solely on the basis of race, does not have traits that will build trust or cooperation with the African-American parents.

The Supreme Court has made clear that such negative racial stereotypes, in which members of a racial group are categorically deemed to not possess a desired trait, are unconstitutional. Jury selection is one context in which the Court has applied this rule. In *Batson v. Kentucky*, the Court determined that a defendant could object on equal protection grounds to race-based peremptory challenges used to exclude potential jurors of the same race as the defendant.[29] The Court held that the prosecutor could not, consistent with the Equal Protection Clause, categorically assume that jurors would be sympathetic to a defendant of the same race: "[The] Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[30] Moreover, the Court said, it "prohibits a State from taking any action based on crude, inaccurate racial stereotypes...."[31] The Court clarified that attorneys could "obtain possibly relevant information about prospective jurors,"[32] but, quoting Justice Felix Frankfurter, the Court announced that "[a] person's race simply 'is unrelated to his fitness as a juror.'"[33]

Whereas *Batson* concerned a situation in which the defendant was the same race as the excluded jurors (both were black), the Court later took up the open question of whether the Equal Protection Clause permits a prosecutor to exclude jurors

16 *See id*. at 634-35.

17 *Id*. at 646.

18 *See id*. at 646-69.

19 *Id*. at 647.

20 *Id*.

21 *Id*. at 653; *but see* Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 Va. L. Rev. 1413, 1468 (1991) ("The assumption that blacks, wherever they reside, tend to be politically cohesive is supported both anecdotally and empirically.").

22 *Shaw*, 509 U.S. at 648 (internal quotes and citation omitted).

23 515 U.S. 900.

24 *Id*. at 913.

25 *Id*. at 911-12 (quoting *Shaw*, 515 U.S. at 647).

26 *Id*. at 912.

27 *Id*. at 911 (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (internal quotation marks and citations omitted).

28 *See generally* League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 434 (2006) ("We do a disservice to. . . important goals by failing to account for the differences between people of the same race.").

29 476 U.S. 79 (1986).

30 *Id*. at 89.

31 *Id*. at 104.

32 *Id*. at n.12.

33 *Id*. at 87 (quoting Thiel v. S. Pac. Co., 328 U.S. 217, 227 (1946)) (Frankfurter, J., dissenting); *see also* Holland v. Ill., 493 U.S. 474, 484 n. 2 (1990) (That "a prosecutor's 'assumption that a black juror may be presumed to be partial simply because he is black'. . . violates the Equal Protection Clause" is "undoubtedly true.").

of a different race than the defendant.[34] The Court held that "the Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race...."[35] In doing so, the Court emphasized that "[r]ace cannot be a proxy for determining juror bias or competence."[36] Further, "where racial bias is likely to influence a jury, an inquiry must be made into such bias," rather than presumed solely because of the racial identity of the prospective juror.[37] These negative presumptions "force[] individuals to labor under stereotypical notions that often bear no relationship to their actual abilities" and they "deprive[] persons of their individual dignity...."[38] The presumptions brand members of a race with blanket attributes, reduce the individual to an undifferentiated part of a racial whole, consider the individual fungible, and fail to honor the autonomy and distinctiveness of the individual.[39]

In short, the Court has stated that, under the Equal Protection Clause, it is impermissible for the government to act as though individuals of the same race think or act alike merely by virtue of their race, or to use race as a proxy for certain ideas, attitudes, or experiences.[40] Qualities or traits instead must be determined on an individual basis.[41] In the words of Ralph Richard Banks, "treat[ing] individuals on the basis of group generalizations that might not apply to any particular individual, perhaps represents the paradigmatic harm that antidiscrimination law, including [the] Equal Protection Clause, is thought to guard against."[42]

In our hypothetical, the school twice violates this principle. First, it presumes that the African-American candidate will be able to generate trust and cooperation solely on the basis of racial identity and without regard to individual traits.[43] The school also presumes, solely on the basis of race, that the Asian-American candidate does not have the desired qualities. More broadly, racial mirroring embodies these racial presumptions and thus cannot be squared with the constitutional rule that prohibits state actors from acting as if certain traits categorically follow racial identity.

B. The Equal Consideration Problem

Not only are stereotypical presumptions unconstitutional, they also produce tangible consequences for the people who are subject to them. An individual presumed on the basis of race to possess a valued characteristic will be favored in hiring, while an individual presumed on the basis of race to not possess a desired trait will be disfavored. In our hypothetical, the Asian-American applicant, who may actually have the qualities that are preferred by the school and that may give rise to a strengthened relationship between the school and the parents, is denied equal consideration for the position and may be excluded from the employment opportunity. This denial cannot be squared with the Constitution.

The Supreme Court has approved three reasons to treat individuals differently on the basis of race: race-conscious admissions in higher education,[44] race-conscious remedies in employment for past discrimination for which the employer is responsible,[45] and race-conscious national security practices.[46] None of these covers racial mirroring, which is a forward-looking enterprise that seeks to benefit an external constituency (e.g., clients), and not a backward-looking remedial response

34 Powers v. Ohio, 499 U.S. 400 (1991).

35 *Id*. at 409.

36 *Id*.

37 *Id.* at 415.

38 Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).

39 *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) ("To whatever racial group… citizens belong, their 'personal rights' to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.") (plurality opinion). Justice William Brennan, for example, said "government may not, on account of race, insult or demean a human being by stereotyping his or her capacities, integrity, or worth as an individual." Mark Tushnet, Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961-1991 126 (1997) (internal quotation marks and citation omitted).

40 *See generally* Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. Rev. 2059, 2060 (1996) ("A huge chunk of equal protection law (and antidiscrimination law more generally) is aimed precisely at barring the use of reasonable, unbigoted judgments that race is a valid proxy for experiences, outlooks, or ideas."); *id*. at 2062 ("One of the great tasks of antidiscrimination law over the past thirty years has been to persuade people that they ought not use race and sex as proxies, even when race and sex are statistically plausible proxies.").

41 In the admissions context, the ability of colleges and universities to make judgments about whether an applicant has valuable viewpoints on the basis of racial self-identification alone and not based on experience perhaps helps explain Chief Justice Roberts's questions at oral argument in the *Fisher v. University of Texas at Austin* case, in which he referred repeatedly to the fact that racial self-identification is on the front of an individual's application for admission to the University of Texas. *See* Transcript of Oral Argument at 32, 33, 36, Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013) (No. 11-345) (questioning by Chief Justice Roberts concerning an applicant's checking of a box to identify with a particular race); *id.* at 54 (asking "whether race is the only . . . holistic factor[] that appears on the cover of every application"); *see also id.* at 35 (questioning by Justice Scalia on the same topic); *id.* at 52 (exchange with Justice Alito on the same topic).

42 R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. Rev. 1075, 1091-92 (2001).

43 Indeed, the employer has not only reduced the applicant's race to a singular interest in ascertaining whether a desired trait is present, but in doing so has exploited that racial identity. This "instrumental" use of race, Nancy Leong points out, "is antithetical to a view of . . . race . . . as a personal characteristic intrinsically deserving of respect." Nancy Leong, *Racial Capitalism*, 126 Harv. L. Rev. 2151, 2155 (2013).

44 *See Grutter*, 539 U.S. 306 (holding that universities can take race into account when making admissions decisions).

45 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 510–11 (1989) (holding that a city cannot take race into account when making procurement decisions without identifying the city's own past discrimination that is in need of remediation).

46 *See* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943). It should be added that, in *Johnson v. California*, 543 U.S. 499 (2005), the Court held that strict scrutiny was the proper standard that governed the use of race by penal institutions. The Court did not rule, on the merits, that the use of race in the penal context constituted a compelling state interest.

to a state actor's own past racial discrimination.[47] Accordingly, the external legitimacy doctrine cannot be reconciled with prevailing constitutional jurisprudence, and the denial of equal consideration to the disfavored party (i.e., the hypothetical Asian-American candidate) is a constitutional violation.

C. The Performance Problem

There are also consequences for those who are positively stereotyped, like the African-American applicant in our hypothetical. The school not only presumes that the African-American teacher possesses the desired traits, but will effectively demand that, once hired, she activate those traits in order to achieve the parental engagement sought by the employer. In other words, the African-American teacher will be expected to act according to the set of characteristics she is presumed to have, without regard to whether she actually has them. An employer who hires an individual because of the way his or her racially stereotyped qualities might manifest themselves for the benefit of the employer will expect the employee to "perform."[48]

In academic literature, "performance" speaks to when an individual acts "in the manner expected of a member of her group," above and beyond any "subjective intent to belong."[49] These expectations, grounded in racial stereotypes, harm the individual. The ability of the individual to assert or explain the meaning of her racial identity is displaced by a set of characteristics imposed on her by the employer. Put differently, the concern here is not just that the individual is subject to automatic stereotypes attached to her racial identity, but that the operation of these stereotypes cuts off the ability of the individual to advance her particular attributes, which may or may not line up with the presumed bucket of attributes. Faced with such racial presumptions, the individual may develop concerns about whether she is unwittingly affirming the external presumptions and may even internalize the racial presumptions, skewing the individual's own process of racial formation.[50]

Consider an example from the admissions context. The University of Texas-Austin has stated that it seeks to admit underrepresented minority students who "play against racial stereotypes," such as the "African American fencer" and "the Hispanic who has… mastered classical Greek."[51] In this statement, the University not only relies on racial presumptions, but, as to the details of those stereotypes, perpetuates the stereotypical notions that African-Americans are not fencers and that Hispanics are not capable of mastering classical Greek. As a result, students from these racial groups are placed in a bind: they may gravitate towards these areas to be more racially palatable and invite greater consideration in admissions, or they may be pushed further from these areas in order to create distance between themselves and the imposed expectations even if they were otherwise interested in fencing or classical Greek.[52] In either instance, the students' interests in these areas may be affected or influenced by the external stereotypes. But their interests should not be impaired by the operation of governmental racial presumptions. The individual, in other words, should be free of that bind.[53]

In our running hypothetical, the school has hired an African-American teacher based on the presumption that she has qualities that will produce trust and cooperation between the school and parents. The employer expects the African-American employee, once hired, to demonstrate those traits, such that the desired trust and cooperation will develop. The African-American employee thus experiences external pressure to act in accordance with those expectations and exhibit the desired traits, even if she does not have, or is not inclined to express, those traits. The employee, furthermore, may face adverse consequences if she does not conduct herself in the manner that comports with the employer's expectations. That response, in turn, affects the meaning developed by the candidate and employee of her racial self.

D. The Stereotype Entrenchment Problem

If the Asian-American applicant actually possesses the qualities the hiring committee wants, but is denied equal consideration and therefore employment, the harms of the external legitimacy doctrine extend beyond the applicant herself to the school officials, students, and parents. In particular, these other stakeholders are denied the opportunity to interact with someone of a different race and the benefit of her talents for building cooperation. The external legitimacy doctrine—and the racial mirroring it is used to justify—reinforces the presumption that only individuals of the same race are going to care about each other and effectively work together. Implementing policies based on the doctrine will result in missed opportunities to break down racial stereotypes. Indeed, students may be denied the chance to interact with, learn from, and be exposed to individuals of different races; such contact can be helpful to the development and maturation of students in an increasingly diverse society and world. As the Supreme Court has suggested, racial classifications, if used, must tear down, and not build up or strengthen, racial barriers to understanding.[54] If the value of

47 Leading constitutional scholars agree that there are only three such acceptable departures from the constitutional ban on the use of race by state actors. *See, e.g.*, Paulsen, et al., The Constitution of the United States 1469 (1st ed., 2010) (enumerating the same three compelling state interests).

48 *See, e.g.*, Zhao v. State Univ. of N.Y., 472 F.Supp.2d 289 (E.D.N.Y. 2007) (denying summary judgment in Title VII case, where a Chinese employee was expected to live up to expectations, in the words of the employer, that Chinese "work very hard, long" and that "the people who really produce results are these Chinese people.").

49 Jessica A. Clarke, *Identity and Form*, 103 Cal. L. Rev. 747, 757 (2015).

50 *See* R.A. Lenhardt, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. Rev. 803, 839-44 (2004).

51 Tr. Oral Argument, Fisher v. Univ. of Texas, No. 11-345, at *61 (U.S. Oct. 10, 2012).

52 *See* Pricewaterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (recognizing this catch-22 faced by employees to conform to institutional stereotypes and be more accepted, on one hand, and to express individuality and risk institutional marginalization, on the other).

53 *See id.* (noting that Title VII of the Civil Rights Act of 1964 was intended to "lift" this bind).

54 *See Grutter*, 539 U.S. at 330 (acknowledging the importance of "cross-racial understanding," "break[ing] down racial stereotypes," and "enabl[ing] students to better understand persons of different races")

diversity is to facilitate cross-racial engagement and awareness, it would stand to reason that a policy keeping individuals of the same race together and individuals of different races apart would actively stifle the prospects for these social benefits.[55]

E. The Role Exclusion Problem

The Court's equal protection jurisprudence demands that social roles should be open to individuals of all races. Two cases dealing with gender stereotyping are particularly instructive in establishing this principle. Because racial discrimination is scrutinized even more closely than gender discrimination,[56] the principle derived from these cases applies with even greater force in the racial context.

In *Mississippi University for Women v. Hogan*, the Court considered whether the Mississippi University for Women's nursing school could "limit[] its enrollment to women."[57] The university argued that its admissions policy "compensate[d] for discrimination against women."[58] The Court held that the university's purportedly benign justification for the admissions policy had the effect of entrenching archaic and stereotypical views of women and female roles: "Rather than compensate for discriminatory barriers faced by women," the Court said, the university's "policy of excluding males from admission to the School of Nursing tends to perpetuate the stereotyped view of nursing as an exclusively woman's job."[59] *Hogan* stands for the proposition that even benign explanations cannot justify categorical gender-based classifications if the classifications embody and entrench stereotypes about the presumptive place of men or women in our society.

In *United States v. Virginia*, the Court appraised whether the Virginia Military Institute (VMI), a public undergraduate institution whose mission was to produce "citizen-soldiers," could, consistent with the Equal Protection Clause, limit enrollment to males.[60] Virginia explained that VMI needed to categorically exclude females because "the unique VMI method of character development and leadership training, the school's adversative approach, would have to be modified were VMI to admit women."[61] But the Court determined that Virginia "may not exclude qualified individuals based on 'fixed notions concerning the roles and abilities of males and females,'"[62] or "rely on overbroad generalizations to make judgments about people that are likely to… perpetuate historical patterns of discrimination."[63] The Court concluded that Virginia's "great goal" of maintaining an all-male military academy that uses the adversative method "is not substantially advanced by women's categorical exclusion, in total disregard of their individual merit."[64] *Virginia* establishes that gender-based stereotypes cannot justify gender-based classifications and that institutions must admit applicants based on their actual individual qualities rather than categorical assumptions. Again, this principle is only stronger in the race context due to the more rigid standard of review that applies to racial classifications.[65]

Racial mirroring runs afoul of the principle announced in *Hogan* and reinforced in *Virginia*. It operates on the premise that certain positions should be available (only or preferably) to individuals whose racial identities mirror the predominant racial identity of the community to be served. Even where the Supreme Court has accepted racial classifications in the employment context, it is because the employer in question has engaged in discrimination in the past. That acceptance has not applied to all employers or because of any broad, forward-looking objectives.

In our hypothetical, the African-American applicant is selected for the position because her racial identity matches that of most parents. The position was therefore only functionally available to the applicant who could enhance the extent to which the employer reflected the racial composition of the parents. But under the Supreme Court's equal protection jurisprudence, the employment role should be open to both on full and equal terms, without the position being the presumptive or exclusive entitlement of the applicant who happens to mirror the racial identity of the parents (or, in other situations, clients or customers).

F. The Judicial Validation Problem

It is undeniable that race continues to matter in a host of daily and important ways. Race informs for example, judgments about whether people are trustworthy or intelligent, informal behaviors such as walking faster near someone deemed dangerous, and formal decisions such as whether to hire someone. The Supreme Court has understood that racial stereotypes persist in modern American society.[66] In addressing

(internal quotation marks and citations omitted).

55 *See id.* at 331-32 (recognizing the importance of ensuring a diverse workforce and military leadership).

56 *See* United States v. Virginia, 518 U.S. 515, 532 (1996); *id.* at n.6 ("The Court has thus far reserved most stringent judicial scrutiny for classifications based on race or national origin. . . .").

57 458 U.S. 718, 720 (1982) (holding the state-supported university could not deny qualified males the right to enroll in the nursing school).

58 *Id.* at 727.

59 *Id.*

60 *See Virginia*, 518 U.S. at 519 (framing the question before the Court as whether "the Constitution's equal protection guarantee precludes Virginia from reserving exclusively to men the unique educational opportunities VMI affords").

61 *Id.* at 535 (internal quotation marks and citation omitted).

62 *Id.* at 541 (quoting *Hogan*, 458 U.S. at 725).

63 *Id.* at 542 (internal quotation marks and citation omitted).

64 *Id.* at 546. At oral argument, counsel for the Department of Justice suggested that VMI advanced stereotypical views of men as well. "[I] don't think that you can have single sex education that offers to men a stereotypical view of this is what men do," in other words participate in the military and engage in rigorous training. Transcript of Oral Argument, *United States v. Virginia*, Nos. 94–1941, 94–2107, at *14 (S. Ct. Jan. 17, 1996).

65 *See supra* note 57. To the extent that racial classifications approved by the Supreme Court embody such general views of race, I would emphasize that these limited areas—i.e., admissions in higher education, remedial employment decisions, and national security—do not cover racial mirroring.

66 *See Grutter*, 539 U.S. at 333 (observing in 2003 that, in our society,

its role in relation to these stereotypes, the Court has made clear that courts cannot endorse or facilitate the operation of those stereotypes. In *Palmore v. Sidoti*, the Court was faced with a case in which a white mother had the custody of her child revoked because she remarried a black man.[67] The courts below ruled that the custody determination was appropriate because the interracial remarriage was against the wishes of the father, and would subject the child to social harms.[68] The Court reversed, holding that the father's wishes and potential social reactions could not justify divesting the mother of custody for racially stereotypical reasons. The Court acknowledged that racial stereotypes exist generally and that the child in question may be stigmatized,[69] but declared that "[t]he Constitution cannot control such prejudices but neither can it tolerate them."[70] The Court also said that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[71] In other words, the courts cannot give legal credit or practical effect to racial stereotypes, even though such biases continue to exist and inform decisions in society.[72]

Racial mirroring violates this constitutional principle, as our hypothetical demonstrates. The school wants to hire an African-American employee because it thinks this will satisfy a predominantly African-American parent base. This decision may be predicated on school officials' beliefs that the parents may hold positive views of African-American teachers or negative views of applicants of other races, and not on the school officials' personal beliefs. There may even be an empirical foundation for the belief that African-American parents respond better to African-American teachers. But the rulings of the Supreme Court command that the courts cannot sanction social assumptions about the attributes of members of a particular race, regardless of who makes those assumptions, regardless of whether those assumptions are considered positive or beneficial, and regardless of whether the assumptions are backed by data. Racial stereotypes may exist, but the courts cannot actively validate or perpetuate them.

"race unfortunately still matters"); see also Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated.").

67 *Palmore*, 466 U.S. at 430-31.

68 *See id*. at 431.

69 *See id*. at 433 ("It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. There is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin.").

70 *Id*.

71 *Id*.

72 *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("The impact [of race-based segregation] is greater when it has the sanction of the law[.]").

II. The Remedy

If employers are not allowed to use racial mirroring to obtain benefits, such as cooperation and trust between employees and clients, how can they obtain those benefits? Decision makers interested in ensuring that employees have certain traits (e.g., an ability to generate trust and cooperation) for purposes of realizing certain benefits from those traits (e.g., greater effectiveness in educating students) should assess whether there is any particularized evidence from applicants' records or materials that show that they have or do not have the desired traits. As Eugene Volokh rightly states, "even when race is correlated with a relevant job characteristic… one should just look at that characteristic and not use race as a proxy."[73]

This rule has several values. It takes off the table race-based presumptions that are harmful themselves and that give rise to additional harms. It restores the individual as the determinant of whether and to what extent his or her racial identity matters, and what meaning may attach to that racial identity. It affords greater respect to the individual, as it does not treat him or her as a person with predetermined or monolithic attitudes, attributes, or experiences. It also pays more honest tribute to the constitutional command that individuals be treated as individuals, not as undifferentiated members of a racial group.[74] Counseling against the practice of racial mirroring does not pretend that race does not matter in our society, nor does it suggest that we should close our eyes to racial realities. Rather, it recognizes the harms of racial presumptions, identifies them, and urges academics and the courts to avoid promoting or adopting those presumptions.

III. Conclusion

This essay identifies constitutional and social harms that stem from the practice of racial mirroring, defined as engineering the racial composition of one group to reflect or match the racial composition of another group. The narrow conclusion that this essay seeks to prove is that the external legitimacy doctrine, along with the practice of racial mirroring that it supports, is unsustainable on constitutional and social grounds. The broader ambition of this essay is to help lay the groundwork for a constitutional and social rule that forbids the use of all categorical racial presumptions. It endeavors to make the case that, because of the harms described, categorical racial preferences must cede to individualized evaluations. The Supreme Court has recognized that, "[i]f our society is to continue to progress as a multiracial democracy, it must recognize that the automatic invocation of race stereotypes retards that progress and causes continued hurt and injury."[75] This essay seeks to give full meaning to this principle and to thereby accelerate the moment when individuals will be treated as individuals.

73 *See* Volokh, *supra* note 41 at 2061.

74 *See Grutter*, 539 U.S. at 337 ("[A] university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual[.]").

75 Edmonson v. Leesville Concrete Co., 500 U.S. 614, 630–31 (1991).

Fisher v. UT–Austin and the Future of Racial Preferences in College Admissions

By Elizabeth Slattery

Note from the Editor:

This article discusses the Supreme Court's recent decision in *Fisher v. University of Texas–Austin* and is critical of the Court's decision and its legal reasoning.

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• Kimberly West-Faulcon, *Symposium: Surprisingly, facts rule the day in Fisher II*, SCOTUSblog (Jun. 24, 2016), http://www.scotusblog.com/2016/06/symposium-surprisingly-facts-rule-the-day-in-fisher-ii/.

• John Paul Schnapper-Casteras, *Symposium: Moving forward from Fisher II*, SCOTUSblog (Jun. 24, 2016), http://www.scotusblog.com/2016/06/symposium-moving-forward-from-fisher-ii/.

• Vinay Harpalani, *The Fishing Expedition is Over: Victory for Affirmative Action in Fisher v. Texas!*, ACSblog (Jun. 24, 2016), https://www.acslaw.org/acsblog/the-fishing-expedition-is-over-victory-for-affirmative-action-in-fisher-v-texas.

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Portions of this article were adapted from Hans A. von Spakovsky and Elizabeth Slattery, Discriminatory Racial Preferences in College Admissions Return to the Supreme Court: Fisher v. University of Texas at Austin*,* *Heritage Foundation Legal Memorandum #168 (Dec. 3, 2015),* available at *http://www.heritage.org/research/reports/2015/12/discriminatory-racial-preferences-in-college-admissions-return-to-the-supreme-court-fisher-v-university-of-texas-at-austin#_ftnref31 and Elizabeth Slattery,* Symposium: A disappointing decision, but more lawsuits are on the way*, SCOTUSblog (Jun. 24, 2016),* available at *http://www.scotusblog.com/2016/06/symposium-a-disappointing-decision-but-more-lawsuits-are-on-the-way/.*

Abigail Fisher made a second trip to the Supreme Court of the United States this term, in her challenge to the University of Texas at Austin's race-conscious admissions program. In 2013, the Supreme Court ruled 7-1 in her favor, finding that the lower courts were too deferential to school officials. But this time around, four justices found that deference "must be given" when school officials give a "reasoned, principled explanation" for why they must discriminate against some applicants in favor of certain preferred minority applicants. Now that *Fisher* has reached the end of the road, what happens next with racial preferences in college admissions?

I. From *Bakke* to *Grutter*: A Brief History of Racial Preferences Jurisprudence

In 1978, the Supreme Court reviewed the admissions program used by the University of California–Davis Medical School in *Regents of the University of California v. Bakke*. At that time, the school used a two-track system for admissions, with 84 out of 100 seats filled based on applicant merit and 16 set aside for "preferred" minorities. It turned out that race "was no mere tiebreaker in otherwise close cases," and that there was a large gap between the average "disadvantaged track" admittee's entering credentials and those of other admittees.[1]

In a fractured decision, the Supreme Court ruled against UC–Davis's program while allowing schools to continue using racial preferences—as long as they were intended to promote the "educational benefits that flow from an ethnically diverse student body."[2] Four members of the Court would have held that race conscious admissions policies are unconstitutional. Another four would have allowed the school to continue using racial preferences in order to "remedy[ ] past societal discrimination," warning against "let[ting] color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."[3]

The controlling opinion, written by Justice Lewis Powell, left the door open to the continued use of racial preferences. He wrote that a "state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[4] For years, legal scholars debated what a "properly devised" affirmative-action program entailed while these programs grew on campuses across the country. The Court subsequently determined that all racial classifications are subject to strict scrutiny, which means that they must be narrowly tailored to meet a compelling governmental interest.[5]

1 Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, Heritage Foundation Special Report No. 167 at 3–4 (2015), *available at* http://www.heritage.org/research/reports/2015/08/a-dubious-expediency-how-race-preferential-admissions-policies-on-campus-hurt-minority-students#_ftnref3.

2 Regents of the University of California v. Bakke, 438 U.S. 265, 306 (1978).

3 *Id.* at 327–28 (Justices, Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part).

4 *Id.* at 320.

5 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). As the majority explained, "[A]ny person, of whatever race, has the right to

It was not until 2003 that the Supreme Court revisited the issue of racial preferences in higher education in a pair of cases from the University of Michigan. In *Grutter v. Bollinger*, a challenge to the law school's purported use of racial quotas, the school claimed its goal was reaching a "critical mass of underrepresented minority students" to "realize the educational benefits of a diverse student body."[6] The admissions data showed that the school maintained separate admissions criteria based on race and admitted preferred minorities "in proportion to their statistical representation in the applicant pool."[7] In an opinion by Justice Sandra Day O'Connor, the Court ruled in favor of the law school, deferring to the school officials' "educational judgment" that a diverse student body is "essential to its educational mission."[8] It found that the school's "critical mass" goal was not an impermissible race-based quota.[9] Justice Clarence Thomas disagreed in a dissenting opinion, pointing out that:

> The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.[10]

In *Gratz v. Bollinger*, the Court held that the university's undergraduate admissions policy, which included automatically giving "one-fifth of the points needed to guarantee admission… to every single 'underrepresented minority' applicant," was not narrowly tailored because it "ha[d] the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant."[11] The school's failure to provide individualized review of applicants and heavy reliance on race could not be squared with strict scrutiny review.

Taken together, these two decisions underscore that the Court has not issued a blanket endorsement of race-based admissions; any consideration of race must be carefully and narrowly crafted and executed. *Grutter* requires that, before resorting to sorting applicants by race, a school must pursue a "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[12] Though schools need not exhaust "every conceivable race-neutral alternative," they must "remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."[13] *Gratz* teaches that race may be considered, but that it may not be the decisive factor in admissions.

In the real world, however, few competitive universities have willingly implemented race-neutral programs to replace racial preferences.[14] Moreover, universities are anything but transparent about their admissions processes. Some schools, including Yale Law School, have even destroyed their admissions records;[15] some speculate that this is to avoid having to disclose the criteria such as race and other standards they use to determine admissions.[16]

II. The Challenge to UT–Austin's Admissions Program

Before *Grutter* was decided by the Supreme Court, a federal appeals court reviewed the race-based admissions policy used by the University of Texas School of Law, finding that the school's overt use of race was constitutionally impermissible.[17] In response to this ruling, the Texas legislature passed the Top 10 Percent Law in 1997. Under this law, students who graduated in the top 10 percent of Texas high schools would be automatically admitted to state-funded colleges and universities.[18] This boosted minority enrollment, drawing in students from majority-minority schools, as well as enrollment from rural areas. In fact, enrollment of African Americans and Hispanics surged, surpassing minority enrollment levels achieved with race-based admissions. Larry Faulkner, the president of UT–Austin at the time, wrote that "the Top 10 Percent Law has enabled us to diversify enrollment at UT–Austin with talented students who succeed."[19] Faulkner added that minority students were earning higher grade-point averages and had better retention rates than students who had previously been admitted through the old race-based admissions program.[20]

Despite these gains, the day the Supreme Court released its *Grutter* decision, Faulkner announced that the university would reintroduce race-based admissions. Thus, for spots not filled by Top 10 Percent students—about one-quarter of offers of admission—the university began conducting a "holistic review" of

demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* at 224.

6 539 U.S. 306, 318 (2003).

7 *Id.* at 386 (Rehnquist, C.J., dissenting).

8 *Id.* at 328.

9 *Id.*

10 *Id.* at 353 (Thomas, J., dissenting).

11 539 U.S. 244, 271–72 (2003) (internal citations omitted).

12 *Grutter*, 539 U.S. at 339.

13 *Id.* at 337–39.

14 Most of the schools that have implemented race-neutral alternatives have been in states that passed ballot initiatives or referenda outlawing racial preferences. *See Studies Show Race-Neutral College Admissions Could Work*, USA Today (Oct. 3, 2012), http://www.usatoday.com/story/news/nation/2012/10/03/study-race-neutral-admissions/1609855/.

15 Joseph Pomianowski, *Yale Law School Is Deleting Its Admissions Records, and There's Nothing Students Can Do About It*, The New Republic (March 16, 2015), *available at* http://www.newrepublic.com/article/121297/yale-law-deletes-admissions-records-congress-must-fix-ferpa.

16 *Plaintiff in Harvard University Admissions Lawsuit Objects to Destruction of Student Records at Yale Law School*, PR Newswire (March 19, 2015), *available at* http://www.bizjournals.com/prnewswire/press_releases/2015/03/19/DC59476.

17 Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

18 Tex. Educ. Code Ann § 51.803 (West 2009).

19 Larry Faulkner, *The 'Top 10 Percent Law' Is Working for Texas*, Your Houston News (Oct. 26, 2000), *available at* http://www.yourhoustonnews.com/archives/the-top-percent-law-is-working-for-texas/article_46e57a32-3c15-56f9-818e-217dc49bb854.html.

20 *Id.*

applicants that allowed administrators to consider race as a "plus factor" for certain preferred minorities. The university defended its decision by arguing that, while minority enrollment was up because of the Top 10 Percent Plan, it did not mirror the overall demographics of Texas.

Abigail Fisher, a white Texas resident, did not graduate in the top 10 percent of her high school class, so her application for admission to UT–Austin was in competition with candidates who received a preference based on their race or ethnicity. After she was denied admission, she sued the university for discriminating against her based on race. Her case went to the Supreme Court, which held that UT–Austin must prove its use of racial preferences meets the narrow tailoring standard state-run universities must meet under the *Grutter* decision.[21]

In an opinion by Justice Anthony Kennedy, the Court determined that the lower courts gave too much deference to UT–Austin officials when examining whether their use of race was narrowly tailored. The Court said that university officials are entitled to "no deference" because it is "for the courts, not for university administrators" to ensure that the means used by the university pass strict scrutiny review.[22] Under narrow tailoring, the school's use of race must have been "necessary…to achieve the educational benefits of diversity."[23] In other words, there must be "no workable race-neutral alternative" that would produce such benefits.[24]

The *Fisher I* opinion stressed that courts must look at *actual* evidence and not "simple…assurances of good intention" from the university.[25] In a concurring opinion, Justice Thomas further noted that even though it may be "cloaked in good intentions, the university's racial tinkering harms the very people it claims to be helping."[26] Six members of the Court joined the majority. Justice Elena Kagan recused herself, presumably based on her involvement with the case when she was U.S. Solicitor General, and Ruth Bader Ginsburg dissented, stating that she would defer to the judgment of university officials.[27]

Thus, Abigail Fisher's case returned to the Fifth Circuit for an examination of the evidence the university used to justify its race-conscious admissions policy. On remand, a three-judge panel upheld the school's plan once again. Two of the judges on the panel claimed that there were "no workable race-neutral alternatives" since Texas had unsuccessfully tried various alternatives to increase diversity in the past.[28] The Top 10 Percent Plan produced too many students from majority-minority schools, which allegedly did not advance the school's interest in "qualitative" diversity.[29]

Judge Emilio Garza dissented, questioning the sufficiency of the evidence provided by UT–Austin. He concluded that the university's "bare submission" of proof that its admissions plan passed strict scrutiny "begs for the deference that is irreconcilable with 'meaningful' judicial review."[30] Based on the Supreme Court's ruling in *Fisher I*, the burden was on the university to demonstrate that its use of racial and ethnic preferences advanced its compelling interest in obtaining a "critical mass" of campus diversity. But, as Judge Garza pointed out, the university "failed to define this term in any objective manner. Accordingly, it is impossible to determine whether the University's use of racial classifications in its admissions process is narrowly tailored to its stated goal—essentially, its ends remain unknown."[31] Judge Garza faulted the majority for continuing "to defer impermissibly to the University's claims" in defiance of the "the central lesson of *Fisher*."[32] In fact, he wrote, the university's failure to produce evidence to justify its race-conscious admissions policy "compels the conclusion" that it "does not survive strict scrutiny."[33]

III. Fisher Returns to the Supreme Court

The Supreme Court agreed to rehear the case in its just-concluded term. Fisher argued that the university had not met its burden of demonstrating why it needed to use race in making admissions decisions.[34] More than 80 percent of minority enrollees in the 2008 freshman class (the class for which Abigail Fisher applied) were admitted through the Top 10 Percent Plan.[35] Among minority students admitted under the "holistic review," program, it is estimated that only 2.7% (or 33 black and Hispanic students) received a preference to gain admission—leading to the conclusion that this use of race in this program was unnecessary to increase minority enrollment.[36] Furthermore, in 2010, UT–Austin reported that its entering freshman class included more minority students than white students for the first time in its history.[37] Fisher maintained that the university's newly asserted interest in "qualitative" diversity could not survive strict scrutiny review. Though Fisher did not ask the Supreme Court to completely ban the use of racial preferences, she asked that UT–Austin

21 Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2420-21 (2013) [hereinafter "*Fisher I*"].

22 *Id.*

23 *Id.* at 2420.

24 *Id.*

25 *Id.* at 2421.

26 *Id.* at 2432 (Thomas, J., concurring).

27 *Id.* at 2434 (Ginsburg, J., dissenting).

28 Fisher v. University of Texas at Austin, 758 F.3d 633, 649 (2014).

29 *Id.* at 667 (Garza, J., dissenting).

30 *Id.* at 673.

31 *Id.* at 661–662.

32 *Id.* at 662.

33 *Id.*

34 Brief for Petitioner at 22-23, Fisher v. University of Texas at Austin, No. 14-981.

35 *Id.* at 10.

36 *Id.*

37 *Class of First-Time Freshmen Not a White Majority This Fall Semester at The University of Texas at Austin*, UTNews (Sept. 14, 2010), *available at* https://news.utexas.edu/2010/09/14/student_enrollment2010.

be held to the constitutional standard of strict scrutiny, which should not be "strict in theory but feeble in fact."[38]

The case was argued in the Supreme Court's December 2015 sitting, and court watchers waited six months for a decision. The Court released the long-awaited decision on June 23, 2016. Once again, Justice Anthony Kennedy wrote for the majority. This time, however, only three justices joined—Justices Stephen Breyer, Sonia Sotomayor, and Ruth Bader Ginsburg—while Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas dissented.[39]

Justice Kennedy's majority opinion took the university at its word that it needed to use race-conscious admissions because it could not meet its "diversity goals" using only the Top 10 Percent Plan. In allowing the university to continue using a race-conscious admissions program without sufficiently articulating its "diversity goal" or providing proof that it was meeting that goal, Justice Kennedy departed from his previous equal protection jurisprudence and the firm standard to which he held the university in *Fisher I*. Echoing his dissent in *Grutter*, Justice Clarence Thomas reiterated that government classifications based on race "demean[ ] us all," and that the "'faddish theor[y]' that racial discrimination may produce 'educational benefits'" does not change the constitutional command of equal protection.[40]

Justice Kennedy noted that race-conscious programs still must meet strict scrutiny review.[41] This means a school must show "with clarity" that its "purpose or interest [in the educational benefits of diversity] is both constitutionally permissible and substantial" and that the use of race is necessary to advance that purpose or interest.[42] While a school may not use "fixed quota[s]" or a "specified percentage" of a race or ethnicity, once they give "a reasoned, principled explanation," "deference must be given to the university's conclusion, based on its experience and expertise, that a diverse student body would serve its education goals."[43] Finally, judges must not defer to school officials on whether the use of race is narrowly tailored to advance the asserted goal. This last requirement lost any teeth it may have had because, as Justice Alito explained in his dissent, the university "merely invok[es] 'the educational benefits of diversity'" without "identify[ing] any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving those interests. This is nothing less than the plea for deference that we emphatically rejected" in *Fisher I*.[44]

While the majority said that the university is "prohibited" from having a set number of seats based on students' races and ethnicities, it also stated that "asserting an interest in the educational benefits of diversity writ large is insufficient."[45] So how does a school sufficiently prove it is meeting its diversity goal without setting quotas? The answer, according to the majority, is putting out a study with all the right buzzwords: promoting "cross-racial understanding," "break[ing] down racial barriers," "cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry."[46] The problem with this, as Justice Alito explained in his dissent, is that these "amorphous goals"[47] (though laudable) are neither concrete nor precise and provide no basis for a court to determine whether a school has made sufficient progress without simply deferring to the judgment of school administrators.

Justice Kennedy's majority opinion concluded by stating that the university must continue to "scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary."[48] Leaving it up to school officials to review their own race-conscious admissions program is like letting a fox guard the henhouse.

IV. The Next Wave of Cases Challenging Racial Preferences

Fisher II has not dramatically changed the Court's jurisprudence in the area of racial preferences in college admissions, and more cases are on the way. Lawsuits are currently pending in federal district courts that challenge the admissions policies of Harvard University and the University of North Carolina–Chapel Hill. The Harvard suit[49] was brought by Asian American applicants who claim they were denied admission because the university has put limits on the number of Asian Americans it will admit, similar to the quotas and caps that Ivy League schools put on the number of Jewish students they would admit in the 1920s.[50] The plaintiffs in the UNC–Chapel Hill case highlight the fact that the university conducted a study showing that, if the school dropped its racial preference policy and switched to a "top ten percent plan" like Texas, its minority enrollment would soar.[51]

Additionally, more than 130 Asian American organizations recently asked the Department of Education and the Justice Department to investigate Yale University, Brown University, and Dartmouth College for their use of racial preferences, which they claim amount to race-based quotas that lock out well-qualified Asian American applicants.[52] They point to data from the Depart-

38 *Fisher I*, 133 S. Ct. at 2421.

39 Justice Kagan was again recused from the case, and Justice Scalia had passed away by the time the case was decided.

40 Fisher v. University of Texas at Austin, 579 U.S. __ (2016), slip op. at 1 (Thomas, J., dissenting).

41 *Id.* at 7 (majority opinion).

42 *Id.*

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

44 *Id.* at 1-2 (Alito, J., dissenting).

45 *Id.* at 12 (majority opinion).

46 *Id.*

47 *Id.* at 15 (Alito, J., dissenting).

48 *Id.* at 19.

49 Complaint at 3, Students for Fair Admissions v. President and Fellows of Harvard College, No. 14-176 (D. Mass. Nov. 17, 2014).

50 Malcolm Gladwell, *Getting In–The Social Logic of Ivy League Admissions*, New Yorker (Oct. 10, 2005), *available at* http://www.newyorker.com/magazine/2005/10/10/getting-in.

51 Complaint at 6, Students for Fair Admissions v. University of North Carolina, No. 14-954 (M.D.N.C. Nov. 17, 2014).

52 Complaint of the Asian American Coalition for Education for the Unlawful

ment of Education showing that Asian American enrollment at Brown and Yale has been stagnant since 1995, and at Dartmouth since 2004, despite an increase in the number of highly qualified Asian American students applying to these schools during that time. In fact, data show that Asian Americans must score, on average, "approximately 140 point[s] higher than a White student, 270 points higher than a Hispanic student and 450 points higher than a Black student on the SAT, in order to have the same chance of admission."[53]

The groups suspect Yale, Brown, Dartmouth, and other Ivy League schools "impose racial quotas and caps to maintain what they believe are ideal racial balances."[54] Like many other schools, Yale, Brown, and Dartmouth use a "holistic" approach to evaluate applicants, which allows race and ethnicity to become large factors in the admission equation. In their complaint, the Asian American groups assert that these colleges rely on stereotypes and biases to deny Asian Americans admission. Admission board reviewers' notes track the stereotypes: "He's quiet and, of course, wants to be a doctor," or her "scores and application seem so typical of other Asian applications I've read: Extraordinarily gifted in math with the opposite extreme in English."[55] Since the admissions policies at these schools are highly secretive, they are free to discriminate against Asian American applicants.

Perhaps if a case involving blatant discrimination against Asian Americans reaches the Supreme Court, the justices in the *Fisher II* majority will see that these admissions officials are not necessarily acting in good faith, but rather are seeking to exclude certain students because of their race. Justice Kennedy once wrote that "[d]istinctions between citizens solely because of their ancestry are by their nature odious to a free people."[56] The Supreme Court should put this principle in place by banning racial preferences in college admissions.

Discrimination Against Asian-American Applicants in the College Admissions Process to the Office for Civil Rights, U.S. Dep't. of Educ. and Civil Rights Division, U.S. Dep't. of Just. (May 23, 2016), *available at* http://asianamericanforeducation.org/wp-content/uploads/2016/05/Complaint_Yale_Brown_Dartmouth_Full.pdf.

53 *Id.* at 2-3.

54 *Id.* at 3.

55 *Id.* at 18.

56 Rice v. Cayetano, 528 U.S. 495, 517 (2000).

A Costly Victory for Congress: Executive Privilege after *Committee on Oversight and Government Reform v. Lynch*

By Chris Armstrong

Note from the Editor:

This article explores the executive privilege to withhold records in congressional investigations in light of a recent D.C. District Court opinion construing the privilege.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. We invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

"[A] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both…. [P]eople who mean to be their own Governors, must arm themselves with the power which knowledge gives." —James Madison[1]

On January 19, 2016, D.C. District Court Judge Amy Berman Jackson ordered the Department of Justice (the Department) to turn over thousands of pages of documents to the House Committee on Oversight and Government Reform (the Committee), despite the Attorney General's claims that they were subject to executive privilege. While the outcome in *Committee on Oversight and Government Reform, United States House of Representatives v. Loretta E. Lynch* (*OGR v. Lynch*)[2] was a win for the Committee, it may prove to be a Pyrrhic victory. Judge Berman Jackson found for the Committee based on narrow factual circumstances while laying out a vision of an expansive deliberative process privilege that—if it stands—may diminish Congress's powers to investigate the Executive Branch.

I. The Operation Fast and Furious Investigation

In January 2011, Senator Charles Grassley began investigating the death of Customs and Border Patrol Agent Brian Terry and its connection to a Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) operation called "Project Gunrunner."[3] Senator Grassley wrote to the acting head of the ATF, detailing whistleblower allegations that the ATF had sanctioned the sale of hundreds of weapons to straw purchasers, who then transported the weapons throughout the southwestern border area and into Mexico, in an action that would come to be known as "Operation Fast and Furious." The letter also questioned whether two of these weapons were used in the firefight that resulted in Agent Terry's killing.

In a February 4, 2011 response, the Department called the allegations "false" and "incorrect."[4] The following month, as Senator Grassley continued his investigation, Committee Chairman Darrell Issa opened his own investigation on the matter. In December of that year, the Department withdrew the February 4 letter and acknowledged that it presented "inaccurate information" about both the operation and the Department's knowledge of ATF's actions.[5] In the meantime, the Committee investigation had focused on the Department's misstatements and the long

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1 Letter from James Madison to W.T. Barry (Aug. 4, 1822), in 9 Writings of James Madison 103 (Gaillard Hunt, ed. 1910).

2 Committee on Oversight and Government Reform v. Loretta E. Lynch, No. 12-1332, Mem. Op. and Order (Jan. 19, 2016).

3 Letter from Ranking Member Charles Grassley to Acting Director Kenneth E. Melson (Jan. 27, 2011).

4 Letter from Assistant Attorney General Ronald Weich to Ranking Member Charles Grassley (Feb. 4, 2011).

5 Letter from Deputy Attorney General James Cole to Chairman Darrell Issa and Ranking Member Charles Grassley (Dec. 2, 2011).

delay in correcting the record. In October 2011, the Committee issued a subpoena to then-Attorney General Eric Holder for records related to Operation Fast and Furious, including records related to the February 4 letter and subsequent communication to Congress.

After producing a subset of those records, and on the eve of a Committee meeting to consider a resolution citing the Attorney General for contempt over the October subpoena, on June 20, 2012, Deputy Attorney General James M. Cole asserted executive privilege and refused to produce documents dated after February 4, 2011 because:

> . . . the compelled production to Congress of these internal Executive Branch documents generated in the course of the deliberative process concerning the Department's response to congressional oversight and related media inquiries would… inhibit the candor of such Executive Branch deliberations in the future and significantly impair the Executive Branch's ability to respond independently and effectively to congressional oversight.[6]

The following week, the House of Representatives voted to hold the Attorney General in contempt over the continued refusal to turn over the subpoenaed documents. The House of Representatives also authorized a lawsuit against the Justice Department, leading to the latest of surprisingly infrequent privilege fights between the legislative and executive branches in the federal courts. The question before the court in *OGR v. Lynch* was whether records of a federal agency's internal deliberations over how to respond to congressional inquiries fall under the protection of the deliberative process privilege.

II. The Scope of Congress's Investigative Power

Congressional investigations are a critical part of our constitutional order. At the Constitutional Convention, George Mason argued that members of Congress would be "not only Legislators but they possess inquisitorial power. They must meet frequently to inspect the Conduct of the public offices."[7] After the Constitutional Convention, James Wilson wrote that the "house of representatives, for instance, form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things."[8] Yet Congress's powers of investigation do not exist in a vacuum, and it has met resistance throughout American history when it has used them against the Executive Branch.

The oldest means of Executive Branch resistance—first used by President George Washington—has been the presidential claim of executive privilege to withhold records from Congress.[9] Though they are both as old as the country itself, neither Congress's investigatory power nor the executive privilege to withhold are specifically mentioned in the text of the Constitution. Given the negotiated nature of congressional investigations, political pressures on both branches to resolve disputes, and the Judicial Branch's reluctance to interfere in political disputes, questions of executive privilege related to congressional investigations have rarely reached the courts. This has left little legal guidance on how the President's privileges and Congress's investigative powers interact. As one commentator put it, the "scope and limitation of congressional oversight are borne of conflict,"[10] and given the limited number of legislative-executive disputes that have reached the courts in this area, much remains unsettled.

Despite this lack of judicial guidance, the branches all agree that Congress has broad powers to investigate nearly any question.[11] The Constitution vests Congress with "all legislative Powers herein granted."[12] It is firmly settled that the Constitution's grant of legislative power contains a corollary power to investigate any matter subject to existing or potential legislation.[13] As the Supreme Court held in *Barenblatt v. U.S.*, "the scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."[14]

III. Defining the Scope of Executive Privilege: Presidential Communications and the Deliberative Process

The earliest judicial mention of executive privilege interests came from Chief Justice Marshall in *Marbury v. Madison*, when he noted that the Court's incursion "into the secrets of the cabinet" would appear to be interfering "with the prerogatives of the executive."[15] As courts understand it today, executive privilege consists of two distinct privileges: the presidential communication privilege (PCP) and the deliberative process privilege (DPP). These concepts are both only relatively recently defined—our understanding of PCP comes principally from the Supreme Court's Watergate-era jurisprudence, while the Court of Appeals for the D.C. Circuit has articulated the more common but less clear DPP in the course of adjudicating over a half-century of Freedom of Information Act (FOIA) litigation.

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6 Letter from James M. Cole, Deputy Attorney General, Department of Justice, to Chairman Darrell E. Issa, Committee on Oversight and Government Reform, U.S. House of Representatives (June 20, 2012).

7 2 The Records of the Constitutional Convention of 1787, at 206 (Max Farrand, ed., 1966).

8 The Works of the Honourable James Wilson, LLD, at 146 (1804).

9 In 1792, the House of Representatives established a special committee to investigate the failure of the northwestern expedition of Major General St. Clair. *See* M. Nelson McGeary, *Congressional Investigations: Historical Development* 18 U. Chi. L. Rev. 425 (1951). Interestingly, President Washington made the first invocation of executive privilege, withholding papers he believed to be in the public interest, though he later supplied them to the Committee. Archibald Cox, *Executive Privilege*, 122 U. Pa. L. Rev. 1383, 1391-92 (1974).

10 Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight*, 98 Marq. L. Rev. 881, 897 (2014).

11 For a more complete discussion of the branches' differing views on Congress's authority, see *id*.

12 U.S. Const. Art. I, § 1.

13 "The power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function." McGrain v. Daugherty, 273 U.S. 135, 174 (1927); "It is beyond dispute that Congress may conduct investigations in order to obtain facts pertinent to possible legislation and in order to evaluate the effectiveness of current laws…" Scope of Cong. Oversight and Investigative Power With Respect to the Exec. Branch, 9 Op. O.L.C. 60 (1985).

14 360 U.S. 109, 111 (1959).

15 5 U.S. (1 Cranch) 137, 170 (1803).

a. Presidential Communication Privilege

While presidents have fought to withhold records from opposing branches since the Washington Administration, it was not until *U.S. v. Nixon* that the Supreme Court articulated the modern doctrine of executive privilege. In *Nixon*, which involved a judicial rather than congressional subpoena, the Court described PCP as ". . . fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution."[16] The Court elaborated:

> [T]he privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.[17]

The Court defined PCP narrowly, limiting it to communications made "in performance of [a President's] responsibilities," and "in the process of shaping policies and making decisions."[18] The Court also immediately recognized the qualified nature of the privilege, stating that the President's "generalized interest in confidentiality,"[19] failed against the judicial branch's "demonstrated, specific need for evidence in a pending criminal trial."[20]

Beyond *Nixon*, much of our understanding of PCP comes from the D.C. Circuit's decision in *In re Sealed Case (Espy)*, which concerned an Office of Independent Counsel subpoena for records accumulated in the preparation of a White House Counsel's Office report to the President.[21] The court in *Espy* recognized the President's ability to invoke PCP when asked to produce records that 1) reflect presidential decisionmaking and deliberations and 2) the President believes should remain confidential, at which point they become presumptively privileged.[22] The privilege can only be applied to records revealing the President's deliberations or those of advisors with operational proximity to the President,[23] applies to records "in their entirety, and covers final and post-decisional materials as well as pre-deliberative ones."[24]

b. Deliberative Process Privilege

DPP is generally viewed as a common law privilege, rather than one arising from the Constitution, and it is a fairly recent creation in American history.[25] Broader than PCP, DPP can be invoked to withhold records that would reveal deliberations and recommendations that are part of the process by which Executive Branch decisions and policies are made.[26] To be privileged, records must be both predecisional and deliberative because, as the Court in *Espy* pointed out, of the privilege's "ultimate purpose[, which] is to prevent injury to the quality of agency decisions by allowing government officials freedom to debate alternative approaches in private."[27]

While both PCP and DPP are qualified, and require a balancing of the public interest at stake and the needs of the party seeking records, there is a clear presumption toward the Executive Branch in the case of PCP.[28] DPP, on the other hand, is more "ad hoc," and the "privilege disappears altogether when there is any reason to believe government misconduct occurred."[29] It can be overcome by a sufficient showing of need by the party seeking the records, forcing courts to consider "factors such as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation, the role of the government, and the possibility of future timidity by government employees."[30]

The Executive Branch, recognizing the limits of PCP, has sought to expand DPP from its origins—covering predecisional deliberations—toward a hybrid deliberative-communication privilege that can be invoked against producing nearly any record the President chooses. As Todd Garvey and Alissa M. Dolan of the Congressional Research Service have pointed out, Attorney General Eric Holder made this argument in a letter to President Obama concerning the Fast and Furious investigation.[31] He wrote that it is "well established that the 'doctrine of executive privilege . . . encompasses Executive Branch deliberative communications,'" without making a distinction between DPP and PCP.[32]

IV. Fast and Furious Investigation Reaches the D.C. District Court

At its core, *OGR v. Lynch* is a subpoena enforcement case that rests on whether the President can assert DPP to withhold records reflecting, not the development of policy, but the development of responses to Congress and the media. This poses two

16 United States v. Nixon, 418 U.S. 683, 708 (1974).

17 *Id.* at 705-706.

18 *Id.* at 711, 708.

19 *Id.* at 713.

20 *Id.*

21 121 F.3d 729 (D.C. Cir. 1997).

22 *Id.* at 744-745.

23 *Id.* at 752.

24 *Id.* at 745.

25 Russell L. Weaver & James T. R. Jones, *The Deliberative Process Privilege*, 54 Mo. L. Rev. 279, 320 (1989) ("of relatively recent origin"); Edward J. Imwinkelried, *The Government's Increasing Reliance On-And Abuse of-The Deliberative Process Evidentiary Privilege*, 83 Miss. L.J. 509, 513 (2014).

26 *Espy*, 121 F.3d at 737, quoting NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (internal quotation marks omitted).

27 *Id.* (quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 324 (D.D.C.1966), aff'd, 384 F.2d 979 (D.C. Cir. 1967) (internal quotation marks omitted)).

28 *Id.* at 746.

29 *Id.*

30 *Id.* at 737 (quoting In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 634 (D.C. Cir. 1992) (internal quotation marks omitted)).

31 Todd Garvey and Alissa M. Dolan, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments,* Cong. Research Serv. (Dec. 15, 2014).

32 Letter from Attorney General Eric Holder to President Barack Obama (June 19, 2012) (interestingly, quoting Letter from Attorney General Michael B. Mukasey to President George W. Bush (June 19, 2008)).

separate questions, for which previous cases provide little guidance: 1) May the Executive Branch assert DPP in response to a congressional subpoena? And 2) if so, can the privilege shield records beyond policy deliberations, such as deliberations over how to respond to congressional and media requests?

After the Committee filed its suit against the Department on August 13, 2012,[33] the Department filed a Motion to Dismiss on the grounds that the court lacked jurisdiction over the matter, and that even if it did have jurisdiction, it should decline to exercise it over a political dispute and that judicial intervention in the matter would threaten the Constitution's balance of powers. The court disagreed, citing *Marbury v. Madison* and *U.S. v. Nixon* for the proposition that "it [i]s the province and duty of the Court to say what the law is with respect to the claim of executive privilege . . . [and] any other conclusion would be contrary to the basic concept of separation of powers and checks and balances that flow from the scheme of a tripartite government."[34]

Following dismissal of the Department's motion, the Committee moved for summary judgement on the grounds that, unlike PCP, DPP has a common law rather than constitutional foundations and therefore could not be invoked in response to a congressional subpoena. Citing *Espy*, the court denied summary judgment on the grounds that there is a constitutional dimension of DPP that, when invoked correctly, could shield records from a congressional subpoena.

The court also found the Department's blanket assertion of privilege to be insufficient, and ordered it to review the records, identify which were both predecisional and deliberative, produce those which were not, and create a list of all records still withheld under the privilege. The Department subsequently produced 10,104 new records that had previously been withheld, along with several lists of records it deemed privileged in whole or in part[35] (which the Committee claimed omitted a body of material). The final list itemized 5,342 records that were withheld under DPP, along with several thousand that were withheld as law enforcement sensitive, private, or on other grounds.[36]

The Committee then moved to compel the production of all records in the case, on the grounds that 1) none were deliberative and 2) even if they were, they Committee's need for the records outweighed the privilege. As the Committee's Motion to Compel sought the same relief as the lawsuit itself (the production of documents responsive to the October 2011 subpoena), the court's January 19, 2016 decision was the court's final ruling in the case.

The Court found that DPP could in fact be invoked in defense against a congressional subpoena, and that it could be invoked to shield records of an agency's internal deliberations over how to respond to congressional and media inquiries.[37] The opinion did not entertain the claim that DPP should not apply against a congressional subpoena, and rested largely on cases brought by private parties under FOIA.[38] Citing the FOIA case law, the Court wrote, "internal deliberations about public relations efforts are not simply routine operational decisions: they are deliberations about policy, even if they involve massaging the agency's public image."[39] On the basis of these cases, the Court held that "documents . . . that reveal the Department's internal deliberations about how to respond to press and Congressional inquiries . . . are protected by the deliberative process privilege."[40]

Having determined that DPP applies to the records in question, the court then turned to the next step of the analysis: the case-by-case, ad hoc balancing of the public interests in question and the need of the party seeking the privileged records. This step requires the court to:

> [B]alance the competing interests on a flexible, case by case, ad hoc basis, considering such factors as the relevance of the evidence, the availability of other evidence, the seriousness of the litigation or investigation, the harm that could flow from disclosure, the possibility of future timidity by government employees, and whether there is reason to believe that the documents would shed light on government misconduct, all through the lens of what would advance the public's—as well as the parties'—interests.[41]

Noting "the principles that caution against judicial intervention in a dispute between the two other branches," the court seemed hesitant to enter the fray between the Committee and the Department.[42] Referring back to *Espy*, the court explained:

> One factor the *Espy* opinion directs the balancing judge to consider is whether the government is a party to the litigation, and in this case, the "government" is on both sides of the dispute. Under those circumstances, the necessary "ad hoc" balancing could give rise to the very concerns that prompted the Attorney General to argue that the case should be dismissed on prudential grounds . . . .[43]

The court noted that the Department had, in the course of the dispute, 1) acknowledged both the seriousness and legitimacy of the investigation and 2) already suffered public disclosure of related, sensitive information through an Inspector General's

33 The suit was filed by the Committee and the full U.S. House of Representatives through the Office of General Counsel. For ease of reference, the plaintiff is referred to as "the Committee."

34 Committee on Oversight and Government Reform v. Eric H. Holder, No. 12-1332, Mem. Op. on Mot. To Dismiss, at 17-18 (Sept. 30, 2013) (internal citations and quotation marks omitted).

35 *Lynch*, *supra* note 2 at 10.

36 *Id.*

37 *Id.* at 17.

38 Mapother v. Dep't of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993); Mead Data Cent., Inc. v. U.S. Dep't of the Air Force, 575 F.2d 932, 935 (D.C. Cir. 1978); ICM Registry, LLC v. Dep't of Commerce, 538 F.Supp.2d 130 (D.D.C. 2008); Judicial Watch v. Dep't of Homeland Sec., 736 F.Supp.2d 202, 208 (D.D.C. 2010); Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Labor, 478 F.Supp.2d 77, 83 (D.D.C. 2007).

39 *Lynch*, *supra* note 2 at 16 (quoting ICM Registry, LLC v. Dep't of Commerce, 538 F.Supp.2d 130 (D.D.C. 2008)).

40 *Id.* at 17.

41 *Id.* at 18.

42 *Id.*

43 *Id.*

report.[44] Under these "specific and unique circumstances," the court found that "the qualified privilege invoked to shield material that the Department has already disclosed has been outweighed by a legitimate need that the Department does not dispute, and therefore, the records must be produced."[45] The Committee filed a notice of appeal on April 8, 2016 in an effort to seek Department documents that are being withheld for other reasons.

V. The Deliberative Process Privilege Now: Remaining Questions and Problems for Future Congressional Investigations

Media reports have portrayed the ruling as a win for Congress and a loss for the Executive Branch, with headlines claiming "Federal Judge Rules against Obama on Executive Privilege for 'Fast and Furious,'"[46] and "Judge rejects Obama's executive privilege claim over Fast and Furious records."[47] While it is true that the Department lost its battle to keep 5,342 documents from the Committee nearly five years after they were first requested, that outcome rested on a narrow decision and a unique fact pattern unlikely to be repeated. Beyond that fact pattern, the court's reasoning hints at an expansion of executive privilege in what could be a long-term win for the Executive Branch.

The Department won in establishing that the privilege—articulated in *Espy* as protecting the decisionmaking and policy process—can be used to shield deliberations on responding to Congress and the media. The application of the privilege to shield these deliberations is especially problematic for Congress because it raises the question of what Executive Branch records—short of public documents—could not also be subject to a claim of DPP.

The decision works against Congress is other ways as well. The Court noted that one of the "specific and unique circumstances" leading to the order that the Department turn over documents was that it has acknowledged the "seriousness and legitimacy" of the Committee's investigation. Should the Executive Branch view such acknowledgements as a factor that will weigh against it if the dispute gets to the federal courts, it may be more likely to challenge the basis of congressional investigations from the outset. This, in turn, may work against the good faith back-and-forth negotiation through which most disputes between the legislative and executive branches are resolved.

The court's decision also set aside the Committee's allegations of Department wrongdoing, specifically noting that the ruling was "not predicated on a finding that the withholding was intended to cloak wrongdoing on the part of government officials or that the withholding itself was improper."[48] This swept aside the rule as stated in *Espy*, that DPP "disappears altogether when there is any reason to believe government misconduct occurred."[49] Though the definition of "government misconduct" remains unclear, the Committee's claims against the Department are substantially centered on whether the Department intentionally misled Congress in its February 2011 letter to Senator Grassley. During the course of the investigation, the Committee alleges the Department engaged in misrepresentations, stonewalling, and other misconduct.[50] Whether this activity is sufficient to preclude DPP under *Espy* is uncertain, but the court explicitly did not consider the question, which could signal to the Executive Branch that the activity is acceptable within what is otherwise considered good faith negotiation.

Regardless of one's reading of the proper balance of power between Congress and the President in the course of congressional investigations, it is likely that federal courts will have more opportunities to consider these questions in the future. In recent months, there appear to have been a marked increase in DPP claims across agencies and to a wide range of congressional committees conducting active investigations. With continued difficulties in the relationship between congressional committee chairs and the President, we may be entering an era in which fewer disputes are resolved through good faith negotiation and the federal judiciary becomes the primary venue for settling these disputes. If *OGR v. Lynch* is indicative of the jurisprudence to come, that may not bode well for Congress.

44 *Id.* at 19-21.

45 *Id.* at 22.

46 Aaron Kliegman, Wash. Free Beacon (Jan. 19, 2016).

47 Josh Gerstein, Politico.com (Jan. 19, 2016).

48 *Lynch*, *supra* note 2 at 22.

49 *Espy*, 121 F.3d at 746.

50 Committee on Oversight & Government Reform, Flash Memorandum to Republican Members (April 14, 2016).

The Fraudulent Joinder Prevention Act of 2016: A New Standard and a New Rationale for an Old Doctrine

By Arthur D. Hellman

Note from the Editor:

This article discusses the doctrine of fraudulent joinder and an ongoing attempt to codify it at the federal level in the Fraudulent Joinder Prevention Act of 2016, which recently passed the House.

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• H.R. Rep. No. 114-422 (House Report on H.R. 3624), *available at* https://www.gpo.gov/fdsys/pkg/CRPT-114hrpt422/pdf/CRPT-114hrpt422.pdf (Dissenting Views at page 18).

• Prepared Statement of Lonny Hoffman, *Hearing on H.R. 3624, the Fraudulent Joinder Prevention Act of 2015: Hearing Before the Subcomm. on the Constitution and Civil Justice of the House Comm. on the Judiciary*, 114th Cong. (Sept. 29, 2015), *available at* https://judiciary.house.gov/wp-content/uploads/2016/02/Hoffman-09292015.pdf.

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It is not often that members of the United States House of Representatives engage in passionate debate over a doctrine of federal-court jurisdiction, but that is what happened on February 25, 2016. The House was considering H.R. 3624, the "Fraudulent Joinder Prevention Act of 2016" (FJPA). The purpose of the bill, as its sponsor explained, was to establish "a uniform standard for determining whether a [local] defendant has been fraudulently joined to a lawsuit, in order to defeat federal diversity jurisdiction."[1] Supporters argued that the legislation would "reduce litigation abuse and forum shopping and … protect innocent parties from costly, extended, and unnecessary litigation."[2] Opponents countered that the measure would "drain judicial resources" and "delay justice for plaintiffs seeking to hold corporations accountable for harming consumers or injuring workers."[3] After an hour of debate, the House passed the bill by a vote of 229 to 189.

The vote on the House floor came less than five months after H.R. 3624 was introduced. Few bills in Congress move that far that fast. But speedy passage through the House is not the only noteworthy aspect of the FJPA. When Congress codifies a judge-made doctrine, the legislation generally moves the law in one direction or another. The FJPA is no exception; it seeks to establish "a somewhat more robust version of the fraudulent joinder doctrine" than the one generally applied by the courts today.[4] But that is not all. The proponents of the FJPA have taken a substantial step toward reconceptualizing fraudulent joinder: they rely in large part on a rationale that cannot be found in the court decisions announcing and applying the doctrine. This new rationale focuses, not on the interest of the *out-of-state* defendant in securing a neutral federal forum for litigation, but on the interest of *in-state* parties in avoiding litigation altogether when frivolous or insubstantial claims are asserted against them by a plaintiff as a stratagem for keeping the case in state court.[5]

H.R. 3624, supported by this enlarged policy perspective, now awaits action by the Senate. Should the Senate act favorably on the bill? The answer to that question depends on whom you ask. Supporters argue that the bill corrects an imbalance in current doctrine that allows plaintiffs to game the system, defeat the legitimate removal rights of out-of-state defendants, and drag local

1 Markup of H.R. 3624 at 51 (Feb. 3, 2016) (unofficial transcript), http://judiciary.house.gov/_cache/files/e4fc993b-e006-40a6-a5dd-9d2864c334b9/02.03.16-markup-transcript.pdf [hereinafter Markup Transcript] (remarks of Rep. Buck).

2 162 Cong. Rec. H908 (daily ed. Feb. 25, 2016) (remarks of Rep. Goodlatte).

3 *Id.* at H910 (remarks of Rep. Nadler).

4 H.R. Rep. No. 114-422 at 5 [hereinafter House Report].

5 In this article, I will use the terms "in-state," "resident," and "local" interchangeably when referring to defendants who reside in the state where the suit was filed. That is what the courts do also, even when plaintiffs invoke a rule that limits joinder of defendants based on their shared citizenship with the plaintiff. *See infra* note 71.

individuals or small businesses into lawsuits notwithstanding their "tangential or peripheral role"[6] in the controversy. Opponents insist that the bill is "a solution in search of a problem,"[7] that it seeks "to tilt the civil justice playing field in favor of corporate defendants,"[8] and that it will "create problems by upending longstanding rules and potentially wreak havoc on the Federal courts."[9]

This article provides an initial look at the FJPA. Part I sketches the background. Part II traces the evolution of the bill, and Part III describes its provisions. Parts IV through VI discuss the principal points of contention between the bill's supporters and its opponents. The article concludes by suggesting that the debate over the FJPA reflects a deeper disagreement over the role of removal based on diversity of citizenship in the American legal system.

I. Background: Diversity Jurisdiction and Fraudulent Joinder

The doctrine of fraudulent joinder emerged from the intersection of jurisdictional rules and litigation strategy. The jurisdictional rules are those governing removal based on diversity of citizenship. The strategy is most commonly seen today in products liability suits and other personal injury or wrongful death cases.

Diversity of citizenship jurisdiction was included in the Constitution "in order to prevent apprehended discrimination in state courts against those not citizens of the State."[10] Starting with the Judiciary Act of 1789, Congress has implemented that grant through statutory authorization. In particular, from the beginning of the nation's history, an out-of-state defendant sued in state court by a citizen of the forum state has had the right to remove the case to federal court, provided that the case satisfies an amount-in-controversy requirement.[11]

Three sections of the Judicial Code—Title 28 of the U.S. Code—and a two-centuries-old precedent provide the current framework for removal based on diversity of citizenship. Section 1441(a) allows removal of "any civil action brought in a State court of which the district courts . . . have original jurisdiction." Section 1332(a) confers original jurisdiction over suits between "citizens of different states" when the amount in controversy exceeds $75,000. But jurisdiction under § 1332(a) is governed by the rule of "complete diversity." Under that rule, which traces back to Chief Justice John Marshall's 1806 decision in *Strawbridge v. Curtiss*,[12] a suit is "between . . . citizens of different states," and thus within federal jurisdiction under § 1332(a), only when no plaintiff is a citizen of the same state as *any* defendant. Finally, superimposed on the requirements for diversity jurisdiction generally is a separate statutory provision applicable only to removal. This provision is referred to as the "forum defendant rule." It is codified in § 1441(b)(2), and it prohibits removal based solely on § 1332(a) "if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought."

Today, removal is a major battleground in civil litigation. The reason is that across the spectrum of civil suits, plaintiffs often prefer to litigate in state court; defendants typically prefer federal court.[13] The complete-diversity requirement and the forum defendant rule create numerous opportunities for plaintiffs to secure their preferred forum. For example, in an insurance dispute, the in-state policyholder sues the out-of-state insurance company that issued the policy, and joins the local agent or claims adjuster as a co-defendant. In a products liability action, the plaintiff sues the out-of-state pharmaceutical manufacturer and also the local doctor who prescribed the drug or the local pharmacist who filled the prescription.

Ordinarily, the joinder of a co-citizen of the plaintiff as defendant would destroy complete diversity and prevent removal. If the out-of-state defendant removes nevertheless, the federal court would be required to grant the plaintiff's motion to remand the case back to the state court. But in the first part of the 20th century, the Supreme Court recognized that plaintiffs might abuse the complete-diversity requirement in order to defeat out-of-state defendants' right to removal. To limit that abuse, the Court developed the doctrine of fraudulent joinder.[14] Under that doctrine, federal courts can disregard the citizenship of non-diverse defendants—and decline to remand cases against diverse defendants to state court—when those defendants have been "fraudulently" joined.

As many courts and commentators have noted, "fraudulent" is a term of art; the plaintiff's motives are irrelevant. But determining what *does* make joinder fraudulent can often be difficult. The Supreme Court has not addressed the issue in many decades, and lower courts have diverged both in their articulation of the governing law and in setting forth procedures for making the determination.

One feature, however, is common to all circuits' law: the standard for identifying fraudulent joinder is very demanding. Typically, courts take the position that joinder is not fraudulent unless the plaintiff has "no possibility" of imposing liability on the in-state defendant.[15] Some courts go so far as to say that the

6 House Report, *supra* note 4, at 3.

7 *Id.* at 19 (Dissenting Views).

8 *Id.* at 18.

9 *Id.* at 22–23.

10 Erie R. Co. v. Tompkins, 304 U.S. 64, 74 (1938).

11 In the Judiciary Act of 1789, the right of removal was limited to cases in which the plaintiff was a citizen of the forum state. Today the right extends to all cases in which all plaintiffs are diverse from all defendants, provided that the amount-in-controversy requirement is satisfied and no defendant properly joined and served is a citizen of the forum state.

12 7 U.S. (3 Cranch) 267 (1806).

13 *See* Arthur D. Hellman, *Another Voice for the Dialogue: Federal Courts as a Litigation Course*, 53 St. Louis U. L.J. 761, 765–68 (2009); *see also* Barlow v. Colgate Palmolive Co., 772 F.3d 1001, 1015–16 (4th Cir. 2014) (en banc) (Davis, J., dissenting) (citing differences in discovery practice, availability of summary judgment, and jury pool composition as reasons for the preferences).

14 *See* Wecker v. National Enameling & Stamping Co., 204 U.S. 176, 186 (1907) (because "the real purpose in joining [the resident defendant] was to prevent the exercise of the right of removal by the nonresident defendant," the lower court was correct in refusing to remand the case).

15 Stillwell v. Allstate Ins. Co., 663 F.3d 1329, 1332 (11th Cir. 2011).

removing party "must prove that there is *absolutely* no possibility that the plaintiff will be able to establish a cause of action against the in-state defendant in state court."[16] In the Fourth Circuit, remand is required if the court finds even a "glimmer of hope" for the plaintiff's claims.[17]

It is true that some decisions use language that appears to embody a less demanding standard—for example, asking whether there is a "reasonable basis" for the claim. But often those same opinions will also contain language that closely resembles the "no possibility" test.[18]

Plaintiffs and defendants alike recognize the importance of the doctrine to litigation strategy. A plaintiff-oriented practice guide explains: "Myriad attempts have been made by creative counsel to state a tenable claim against non-diverse defendants in order to defeat diversity jurisdiction without running afoul of the fraudulent joinder rule. As would be expected, some have been successful and some not."[19] A defense-oriented guide warns:

> [Fighting] fraudulent joinder requires reasonable preparation and, as a consequence, can substantially raise litigation costs. [The efforts] will probably fail under the "no possibility" standard. Apparently erroneous decisions by the district court, moreover, are final because remand orders are generally not reviewable by appeal or writ of mandamus. Even worse, there is a possibility that the corporate client will have to pay opposing counsel's attorneys' fees under 28 U.S.C. § 1447(c) in the event that the district court determines that the removal was improvident.[20]

This quotation calls attention to another important element of removal practice: if the district court erroneously remands a case on the ground that the plaintiff's claim against the co-citizen has *some* chance of success, the error cannot be corrected by the court of appeals because 28 U.S.C. § 1447(d) prohibits review of remand orders.[21] To make matters worse (from the perspective of the removing defendant), many district judges follow a mantra to the effect that there is a "presumption against removal jurisdiction" and "any doubt about the right of removal requires resolution in favor of remand."[22]

Against this background, Congressman Ken Buck (R. Colo.) introduced H.R. 3624, the Fraudulent Joinder Prevention Act of 2015.

II. Evolution of the Bill

In its original form, the FJPA addressed the problem of fraudulent joinder by adding two sentences to § 1447(c) of the Judicial Code. The first sentence specified the kinds of materials that may be presented by the parties in a motion for remand and "any opposition thereto." The second sentence delineated two criteria for denying a motion to remand. Attention focused on the first criterion: "the complaint does not state *a plausible claim for relief* against a nondiverse defendant under applicable state law."

The Subcommittee on the Constitution and Civil Justice of the House Judiciary Committee held a hearing on the bill on September 29, 2015, the day after the bill was introduced.[23] Three witnesses testified.[24] Strong support for the legislation came from Elizabeth Milito, representing the National Federation of Independent Business, and Cary Silverman, speaking on behalf of the U.S. Chamber of Commerce Institute for Legal Reform. Professor Lonny Hoffman of the University of Houston Law Center spoke against the bill. I submitted a statement that supported the general thrust of the bill, but expressed several concerns about the bill's drafting and suggested a number of technical changes.

It was at this hearing that the new focus on the interest of the potential in-state defendant first emerged. The idea was stated briefly at the very end of the opening statement of Rep. Trent Franks (R. Ariz.), the chairman of the subcommittee, but it emerged full-blown only when the chairman of the full Committee, Rep. Bob Goodlatte (R. Va.), made his opening statement. The FJPA, Rep. Goodlatte said, will "help address a litigation abuse that regularly drags small businesses into court to answer for claims to which they have no real connection."[25] The remainder of his statement enlarged on that point. The first witness, Elizabeth Milito, elaborated further; she emphasized the "substantial financial costs" and the "heavy emotional toll" experienced by small business owners who find themselves being used as "diversity-destroying pawn[s]."[26]

16 Sanchez v. Lane Bryant, Inc., 2015 WL 4943579 at *2 (C.D. Cal. Aug. 17, 2015) (internal quotations omitted) (emphasis added); *see also, e.g.*, National Pump & Compressor, Ltd. v. Nichols, 2013 WL 1501861 at *6 (E.D. Tex. Apr. 10, 2013); Loid v. Computer Sciences Corp., 2013 WL 808696 at *2 (E.D. Wash. Mar. 5, 2013).

17 Hartley v. CSX Transp., Inc., 187 F.3d 422, 426 (4th Cir. 1999).

18 For example, in the leading case of *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806 (8th Cir. 2003), the opinion says at one point that to determine whether joinder is fraudulent, "the court must simply determine whether there is a *reasonable basis* for predicting that the state's law might impose liability against the defendant." *Id.* at 811 (emphasis added). That sounds at least somewhat less demanding than a "no possibility" test. But the opinion also says that joinder is *not* fraudulent "if the state law *might* impose liability on the resident defendant under the facts alleged." *Id.* at 810 (emphasis in original). That is very close to a "no possibility" test.

19 David S. Casey, Jr. & Jeremy Robinson, Litigating Tort Cases § 7.7 (updated Aug. 2014).

20 Jay S. Blumenkopf et al., *Fighting Fraudulent Joinder: Proving the Impossible and Preserving Your Corporate Client's Right to a Federal Forum*, 24 Am. J. Trial Advoc. 297, 310 (2000).

21 There are some court-made exceptions to the prohibition on appellate review, but the orders described in the text fall squarely within the prohibition's heartland.

22 *See, e.g.*, Dulcich Inc. v. Mayer Brown LLP, 954 F. Supp. 2d 1129, 1135-36 (D. Or. 2013); *see generally* Scott R. Haiber, *Removing the Bias Against Removal*, 53 Cath. U. L. Rev. 609 (2004); Aaron-Andrew P. Bruhl, *Jurisdictional Canons*, 70 Vand. L Rev. ___ (forthcoming 2016).

23 *H.R. 3624, the Fraudulent Joinder Prevention Act of 2015: Hearing Before the Subcomm. on the Constitution and Civil Justice of the House Comm. on the Judiciary,* 114th Cong. (2015), *available at* http://judiciary.house.gov/_cache/files/46c87093-52db-4b6e-a9b3-9b2b67e6611f/114-44-96273.pdf [hereinafter *House Hearing*].

24 The text of the bill was made available to the witnesses as they prepared their statements.

25 *House Hearing*, *supra* note 23, at 7 (statement of Rep. Goodlatte).

26 *Id.* at 14 (statement of Elizabeth Milito).

On February 1, 2016, an Amendment in the Nature of a Substitute (Substitute) was posted on the Judiciary Committee website. The Substitute largely retained the substance of the bill as introduced, but the structure was different, and several new provisions had been added. Two days later, at a markup session, the Committee voted to approve the Substitute and to report the bill as amended. The vote was 13-10, with Republicans voting "Yea" and Democrats voting "Nay." The Committee issued its Report on February 16, 2016. The Report included "Dissenting Views" signed by 12 Democratic members of the Committee. One week later, the House Rules Committee met and approved a structured rule for consideration of H.R. 3624 on the House floor. Two amendments were allowed, one a technical Manager's Amendment and one a hostile Democratic amendment.

The bill was considered on the House floor on February 25, 2016. The chairman of the House Judiciary Committee and Rep. Buck spoke in support of the legislation. Democratic members of the Committee spoke against it, generally reprising the arguments in the Dissenting Views in the Committee Report. The Manager's Amendment was agreed to on a voice vote; the Democratic amendment was rejected. The bill as amended was then approved; as already noted, the vote was 229 to 189. Ten Republicans joined all participating Democrats in voting against it.

III. Codifying Fraudulent Joinder: The Content of the Act

The FJPA as approved by the House deals with the problem of fraudulent joinder by adding a new subsection (f) to 28 U.S.C. § 1447, the section of the Judicial Code that deals with procedure after removal. The new subsection has four paragraphs. Paragraph (1) defines the class of cases to which the bill applies. Paragraph (2) specifies four situations in which courts should find joinder to be fraudulent. The remaining paragraphs deal with procedure.[27]

A. Defining the Class of Cases to Which the Bill Applies

Paragraph (1) specifies the three criteria that, in combination, define the class of cases in which courts would apply the standard set forth in paragraph (2) for determining whether joinder is fraudulent. These criteria relate to the basis for original jurisdiction, the ground of the motion to remand, and the ground for opposing the motion. Essentially, they limit application of the new subsection to cases in which removal is based on § 1332(a) and the issue is fraudulent joinder.

One provision of paragraph (1) proved to be surprisingly controversial. The bill as introduced addressed fraudulent joinder only in the context of the complete-diversity rule. But, as already noted, fraudulent joinder is also used to exploit the forum defendant rule of 28 U.S.C. § 1441(b)(2). And the doctrine has generally been applied in the same way.[28] The Substitute therefore added language bringing both kinds of remand motions within the ambit of the Act.

When the Committee Report appeared, the Dissenting Views asserted that the bill "effectively repeals" the forum defendant rule.[29] It is hard to understand the thinking behind this accusation. The forum defendant rule remains as it was. The court may disregard the in-state defendant if, and only if, that defendant has been fraudulently joined as defined in paragraph (2) of the new provision.

B. Defining Fraudulent Joinder

Paragraph (2) sets forth four criteria that define fraudulent joinder. To a large extent, these four prongs codify current law. There is one major exception: prong (B) adopts a uniform "plausibility" standard in place of tests like "no possibility." Paragraph (2) also makes clear that affirmative defenses can be considered as a basis for finding fraudulent joinder, and it abrogates the "common defense" doctrine recognized by some courts.

1. Actual fraud and lack of "good faith intention"

Two of the four prongs—(A) and (D)—do little more than codify seldom-invoked aspects of existing law. Under prong (A), joinder is fraudulent if "there is actual fraud in the pleading of jurisdictional facts." This language is taken verbatim from the Fifth Circuit's landmark en banc decision in *Smallwood v. Illinois Central R.R. Co*.[30] Many cases repeat the language, but very few actually consider this basis for finding fraudulent joinder. The House Report cites one of the few, a 2013 decision by a district court in Texas.[31] The case gives as an example of actual fraud a knowingly false representation about a party's citizenship.

Under prong (D), joinder of a non-diverse or in-state defendant is fraudulent if "objective evidence clearly demonstrates that there is no good faith intention to prosecute the action against that defendant or to seek a joint judgment against that defendant." This language is taken, with slight modification, from an often-cited decision of the Third Circuit.[32] Again, the language is frequently repeated, but the criterion itself is rarely invoked. The House Report cites two district court cases to illustrate how the lack of good faith intention can be shown by objective evidence.[33]

2. Plausibility instead of possibility

Prong (B) will be widely regarded as the central provision of H.R. 3624. It provides that joinder of a non-diverse or in-state defendant is fraudulent if, "based on the complaint and [other materials submitted by the parties], it is *not plausible* to conclude that applicable state law would impose liability on that defendant." (Emphasis added.)

27 *See* House Report, *supra* note 4, at 9–16, for a detailed section-by-section explanation of the bill's provisions. This article provides only a brief summary, with emphasis on the changes the bill would make to existing law.

28 *See id.* at 10 (citing cases); *see also House Hearing*, *supra* note 23, at 68–69 (statement of Arthur D. Hellman).

29 House Report, *supra* note 4, at 18 (Dissenting Views); *see also id.* at 27.

30 385 F.3d 568, 573 (5th Cir. 2004) (en banc).

31 Coffman v. Dole Fresh Fruit Co., 927 F. Supp. 2d 427, 434-35 (E.D. Tex. 2013).

32 *In re* Briscoe, 448 F.3d 201, 216 (3d Cir. 2006) (quotation marks omitted).

33 House Report, *supra* note 4, at 15, citing Faulk v. Husqvarna Consumer Outdoor Products N.A., Inc., 849 F. Supp. 2d 1327, 1331 (M.D. Ala. 2012); and *In re* Diet Drugs Prods. Liab. Litig., 220 F. Supp. 2d 414, 420-22 (E.D. Pa. 2002).

Prong (B) thus replaces standards like "no possibility of recovery" with a uniform standard of "plausibility" drawn from the Supreme Court's *Twombly* and *Iqbal* decisions that redefined the federal pleading standard under Rule 8 of the Federal Rules of Civil Procedure.[34] Those decisions make clear that "plausibility" requires more than "possibility," but it is not tantamount to a requirement of "probability."[35] Rather, a claim lacks plausibility when "there is *no reasonable likelihood* that the plaintiffs can construct a claim from the events related in the complaint."[36] Under paragraph (2)(B), the removing defendant bears the burden of showing that the claims against the non-diverse or in-state defendants lack plausibility in the sense set forth in *Twombly* and *Iqbal*.

3. Affirmative defenses

Prong (C) states that joinder of a non-diverse or in-state defendant is fraudulent if "State or Federal law clearly bars all claims in the complaint against that defendant." The purpose of this provision is to establish that a plainly meritorious affirmative defense, whether under state or federal law, can be the basis for finding fraudulent joinder. Some courts already take that position. For example, in the same Third Circuit case cited earlier, the court stated: "Courts have . . . recognized that a statute of limitations defense is properly considered in connection with a fraudulent joinder inquiry."[37] Just last year, the Fourth Circuit held that a non-diverse defendant was fraudulently joined because "the Communications Act clearly preempts the [plaintiffs'] state-law tort claim against [that defendant] as a matter of law."[38]

Other courts, however, have held that affirmative defenses cannot be considered as a basis for finding fraudulent joinder. There seems to be a particular resistance to considering *federal* defenses, notably the defense of preemption. This resistance is grounded in part on the assumption that the "well-pleaded complaint" rule applies in the context of fraudulent joinder.[39] Under that rule, "a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption."[40] But as the Supreme Court has made clear, the well-pleaded complaint rule governs whether a federal court has *federal-question jurisdiction* under 28 U.S.C. § 1331.[41] It "applies only to statutory 'arising under' cases."[42] It does not apply to diversity jurisdiction, and it is thus irrelevant to fraudulent joinder.

Nor is there any policy reason for excluding defenses—state or federal, affirmative or otherwise—from consideration as a basis for fraudulent joinder. The purpose of the fraudulent joinder doctrine is to prevent a plaintiff from nullifying an out-of-state defendant's removal rights by "fraudulently" joining an in-state or co-citizen party as defendant. From that perspective, it does not matter whether the joinder is fraudulent because the *claim* against the local defendant is insubstantial under the governing state law or because the claim is barred by an affirmative *defense* under state or federal law.

4. Abrogation of the "common defense" doctrine

As the House Report points out, prongs (B) and (C), taken together, abrogate the "common defense" doctrine, a limitation on fraudulent joinder recognized by some courts. Under the "common defense" rule, "no matter how clear it is that the plaintiff's claim against the in-state defendant is barred, the case must be remanded to the state court if the same defense also bars the claim against the out-of-state defendant."[43]

The principal authority for the "common defense" rule is the closely divided (9-7) en banc decision of the Fifth Circuit in *Smallwood v. Illinois Central R. Co*.[44] Full discussion is beyond the scope of this article, but three points should be noted. First, the majority opinion in *Smallwood* relies heavily on an old and opaque Supreme Court decision.[45] Of course, that decision is not binding on Congress. Second, the opinion says that when there is a common defense, "there is no [fraudulent] joinder; there is only a lawsuit lacking in merit."[46] The court never explains why the two are mutually exclusive. And they are not. Finally, the doctrine creates practical problems for both sides. As one district court observed, the *Smallwood* rule "puts all of the parties in the unenviable position of arguing contrary to their interests while running the risk of making judicial admissions that could haunt them later."[47]

Under H.R. 3624, a court should examine only the case against the in-state or non-diverse defendants. If the claims against those defendants are "fraudulent" as defined by the statute, that is the end of the matter, and the case should stay in federal court. The possibility that the same arguments might bar the claims against the removing defendant should play no role at the jurisdictional stage.

C. Procedures for the Fraudulent Joinder Inquiry

In broad outline, the process for resolving disputes about fraudulent joinder is well established. After the plaintiff sues in state court, the out-of-state defendant removes the case to federal district court based on diversity jurisdiction even though the plaintiff has joined one or more co-citizens or forum residents as co-defendants. The plaintiff moves to remand, asserting that the

34 *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

35 *Iqbal*, 556 U.S. at 678.

36 *Twombly*, 550 U.S. at 558, quoting Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (7th Cir. 1984) (emphasis added).

37 *In re* Briscoe, 448 F.3d 201, 219 (3d Cir. 2006).

38 Johnson v. American Towers, LLC, 781 F.3d 693, 705–06 (4th Cir. 2015).

39 *See, e.g.*, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 905 F. Supp. 2d 644, 646–47 (E.D. Pa. 2012).

40 Caterpillar, Inc. v. Williams, 482 U.S. 386, 393 (1987) (emphasis removed).

41 *Id.* at 392.

42 American National Red Cross v. S.G., 505 U.S. 247, 258 (1992).

43 House Report, *supra* note 4, at 14.

44 385 F.3d at 574–76.

45 *See* Chesapeake & O. R. Co. v. Cockrell, 232 U.S. 146 (1914).

46 *Smallwood*, 385 F.3d at 574.

47 Frisby v. Lumberman's Mut. Cas. Co., 500 F. Supp. 2d 697, 700 (S.D. Tex. 2007).

joinder of those defendants—the "spoilers"—destroys complete diversity or violates the forum defendant rule of 28 U.S.C. § 1441(b)(2). The defendant opposes the motion on the ground that the joinder is fraudulent. The district court determines whether this opposition is well-taken. If it is, and the joinder is fraudulent, the district court denies the motion to remand, and the case proceeds in federal court.

The FJPA retains this process and specifies a few details, largely ratifying what the courts have been doing. Paragraph (3) states that, in determining whether joinder is fraudulent, the court should not restrict itself to the pleadings but should consider affidavits and materials submitted by the parties. This codifies the practice that courts have generally been following, as illustrated by an Eleventh Circuit decision cited in the House Report.[48] But a few courts have taken the position that they may not consider materials such as affidavits.[49] H.R. 3624 rejects the notion that a court should be "held captive by the allegations in the complaint."[50]

Paragraph (3) also states that the court may allow amendments to pleadings. This provision is new. As the House Report explains, it is designed to address the concern "that the plaintiff, having filed a complaint in state court under state procedural rules, may not have anticipated application of a . . . federal standard."

Paragraph (4) instructs the court to dismiss the fraudulently joined defendants *without* prejudice. This accords with the view of all but one of the courts of appeals that have addressed the issue. The one outlier is the Seventh Circuit, which issued its ruling in a single sentence without explanation.[51] H.R. 3624 abrogates that decision.

IV. The FJPA and Current Law

Apart from policy arguments, supporters and opponents of the FJPA disagree about the relationship between H.R. 3624 and current law. There are two points of contention. First, is the fraudulent joinder doctrine today "well-settled" or is it rife with uncertainty and inconsistency? Second, how much of a change in the law would be effected by the FJPA?

A. Conflict or Consensus?

Subcommittee Chairman Franks opened the hearing on H.R. 3624 by asserting that "the lack of guidance from the Supreme Court and Congress has led to poorly defined standards and inconsistent interpretations and application of the fraudulent joinder doctrine in the lower Federal courts."[52] Later in the hearing, however, Professor Lonny Hoffman countered that the law of fraudulent joinder is "well-settled" and that the "minor variances" in language in court decisions reflect only "semantic differences."[53] The debate on this point continued in the Committee Report on the bill and thereafter on the House floor. Who has the better of the argument?

I think Prof. Hoffman is correct to say that some of the differences in the formulation of the standard are semantic rather than substantive. But it is also true that commentators have repeatedly pointed to conflicts and inconsistency in lower court decisions.[54] Moreover, even semantic differences can be a source of uncertainty and can generate litigation, in part because lawyers cannot be confident that the differences are indeed semantic.

The Dissenting Views in the House Report attempted to turn Rep. Franks' point about the lack of guidance from the Supreme Court into an argument against the bill. Said the dissenters: "Current law already establishes a standard for courts to determine when a party has been improperly joined, a standard that has been in place for a century. *Tellingly, the Supreme Court has not seen fit to change this standard* . . . ."[55] The implication is that the Supreme Court has consciously decided not to change the law currently applied by the lower federal courts.

There is no basis whatever for inferring that the Supreme Court has made any kind of decision about fraudulent joinder, much less that it endorses what courts do today. The Supreme Court can address issues only if they are presented in certiorari petitions, and there are many obstacles to the Court's ever receiving a petition raising a fraudulent joinder issue. As already noted, if the district court remands a case under current law, appellate review is forbidden by 28 U.S.C. § 1447(d), so the case will never even get to the court of appeals. If the district court denies the motion to remand, appellate review is theoretically possible, but only after final judgment. And "after final judgment in a removed case that is not remanded, only the most disappointed and dogged of parties would have sufficient incentive to pursue this threshold issue."[56]

The upshot is that if there is disarray in the law of fraudulent joinder, it can be remedied only through legislation. And supporters of H.R. 3624 do emphasize the importance of uniformity. But it would be naïve to think that Members of Congress would devote considerable time and effort simply to bring greater coherence to a small corner of jurisdictional doctrine. The purpose of the legislation is to change the law. But to what degree, and is the change justified?

B. A "Narrowly Targeted" Response, or a Bill Making "Radical Changes"?

The House Report on H.R. 3624 characterizes the bill as "a narrowly targeted legislative response to a very real problem created by current law."[57] Opponents argue that the legislation

48 *See* Legg v. Wyeth, 428 F.3d 1317, 1320–23 (11th Cir. 2005).

49 *See, e.g.*, Greenberg v. Macy's, 2011 WL 4336674 at *5 (E.D. Pa. Sept. 15, 2011).

50 House Report, *supra* note 4, at 16, quoting Mills v. Allegiance Healthcare Corp., 178 F. Supp. 2d 1, 5–6 (D. Mass. 2001).

51 Walton v. Bayer Corp., 643 F.3d 994, 1000–01 (7th Cir. 2011).

52 *House Hearing*, *supra* note 23, at 2 (statement of Rep. Franks).

53 *Id.* at 23-24 (statement of Lonny Hoffman)

54 *See* House Report, *supra* note 4, at 3 (quoting law review articles published in 1991, 2005, and 2009).

55 *Id.* at 19 (Dissenting Views) (emphasis added).

56 Gentile v. Biogen Idec, Inc., 934 F. Supp. 2d 313, 326 n.3 (D. Mass. 2013). This assessment may be somewhat overstated, but it is nevertheless true that appellate decisions on fraudulent joinder are uncommon.

57 House Report, *supra* note 4, at 5.

makes "radical changes to long-standing jurisdictional practice" and "would . . . potentially wreak havoc on the Federal courts."[58]

The opponents' characterization is based in part on untenable assumptions about of two of the four criteria used to define fraudulent joinder in the bill. The Dissenting Views in the House Report describe the "actual fraud" and "good faith intention" prongs as "significant" or "major" departures from current law.[59] But as shown in Part III, they are anything but that; both formulations are taken directly from often-cited court of appeals decisions. And the Dissenting Views barely mention prong (C), which deals with affirmative defenses.

So if H.R. 3624 effects a "radical change," it must be through prong (B) and the "plausibility" standard. Certainly prong (B) effects a change. If Congress wanted to codify current law, prong (B) would provide that joinder is fraudulent if "it is not *possible* to conclude that applicable State law would impose liability on [the spoiler] defendant."[60] Instead, it provides that joinder is fraudulent if that conclusion is not *plausible*.

To understand what this change would mean, we can look at the cases from which the plausibility standard is drawn—*Bell Atlantic Corp. v. Twombly*[61] and *Ashcroft v. Iqbal*.[62] Before *Twombly*, pleading in the federal courts was governed by the rule of *Conley v. Gibson* that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[63] The "no set of facts" test is similar to the "no possibility" standard widely applied in fraudulent joinder cases. *Twombly* "retired" the "no set of facts" rule and replaced it with the plausibility standard.

There is a substantial body of empirical scholarship on the effect of *Twombly* and *Iqbal* on motions to dismiss.[64] The results have been mixed. One study, based on analysis of a large number of cases, found "no (significant) change in the willingness of courts to dismiss cases" as a result of *Twombly*, "even after accounting for selection effects."[65] However, another scholar found a significant increase in dismissals of employment discrimination and civil rights cases after *Iqbal*.[66]

Employment discrimination and civil rights cases are generally grounded in federal law, so fraudulent joinder is rarely an issue. Thus it is hard to know whether the results of this second study would have any bearing at all on the fraudulent joinder context. The first-quoted study included diversity cases, but presumably most of those were filed initially in federal court, so the results may have limited relevance for fraudulent joinder, which by definition comes into play only when a case has been filed in state court.

So any attempt to quantify the likely effect of prong (B) based on existing empirical research is probably doomed to failure. Nevertheless, it seems reasonable to conclude that in some unknowable number of cases, out-of-state defendants will succeed in securing the dismissal (without prejudice) of claims against in-state defendants that would not be dismissed under current law. The effect will be to sustain the removal to federal court in those cases. The question is whether this "somewhat more robust version of the fraudulent joinder doctrine"[67] is justified. To answer the question, it will be useful first to examine the rationales advanced by the bill's supporters and then to consider some of the arguments made by opponents.

V. Two Rationales for a "More Robust" Doctrine

The FJPA "expands the class of situations in which the citizenship of a local defendant can be disregarded in determining whether the case can be removed on the basis of diversity."[68] It does so in pursuit of two goals: to "give out-of-state defendants a better opportunity to secure the neutral federal forum that they would be entitled to if sued alone," and to "help to protect individuals and small businesses from being dragged into court when their involvement in the controversy is peripheral at best."[69]

A. The Neutral Federal Forum for Out-of-State Defendants

As noted at the outset, the right of an out-of-state defendant to remove a case to the neutral forum of a federal court was instituted by Congress to implement the grant of diversity jurisdiction in Article III of the Constitution. The Supreme Court developed the fraudulent joinder doctrine in order to protect that right. But the Court never offered a detailed explanation for the doctrine, and lower courts seldom advert to its Article III foundations.

One exception is an often-quoted opinion of the Seventh Circuit. In *Poulos v. Naas Foods, Inc.*,[70] the court elaborated on the rationale for the doctrine and its grounding in the purpose of diversity jurisdiction:

58 Markup Transcript, *supra* note 1, at 46 (remarks of Rep. Conyers); House Report, *supra* note 4, at 22–23 (Dissenting Views).

59 House Report, *supra* note 4, at 25 (Dissenting Views).

60 *See, e.g.*, Lunn v. Union Pac. R.R., 2006 WL 516776 at *5 (W.D. Mo. Mar. 1, 2006) ("[T]he Court finds . . . that it is possible that Kansas law might impose liability on the resident defendants. Therefore, the Court finds that the joinder of [those defendants] is not fraudulent.").

61 550 U.S. 544 (2007).

62 556 U.S. 662 (2009).

63 Conley v. Gibson, 355 U.S. 41, 46 (1957) (emphasis added). Although the *Conley* Court referred to this as "the accepted rule," it cited only court of appeals cases. *See id.* at n.5.

64 *See* Thomas D. Rowe, Jr., Suzanna Sherry & Jay Tidmarsh, Civil Procedure, Chapter 2 (4th ed. forthcoming 2016). The citations in this paragraph are drawn from that work.

65 William H.J. Hubbard, *Testing for Change in Procedural Standards, with Application to* Bell Atlantic v. Twombly, 42 J. Legal Stud. 35, 57 (2013).

66 Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 Va. L. Rev. 2117 (2015).

67 House Report, *supra* note 4, at 5.

68 *Id.*

69 *Id.*

70 959 F.2d 69 (7th Cir. 1992).

> Broadly speaking, the purpose of federal diversity jurisdiction is to provide a neutral forum for lawsuits between parties from different states. . . .
>
> No matter what the plaintiff's intentions are, an out-of-state defendant may need access to federal court when the plaintiff's suit presents a local court with a clear opportunity to express its presumed bias—when the insubstantiality of the claim against the in-state defendant makes it easy to give judgment for the in-state plaintiff against the out-of-state defendant while sparing the in-state defendant.[71]

So the *insubstantiality* of the claim against the in-state defendant is the key to the doctrine, because it creates the opportunity for a state court to act on its "presumed bias" against out-of-state litigants.[72] But there is a disconnect between the rationale as stated by the Seventh Circuit and the statement in the same paragraph (echoed by other courts) that a claim is fraudulent only when it "has *no chance* of success."[73] If the goal is to identify cases in which it would be "easy to give judgment for the in-state plaintiff against the out-of-state defendant while sparing the in-state defendant," the rule would not limit application of the doctrine to situations in which the claim against the in-state defendant is *hopeless*. It would also include situations in which the claim against the in-state defendant is *extremely weak*.

The "plausibility" standard of H.R. 3624 would accomplish that goal, especially in light of the House Report's reliance on the "reasonable likelihood" test drawn from the Supreme Court's decision in *Twombly*.[74] This standard would allow the federal court to retain jurisdiction over a case when the plaintiff has no more than a "glimmer of hope" of imposing liability on the in-state defendant.[75] It would better serve the purpose of the fraudulent joinder doctrine than the more demanding tests generally applied by the courts today.

The soundness of the plausibility/"reasonable likelihood" approach can also be seen by considering the Supreme Court's rationale in *Twombly* and *Iqbal*. As Sixth Circuit Judge Jeffrey Sutton has explained, the Court adopted the plausibility standard to "prevent[] plaintiffs from launching a case into discovery—and from brandishing the threat of discovery during settlement negotiations—'when there is no reasonable likelihood that [they] can construct a claim from the events related in the complaint.'"[76] The underlying concerns are thus twofold. First, discovery "imposes costs—not only on defendants but also on courts and society."[77] Second, the threat of discovery exerts pressure on defendants "to settle even anemic cases."[78]

These may be weighty concerns, but they are matters of policy, with no constitutional underpinnings. In contrast, the out-of-state defendant's removal rights implicate Article III of the Constitution. If plausibility is an appropriate threshold for allowing the plaintiff to engage in (or threaten) discovery, as the Supreme Court believes it to be, it would seem to follow a fortiori that it is also an appropriate standard for determining when the plaintiff should be able to deprive the out-of-state defendant of the removal rights it would have if sued alone.

It is important to note also that the consequence of finding fraudulent joinder under H.R. 3624 is not that the plaintiff is thrown out of court—which is what happens in the Rule 8 pleading context under *Twombly* itself—but rather that his claims against the in-state defendant are dismissed without prejudice. In almost all fraudulent joinder cases, the plaintiff's "real target" is the out-of-state defendant,[79] and the claims against that defendant remain in the federal case for adjudication on the merits. If the plaintiff still wishes to seek redress from the in-state defendant, he is free to do so in state court.

B. The In-State Party as "Diversity-Destroying Pawn"

Although the proponents of H.R. 3624 seek to protect the removal rights of out-of-state defendants, they place at least as much emphasis on a second purpose: to protect *local* individuals and businesses from being dragged into lawsuits when their involvement in the controversy is tangential at best. This idea is novel. It played no role in the Supreme Court decisions that established the fraudulent joinder doctrine, nor can it be found in current case law or academic commentaries.

Novelty, of course, is no reason why Congress should not embrace the idea. Just as Congress is free to depart from the substance of court-made jurisdictional doctrine, it also has the prerogative of reshaping doctrine in order to accomplish a different purpose. But articulation of this particular purpose raises the question: what is the federal interest here? Individuals and small businesses are being sued by citizens of their own state in state court on state-law claims. Even if the claims are feeble or frivolous or brought in bad faith, why should that be of concern to Congress?

If the claims were being asserted against the in-state defendants in standalone lawsuits in state court, it is hard to see

71 *Id.* at 71, 73. As this quotation indicates, this rationale assumes that the plaintiff is a citizen of the forum state. That is the usual pattern in fraudulent joinder litigation, although it was not the case in *Poulos* itself. *See id*. at 71 n.2.

72 The reference to "presumed bias" is unfortunate; it would be more accurate as well as more diplomatic to speak of "*possible* bias." No one thinks that state courts today are generally prejudiced against out-of-state defendants, so that bias could be *presumed*. But the fraudulent joinder doctrine, like diversity jurisdiction itself, is premised on the *possibility* of bias. *See, e.g.*, Hertz Corp. v. Friend, 559 U.S. 77, 85 (2010) (referring to the "basic rationale" of diversity jurisdiction as "opening the federal courts' doors to those who might otherwise suffer from local prejudice against out-of-state parties.").

73 *Poulos*, 959 F.2d at 73 (emphasis added).

74 *See* House Report, *supra* note 4, at 13.

75 *See* Hartley v. CSX Transp., Inc., 187 F.3d 422, 426 (4th Cir. 1999) ("Once the court identifies this glimmer of hope for the plaintiff, the jurisdictional inquiry ends [and the case must be remanded].").

76 16630 Southfield Limited Partnership v. Flagstar Bank, F.S.B., 727 F.3d 502, 504 (6th Cir. 2013) (quoting *Twombly*). Although the discussion in *Twombly* referred to antitrust litigation, the Court made clear in *Iqbal* that the rules adopted in *Twombly* apply to all civil litigation. *See Iqbal*, 556 U.S. at 684.

77 *16630 Southfield*, 727 F.3d at 504.

78 *Twombly*, 550 U.S. at 559.

79 *See* 151 Cong. Rec. 2642 (2005) (remarks of Rep. Goodlatte) (explaining the "primary defendant" provision of the Class Action Fairness Act).

how Congress could justify using its legislative power to police their quality or legitimacy. But that is not what is happening. The claims are being asserted in suits where out-of-state entities are also defendants, and under circumstances where—or so Congress could conclude—the plaintiff's decision to join the two sets of claims is part of a litigation strategy shaped by the rule of complete diversity. That is a rule established by the federal judiciary in interpreting a federal statute, and it is that rule that provides the incentive for asserting the feeble or frivolous or bad faith claims against the in-state individuals and small businesses. The in-state defendants are thus suffering harm as the direct result of a legal regime that is ultimately attributable to Congress.

That is the theory that underlies this second rationale. What about the factual premises? No one would dispute that litigation is burdensome, especially for individuals and small businesses who do not have in-house counsel or a law firm on retainer. As Elizabeth Milito, representing the National Federation of Independent Business, said in her testimony at the hearing on H.R. 3624, when small business owners are sued, they "are forced to incur substantial financial costs in defending their business, they must dedicate their time and energy to the case, and they must deal with the heavy emotional toll that a wrongful suit may cause."[80] But litigation is a feature of American life, and the mere fact that claims prove to be meritless does not prove that the suit was wrongful. According to Ms. Milito, however, the claims at issue here are not simply meritless claims. She gave as an example a "familiar strategy" in the realm of pharmaceutical litigation. The plaintiff's real target is the out-of-state manufacturer, but the complaint also names a local pharmacy "as the diversity-destroying pawn to be a roadblock to the drug manufacturer's removal efforts." She continued: "Plaintiffs in these circumstances rarely intend in good faith to pursue the local independently-owned pharmacy. Rather, they usually dismiss the pharmacy once the case is remanded to state court."[81]

If it were true that in the typical case in which fraudulent joinder is litigated, the plaintiffs dismiss the in-state defendant soon after the case returns to state court, that would be powerful evidence that the local defendants are indeed being used as "diversity-destroying pawn[s]" and that the rule of complete diversity is being abused. But Ms. Milito offered no empirical data on that point.[82]

Certainly it would be useful to have data about the extent to which plaintiffs voluntarily dismiss the local defendant after securing the remand to state court. But given the particular standard embodied in the FJPA, I do not think it is necessary. Take the pharmaceutical litigation discussed by Ms. Milito. Almost invariably, if there is any entity that can be held legally responsible for the plaintiff's injuries, it is the out-of-state pharmaceutical manufacturer. Under the FJPA, the plaintiff will be able to pursue her claims against that defendant no matter how the court rules on the fraudulent joinder argument. She will also be able to pursue her claims against the local pharmacy—and in her preferred state forum—as long as those claims satisfy the standard of plausibility. The FJPA will make a difference only in cases where the claims do not meet the plausibility standard. The bill would thus eliminate the incentive that current law creates for the plaintiff to assert borderline claims and thereby subject the pharmacy to the burdens of litigation simply to keep the case in state court. That is a legitimate exercise of congressional power over federal-court jurisdiction.

In the floor debate on the FJPA, one opponent argued that dismissing the local defendant from the case would disadvantage the plaintiff because "it [would be] easy for the remaining defendant to finger point and blame the absent defendant for the plaintiff's injuries."[83] There are two responses to this argument. First, it would *not* be all that easy to finger point when the district court has found that the claims against the absent defendant do not even rise to the level of plausibility. Second, the out-of-state defendant's ability to finger point would be limited if not indeed foreclosed by the doctrine of judicial estoppel. That doctrine "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."[84] If, at the jurisdictional stage, the out-of-state defendant has succeeded in persuading the district court that the plaintiff's claims against the in-state defendant are not even plausible, it will probably be estopped from arguing in the merits phase that the in-state defendant bears the responsibility for the plaintiff's injuries.[85] So the case will turn, as it should, on whether the plaintiff can prove the elements of the claims against the out-of-state defendant under the governing state law.

VI. Arguments Against the FJPA

Neither in the Dissenting Views nor in the debate on the House floor did opponents directly challenge the premise of the FJPA: that plaintiffs sometimes assert feeble or unsubstantiated claims against in-state defendants for the purpose of frustrating the removal rights that out-of-state defendants would have if sued alone. Here I will address some of the arguments that opponents of the bill did make.

A recurring theme of the opponents' arguments is that the FJPA is "just the latest attempt to tilt the civil justice system in favor of corporate defendants by making it more difficult for plaintiffs to pursue State law claims in State courts."[86] This may be more rhetoric than argument, but either way it is misplaced. It is true that H.R. 3624 would make it easier for corporate defendants to remove state-law cases to federal court, but if that were the principal aim, there are more direct and more effective ways of accomplishing it. For example, Congress could follow the

80 *House Hearing*, *supra* note 23, at 14 (statement of Elizabeth Milito).

81 *Id.*

82 On the contrary, she cited four cases in which the district courts held that the local defendant *was* fraudulently joined.

83 162 Cong. Rec. H911 (daily ed. Feb. 25, 2016) (remarks of Rep. Jackson Lee).

84 New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (internal quotation omitted).

85 *See* Walton v. Bayer Corp., 643 F.3d 994, 1002–03 (7th Cir. 2011) (finding fraudulent joinder and holding *plaintiff* estopped at merits stage based on her arguments *against* removal).

86 162 Cong. Rec. H908 (daily ed. Feb. 25, 2016) (remarks of Rep. Conyers).

example of the Class Action Fairness Act and allow removal based on minimal diversity.[87] Or Congress could allow removal based on a federal defense. Either measure would do more to facilitate removal by corporate defendants than adjusting the fraudulent joinder doctrine. But they would not directly address the concern that *local* businesses are being dragged into litigation to forestall removal by out-of-state defendants.

Another recurring theme is that incorporating the plausibility standard into the fraudulent joinder inquiry "effectively requires litigation on the merits at the nascent stage of the case."[88] This argument seems to assume that the current approach to fraudulent joinder does *not* involve an inquiry into the merits. However, that assumption blurs the distinction between two senses of "the merits." When we speak of *deciding* a case on the merits, we mean deciding whether the plaintiff wins or loses. That is not what happens in the fraudulent joinder inquiry today, and H.R. 3624 does not change that; it states explicitly that the fraudulently joined claims against the in-state defendants should be dismissed without prejudice.

But we also talk about "the merits" of a case in a looser sense, signifying any consideration of the validity of the claim under the applicable law. The fraudulent joinder inquiry does address "the merits" in that sense, but it does so with or without the FJPA. If the court says the plaintiff has "no possibility" of recovery from the in-state defendant, that is addressing the merits of the claim. It says that the claim definitely has no merit. The FJPA would tell courts to ask the same kind of question, but using a less demanding standard. Instead of saying that joinder is fraudulent only if it is *not possible* that state law will impose liability on the spoiler, it says that joinder is also fraudulent if it is *not plausible* that state law will impose liability on the spoiler. The latter is not any more about "the merits" than the former.

Beyond this, much of the attack on the FJPA's use of the plausibility standard is really an attack on the Supreme Court's embrace of the standard in *Twombly* and *Iqbal*. It is therefore worth pointing out that *Twombly* was decided by a 7-2 margin, and that in *Iqbal* the dissent for four Justices (by the author of the *Twombly* opinion) accepted the plausibility standard and disputed only its application.

Another argument is that the FJPA "imposes the burden of proof" on plaintiffs.[89] That is not so. As the House Report points out, when the removing party asserts that an in-state or co-citizen defendant has been fraudulently joined, the removing party must persuade the court that one or more of the criteria discussed above have been satisfied. "If the removing party does not carry its burden, then the motion to remand must be granted."[90]

Finally, the opponents of H.R. 3624 assert that the bill "raises serious federalism concerns" and "infringes state sovereignty." There are two variations on this argument. First, the Dissenting Views emphasize that "the Federal courts generally disfavor Federal jurisdiction and read removal statutes narrowly."[91] That is true, but it is hardly an argument for why *Congress* should refrain from adopting a more robust doctrine of fraudulent joinder. The reason federal courts have been reading removal statutes narrowly is that the courts think that is what Congress wants. If Congress broadens the grounds for removal, courts must follow suit, as indeed the Supreme Court has recognized. In 2014, the Court adverted to "a purported 'presumption' against removal" and said: "We need not here decide whether such a presumption is proper in mine-run diversity cases. It suffices to point out that no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court."[92] If Congress enacts the FJPA, it will be to "facilitate adjudication of certain [non-class] actions in federal court."

Opponents also argue that the FJPA would "deny state courts the ability to decide and, ultimately, to shape state law in many cases." It is not clear whether the reference here is to the claims against the out-of-state defendant or the claims against the in-state defendant. If the former, that is a routine feature of diversity jurisdiction. If the latter, the concern is unrealistic for the general run of fraudulent joinder cases. State law is shaped by state-court appellate decisions. By hypothesis, the claims against the in-state defendant are marginal at best. The likelihood that these marginal claims would be decided on the merits at the trial level and ultimately decided by an appellate court seems quite remote.

VII. Conclusion: Diversity Removal in Perspective

Supporters and opponents of the FJPA often seem to be talking past one another; one might almost think they were talking about different pieces of legislation. But if we focus on the underlying premises rather than the particular arguments, we see that what really divides the two sides is a fundamental disagreement about removal based on diversity of citizenship and its role in the American legal system. For opponents of H.R. 3624, diversity removal is an anomaly in the law, to be kept under tight restraints and made available only when absolutely necessary. In this view, the requirement of complete diversity is a desirable and almost unassailable part of the legal regime. In contrast, for supporters of the bill, diversity removal is an integral part of the judicial system established by the Constitution and the Judiciary Act of 1789. The anomaly, if there is one, is the complete-diversity rule—a rule that perhaps should be abrogated because it is contrary to "the original understanding of the Framers."[93]

It will come as no surprise to anyone who has read this far that I do not share the opponents' jaundiced view of removal based on diversity of citizenship. Full discussion is beyond the

87 *See Federal Jurisdiction Clarification Act: Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the U.S. House of Representatives Committee on the Judiciary*, 109th Cong. 38–39 (2005) (statement of Arthur D. Hellman).

88 Markup Transcript, *supra* note 1, at 54 (remarks of Rep. Cohen).

89 Susan Steinman, *Help Fight Corporate Forum Shopping*, Trial, Apr. 2016, at 16 (internal quotation marks omitted).

90 *House Report*, *supra* note 4, at 11.

91 *Id.* at 26 (Dissenting Views).

92 Dart Cherokee Basin Operating Co. v. Owens, 135 S. Ct. 547, 554 (2014).

93 *House Report*, *supra* note 4, at 5 n.9.

scope of this article, but two points deserve mention. First, the complete-diversity rule derives from an opinion (to be sure, an opinion by Chief Justice Marshall) that is very brief and very cryptic, providing no justification or explanation for the limitation on diversity jurisdiction that it imposes. Justices who served with Marshall later reported that he "repeatedly expressed regret that [the decision] had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different."[94] This does not necessarily mean that the rule should be abrogated—only that Congress should not regard it as sacrosanct when particular abuses are brought to its attention.

Second, even if it is wrong to presume that state-court judges and juries are biased against out-of-state defendants because they are from *out of state*,[95] it is still possible that litigation practices in state systems reflect an institutional bias against out-of-state defendants as *defendants*. Over the last three decades, the Supreme Court, through rulemaking and adjudication, has substantially dismantled the elements of federal practice that put pressure on defendants "to settle even anemic cases."[96] But state systems may have retained or even strengthened those elements. To the extent that they have done so, defendants sued in state court may legitimately believe they will receive a "juster justice" in the federal court.[97]

In this light, it seems to me that the FJPA is best seen as a modest step toward the ideal that Hamilton articulated in Federalist No. 80—"that in order to [maintain the] equality of privileges and immunities to which the citizens of the union will be entitled, the national judiciary ought to preside in *all* cases in which one State or its citizens are opposed to another State or its citizens." H.R. 3624 is modest in at least two respects. It does not abrogate the complete-diversity rule, nor does it shift the burden of proof to the plaintiff when fraudulent joinder is asserted. Rather, it enables the out-of-state defendant to have its case heard in the neutral federal forum if it can show that the plaintiff's claims against the in-state defendants do not satisfy the standard of plausibility. This adjustment of the fraudulent joinder doctrine provides a better balance of the competing interests than the versions of the doctrine now applied in the lower federal courts.[98]

94 Louisville, C. & C. R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844).

95 *See supra* note 72.

96 *See supra* note 78 and accompanying text. Landmarks include Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (reinvigorating summary judgment as "an integral part of the Federal Rules as a whole"); Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) (delineating "gatekeeping" role for judge in assessing expert evidence); amendments to the Federal Rules of Civil Procedure limiting the scope of discovery as of right; and of course *Twombly* and *Iqbal*. Not surprisingly, opponents of the FJPA tend to view these developments differently.

97 *See* Henry M. Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 513 (1954) ("Why is it an offense to the ideals of federalism for federal courts to administer, between citizens of different states, a juster justice than state courts, so long as they accept the same premises of underlying, primary obligation and so avoid creating uncertainty in the basic rules which govern the great mass of affairs in the ordinary processes of daily living? Was Hamilton wrong in saying that the assurance of the due administration of justice to out-of-state citizens is one of the great bonds of federal union?") (footnotes omitted).

98 It would also be desirable for Congress to enact legislation to neutralize a counterpart stratagem used by defendants—removing cases to federal court before a local defendant has been served to avoid the constraints of the forum defendant rule. The practice has been referred to as "snap removal." *See* Breitweiser v. Chesapeake Energy Corp., 2015 WL 6322625 at *2 (N.D. Tex. Oct. 20, 2015).

Stormans v. Wiesman: Paths to Strict Scrutiny in Religious Free Exercise Cases

By Steven T. Collis

Note from the Editor:

This article is about *Stormans v. Wiesman*, a case from the 9th Circuit that has a petition for certiorari pending at the Supreme Court. Since the petition was filed on January 4, 2016, the case has been distributed for conference three times and rescheduled each time (most recently in late April).

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Stormans, Inc. v. Weisman, 794 F.3d 1064 (9th Cir. 2015), *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/Stormans-op.pdf.

• Washington State Respondents' Brief in Opposition to Certiorari, Stormans, Inc. v. Weisman, No. 15-862 (March 7, 2016), *available at* http://www.scotusblog.com/wp-content/uploads/2016/03/Stormans-State-BIO.pdf.

• James M. Oleske, Jr., *Lukumi at Twenty: A Legacy of Uncertainty for Religious Liberty and Animal Welfare Law*, 19 Animal L. 295 (2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2216207.

• Ian Millhiser, *Court Smacks Down Pharmacy That Refused To Fill Prescriptions On Religious Grounds*, Think Progress (July 25, 2015), *available at* http://thinkprogress.org/justice/2015/07/25/3684270/court-pharmacy-religious-grounds/.

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Introduction

Currently pending on the docket of the United States Supreme Court is the case of *Stormans v. Wiesman*, No. 15-862, on petition for a writ of certiorari to the Ninth Circuit. At issue is whether the Free Exercise Clause of the United States Constitution compels the state of Washington to grant pharmacists a religious exemption from a regulatory obligation to fill all lawful prescriptions when the regulation already grants a number of secular exemptions. If the Court grants certiorari, the case will become just the third in the last thirty years to provide guidance on when, under the Free Exercise Clause, courts must apply the compelling interest test—rather than rational basis review—to a law or regulation that burdens the free exercise of religion.

A number of religious freedom cases in the Supreme Court have made headlines in recent years,[1] but almost all have arisen under the Religious Freedom Restoration Act ("RFRA"), which requires courts to apply compelling interest review to any law or regulation that puts a substantial burden on the free exercise of religion.[2] The federal RFRA, however, applies only to federal laws.[3] Thirty-two states have similar protections, either through legislation or through interpretations of their state constitutions, but many of those state RFRAs and equivalents are underenforced or relatively untested. *Stormans* stems from regulations passed by the state of Washington. Plaintiffs brought their claims under the Free Exercise Clause of the federal Constitution.

In contrast to RFRA, the Free Exercise Clause requires compelling interest review only when a law lacks neutrality or is not generally applicable. This was the holding of *Employment Division v. Smith*, which the Court applied in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*. Since those decisions, handed down in 1990 and 1993 respectively, the Supreme Court has not provided any additional insight into the meaning of the terms "neutral" and "generally applicable." As a result, a circuit split has arisen in the lower courts, and the justices now have an opportunity to provide much-needed clarity.

I. The Legal Backdrop

The First Amendment provides, "Congress shall make no law . . . prohibiting the free exercise" of religion.[4] This constitutional right applies to state and local governments through the

1 *See, e.g.*, Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. ____, 134 S. Ct. 2751 (2014); Little Sisters of the Poor Home for the Aged v. Burwell, No. 15-105 (argued March 23, 2016).

2 42 U.S.C. §2000bb–1(b). A number of other cases has also arisen under the Religious Land Use and Institutionalized Persons Act, which applies only in cases involving prisoners or religious land use. *See, e.g.,* Holt v. Hobbs, 574 U.S. ___, 135 S. Ct. 853 (2015).

3 City of Boerne v. Flores, 521 U.S. 507 (1997).

4 U.S. Const., amend. I.

Fourteenth Amendment.[5] The Supreme Court has interpreted the Free Exercise Clause in varying ways over the years,[6] but our current understanding derives from two cases with facts at opposite ends of a continuum—*Employment Division v. Smith*[7] and *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[8]

Smith upheld the epitome of a neutral and generally applicable law. The state of Oregon passed an "across-the-board criminal prohibition" on possession of peyote.[9] Smith challenged whether the state could deny unemployment benefits to a person fired for violating that prohibition when he did so only as part of a religious ritual central to a traditional Native American religion.[10] The Supreme Court held that as long as a law is "neutral" and "generally applicable" it need not be justified by a compelling interest even if it fails to exempt religious exercise from its burdens.[11] The Court thus upheld the law under the Free Exercise Clause.[12]

Lukumi, in contrast, unanimously struck down a system of city ordinances gerrymandered to such an extreme degree that they applied only to the adherents of one religion "but almost no others."[13] Based on both Old Testament and West African traditions, the Santeria considered animal sacrifice a crucial part of their religious practice.[14] The City of Hialeah passed or adopted a series of ordinances and regulations banning the killing of animals, but the ban exempted so many forms of animal killing that it allowed almost everything but the Santeria sacrifices.[15] The Supreme Court struck down the ordinances, holding that they were not neutral because they targeted religion,[16] nor were they generally applicable because "the burden of the ordinance, in practical terms, falls on Santeria adherents but almost no others."[17]

In other words, the law in *Smith* applied to everyone; the law in *Lukumi* applied to people of one religion only and was designed to do so. In the quarter century since, how courts should treat laws that fall between these extremes has remained an open question. *Stormans v. Wiesman* provides the Court an opportunity to answer it.

II. Facts and Background of *Stormans*

A. The District Court's Findings of Fact

In 2007, the Washington State Board of Pharmacy enacted regulations requiring pharmacists and pharmacies to dispense lawfully prescribed emergency contraceptives[18] even if they had a sincerely held religious belief that doing so terminates a human life.[19] The Board passed the regulations at the insistence of Planned Parenthood, the Governor, and the Northwest Women's Law Center.[20] The plaintiffs in *Stormans* refused to comply with the regulations, the Board launched a series of investigations, and the plaintiffs filed suit, arguing, among other things, that the regulations violated the Free Exercise Clause.[21]

After a twelve-week trial, the district court determined that "literally all of the evidence demonstrates that the 2007 rulemaking was undertaken primarily (if not solely) to ensure that religious objectors would be required to stock and dispense Plan B."[22] It also found that the burden of the regulations fell almost exclusively on religious objectors.[23] The Board exempted pharmacies from stocking and delivering contraceptives for a swarm of secular reasons: if the drug fell outside the pharmacy's business niche, had a short shelf life, was too expensive, required specialized training or equipment, was difficult to store, required additional paperwork, required the pharmacy to monitor the patient, would make the pharmacy a target for crime (with drugs like oxycodone or cough medicine), and other reasons.[24] When the Pharmacy Board actually applied the regulations, even more exceptions surfaced. The regulations only had a practical effect when the Board enforced them.[25] The district court found that the Board interpreted the regulations and responded to complaints in a way that ensured the burden of the regulations fell "almost exclusively on religious objectors."[26] Once all of the secular exemptions were applied, it became obvious that the regulations affected religious objectors and almost no one else.

B. The District Court and Ninth Circuit Rulings

Based on these findings, the district court ruled that the regulations were neither neutral nor generally applicable and thus violated the Free Exercise Clause.[27] The Ninth Circuit reversed, holding the district court clearly erred in finding discriminatory

5 Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

6 *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878); *Cantwell*, 310 U.S. 296; Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 450 U.S. 707 (1981).

7 494 U.S. 872 (1990).

8 508 U.S. 520 (1993).

9 494 U.S. at 884.

10 *Id.* at 874–875.

11 *Id.* at 886 & n.3.

12 *Id.*

13 508 U.S. at 536.

14 *Id.* at 524–25.

15 *Id.* at 536.

16 *Id.* at 542.

17 *Id.* at 536.

18 The contraceptives at issue were Plan B and *ella*, and the pharmacists in *Stormans* refused to dispense Plan B. Stormans, Inc. v. Selecky, 844 F. Supp. 2d 1172, 1176 (W.D. Wash. 2012).

19 *Id.* at 1175, 1181.

20 *Id.* at 1178.

21 *Id.* at 1175.

22 *Id.* at 1193.

23 *Id.* at 1188.

24 *Id.* at 1190.

25 *Id.* at 1194.

26 *Id.* at 1192.

27 *Id.* at 1193–94.

intent.[28] It also held that the laws were generally applicable because (1) they did not underinclude secular conduct;[29] (2) the secular exemptions they allowed were "necessary" because they allowed "pharmacies to operate in the normal course of business"; [30] and (3) the Pharmacy Board had not engaged in selective enforcement—it had merely responded to the complaints it received, and those had related only to religious objectors.[31] Because the Ninth Circuit determined the regulations were both neutral and generally applicable, it refused to apply the compelling interest test and upheld the regulations as being rationally related to a legitimate government purpose.[32]

III. What's at Stake: A Coherent and Consistent Understanding of What Triggers Strict Scrutiny Under the Constitution's Free Exercise Clause

Lukumi and *Smith* are both special cases, at opposite ends of a broad range. Many cases fall in the middle, involving laws that regulate religious conduct and some but not all analogous secular conduct. In the quarter century since *Smith* and *Lukumi*, the Supreme Court has provided no further guidance. The result is the circuit split detailed in the petition for a writ of certiorari in *Stormans*,[33] as well as the Ninth Circuit's failure to apply *Lukumi* to the Washington regulations, which fall at the *Lukumi* end of the continuum.

Stormans presents the Court with an opportunity to clarify the free exercise doctrine it set forth in *Smith*, *Lukumi*, and the earlier precedents they reinterpreted: if a law is *either* (1) not neutral, *or* (2) not generally applicable, it triggers strict scrutiny.

A. Neutrality and General Applicability Are Independent Requirements with Distinct Tests for Triggering Strict Scrutiny

The first prong of the *Smith-Lukumi* test requires courts to determine whether a law is neutral. *Smith* 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.'"[34] If a law is either not neutral or not generally applicable, it must be justified under strict scrutiny and the compelling interest test.[35] *Lukumi* is the only other Supreme Court case to apply this test and, in the decades since it was decided, lower courts have inconsistently construed it.

Lukumi addressed neutrality and general applicability as distinct requirements, and in separate sections of the opinion. The ordinances were not neutral, because they "target[ed]" Santeria, their "object" was to suppress Santeria sacrifice, and they were "gerrymandered with care to proscribe religious killings of animals but to exclude almost all secular killings."[36] These words—target, targeting, object, and gerrymander—are pervasive in the neutrality section of the opinion.[37] But they do not even appear in the section on general applicability.[38] The neutrality section of the opinion also uses the language of equal protection and nondiscrimination law: "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue *discriminates against* some or all religious beliefs or regulates or prohibits conduct *because* it is undertaken for religious reasons."[39] These words—discriminate, discrimination, because—are also entirely absent from the general applicability section of the opinion. General applicability is a distinct requirement—not just another term for neutrality—as explained below.

The trial court in *Stormans* found that Washington state acted with anti-religious motive; the Ninth Circuit held that finding clearly erroneous. But determining that a law lacks anti-religious motive does not save it from strict scrutiny. Anti-religious motive is *sufficient* to trigger strict scrutiny, but it is not *necessary*.[40]

We know that anti-religious motive is not necessary to trigger strict scrutiny because nine Justices held the *Lukumi* ordinances unconstitutional (based on their application of strict scrutiny), while only two found bad motive.[41] Two said motive is irrelevant.[42] Three said that strict scrutiny should apply even to neutral and generally applicable laws in spite of the *Smith* decision from three years earlier.[43] Two more (Justices White and Thomas) did not write separately, but did not join the motive section of the opinion.[44] Motive added little in *Lukumi*, where there were so many other grounds for holding that the ordinances were not neutral and not generally applicable.

But the answer to whether anti-religious motive is sufficient to show lack of neutrality comes earlier in the opinion, where five justices concluded: "*At a minimum*, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons."[45] The Court uses the language of equal protection and nondiscrimination law to hold that an anti-religious motive would suffice to render a law non-neutral and therefore subject to strict scrutiny under the Free Exercise Clause. In equal protection and nondiscrimination law, it is settled that a plaintiff may prove either a facial classification or

28 Stormans, Inc. v. Weisman, 794 F.3d 1064, 1079 (9th Cir. 2015).

29 *Id.* at 1079–81.

30 *Id.* at 1080.

31 *Id.* at 1080–81, 1083–84.

32 *Id.* at 1084.

33 Pet. 22–38.

34 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

35 *Id.* at 884 (reaffirming *Sherbert*, 374 U.S. 398).

36 508 U.S. at 542.

37 *Id.* at 532-42.

38 *Id.* at 542-46.

39 *Id.* at 532 (emphases added).

40 Shrum v. City of Coweta, 449 F.3d 1132, 1144-45 (10th Cir. 2006) (collecting cases).

41 508 U.S. at 540-42 (Kennedy and Stevens, JJ.).

42 *Id.* at 558-59 (Scalia, J. and Rehnquist, C.J., concurring).

43 *Id.* at 565-77 (Souter, J., concurring); *id.* at 577-80 (Blackmun and O'Connor, JJ., concurring).

44 *See id.* at 522.

45 *Id.* at 532 (emphasis added).

that a facially neutral law is "a purposeful device to discriminate."[46] When a challenged rule is facially neutral, those claiming discrimination may show that the rule was adopted "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[47] In *Hunter v. Underwood*, the Supreme Court unanimously held that a facially neutral provision of the Alabama Constitution was invalid because it had been "enacted with the intent of disenfranchising blacks."[48]

A lack of discrimination is the "minimum" requirement of neutrality.[49] Laws that burden religion must at least be free of anti-religious motive. Plaintiffs *may* prove, as a path to strict scrutiny, that a law was enacted with anti-religious motive and thus is not neutral. But they *need not* do so if a law is not generally applicable.

B. Regardless of Neutrality, Laws That Are Not Generally Applicable Must Be Reviewed with Strict Scrutiny

1. To Be Generally Applicable, a Law Must Treat Religious Conduct as Well as It Treats Analogous Secular Conduct

Smith's second requirement is that a law that burdens religion be generally applicable. Because the "across-the-board criminal prohibition" in *Smith* so clearly was generally applicable,[50] the Court did not explicitly define the boundaries of general applicability. But *Smith*'s understanding of that requirement appears in the Court's analysis of its earlier cases on unemployment compensation: *Sherbert v. Verner*[51] and *Thomas v. Review Board.*[52] *Sherbert* and *Thomas* applied compelling interest review to unemployment compensation statutes that denied benefits to claimants who refused work that conflicted with their religious practices.

Smith reaffirmed these precedents, explaining that strict scrutiny applied because the unemployment compensation law allowed individuals to receive benefits if they refused work for "good cause," thus creating "individualized exemptions" from the requirement of accepting available work.[53] Where the state enacts a system of individual exemptions, "it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[54] Individualized exemptions are one way in which a law can fail to be generally applicable. The statute at issue in *Sherbert* was not generally applicable because it allowed "at least some" exceptions.[55] There cannot be many acceptable reasons for refusing work and claiming a government check instead, but there were "at least some," and therefore the state also had to recognize religious exceptions or provide a compelling interest why it would not do so.

The Court elaborated on the new standard in *Lukumi*, where it struck down Hialeah's ordinances that prohibited the killing of animals only when the killing was unnecessary, took place in a ritual or ceremony, and was not for the primary purpose of food consumption.[56] As already explained, the Court separated neutrality from general applicability.[57] General applicability requires laws to apply to all the secular conduct that undermines the same state interests as the regulated religious conduct. General applicability concerns objectively unequal treatment of religious and secular practices, regardless of targeting, motive, or an improper object. The lack of general applicability in *Lukumi* was clear to the Court; the city narrowly prohibited selected conduct and provided categorical and individualized exemptions for analogous secular conduct,[58] resulting in a failure "to prohibit nonreligious conduct" that endangered the city's interests "in a similar or greater degree than Santeria sacrifice."[59]

Some courts, including the Ninth Circuit, appear to think that a law is generally applicable if it is not as bad as the ordinances in *Lukumi*.[60] The Supreme Court rejected that idea by identifying *Lukumi* as an extreme case. The ordinances were *not* at or near the borders of constitutionality; they fell "well below the minimum standard necessary to protect First Amendment rights."[61] It was therefore unnecessary for the *Lukumi* Court to "define with precision the standard used to evaluate whether a prohibition is of general application."[62] The circuit split that has followed the *Lukumi* decision, exacerbated by the Ninth Circuit's failure to appropriately apply *Lukumi* to a case that is just as bad, shows that the Court should provide a more precise definition of "general applicability." *Smith* and *Lukumi* already provide the framework: "The Free Exercise Clause 'protect[s] religious observers against unequal treatment.'"[63] "[F]irst and foremost, *Smith-Lukumi* is about objectively unequal treatment of religious and analogous secular activities."[64]

2. A Law Is Not Generally Applicable if Exceptions or Coverage Gaps Exempt Analogous Secular Conduct

A law is not generally applicable if, on its face or in practice, it fails to regulate some or all secular conduct that undermines the government interests allegedly served by regulating religion. It

46 Washington v. Davis, 426 U.S. 229, 246 (1976).

47 Personnel Administrator v. Feeney, 442 U.S. 256, 279 (1979).

48 471 U.S. 222, 228-29 (1985).

49 *Lukumi*, 508 U.S. at 532.

50 494 U.S. at 884.

51 374 U.S. 398 (1963).

52 450 U.S. 707 (1981).

53 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986) (plurality opinion)).

54 *Id.*

55 *Id.*

56 508 U.S at 535-37.

57 *Supra*, Section III.A.

58 508 U.S. at 543-44.

59 *Id.* at 543.

60 App.28a-29a.

61 508 U.S. at 543.

62 *Id.*

63 *Lukumi*, 508 U.S. at 542 (quoting Hobbie v. Unemp't App. Comm'n, 480 U.S. 136, 148 (1987) (Stevens, J., concurring) (alteration by the Court)).

64 Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 Harv. L. Rev. 155, 210 (2004).

does not matter whether there are good reasons for secular exceptions, whether secular exceptions are explicitly stated in the text of the challenged law, whether there are few such exceptions, or whether there is only one. What matters is whether a secular exception or gap in coverage undermines the state's asserted interests to the same or a similar degree as the burdened religious conduct.

a. Reasonableness of the Secular Exceptions Does Not Matter

The stocking and delivery rules in *Stormans* have been interpreted to prohibit failure to stock or deliver a drug for religious reasons, but they explicitly exempt several secular reasons for not stocking or delivering a drug, and implicitly exempt all or nearly all remaining secular reasons. The Ninth Circuit recognized that Washington's rules "carve out several enumerated exemptions,"[65] yet it held these rules to be generally applicable.[66] The Ninth Circuit decided that business reasons for not stocking or delivering drugs make sense, and therefore do not detract from the general applicability of the rules. According to the Ninth Circuit, "the enumerated exemptions are necessary reasons … that … allow pharmacies to operate in the normal course of business."[67] This reasoning implies that business reasons for not stocking a drug are more deserving of the state's respect than religious reasons.

This is precisely the preference for secular reasons for an exemption over religious reasons that *Smith* and *Lukumi* prohibit. In *Smith*, the Court said that *Sherbert* and *Thomas* stand for the "proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[68] That proposition does not turn on whether secular reasons are "better" than religious ones, a judgment that government is generally not permitted to make. In *Sherbert*, the narrow exemption for "good cause"[69] was a perfectly sensible exemption to the general requirement of accepting available work. But this narrow and justified secular exemption still required a corresponding religious exemption—or a compelling reason for lacking one. It was not the bad policy of the secular exemption that mandated a religious exemption; it was the secular exemption's mere existence.

Similarly in *Lukumi*, the city argued that its permitted secular reasons for exemptions from the ban on killing animals were "important," "obviously justified," and "ma[de] sense."[70] But the quality of the secular exceptions did not make the ordinances generally applicable. Secular exceptions defeat general applicability no matter how important, justified, or sensible they are. And when a law is not generally applicable, it must pass strict scrutiny. If the government thinks it has a good reason for treating secular acts more favorably than analogous religious acts, it must present that reason as part of the compelling interest analysis. In *Stormans*, the Ninth Circuit erroneously moved that potential issue from the back of the case to the front—from compelling interest to general applicability—and applied an unspecified but much lower standard of review.

The Ninth Circuit also said that the state's exemptions for business reasons were "necessary."[71] The flipside of this reasoning is an assumption that religious reasons are unnecessary—even if the religious practice is absolutely necessary to the believer. The necessity argument flouts a specific holding in *Lukumi*. The ordinances in that case prohibited only unnecessary killings. The city argued that most secular killings were necessary but that religious killings were not.[72] The Court rejected this necessity standard: "[T]he ordinance's test of necessity devalues religious reasons for killing by judging them to be of lesser import than nonreligious reasons."[73] Yet the Ninth Circuit applied the same necessity test that the Supreme Court invalidated in *Lukumi*.

The regulations at issue in *Stormans* are subject to strict scrutiny under *Sherbert*, *Thomas*, *Smith*, and *Lukumi*, regardless of how the secular exceptions compare in judicially perceived value to religious exceptions. The presence of exemptions for analogous secular conduct, no matter how important, precludes a finding that the rules are generally applicable. The Ninth Circuit failed to understand that it could not dismiss religious exercise—a core constitutional right—as unnecessary.

b. Whether Exempted Secular Conduct Is Analogous Depends on the State's Asserted Interests, Not on the Reasons for the Conduct

The requirement that analogous religious and secular conduct be treated equally depends on the identification of analogous secular conduct. Because the whole point of the general applicability standard is to treat religious reasons for acting equally with secular reasons, judges cannot identify analogous conduct by assessing the comparative merits of religious and secular reasons. *Lukumi* clearly stated what makes religious and secular conduct analogous: that the "nonreligious conduct … endangers these [state] interests in a similar or greater degree" than the burdened religious conduct.[74]

The many exempted business reasons not to stock or deliver a drug affect the state's asserted interests in the same way as a religious decision to the same effect: whatever the pharmacy's reasons, the drug is not stocked or delivered, and customers cannot get the drug at that particular pharmacy. Cumulatively, business reasons endanger the state's interests to a vastly greater degree than religious reasons because the state accepts such a wide range of business reasons (including reasons the district court viewed as mere matters of convenience)[75] and because so many more pharmacies act on business reasons. Even with respect to the drugs at issue in *Stormans*, the vast majority of pharmacies that

65 794 F.3d at 1080.

66 *Id.* at 1079–84.

67 *Id.* at 1080.

68 494 U.S. at 884.

69 374 U.S. at 400-01.

70 508 U.S. at 544.

71 794 F.3d at 1080.

72 508 U.S. at 537.

73 *Id.*

74 *Id.* at 543.

75 844 F. Supp. 2d at 1190.

choose not to stock emergency contraception do so for secular reasons, not religious reasons.[76]

c. Secular Exceptions Make a Law Not Generally Applicable, Even if They Are Not Stated in the Law's Text

Unequal treatment of religious and secular conduct requires strict scrutiny, whether or not that inequality is reflected in the text of the challenged law. *Lukumi* expressly rejected the city's contention that judicial "inquiry must end with the text of the law at issue."[77] In addition to evaluating the text of the ordinances, the Court reviewed an array of other sources to identify analogous secular conduct left unregulated.[78]

The Ninth Circuit departed from this precedent by making selective and inconsistent use of the drafting, interpretive, and enforcement history of the regulations in *Stormans*. When considering whether the regulations would prohibit conscience-based refusals to stock and deliver emergency contraception, the court rightly went beyond the bare text of the regulations and relied on the history of the regulations and the law's "effect … in its real operation."[79] But when considering whether the regulations allowed secular exemptions, the court myopically focused on the bare text of the regulations, attempting to explain away the interpretation revealed by the enforcement history,[80] and refusing to consider the overwhelming evidence of the drafting history.[81] Had the Ninth Circuit followed the Supreme Court's example and gone beyond the bare text, it would have concluded—as did the district court in careful and detailed findings of fact and conclusions of law—that the regulations prohibit conscience-based refusals to stock and deliver drugs, but almost nothing else.[82]

The Ninth Circuit said it was irrelevant that the rules had never been enforced against anyone but the plaintiffs because the Pharmacy Board followed a policy of "complaint-driven enforcement."[83] There had been "many complaints" against plaintiff, and no complaints against anyone else.[84] This reasoning provides a formula for discriminatory enforcement. If governments can write vague rules that leave accepted understandings unstated, or that leave much to the discretion of enforcement authorities or activists among the public, and courts then ignore the extra-textual understandings and the actual or intended exercise of discretion, government would be completely free to treat religious and secular practices unequally. The Free Exercise Clause would protect only against unsophisticated governments that explicitly state what they are doing. *Lukumi* made clear that the reach of the Free Exercise Clause is not so limited.

d. Rules That Apply to Some But Not All Analogous Secular Conduct Are Not Generally Applicable

Many laws burden some but not all analogous secular conduct. If the exempted secular conduct undermines the state's interest to the same degree as the burdened religious conduct, such a law is not generally applicable, notwithstanding the fact that some secular conduct is also burdened.

An illuminating example of this principle is *Rader v. Johnston*, one of the early cases to apply the *Smith-Lukumi* test.[85] *Rader* was a challenge to the University of Nebraska-Kearney's rule that freshmen were required to live in the dormitory.[86] Rader sought permission to live in a Christian group house instead, because alcohol, drugs, and pre-marital sex were prevalent in the dormitories.[87] He was denied an exemption from the rule.[88] The rule contained categorical exemptions for students older than nineteen, married students, and students living with their parents.[89] These categorical exemptions had a sound basis, but they treated students' secular needs more favorably than Rader's religious needs. There was also an explicit exception for individual hardship that was generously interpreted in secular cases, but not in Rader's case.[90] Discovery revealed that there were additional individualized exceptions in unwritten administrative practice.[91] When all exceptions were accounted for, only sixty-four percent of freshmen were actually required to live in the dormitory.[92] Although the rule still burdened a majority of freshmen, the court held that the rule was not generally applicable because the state had created a "system of 'individualized government assessment' of the students' requests for exemptions," but "refused to extend exceptions" to freshmen desiring to live outside the dormitories "for religious reasons."[93] There are other decisions to similar effect, both in the Ninth Circuit[94] and elsewhere.[95]

76 *Id.*

77 508 U.S. at 534.

78 *See id.* at 526, 537, 539, 544-45 (considering numerous sections of Florida statutes); *id.* at 543 (fishing); *id.* at 544-45 (garbage from restaurants).

79 794 F.3d at 1076 (quoting *Lukumi*, 508 U.S. at 535 (ellipsis by Ninth Circuit)).

80 *Id.* at 1080–81.

81 *Id.* at 1079.

82 844 F. Supp. 2d at 1190.

83 794 F.3d at 1083.

84 *Id.*

85 924 F. Supp. 1540 (D. Neb. 1996).

86 *Id.* at 1543.

87 *Id.* at 1544-46.

88 *Id.* at 1548.

89 *Id.* at 1546.

90 *Id.* at 1546-47

91 *Id.* at 1547.

92 *Id.* at 1555.

93 *Id.* at 1553.

94 *See* Alpha Delta Chi v. Reed, 648 F.3d 790, 804 (9th Cir. 2011) ("[G]iven the evidence that San Diego State may have granted certain groups exemptions from the policy, there remains a question whether Plaintiffs have been treated differently because of their religious status."); Canyon Ferry Road Baptist Church v. Unsworth, 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (concluding that restrictions on church's speech on referendum issue were not neutral and generally applicable where there were exceptions for newspapers, magazines, and broadcasters).

95 *See, e.g.,* Ward v. Polite, 667 F.3d 727, 738-40 (6th Cir. 2012) (Sutton, J.) (holding that rule preventing counseling student from referring gay

e. A Law Is Not Generally Applicable if It Contains Even a Single Secular Exception That Undermines the State's Regulatory Purpose

A single secular exception triggers strict scrutiny if it undermines the state interest allegedly served by regulating religious conduct. This is the holding of a well-reasoned opinion by then-Judge Alito, writing for the Third Circuit in *Fraternal Order of Police v. City of Newark*.[96] In *Newark*, two Muslim police officers whose religious beliefs required them to grow beards challenged a city policy requiring officers to be clean shaven. Though touted as a "zero tolerance" policy, it had two exemptions—one for officers with medical conditions, and one for officers working undercover. The undercover exemption did not trigger strict scrutiny, because the department's interest in a uniform appearance did not apply to undercover officers.[97] Indeed, uniform appearance would have wholly defeated the purpose of having undercover officers. But the medical exemption made the rule not generally applicable because it undermined the city's interest in the uniform public appearance of its police officers in the same way as would a religious exemption.[98]

The Eleventh Circuit reached a similar result in *Midrash Sephardi, Inc. v. Town of Surfside*,[99] which applied compelling interest review to a zoning ordinance excluding religious assemblies from the business district. The stated goal of the ordinance was protecting "retail synergy" in the business district.[100] The court found that a single exemption for lodges and private clubs "violates the principles of neutrality and general applicability because private clubs and lodges endanger Surfside's interest in retail synergy as much or more than churches and synagogues."[101]

The unemployment compensation cases—*Sherbert* and *Thomas*—can also be viewed in this light: a single exception for "good cause" required strict scrutiny of the state's failure to provide a religious exception. *Newark* and *Midrash Sephardi* each involved a single categorical exception; the unemployment cases involved a single provision for individualized exceptions. Just one of either kind of exception, if it undermines the state's asserted interests, results in unequal treatment of persons who need a religious exception.[102] The question is not how many secular analogs are regulated. The question is whether a single secular analog is *not* regulated. Under *Smith* and *Lukumi*, the constitutional right to free exercise of religion includes a right to be free from regulation of religious conduct to the same extent that the most favored analogous secular conduct is free from regulation (or the government must show a compelling interest it is achieving by treating religion differently and that the different treatment of religion is the only way to achieve it). Treating religious exercise like the least favored, most heavily regulated secular conduct does not satisfy the First Amendment.

3. There Are Important Reasons for Strictly Interpreting and Enforcing the General Applicability Requirement

These rules about the general applicability requirement, including the rule that a single secular exception defeats general applicability, are not arbitrary. They are deeply rooted in the underlying rationale of the general applicability requirement.

a. Secular Exceptions Without Religious Exceptions Imply a Value Judgment About Religion

The *Newark* opinion reasoned that the medical exception "indicates that the Department has made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."[103] The Eleventh Circuit adopted this reasoning in *Midrash Sephardi*.[104] This point about value judgments also appears in *Lukumi*, which said that the ordinances' necessity test "devalues religious reasons for killing [animals] by judging them to be of lesser import than nonreligious reasons."[105]

The point deserves further elaboration. The prohibition against value judgments does not only apply to cases in which the state makes an explicit value judgment, or where state officials consciously compare religious and secular conduct and deem the secular conduct more worthy—although both

counselee to another counselor was not neutral and generally applicable where referrals were permitted for other values conflicts and for failure to pay); Blackhawk v. Pennsylvania, 381 F.3d 202, 206-12 (3d Cir. 2004) (Alito, J.) (holding that a permit fee for keeping wild animals, with exceptions for zoos, circuses, hardship, and extraordinary circumstances, was not generally applicable); Axson-Flynn v. Johnson, 356 F.3d 1277, 1297-99 (10th Cir. 2004) (Ebel, J.) (holding that one exception given to student of another faith, and earlier exceptions given to plaintiff, raised triable issue of whether defendant maintained a system of individualized exceptions); Mitchell County v. Zimmerman, 810 N.W.2d 1, 15-16 (Iowa 2012) (unanimously holding that prohibition of buggies with steel protuberances on wheels was not neutral and generally applicable where county failed to prohibit other devices that also damaged roads); *see also* Horen v. Commonwealth, 479 S.E.2d 553, 556-57 (Va. Ct. App. 1997) (holding that ban on possession of certain bird feathers was not neutral, where it contained exceptions for taxidermists, academics, researchers, museums, and educational institutions); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885-86 (D. Md. 1996) (holding landmarking ordinance subject to strict scrutiny where it had exceptions for substantial benefit to city, financial hardship to owner, and best interests of community).

96 170 F.3d 359 (3d Cir. 1999).

97 *Id.* at 366.

98 *Id.* at 364-66.

99 366 F.3d 1214, 1235 (11th Cir. 2004).

100 *Id.* at 1234-35.

101 *Id.* at 1235.

102 *Smith* is consistent as well. At first glance, it appears that Oregon permitted a secular exception by allowing possession of a "controlled substance" pursuant to a doctor's prescription. 494 U.S. at 874. But "controlled substance" covers a wide range of drugs, and Oregon confirmed that the exception did not apply to Schedule I drugs, including peyote, Brief for Petitioner 14, 14 n.6, which is presumably why the Supreme Court described the prohibition as "across-the-board," 494 U.S. at 884. The case concerned the prohibition of peyote, and there were no secular exceptions. It is therefore unnecessary to consider whether medical use under a physician's supervision would have undermined the state's interests to the same extent as religious use.

103 170 F.3d at 366.

104 366 F.3d at 1235.

105 508 U.S. at 537.

Washington and the Ninth Circuit did that in *Stormans*.[106] More commonly, the value judgment emerges from a series of separate comparisons. In *Newark*, the exemption for medical needs showed that the city considered medical needs more important than its interest in uniformity. And the refusal to exempt religious obligations showed that the city considered its interest in uniformity more important than its officers' religious obligations. The transitive law applies; if medicine is more important than uniformity, and uniformity is more important than religion, then medicine is more important than religion. Whether explicit or implicit, that is the value judgment that is suspect under the Free Exercise Clause and that will therefore trigger strict scrutiny.

In the same way, the Ninth Circuit held that Washington could decide that business and convenience needs are more important than its interest in making emergency contraception available in every pharmacy, but that emergency contraception in every pharmacy is more important than the religious needs of conscientiously objecting pharmacists. With or without a conscious or direct comparison, both Washington and the Ninth Circuit deemed business and convenience needs more important than religious needs.[107] This is precisely the kind of value judgment condemned by *Lukumi*, *Newark*, and *Midrash Sephardi*.

b. Requiring General Applicability Provides Vicarious Political Protection for Religious Minorities

The requirement that burdensome laws and regulations be generally applicable is an implementation of Justice Jackson's much-quoted observation that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."[108] Regulation that "'society is prepared to impose upon [religious groups] but not upon itself'" is the "precise evil the requirement of general applicability is designed to prevent."[109] Small religious minorities will rarely have the political clout to defeat a burdensome law or regulation. But if that regulation also burdens other, more powerful interests, there will be stronger opposition and the regulation is less likely to be enacted. Burdened secular interests provide vicarious political protection for small religious minorities.

"Even narrow secular exceptions rapidly undermine" this vicarious political protection.[110] If secular interest groups burdened by the regulation get themselves exempted, they have no reason to oppose the regulation, and religious minorities are left standing alone. That is plainly what happened in Washington: the groups seeking to suppress conscientiously objecting pharmacies were careful at every stage not to threaten any other pharmacy's secular reasons for failing to stock and deliver drugs. With its secular interests protected, and with the Pharmacy Board threatened into submission by the governor's office, the industry abandoned its defense of the few pharmacies with objections based on conscience. This concern with vicarious political protection is the deepest rationale for the rule that even a single secular exception, if it undermines the asserted reasons for the law, undermines general applicability and therefore triggers strict scrutiny.

IV. Conclusion

The Ninth Circuit treated the *Stormans* case as unremarkable, finding that the challenged regulations had just some secular exemptions, and then holding that if there were good reasons for the secular exemptions, they did not undermine the regulations' general applicability. This result is not only wrong, it is in conflict with results reached by other circuit courts. The *Stormans* case is therefore a proper vehicle for the Supreme Court to give guidance to lower courts.

The Ninth Circuit's opinion referenced one fact that by itself should have put this case far down the path to strict scrutiny: "The rules require pharmacies to deliver prescription medications, but they also carve out several enumerated exemptions."[111] Yet instead of asking whether any of these exemptions undermined the state's interest in delivery of drugs, the Ninth Circuit engaged in a lengthy effort to explain away those secular exemptions, concluding at one point that "the rules' delivery requirement applies to *all* objections to delivery that do not fall within an exemption."[112] The court's italicized "all" is entirely circular; it just means the law applies to everything it applies to. And because the court intended to refer only to explicit exemptions, the statement is also inaccurate. The district court found that there were many exemptions not stated in the regulations' text.[113]

Courts need not engage in such mental gymnastics. An unambiguous ruling from the Supreme Court, setting forth more explicitly what it indicated in *Smith* and *Lukumi*, will ensure that they do not. A quarter century after *Smith* and *Lukumi*, it is time.

106 *Supra,* Section IV.B.2.a.

107 794 F.3d at 1080.

108 Railway Express Agency v. City of New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

109 *Lukumi*, 508 U.S. at 545-46 (quoting Florida Star v. B.J.F., 491 U.S. 524, 542 (1989) (Scalia, J., concurring)).

110 Laycock, *supra* note 64 at 210.

111 794 F.3d at 1080.

112 *Id.* at 1077 (emphasis in original).

113 844 F. Supp. 2d at 1194.

The FCC Threatens the Rule of Law: A Focus on Agency Enforcement and Merger Review Abuses

By Randolph J. May & Seth L. Cooper

Note from the Editor:

This article discusses enforcement and merger review activities of the Federal Communications Commission and argues that they undermine important rule of law principles.

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• FCC and United States' Respondents' Brief, U.S. Telecom Assoc. v. Fed. Commc'n Comm'n, No. 15-1063 (DC Cir. Sept. 14, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-335258A1.pdf.

• Statement of Chairman Tom Wheeler, Re: TerraCom, Inc. and YourTel America, Inc., Notice of Apparent Liability for Forfeiture, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A2.pdf.

• Remarks of Jon Sallet, Federal Communications Commission General Counsel, Telecommunications Policy Research Conference, *The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews* (Sept. 25, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-335494A1.pdf.

• Chairman Tom Wheeler, Press Conference Re: Open Internet Order (Feb. 26, 2015) (video), *available at* http://www.c-span.org/video/?324473-3/fcc-news-conference-open-internet-rules.

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Introduction

"The highest morality almost always is the morality of process," according to the late eminent Yale Law professor Alexander Bickel.[1] Professor Bickel's assertion offers a useful starting point for some thoughts on the relationship of proper process to commonly accepted rule of law norms. More specifically, the focus of this article is the handling of certain process issues by the Federal Communications Commission ("FCC" or "Commission") in the context of these accepted rule of law norms. There are many candidates from which to choose in thinking about FCC process reform and the rule of law. But the focus of this article is on the Commission's enforcement and merger review activities. It is hoped that this discussion will provide a further impetus for process reform at the agency.[2]

At the outset, it is useful to explain what this article means by "process" and "rule of law." By process, this article refers to the procedure or mechanics employed by the agency to reach a decision, as opposed to the decision's pure substance (although process often affects substance). For example, providing adequate notice so that the public has a meaningful opportunity to comment in a Commission rulemaking is a matter of process. Requiring relevant materials to be included in the record so that the public has an adequate opportunity to comment on them is a matter of process.

Maintenance of a rule of law regime requires adherence to certain process norms. In the context of constitutional and administrative law, these norms often are subsumed under the expression "due process of law." In his famous concurrence in *Youngstown Sheet and Tube Co. v. Sawyer*, Justice Robert Jackson explicitly invoked the Constitution's Due Process Clause and combined it with a famous adage when he declared, "there is a

1 Alexander M. Bickel, The Morality of Consent 123 (1975).

2 I (Randolph J. May) have published literally dozens of articles addressing FCC process reform. And I (May) have been privileged to have been invited to testify three times in recent years before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Communications and Technology, in hearings on FCC process reform. Some of the material in this article is drawn from ideas presented in testimony on these three occasions. *See* Testimony of Randolph J. May, Hearing on "Reforming FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, June, 22, 2011, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_Hearing_on_FCC_Reform_-_June_22,_2011.pdf; Testimony of Randolph J. May, Hearing on "Improving FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, July 11, 2013, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_FCC_Reform_-_071113.pdf; Testimony of Randolph J. May, Hearing on "FCC Reauthorization: Improving Commission Transparency – Part II" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, May 15, 2015, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_FCC_Process_Reform_-_May_2015_Final_051415.pdf.

principle that ours is a government of laws and not of men, and that we submit ourselves to rulers only if under rules."[3]

What does it really mean to have a government of laws, not of men? To submit to rulers only if under rules? In his instructive book, *The Rule of Law in America*, Ronald Cass defined the elements of the rule of law as: (1) a system of binding rules; (2) of sufficient clarity, predictability, and equal applicability; (3) adopted by a valid governing authority; and (4) applied by an independent authority.[4] In the same vein, Friedrich Hayek, in his famous work *The Road to Serfdom*, declared that the rule of law "means the government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to see with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."[5] For the Federal Communications Commission to conform to the rule of law, it cannot regulate the affairs of private parties subject to its authority or sanction them for their conduct in the absence of rules that are fixed, predictable, and knowable in advance. By this standard, the FCC often falls short.

I. The FCC's Enforcement Activities

The FCC often contravenes rule of law norms in making and enforcing its rules. Recently, the Commission has assumed the power to impose sanctions on private parties for actions these parties could not have known in advance to be unlawful. This conduct by the agency violates fundamental rule of law principles because the agency is penalizing regulated parties without adopting knowable, predictable rules in advance.

A. The FCC's Open Internet Order

The most consequential and controversial action taken by the FCC in 2015 was its adoption of the *Open Internet Order*.[6] The *Open Internet Order* imposed internet regulations, often referred to as "net neutrality" regulations.[7] At the time the order was adopted, FCC Chairman Tom Wheeler stated that it would give consumers, innovators, and entrepreneurs the protections they deserve, "while providing certainty for broadband providers and the online marketplace."[8] There are many substantive problems with the *Open Internet Order* as a matter of policy and law, but this paper is not intended to rehearse them all here.[9] Rather, this paper will show that one key aspect of the agency's order is particularly troublesome from a rule of law perspective. Contrary to Chairman Wheeler's assertion, the order does not provide certainty in this key respect. Indeed, it generates uncertainty by its very nature, which creates a rule of law problem with regard to the order's enforcement.

After establishing what the Commission calls three "bright-line" rules,[10] the *Open Internet Order* sets forth a general conduct standard that the Commission itself calls a "catch-all" standard.[11] This catch-all standard provides that an internet service provider "shall not unreasonably interfere with or unreasonably disadvantage" end users or edge content or application providers.[12] The elastic nature of this catch-all gives FCC officials nearly unbounded discretion to determine whether an internet provider should be punished for violating the rule. The problem, of course, is that the catch-all provision—grounded as it is only in "reasonableness"—does not provide, in advance, a knowable, predictable rule consistent with due process and rule of law norms.[13] The operation of broadband networks involves intricate design trade-offs and meticulous engineering decisions, the details of which cannot be easily subsumed within a general "reasonableness" standard. The FCC has no common-law of broadband network management to draw upon in order to establish clear, knowable, predictable, and equally applied rules of conduct. And the fact that the entire internet ecosystem is so dynamic, with business models changing at a fast-paced rate in response to quickly evolving consumer demands and technological developments, compounds the difficulty confronting internet service providers. As they contemplate new services and features to distinguish their offerings from their competitors, internet providers are put in the position of guessing whether the Commission's view of reason-

3 343 U.S. 579, 646 (1952). *See also* Constitution of Massachusetts, Declaration of Rights, Article 30 (1780); David Hume, Essays, Moral, Political, and Literary, reprinted in Eugene F. Miller (ed.) 94 (1985).

4 Ronald A. Cass, The Rule of Law in America 4 (2001).

5 Friedrich A. Hayek, The Road to Serfdom 80 (1944).

6 Protecting and Promoting the Open Internet, *Report and Order on Remand and Declaratory Ruling and Order* ("*Open Internet Order*"), FCC 15-24, 30 FCC Rcd 17905 (2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A1.pdf.

7 *See Open Internet Order*. Even though the FCC decided a few years ago to switch terminology from "net neutrality" to "Open Internet," many observers continue to refer to the object of the Commission's regulatory desires in the *Open Internet* proceeding as "net neutrality" regulation.

8 Statement of Chairman Tom Wheeler, *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, released February 26, 2015, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A2.pdf.

9 For a critique of the order as a matter of policy, see Randolph J. May, *Thinking the Unthinkable: Imposing the 'Utility Model' on Internet Providers*, Perspectives from FSF Scholars (Sept. 29, 2014), *available at* http://freestatefoundation.org/images/Thinking_the_Unthinkable_092914.pdf. For a critique of the order as a matter of law, see Randolph J. May, *Why Chevron Deference May Not Save the FCC's Open Internet Order – Part 1*, Perspectives from FSF Scholars (April 23, 2015), *available at* http://freestatefoundation.org/images/Why_Chevron_Deference_May_Not_Save_the_FCC_s_Open_Internet_Order_-_Part_I_042315.pdf.

10 *Open Internet Order*, at paras. 14-19 (These rules prohibit broadband internet service providers from "blocking" or "throttling" internet traffic or engaging in "paid prioritization."). Even these supposed bright-line prohibitions will not be free from ambiguities as to their meaning. Over time, the boundaries of the bright-line rules most likely will be tested and defined—and redefined—in litigation. But for the sake of argument, let's assume that the three prohibitions will promote certainty. This is definitely not the case for the fourth prohibition, as this paper intends to explain.

11 *Id.* at para. 21.

12 *Id.*

13 The Commission provided what it called a "non-exhaustive" list of seven factors that it said it would use to assess the reasonableness of internet provider practices. But highlighting the inherent elasticity of the catch-all provision, the Commission emphasized that, in addition to the non-exhaustive list, "there may be other considerations relevant to determining whether a particular practice violates the no-unreasonable interference/disadvantage standard." *Id.* at para. 138.

ableness will comport with their own. This surely is not a recipe for the "permissionless innovation" regime that FCC Chairman Wheeler claims to be supporting.[14]

Compounding these rule of law problems, the Commission delegated authority to enforce the catch-all general conduct standard, at least in the first instance, to its Enforcement Bureau staff. Of late, this staff has been especially aggressive in imposing large fines on regulated parties for actions that arguably were not known in advance to be unlawful.[15] The Commission also delegated authority to the Enforcement Bureau staff to establish a cumbersome, complex process by which private parties can seek "advisory opinions" that may not be binding in any event.[16]

Because of the open-ended nature of the *Open Internet Order* and the enforcement plan, it is difficult to accept at face value Chairman Wheeler's claim that the FCC promotes certainty. Instead, the new rules, especially the catch-all provision, likely will make it difficult for regulated parties to know in advance whether their business practices or technical operations subsequently will be determined to violate the agency's regulations and whether they will be penalized. In this respect, the *Open Internet Order* is inconsistent with accepted due process and rule of law principles.

B. Individual Enforcement Actions

Recently, several of the FCC's enforcement actions have posed similar rule of law issues in that regulated parties could not reasonably have known in advance that Commission officials would subsequently determine that they had acted unlawfully. In June 2015, the Commission proposed imposing a $100 million fine on AT&T[17] for allegedly violating a "transparency" rule adopted as part of the agency's 2010 *Open Internet Order*.[18] The Commission claims that AT&T Mobility violated the 2010 transparency rule by (1) using the allegedly misleading and inaccurate term "unlimited" in the description of its mobile data plan even though subscribers were subjected to speed reductions after using a set amount of data; and (2) failing to disclose that the speed reductions applied to the "unlimited" data plan once customers reached the data threshold.[19] On the surface, the Commission's claim seems plausible, but closer examination reveals otherwise. The agency was aware of AT&T's targeted speed-reducing measures, which AT&T asserts were permissible and reasonable network management practices to address network congestion. And the company had advised its subscribers of its speed-throttling practices through various means of disclosure. Even though the Commission was aware of AT&T's practices, it had given no indication that reducing speeds for network management purposes was inconsistent with offering an "unlimited" data plan under the 2010 transparency rule.

The 2015 *Open Internet Order*, presently subject to challenge in the D.C. Circuit,[20] adopted a bright-line prohibition on throttling as well as a broad and stringent transparency rule. But the 2010 transparency rule under which the FCC is seeking to fine AT&T did not. The FCC appears not to have given AT&T fair notice that, by reducing customers' speeds the way it did, or by describing its data plan as "unlimited," the company would be violating the 2010 rule. Fair notice, provided by the terms contained in a statute or regulation, is a critical aspect of knowable, clear, and predictable rules. To conform to the rule of law, the Commission cannot penalize AT&T for not predicting that the Commission would seek to enforce its 2010 *Open Internet* rules in a more stringent way, akin to the regulations it later adopted in 2015.

In October 2014, the Commission's Enforcement Bureau proposed a $10 million fine on TerraCom, Inc. and YourTel America, Inc., two relatively small telephone companies, for a data breach that exposed certain personally identifiable information to unauthorized access.[21] The Commission proposed the fines relying on Communications Act Section 222(a) provisions and agency regulations involving proprietary information specifically tied to telephone service.[22] Those provisions of the Act and regulations had never been construed to provide for sanctions for failing to employ "reasonable data security practices" to protect consumers' personally identifiable information.[23] Although breaches are matters of real concern, neither the Communications Act nor the Commission's rules specifically imposes such a duty con-

14 Statement of Chairman Tom Wheeler, *Open Internet Order*, Gen Docket No. 14-28, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-24A2.pdf ("These enforceable, bright-line rules assure the rights of Internet users to go where they want, when they want, and the rights of innovators to introduce new products without asking anyone's permission."); John Eggerton, *FCC's Wheeler and the 'Common Good' Standard*, Broadcasting & Cable (Nov. 4, 2015) ("Wheeler said the new rules were all about stimulating 'permissionless innovation.'").

15 *See infra* at I.B. *See also* Margaret Harding McGill, *GOP Criticism Unlikely to Deter Aggressive FCC Enforcement*, Law 360 (Nov. 25, 2015).

16 *Id*. at paras. 228-239. The establishment of the elaborate new regime for seeking advisory opinions regarding the lawfulness of proposals for new services is a good indication that, at the end of the day, "permissionless innovation" won't prevail.

17 Notice of Apparent Liability for Forfeiture and Order, AT&T Mobility, LLC, File No. EB-IHD-14-000117505, released June 17, 2015, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-63A1.pdf.

18 Most of the regulations adopted as part of the FCC's 2010 *Open Internet Order* were invalidated by the U.S. Court of Appeals for the D.C. Circuit. *See* Preserving the Open Internet, Report and Order, 25 FCC Rcd 17905 (2010) (2010 *Open Internet Order*), *aff'd in part, vacated and remanded in part sub nom.* Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014). But the transparency rule in the 2010 order was affirmed. The 2015 *Open Internet Order* adopted an even more expansive transparency rule than the 2010 rule.

19 Notice of Apparent Liability, AT&T Mobility, LLC, at para. 2

20 United States Telecom Ass'n v. FCC, No. 15-1063 (D.C. Cir. filed Mar. 23, 2015).

21 Notice of Apparent Liability for Forfeiture, TerraCom, Inc. and YourTel America, Inc., File No. EB-TCD-13-00009175, released October 24, 2014, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A1_Rcd.pdf. Rather than litigate, the companies ultimately settled the matter in July 2015 by agreeing to pay a $3.5 million fine. *See TerraCom and YourTel to Pay $3.5 to Resolve Consumer Privacy & Lifeline Investigations*, FCC News (July 9, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-334286A1.pdf.

22 *See* 47 U.S.C. §222(a); Notice of Apparent Liability for Forfeiture, TerraCom, Inc. and YourTel America, Inc., at paras. 14-28.

23 *Id*. at para 2. *See also* Seth L. Cooper, *FCC's Internet Privacy Grab Unsupported by Law*, FSF Blog (Oct. 23, 2015), *available at* http://freestatefoundation.blogspot.com/2015/10/fccs-internet-privacy-power-grab.html.

cerning personally identifiable information. In dissenting from the proposed fine, Commissioner Ajit Pai aptly declared, "The government cannot sanction you for violating the law unless it has told you what the law is."[24] More recently, the Commission imposed a $595,000 fine on Cox Communications for failing to prevent a data breach by a third-party hacker.[25] The Enforcement Bureau order stated that "at the time of the breach, Cox's relevant data security systems did not include readily available measures for all of its employees or contractors that might have prevented the use of the compromised credentials."[26] Like TerraCom, YourTel, and others, Cox settled the case rather than litigate, even though it was not obvious that the Communications Act and agency regulations allegedly violated are intended to authorize the agency to sanction firms that are themselves victims of third-party hack attacks.[27]

It is not surprising that companies closely regulated by the FCC choose to settle cases based on questionable assertions of agency enforcement authority rather than endure lengthy costly litigation that risks incurring the disfavor of their regulator. And it may not be surprising that government officials have shown such eagerness to exercise enforcement authority in instances in which regulated parties have not been provided fair warning that their conduct violates any law or regulation. What *is* surprising is that so little public attention has been paid to these FCC actions that contravene basic rule of law principles.

II. The FCC's Merger Review Process

The way the Commission conducts its reviews of proposed mergers presents serious process and rule of law problems akin to those presented by its enforcement activities. These problems are grounded in the Commission's abuse of nearly unbounded administrative discretion to impose conditions on transactions proposing transfers or assignments of Commission-issued licenses or authorizations that are not knowable or predictable.[28] The way the Commission exercises its discretion in reviewing merger proposals frequently leads to a form of "regulation by condition" that results in merger applicants being subjected to regulatory mandates that apply uniquely to them and not to similarly situated parties. The conditions attached to the agency's approval of the proposed merger are said to be proffered "voluntarily" by the applicants as part of the review process. This often unseemly merger review process is ripe for reform.[29]

Under the Communications Act, the Commission reviews mergers to determine whether the proposed transactions are consistent with the "public interest."[30] A component of this public interest review usually involves examination of the competitive impacts of the proposed transaction.[31] But, as the Commission often makes clear, the public interest analysis is not limited to examining the proposal's competitive effects. In the agency's view, it necessarily encompasses the "broad aims of the Communications Act."[32] By construing the vague public interest standard so broadly, the Commission assumes largely unconstrained power to approve or disapprove mergers—or, more to the point here, to approve the transaction subject to conditions.

Armed with such an indeterminate standard, the Commission holds a proverbial Sword of Damocles over the merger applicants—and the agency has not been shy about using this powerful weapon to extract so-called "voluntary" conditions from merger applicants before finally ruling on the merger. Often these voluntary conditions are not closely related to any specific competitive concerns raised by the proposed transaction, but instead involve extraneous matters. For example, in prior transaction reviews, merger applicants have volunteered the following commitments, which were then incorporated into the Commission's orders as conditions: to offer discounted rates

24 Dissenting Statement of Commissioner Ajit Pai, TerraCom, Inc. and YourTel America, Inc., *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-173A4.pdf.

25 *Cox Communications to Pay $595,000 to Settle Data Breach Investigation*, FCC News (Nov. 5, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-336222A1.pdf.

26 *Id.*

27 It is worth noting that the Federal Trade Commission, which possesses general jurisdiction under the Federal Trade Act, *see* 15 U.S.C. § 45(a), to prevent businesses from engaging in deceptive or unfair business practices, has taken an active role in investigating the recent spate of data security breaches perpetrated by hackers and acted to hold companies accountable for such breaches when it determines such action is warranted. *See, e.g.*, FTC v. Wyndham Worldwide Corp., 799 F.3d 236 (3d Cir. 2015); *see also* Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 598-606 (2014) (discussing FTC's expanding role in privacy and data security regulation).

28 Technically, the FCC does not review mergers per se; rather it reviews proposals in which applicants are seeking to transfer or assign licenses or authorizations held by the parties to a proposed merger or other form of business transaction that may not be assigned or transferred without prior Commission approval. Typically, when media companies are parties to the transaction, the agency is asked to approve the transfer of broadcast licenses pursuant to Section 310(d) of the Communications Act, 47 U.S.C. §310(d), and when telecommunications companies are involved, the agency is asked to approve the transfer of facilities authorizations pursuant to Section 214(a) of the Communications Act, 47 U.S.C. §214(a). Although the FCC is reviewing the proposed license or authorization transfer and not the merger per se, in common parlance the FCC's action is referred to as a merger review, and we will use the same convention.

29 For a call for reform of the FCC's merger review process written sixteen years ago, see Randolph J. May, *Any Volunteers?*, Legal Times (March 6, 2000). With regard to the Commission's process, the problems discussed in that essay still remain.

30 *See* 47 U.S.C. §§214(a) and 310(d).

31 To a large extent, the FCC's review of a transaction's competitive impacts duplicates the review undertaken by the antitrust authorities, whether the Department of Justice or the Federal Trade Commission. These antitrust authorities, carrying out their reviews pursuant to statutes specifically focused on competitive impacts, generally apply a rigorous economic analysis in evaluating the transaction. Thus, apart from the rule of law concerns raised here, the FCC's duplication of the DOJ's or FTC's competitive analysis raises questions concerning efficient expenditure of government and private resources.

32 Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order and Report and Order, 23 FCC Rcd 12348,12364, para. 31 (2008); News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, Memorandum Opinion and Order, 23 FCC Rcd 3265, 3277-78, para. 23 (2008).

to low-income households for certain services;[33] to advertise the availability of low-cost broadband service to low-income families through specific media channels and outreach efforts;[34] to freeze prices for certain services for a period of time;[35] to carry ten new independent program channels in a cable channel lineup;[36] to repatriate a specific number of jobs to the U.S.;[37] and to donate a specific amount of money to a non-profit or public entity which promotes public safety.[38]

However worthy such commitments may be as a matter of policy, the process used by the Commission to carry out such "regulation by condition" poses rule of law issues. First, the conditions apply only to the merger applicants and not generally or equally to similarly situated market participants. To the extent the Commission wishes to impose requirements that are not related to specific concerns raised by the merger, as a matter of equity it should do so through a generic rulemaking proceeding that would apply the requirements on an industry-wide basis. Second, the "voluntary" conditions are usually offered very late in the review process after "midnight" negotiations between Commission officials and the parties take place out of the public view,[39] and then only after the parties often have waited a year or more for Commission action. As then-FCC Commissioner Michael Powell said in connection with the FCC's review of the SBC Communications/Ameritech merger, which itself was subject to a fifteen-month review: "I do not subscribe to…the idea that a regulated party can 'voluntarily' offer and commit to broad-ranging legal obligations and penalties. There is never anything voluntary about the regulatory relationship."[40]

While the merger applicants typically submit the proffered conditions in an ex parte letter that is included in the public file, by the time the proposed conditions are made public, frequently there is little, if any, time for the public to comment. Typically, the proposed conditions are made public as an appendix to the FCC's order when the latter is publicly released. The lack of transparency associated with commitments "volunteered" at the end of a long drawn-out process is unseemly. This lack of transparency makes the merger review process a far cry from rule of law concepts of knowability, predictability, and certainty.

Furthermore, the conditions may have nothing to to do with competitive effects of the merger. The FCC has, on occasion, imposed conditions that are not "transaction-specific." The Commission's order approving Charter Communications' merger with Time Warner Cable and Bright House Networks is the latest, starkest example of this process problem. The Commission made a finding that "Charter's proposed low-income broadband program is not a transaction-specific benefit."[41] Since agency precedent forbids the Commission from imposing conditions unrelated to the effects of mergers,[42] that finding should have ended the matter. Nonetheless, the Commission "impose[d] a modified version of Charter's proposal as a condition to the transaction."[43] Although it admitted that the condition was not merger-specific, the Commission claimed "the public would benefit from programs designed to bridge the digital divide."[44] The agency-modified program is subject to Commission-imposed performance goals and agency enforcement mechanisms.[45] Commissioner Michael O'Rielly said

33 Applications of Ameritech Corp. and SBC Communications Inc., For Consent to Transfer Control of Corporations Holding Commission Licenses and Line Pursuant to 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, Memorandum Opinion and Order, CC Docket No. 98-141, released October 8, 1999, *available at* https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1999/fcc99279.txt.

34 Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Memorandum Opinion and Order, FCC 15-94, MB Docket No. 14-90, released July 28, 2015, Appendix B, at page 165; *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-94A1.pdf.

35 Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., For Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order, FCC 11-4, MB Docket No. 10-56, released January 20, 2011, Appendix A, Section IV, D, para. 1, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.

36 *Id.* at Appendix A, page 121.

37 AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, FCC 06-189, WC Docket No. 06-74, released March 26, 2007, Appendix F, *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-06-189A1.pdf.

38 *Id.* at Appendix F, page 148.

39 *See, e.g.*, *supra* note 29, May, *Any Volunteers?*; Randolph J. May, *FCC's Secret Meetings Raise Significant Process Concerns*, FSF Blog (Sept. 5, 2014), *available at* http://freestatefoundation.blogspot.com/2014/09/fccs-secret-meetings-raise-significant.html.

40 Press Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part, Re: Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and Section 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules (CC Docket No. 98-141), released October 6, 1999, *available at* https://transition.fcc.gov/Speeches/Powell/Statements/stmkp929.html.

41 Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations ("*Charter-Time Warner Cable Order*"), Memorandum Opinion and Order, FCC 16-59, MB Docket No. 15-149, released May 10, 2017, at 203, para. 452, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-784A1.pdf.

42 *See, e.g.*, Applications of AT&T Inc. and Centennial Communications Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, FCC 09-97, WT Docket No. 08-246, Memorandum Opinion and Order, released November 5, 2009, at 55, para. 133 ("AT&T-Centennial Order") (The Commission will "impose conditions only to remedy harms that arise from the transaction (i.e., transaction-specific harms)...."), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-09-97A1.pdf; Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC For Consent to Transfer Control of Licenses and De Facto Transfer Leasing Arrangements, FCC 08-258, WT Docket No. 08-95, released November 10, 2008, at 19, para. 29 (The Commission "will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction."), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-08-258A1.pdf.

43 *Charter-Time Warner Cable Order*, at 203, para. 453.

44 *Id.* at 203, para. 452.

45 *Id.* at Appendix B, at 221-223.

in dissent with respect to conditions like this: "Once delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption."[46]

There is no doubt that the FCC's process is ripe for reform. The FCC itself could reform its process by announcing that it will henceforth refrain from imposing merger conditions that are not closely related to specific concerns raised by the particular transaction under consideration.[47] In a further exercise of regulatory modesty, the Commission could announce that, instead of conducting its own largely duplicative competitive analysis of the proposed transaction, to avoid unnecessary effort and a wasteful expenditure of resources by both the government and interested private parties, it normally will rely on the competitive impact assessments performed by the Department of Justice and the Federal Trade Commission. If the Commission followed this course by narrowing the current expansive application of the public interest standard, the public still would be protected because the agency's attention then could be devoted primarily to ensuring that the merger, if approved, is consistent with all existing Communications Act provisions and regulatory requirements.[48]

The reality, however, is that the FCC is not likely to undertake these reforms itself. Consistent with the recommendations set forth above, I (Randolph J. May) testified at a June 2011 hearing on "Reforming the FCC Process" before the House of Representatives Subcommittee on Communications and Technology of the Committee on Energy and Commerce that:

> [T]he provision [in the bill under consideration] reforming the Commission's transaction review process is as important as any other in the bill in light of the abuse of the process for many years now. The agency often imposes extraneous conditions—that is, conditions not related to any alleged harms caused by the proposed transaction—after they are "volunteered" at the last-minute by transaction applicants anxious to get their deal done. The bill's requirement that any condition imposed be narrowly tailored to remedy a transaction-specific harm, coupled with the provision that the Commission may not consider a voluntary commitment offered by a transaction applicant unless the agency could adopt a rule to the same effect, would go a long way to reforming the review process.[49]

And to address the duplication of effort and unnecessary expenditure of government and private resources that now routinely occurs, I (May) testified:

> I would place primary responsibility for assessing the competitive impact of proposed transactions in the hands of the Department of Justice and the Federal Trade Commission, the agencies with the most expertise in the area. The FCC's primary responsibility then would be to ensure the applicants are in compliance with all rules and statutory requirements.[50]

While Congress has yet to pass any comprehensive FCC reform legislation that includes merger review reform provisions, the House Communications and Technology Subcommittee has laid a solid foundation for future efforts through its recent work. If the FCC fails to act on its own, then Congress should reform the merger review process. By reducing the Commission's unconstrained latitude to "regulate by condition" in a way that imposes different regulatory mandates on similarly situated market participants, this is one of the more meaningful communications policy reform measures that Congress could adopt.

III. Conclusion

There are many worthy candidates from which to choose in evaluating FCC process reform. This article focuses on two areas that are especially in need of reform because they materially affect not only the parties subject to the Commission's regulatory edicts, but public confidence in the integrity and fairness of the Commission's processes. Absent changes that bring the agency's actions in line with rule of law norms, the agency's institutional legitimacy is undermined, rendering its actions less deserving of public respect—and, in fact, less respected.

Federalist Paper No. 62 addresses the "calamitous" effects of mutable and inscrutable laws "so incoherent that they cannot be understood." The *Federalist* concludes, "Law is defined to be a rule of action; *but how can that be a rule, which is little known and less fixed*."[51] The author did not have the FCC in mind when that admonishment was written, but the FCC and the public it was created to serve would benefit if its officials would heed the *Federalist*'s injunction. At the end of the day, appreciating what Alexander Bickel called the "morality of process" will not only uphold the rule of law, but it also will lead to better communications policy.

46 *Id*. at 348 (Statement of Commissioner Michael P. O'Reilly Approving in Part, Concurring in Part, and Dissenting in Part).

47 *See* Randolph J. May, *A Modest Plea for FCC Modesty Regarding the Public Interest Standard*, 60 Admin. L. Rev. 895, 904-905 (2008).

48 *Id*. at 995.

49 Testimony of Randolph J. May, Hearing on "Reforming FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, June, 22, 2011, at 4, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_Hearing_on_FCC_Reform_-_June_22,_2011.pdf.

50 *Id*. at 5. *See also* Testimony of Randolph J. May, Hearing on "Improving FCC Process" before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives, July 11, 2013, at 7-8, *available at* http://freestatefoundation.org/images/Testimony_of_Randolph_J._May_-_FCC_Reform_-_071113.pdf.

51 *The Federalist* No. 62 (probably James Madison) (emphasis added).

Book Reviews

Dark Money, by Jane Mayer

Plutocrats United, by Richard L. Hasen

Reviewed by William R. Maurer

Note from the Editor:

This book review takes a critical look at two recent books that advocate campaign finance reform.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. In this case, the best opposing views can be found in the books themselves, and we accordingly offer links to purchase them, and to positive reviews of them. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (2016), *available at* http://www.amazon.com/Dark-Money-History-Billionaires-Radical/dp/0307970655.

• Bill McKibben, *The Koch Brothers' New Brand*, New York Review of Books (March 10, 2016), *available at* http://www.nybooks.com/articles/2016/03/10/koch-brothers-new-brand/.

• Richard L. Hasen, Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections (2016), *available at* http://www.amazon.com/Plutocrats-United-Campaign-Distortion-Elections/dp/0300212453.

• Greg Sargent, *How to rid politics of its pollution by wealthy donors?*, Washington Post (Jan. 8, 2016), *available at* https://www.washingtonpost.com/opinions/how-to-rid-politics-of-its-pollution-by-wealthy-donors/2016/01/06/74798932-a2a4-11e5-ad3f-991ce3374e23_story.html.

About the Author:

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Soviet Studies majors who graduated in 1990 do not get as much sympathy as they deserve. All those years spent working toward a goal, only to see the world change and make it irrelevant.

Jane Mayer and Richard Hasen must feel a little like those graduates. A big issue in the 2016 election was supposed to be the Koch Brothers and other purveyors of "dark money." Except for Bernie Sanders including *Citizens United*[1] in his list of all things wrong with this country, however, the national discussion has instead been dominated by things like Donald Trump's fingers and Hillary Clinton's private server. Candidates favored by large contributors, such as Jeb Bush, failed, while candidates like Donald Trump and Bernie Sanders, who explicitly disclaimed large donations during the primaries, ran effective campaigns. Charles Koch himself is even speaking of holding his nose and supporting Hillary Clinton.[2] "Dark money" was not supposed to be an afterthought.

Nonetheless, Mayer's *Dark Money: The Hidden History of the Billionaires Behind the Radical Right* and Hasen's *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*—both published in the thick of the 2016 election—are aimed directly at the issue.[3] One of these books is a valuable contribution that addresses the history of campaign finance law, the constitutional issues involved in regulating political spending, and the difficulty of creating policies that allow all Americans a voice while protecting free speech. The other is not.

Mayer's is the book that is not.[4] It is an expansion of her 2010 article in the *New Yorker* about the Koch brothers and their funding of various conservative and libertarian causes and candidates.[5] That article ignited the Koch brothers obsession of modern liberals, which resulted in, among other things, Senator Harry Reid denouncing them by name 134 times on the floor of the Senate.[6]

1 Citizens United v. FEC, 558 U.S. 310 (2010).

2 Tom LoBianco, *Charles Koch: 'Possible' Clinton could be better than GOP nominee*, CNN.com (April 24, 2016), *available at* http://www.cnn.com/2016/04/24/politics/charles-koch-hillary-clinton-2016/index.html.

3 Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right (2016); Richard L. Hasen, Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections (2016).

4 Full disclosure: some of the subjects of Mayer's book have contributed to the firm for which I work, the Institute for Justice (IJ). Mayer mentions IJ a number of times in her book, although she is relatively gentle in her discussion of the firm. Regardless, my opinions here would be the same if none of her subjects had contributed to IJ or, for that matter, if she were writing about donors to progressive causes.

5 Jane Mayer, *Covert Operations*, The New Yorker (Aug. 30, 2010), *available at* http://www.newyorker.com/magazine/2010/08/30/covert-operations.

6 David Rutz, *One-Trick Pony: All 134 Times Harry Reid Has Mentioned the Koch Brothers on the Senate Floor*, Washington Free Beacon (April 11, 2014), *available at* http://freebeacon.com/politics/one-trick-pony/.

Mayer's title telegraphs what the book will be: too long, not entirely accurate, and filled with clichés. There may be a good book to be written about the history of money in American politics, but this is not it. Instead, this book is simply a sustained attack on the political spenders on the right. She excoriates leading conservative and libertarian donors, including not just the Kochs, but Richard Mellon Scaife, the Bradley family, John M. Olin, and others. To Mayer, there is nothing good to be said about these people; no lawsuit against them goes unmentioned, no family feud unexamined, and no intemperate word unquoted (typically out of context). In Mayer's view, any good work they have done is simply to provide cover for their actual, dark agenda. Nothing is too petty for Mayer: she reports that David Koch's former doorman does not like him.[7]

Her big "hidden history" reveal is that the Koch brothers' father did business in Germany in the 1930's; specifically, the company he owned built an oil refinery in Hamburg in 1934, and the Nazis used oil from the refinery during World War II (long after Fred Koch had left Germany).[8] However, many companies, including Bayer, Siemens, Mercedes, Ford, and General Motors, did more business in Nazi Germany for far longer than the elder Koch.[9] Nonetheless, for Mayer, the refinery is proof of the Kochs' place among the Boys in the Bund; she hints that the refinery links the funding of libertarian and conservative causes to National Socialism. She even goes on to suggest that Charles Koch learned fascistic tendencies from his German governess, who, Mayer relays from an anonymous source, was purportedly strict with his toilet training.[10]

Mayer only makes bizarre insinuations like this against the donors of the right—she never mentions labor unions' spending and she glosses over progressive donors. Her explanation for not investigating the potty training or apartment-building staff of George Soros et al. is that, to her, the progressives' political spending is altruistic while the billionaires of the "radical right" are motivated, not by a belief in the benefits of free markets and individual liberty, but by greed. According to Mayer, the true goal of those funding conservative and libertarian causes is to remove environmental restrictions and lower taxes, so that they may pollute at will, not pay their fair share, and earn even more money (perhaps in which to swim, Scrooge McDuck-style).[11]

Putting aside the question of whether the spending of Soros, Tom Steyer, and other progressives is entirely unrelated to their financial interests, Mayer's reasoning is unpersuasive. Taxi companies can tell you that if you really want to make money off of government policy, the way to do it is not to unleash the chaos of unregulated markets, but to prevail on legislators to grant you a monopoly or at least create insurmountable barriers to entry for your competitors. As then-Chief Judge Deanell R. Tacha of the Tenth Circuit noted, "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments."[12] This is undoubtedly true for the ever-expanding federal government as well. In contrast, unregulated markets can destroy as well as create, a lesson learned by slide-rule manufacturers, buggy whip makers, and Netscape. Government protection leaves existing businesses exactly where they are, like ants in amber. If the purpose of the political spending of the Kochs or other pro-free market donors is to make money, unleashing an uncontrollable and unpredictable force like the market is a spectacularly misguided way to accomplish that.

Gaps in logic aside, Mayer's book has other problems. She is sloppy with facts, for instance, claiming that *Citizens United* undid a law that had stood for a century.[13] In fact, Congress passed the law the Court struck down in Citizens United in 1947.[14] Her original research seems to be obtaining a few private histories (Mayer consistently confuses "not public" with "secret") and some interviews, but, for the most part, her book largely relies on the work of ideologically simpatico organizations and writers (who will no doubt reference *Dark Money* in their work, thus creating a citation ouroboros). Her writing style is tedious. People are rarely just "conservative"; they are "ultra" or "staunchly" so. She adds "right-wing" or "extremist" to the name of almost every right-of-center figure or organization. A memo is not just a memo: it is a "seething memo."[15] People who head up energy companies are not executives, but "magnates."[16] You get the seething picture.

One favorite rhetorical trick is to introduce a conservative and then quote a progressive who has said bad things about them, as if this provides proof of whatever accusation Mayer levels. For instance, while discussing Jim DeMint, the former Senator and now president of the Heritage Foundation, Mayer writes, "He understood how to sell, and what he was pitching that night was an approach to politics that according to historian Sean Wilentz

7 Mayer, *supra* note 3, at 53. This leads to the unintentionally humorous index reference of "Koch, David, cheapness of," referring to one of the largest donors to philanthropic causes in America. *Id*. at 438. Mayer also seems to have forgotten the old saying that no man is a hero to his valet.

8 *Id.* at 29.

9 S. Jonathon Wiesen, *German Industry and the Third Reich: Fifty Years of Forgetting and Remembering*, Dimensions: A Journal of Holocaust Studies, Vol. 13, No. 2 (1999), *available at* http://archive.adl.org/braun/dim_13_2_forgetting.html#.VyznPfkrKM8.

10 Mayer, *supra* note 3, at 32-33.

11 *Id.* at 209-10.

12 Powers v. Harris, 379 F.3d 1208, 1221 (10th Cir. 2004).

13 Mayer, *supra* note 3, at 227.

14 Allison R. Hayward, *Revisiting the Fable of Reform*, 45 Harv. J. on Legis. 421, 458-59 (2008); Labor Management Relations Act, 1947, 61 Stat. 159 (codified at 2 U.S.C. § 251 (1946)). Congressional Republicans had introduced the bill to decrease the political power of labor unions. President Truman vetoed the bill, in part, because of the harm it caused to free speech, but Congress overrode his veto. When labor unions later challenged the law, the U.S. Supreme Court sidestepped the constitutional issues twice. Liberal Justices such as Black, Douglas, Warren, and Murphy would have reached the constitutional question and struck the law down. Hayward, supra note 14, at 461-63 (citing U.S. v. CIO, 335 U.S. 106 (1948); U.S. v. Int'l Union United Auto., Aircraft & Agric. Implement Workers, 352 U.S. 567 (1957)). Mayer mentions none of this history, instead preferring to inaccurately portray *Citizens United* as some out-of-the-blue break from 100 years of uniform jurisprudence upholding the law's constitutionality.

15 Mayer, *supra* note 3, at 73.

16 *Id.* at 15.

would have been recognizable to DeMint's forebears from the Palmetto State as akin to the radical nullification of federal power advocated in the 1820s by Confederate secessionist John C. Calhoun."[17] Mayer could have written, "Jim DeMint sounds like a Confederate, the Confederates supported secession, so Jim DeMint supports secession," but to say it that straightforwardly sounds idiotic. Instead, she produces a mess of a sentence that manages to affirm the consequent and argue from authority—two logical fallacies unseparated by a period.

Mayer does not write to persuade. She writes to produce vigorous head-nods from people who have "Corporations Are Not People" bumperstickers on their cars. Reading her book is like being trapped in a malfunctioning elevator with a Red Sox fan who is obsessed with Derek Jeter—it will only be bearable if you also hate the Yankees.

After being subjected to Mayer's *Daily Kos*-comments-section writing style, reading Professor Richard Hasen's discussion of the same topic is refreshing. Hasen thinks seriously about money in politics and weighs the goals of reform with the benefits of the First Amendment (even if the former usually ends up weighing more than the latter). *Plutocrats United* gives a good account of the modern history of campaign finance laws and court decisions, and discusses, in a fairly even-handed way, arguments from both sides about the role of money in campaigns. Hasen criticizes donors of the right and the left; he does not mention German nannies or disgruntled doormen. His book is also well-written, which is usually not the case with books by academics about complex topics.

Hasen is pro-regulation, but he does not buy into the more simplistic arguments of reformers. For instance, he rejects the idea that money buys elections[18] and places a large share of the blame for corruption in government on the shoulders of lobbyists, not campaign donors.[19] He also rejects expansively written constitutional amendments to undo *Citizens United* as threats to free expression.[20]

Part of Hasen's unorthodox approach comes from the fact that he is highly critical of the focus of much of the reform movement's efforts. As opposed to reformers and judges intent on rooting out corruption, Hasen has a different, loftier goal: using campaign finance laws to create equality in the political system among all economic levels of American society. He calls this "equality of inputs," which he defines as a "system in which each voter has roughly equal political power in the electoral or policymaking process."[21] In essence, he believes that the government should use campaign finance laws to make members of the 99% as politically influential as members of the 1% (to use the terms of Occupy Wall Street). This includes not only helping the poor participate in politics, but limiting the influence of the rich. He urges the Supreme Court to overturn decisions dating back to *Buckley v. Valeo*[22] that rejected "equality" as a weighty enough (or even legitimate) governmental goal to justify restrictions on political activity. He celebrates a concurrence by Second Circuit Judge Guido Calabresi that explicitly called for reshaping campaign finance jurisprudence to recognize equality as a legitimate, indeed overwhelming, governmental interest, so that those who do not have access to the pliable politicians are not left out of political decisionmaking.[23]

Hasen also presents a number of policy proposals to achieve this result. In order to achieve his "equality of inputs,"—often described by others as "leveling the playing field"—he puts forth a series of public policy proposals designed to achieve equality.[24] Here is where Hasen rejoins the other players on the reform bench, as all of his policy proposals have been pushed for decades by reformers concerned with corruption: contribution and spending limits, more disclosure, and public (that is, taxpayer) financing of campaigns.[25] In other words, while Hasen would like to think he is driving to a new destination, he is using very well-traveled roads to get there.

Hasen is attempting to redefine the entire thrust of campaign finance jurisprudence, so he, to his credit, also attempts to preemptively address and answer objections to these proposals from those opposed to further regulation. Specifically, he responds to the objection that, if implemented, his policies would insulate incumbents from challenge,[26] give the media an outsized voice in the political debate,[27] and increase political polarization.[28] He has varying degrees of success here—his argument about the press essentially can be paraphrased as, "Yes, the press will have greater opportunities to influence politics, but they are important and people get nervous if you start restricting the press, so the press gets to exert undue influence, but nobody else." On the other hand, he argues persuasively that American politics is already extremely polarized and giving people more of an opportunity to participate in political campaigns may, in fact, alleviate some of that polarization.

These are important questions. However, there are more fundamental issues with Hasen's proposal that he does not examine and his book would have benefitted from his wrestling with them as well. In particular, he never articulates what he ultimately hopes to achieve, how equality will be measured (and by whom), and whether restrictions on political activity can ever succeed in reducing inequality in the modern bureaucratic welfare state.

17 *Id.* at 19.

18 Hasen, *supra* note 3, at 41-44.

19 *Id.* at 5.

20 *Id.* at 165-68.

21 *Id.* at 73.

22 424 U.S. 1 (1976).

23 Hasen, *supra* note 3, at 77 (citing Ognibene v. Parkes, 671 F.3d 174, 198-99 (2d Cir. 2011) (Calabresi, J., concurring)).

24 Even fuller disclosure: Hasen spends a great deal of time critiquing the outcome of a case in which I was the lead counsel for the victorious party. *Id.* at 84-85 (discussing Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011)). Hasen points to Arizona Free Enterprise as an example of exactly the kind of decision the Supreme Court should not make if it cares about political equality. *Id.* at 84-89.

25 *Id.* at 94.

26 *Id.* at 173.

27 *Id.* at 124.

28 *Id.* at 157.

Hasen spends a great deal of time discussing what "equality of inputs" consists of, but he never describes what it is supposed to achieve. Will it result in different policies? What will they be? Whom will they affect? Many reformers openly admit that they view campaign finance reform as just a means to minimize the influence of people with whom they disagree.[29] The language of removing obstacles from a progressive future is omnipresent among those who wish to "level the playing field"—if we only got rid of money in politics, we could pass Medicare for all, break up the big banks, close down the coal industry, etc. If this is what "leveling the playing field" is, it is just a nice way to describe an effort by progressives to implement their chosen policy preferences by muting their ideological opponents (ironically, proponents of such suppression of ideas typically describe the result as "democracy"). Unfortunately, Hasen does not tell us if his "equality" goal is different from theirs and, if it is not, "equality of inputs" would also seem to be exactly the type of governmental control of political discourse that the First Amendment was designed to prevent.

Hasen also starts with the assumption that unrestricted money is "distorting" the political process, which then becomes far too "skewed" towards the wealthy. But what does an undistorted and unskewed political process look like? Given that there are no Platonically correct political outcomes, and therefore no way to identify when politics are not "skewed," this ephemeral and unreachable goal could be used to justify restrictions on any policy that threatens the vision of the political good of those in charge. In other words, an amorphous goal lends itself to further restrictions on speech, as politicians will likely continue to believe that politics is skewed whenever someone disagrees with them.

Finally, Hasen does not address a foundational problem with campaign finance regulations (although, to be fair, no other reformers address it either, at least to my knowledge). Hasen is rightly concerned with large, wealthy interests manipulating the political process to steer benefits to themselves and burdens to their competitors. But so long as the government can distribute significant benefits and burdens, people will always attempt to influence those decisions to come out in their favor. At its heart, campaign finance reform is just a means to prevent the modern intrusive, massive, bureaucratic state from sliding into "pay-to-play" corruption and, eventually, the plutocracy Hasen fears. But if a politician does not have strong, internal ethical standards, the desire to reward her friends and punish her enemies will always be there, regardless of what laws are on the books—unless, of course, the structure of government prevents her from doing so. If politicians cannot hand out favors and burdens, then there is little point in spending money to get them to do so. A government that acts within its constitutional limitations should be far less susceptible to corruption or distortion than one that is unlimited and unchecked.

Unfortunately, constitutional boundaries require a judiciary willing to enforce them, and here judges have contributed far more to corruption and inequality than any of the donors with which Mayer and Hasen concern themselves. You will recall Hasen's celebration of Judge Calabresi's concurrence arguing for an emphasis on equality in campaign finance jurisprudence. Yet when Judge Calabresi was presented with a case in which the laws of Connecticut were blatantly manipulated to favor dentists at the expense of unlicensed teeth-whiteners, he let the law stand.[30] In *Sensational Smiles v. Mullin*, a state board passed a rule that only dentists could shine an LED light at the mouth of a customer during a teeth-whitening procedure, even though dentists are not trained to use the lights or even practice teeth-whitening. It was fairly obvious that the rule was designed to drive teeth-whiteners out of business. Judge Calabresi nonetheless brushed away this corruption of the political process with these words: "Much of what states do is favor certain groups over others on economic grounds. We call this politics. Whether the results are wise or terrible is not for us to say, as favoritism of this sort is certainly rational in the constitutional sense."[31]

Judge Calabresi is willing to sacrifice the people's ability to engage in peaceful political activity that requires money in order to combat inequality, but he is not willing to recognize restrictions on governmental actions extant in the Constitution to achieve the same result. Put another way, Calabresi (and perhaps Hasen as well) would prefer an unbounded government combined with judicial abdication to a robust First Amendment. The Connecticut case creates a much bigger incentive for powerful interests to skew the political process than anything produced by *Citizens United*. Ultimately, Judge Calabresi and Professor Hasen can have a system where the rich and powerful cannot manipulate policy to benefit themselves or they can have a big government. History and human nature suggest that they cannot have both.

As noted above, Hasen's book is an important contribution to this field and is highly recommended. One hopes that with his future writings he begins to wrestle with the fact that campaign finance laws deal only with symptoms like corruption and inequality, and not the disease, which is a government that is too big and does too much.

29 *See, e.g.*, Ron Fein, *Why We Need a Constitutional Amendment to Overturn* Citizens United, Huffington Post (Dec. 22, 2014), *available at* http://www.huffingtonpost.com/ron-fein/why-campaign-finance-matt_b_6028354.html (listing the minimum wage, the carried interest rule, and global warming as policies whose implementation is being prevented by "narrow corporate interests and high rollers").

30 Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 288 (2d Cir. 2015).

31 *Id.* at 287.

Our Republican Constitution: Securing the Liberty and Sovereignty of We the People, by Randy Barnett

Reviewed by Ilya Somin

Note from the Editor:

This article favorably reviews Randy Barnett's new book about the Constitution.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Jack M. Balkin, *Randy Barnett's Republican Constitution*, Balkinization (April 14, 2016), *available at* http://balkin.blogspot.com/2016/04/randy-barnetts-republican-constitution.html.

• Jack M. Balkin, *Which Republican Constitution?*, Constitutional Commentary (*forthcoming*) (April 9, 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2761513.

• Eric J. Segall, *The Constitution Means What the Supreme Court Says It Means*, Harvard Law Review Forum (Feb. 10, 2016), *available at* http://harvardlawreview.org/2016/02/the-constitution-means-what-the-supreme-court-says-it-means/.

• Ed Whelan, *George Will's Mistaken Critique of Judicial Restraint*, National Review Online (Oct. 22, 2015), *available at* http://www.nationalreview.com/bench-memos/425927/george-wills-mistaken-critique-judicial-restraint-ed-whelan.

• Ian Millhiser, *The Plan To Build The Yuugest, Classiest, Most Luxurious Constitution You've Ever Seen*, Think Progress (April 28, 2016), *available at* http://thinkprogress.org/justice/2016/04/28/3772953/the-plan-to-build-the-yuugest-classiest-most-luxurious-constitution-youve-ever-seen/.

Purchase this book at https://www.amazon.com/Our-Republican-Constitution-Securing-Sovereignty/dp/0062412280.

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Randy Barnett is one of America's leading constitutional scholars. His new book, *Our Republican Constitution*, is a major contribution to the ongoing debate over the appropriate role of judicial review in our constitutional system. For decades, one of the main arguments against strong judicial review has been the claim that it is antidemocratic and thus goes against the sovereign will of the people. Barnett's book turns this claim on its head by explaining how judicial review can actually promote popular sovereignty, understood in an individual rather than a collective sense.

I. Competing Approaches to Popular Sovereignty

The conventional understanding of popular sovereignty in constitutional law centers on the idea that the will of the people is represented by majoritarian democratic processes: elections, referenda, and legislative enactments. Barnett calls this approach the "Democratic Constitution." But, as he emphasizes, democratic political processes at best represent only the will of electoral majorities, and often only that of influential minority lobbies and interest groups. Moreover, Barnett notes, "We the People as a whole never govern" (23); rather, power is delegated to a subset of government officials. The people as a whole are never truly sovereign except insofar as each individual has a sphere of liberty within which the power of government (and other individuals) cannot intrude. Only in that sense can all of the people be truly sovereign. Barnett calls this variant of constitutional theory the "Republican Constitution." As he defines it, the Republican Constitution is based on the principle of individual sovereignty, protected by strict limits on government power. It is the rival of the Democratic Constitution's emphasis on electoral majoritarianism.

The importance of individual sovereignty, Barnett powerfully argues, strengthens the case for aggressive judicial review. A strong judiciary limits the power of government officials, and thereby vindicates the sovereignty of all the people as individuals, as opposed to merely the powers wielded by temporary political majorities, influential interest groups, and political leaders.

Barnett's argument is distinct from the traditional defense of judicial review which argues that it can actually facilitate majoritarian democracy by, for example, defending freedom of political speech and the right to vote.[1] Such "representation-reinforcement" arguments justify judicial protection of individual rights only in so far as those rights help make majoritarian political processes possible. By contrast, Barnett seeks to impose strict limits on democratic majorities in order to protect individuals as sovereigns.

Barnett's theory of individual sovereignty implies strong judicial protection for a wide range of individual freedoms, both economic and non-economic (chs. 3, 8). While modern judicial orthodoxy emphasizes the need to protect "personal" liberties such as freedom of speech and privacy, Barnett emphasizes that economic freedom is often just as important to individual liberty and just as threatened by unconstrained majoritarianism.

Barnett also explains how judicial protection of federalism—by enforcement of structural limits on federal power—can

1 For the most famous work along these lines see John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

promote individual sovereignty (chs. 6-7). When political power is decentralized, individuals can "vote with their feet" for policies they prefer, and against those that harm or oppress them (176-77). Individual foot voters often have much greater opportunity to make meaningful political choices than individual ballot box voters do. Whereas the latter have only an infinitesimal chance of actually changing an electoral outcome, the former can make individually decisive choices about what policies they will live under.[2] Citizens have more opportunity to vote with their feet when federal government power is more limited and policy decisions are made at the state and local level.

II. Popular Sovereignty and Constitutional History

Barnett traces the history of the Democratic and Republican Constitutions through different periods of American history. He argues that the Founders imposed a republican vision on the federal government, including tight constraints on federal power and a strong Bill of Rights (chs. 2-3). But the original Constitution imposed few limits on state government power.

In perhaps the most insightful and original part of the book (ch. 4), Barnett explains how the flaws in the original Constitution were made manifest by the growing controversy over slavery during the last several decades before the Civil War. State governments committed to protecting slavery not only oppressed the slaves themselves, but also free blacks and white opponents of slavery. In reaction, the antislavery movement advocated the imposition of tighter restrictions on state power in order to protect individual liberty. They ultimately triumphed with the enactment of the Thirteenth and Fourteenth Amendments after the Civil War. As Barnett explains, while these amendments were inspired by the history of slavery and racial oppression, they were also part of a much broader ideology of individual liberty that sought to prevent states from infringing on individuals' rights in a variety of different ways, including by protecting economic liberties and property rights.

Barnett then traces the history of the conflict between the republican and democratic views to the present day. Progressive and New Deal-era liberals sought to curb judicial review in order to strengthen legislative and executive power—especially, but not exclusively, over the economy. Beginning in the 1950s and 1960s, under the influence of the civil rights movements, modern liberals partially abandoned Progressive-era "judicial restraint" in order to combat racial and gender discrimination and protect various civil liberties. Ironically (and in Barnett's view, mistakenly), judicial conservatives reacted to the real and imagined excesses of the Warren and Burger Courts by embracing the doctrine of judicial restraint associated with the Democratic Constitution earlier advocated by early twentieth century Progressives. Barnett argues that conservatives should instead embrace the "judicial engagement" associated with the Republican Constitution, as some have begun to do in recent years.

Not every aspect of Barnett's historical account is fully persuasive. In particular, some of the historical conflicts over constitutional law covered in the book do not fall as clearly along the democratic v. republican divide as Barnett suggests. For example, he contends that the pre-Civil War Democratic Party largely favored the Democratic Constitution (87-88). This is true to some extent, especially when it came to white democratic majorities' power to control the fate of slaves, free blacks, and other non-whites. But Jacksonian Democrats also articulated a relatively narrow view of federal power backed by judicial enforcement of those limits, and advocated considerable judicial protection for economic liberties and property rights,[3] particularly under state constitutions. They were highly critical of the Supreme Court's famous decision in *McCulloch v. Maryland*,[4] which upheld the constitutionality of the Bank of the United States, believing that it gave too much scope to federal power.[5]

Barnett is on firmer ground in describing early twentieth century Progressives and New Dealers as champions of the Democratic Constitution. They did indeed take a narrow view of the appropriate scope of judicial review across a wide range of issues. But, as he recognizes, more recent left-liberal jurisprudence does not fit the framework quite as well—a tendency that began to emerge as early as the latter years of the New Deal period itself.

While exalting democracy on some issues—particularly federalism and economic regulation—modern liberal judges and legal scholars advocate robust judicial intervention on many others, most notably race and sex discrimination, the rights of gays and lesbians, protecting criminal defendants, and other such causes. As Barnett puts it, "[c]onfronted with the majoritarian implications of the Democratic Constitution with respect to the civil and personal rights they favored….progressives retreated to a watered-down form of the Republican Constitution" (162). Most modern liberal legal thought is, in Barnett's terms, an uneasy mix of the Democratic and Republican Constitutions.

Recent conservative legal thought does not fully fit the framework either. Barnett is right to argue that "judicial restraint," often defined as deference to democratic legislatures, was a major element in the conservative critique of the "judicial activist" left. But, from early on, many conservatives also argued for strong judicial enforcement of the original meaning of the Constitution, even in cases where doing so meant invalidating a variety of democratically enacted laws. As far back as the 1970s, conservative Supreme Court Justice William Rehnquist wrote a series of important opinions advocating stronger judicial enforcement of limits on federal power, and constitutional property rights.[6] Judge Robert Bork, perhaps the best-known conservative advocate of judicial deference to democratic decision-making of his era,

2 I discuss the significance of this difference in greater detail in Ilya Somin, *Foot Voting, Federalism, and Political Freedom,* in Nomos: Federalism and Subsidiarity (John Fleming & Jacob S. Levy, eds. 2014); and Ilya Somin, Democracy and Political Ignorance: Why Smaller Government is Smarter, ch. 5 (2nd ed. 2016).

3 For an overview, see David Currie, The Constitution in Congress: Democrats and Whigs, 1829-61 (1985).

4 15 U.S. (4. Wheat.) 316 (1819).

5 Currie, *supra* note 3 at ch. 3.

6 *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976), overruling Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985); Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) (Rehnquist, J., dissenting).

also often wrote of the need to vigorously enforce the original meaning of the Constitution, and denounced the New Deal Supreme Court's acquiescence to a vast expansion of federal power as "judicial activism."[7] Focused as they were on what they saw as the activist sins of the Warren Court, many judicial conservatives at first simply ignored or swept under the rug the potential contradictions between their commitment to judicial deference on the one hand, and their advocacy of originalism and judicial enforcement of federalism and property rights on the other.

These complications by no means invalidate the usefulness of Barnett's framework. The democratic and republican models he outlines are extremely valuable archetypes for capturing one type of recurring tension in debates over judicial review. But alongside this conflict are other debates that focus not on democracy v. individual rights generally, but rather on conflicts over which individual rights are important and why, and debates over interpretive methodology.

III. Originalism and the Republican Constitution

This brings us to the interesting question of the relationship between Barnett's defense of the Republican Constitution in this book and his powerful—and highly influential—defense of originalism in his previous scholarship.[8] Neither originalism nor any other interpretive theory plays a major role in *Our Republican Constitution*. In principle, the individual sovereignty outlined by Barnett might be compatible with originalism, some version of living constitutionalism, or a hybrid theory combining elements of both. In my view, however, there is a strong potential connection between originalism and individual sovereignty: the latter can help justify the former.

Originalism cannot be self-justifying. Why do we today have an obligation to obey words set on paper centuries ago by people who have long been dead? It cannot be because we have consented to it. Barnett rightly rejects the view that we must obey because the Framers enacted the Constitution through a democratic process; if left unconstrained, such a process can easily destroy individual freedom and individual sovereignty along with it. Moreover, as left-wing critics of the Constitution correctly point out, the process of enactment was actually undemocratic in important ways, leaving out nearly all women and most non-whites, among others.

The theory of individual sovereignty advanced by Barnett offers an alternative potential justification for originalism: given the many liberty-enhancing aspects of the original Constitution, as amended after the Civil War,[9] adhering to the original meaning offers a greater likelihood of effectively protecting individual sovereignty than any other realistically available option.[10] This is a more contingent defense of originalism than those offered by advocates who claim that originalism is intrinsically superior to other modes of judicial interpretation, regardless of consequences. It leaves open the possibility that originalism may *not* be the best approach to judicial review in all conceivable times and places. But it may give a more compelling answer to the age-old question of why modern American judges should adhere to the terms of a centuries-old document.

IV. The Republican Party and the Republican Constitution

In addition to his theoretical and historical analysis, Barnett also has a political coalition-building project in mind: he hopes that the modern Republican Party will embrace the Republican Constitution (251-57) by appointing judges who will enforce it, and perhaps even by passing constitutional amendments to further limit federal power. There is indeed important common ground between Barnett's project and the views of many conservatives. Both he and they favor stronger judicial enforcement of federalism and increased enforcement of constitutional protections for some individual rights, particularly property rights and the Second Amendment right to bear arms.

Nonetheless, the prospects for a conservative-libertarian coalition to reinvigorate the Republican Constitution within the Republican Party remain uncertain at best. The GOP is in a state of ideological upheaval. The outcome of this process is difficult to predict. But the resulting party could potentially turn out be much more hostile to Barnett's vision than the pre-2016 party was.

Even if conventional conservatives retain control of the Republican Party and little changes in its ideology over the next few years, there will still be some important tensions between the conventional GOP worldview and Barnett's vision. As articulated by Barnett, the Republican Constitution implies strong protection for a wide range of personal liberties, as well as "economic" ones. Some of the former are likely to be inimical to social conservatives. For example, most, if not all, of the federal War on Drugs is likely unconstitutional under Barnett's approach to federal power under the Commerce Clause.[11]

The same, perhaps, goes for many state-level morals regulations. For example, Barnett has forcefully defended the Supreme Court's 2003 decision in *Lawrence v. Texas*,[12] which struck down anti-sodomy laws, a decision he considers to be based on a more broadly libertarian vision of the Constitution and judicial review.[13] While very few conservatives seek to revive anti-sodomy laws today, many view *Lawrence* with great suspicion due to its implications for other types of morals regulation. More recently, conservative-libertarian tensions over such issues have

7 For a discussion of these tensions in Bork's thought, see Ilya Somin, *The Borkean Dilemma: Robert Bork and the Tension between Originalism and Democracy*, 80 University of Chicago Law Review Dialogue 243 (2013).

8 *See especially* Randy E. Barnett, Restoring the Lost Constitution: The Presumption of Liberty (2d ed. 2014).

9 Barnett discusses the Constitution's many protections for liberty in detail in *Our Republican Constitution* (e.g., chs. 3-4, 8).

10 For a somewhat more extensive, but still very preliminary, discussion of this idea, see Ilya Somin, *How Constitutional Originalism Protects Liberty,* Liberty Law Blog (June 1, 2015), *available at* http://www.libertylawsite.org/liberty-forum/how-constitutional-originalism-promotes-liberty/. Obviously, the issue deserves additional exploration.

11 *See, e.g.*, Barnett, Restoring the Lost Constitution, ch. 11 (outlining a narrow interpretation of the federal Commerce Clause power, on which the War on Drugs is based).

12 539 U.S. 558 (2003).

13 *See* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas,* 2002-2003 Cato Supreme Court Rev. 21.

been heightened by the Supreme Court's 2015 decision striking down state laws banning same-sex marriage, a result supported by most libertarians, but anathema to most social conservatives.[14]

In *Our Republican Constitution*, Barnett suggests that such differences over "social issues" can be minimized by keeping them local (178-81). If we enforce constitutional limits on federal power over such matters, liberals and conservatives (and perhaps also libertarians and conservatives) might be able to agree to disagree on many hot-button "culture war" issues, by decentralizing them to a local level where each group can have some jurisdictions that adopt its preferred policies.

This is, in many ways, an attractive vision. But there is some tension between it and Barnett's advocacy of strong judicial protection for economic liberties and property rights, even as against state and local governments. Why is "social" freedom less deserving of such protection? There are ways to differentiate the two, but Barnett does not pursue the issue in detail.

Barnett's approach does not imply a categorical ban on government regulation. The laws in question need only have a "proper" purpose (which excludes mere efforts to impose majority preferences or help some interest groups at the expense of others) and have "some degree of means-end" fit with that purpose (231-32). But if applied in a nondeferential way across the board, this approach would lead to the invalidation of many social regulations, as well as economic ones.

In the medium to long term, the tension between Barnett's position and that espoused by conservative Republicans may be partly dissipated not by federalism, but by generational change. Survey data suggests that younger Republicans are far more sympathetic to social freedom than their elders. Most tend to support marijuana legalization and same-sex marriage, for example, and are more open to immigration than their elders.[15] Most young Republicans are not full-blown libertarians, but they lean more in that direction than previous generations. The Republican Party might, over time, become a more hospitable home for the Republican Constitution. But that may not happen for some time to come, if at all.

Ultimately, however, constitutional theories should be judged not by their immediate political prospects, but by their contribution to public discourse over important political and legal issues. By that metric, *Our Republican Constitution* is a significant success. It outlines a valuable new framework for understanding historical and contemporary disputes over judicial power. It also offers a powerful account of popular sovereignty and its connection to judicial power that stands as an important challenge to the conventional wisdom on the subject. Whether or not Barnett's ideas ultimately meet with success in the political arena, they deserve serious consideration from anyone interested in the past, present, and future of the Republican Constitution.

14 Obergefell v. Hodges, 135 S.Ct. 2071 (2015).

15 *See, e.g.*, Jocelyn Kiley and Michael Dimock, *The GOP's Millennial Problem Runs Deep*, Pew Research Center (Sept. 25, 2014), *available at* http://www.pewresearch.org/fact-tank/2014/09/25/the-gops-millennial-problem-runs-deep/; George Gao, *63% of Republican Millenials Favor Marijuana Legalization*, Pew Research Center (Feb. 27, 2015), *available at* http://www.pewresearch.org/fact-tank/2015/02/27/63-of-republican-millennials-favor-marijuana-legalization/.

The Intimidation Game: How the Left Is Silencing Free Speech, by Kimberley Strassel

Reviewed by Stephen R. Klein

Note from the Editor:

This article favorably reviews Kimberley Strassel's new book about efforts by the left to suppress freedom of speech.

The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please email us at info@fedsoc.org.

• Sunlight Foundation, *A Comprehensive Disclosure Regime in the Wake of the Supreme Court's Decision in Citizens United v. Federal Election Commission*, *available at* https://sunlightfoundation.com/policy/documents/comprehensive-disclosure-regime-wake-supreme-court/.

• Trevor Potter & B. B. Morgan, *The History of Undisclosed Spending in U.S. Elections & How 2012 Became the Dark Money Election*, 27 Notre Dame J.L. Ethics & Pub. Pol'y 383 (2013), *available at* http://scholarship.law.nd.edu/ndjlepp/vol27/iss2/4.

Purchase this book at https://www.amazon.com/Intimidation-Game-Left-Silencing-Speech/dp/1455591882.

About the Author:

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Campaign finance, taxation, securities, and freedom of information are complex areas of legal practice, each with pitfalls into which even experienced attorneys can stumble. Because of this, it is often difficult to explain legal requirements to clients, particularly in light of evolving regulations and enforcement practices. Moreover, when, constitutionally speaking, something really *stinks* with the laws governing these areas, lawyers have to work twice as hard to expose the problem, not only to the courts hearing challenges, but to the public that has the right to hold government accountable. This is especially difficult when the government has its own narrative and—thanks again to that legal complexity—plausible deniability.

In *The Intimidation Game*, Kim Strassel tells compelling stories of Americans immersed in unconstitutional stink, assembling a convincing narrative of an effort predominantly by the left to silence its opponents, subverting the freedom of speech in the process. The book is a welcome and accessible account of the IRS scandal of targeting Tea Party groups, the Wisconsin "John Doe" campaign finance inquisition, and other shameful activities. As a free speech attorney who has been involved directly or close at hand in some of the cases Strassel describes, I was nevertheless taken aback at the breadth of the intimidation game, which stems from an all-encompassing term: "disclosure."

Instinctively, disclosure is a comforting term, a pleasant platitude to suggest that citizens expect to be informed about the happenings in government. And it is certainly true that citizens expect to have access to the kind of information exposed by disclosure rules. However, disclosure applies not only to the government, but to private citizens and organizations attempting to influence the government, particularly through elections. Since the mid-1970s, contributions to federal candidates and political action committees ("PACs") have been publicly disclosed, and election advertisements have required disclaimers that state who or what organization is paying for them. Since the turn of the century, however, the type of political activities subject to disclosure and the amount of disclosure required of individuals and organizations who undertake such activities have both increased. This adds financial costs to political participation—a core part of free speech—and puts more risk on participation; the more forms one must fill out, the more chances there are to make a mistake, and with mistakes under the law come punishment. Moreover, assuming donors properly comply with disclosure, they can be subject to retaliation, either from fellow citizens or from the government. The intimidation game, as Strassel details, is the culmination of this expansive disclosure effort, making disclosure not a check against corrupted government, but a corrupt political tool.

The *Citizens United* case overturned restrictions on independent political speech by corporations and unions, but upheld a limited campaign finance disclosure requirement for certain types of political advertisements.[1] With this imprimatur, Democrats wanted to expand disclosure requirements legislatively, but could not do so after Republicans won a majority in the House of Representatives in the 2010 election cycle. Undaunted by this setback, various progressive interest groups, Democratic members of Congress and, Strassel argues, the White House successfully prodded the administrative state to expand disclosure require-

1 Citizens United v. Fed. Elec. Comm'n, 558 U.S. 310, 366–71 (2010).

ments by any means necessary. Strassel tells the complete story of the IRS scandal—what is known, that is—and of the evolution of certain SEC commissioners to support regulating corporate political disclosure. She details FEC Commissioner Don McGahn's efforts to bolster free speech and due process at the agency against recalcitrant bureaucrats, campaign finance interest groups, and an all-too biased press.[2] Just as concerning as the full-fledged scandals are the scandalous efforts that did not come to fruition; for example, there is evidence that, before the IRS scandal came to light, the DOJ sought to investigate Tea Party groups for false statement crimes based on their IRS filings.

Strassel stresses that free speech is bigger than the First Amendment. Even if "disclosure" passes scrutiny in court, its stalwarts often use it to censor political opposition. Their specific tactics include burying Tea Party groups in endless and frivolous IRS questionnaires to receive tax-exempt status.[3] Though that scandal is, for the moment, resolved, there are plenty of other avenues of intimidation. One that remains popular is to file invasive freedom of information requests with universities demanding entire email caches of professors who question climate science orthodoxy. Some state attorneys general, taking cues from this effort, are now using their subpoena powers against not only scientists, but any organizations with which they might associate. Reaching down to individual donors, a most effective tactic is to utilize disclosed data to create interactive maps that show the addresses of large and small donors to issue campaigns. When you see the scope and severity of all of these tactics being applied by ostensibly neutral bureaucrats, the righteousness of accountability promised in "disclosure" sounds all the more like "shut up"—in legal terms, it has a chilling effect. Throw in myriad coincidences—such as conservative donors and their businesses facing irregular audits from the IRS, the Department of Labor, the FDA, and other agencies around the same time their donations were singled out by the press or politicians—and the chill looks more like a bad winter. All the more concerning, even a sleuth like Strassel cannot get to the bottom of some of the governmental workings behind these scandals, because the government does not have the same disclosure obligations it imposes on the people.

The Intimidation Game suffers from a few unnecessary, perhaps partisan, slips. For example, in her effort to tie the Obama administration to the IRS scandal, Strassel takes aim at former White House counsel Bob Bauer, with repeated unflattering references throughout the book. Certainly, when he represented the Obama campaign, Bauer filed FEC complaints against groups that opposed Obama, and some of these complaints stood on constitutionally dubious ground. However, since leaving the White House, Bauer has continued to provide thoughtful views on campaign finance law, unafraid to contradict the so-called "reform" movement. In fact, Bauer has authored some of the most biting critiques of "disclosure" disciples.[4] To put this into perspective, consider the credit Strassel gives to Ted Olson, former Solicitor General under George W. Bush. Though Olson argued—and won—the *Citizens United* case at the Supreme Court in 2010, as Solicitor General he argued—and won—*McConnell v. FEC* in 2003, which upheld constitutionally dubious provisions of McCain-Feingold that were later struck down in *Citizens United*. Olson's earlier work is described as "dutiful," while Bauer receives no credit for his work outside of dutiful representation of his own past client. The critique is unfair, and plenty of campaign finance reformers display a bloodlust worthier of Strassel's ire.

Although the book is a much-needed compilation of the intentional or, at least, grossly negligent game the left has played with free speech in recent years, at times the book is counterproductive. Opponents of all-encompassing disclosure sometimes falter in wielding a similarly all-encompassing definition of intimidation that can make it seem like they are wallowing in victimhood. Strassel accuses President Obama and members of Congress of dog-whistling to cause the IRS scandal and other happenings. But the president and legislators are elected officials, and free to enjoy the same political speech as Tea Party groups or anyone else—speech that can be intimidating for the faint of heart. Unless there is a governmental action that crosses the line—and Strassel details plenty of them—we must accept that politics still ain't beanbag. Strassel, to her credit, makes this very point in other parts of the book; some of the most powerful anecdotes are about targets that fight back politically, such as the American Legislative Exchange Council (ALEC) standing against a cabal of campaign regulation advocates and Senator Dick Durbin.

Disclosure is at a historically high-water mark within campaign finance law, and may continue its rise. Following *Citizens United* and numerous lower court decisions in its wake, various states have imposed onerous requirements onto individuals and groups who pay for even a modicum of political speech.[5] In court, it is nearly pointless to try and appeal to binding precedent from *NAACP v. Alabama* and similar cases that once provided exemptions from disclosure to individuals and groups who were intimidated by the government. Free speech advocates now have the difficult task of challenging red tape as a costly burden and illustrating that disclosed information does not actually serve an interest that justifies such burdens.[6] But given that law follows culture—disclosure certainly did—Strassel's book and other narratives are now, perhaps, the most important contributions to the fight for political privacy.

Minor quibbles aside, it is encouraging to have a book that I can recommend with the simple quip, "it shows what we're up against." More importantly, *The Intimidation Game* is sure to encourage others to join this fight, to assure the game's future targets that they are not alone, and to let the would-be speech police know that their deniability is no longer plausible.

2 I interned for Don McGahn at the FEC in the summer of 2008.

3 *See* True the Vote, Inc. v. Internal Revenue Serv., No. 14-5316 (D.C. Cir. Aug. 5, 2016) (reinstating lawsuits against the IRS over the scandal), *available at* https://www.cadc.uscourts.gov/internet/opinions.nsf/E780A4723CBF0726852580060052C212/$file/15-5013.pdf.

4 *See, e.g.*, Bob Bauer, *Mr. Noble in His Gyrocopter*, More Soft Money Hard Law, Apr. 15, 2015, http://www.moresoftmoneyhardlaw.com/2015/04/mr-noble-gyrocopter/

5 *See* Stephen R. Klein, Bailey v. Maine Commission on Governmental Ethics*: Another Step Toward the End of Political Privacy*, 14 Engage: J. Fed. Soc'y Practice Groups, Jul. 2013, at 54, *available at* http://www.fed-soc.org/publications/detail/bailey-v-maine-commission-on-governmental-ethics-another-step-toward-the-end-of-political-privacy.

6 *See, e.g.*, Coalition for Secular Gov't v. Williams, 815 F.3d 1267 (10th Cir. 2016).