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E n g a g e : The Journal of the Federalist Society's Practice Groups Volume 5, Issue 1 April 2004


# E n g a g e

# The Journal of the Federalist Society's Practice Groups

## A Project of the E.L. Wiegand Practice Groups



*James Madison by Chester Harding, National Portrait Gallery, Smithsonian Institution*

E n g a g e

Volume 5, Issue 1

# Letter from the Editor...

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

Volume 5, Issue 1, following the trend of our recent issues, is dedicated almost exclusively to original articles produced by Society members and friends. Recess appointments of judicial nominees and campaign finance reform are just two of the hot topics that have inspired written work in this issue. This issue features an article that examines the relationship between the current controversy over gay marriage and the judicial confirmation process. The next issue of *E n g a g e* will feature a response article that will examine this issue from another perspective. Activity in the courts is also well documented, with *United States* v. *Patane, Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH* v. *Dana Corp,* and *Gilpin* v. *AFSCME* representing only a sampling of those commented on in the pages that follow.

Also notable in this issue are several reviews of fantastic books. Hon. William Pryor Jr. contributed a review of Judge Robert Bork's recent book *Coercing Virtue: The Worldwide Rule of Judges*, and Thor Halvorssen gives his analysis of *You Can't Say That!: The Growing Threat to Civil Liberties from AntiDiscrimination Laws* by David Bernstein.

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

# E n g a g e

Volume 5, Issue 1 April 2004

## The Journal of the Federalist Society's Practice Groups

**Managing Editor**
*Katherine J. Mendis*

# Administrative Law & Regulation

## Independent Peer Review: The *Sine Qua Non* of Information Quality

*By Jeffrey Ladik**

**Introduction**

In September 2003, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) published a notice in the *Federal Register* that proposed new guidance regarding independent peer review of federal agency scientific and technical information, and also asked for comments.[1] The OMB notice states that existing agency peer review mechanisms have not always been sufficient to ensure the reliability of regulatory information disseminated or relied upon by federal agencies.[2] OMB is entirely correct in its assessment of the challenges agencies face in developing high-quality and objective information that is used in regulatory decision making. Independent peer review, if properly conducted, would add integrity and transparency to the regulatory process. Equally important, Congress requires OMB to issue peer review guidelines.

OMB should be complimented for recognizing the importance of independent peer review of agency scientific and technical information. Regulatory decision making requires high-quality and credible information. Information cannot be considered to be objective until it has received impartial and erudite scrutiny. Furthermore, independent peer review also allows OMB to comply with its statutory directives to ensure and maximize the quality, objectivity, utility and integrity of information disseminated by federal agencies.[3]

As noted in the *Federal Register* notice, the guidance is a work in progress. This article does not attempt to cover the many nuances of peer review, but it will show why peer review is required by law, outline a few aspects of the Bulletin as currently written, and discuss some additional questions that arise.

**The Information Quality Act Requires OMB to Issue Peer Review Guidelines**

In order to fulfill its obligations under the Information Quality Act,[4] OMB must issue peer review guidance. OMB's current information quality guidance encourages but does not require peer reviews.[5] Section 515 of the Treasury, Postal Service, and General Government Appropriations Act for Fiscal Year 2001 required OMB to replace its existing informal guidance with more formal guidance.[6] OMB's present information quality guidance identifies general criteria that agencies should consider when they conduct such reviews, but consistency could only be achieved through strengthening these recommendations into more formal guidelines. In section 515(a), Congress directed OMB to issue government-wide guidelines that "provide *policy and procedural guidance* to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies…"[7] Section 515(b) goes on to state that the OMB guidelines shall:

> (1) apply to the sharing by Federal agencies of, and access to, information disseminated by Federal agencies; and
> (2) require that each Federal agency to which the guidelines apply —
>
> (A) issue guidelines ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by the agency, by not later than 1 year after the date of issuance of the guidelines under subsection (a);
>
> (B) establish administrative mechanisms allowing affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with the guidelines issued under subsection (a); and
>
> (C) report periodically to the Director —
>
> (i) the number and nature of complaints received by the agency regarding the accuracy of information disseminated by the agency; and
>
> (ii) how such complaints were handled by the agency.

OMB in coordination with the Office of Science and Technology Policy (OSTP)[8] issued its guidelines under sections 3504(d)(1) and 3516 of the Paperwork Reduction Act.[9] OMB designed the guidelines so agencies will meet basic information quality standards. Given the administrative mechanisms required by section 515 as well as the standards set forth in the Paperwork Reduction Act, agencies should not disseminate substantive information that does not meet a basic level of quality.[10]

Independent peer review is perhaps the only way to ensure and maximize the objectivity of scientific or technical information prior to dissemination. For instance, if an agency promulgates conclusions based upon inadequate information, expert peer review can help to detect when data is flawed or when the science is unsound. The "objectivity"[11] and "quality"[12] of information can only be achieved through extensive, impartial analysis. Independent peer review is by no means a given that information will be perfect, but it would add transparency and consistency to the regulatory process which would enhance the "integrity"[13] of information that is used and

disseminated by agencies. As OMB notes: "The focus of Section 515 is on the Federal Government's information dissemination activities. In recent years…Federal information dissemination has grown due to the advent of the Internet, which has ushered in a revolution in communications. The Internet has enabled Federal agencies to disseminate an ever-increasing amount of information."[14] Given OMB's statutory directives, the quality of information cannot be ensured prior to dissemination without independent expert critique. Hence, peer review provides a mechanism for OMB to fulfill its legal responsibilities.

**The Importance of Independent Peer Review**

Regulatory decision making must use accepted notions of science and technology; otherwise, costly burdens are unjustly imposed upon the economy.[15] Independent peer review can promote better information quality because it would allow for greater scrutiny from the scientific and technical communities and input from affected stakeholders. In fact, independent peer review is not a novel concept; it is established protocol. Of course, peer review is not a panacea.[16] Nevertheless, the lack of consistency in current peer review guidance necessitates some form of interagency standards. As one commenter stated, "requiring thorough and consistent peer review of important scientific and technical information *early* in the information development process is critical to ensuring information quality, and is fundamental to OMB's obligation to ensure that information that underpins federal regulatory actions is based on sound science and rigorous technical analysis."[17]

Opponents of OMB's proposed guidelines make several points in order to defeat the addition of any peer review guidance for agencies.[18] Critics argue that OMB does not have the legal authority to establish peer review guidelines; peer review guidance would permit politics to interfere with the regulatory process to the benefit of industry; and, currently there is no problem with the regulatory process that would necessitate peer review guidelines. All of these points are without merit.

First, OMB has the legal authority to issue peer review guidance for agencies. The specific requirements of the IQA (which applies to all federal information disseminated regardless of a regulatory application) mandate that information be of the highest quality, be objective, and have integrity and utility. In addition, the IQA explicitly gives OMB/OIRA the authority to "provide policy and procedural guidance" to agencies in order to ensure that the aforementioned criteria have been maximized. Therefore, because OMB has the authority to promulgate policy and procedural guidance for information quality, peer review guidelines are well within OMB's legal authority. Furthermore, the PRA *inter alia* exists to "improve the quality and use of Federal information,"[19] which taken together with the benefit-cost requirements of Executive Order 12866, grants OMB the authority and discretion to implement its directives.

In arguing that OMB does not have the legal authority under the IQA to issue peer review guidelines, opponents seem to be preoccupied with the act's length[20] and the subjective intent of prior Congressional inaction on the issue of peer review.[21] Regardless of its nominal length, the IQA outlines clear information quality standards for agencies and gives OMB the authority to ensure and maximize those standards. Similarly, one should not attach much significance to Congressional silence on the topic, especially from nearly a decade ago.

Opponents also claim that the regulatory process does not require improvements because "no fundamental or overarching problem exists in peer review as it is used by federal agencies…" and because "the majority of agency programs are working effectively."[22] To this end, critics argue that the IQA is a nefarious tool used by regulated industries to defeat or delay necessary regulations that protect the public welfare. Additionally, opponents object to the notion that agencies' conclusions should be impartially scrutinized out of fear that industry-funded scientists would capture the regulatory process. The flaw in this line of reasoning is simple: the IQA makes the regulatory process *more* transparent, not less. The IQA applies to information disseminated by the federal government for a reason: if regulations are to be imposed, then the underlying data must be sound. If concern exists that backroom deals could be made, peer review guidelines would prevent such an occurrence, not facilitate it. Again, if information is subject to peer review, this fact in itself makes the regulatory process more open.

Some critics argue that the cost of having peer reviews would be too expensive and burdensome. But the negligible cost of paying for expert personnel would be well offset by the savings to the national economy by preventing flawed technical and scientific data from being used in regulatory decision making.

Finally, opponents argue that peer review guidelines would expand the authority of the OIRA Administrator, thereby politicizing the regulatory process. However, as required by Executive Order 12866, OIRA must review proposed "major" regulations to ensure that benefit-cost standards are met.[23] OIRA would neglect its duties if it were to ignore the veracity of scientific and technical data that underpins the bases of proposed regulations.

Irrespective of the wholesale criticism put forth by interest groups, OMB's proposed guidance does raise some questions as to how the peer review guidelines will be specifically implemented. A handful of the more pertinent questions deserve extra attention.

**Some Aspects of OMB's Proposed Bulletin**

The proposed OMB Bulletin would supplement (but not replace) OMB's information quality guidelines pursuant to the Information Quality Act, and would also serve as guidance pursuant to the Paperwork Reduction Act,

and Executive Order 12866. If an agency already has peer review requirements, OMB's guidance would supplement those requirements for the peer review of "*significant regulatory information*," which is scientific or technical information that (i) qualifies as "influential" under OMB's information quality guidelines and (ii) is relevant to regulatory policies.[24] This category does not include most routine statistical and financial information, such as that distributed by the Census Bureau, the Bureau of Labor Statistics and the Federal Reserve.[25] Nor does it include science that is not directed toward regulatory issues.[26] It is also limited to the peer review of *studies* to be disseminated, as opposed to applications for grants.[27] OMB has also excluded national security information.[28]

OMB's Bulletin also establishes a second category of information that would be subject to peer review, which is called "especially significant regulatory information."[29] It is unclear why OMB made this distinction, because any information disseminated would have a potentially "significant" or "especially significant" impact depending upon what entity it was applicable to. OMB, therefore, ought to clarify what exactly the difference is, how agencies should determine the difference, and how to manage their peer reviews based upon the difference. The distinction, for peer review purposes, between "significant" or "especially significant" information seems irrelevant to the impact that any information disseminated by agencies can have on society generally and, in particular the private sector.

Also ambiguous is the distinction between the terms "influential information"[30] in the information quality guidelines, and "significant regulatory information" as it appears in the Bulletin. "Influential information" in the information quality guidelines is tied to "scientific, financial, and statistical" information and to "information concerning risks to human health, safety, and the environment" whereas "significant regulatory information" references "any scientific and technical study." Is one of the terms intended to be broader or narrower than the other, and what types of information are (and are not) intended to be covered?[31] OMB needs to address this point in its final guidance.

Irrespective of the types of information that would be subject to peer review, it is important to note that the data quality guidelines (of the IQA) apply to all and any information that federal agencies make public.[32] Among its other provisions, the IQA provides that OMB's interagency data quality guidelines require all federal agencies subject to the PRA to establish administrative processes allowing "affected persons to seek and obtain correction of information maintained and disseminated by the agency that does not comply with" OMB's interagency guidelines.[33] In practice, OMB's peer review guidance would be reserved only for what it had deemed "significant regulatory information" or "especially significant regulatory information." The IQA, however, applies to all information disseminated regardless of a regulatory application.[34] Peer review guidance should not alter that scheme; it should supplement existing information quality guidelines to ensure the quality of significant regulatory information. Consequently, any peer review guidance must adhere to the requirements of the IQA, and OMB should explicitly mandate that agencies amend their information quality guidelines to conform to the final OMB peer review guidance. If, for example, a particular peer review failed to meet dissemination standards, challenges to the veracity of that data could be brought under the IQA's data quality guidelines. Although helpful to ensure the consistency and integrity of information, problems might arise between the IQA and prospective peer review guidelines. For instance, "if the peer review is not yet complete, it is unclear whether an agency can nonetheless proceed to regulate or establish regulations on the basis of yet to be peer reviewed information. One can envisage a situation in which an agency chooses to regulate on the basis of information that has not yet been peer reviewed, while at the same time, the right of third parties to challenge the quality of the information underpinning the regulation is denied by the agency because, as the peer review has not yet been completed, the information is not yet considered disseminated and is therefore not yet challengeable."[35]

OMB's Bulletin raises additional questions as to how the peer review guidance will be specifically implemented. Most notably, what does "adequate" peer review look like? It is foreseeable that an agency could comply with the peer review guidance in form but not in substance. For instance, would there be a difference between *peer input* and peer review?[36] And, what institution and who would ultimately select the reviewers? If the same agency selects the peer reviewers, problems might arise because the reviewers may simply serve to rubber stamp an agency's views.[37] Alternatively, peer reviews must be independent, but to what degree? For "significant regulatory information," whose reliability is paramount, the OMB Bulletin requires that agencies must take care to select external peer reviewers who possess the requisite experience and independence from the agency.[38] But, because virtually all reviewers will have some potential conflicts, should more weight be given to actual expertise in a field than perceived conflicts of interest?[39] In other words, objectivity in a vacuum might lead to less than "adequate" peer reviews.

The OMB Bulletin states that agencies must provide the peer reviewers with sufficient information and an appropriately broad charge.[40] Taken alone, however, this provides no guarantee that the final work product will be of the highest quality. One suggestion was that the reviewers, if qualified, should be financially compensated for their time in order to provide incentives for high quality regulatory analysis.[41] Experts will have to spend a degree of time reviewing agency information, and financial incentive can promote better quality work.

The OMB Bulletin also presumes that journal peer review is adequate. This poses a substantive problem because "journal peer review often does not attempt to address the supportability of a manuscript's conclusions, and focuses more on whether the material is worthy of dissemination to the scientific community where it can be subjected to further scrutiny and attempts to replicate and validate its findings and conclusions. Thus, journals often publish material because it is believed to contain significant observations, suggest a new hypothesis for further examination, or describe potentially useful new test methods or materials."[42]

Perhaps the most important requirement is transparency. Transparency must apply to all information, data, and economic models. Such a policy would allow stakeholders to fully participate in the regulatory process and would further ensure that benefits and costs are appropriately quantified. Without transparency, peer review requirements are unlikely to have any real impact because there is no way for OMB and others to verify that the peer review is, or was, indeed independent, rigorous, and objective.[43] Thus, total transparency adds "objectivity" and "integrity" to the peer review process by improving agency accountability and helping to further ensure the soundness of the science that underpins federal policies encompassed in regulations, guidance documents, and risk assessments.[44]

**Conclusion**

Inevitably, tradeoffs will have to be made at some point in the guidance, but that should not discourage OMB and the public from moving forward on this initiative. Those who have criticized OMB's Bulletin in its entirety view regulation as an absolute necessity, albeit without any regard to the costs and inefficiencies imposed by wanton regulatory policies. If hastily imposed without transparency, careful consideration to the benefits and costs and the underlying science and technical data, regulations do not serve to protect health and safety or market inefficiencies, they exist only to create unnecessary economic costs and damage the very entities they ostensibly seek to protect. If properly drafted, OMB peer review guidance can balance independence with expertise, insist upon accepted scientific conclusions, and mandate total transparency in the process. Federal information has enormous impacts on the business and economic climate; therefore, it must pass benefit-cost tests and be based upon objective scientific and technical information. Peer review is the manner in which to achieve high-quality information that is used and disseminated by the federal government. OMB is on the right track; the finer points and details of its guidance, however, are yet to be determined.

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**Footnotes**

[1] *See* Proposed OMB Bulletin on Peer Review and Information Quality, 68 Fed. Reg. 54023 (September 15, 2003). A list of all the comments submitted is available at http://www.whitehouse.gov/omb/inforeg/2003iq/iq_list.html.

[2] *Id.* at 54024

[3] *See* Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies ("data quality guidelines"), 67 Fed. Reg. 8452 (February 22, 2002) available at http://www.whitehouse.gov/omb/fedreg/reproducible.html.

[4] 44 U.S.C. § 3516.

[5] 68 Fed. Reg. 54023 at 54026; *see also* John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, Memorandum for the President's Management Council (September 20, 2001) "For economically significant and major rulemakings, OMB recommends that agencies subject RIAs [Regulatory Impact Analyses] and supporting technical documents to independent, external peer review by qualified specialists. Given the growing public interest in peer review at agencies, OMB recommends that (a) peer reviewers be selected primarily on the basis of necessary technical expertise, (b) peer reviewers be expected to disclose to agencies prior technical/policy positions they may have taken on the issues at hand, (c) peer reviewers be expected to disclose to agencies their sources of personal and institutional funding (private or public sector), and (d) peer reviews be conducted in an open and rigorous manner. OIRA will be giving a measure of deference to agency analysis that has been developed in conjunction with such peer review procedures."
Available at http://www.whitehouse.gov/omb/inforeg/oira_review-process.html.

[6] Consolidated Appropriations FY 2001 of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-153 to 2763A-154.

[7] *Id.* (emphasis added).

[8] The Office of Science and Technology Policy (OSTP), like OMB, is an office within the Executive Office of the President of the United States (EXOP).

[9] *Id; see also* note 3, *supra*.

[10] 67 Fed. Reg. 8452.

[11] 67 Fed. Reg. 8452 at 8460. "Objectivity" involves two distinct elements, presentation and substance. "Objectivity" includes whether disseminated information is being presented in an accurate, clear, complete, and unbiased manner. This involves whether the information is presented within a proper context. Sometimes, in disseminating certain types of information to the public, other information must also be disseminated in order to ensure an accurate, clear, complete, and unbiased presentation. Also, the agency needs to identify the sources of the disseminated information (to the extent possible, consistent with confidentiality protections) and, in a scientific or statistical context, the supporting data and models, so that the public can assess for itself whether there may be some reason to question the objectivity of the sources. Where appropriate, supporting data should have full, accurate, transparent documentation, and error sources affecting data quality should be identified and disclosed to users.

[12] "Quality" is an encompassing term comprising utility, objectivity, and integrity. It contains concepts based upon the PRA. 67 Fed. Reg. 8452 at 8459; *cf*. 44 U.S.C. § 3504(e)(1)(B)(2000).

[13] *Id.* at 8459. "Integrity" refers to the security of information – protection of the information from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.

[14] *See* note 3, *supra*, also available at http://www.whitehouse.gov/omb/fedreg/final_information_quality_guidelines.html

[15] *See e.g.* Thomas J. Bray, "Garbage In, Regulation Out," OpinionJournal.com, July 9, 2002 (The thought that policy should be based on objective, reproducible information, as the Data Quality Act requires, appalls regulatory zealots. "It ultimately could lead to less government action," Sean Moulton, senior policy analyst for OMB Watch, a left-wing watchdog group, fretted to The Wall Street Journal…"If human health is potentially at risk, you can't wait for all the facts to come in." [sic]) available at http://www.opinionjournal.com/columnists/tbray/?id=110001962.

[16] *See* Robert W. Hahn and Robert E. Litan, Comment on Peer Review and Information Quality, Regulatory Analysis 03-11 at 2 (December 2003) available at http://aei-brookings.org/admin/pdffiles/phpjZ.pdf

[17] *See* William L. Kovacs, Chamber of Commerce of the United States of America Comments on Proposed OMB Bulletin on Peer Review and Information Quality at 2 (December 15, 2003) (emphasis added) available at http://www.whitehouse.gov/omb/inforeg/2003iq/170.pdf.

[18] *See* OMB Watch Comments on OMB's Proposed Bulletin on Peer Review and Information Quality (December 15, 2003) available at http://www.ombwatch.org/info/dataquality/PRbulletinOMBWcomments.pdf; *see also* Public Citizen Comments on OMB's Proposed Bulletin on Peer Review and Information Quality (December 15, 2003) available at http://www.publiccitizen.org/documents/OMB%20Comments.pdf; *see also* Center for Progressive Regulation (CPR) Comments on OMB's Proposed Bulletin on Peer Review and Information Quality (December 7, 2003) available at http://www.whitehouse.gov/omb/inforeg/2003iq/24.pdf.

[19] 44 U.S.C. § 3501(4)

[20] *See e.g.* OMB Watch, *supra* note, at 2, referring to the IQA as "a slim 15 line rider on an appropriations bill; *see also* CPR, *supra* note, at 3, "After all, the IQA was a rider hidden in an appropriations bill."

[21] CPR, *supra* note, at 2, citing H.R. 9 (1995) that failed to be enacted in the 104th Congress. This legislation, which would have required agency peer review, passed the House, but did not come to a vote in the Senate.

[22] OMB Watch, *supra* note, at 3.

[23] Executive Order 12866, 3 C.F.R. 638 (1993). OIRA oversees agency activity in three areas: regulation, collection of information, and information resources management. OIRA is headed by a Presidential appointed, Senate confirmed, Administrator. Pursuant to Executive Order 12866, OIRA reviews major regulations, i.e. Federal regulations that would have an impact on the economy of $100 million or more, to insure that the benefits of the regulation "justify" the costs.

[24] 68 Fed. Reg. 54023 at 54026. The Bulletin requires peer review of "significant regulatory information" and has specific requirements for this type of information that an agency intends to disseminate in support of a major regulatory action, that could have a clear and substantial impact on important public policies or important private sector decisions with a possible impact of more than $100 million in any year, or that the Administrator of OIRA determines to be of significant interagency interest or relevant to an Administration policy priority. As OIRA notes, such an impact can occur whether or not a federal rulemaking is envisioned or considered likely to occur, in part because information might influence local, state, regional, or international decisions.

[25] *Id*.

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id.* at 54027.

[30] 67 Fed. Reg. 8452 at 8460. "Influential" when used in the phrase "influential scientific or statistical information" means the agency expects that information in the form of analytical results will likely have an important effect on the development of domestic or international government or private sector policies or will likely have important consequences for specific technologies, substances, products or firms.

[31] Kovacs, *supra* note, at 3.

[32] 44 U.S.C. § 3516.

[33] *Id*.

[34] *See e.g.* U.S. Environmental Protection Agency, Information Quality FY03 Annual Report (January 1, 2004) available at http://www.epa.gov/oei/qualityguidelines/pdf/EPA_IQG_FY03_Annual_Report.pdf.

[35] Kovacs, *supra* note, at 7.

[36] *See* William G. Kelly, Jr., Center for Regulatory Effectiveness Comments on Proposed OMB Bulletin on Peer Review and Information Quality at 10 (December 15, 2003) available at http://www.thecre.com/quality/120.pdf.

[37] Hahn and Litan, *supra* note, at 1.

[38] 68 Fed. Reg. 54023 at 54026.

[39] Hahn and Litan, *supra* note, at 4.

[40] 68 Fed. Reg. 54023 at 54026.

[41] Hahn and Litan, *supra* note, at 4.

[42] Kelly, *supra* note, at 5.

[43] *Id.* at 6.

[44] Kovacs, *supra* note, at 1.

# Civil Rights

## Gay Marriage and the Federal Judicial Confirmation Process

*By Brian J. Murray and David S. Petron**

Last year saw momentous advances in civil rights for homosexual persons. First, in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the U.S. Supreme Court struck down as unconstitutional a Texas statute outlawing homosexual sex acts under a rationale broad enough to make it unlikely that any State can successfully prosecute such acts. The decision, and the new right to homosexual intercourse it created, was all the more dramatic because to achieve it, the Court had to overrule its own recent precedent, *Bowers v. Hardwick*, 478 U.S. 186 (1986). Then, a few months later, in *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (2003), the Supreme Judicial Court of Massachusetts decided that the Commonwealth's laws allowing only persons of different sexes to be married violated the Massachusetts Constitution. In the course of its opinion, the Supreme Judicial Court referred extensively both to the result and to the interpretive methodology employed in *Lawrence* as justifying its result and approach. Emphasizing that its opinion marked a fundamental change in Massachusetts marriage law, the Court boldly declared that the Massachusetts Constitution not only forbids discrimination against homosexuals in this manner, but affirmatively requires that homosexuals be allowed, if not to marry, then to at least something closely akin to marriage. The Court left the details of fashioning an appropriate remedy in the first instance to the Massachusetts Legislature. Thus, without a majority of Americans, or even of Bay Staters, stating their policy preferences, homosexuals gained two important rights: the right to engage in homosexual sex acts anywhere in the Republic, and the right to marry, or something close to it, in the Commonwealth of Massachusetts.

Much has been written about these decisions, both pro and con. While both sides in this contentious cultural dispute make forceful arguments, we do not, in this piece, propose to cast our lot with either. Instead, we wish only to emphasize the effect that these decisions are sure to have on the process of confirming federal judges.

Our thesis can be summed up as follows. In our American democracy, the Constitution makes at least two things clear. *First*, the Legislative Branch is the one entrusted with enacting the laws under which we will live. Members of this branch are, periodically, popularly elected. *Second*, the Judicial Branch exercises the judicial power of the United States. Members of this branch are not elected, but appointed and enjoy lifetime tenure to guarantee their independence from ordinary political pressures. Americans, as citizens of this Republic, hold dear the right to elect those persons who will make the laws. Accordingly, when judges cross the line from adjudicating into lawmaking, it makes sense that Americans will seek to exercise something like electoral control over who can be a judge. That is, when these two distinct governmental powers are not kept within their constitutionally-ordained bounds, it is inevitable that the process for creating new federal judges will be come regrettably politicized, thereby threatening the independence of the federal judiciary.

Indeed, we are already seeing this phenomenon. Although Republicans control the Senate, Democrats remain committed to keeping off the bench conservative nominees who they deem "out of the mainstream" (whatever that means). Accordingly, in the past year, a minority has taken the unprecedented step of simultaneously filibustering five Republican judicial nominees. Their strategy is working: already Miguel Estrada has decided that the game isn't worth the candle and has withdrawn from the confirmation process.

To be fair, although aggressive use of the filibuster—especially for lower-court nominees—is new, political action to keep "extremist" judges off the bench is not. During the Clinton administration, various judicial nominees never even made it to the floor of the Senate for a vote because the Republicans saw them as too "activist" (whatever that means).

The point is this: the days in which judicial appointments were seen primarily as a spoil to be awarded by the victorious Presidential candidate—when intelligence, judicial temperament, and experience were the only qualifications that mattered for confirmation—are long gone. When passionate political issues become the domain of the judiciary instead of the legislature (or of the State legislatures), the Senate Judiciary Committee Hearing Room is bound to be the next great battlefield of the culture wars. Indeed, our theory is not novel; prominent public figures from across the ideological spectrum, from Senator Charles Schumer to Supreme Court Justice Antonin Scalia, have endorsed it for years. But in light of *Lawrence* and *Goodridge*, the point, perhaps, merits renewed consideration.

### I

To understand fully the import of *Lawrence*, some background is helpful. Prior to 2003, the relevant precedent was found in *Bowers*, a case involving a man prosecuted under a Georgia sodomy law prohibiting homosexual intercourse. He contended that the law violated the Constitution's Due Process Clause, and more specifically, his substantive due process rights. But the Su-

preme Court disagreed. Relying on its precedents, the Court explained that, under substantive due process, the work of state legislatures is reviewed with significant deference unless it impinges on a fundamental right. In the absence of a fundamental right, laws are sustained so long as there is a rational basis for their enactment. The Court in *Bowers* decided that there is no fundamental right to participate in homosexual intercourse, and that under deferential rational-basis review, the Georgia law passed Constitutional muster.

Although the Court in *Lawrence* expressly overruled *Bowers*, it left this central holding—that there is no fundamental right to homosexual intercourse—intact. It struck down a Texas statute outlawing homosexual intercourse not because it impinged upon a fundamental right. Instead, the Court emphasized that such conduct is "an exercise of . . . liberty," and concluded that the statute must yield because no "rational basis" supported it.

The Court began with some sweeping pronouncements on the nature of liberty: "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." The Court then phrased the issue before it as follows: "We conclude the case should be resolved by determining whether the petitioners were free as adults to engage in the private conduct [of homosexual intercourse] in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."

To answer that question, the Court examined its precedents, and in particular, *Bowers*. The Court took the *Bowers* majority to task for "fail[ing] to appreciate the extent of the liberty at stake" in that case: "To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said that marriage is simply about the right to have sexual intercourse." Without citation, the *Lawrence* Court explained, "[t]he statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals." Thus, the Court concluded,

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.

To be sure, the *Lawrence* Court conceded that the majority in *Bowers* was "making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral." But, the *Lawrence* Court rejoined: "Those considerations do not answer the question before us . . . . The issue is whether the majority may use the power of the State to enforce these views on the whole society through the operation of the criminal law. '*Our obligation is to define the liberty of all*, not to mandate our own moral code.'" (Emphasis added.) And emphasizing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex," the Court decided that, under its definition of liberty, homosexual intercourse is constitutionally protected.

The Court's opinion in *Lawrence* is remarkable for many reasons. But whatever one's view of homosexual conduct, its approach is particularly interesting. In a self-governing Republic, one might think that when the opposing sides have drawn battle lines over such a hotly-contested issue, a court might recognize that the continued existence of a long-standing law like that at issue in *Lawrence* ought to be left to the political arena. Justice Thomas recognized as much in his separate dissent, in which he opined that the sodomy law at issue was "uncommonly silly," and that were he a "member of the Texas Legislature, [he] would vote to repeal it," but that "as a member of [the Supreme] Court [he was] not empowered to help petitioners and others similarly situated." But instead, the Court decided that it was best positioned to end the controversy by creating a new constitutional right. Indeed, the Court opined,

> Had those who drew and ratified that Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

Yet, even accepting the Court's conclusion that there is an "emerging consensus" that criminal liability ought not attach to homosexual conduct, and that times can blind us to certain truths such that only later generations can recognize oppressive laws for what they truly are, one may still reasonably ask: why is it proper for the Court to declare a new right to homosexual intercourse as a Constitutional matter? The Court took upon itself the task of "defin[ing] the liberty of all." But if there truly is an "emerging consensus" that statutes like that at issue in *Lawrence* ought not exist, it would be better for the body politic to rid itself of such statutes. For more than

the good of self-government is at risk when judges step into the fray and perform the task themselves: as Justice Scalia pointed out in his dissent,

> [o]ne of the benefits of leaving regulation [of homosexual intercourse] to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion. The people may feel that their disapprobation of homosexual conduct is strong enough to disallow homosexual marriage, but not strong enough to criminalize private homosexual acts—and may legislate accordingly. The Court today pretends that it possesses a similar freedom of action. . . . [But its decision] dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.

Of course, before the ink was dry, the *Lawrence* Court did attempt to cabin the scope of this new right. Indeed, just before setting forth its holding, that "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual," the Court emphasized what it was *not* deciding. "The present case," the Court pointed out, "does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution." And perhaps most importantly, for present purposes, "[i]t does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." This attempted limitation on the scope of *Lawrence* was tested only months later, when the Supreme Judicial Court of Massachusetts issued its opinion in *Goodridge*.

**II**

*Goodridge* involved fourteen individuals from five Massachusetts counties. Each was involved in a committed relationship with another of the plaintiffs. (That is, the plaintiff group was comprised of seven couples.) Each couple had been together for some years, and several were even raising children. Yet, each plaintiff wanted something more: "to marry his or her partner in order to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children." But, Massachusetts' marriage statutes did not provide for the marriage of same-sex individuals. Accordingly, although each couple applied for a marriage license, none received one—and accordingly, none was able to marry.

The plaintiffs then brought suit, alleging that Massachusetts' marriage scheme, and specifically its "exclusion of . . . qualified same-sex couples from access to marriage licenses, and the legal and social status of civil marriage, as well as the protections, benefits and obligations of marriage, violated" various provisions of the Massachusetts Constitution. A trial judge granted summary judgment to the State defendants. But on a granted request for direct appeal, the Supreme Judicial Court of Massachusetts reversed.

The court's opinion in *Goodridge* reads much like the *Lawrence* opinion. It, too, begins with a paean, not to liberty, but instead to the institution of marriage, which it describes as a "vital social institution" which "brings stability to our society," imposing "weighty legal, financial, and social obligations," but also bestowing "an abundance of legal, financial, and social benefits." It then frames the question to be decided as follows: "whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." The Court answered this question in the negative, concluding, like the Court in *Lawrence*, that the government had failed to identify "any constitutionally adequate reason for denying civil marriage to same-sex couples."

Like the Supreme Court in *Lawrence*, the *Goodridge* court thought itself obliged "to define the liberty of all, not to mandate our own moral code." (citing *Lawrence*.) Accordingly, like the *Lawrence* Court, the court believed it irrelevant that "[m]any people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral," while others "hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married." What mattered, the court thought, was that because the Massachusetts marriage law acted to "bar[] access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions." The court thought this unjust, and accordingly, despite recognizing that its decision marked a judicial "change in the history of [Massachusetts] marriage law," held Massachusetts' legal marriage regime violated the Commonwealth's constitution. (Whether the violation was of the Equal Protection Clause, or of substantive due process, did not really matter; in either event, the Court concluded, the law flunked the rational basis test.)

The *Goodridge* court's reliance on *Lawrence* was extensive. To begin, the court read *Lawrence* as affirming "that the core concept of common human dignity protected by the Fourteenth Amendment to the United States Constitution precludes government intrusion into the deeply personal realms of consensual adult expressions of intimacy and one's choice of an intimate partner." To be sure, the court admitted, *Lawrence* left open the ques-

tion of whether federal law requires same-sex marriage—because, of course, that was "not a[t] issue." Nonetheless, the court opined, *Lawrence* "reaffirmed the central role that decisions whether to marry or have children bear in shaping one's identity," and indeed, that "[w]hether and whom to marry, how to express sexual intimacy, and whether and how to establish a family . . . are among the most basic of every individual's liberty and due process rights."

In fact, *Lawrence* seems to have emboldened the *Goodridge* court to go even further than the *Lawrence* Court itself was prepared to go. While *Lawrence* requires legal ambivalence as between homosexual and heterosexual sex, the *Goodridge* court expressed outright moral disapprobation for those who think homosexual marriage morally wrong. The opinion even compares such persons to racists and mysogynists. Emphasizing that marriage is a "civil right," and citing *Loving* v. *Virginia*, 388 U.S. 1 (1967) (in which the Supreme Court found unconstitutional a statute banning interracial marriage), the *Goodridge* court equated the Virginia Statute in *Loving* with Massachusetts' marriage scheme: "In this case, as in . . . *Loving*, a statute deprives individuals of access to an institution of fundamental legal, personal, and social significance—the institution of marriage—because of a single trait: skin color in . . . *Loving*, sexual orientation here. As it did in . . . *Loving*, history must yield to a more fully developed understanding of the invidious quality of the discrimination." "Recognizing the right of an individual to marry a person of the same sex will not," the court opined, "diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race." Moreover, the court noted that under the common law, "a woman's legal identity all but evaporated into that of her husband," justifying one commentator's observation that "the condition of a slave resembled the connection of a wife with her husband, and of infant children with their father."

With these lines of reasoning established, the *Goodridge* court rejected the Commonwealth's proffered justifications for its traditional marriage law: (1) providing a "favorable setting for procreation"; (2) ensuring the optimal setting for child rearing; and (3) preserving scarce State and private financial resources. The court discarded the first out of hand, noting that this approach "singles out the one unbridgeable difference between same-sex and opposite-couples, and transforms that difference into the essence of legal marriage," and in the process "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently inferior to opposite-sex relationships and are not worthy of respect." As to the second, the court concluded—without citation to any relevant social, psychological, or other study—that "[t]here is . . . no rational relationship between the marriage statute and the . . . goal of protecting the 'optimal' child rearing unit," because there was no evidence offered to the court that "forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children." And the third justification fell with the State's contention that same-sex couples are more financially independent than married couples and thus more needy of the public marital benefits, such as tax benefits or private marital benefits like employer-sponsored health plans. This contention, the court explained, ignores the twin facts that many same-sex couples have children, and thus need these benefits just as much as opposite-sex couples, and the advantages are not conditioned on financial interdependence.

In conclusion, the court explained, "[t]he history of constitutional law is the story of the extension of constitutional rights and protections to people once ignored or excluded. . . . This statement is as true in the area of civil marriage as in any other area of civil rights." The marriage ban "works a deep and scarring hardship on a very real segment of the community for no rational reason."

The court, however, did not strike down the Massachusetts marriage laws. Instead, it re-defined the common-law meaning of marriage to include same-sex couples, a remedy it thought "entirely consonant with established principles of jurisprudence empowering a court to refine a common-law principle in light of evolving constitutional standards." The court "construe[ed] civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others," but left it to the Legislature to fashion an appropriate remedy in the first instance, taking "such action as it may deem appropriate in light of this opinion."

Finally, like the *Lawrence* Court, the *Goodridge* court attempted to cabin the scope of the new right it created. It stressed that the plaintiffs before it "do not attack the binary nature of marriage, the consanguinity provisions, or any of the other gate-keeping provisions of the marriage licensing law."

**III**

These legal developments will inevitably make the issue of gay marriage yet another flashpoint in the ongoing judicial confirmation wars. The current confirmation process for federal judges is one of the most polarized arenas in contemporary American politics. Injecting another issue on which many Americans have passionately-held political views will only raise the temperature in the already boiling Senate hearing rooms and force both parties to take ever-more-extreme measures to further their ideological agendas.

In many ways, the brewing culture war over gay marriage resembles the early 1970's, when abortion rights were first becoming central in the American political con-

sciousness. As political forces in favor of liberalizing existing anti-abortion laws became more organized and vocal, they began to make gains in some states. Conventional wisdom suggests that, left to the ordinary political process, abortion rights advocates may have succeeded in passing laws permitting abortions in most states—though with varying conditions and limitations. Before the political process in most states could begin to react to the growing cultural issue, however, the Supreme Court stunted the political discourse by constitutionalizing abortion rights in *Roe v. Wade*, 410 U.S. 113 (1973). As a direct result, anti-abortion groups organized in opposition, but because the core of the abortion debate had been taken off the table by the Supreme Court, there was little these groups could do through the electoral process. In the three decades since *Roe*, there have been intermittent skirmishes around the edges of abortion rights, but the central holding of *Roe*—reaffirmed in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)—continues to be the governing law of the land.

The real battles over abortion rights have taken place not before the general voting public, but instead, before judges. Not coincidentally, abortion rights have at the same time become the single most contentious issue in the judicial confirmation process. Robert Bork's skepticism over a constitutional right to privacy—the cornerstone on which constitutional abortion rights were erected—was the central criticism of his nomination to the Supreme Court. Bork had a substantial paper trail on privacy rights; when privacy and abortion became confirmation battlegrounds, he had no choice but to fight. The prominence of abortion rights in that confirmation battle led Presidents Reagan and Bush to attempt to evade such battles by subsequently nominating individuals with little or no record on abortion. Similarly, during the Clinton administration, conservatives used any evidence that a nominee was strongly in favor of abortion rights to argue that he or she was as an "activist" who needed to be kept off the bench. And more recently, opponents of President George W. Bush's judicial nominees have gone to extraordinary lengths to paint them as anti-abortion. For example, when confronted with one nominee with no record on abortion rights at all, liberal opponents seized on a passing, innocent citation to *Roe v. Wade* in a decade-old speech as evidence that the nominee had "cast a disparaging eye" on abortion rights in general. And whenever a nominee's public record touched on abortion rights in the slightest way, opponents would spin that record into one of vehement opposition to abortion rights. Thus, Texas Supreme Court Justice Priscilla Owen's series of opinions on the Texas parental notification statute—one of the remaining regions where the ordinary political process can exercise some populist control over abortion rights—became "proof" that she was completely opposed to *Roe v. Wade* and could not be trusted to follow the governing law of that case and its progeny.

Through administrations of both parties, then, political warfare over judicial nominations has steadily intensified, with the issue of abortion rights always at the center. The result has been a confirmation process stalled by unprecedented filibusters of five judicial nominees, all of whom were perceived by their opponents as anti-abortion. The pattern is clear: when important cultural issues are removed from the voting booth to the courtroom, the passionate political debate over those issues is similarly transferred from elections to the judicial confirmation process. There is little reason to think this pattern will not be repeated with respect to the emerging issue of gay marriage.

Indeed, there is plenty of evidence that it is already become another hotly-debated issue in the judicial confirmation wars. For one thing, many of the organizations that wield significant influence in the confirmation process are passionately interested in the issue of gay marriage. For example, controversial Democratic Judiciary Committee staff memos leaked to the press reveal that in at least one instance, the coalition of liberal groups involved in the process was "checking with the gay rights groups" about their stance on a particular nominee. While the groups involved were not specifically identified, those gay rights groups would likely fight any nominee believed to be opposed to gay marriage. On the conservative side, several of the organizations active in the judicial confirmation process are explicitly religious in nature and can be expected to represent their constituencies' passionate opposition to gay marriage.

For another thing, a nominee's views on gay rights have already contributed to the acrimony of Senate-judicial-confirmation proceedings on at least two occasions. *First*, Michael Mosman, President Bush's nominee to the U.S. District Court for the District of Oregon, came under fire for his perceived views on gay rights. Before his nomination, Mosman had served as the U.S. Attorney for that district and had a long and distinguished career as an advocate and prosecutor. But various groups opposed his nomination to the bench when allegations surfaced that, while clerking for Justice Powell at the Supreme Court many years before, he authored a bench memo in support of the outcome in *Bowers* that persuaded Justice Powell to vote as he did in that case. (Justice Powell was, of course, the crucial swing vote in that 5-4 decision, and in his later years expressed concern that he had voted the wrong way.) While Judge Mosman was eventually confirmed, it was only after he had a series of meetings with gay rights groups in which he reportedly assured them that he supported their cause, or at least was not hostile to it.

*Second*, critics blasted Alabama Attorney General William Pryor—President Bush's nominee to the Eleventh Circuit—for his alleged hostility to gay rights. In fact, they even went so far as to filibuster his nomination. The evidence of Pryor's alleged hostility, however, was somewhat unusual; Pryor had cancelled a planned family va-

cation to Disney World after learning that his family's trip would coincide with "Gay Day" at the theme park. To some, it may seem silly to treat a nominee's decision about when to take his family vacation as evidence of the character, learning, and skill that should be the central concerns of the nomination process. To passionate advocates, however, that decision became another weapon in the ongoing battle to shape the future of the federal bench.

In light of *Lawrence* and *Goodridge*, the judicial confirmation wars are bound to focus increasingly on the issue of gay marriage. Unfortunately, such a focus is likely to further poison an already unhealthy process. For one thing, the inordinate attention paid to passionate issues like gay marriage distracts attention away from the more pressing needs of the federal judiciary. The staggering growth in caseloads over the past two decades has led to a judiciary that is stretched thin; under present circumstances, even one vacancy on a court can dramatically increase the burden of sitting judges and delay the administration of justice. What the judiciary desperately needs is legally talented and wise men and women to serve in the courts. The judicial confirmation process would do best to limit examination of a President's nominees to whether they are unfit, be it because they lack these qualities, or because their appointments were "from State prejudice, from family connection, from personal attachment, or from a view to popularity"—the defects identified by Hamilton in the *Federalist Papers*, Number 76. Instead, by focusing on difficult political issues, the confirmation process all but ignores potentially serious concerns about temperament or legal ability that can have a far greater effect on the day-to-day operations of the courts. When those political issues provide an alleged justification for longer and longer periods between nomination and confirmation—whether from a majority's stalling on hearings and votes or a minority's procedural delays and filibusters—judicial vacancies are prolonged and the administration of justice is denied by delay.

Even worse, the past two decades of judicial confirmation battles have demonstrated that a politicized judicial confirmation process is incapable of examining the nuances of legal doctrine and arguments that are the work product of the judiciary. In any concrete legal dispute, numerous legal issues can be overlapped with each other, and subtle factual differences can be outcome-determinative. Only rarely will the two sides in a case map neatly into familiar left-right political camps. Unfortunately, the distinctions and qualifications that are inherent in legal craft—a craft in which any acceptable nominee should excel—are bleached out of a political process accustomed to sound bite-sized morsels of argument. Thus, zealous advocates can readily manipulate a candidate's record to get their desired political spin, and a Senate that is constantly addressing countless issues of importance to the country cannot always separate the facts from the fiction—even if it wanted to.

Consider how the legal complexities of a statute like the federal Defense of Marriage Act (DoMA) would be lost in a judicial confirmation debate focused on gay marriage. DoMA purports to exercise Congress' authority under Article IV, Section 1 (not exactly a provision studied in every high school civics class) to define the effect under the Full Faith and Credit Clause of any state law that would recognize "a relationship between persons of the same sex that is treated as a marriage." Under DoMA, states remain free to authorize civil unions or gay marriages as they see fit, but no other state need recognize those policies and give them effect. To a nonlawyer—and even to most lawyers—the choice-of-law technicalities of the Full Faith and Credit Clause are soporific, if they are comprehended at all. In the context of a judicial confirmation proceeding, those technicalities would be ignored altogether in favor of splashier statements about gay marriage. Thus, if a nominee wrote a scholarly article examining the history of the Full Faith and Credit Clause and arguing that DoMA was constitutional under Article IV, Section 1, it is quite likely that liberal proponents of gay marriage would denounce the nominee for her opposition to gay rights. Because gay marriage is such a passionate issue in the culture wars, all attention would be focused on the nominee's supposed anti-gay position, when it might in fact be the case that the nominee generally favors gay marriage but nonetheless thinks, as a legal matter, that DoMA is a permissible exercise of Congressional power. For, in the judicial-confirmation wars, legal arguments tend to be seen merely as the continuation of politics by other means.

Finally, making gay marriage an issue in the confirmation wars will only further politicize the process and threaten the independence of the federal judiciary. The confirmation process has already become so ugly and personally costly to nominees that many outstanding individuals will likely decline the honor of being nominated in the first place. And one nominee, Miguel Estrada, has already withdrawn his nomination after being blocked in a partisan filibuster. If political issues are the focus of every confirmation process, then only politically-minded and ideologically-committed individuals will be willing to suffer through it so they may serve on the bench. Unfortunately, such nominees are more likely to allow their political commitments to influence their judging, in which case other passionate political issues will be removed from the ordinary political discourse and will become yet more ammunition for the confirmation process. In effect, an overly-politicized confirmation process creates a vicious cycle in which the judiciary itself becomes politicized, thereby justifying further politicizing the confirmation process, and on and on. The effect will be to wrest governance of the Republic out of the hands of We the People, in favor of a handful of unelected judges and the behind-the-scenes activists who control who does and does not get confirmed.

* * * *

The first premise of the American Republic is that the People, through their elected representatives, make the laws that govern our society. When our most important laws are made by unelected judges, however, it is only natural that political passions will be vented in the judicial confirmation process — a forum less well-suited to such political discourse than the ordinary electoral process. Given the recent judicial activity on issues of homosexual rights in *Lawrence* and *Goodridge*, there is good reason for concern that this area will become yet another battleground in the judicial confirmation wars. Indeed, that is already coming to pass.

The *Goodridge* court may well have been correct in its assessment that, at least in recent decades, "[t]he history of constitutional law is the story of the extension of constitutional rights and protections to people once ignored or excluded." But it is important to recognize that the creation of these new rights by judges is not without cost. Indeed, judicial encroachment of this kind into the legislative sphere has caused, and will continue to cause, collateral damage by imperiling the institutional independence of the federal judiciary and depriving the federal bench of legally-talented men and women who are badly needed to ensure the timely administration of justice.

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**Editor's Note:** The next issue of *Engage* will feature a response article that will examine this issue from another perspective.

# Minority Job Fairs for Law Students

*By Roger Clegg**

"Minority job fairs" are prevalent at our nation's law schools. As this article discusses, minority job fairs violate Title VII of the Civil Rights Act of 1964 because they discriminate against job applicants based upon the applicant's race or ethnicity. Law students discriminated against by these job fairs can complain to their law schools, those hosting or participating in the job fairs, and/or to the Equal Employment Opportunity Commission ("EEOC") or Department of Education.

**I. Overview: Minority Job Fairs Violate Title VII of the Civil Rights Act of 1964**

Title VII provides that it is unlawful for employers "to fail or refuse to hire … because of an individual's race, color, religion, sex, or national origin." 42 U.S.C. section 2000e-2(a)(1). Title VII further provides that it is unlawful for employers "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities … because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. section 2000e-2(a)(2). Minority job fairs segregate applicants by race and by doing so tend to deprive applicants who are not members of the specified racial or ethnic group of employment opportunities. See also 42 U.S.C. section 2000e-2(m) (race may not be a "motivating factor for any employment practice").

Entities involved in minority job fairs also violate 42 U.S.C. section 2000e-3(b) by publicizing and advertising them. This provision of Title VII makes it unlawful for employers and employment agencies "to print or cause to be printed or published any notice or advertisement relating to employment … indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin."

**II. Why Law Schools, Employers, and Other Entities Involved in Minority Job Fairs Are in Violation of Title VII**

Minority job fairs take on various forms. Some are hosted by law schools, others by employers, and still others by bar associations or other similar organizations. Regardless of which entity is identified as host of such an event, law schools and employers are usually involved integrally in minority job fairs. Law schools, through their career services offices, supply applicants through advertising, résumé forwarding, and other means. Employers review résumés, select applicants to interview at the job fairs, and make job offers based upon those interviews. By participating in minority job fairs, law schools, employers, and other entities involved violate Title VII.

*A. Employer Liability*

Employers participating in job fairs are typically law firms or corporations. Government agencies and offices are also potential participants. As private employers, law firms and corporations are subject to Title VII. Specifically, law firm partnerships are employers for the purposes of Title VII. *See Hishon v. King & Spalding*, 467 U.S. 69 (1984). To use racial preferences in hiring, a private employer must demonstrate the "existence of a 'manifest imbalance' … in 'traditionally segregated job categories," *Johnson v. Transportation Agency*, 480 U.S. 616 (1987). In my view, the "traditionally segregated" element of this test requires the employer to trace the imbalance to relatively recent past discrimination, which will be difficult for law firms to do, since they have been banned from such employment discrimination for nearly forty years now. Furthermore, the "manifest imbalance" part of the test requires that "the comparison should be with those in the labor force who possess the relevant qualifications." *Id*. It is unlikely that private legal employers could meet this burden either.

Even if private legal employers could demonstrate the "existence of a 'manifest imbalance' … in 'traditionally segregated job categories,'" minority job fairs would violate Title VII because they categorically exclude non-minority law students. In approving an affirmative action plan by a private employer in *Steelworkers v. Weber*, 443 U.S. 193 (1979), the Supreme Court took note that the plan did "not unnecessarily trammel the interests of the white employees." It also noted the plan was "a temporary measure." *Id.* Similarly, in *Johnson*, the Court approved a plan which did not "create 'an absolute bar to the advancement of white employees.'" 480 U.S. 616. Because minority job fairs categorically exclude non-minority students, they do "unnecessarily trammel the interests" of non-minority applicants and present an "absolute bar" to taking advantage of this interview opportunity.

Government employers must meet an even higher standard. In addition to complying with Title VII, they must comply with the Equal Protection Clause. The entities involved cannot claim a remedial justification unless they are willing to admit that they themselves have discriminated against minority groups in the recent past. In *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267 (1986), Justice Powell noted that the Supreme Court "never has held that societal discrimination alone is sufficient to justify a racial classification." If government employers were to claim a diversity justification, which has never been accepted in the realm of employment, *id*.—two courts of appeals have rejected it in the Title VII context—the Supreme Court's recent decisions in *Grutter v. Bollinger* and *Gratz v. Bollinger* have made it clear that "individualized consideration" would be necessary to satisfy the "narrow tailoring" prong of strict scrutiny. A job fair which excludes certain applicants because of the color of their skin does not provide "individualized consideration." (It also appears that even private entities must now meet this higher standard, since the Court's *Grutter* and *Gratz*

decisions say that the prohibitions against intentional discrimination in the Fourteenth Amendment, Title VI, *and* 42 U.S.C. section 1981—which applies to public and private employment-related matters—are coextensive.)

*B. Law School Liability*

Law schools that host, participate in, or in any way assist minority job fairs are violating Title VII. Law schools, specifically the career services office within law schools, act as employment agencies and, therefore, are subject to Title VII. Title VII defines an employment agency as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer." 42 U.S.C. section 2000e(c). The career services office within any law school satisfies this definition because its purpose is to assist law students in finding jobs both while they are in school and after they graduate. Career services offices post job opportunities, collect résumés for employers, and host on-campus interviews. 42 U.S.C. section 2000e-2(b) makes clear that they may not do so in a way that discriminates on the basis of race or ethnicity. Moreover, minority job fairs are made possible by the advertising conducted by career services offices, and such advertisement also directly violates 42 U.S.C. section 2000e-3(b).

Law schools cannot rely upon the "existence of a 'manifest imbalance'" in "traditionally segregated job categories." Nothing in the Civil Rights Act of 1964 indicates that the law school could rely upon a showing that the employers for whom they are recruiting have discriminated in the past. Even if they could do this, the law school would need to demonstrate that they screened each legal employer and determined that each employer had a "manifest imbalance"—and a recent history of discrimination. Considering legal employers tend to be well-versed in the law, it is unlikely that forty years after the passage of the Civil Rights Act such a showing could be made.

By violating Title VII, law schools also violate Title VI. Because universities receive federal money, law schools must satisfy Title VI. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. section 2000d. By participating in minority job fairs, law schools discriminate. For law schools to justify this violation of Title VI, they must meet the higher standard of showing that they themselves have discriminated in assisting their minority students with finding jobs.

The law school could not rely on *Grutter v. Bollinger* to claim a diversity justification. *Grutter* addresses diversity in the classroom setting only. To the extent that a law school presented a diversity justification, which again has never been accepted in the realm of employment—see *Wygant, supra*—they would still need to provide "individualized consideration." See *Grutter v. Bollinger*. A job fair which categorically excludes applicants due to race or ethnicity does not provide "individualized consideration."

*C. Bar Associations and Other Hosts of Minority Job Fairs*

Many minority job fairs are hosted by bar associations. As with the law schools, bar associations and other hosts of minority job fairs are acting as employment agencies. They are undertaking "to procure employees for an employer or to procure for employees opportunities to work for an employer." 42 U.S.C. section 2000e(c). As stated above, there is nothing in Title VII which suggests that an entity acting as an employment agency can rely on the past discrimination of the employer for which they are providing employees. Even if they could, the bar association would have to screen each employer to ensure that the employer had a history of discrimination and "manifest imbalance." Once again, such a showing would be highly unlikely in regard to legal employers.

**III. Conclusion**

By excluding participants on the basis of race and ethnicity, minority job fairs violate Title VII. Some organizers of minority job fairs may claim that their "*minority* job fair" is merely called that, but is actually open to all students. Even if this were true, such a practice would be equivalent to posting a sign stating, "No blacks need apply," and then claiming blacks would be considered if they did apply. This latter practice would not be tolerated and neither should the former. The practice of advertising a job fair as a "minority job fair" would also violate 42 U.S.C. section 2000e-3(b) by publishing a "preference."

Because minority job fairs violate Title VII, they should be opened to all students and it should be clearly advertised that they are now open to all students regardless of race or ethnicity. Until this occurs, law schools, participating employers, hosting bar associations, and other entities involved with minority job fairs are violating Title VII and other civil rights laws.

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# CORPORATIONS

## A COMMENT ON THE SEC'S SHAREHOLDER ACCESS PROPOSAL

*BY STEPHEN M. BAINBRIDGE**

**I. Introduction**

The Securities and Exchange Commission (SEC, or the "Commission") recently proposed a dramatic shakeup in the process by which corporate directors are elected.[1] At present, the director nomination machinery is under the control of the incumbent board of directors. When it is time to elect directors, the incumbent board nominates a slate, which is then put forward on the company's proxy statement. Because the SEC's shareholder-proposal rule cannot be used to nominate directors,[2] a shareholder who wishes to nominate directors is obliged to incur the considerable expense of conducting a proxy contest to elect a slate in opposition to that put forward by the incumbents. This is the situation the SEC proposes to change. If adopted, proposed new Rule 14a-11 would permit shareholders, upon the occurrence of certain specified events and subject to various restrictions, to have their nominees placed on the company's proxy statement and ballot. A shareholder-nominated director thus could be elected to the board in a fashion quite similar to the way shareholder-sponsored proposals are now put to a shareholder vote under SEC Rule 14a-8.[3]

Part II of this commentary discusses the proposal's main points and identifies several significant interpretative issues raised by it. Part III addresses whether the SEC has authority to adopt Rule 14a-11, as proposed. Finally, Part IV addresses the proposal's cost and benefits.

**II. An Overview**

*A. The Proposal*

As proposed, Rule 14a-11 contemplates a two-step process stretching over two election cycles. Under the rule, a shareholder may place his or her nominee on the corporation's proxy card and statement if one of two triggering events occurs:

> 1. A shareholder proposal is made under Rule 14a-8 to authorize shareholder nominations, which is then approved by the holders of a majority of the outstanding shares at a meeting of the shareholders; or
> 2. Shareholders representing at least 35% of the votes withhold authority on their proxy cards for their shares to be voted in favor of any director nominated by the incumbent board of directors.

At the next annual meeting of the shareholders at which directors are to be elected, shareholder nominees would be included in the company's proxy statement and ballot.[4] As proposed, the SEC contemplates that the triggering event could occur during the proxy season beginning in January 2004.

Not all shareholders would be entitled to make use of the nomination process, however. Only shareholders satisfying four criteria would have access to the company's proxy materials; namely, a shareholder or group of shareholders who:

> 1. beneficially own more than 5% of the company's voting stock and have held the requisite number of shares continuously for at least two years as of the date of the nomination,
> 2. state an intent to continue owning the requisite number of securities through the date of the relevant shareholders meeting,
> 3. are eligible to report their holdings on Schedule 13G rather than Schedule 13D, and
> 4. have filed a Schedule 13G before their nomination is submitted to the corporation.[5]

Because the eligibility requirements for use of Schedule 13G include a disclaimer of intent to seek control of the corporation,[6] proposed Rule 14a-11 supposedly will not become a tool for corporate acquisitions.

Data reported in the SEC's proposing release suggest that 42% of registered issuers already have at least one shareholder who would be able to make use of Rule 14a-11,[7] although one must wonder how many of those companies are already *de facto* controlled by that shareholder. If most are, the key issue with respect to how often Rule 14a-11 will be used in practice is not how many corporations already have one or more large shareholders, but rather how many have a handful of institutional investors, each owning perhaps 1% of the company's shares, who would band together to form the requisite group.

The number of nominees who may be put forward by a qualifying shareholder depends on the number of board positions. A company whose board consists of eight or fewer directors would be required to include one security holder nominee. A company with a board of directors having more than eight but fewer than twenty members would be obliged to include two shareholder nominees. A company with twenty or more board members would be obliged to allow three nominees to be included on the proxy materials. Where the terms of the board members are staggered, the relevant consideration

is the size of the board as a whole rather than the size of the class to be elected in that year.

In order for an individual to be eligible to be nominated, that individual must satisfy the applicable stock exchange definition of independence from the company. To avoid the use of surrogate director nominees by the incumbents, there can be no agreement between the nominee or nominating group and the company. Perhaps more surprising, however, the proposal also contemplates that the nominee will satisfy a number of independence criteria (e.g., no family or employment relationships) vis-à-vis the nominating shareholder or group. The SEC clearly is concerned that the proposal would be used to put forward special-interest directors who would not represent the shareholders as a whole but only the narrow interests of those who nominated them.

As with Rule 14a-8, the nominating shareholder would be allowed to include a supporting statement of up to 500 words. In order to broadly solicit proxies in favor of the nominee, however, the shareholder would either have to qualify for one of the limited solicitation exemptions[8] or conduct a proxy contest with his or her own proxy statement.

*B. The Possible Third Trigger*

In addition to the two triggering events incorporated into the rule as proposed, the SEC solicited comments on a possible third triggering event with three criteria:

> [A] A security holder proposal submitted pursuant to Exchange Act Rule 14a-8, other than a direct access security holder proposal,[9] was submitted for a vote of security holders at an annual meeting by a security holder or group of security holders that held more than 1% of the company's securities entitled to vote on the proposal for one year and provided evidence of such holdings to the company;
>
> [B] The security holder proposal received more than 50% of the votes cast on that proposal; and
>
> [C] The board of directors of the company failed to implement the proposal by the 120th day prior to the date that the company mailed its proxy materials for the [subsequent] annual meeting.[10]

As the SEC acknowledged, adopting this trigger would invite time-consuming disputes on such minutiae as whether the board failed to implement the proposal.

There is a more fundamental flaw with this third trigger, however. State corporate law provides that the key player in the statutory decisionmaking structure is the corporation's board directors.[11] As the Delaware code puts it, the corporation's business and affairs "shall be managed by or under the direction of a board of directors."[12] The vast majority of corporate decisions accordingly are made by the board of directors alone (or by managers acting under delegated authority). Shareholders essentially have no power to initiate corporate action and, moreover, are entitled to approve or disapprove only a very few board actions. The statutory decisionmaking model thus is one in which the board acts and shareholders, at most, react.

The proposed trigger shifts that balance of power in favor of the shareholders. At present, the vast majority of shareholder proposals under SEC Rule 14a-8 must be phrased as recommendations rather than as directives to the board.[13] If a precatory proposal passes but the board of directors decides after due deliberation not to accept the shareholders' recommendation, the board's decision currently is protected by the business judgment rule. Hence, the board's power of direction is insulated from being trumped by the shareholders.

To be sure, the proposed trigger would not mandate that boards implement precatory proposals. It would, however, ratchet up the pressure on boards to accede to shareholder proposals even when the board in the exercise of its business judgment believes the proposal to be unwise. As we shall see, if adopted, Rule 14a-11 would impose significant direct and indirect costs on the corporation. In order to avoid a shareholder nomination contest, the board therefore might implement a proposal it deems unsound.

*C. Relationship to State Law and a Possible Opt-Out*

As proposed, Rule 14a-11 applies only to those corporations whose shareholders have a state-law right to nominate candidates for election to the board:

> [T]he security holder nomination procedure would be available unless applicable state law prohibits the company's security holders from nominating a candidate or candidates for election as a director. If state law permits companies incorporated in that state to prohibit security holder nominations through provisions in companies' articles of incorporation or bylaws, the proposed procedure would not be available to security holders of a company that had included validly such a provision in its governing instruments.[14]

In effect, where state law permits, corporations thus would be permitted to opt out by adopting appropriate charter or bylaw provisions.[15]

Does state law permit the necessary opt-out provision? Delaware law has a fairly strong streak of freedom of contract. As Vice Chancellor Leo Strine explained in a

recent decision, *Harrah's Entertainment, Inc. v. JCC Holding Co.*,[16] a corporation may opt out of the default voting—and nominating—rules of state law, provided it does so clearly and unambiguously:

> When a corporate charter is alleged to contain a restriction on the fundamental electoral rights of stockholders under default provisions of law—such as the right of a majority of the shares to elect new directors or enact a charter amendment—it has been said that the restriction must be "clear and unambiguous" to be enforceable.[17]

Vice Chancellor Strine's opinion in *Harrah's* thus suggests an affirmative answer to the question of whether the required opt-out provision is authorized by state law, albeit with qualifications:

> Because of the obvious importance of the nomination right in our system of corporate governance, Delaware courts have been reluctant to approve measures that impede the ability of stockholders to nominate candidates. Put simply, Delaware law recognizes that the "right of shareholders to participate in the voting process includes the right to nominate an opposing slate." And, "the unadorned right to cast a ballot in a contest for [corporate] office ... is meaningless without the right to participate in selecting the contestants. As the nominating process circumscribes the range of choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders. To allow for voting while maintaining a closed selection process thus renders the former an empty exercise."[18]

Because restrictions on shareholder voting rights, such as a departure from the one share-one vote norm, must be in the articles of incorporation, per DGCL § 212, it would be advisable to include any restriction on shareholder nominations in the articles rather than the bylaws.[19] For existing companies, getting the shareholders to approve a charter amendment banning shareholder nominations will probably be difficult; few firms likely would even try to buck the inevitable bad press and institutional investor complaints. Assuming the rule goes through in present form, however, it will be interesting to see how many IPOs include such a provision.

Another wrinkle is suggested by the 1990 takeover fight between BTR plc, a U.K. holding company, and Norton Co., a Massachusetts corporation. Norton's incumbent managers wanted to classify their board of directors as a takeover defense, but knew they had neither the time nor the shareholder support to get approval of an amendment to their articles. Norton's managers therefore went to the Massachusetts legislature, which passed H.B. 5556, which classified, by operation of law, the boards of directors of all Massachusetts corporations having a class of securities registered under the federal Securities Exchange Act.[20] As proposed, Rule 14a-11 seems vulnerable to just such a blanket state exemption. Alternatively, a state presumably could also undermine Rule 14a-11 by providing for three year director terms, for example, rather than the current one-year default.[21]

*D. The Relationship with Rule 14a-8*

Corporations currently must expend considerable sums on shareholder proposals under Rule 14a-8. According to the SEC's own figures, the cost per company of determining whether or not a 14a-8 proposal should be included in the proxy statement is $37,000, and the direct cost per company of including a proposal is $50,000.[22] ISS tracked 1,042 shareholder proposals in the 2003 proxy season.[23] Assuming that corporations seek to exclude all proposals, which implies a cost of $87,000 per proposal, we can estimate total annual expenditures on shareholder proposals at $90,654,000.[24]

If corporations are to be allowed to opt-out of Rule 14a-11, why should they not also be allowed to opt out of Rule 14a-8? The shareholder-proposal rule has become an increasingly costly mechanism by which social activists, unions, and public pension fund managers hijack the corporate proxy statement as a soapbox for multiple proposals that often have little to do with shareholder welfare. Granted, there is increasing use of the rule for what purport to be governance proposals, but do the benefits justify the costs? If it makes sense to let firms opt out of Rule 14a-11, there is no good reason to forbid them from doing so with respect to Rule 14a-8.

At the very least, the SEC should consider allowing corporations to exclude precatory shareholder proposals in any election cycle in which Rule 14a-11 has been triggered. Precatory proposals cost a small fraction of what Rule 14a-11 will cost, of course, but their costs still amount to a considerable sum.[25] If shareholders want to put corporations to the expense of a contested director election, perhaps they should be obliged to forego putting the corporation to the added expense of dealing with precatory proposals.

**III. Does the SEC have the Requisite Authority?**

Section 14(a) of the Securities Exchange Act of 1934 is the basic federal proxy statute.[26] It is not self-executing, however. Instead, Section 14(a) merely prohibits solicitation of proxies unless the solicitor complies with the proxy rules promulgated by the SEC.

The SEC has long claimed that the rulemaking authority granted it by Section 14(a) sweeps very broadly. In July 1988, the Commission made its most dramatic assertion to date of authority under Section 14(a) by adopting Rule 19c-4.[27] Rule 19c-4 amended the rules of the self-regulatory organizations to prohibit an issuer's equity

securities from being listed on national securities exchanges or on NASDAQ if the issuer issued securities or took other corporate action nullifying, restricting, or disparately reducing the voting rights of existing shareholders. The rule was intended to restrict the ability of U.S. corporations to adopt dual-class stock plans in which different classes of voting stock have disparate voting rights. In June 1990, the United States Court of Appeals for the District of Columbia invalidated Rule 19c-4 on the grounds that the Commission had exceeded the statutory authority delegated to it by Congress.[28] In doing so, the court sharply limited the SEC's Section 14(a) powers over substantive aspects of shareholder voting.

In defending Rule 19c-4, the SEC advanced its longstanding view that Exchange Act Section 14(a) was intended to promote corporate democracy. In striking down Rule 19c-4, however, the D.C. Circuit adopted a much narrower view of Section 14(a)'s purposes. According to the court, federal proxy regulation has two principal goals. First, and foremost, it regulates the disclosures shareholders receive when they are asked to vote. Second, it regulates the procedures by which proxy solicitations are conducted. Section 14(a)'s purposes thus do not include regulating substantive aspects of shareholder voting. While confirming that the SEC has extensive authority to adopt rules assuring full disclosure and fair solicitation procedures, the *Business Roundtable* decision thus also drew a critical distinction between substantive and procedural regulation of shareholder voting. As to the former, the SEC has little, if any, authority.

The court's *Business Roundtable* decision recognized the "murky area between substance and procedure," in which rules may resist classification. Nonetheless, the opinion offers a few signposts by which the validity of Rule 14a-11 can be resolved. In particular, consider the distinction the court drew between Rule 19c-4 and Rule 14a-4(b)(2)'s requirement that proxies give shareholders an opportunity to withhold authority to vote for individual director nominees. In the court's view, the latter "bars a kind of electoral tying arrangement, and may be supportable as a control over management's power to set the voting agenda, or, slightly more broadly, voting procedures," while "Rule 19c-4 much more directly interferes with the substance of what shareholders may enact."[29]

On which side of the line does Rule 14a-11 fall? In an article I wrote on 19c-4, I concluded that the shareholder-proposal rule would pass muster under the *Business Roundtable* approach.[30] Absent Rule 14a-8, shareholders have no practical means of initiating action in the voting process or otherwise affecting the agenda. As such, I argued, Rule 14a-8 presumably is supportable "as a control over management's power to set the voting agenda."[31] Director-nomination rules would seem to fall into that category as well.

**IV. Costs versus Benefits**

The SEC contends that Rule 14a-11 is necessary to remove "barriers to meaningful participation in the proxy process" and to address "concern over corporate scandals and the accountability of corporate directors."[32] In my view, however, the benefits the proposal offers in these areas are quite modest at best, and are likely to be outweighed by the costs imposed by the rule.

*A. Direct Costs*

What will Rule 14a-11 cost affected corporations? A review of proxy contests in a late-1980s survey found that insurgents spent an average of $1.8 million and incumbents an average of $4.4 million.[33] Proxy contest costs almost certainly are much higher today, but for the sake of conservatism I have used the late-1980s data as a baseline. Assume that a company faces a Rule 14a-11 contested director election every three years. Assume further that a Rule 14a-11 contested election costs one-third what a full proxy contest costs. On those assumptions, each public corporation would face annualized costs of about $500,000. Using the 10,000 actively traded U.S. companies in the Compustat database as a proxy for the number of companies potentially subject to Rule 14a-11, we can estimate an aggregate annual cost of $5 billion. Admittedly, this analysis likely overestimates both the number of contests and the cost of each contest.

An alternative estimate could use the annual cost of Rule 14a-8 shareholder proposals as a baseline. Recall that, according to the SEC's own figures, the cost per company of including a shareholder proposal in the proxy statement is $87,000. Also recall that ISS tracked 1,042 shareholder proposals at public corporations during the 2003 proxy season, which gives us total annual corporate expenditures on shareholder proposals of $90,654,000. Granted, it is unlikely there will be as many Rule 14a-11 election contests as Rule 14a-8 shareholder proposals. On the other hand, incumbent boards likely will spend considerably more on opposing each Rule 14a-11 contest than on opposing a Rule 14a-8 shareholder proposal. As such, $100 million may not be a bad estimate for the lower boundary of the range within which Rule 14a-11's direct costs will fall.

*B. The Costs and Benefits of Promoting Shareholder Democracy*

As noted, a chief claimed benefit of Rule 14a-11 is its contribution to shareholder democracy. U.S. corporate law, however, is far more accurately described as a system of director primacy than one of shareholder primacy.[34] As Berle and Means famously demonstrated, U.S. public corporations are characterized by a separation of ownership and control.[35] The firm's nominal owners, the shareholders, exercise virtually no control over either day-to-day operations or long-term policy.[36] Instead, control is vested in the hands of professional managers, who typically own only a small portion of the firm's shares.[37]

Some commentators have argued for reducing the extent to which ownership and control are separated by promoting shareholder democracy, a goal the SEC has advanced to justify Rule 14a-11. Most of these scholars acknowledge that the rational apathy of small individual shareholders precludes such investors from playing an active role in corporate governance, even setting aside the various legal impediments to shareholder activism. Instead, these scholars focus on institutional investors, such as pension and mutual funds.[38]

As the theory goes, institutional investors will behave quite differently from dispersed individual investors. Because they own large blocks, and have an incentive to develop specialized expertise in making and monitoring investments, institutional investors could play a far more active role in corporate governance than dispersed shareholders. Institutional investors holding large blocks thus have more power to hold management accountable for actions that do not promote shareholder welfare. Their greater access to firm information, coupled with their concentrated voting power, might enable them to more actively monitor the firm's performance and to make changes in the board's composition when performance lags.

There is relatively little evidence that institutional investor activism has mattered, however. Large blocks held by a single institution remain rare, as few U.S. corporations have any institutional shareholders who own more than 5-10% of their stock.[39] Even the most active institutional investors spend only trifling amounts on corporate governance activism. Institutions devote little effort to monitoring management; to the contrary, they typically disclaim the ability or desire to decide company-specific policy questions.[40] They rarely conduct proxy solicitations or put forward shareholder proposals.[41] Not surprisingly, empirical studies of U.S. institutional investor activism have found "no strong evidence of a correlation between firm performance and percentage of shares owned by institutions."[42]

Some former advocates of institutional investor activism have therefore retreated to the more modest claim that "it's hard to be against institutional investor activism."[43] Yet, even this last revisionist redoubt fails to adequately acknowledge that the purported benefits of institutional control, if any, may come at too high a cost. As even one of the most prominent proponents of institutional investor activism conceded, for example, there is good evidence that bank control of the securities markets has harmed Japanese and German economies by impeding the development of new businesses.[44]

Because we are concerned with the governance of large publicly held corporations, however, this essay focuses on a different concern: the risk that institutional investors may abuse their control by self-dealing and other forms of over-reaching. In his important study of institutional ownership, Mark Roe contended that large-block holders can improve firm performance by personifying the shareholder community.[45] He argued that loyalty to real people may be a better motivator than loyalty to an abstract collection of small shareholders.[46] The trouble, of course, is that the interests of large and small investors often differ.[47] If the board becomes more beholden to the interests of large shareholders, it may become less concerned with the welfare of smaller investors.

Let us assume, however, that interests of individual and institutional investors are congruent. As I have argued elsewhere in detail,[48] institutional investor activism would still be undesirable if the separation of ownership and control mandated by U.S. law has substantial efficiency benefits. Berle and Means, of course, believed that the separation of ownership and control was both a departure from historical norms and a serious economic problem.[49] They likely were wrong on the former score, although that is a question beyond the scope of this essay.[50] As to the latter, the separation of ownership and control is a highly efficient solution to the decisionmaking problems faced by large corporations.

Kenneth Arrow's work on organizational decisionmaking identified two basic decisionmaking mechanisms: "consensus" and "authority."[51] Consensus is utilized where each member of the organization has identical information and interests, which facilitates collective decisionmaking. In contrast, authority-based decisionmaking structures arise where team members have different interests and amounts of information. Because collective decisionmaking is impracticable in such settings, authority-based structures are characterized by the existence of a central agency to which all relevant information is transmitted and which is empowered to make decisions binding on the whole.[52]

The modern public corporation precisely fits Arrow's model of an authority-based decisionmaking structure. Shareholders have neither the information nor the incentives necessary to make sound decisions on either operational or policy questions. Overcoming the collective-action problems that prevent meaningful shareholder involvement would be difficult and costly. Rather, shareholders will prefer to irrevocably delegate decisionmaking authority to some smaller group. Separating ownership and control by vesting decisionmaking authority in a centralized entity distinct from the shareholders is thus what makes the large public corporation feasible.

To be sure, this separation results in the well-known agency-cost problem. Agency costs, however, are the inevitable consequence of vesting discretion in someone other than the shareholders. We could substantially reduce, if not eliminate, agency costs by eliminating discretion; that we do not do so suggests that discretion has substantial virtues. A complete theory of the firm thus

requires one to balance the virtues of discretion against the need to require that discretion be used responsibly. Neither discretion nor accountability can be ignored, because both promote values essential to the survival of business organizations. Unfortunately, however, they also are antithetical—at some point, one cannot have more of one without also having less of the other. This is so because the power to hold to account is ultimately the power to decide. As Kenneth Arrow explained:

> [Accountability mechanisms] must be capable of correcting errors but should not be such as to destroy the genuine values of authority. Clearly, a sufficiently strict and continuous organ of [accountability] can easily amount to a denial of authority. If every decision of A is to be reviewed by B, then all we have really is a shift in the locus of authority from A to B and hence no solution to the original problem.[53]

Hence, directors cannot be held accountable without undermining their discretionary authority. Establishing the proper mix of discretion and accountability thus emerges as the central corporate governance question.

The root economic argument against shareholder activism thus becomes apparent. Large-scale investor involvement in corporate decisionmaking seems likely to disrupt the very mechanism that makes the public corporation practicable: the centralization of essentially nonreviewable decisionmaking authority in the board of directors. The chief economic virtue of the public corporation is not that it permits the aggregation of large capital pools, as some have suggested, but rather that it provides a hierarchical decisionmaking structure well suited to the problem of operating a large business enterprise with numerous employees, managers, shareholders, creditors, and other inputs. In such a firm, someone must be in charge: "Under conditions of widely dispersed information and the need for speed in decisions, authoritative control at the tactical level is essential for success."[54] While Roe argues that shareholder activism "differs, at least in form, from completely *shifting* authority from managers to" institutions,[55] it is in fact a difference in form only. Shareholder activism necessarily contemplates that institutions will review management decisions, step in when management performance falters, and exercise voting control to effect a change in policy or personnel. For the reasons identified above, giving institutions this power of review differs little from giving them the power to make management decisions in the first place. Even though institutional investors probably would not micromanage portfolio corporations, vesting them with the power to review major decisions inevitably shifts some portion of the board's authority to them.

Given the significant virtues of discretion, one ought not lightly interfere with management or the board's decisionmaking authority in the name of accountability. Preservation of managerial discretion should always be the null hypothesis. The separation of ownership and control mandated by U.S. corporate law has precisely that effect. To the extent Rule 14a-11 empowers shareholders to review board decisions, it weakens the very foundation of U.S. corporate law: the principle of director primacy.

*C. The Effect on Board Governance*

A proponent of Rule 14a-11 likely would respond that the rule does not give shareholders the power to reverse board decisions, but only a power to replace one board member.[56] Fair enough, but there are sound reasons to believe that Rule 14a-11 would lead to worse rather than better corporate governance. The problem is that introduction of a shareholder representative is likely to trigger a reduction in board effectiveness.

The impact of a shareholder right to elect board members on the effectiveness of the board's decisionmaking processes will be analogous to that of cumulative voting. Granted, some firms might benefit from the presence of skeptical outsider viewpoints. It is well-accepted, however, that cumulative voting tends to promote adversarial relations between the majority and the minority representative. The likelihood that cumulative voting will results in affectional conflict rather than cognitive conflict[57] thus leaves one doubtful as to whether firms actually benefit from minority representation.

The likelihood of disruption of effective board processes is confirmed by the experience of German firms with codetermination.[58] German managers sometimes deprive the supervisory board of information, because they do not want the supervisory board's employee members to learn it. Alternatively, the board's real work is done in committees or *de facto* rump caucuses from which employee representatives are excluded. As a result, while codetermination raises the costs of decisionmaking, it seemingly does not have a positive effect on substantive decisionmaking.[59]

The likely effect of electing a shareholder representative therefore will not be better governance. It will be an increase in affectional conflict (as opposed to the more useful cognitive conflict). It will be a reduction in the trust-based relationships that cause horizontal monitoring within the board to provide effective constraints on agency costs. It will be the use of pre-meeting caucuses and a reduction in information flows to the board. A chief indirect cost of Rule 14a-11 therefore will be less effective governance.

**Conclusion**

History teaches that market bubbles are fertile ground for fraud. Cheats abounded during the Dutch tulip-bulb mania of the 1630s. The South Sea Company, which was at the center of the English stock market bubble

in the early 1700s, was itself a pyramid scheme. No one should have been surprised that fraudsters and cheats were to be found when we started turning over the rocks in the rubble left behind when the stock market bubble burst in 2000.

Corporate scandals are always good news for big-government types. After every bubble bursts, going all the way back to the South Sea Bubble, a slew of new laws have been enacted. Why? There is nothing a politician or regulator wants more than to persuade angry investors that he or she is "doing something" and being "aggressive" in rooting out corporate fraud.

Hence, it was entirely predictable that the shenanigans at Enron, WorldCom, et al., coming after several years of steady decline in the stock market, would lead to regulation. Yet, how quickly we forget. Remember what Ronald Reagan said: "The nine most terrifying words in the English language are: 'I'm from the government and I'm here to help.'"

Like a cook who throws spaghetti at the wall to see if it's done, legislators and regulators have been throwing a lot of new rules at corporations to see what sticks: Sarbanes-Oxley, numerous SEC regulations, California's onerous corporate disclosure act, New York Attorney General Spitzer's settlement with the analyst community, and countless law suits and indictments. Unlike the cook, who stops when the spaghetti is done, the lawmakers just keep throwing things at corporations without stopping to ask whether enough is enough.

The costs of all this regulatory activity are beginning to mount up. Some companies, for example, will incur 20,000 staff hours to comply with just one SEC new rule – a rule the SEC estimated would require only 383 staff hours per firm.[60] According to a study by Foley Lardner, "[s]enior management of public middle market companies expect costs directly associated with being public to increase by almost 100% as a result of corporate governance compliance and increased disclosure as a result of the Sarbanes-Oxley Act of 2002 (SOX), new SEC regulations and changes to [stock] exchange listing requirements."[61] If adopted, the SEC's shareholder access proposal would significantly add to that regulatory burden.

If the SEC could figure out a way to limit the proposal to situations in which the board is clearly dysfunctional, these concerns might be less important. The problem is that the SEC is letting the tail wag the dog. The evidence strongly suggests that most companies are well-managed. As the Wall Street Journal explained:

> The economy and stock market have performed better in recent years than any other on earth. "How can we have done marvelously if the system is fundamentally flawed?" [economist Bengt] Holmstrom asks. If the bulk of American executives were stealing from shareholders and financial markets were rigged, they reason, then capital would flow to the wrong places and productivity wouldn't be surging.[62]

The SEC's rules apply to all public corporations, however, whether their internal governance is good, bad, or just indifferent. As currently drafted, nothing in either trigger limits the rule to the Enrons of the world. If enough shareholders are disgruntled, for whatever reason, they can force a vote. This makes no sense. The point of all these reforms, supposedly, is to restore investor confidence by ensuring good corporate governance. But if firms are well-managed, why put them to the expense and bother of a shareholder nomination contest?

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**Footnotes**

[1] Proposed Rule: Security Holder Director Nominations, SEC Exchange Act Rel. No. 48626 (Oct. 14, 2003), available at <http://www.sec.gov/rules/proposed/34-48626.htm>. The release is quite staggering. One commentator observed: "The release fills 107 pages, contains 238 footnotes and, incredibly, poses over 320 separate questions for consideration by commenters." <http://www.corplawblog.com/archives/000250.html>.

[2] *See* 17 CFR 240.14a-8(i)(8).

[3] 17 CFR 240.14a-8.

[4] More precisely, the shareholders' right of access to the company's proxy statement would remain in effect for (1) the remainder of the calendar year in which a triggering event occurs; (2) the subsequent calendar year; and (3) a portion of the second calendar year following the calendar year in which the triggering event occurs, up to and including the annual meeting of the shareholders held during that calendar year. Exchange Act Rel. No. 48626, *supra* note 1.

[5] *Id.*

[6] 17 CFR 240.13d-1(b).

[7] Exchange Act Rel. No. 48626, *supra* note 1. In the event more than one shareholder or shareholder group puts forward a nominee, only the nominee proposed by the largest holder need be included in the company's proxy materials. *Id.*

[8] SEC Rule 14a-2 exempts from the proxy rules a number of situations in which a shareholder contacts other shareholders, such as when the shareholder only contacts ten or fewer other shareholders. 17 CFR 240.14a-2.

[9] This exception means that the trigger would be invoked only by shareholder proposals addressing issues other than shareholder access. It might be invoked, for example, where the shareholders approve a proposal recommending repeal of a poison pill and the board of directors fails to act.

[10] Exchange Act Rel. No. 48626, *supra* note 1.

[11] All state corporate codes provide for a system of nearly absolute delegation of power to the board of directors, which in turn is authorized to delegate power to subordinate firm agents. *See* Model Bus. Corp. Act Ann. § 8.01 cmt. (1995) (reviewing statutes).

[12] Del. Code. Ann., tit. 8, § 141(a) (2001).

[13] *See* 17 CFR 240.14a-8(i)(1), which provides that shareholder proposals must be a proper subject for shareholder action under state law. Because shareholders have such limited powers to initiate corporate action, most shareholder proposals would be excludible under this pro-

vision were it not for the SEC's position that precatory proposals must be included even if the shareholders lack the requisite power to insist on their implementation.

[14] Exchange Act Rel. No. 48626, *supra* note 1.

[15] Although proposed Rule 14a-11 represents a fairly dramatic expansion of the federal role in corporate governance, I do not address herein the federalism implications of the proposal. First, as discussed below (*infra* Part III), it seems clear that the SEC has authority to adopt the proposal. Second, because the SEC has provided the state-law-based opt-out provision, the preemptive effect of the proposal on state corporate law is mitigated. For an argument against federalization of corporate law, see Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, Regulation, Spring 2003, at 26.

[16] 802 A.2d 294 (Del.Ch. 2002).

[17] *Id.* at 310.

[18] *Id.* at 310-11 (citations omitted).

[19] Not only would a bylaw provision be of dubious enforceability, but under DGCL § 109(a) the shareholders always retain the right to initiate amendments to the bylaws.

[20] *See generally* Stephen M. Bainbridge, *Redirecting State Takeover Laws at Proxy Contests*, 1992 Wis. L. Rev. 1071, 1090.

[21] Note that with a classified board there still is an annual election, even though each director's individual term will be 3 years. I'm referring to a situation in which there would only be one election every three years.

[22] <http://www.sec.gov/rules/final/34-40018.htm>.

[23] <http://www.dlbabson.com/dlbindex/1,5243,8-23-59-509,00.html>.

[24] Note that this estimate may be conservative, as it does not include sums spent on proposals corporations successfully excluded. On the other hand, of course, it is doubtful that all proposals were resisted.

[25] Precatory proposals not only impose direct costs, but also lengthen the proxy statement, raising the opportunity costs to shareholders of making informed decisions.

[26] 15 U.S.C. § 78n(a).

[27] *See generally* Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 Wash. Univ. L.Q. 565 (1991).

[28] Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990).

[29] *Id.* at 411.

[30] Bainbridge, *supra* note 25, at 621-22.

[31] *Id.* at 622.

[32] Exchange Act Rel. No. 48626, *supra* note 1.

[33] *See* Randall S. Thomas & Catherine T. Dixon, Aranow & Einhorn on Proxy Contests for Corporate Control § 21.01 (3d ed. 1998).

[34] *See generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547 (2003)

[35] Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property 66 (1932).

[36] *Id.* at 82.

[37] *Id.*

[38] *See*, e.g., Mark J. Roe, Strong Managers, Weak Owners: The Political Roots of American Corporate Finance (1994); Bernard S. Black, *Shareholder Passivity Reexamined*, 89 Mich. L. Rev. 520 (1990). For more skeptical analyses, see Edward Rock, *The Logic and Uncertain Significance of Institutional Investor Activism*, 79 Geo. L.J. 445 (1991); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 Colum. L. Rev. 795 (1993); Robert D. Rosenbaum, *Foundations of Sand: The Weak Premises Underlying the Current Push for Proxy Rule Changes*, 17 J. Corp. L. 163 (1991).

[39] *See* Black, *supra* note 37, at 567-68 (summarizing data).

[40] *See* Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, in The New Palgrave Dictionary of Economics and the Law 459, 460 (1998) (noting that even "activist institutions spend less than half a basis point of assets … on their governance efforts").

[41] *Id*.

[42] *Id*. at 462.

[43] *Id.*

[44] Roe, *supra* note 37, at 256.

45 *Id.* at 237-38.

46 *Id.*

[47] Rock, *supra* note 37, at 466-68; Rosenbaum, *supra* note 37, at 176-79.

[48] *See generally* Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 Transnational Law. 45 (2002), on which the following discussion draws.

[49] Berle & Means, *supra* note 34, at 3-10 (discussing a perceived transition in the nature of the corporation and describing the purported consequences thereof).

[50] The classic debunking of Berle and Means' historical account remains Walter Werner, *Corporation Law in Search of its Future*, 81 Colum. L. Rev. 1611 (1981).

[51] Kenneth J. Arrow, The Limits of Organization 68-70 (1974).

[52] *Id.* at 68-69.

[53] *Id.* at 78.

[54] *Id.* at 69.

[55] Roe, *supra* note 37, at 184 (emphasis in original).

[56] Companies are already having a hard time attracting independent directors. The shareholder access proposal likely will make that search even harder. Why would somebody be willing to serve on the board if he or she might be the one singled out to be ousted?

[57] A classic example of cognitive conflict occurs during brainstorming sessions, when people vigorously bounce ideas off one another. Affectional conflict occurs when brainstorming sessions devolve into ad hominem arguments.

[58] In Germany alone, there are at least four different statutory models of participatory management. Klaus J. Hopt, *Labor Representation on Corporate Boards: Impacts and Problems for Corporate Governance and Economic Integration in Europe*, 14 Int'l Rev. L. & Econ. 203, 204 (1994). Some other member-states of the European Union also have some form of employee representation, and there have long been proposals to develop harmonized company laws or even a European Union-wide company law that would provide for employee representation. *See generally* Terence L. Blackburn, *The Societas Europea: The Evolving European Corporation Statute,* 61 Fordham L. Rev. 695, 743-55 (1993). Codetermination includes a dual board structure: a supervisory board that appoints a managing board, with the latter actively operating the firm. Workers are represented only on the former. The supervisory board concept is difficult to translate into terms familiar to those trained exclusively in U.S. forms of corporate governance. Its statutory mandate is primarily concerned with the appointment and supervision of the managing board. Hopt, *supra*, at 204. In theory, employees and shareholders are equally represented on the supervisory board. In practice, however, the board is often controlled either by the firm's managers or by a dominant shareholder. *Id.* One of the employee representatives must be from management, and shareholders are entitled to elect the chairman of the board, who has the power to break tie votes. If push comes to shove, which it reportedly rarely does, id., shareholders thus retain a slight but potentially critical edge.

[59] *See generally* Stephen M. Bainbridge, *Privately Ordered Participatory Management: An Organizational Failures Analysis*, 23 Del. J. Corp. L. 979 (1998).

[60] <http://slw.issproxy.com/securities_litigation_blo/2003/10/20000_hours_to_.html>.

[61] <http://www.foley.com/publications/pub_detail.aspx?pubid=1382>.

[62] David Wessel, *"The American Way" is a Work in Progress,* Wall St. J., Nov. 13, 2003, at A2.

# An Uncertain Trumpet: Delaware Hears the Call of Corporate Governance Reform

*By Daniel Fisher**

**Introduction**

Delaware, the home of 60% of the Fortune 500,[1] is synonymous with corporate activity and is considered the standard in American corporate law.[2] Delaware statutory and case law also play a large, even dominant, role in governing and influencing corporate behavior and procedures in other jurisdictions.[3] Delaware courts, cognizant of this influence, have generally attempted to fulfill their responsibility by providing stable, measured and reliable corporate laws. However, like all rational actors, Delaware seeks to maintain its leading position as the jurisdiction of choice for incorporation, with all of the benefits that status brings to the state.[4] Thus, Delaware is not immune from a legal form of "market pressure," and its body of law reflects both recent events and developments in federal legislation.

Delaware's reaction to the corporate scandals of recent years sheds light on the state's perception of its role as a standard-setter for corporate behavior and as a leader in maintaining the independence and supremacy of state corporate law. These scandals, and the ensuing federal corporate governance reforms, are perhaps the most severe challenge to the Delaware-led framework of state-made corporate law that has become ingrained in the corporate decision-making process. A recent Delaware case before the Court of Chancery, which addressed the actions of the board of directors of The Walt Disney Company in connection with the hiring and termination of Michael Ovitz as Disney's President, is one of the first attempts by Delaware courts to deal with corporate governance issues in the post-scandal era.[5] *Disney* examines the conduct and oversight of directors, a concern that is at the heart of corporate governance. Initially dismissed in 1998, the case was revived in 2003 in a different corporate governance world. The *Disney* ruling, as well as commentary by leading Delaware jurists and others, indicates that Delaware may be prepared to respond to the corporate law challenges of the 21st century. The link between *Disney* and the commentary—and the most pressing current issue in American corporate law—is the intersection between the heightened duties and responsibilities of a corporation and its directors on the one hand, and the battle for regulatory supremacy between the states and the federal government on the other hand. If Delaware, as the leading state, proves unable to keep up with "progress," the result may be a ceding of power to the federal government and further federalization of American corporate law, especially as federal legislation shifts from a focus on securities regulation to an emphasis on general corporate behavior. This, in turn, would eventually result in little differentiation among the corporate laws of the states, and severely damage Delaware's market position. Thus, Delaware's reactions to recent events and the challenges they bring are of crucial interest to all actors in the corporate law sphere.

***Disney*—Delaware's Response?**

The analysis in *Disney* is built upon the two distinct duties owed by Delaware directors to their corporation: the duty of loyalty and the duty of care.[6] If Delaware directors satisfy these duties, their decisions will be protected by the business judgment rule and, as a practical matter, only in rare occasions will a Delaware court question them.[7] The duty of care requires that directors adequately inform themselves and take proper deliberation in their decision-making process.[8] If directors violate the duty of care, they can be found liable to the corporation.[9] However, in response to cases that found violations of the duty of care and thus director liability, and the ensuing difficulty in directors obtaining D&O insurance, the Delaware legislature amended the Delaware General Corporation Law (DGCL) to include §102(b)(7). Section 102(b)(7) authorizes a Delaware corporation's charter to contain provisions "eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director."[10] However, §102(b)(7) bars the elimination of liability for a breach of the duty of loyalty.[11] Thus, the practical effect of §102(b)(7) is that, when bringing suit against a Delaware company that has a §102(b)(7) charter provision, plaintiffs must generally allege a breach of the duty of loyalty (which includes failing to act in good faith) in order to have a recoverable cause of action.

With this framework in mind, the core question of *Disney*—whether the facts alleged by the plaintiff constitute a violation of the duty of good faith by the directors—reaches the heart of director liability in Delaware. Since Disney's charter contained a §102(b)(7) exculpatory provision, a viable claim alleging breach of the duty of care could not be brought.[12] Thus, the plaintiffs could only be successful in an action that alleged a breach of the duty of loyalty: if the directors did not act in good faith, they could be found liable.[13]

The initial Disney lawsuit was filed in 1998 and alleged a general breach of duty on the part of the directors that was not supported by particularized facts or meaningful discovery.[14] This suit was dismissed by the Court of Chancery. The court stated that under §102(b)(7) and Disney's governing documents, Disney's directors would not be liable for a breach of the duty of care and there was no support on the record for a claim that their directors breached their duty of loyalty.[15] On appeal, the Delaware Supreme Court upheld the Chancery Court's ruling. However, the Supreme Court granted the plaintiffs leave to replead if they could, through discovery, produce facts that

would support a valid cause of action.[16] Over the next two years, the plaintiffs used their access to the books and records of Disney[17] to obtain detailed information about the actions of the Disney board in connection with the Ovitz hiring and termination. The plaintiffs then refiled their complaint, and the defendants made a motion to dismiss.

The Disney plaintiffs, represented by Milberg Weiss Bershad Hynes & Lerach LLP, alleged that the Disney directors had breached their duties in connection with the Ovitz hiring and termination. Specifically, the plaintiffs alleged that the directors:

> •did not review Ovitz's final employment agreements, but only reviewed term sheets;
> •were not aware of changes between the term sheets and the final employment agreements;
> •did not receive advice on whether the Ovitz compensation package was consistent with industry practices;
> •were not aware of the potential total cost of the Ovitz compensation package, particularity in connection with a possible no-fault termination (which eventually occurred);
> •failed to take adequate time to review the terms and content of the Ovitz compensation package, particularly in light of the package's potential cost; and
> •left most of the negotiations over the Ovitz compensation package to Disney Chairman and Chief Executive Officer Michael Eisner, who had a long-time personal relationship with Ovitz.

For purposes of the motion to dismiss, the Chancery Court assumed that the facts alleged by the plaintiffs were true. Upon this assumption, Chancellor William B. Chandler III ruled that there was sufficient doubt that the Disney board acted in good faith for the lawsuit to continue, and stated that if "a director consciously ignores his or her duties to the corporation…the director's actions are either 'not in good faith' or 'involve intentional misconduct.'"[18] This ruling can be seen as an expansion of the traditional boundaries of the duty of good faith, and perhaps signals a tightening of Delaware's standards for director conduct. As one of the first major cases to be decided in the post-scandal era, *Disney* could be Delaware's attempt to respond to the corporate scandals and could represent a turning point in its case law.

**Others Hear the Call and See the Danger**

*Disney* is not the only evidence of Delaware's reaction to recent corporate and federal legislative events. In a roundtable discussion published by the *Harvard Business Review* in January 2003, Chief Justice E. Norman Veasey of the Delaware Supreme Court made a number of interesting remarks that speak to Delaware's current attitude towards corporate governance.[19] Chief Justice Veasey said that "[d]irectors who are supposed to be independent should have the guts to be a pain in the neck and act independently," and that Delaware corporations should have "good corporate practices in place" that were implemented "genuinely and in good faith."[20] Chief Justice Veasey also frankly acknowledged the new legal environment in light of the corporate scandals, noting that "changes in corporate governance that [have developed] through the voluntary best practices codes, for example, or through the New York Stock Exchange listing requirements[,] have created a new set of expectations for directors."[21] According to Chief Justice Veasey, this in turn will change how Delaware courts will "look at these issues" of corporate behavior.[22]

Vice Chancellor Leo E. Strine, Jr. of the Delaware Court of Chancery, one of the more prolific writers on corporate law issues, has made similar points about Delaware's reaction to the corporate scandals and the ensuing reforms. Writing before *Disney*, but specifically commenting on Enron's aftermath, Vice Chancellor Strine viewed the corporate scandals as generating "increased pressure on courts to examine carefully the plausibility of director claims that they were able to devote sufficient time to their duties to have carried them out in good faith."[23] Perhaps even more troubling for directors seeking deference from Delaware courts, Vice Chancellor Strine addressed the possibility of a similar examination of decision-making in a change-of-control situation, noting that while the recent corporate scandals did not arise in the takeover context, they challenge the assumption of directors' competence in such a context.[24] Continuing, Vice Chancellor Strine wrote that the corporate scandals weakened other arguments in favor of deference to directors, including the notion that the efficient market theory justifies and legitimizes directors' decision-making: since the markets were not able to detect the alleged corporate abuses, more skepticism should be given to directors' decision-making in a takeover situation.[25]

One undercurrent to the case law and commentary is that although such corporate governance reforms as the Sarbanes-Oxley Act of 2002 were enacted as changes to federal law, they will have a major impact on, and be a threat to, state corporate law. Chancellor Chandler and Vice Chancellor Strine, in an unpublished article entitled "The New Federalism of the American Corporate Governance System," wrote that "if history is any guide, the active plaintiffs' bar will be creative and aggressive in deploying the [corporate governance reforms] as a tool in shareholder litigation under state law."[26] Additionally, Chandler and Strine foresee the possibility of new causes of action stemming from the fiduciary duties created by the corporate governance reforms, stating that "[t]here will be some legitimate pressure on state courts to respond with a measure of receptivity" to claims of a breach of fiduciary duties created by the corporate governance reforms.[27]

The two jurists view the traditional balance of power in corporate law, which gave the states a leading role, as having "served investors and the public well."[28] However, unless the states recognize and aggressively adhere to the spirit of the corporate governance reforms, the traditional state role is in grave danger of being usurped by the federal government and the stock exchanges.[29] As an example of an area where the states may need to take the lead aggressively, both Chandler and Strine's unpublished article and Strine's piece on the implications of Enron discuss the advantage held by incumbent directors in election battles.[30] Since the two articles were published, the Securities and Exchange Commission has addressed this area.[31] Such action by the SEC merely highlights the critical nature of prompt state action.

In addition to Chandler and Strine, others have noted the growing influence of federal corporate law as a threat to the traditional Delaware role, and while the general subject of the federalization of American corporate law will not be discussed here, federalization is a useful point of inquiry to examine Delaware's behavior.[32] As Professor Stephen Bainbridge has written, the corporate scandals have only hastened the expansion of national corporate governance standards "that displace state corporate law," which has had traditional primacy.[33] According to Professor Bainbridge, under the Commerce Clause the federal government has the right to make national corporate law, and the issue is not constitutional but one of "prudency and federalism."[34] However, empirical studies have not shown any shareholder gains from corporate governance reforms, and there are strong arguments in favor of "competitive federalism," which encourages corporations to choose the legal framework under which they operate.[35] Thus, according to Professor Bainbridge, the "substance of corporate governance standards [are best] left to the states."[36]

**Conclusion**

Few matters are more critical to directors than ensuring that they are not held personally liable for their official actions. A trend of Delaware courts to find widespread liability for breaches of the duty of loyalty in non-self-dealing contexts, thus placing directors' actions outside of §102(b)(7)'s protections, would have grave consequences. If this occurs, directors will be even more reluctant to serve on boards than they already are, which should be unwelcome news to proponents of effective corporate governance.

By itself, *Disney* may not be of huge significance. The rhythms of Delaware corporate case law occasionally change from pro-director to pro-shareholder and then back again. However, *Disney* and the ancillary commentary may well be an accurate prediction of the state-law response to the corporate scandals, and show recognition by Delaware of the new skepticism of corporate actions that is shared by regulators and the public. If so, then *Disney* and the push for a tighter rein on director behavior, as part of the larger mosaic of state responses to the corporate scandals and encroaching federalization of corporate law, makes this a watershed moment. Without a system that ensures that directors will be able to serve without constant fear of liability, the framework that Delaware has nourished so well, for so long, may be imperiled. Perhaps the duty of good faith should be examined more skeptically, as it was in *Disney* and as suggested by the commentary; but equity and reason would seem to call for such an examination to be accompanied by higher standards for plaintiffs, or an expansion of the limitations on director liability provided by §102(b)(7).

Leading Delaware jurists note that states are under pressure to respond to the corporate scandals and reforms, and state law changes further shielding directors from liability seem unlikely at the present time. However, the states should not let their actions be governed solely by popular perceptions and events. If they do, the forces of government regulation will drive further and further towards a harmonization of state law to match the federal mood. If Delaware merely tightens its standards to keep up with the spirit of federal legislation, the result may be state corporate law supremacy on paper—but a reality of states marching to the federal drum. This would be a pyrrhic victory, and far from the ideal of "competitive federalism" which benefits both economic and personal liberty.

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**Footnotes**

[1] Paula Moore, *Coors Explains Delaware Reincorporation Plan*, Denver Business Journal, August 29, 2003.

[2] Other states have established other specialties—for example, Maryland is the leading jurisdiction of incorporation for real estate investment trusts, or REITs. Heather Harlan, *Maryland is the right place for plenty of REITs*, Washington Business Journal, March 24, 2000. However, relatively few states even attempt to keep a state-of-the-art corporations law on their books, let alone have Delaware's volume of precedent. The practical result is that Delaware precedent is extremely persuasive and extensively cited in nearly all jurisdictions. Carol Vinzant, Why Do Corporations Love Delaware So Much? FORTUNE, February 1, 1999.

[3] Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. Cin. L. Rev. 1061 (2000).

[4] After the Deleware Chancery Court's decision in City Capital Assocs. Ltd. Partnership v. Interco Inc., 551 A.2d 787 (Del. Ch. 1988), (hereinafter *Interco*), which limited the takeover defenses that a target company could use, Martin Lipton, founding partner of Wachtell, Lipton, Rosen & Katz, strongly criticized Delaware and said "[p]erhaps it is time to migrate out of Delaware." Paramount Communication v. Time, Inc., 571 A.2d 1140 (Del. 1990), overruled Interco. Jeffrey Gordon, *Markets and the Courts*, 91 Colum. L. Rev. 1931, 1958-1959 (1991). It has been reported in the press that Lipton's statement was in response to the decision in Smith v. Van Gorkom, 488 A.2d 858

(Del. 1985), but this is incorrect; see Marc Gunther, *Boards Beware*, FORTUNE, November 10, 2003.

[5] In re Walt Disney Co. Derivative Litigation, C.A. No. 15452, Chandler, C. (Del. Ch. May 28, 2003) (hereinafter *Disney*).

[6] The duty of loyalty and the duty of care are generally considered the twin fiduciary duties of Delaware corporate law. The duty of loyalty encompasses the duty of good faith, which is at the heart of the Disney case. The Court of Chancery made clear in *Emerald Partners v. Berlin* that the duty of good faith "is subsumed within the duty of loyalty, as distinguished from being a compartmentally distinct fiduciary duty of equal dignity with the two bedrock fiduciary duties of loyalty and due care." Emerald Partners v. Berlin, C.A. No. 9700, 2001 Del. Ch. LEXIS 20, at *87 n.63 (Del. Ch. Feb. 7, 2001). Another obligation under the duty of loyalty, in addition to good faith, is the obligation not to engage in self-dealing. The duties of loyalty and good faith are referred to in this article interchangeably, unless otherwise noted.

[7] See generally Donald E. Pease, *Aronson v. Lewis*: *When Demand Is Excused and Delaware's Business Judgment Rule*, 9 DEL. J. CORP. L. 39 (1984).

[8] See generally Justice Henry Ridgely Horsey, *The Duty of Care Component of the Delaware Business Judgment Rule*, 19 DEL. J. CORP. L. 971 (1994).

[9] See Bud Roth, Entire Fairness Review for a "Pure" Breach of Duty Care: Sensible Approach or Technicolor Flop?, 3 DEL. L. REV. 145, 171-173 (2000).

[10] DEL. CODE ANN. tit.8, § 102(b)(7).

[11] *Id*.

[12] Richards, Layton & Finger, Recent Delaware Corporate Law Decisions, available at <http://www.rlf.com/spot072503.htm>.

[13] *Id*.

[14] *In re The Walt Disney Company Derivative Litigation,* No.15452 (Del. Ch. Oct. 7, 1998),

[15] *Id.*

[16] Brehm v. Eisner*,* 746 A.2d 244 (Del. 2000).

[17] DEL. CODE ANN. tit.8, § 220 gives shareholders the right to inspect the books and records of a Delaware corporation for a proper purpose.

[18] *Disney*, slip op. at 28.

[19] *What's Wrong with Executive Compensation*: A Round-table Moderated by Charles Elson, HARV. BUS. REV., Jan. 2003.

[20] *Id*.

[21] *Id*.

[22] *Id.*

[23] Leo E. Strine, Jr., *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371 (2002) (hereinafter, Strine, Derivative Impact). Enron was an Oregon corporation, WorldCom a Georgia corporation and Tyco a Bermuda corporation.

[24] *Id.*

[25] *Id.*

[26] Chancellor William B. Chandler and Vice Chancellor Leo E. Strine, Jr., *The New Federalism of the American Capital System: Preliminary Reflections of Two Residents of One Small State*, available at <http://www.stern.nyu.edu/clb/2003/03-001.pdf>.

[27] *Id*.

[28] *Id*.

[29] *Id.*

[30] *Id.*; Strine, Derivative Impact, supra note 23.

[31] Cf. Stephen M. Bainbridge, A Comment on the SEC's Shareholder Access Proposal, infra.

[32] For an early discussion of this issue, see Alan R. Palmiter, *The CTS Gambit: Stanching the Federalization of Corporate Law*, 69 WASH. U. L.Q. 445 (1991). The role of state regulators in policing corporate activities is an unknown factor. It is unclear whether actions by state officials such as New York Attorney General Elliot Spitzer and Massachusetts Commonwealth Secretary William Galvin will strengthen the arguments for increasing federalization of corporate law, or will instead be persuasive evidence for the wisdom of leaving power to the states. In either case, the state regulators' claim of jurisdiction over companies regardless of their state of incorporation is a challenge to the traditional notions of corporate sovereignty and must be addressed within the context of the assumed primary legal position of a state over its domestic corporations. However, this challenge is still in its incipient stages, and its result may depend on the ability of the states to respond to the federal challenge to their traditional corporate law role.

[33] Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law*, REGULATION, Spring 2003.

[34] *Id.*

[35] *Id.*

[36] *Id.*

# The SEC's Proposed Shareholder Nomination Rules: A Dialogue

*By Joseph McLaughlin**

Americans are traditionally wary of large aggregations of economic power. The antitrust laws are one means of expressing this wariness, but so are the federal securities laws. Any person that "controls" a public company has to pay a price in terms of disclosure and often in terms of having to accept certain disabilities and liabilities.

The SEC is entrusted with the administration of the federal securities laws, and for decades it has zealously enforced the "control" provisions of those laws. Regrettably, it has now dropped this guard in connection with its recent proposal to permit large shareholders to nominate their own directors by means of a company's own proxy statement.

The abuses that the "control" provisions seek to deter have not gone away, and the SEC's proposals offer no guarantees that the new proposals will not encourage such abuses. But the SEC's desire to achieve a policy objective close to the hearts of certain institutional investors—primarily public and union pension funds—has led it to pretend that those abuses won't arise.

**"Control" in the Federal Securities Laws**

A few years ago, a client named Fred came to visit us. Fred managed a hedge fund that owned just over 5% of a public company called Acme Widget. Acme's management had asked Fred to nominate one of his partners to serve as an independent member of the company's board. Fred wanted to know of any adverse securities laws consequences. We pointed out that there was a danger that the directorship plus the significant stock position might result in a finding that Fred's fund "controlled" Acme for securities law purposes.

"What would that mean?" asked Fred.

We explained that if a person "controls" a public company, that relationship triggers a number of consequences. The company is obligated to disclose the fact of such control. The control person may not sell any of its securities without relying on an exemption such as Rule 144. (Alternatively, it may ask—not require—the company to register the securities with the SEC for resale by means of a prospectus that meets SEC requirements.)

Also, Fred had so far not had to worry about reporting his fund's purchases and sales on a current basis or about forfeiting to Acme any short-term profits on such transactions. Section 16 of the 1934 Act imposes these obligations and liabilities only on persons who own 10% or more of a company's voting securities or who are directors or executive officers. But several cases suggest that an outsider will be treated as a director if it has "deputized" a person to act as a director.

If Fred were in control of Acme, he might also not be able to wait until year-end to file a statement reporting his position. Rather, he might have to file an immediate and more detailed statement and report material changes on a current basis.

"That's pretty serious," said Fred. "Is that all?"

No, we said. Both of the principal federal securities statutes contain provisions that make control persons equally liable with the controlled company for any liability under either statute. To avoid personal liability, the control person has to prove that it acted in good faith and did not participate in or know about the violation. In view of the "deputization" theory, the exculpatory defense might not be enough to get a complaint dismissed before trial. In addition, any information that the designated director received in his capacity as a director would be deemed to have been received in trust and confidence and could not be used by Fred as a basis for buying or selling Acme's stock.

"But of course we would set up a Chinese Wall arrangement," said Fred.

We pointed out that Chinese Walls essentially required one to prove the negative, i.e., that no information had changed hands, and that it was difficult these days to prove such a proposition to the public, regulators and the financial press.

"Well," said Fred, "I don't think I would control Acme even if we did ask one of our partners to act as a director. What do you mean by 'control' anyway?"

We explained that control is defined in SEC rules as "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."

"That's a mouthful," observed Fred. "What does it mean?"

We explained that the definition was designed to be broad in its application. It was not necessary that a person exercised the power to control; rather, it was sufficient to possess the power. Moreover, the power could be exercised directly or indirectly and by any means, with or without ownership of voting stock. Family or social ties, interpersonal relationships, patterns of assertion or deferral at board or committee meetings could all be relevant. Also, a person might himself not be in a control position, but he might be a member of a control group.

"But if I explain all that to you to your satisfaction, can you give me a legal opinion that we're not in control or part of a control group?"

Not necessarily, we cautioned. Control (or the absence of control) depended on all the facts and circumstances, most of which we could not verify for opinion purposes. The only situation in which we felt comfortable giving an opinion was where someone else—with whom Fred had no ties—was indisputably in control of Acme.

"That's not the case here," Fred responded. "We are one of the biggest holders, and we'd certainly be the largest holder represented on the board. Also, the CEO and I have been buddies for years. But I really can't imagine I would be in control of his company. Why doesn't the SEC do something to make the rules clearer?"

The SEC did propose some clarification a few years ago, we pointed out. In 1997, it proposed a definition that would have excluded any person not owning more than 10% of a company's voting stock and who was neither an officer nor a director of the issuer.[1] The definition was never adopted, but it would only have applied to whether or not a person's sales were covered by the SEC's Rule 144; it would not have applied to determinations whether or not a person was in control of a company for other purposes.

"But that wouldn't have helped me anyway," observed Fred, "since I suppose that 'deputizing' a director is the same as 'being' a director."

That's likely, we replied. But we'll never know since the rule was never adopted.

"Can I get one of those letters from the SEC? You know, a no-action letter?"

No, we explained. The SEC staff won't issue no-action letters on control questions because they are so fact-specific.

"I can't afford to have our position treated as illiquid," noted Fred, "and I can't expose our investors to the liabilities you mentioned. I think I'll pass on the invitation."

**The SEC's Shareholder Director Nomination Proposals**

Fred came back to see us last week. "I hear that the SEC wants to give us the ability to nominate a director in opposition to Acme's slate of directors."

That's right, we confirmed. The SEC has proposed permitting any long-term holder of more than 5% of a company's voting stock to use the company's proxy statement to nominate a director in opposition to management's slate. But the procedure would be available only if shareholders withheld more than 35% of their votes from a management nominee at a previous meeting or if a majority of shareholders voted in favor of a shareholder proposal that the company adopt a shareholder nomination procedure.

"That's ridiculous," said Fred. "If they're doing their job right, Acme's nominating committee would have put together a slate of directors who have the background and experience that management needs on the board. I would just muck it up if I proposed someone else. And before I went into this business on a full-time basis, I used to vote against any director who owned less stock than I did. Who's to say why shareholders refuse to support a nominee? Maybe he got involved in a messy divorce after the proxy statement went out. Or maybe he's a Democrat."

"Also," Fred went on, "who's going to stand for election as a director if it can turn out to be a popularity contest and you can get defeated? Some good people just won't agree to be nominated."

That may be, we agreed. But the SEC has heard all of these arguments, and it appears determined to adopt the rules in some form. It has also proposed a third "triggering event," which is that management does not implement a shareholder proposal that gets more than 50% of the votes.

"You mean those shareholder proposals that take up more space in the proxy statement than the information about directors and the rest of it?" asked Fred. "They're a plague. Since when did special interest groups get the right to hijack the proxy statement? We pay for all that paper."

We know how much you love shareholder proposals, we noted. But they have been around for a long time even though the SEC appears determined to expand them.

"Wait a minute," said Fred. "Let's get back to the SEC's shareholder nomination proposal. Didn't you tell me a few years ago that if I nominated someone for Acme's board I could have a lot of trouble because someone might think that I controlled Acme?"

We did, we acknowledged. But the proposed rules say that you couldn't nominate yourself or someone who works for you.

"That's no problem. Remember my college roommate Gus? He's a professor at the business school, and I'm a big donor to his graduate program. He is looking to join some boards. He needs the money. I could nominate him, and he would see everything the way I see it. Would that still give me the control problem?"

It might, we cautioned. The proposed rules say that someone will not be deemed to be in control of the issuer "solely" as a result of nominating a person who is elected to the board, but there cannot be any "agreement or relationship" between the person nominating and the person who is elected.

"So this would take care of the problem you mentioned about my not being able to sell Acme stock on the NYSE without a prospectus?"

Right, we agreed.

"You mean they finally started drawing some bright-line rules on the control question? It's about time," Fred exclaimed. "Not that it's much of a bright-line test to say that I can't have any 'agreement or relationship' with someone. What does that mean?"

We don't know, we admitted. But it could be a problem if Gus is compensated indirectly through your contributions. There's not much help in the SEC's explanation of the proposed rules.

"But why would I nominate someone with whom I have no 'agreement or relationship,'" asked Fred. "The whole point of nominating someone would be to put pressure on management to do something specific, like getting rid of deadwood operations or putting a lid on management compensation. And there are arbitragers out there who are always agitating for companies to be sold or broken up. Why would anyone nominate a person to be a director without having some basis for thinking that he knew the person's position on specific issues?"

We can't disagree with you, we admitted.

"I'm still the largest holder of Acme," said Fred. "But there are a few 1% and 2% holders out there. Can they get together to nominate someone even if I don't?"

Yes, we responded. The proposed rules relax the proxy rules to permit investors to form groups without having to file and mail a proxy statement.

"It sounds as if the SEC really wants this to work," observed Fred. "But suppose the group has more than 10%? Do they have to report buys and sells on a monthly basis? And what about the 'deputization' theory you told me about?"

You are right that the SEC wants this to work, we agreed. They are bending quite a few rules to this end. For example, they say in the release that a group formed to nominate a director is not "the type of group that should be viewed as being aggregated together for purposes of …Section 16," so they propose amending the rules to exclude such a group from Section 16. They are quite frank in admitting that there would otherwise be a "disincentive" to take advantage of the new procedure. Also, the release rather cavalierly dismisses the "deputization" theory as not applicable because of the required "independence" of a nominee from the nominating shareholder. It doesn't propose any rule to this effect, however, so the courts are still free to come to a different conclusion.

"You know," said Fred after a long (for him) silence. The only people who really want this have to be the public pension funds and the unions. Everyone else is going to continue to rely on the boards to do the right thing and if necessary to lean on them once in a while. But what worries me is how I react if the politicians and the labor leaders get together to nominate someone I think is a flake. Can I talk to other holders in opposition to the flake and urge them to support management's slate?"

You can do whatever you can do now, we advised. There is no special exemption in the new rules for opponents of a shareholder nominee, but the existing rules permit you to talk to other holders so long as you don't request a proxy. You would have to be careful not to be seen as acting on behalf of management.

"Not exactly a two-way street, is it?"

Not really, we agreed.

"I can just imagine your enthusiasm for my trying to get involved in an election contest," Fred sighed. "But these rules really make no sense. You can nominate a person to be a director, get him elected and enjoy whatever comes next—having been careful of course to avoid any 'agreement or relationship.' And you can get away without having to bear the disclosure, disabilities and liabilities that usually come with having a representative on the board.

"Are you sure the Republicans won the last election?"

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[1] Securities Act Release No. 33-7391 (February 20, 1997).

# Criminal Law & Procedure

## Supreme Court Preview: Fine-Tuning Miranda

*by Kent Scheidegger**

***Miranda* and Its Limitations**

For its October 2003 term, the United States Supreme Court accepted four cases relating to the rule of *Miranda* v. *Arizona*.[1] This unusual cluster reminds us once again that the case which supposedly drew bright lines 37 years ago remains a fertile source of litigation to this day.

From the day it was decided, *Miranda* was among the most controversial of the Supreme Court's criminal procedure decisions. Justice Harlan called it "heavy-handed and one-sided."[2] Justice White said the rule had "no significant support in the history of the privilege or in the language of the Fifth Amendment."[3] Two years after the *Miranda* decision, Congress repudiated it by enacting 18 U.S.C. § 3501, a statute which would lie dormant for three decades.

The *Miranda* rule "overprotects" the privilege against compelled self-incrimination by excluding from evidence any statement given by a suspect in custody without the prescribed warnings and an express waiver.[4] As a result, it does not merely exclude statements which actually are compelled,[5] but also "patently *voluntary* statements taken in violation" of its requirements.[6] The consequent injury to the truth-seeking function of the criminal trial caused the Supreme Court to issue a long series of damage-control decisions limiting the scope of *Miranda*'s rule of exclusion. The rule was not applied retroactively to other cases tried before its issuance.[7] In *Harris* v. *New York*,[8] the Court limited *Miranda*'s rule of exclusion to the prosecution's case in chief. If the defendant takes the stand, his voluntary but unwarned statement can be used for impeachment. *Michigan* v. *Tucker*[9] rejected a "fruit of the poisonous tree" argument and allowed the prosecution to use a witness located through the defendant's statement despite noncompliance with the *Miranda* rule. In *New York* v. *Quarles*,[10] the Court crafted a public safety exception to *Miranda*, allowing the police to question an arrested suspect about the location of a gun without the *Miranda* warnings and admit his answer in evidence. "The prophylactic *Miranda* warnings are 'not themselves rights protected by the Constitution,' "[11] justifying a distinction between a *Miranda*-noncompliant statement and an actually compelled statement.

*Oregon* v. *Elstad*,[12] an opinion written by Justice O'Connor in 1985, is the central precedent for the cases to be decided this term. In *Elstad*, the police went to the suspect's home with an arrest warrant for a burglary. They asked Elstad if he knew why they were there. When he said he did not, the officer described the crime and said he believed Elstad was involved. He said, "Yes, I was there." Then they took him to the police station and read him his *Miranda* rights. Elstad understood and waived his rights and made a full statement.[13] The Supreme Court assumed that the first statement was a *Miranda* violation, because the state had conceded that point earlier in the litigation, but it allowed admission of the defendant's second, properly warned statement. "We find that the dictates of *Miranda* and the goals of the Fifth Amendment proscription against use of compelled testimony are fully satisfied in the circumstances of this case by barring use of the unwarned statement in the case in chief. No further purpose is served by imputing 'taint' to subsequent statements obtained pursuant to a voluntary and knowing waiver."[14]

***Dickerson* and *Chavez***

In 2000, the Court's arguably conflicting statements on the status of *Miranda* came to a head in *Dickerson* v. *United States*.[15] The Fourth Circuit had awakened Congress's long-dormant repudiation of *Miranda*. Seizing upon the *Quarles/Tucker* statement above, it held that *Miranda* was a nonconstitutional rule within the power of Congress to modify, and admissibility of confessions in federal trials was governed by the voluntariness standard of 18 U.S.C. § 3501.[16] The Supreme Court reversed. The fact that it had always applied the rule to state as well as federal courts was conclusive that the rule was constitutional and that Congress could not simply legislate a return to the status quo ante.[17] The Court also declined to overrule *Miranda* on its own, based squarely on *stare decisis* rather than on the correctness of *Miranda* as an original matter.[18] The *Dickerson* Court did not repudiate the earlier decisions making "exceptions" to *Miranda*, including *Harris*, *Elstad*, and *Quarles*. Indeed, it seems to reaffirm them.[19] It also did not repudiate earlier statements that the *Miranda* warnings are not themselves constitutional rights or that the legislative branch could substitute other effective procedures. The Court quoted a statement from Chief Justice Burger that he would neither overrule nor extend *Miranda*.[20]

The last case on the *Miranda* rule before the present term was *Chavez* v. *Martinez*,[21] decided at the end of the last term. This case was a civil suit brought by a person who was arrested and questioned, but never prosecuted. Although the Court was fractured, it is apparent from the several opinions that the status of *Miranda* as a "prophylactic" rule survives *Dickerson*, and taking a statement without complying with *Miranda* is not, by itself, a violation of the Constitution.[22]

Even before the Supreme Court issued its decision

in *Chavez*, it had apparently decided that further clarification of *Miranda* was needed. It had granted *certiorari* in three cases related to the *Miranda* rule for argument and decision in the October 2003 Term: *Fellers* v. *United States*, *United States* v. *Patane*, and *Missouri* v. *Seibert*. All three were argued in December, and one was decided January 26. Just before commencement of the term, the Court took a fourth case, *Yarborough* v. *Alvarado*, which will be argued March 1.[23]

***United States* v. *Patane***

The strongest case for the prosecution is *United States* v. *Patane*. The police arrested Patane and began to read him the *Miranda* warnings when he interrupted them and said he knew his rights. Then they asked him about the location of his gun, which, as a convicted felon, it was illegal for him to possess. He told them it was in his bedroom and gave consent for them to enter to retrieve it. The government made a dubious concession that this was a *Miranda* violation, so Patane's statement was not admissible, but argued that the gun itself remained admissible under *Tucker* and *Elstad*. The Tenth Circuit held that *Dickerson* had undermined the premise of *Tucker* and *Elstad*, that *Miranda* is a "prophylactic" rule, and further that physical evidence as "fruit" is distinguishable from both the witness in *Tucker* and the defendant's subsequent statement in *Elstad*.[24] The latter holding was contrary to the Tenth Circuit's own precedent. "However," the court said, "once again *Dickerson* has undercut the premise upon which that application of *Elstad* and *Tucker* was based because *Dickerson* now concludes that an un-Mirandized statement, even if voluntary, is a Fifth Amendment violation."[25] This opinion was rendered before *Chavez*.

The defendant's brief makes three main arguments. First, failure to comply with *Miranda*'s warning requirement is itself a violation of the Constitution, and therefore the derivative evidence rule applies full force. This is a difficult argument, at best, given the holding in *Chavez* (which the defendant only mentions briefly), and the Court's apparent reaffirmation of *Tucker* and *Elstad*. Second, the balancing of interests weighs in favor of exclusion of derivative evidence, the very argument the Court rejected in *Tucker* and *Elstad*. Third, Patane argues that physical evidence is distinguishable, because there is no intervening act of free will, as there is in the cases of a witness testifying or an arrested suspect making a second, properly warned statement. This argument is somewhat stronger, but weighing on the other side is the greater reliability of physical evidence, not depending on a witness's veracity or unknowable psychological pressures that may have produced an out-of-court statement. In the present case, the presence of a gun in the defendant's bedroom is virtually conclusive evidence of guilt. In *Withrow* v. *Williams*,[26] the Court said that keeping out unreliable evidence was a major purpose of the *Miranda* rule, and that factor is completely absent here.

***Fellers* v. *United States***

A different twist on the "fruit" question was presented but not decided in *Fellers* v. *United States*. After Fellers had been indicted on drug charges, the police came to his house and said they wanted to discuss the indictment. Fellers made incriminating statements. The police then arrested him, took him to jail, gave him the *Miranda* warnings, and obtained a waiver. Fellers made more incriminating statements. The District Court suppressed the statements made at the house but admitted those made at the jail. The Tenth Circuit affirmed based on *Oregon* v. *Elstad*.[27]

The twist here is that the underlying violation is not of the Fifth Amendment *Miranda* rule. Rather, it was the Sixth Amendment rule of *Massiah* v. *United States*[28] that was violated. Because judicial criminal proceedings had already begun against Fellers, he had a right not to be interrogated without his lawyer present, regardless of whether he was in custody. However, *Patterson* v. *Illinois*[29] established that a waiver taken according to *Miranda* also waives the *Massiah* right. To succeed in suppressing the second statement, assuming *Elstad* is still good law, Fellers must distinguish his case from *Elstad*.

To distinguish *Elstad*, Fellers asserted that the *Massiah* violation in his case is a violation of the Sixth Amendment itself, and therefore it is distinguishable from the antecedent *Miranda* violation in *Elstad*, where the Court said that a violation of the *Miranda* warning requirement is not itself a violation of the Constitution. This argument put the defendant in *Fellers*, supported by the American Bar Association, at odds with the defendant in *Patane*, supported by the Brennan Center for Justice, who asserts that a *Miranda* violation is a violation of the Constitution.

The Supreme Court decided not to resolve the intricate questions presented by the *Fellers* case. On January 26, the Court issued a short, unanimous opinion by Justice O'Connor, which simply reversed the Eighth Circuit on the issue of the initial *Massiah* violation.[30] The Court confirmed the "deliberate elicitation" standard for *Massiah* cases and left the "fruits" question to be reconsidered by the Eighth Circuit on remand.

***Missouri* v. *Seibert***

The strongest case for the defense side is *Missouri* v. *Seibert*. This case arose from a bizarre scheme by Patrice Seibert and two of her sons to conceal the circumstances of the death of a third son by burning down their own home. Donald Rector, another teenager living in the home, died in the fire, and the critical question was whether his death was part of the plan.[31] The police intentionally questioned Seibert and obtained inculpatory statements without reading her the *Miranda* warnings, then read her the warnings and obtained a waiver, and then got more

statements from her by referring back to the earlier statements. The Missouri Supreme Court divided 4-3, with the majority holding this was distinguishable from *Elstad* and the dissent believing that *Elstad* was controlling precedent.

Unfortunately for Seibert, her attorney has filed a shrill, over-the-top brief that does not get around to distinguishing *Elstad* until page 33. Once there, though, the brief does note that the short conversation in Elstad's living room was far less coercive than Seibert's station-house interrogation. Further, the brief notes that *Elstad* limited its rule to circumstances "absent deliberately coercive or improper tactics in obtaining the initial statement,"[32] and otherwise hedged its holding. The United States Solicitor General, as *amicus* in support of the state, reads *Elstad* as allowing an exception to its rule of admissibility only for cases where the first statement is coerced in the pre-*Miranda* due process sense.

The bright-line alternatives in this case are to either (1) accept the Solicitor General's position and admit the second statement whenever the first is not actually coerced; or (2) overrule *Elstad* and exclude the second statement whenever the first is not taken in compliance with *Miranda*. Neither of these courses seems likely, and the Court has just recently reminded us how much it dislikes bright-line rules.[33] A more probable outcome is a rule somewhere between these two extremes, raising as many questions as it answers.

***Yarborough* v. *Alvarado***

The Fourth *Miranda* case, *Yarborough* v. *Alvarado*, differs from the others in that it arises from federal *habeas* review of a state judgment, rather than direct appeal. The standard of review here is quite different due to the Antiterrorism and Effective Death Penalty Act of 1996.[34] The case is also different in that it does not involve a "fruit of the poisonous tree" question, but rather the question of when a suspect is "in custody" so as to require the *Miranda* warnings. The Court has long recognized that "the task of defining 'custody' is a slippery one,"[35] and that errors by the police in determining whether a suspect is in custody are inevitable.

Alvarado was a 17-year-old suspected of involvement in a robbery-murder. He was brought to the station by his parents, questioned there, and then taken home by his parents. The state appellate court concluded he was not in custody for the purpose of requiring *Miranda* warnings, applying a test taken from a Supreme Court opinion.[36]

The Ninth Circuit found that the state court had failed to give sufficient weight to the fact that Alvarado was a juvenile, and that, in the terms of the *habeas* statute, this was an "unreasonable application" of Supreme Court precedent, in that the state court had unreasonably failed to extend Supreme Court precedent on *Miranda* by recognizing special protections for juveniles.[37]

*Alvarado* will probably be decided primarily as a *habeas* case and shed little additional light on the *Miranda* body of jurisprudence. The standard the Ninth Circuit used to evaluate the state judgment was already disapproved last term.[38] Once the federal court finds that the state court applied the correct legal standard from Supreme Court precedents, as it clearly did in this case, a collateral attack can only succeed if the state court's application of that standard to the facts was objectively unreasonable.[39] The *Alvarado* case would be close if the Court were reviewing it *de novo* on direct appeal. Under the AEDPA standard, a case that is close on the merits is clearly not a proper ground for collateral attack.

**Conclusion**

*Patane* and *Seibert* should provide some clarification of the "fruit of the poisonous tree" issue for the *Miranda* rule. The question of whether the same analysis applies to the *Massiah* rule will have to wait for another term. Look for a decision in *Alvarado* at the end of the term, but do not expect the Court to shed much light on what "custody" means.

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**Footnotes**

[1] 384 U. S. 436 (1966).
[2] *Id.*, at 525 (dissenting opinion).
[3] *Id.*, at 526 (dissenting opinion).
[4] *See* Duckworth v. Eagan, 492 U. S. 195, 209 (1989) (O'Connor, J., concurring).
[5] "[N]or shall [any person] be compelled in any criminal case to be a witness against himself . . . ." U. S. Const. Amdt. 5.
[6] Oregon v. Elstad, 470 U. S. 298, 307 (1985) (emphasis in original).
[7] *See* Johnson v. New Jersey, 384 U. S. 719, 721 (1966). The absence of any principled basis for distinguishing Johnson's case from Miranda's drew a dissent from Justices Black and Douglas. See *id*., at 736; Linkletter v. Walker, 381 U. S. 618, 641-642 (1965) (Black, J., dissenting). Years later, the Court would accept that all appellants at the same stage of review must be treated the same. *See* Griffith v. Kentucky, 479 U. S. 314, 323-324 (1987); Teague v. Lane, 489 U. S. 288, 304-305 (1989) (plurality opinion).
[8] 401 U. S. 222, 226 (1971).
[9] 417 U. S. 433, 445-446, 452 (1974).
[10] 467 U. S. 649 (1984).
[11] *Id*., at 654 (quoting *Tucker*, 417 U. S., at 444).
[12] 470 U. S. 298, 308 (1985).
[13] *Id*., at 301.
[14] *Id.*, at 318.
[15] 530 U. S. 428 (2000).
[16] United States v. Dickerson, 166 F. 3d 667, 672 (CA4 1999).
[17] 530 U. S., at 438.
[18] *Id.*, at 443.
[19] See *id.*, at 441.
[20] *Id*., at 443 (quoting *Rhode Island* v. *Innis*, 446 U. S. 291, 304 (1980) (Burger, C. J., concurring in judgment)).
[21] 123 S. Ct. 1994 (2003).
[22] *Id.*, at 2003-2004 (opinion of Thomas, J.); *id*., at 2007 (opin-

ion of Souter, J.); *id*., at 2013 (Kennedy, J., concurring in part and dissenting in part).

[23] Briefs of the parties are available on the ABA Web site, http://www.abanet.org/publiced/preview/briefs/home.html. The Solicitor General's briefs as a party in *Patane* and *Fellers* and as *amicus* in *Seibert* are available at http://www.usdoj.gov/osg/briefs/2003/2003brieftypes.html. *Amicus* briefs of the Criminal Justice Legal Foundation in *Patane*, *Fellers*, and *Alvarado* are available at http://www.cjlf.org/briefs/briefmain.htm.

[24] United States v. Patane, 304 F. 3d 1013, 1019, 1023 (CA10 2002).

[25] *Id*., at 1023.

[26] 507 U. S. 680, 692 (1993).

[27] United States v. Fellers, 285 F. 3d 721 (CA10 2002).

[28] 377 U. S. 201 (1964).

[29] 487 U.S. 201 (1964).

[30] Fellers v. United States, 540 U.S.__(No. 02-6320, Jan. 26, 2004), http://www.supremecourtus.gov/opinions/03pdf/02-6320.pdf.

[31] State v. Seibert, 93 S.W.3d 700 (2002).

[32] 470 U.S., at 314.

[33] *See* United States v. Bank*s*, 540 U.S.__(No. 02-473, Dec. 2, 2003) (slip op., at 4), http://www.supremecourtus.gov/opinions/03pdf/02-473.pdf.

[34] 28 U.S.C. § 2254(d).

[35] *Elstad*, 470 U.S., at 309.

[36] The state court opinion in *Alvarado* is unpublished. It took the custody standard from People v. Ochoa, 966 P. 2d 442, 471 (Cal. 1998), which quoted Thompson v. Keohane, 516 U.S. 99, 112-113 (1995).

[37] *See* Alvarado v. Hickman, 316 F. 3d 841, 853-854 (CA9 2002).

[38] *See* Lockyer v. Andrade, 538 U.S. 63 (2003), disapproving Van Tran v. Lindsey, 212 F. 3d 1143 (CA9 2000).

[39] *See* Williams v. Taylor, 529 U.S. 362, 409 (2000).

# Environmental Law & Property Rights

## Berman and Beyond: The Misuse of Blight Laws and Eminent Domain

*By Scott Bullock and Dana Berliner**

**Introduction**

One of the primary methods used by government to take property through eminent domain for redevelopment projects is to declare a particular area to be blighted. In blight cases, the purported purpose of the condemnation is the elimination of blight—the removal of a public harm. The U.S. Supreme Court in *Berman v. Parker*, 348 U.S. 26, 31 (1954), held that the condemned properties at issue were "injurious to the public." Thus, the *Berman* Court decided that the properties could, consistent with the Constitution, be transferred to private parties because the public purpose of the condemnation was the elimination of blight.

*Berman* established blight elimination as a justification for using eminent domain, and the removal of blight has been used to justify the taking of property for private redevelopment for almost a half a century. However, what constitutes a blighted neighborhood has been vastly expanded since *Berman*. As a result, neighborhoods that have very little in common with the one at issue in *Berman* are being condemned. Indeed, it seems that several governments merely use blight as a pretext for their real goal—the removal of existing homes and businesses and the transfer of the land to a private developer so that the government can obtain more tax revenue. Courts, however, are starting to become more skeptical of the misuse of blight designations.

**The Blight at Issue in *Berman***

*Berman* concerned the question of whether the government could condemn property necessary to clear "slums" and subsequently transfer the cleared or improved property to another private party. A slum was defined as "the existence of conditions injurious to the public health, safety, morals and welfare." *Berman*, 348 U.S at 31. In the nearly 50 years since *Berman*, the Court has not addressed the Fifth Amendment's Public Use Clause in a "slum clearance," or more politely "urban redevelopment," case. Although the terminology has changed from slums to blight, the rationale remains. Property may be condemned to eliminate conditions injurious to the public welfare. In *Berman*, the Court cited surveys finding that "64% of the dwellings were beyond repair . . . 57% of the dwellings had outside toilets . . . 83% lacked central heating." *Id.* at 30.

The district court was even more specific in detailing the conditions of the area. In *Schneider v. District of Columbia*, 117 F. Supp. 705, 709 (D.D.C. 1953), the district court case resulting in *Berman*, the court found that the death rate for the subject area was 50% higher than in the remainder of the District of Columbia. Moreover, the death rate from tuberculosis was two and a half times greater and the death rate from syphilis infection was more than six times than the general rate in the District of Columbia. *Id.* at 709. This was the factual situation that confronted the Court in *Berman*.

The condition of the area at issue in *Berman* is in contrast to many modern blight cases. Indeed, the modern-day blight cases seem to confirm the Court's anxiety in *Schneider* when it upheld the use of eminent domain for slum clearance:

> These extensions of the concept of eminent domain, to encompass public purpose apart from public use, *are potentially dangerous to basic principles of our system of government*. And it behooves the courts to be alert lest currently attractive projects impinge upon fundamental rights. . . . [T]hat the government may do whatever it deems to be for the good of the people is *not* a principle of our system of government. Nor can it be . . . . [I]t is universally held that the taking of private property of one person for the private use of another violates the due process clauses of the Fifth and Fourteenth Amendments.
> *Id*. at 716. (emphasis added).

**Two Modern Case Studies in the Abuse of Blight Laws**

*1. Norwood Ohio*

Carl and Joy Gamble worked hard their entire lives. Their oasis for more than 34 years has been their well-kept home, with a huge backyard, on Atlantic Avenue in Norwood, Ohio (a city surrounded by Cincinnati). They raised two kids there. When they sold their small, family-owned grocery store in November 2001 and retired, they looked forward to quiet days gardening in their yard and enjoying visits from their now-grown children.

But Cincinnati developer Jeffrey Anderson has different plans for the Gambles and their neighbors. He wants to build Rookwood Exchange, a follow-up to the adjacent Rookwood Commons. The project is expected to contain private offices, condos, chain stores and a parking garage on a triangular piece of property bounded by Interstate 71, and Edmondson and Edwards roads in Norwood.

Anderson bought many of the properties in this neighborhood, but he met stiff resistance from a group of home and business owners that do not wish to sell their

properties or be forced out through eminent domain. So in December 2002, the developers asked the Norwood city council to pursue an urban renewal study. The developers admitted that the "study's findings are key only if they can't get the property owners to sell."[1] Anderson knew that with a finding of blight and a declaration that the area was an urban renewal zone, the City would be able to use eminent domain to force out those who refused to sell. Anderson brazenly offered to pay for the urban renewal study, and the Norwood City council accepted his offer.

Given the desires of Anderson for this neighborhood and the fact that he paid for the urban renewal study, it was perhaps not surprising that the study concluded that a perfectly fine, middle-class neighborhood of 99 homes and small businesses (in addition to some vacant properties) was in fact "blighted," "deteriorated," and "deteriorating." Following through on Anderson's wishes, the urban renewal study was adopted by the Norwood city council on August 26, 2003.

The so-called Urban Renewal Plan for the Edwards Road Corridor Area was a study specifically designed to the reach a pre-determined result: to declare blighted an attractive, well-maintained neighborhood of homes and businesses.

The key to understanding the entire study is the third paragraph of the Introduction, which concedes "Private development interests, including the developers of the adjacent *Rookwood* projects, have proposed developing two separate mixed-use commercial projects on separate sites on opposite sides of the interstate north of Edmondson and west of Edwards Roads," the very area declared an urban renewal zone by the City. Thus the urban renewal plan is the direct result of the desire of private developers to have this land.

The study put the cart before the horse. First, private developers came up with a plan, and then the City commissioned a study that declares the neighborhood to be an urban renewal area, with the ability of the City to use eminent domain to remove those who do not sell to the developer. This is a blatant misuse of the urban renewal law.

Even though the study was fueled by a desire to obtain land for a private development project, it had to concede a number of remarkable things. In direct contrast to the bad neighborhood conditions at issue in *Berman* and traditional blight cases, the study found there is not one home, business or other building that is dilapidated. *Not one*. Moreover, there is not one property that is delinquent on taxes. Genuine concern for and evidence of serious problems with the conditions of the structures or signs that properties have been neglected or abandoned lie at the very core of urban renewal laws and the Court's decision in *Berman*. And yet these fundamental urban renewal factors are completely non-existent in the Edwards Road area.

Given the fine condition of the homes and businesses, the urban renewal study instead had to rely on several factors, such as broken pavement along sidewalks, standing water on roads, and poorly designed streets, over which the property owners have no control whatsoever. Indeed, if these supposed blighting characteristics exist, it is the City itself that has created them. The City thus creates these blighting factors—or at least permits them to exist—and then uses them as a basis to take the homes and businesses in the area.

The inclusion of such factors in the blighting categories as weeds and cars parked in front of houses are absurd. No court would permit homes to be torn down because of some weeds in a yard or a car out front. Moreover, in order to beef up the blighting categories, the study illegitimately counts certain supposed problems numerous times. For instance, rather than zoning problems being counted in one category, they are counted in at least five separate blighting categories. Supposed problems with the street layout in the area are counted three times. Factors such as "lack of required safety rails, hand railings, or landings" are repeated verbatim in two separate blighting categories.

This double, triple, and even quintuple counting is clearly used to achieve the desired result: the declaration that this area is blighted. They are also an indication of the very real problems that plague this report. Indeed, problems with the study itself and the extremely thin reed upon which it advocates declaring this neighborhood blighted virtually invited a legal challenge. And currently, the Institute for Justice, where we are attorneys, is challenging Norwood's blight designation and the ability of the City to use eminent domain to implement the urban renewal plan. We also recently filed a lawsuit challenging a blight designation in Lakewood, Ohio.

2.Lakewood, Ohio

Jim and JoAnn Saleet first saw their dream home in 1965. The house on Gridley Street in Lakewood, Ohio, was perfect for the couple. It was in a cozy neighborhood and had a sweeping view of the Rocky River and valley. Jim and JoAnn wanted that home the moment they first stepped into the yard and saw the breathtaking view of fall foliage aglow in the valley. Standing together in that yard back in 1965, they decided that they would buy the place and never move again. This was where they would raise their children and stay for the rest of their lives. Over the next 38 years, they made many improvements to the house and continued to enjoy their beautiful view as they gardened. They promised their daughter, Judy, who lives nearby and loves her childhood home, that they would leave the house to her and her family.

The Saleets, however, are not the only ones who want to enjoy that beautiful view. After nearly 40 years happily ensconced in their home, the Saleets were stunned

when Lakewood Mayor Madeline Cain announced that, to increase the city's tax base, the City was helping a developer replace their home and neighborhood with high-end shopping and upscale condos. Interestingly, the same developer who is behind the project in Norwood described above is one of the two developers who stand to gain from the Lakewood project. Suddenly, the Saleets faced the prospect of losing their home through eminent domain abuse, where government takes one person's private property only to hand it over to another private party.

The news shocked many other residents of Lakewood's West End. Julie and Hal Wiltse's home and business is slated to be destroyed. They have lived there for more than 40 years. Sandeep Dixit and his family had moved to the neighborhood only a few years ago. He chose it as a safe, comfortable neighborhood to raise his two young children. Christa Eckert Blum moved to the neighborhood eight years ago with her husband.

As these and other home and business owners look around, they cannot understand it. They keep up their colonial homes, invest money in them and make improvements. The West End has a vibrant business community, without a single commercial vacancy—compared to more than 100 commercial vacancies in the rest of Lakewood. Why does the City want West End homeowners and businesspeople to leave?

After eight months of living in stress and uncertainty following Mayor Cain's announcement, the Saleets and other West End residents watched their worst nightmares come true. In December 2002, the City officially approved a "community development plan," along with a finding that the Saleets' neighborhood was "blighted" under Lakewood law. A "blight study" alleged that the neighborhood had a disproportionate number of police and fire department calls and was "functionally and economically obsolete." The homeowners knew this was impossible. Not only did their neighborhood look just like all the homes in Lakewood, but there had been no major crimes or fires.

With further investigation, it turns out the owners were right. There had been only one major crime (a robbery) in the preceding two-and-a-half years. The other police calls had been minor. Even more perplexing, while many police calls were related to several bars on a commercial street,[2] the City's development plan will actually increase the number of bars. And most of the calls to the fire department had in fact been medical emergencies.[3]

The homes do not have major structural deficiencies, so the study had to use something else to find "blight." The study's "blighting factors" include:

- lack of a two-car attached garage,
- less than two full bathrooms,
- less than three bedrooms,
- too-small homes (less than 1,400 square feet), and
- too-small yards (less than 5,000 square feet of lot size).

The study counted weeds and sidewalk cracks as site condition deficiencies. And it found homes "economically obsolete" if they were valued at less than $75 per square foot.[4]

Of course, such "blighting factors" do not distinguish the West End from any other part of Lakewood. Almost no home in Lakewood has a two-car attached garage. A large majority have less than two full bathrooms. More than half are valued at less than $75 per square foot. Indeed, as it turns out, the homes of the Mayor and all of the City Council members (along with the vast majority of all Lakewood homes) would be blighted under the standards the "blight study" and the City applied to the West End homes.[5] The Saleets' neighborhood really is like every other neighborhood in Lakewood.

No one could honestly say the area is blighted. It's far too attractive. Even Mayor Madeline Cain described it as a "cute neighborhood."[6] But it's a cute little neighborhood with a beautiful view. Richer people might pay for that view and thus generate more tax dollars—at least that's what the City is hoping.

Norwood and Lakewood are not the first to stretch the definition of "blight" to justify taking perfectly fine property and handing it over to a private developer. In Kentucky, a neighborhood with $200,000 homes has been declared blighted. Englewood, N.J., termed blighted a thriving industrial park that had one unoccupied building out of 37 and generated $1.2 million per year in property taxes. Richfield, Minn., labeled buildings blighted that did not have insulation that met Minnesota's rules for energy-efficient construction of new buildings. And various California cities have tried to label neighborhoods blighted for peeling paint and uncut lawns.[7]

Although city officials will usually tell citizens that blight and urban renewal designations are useful for funding and tax abatement, in fact a blight designation places all properties in the area at the mercy of both government officials and developers. Residents should therefore view any blight designation as the first move in a coming eminent domain action.

**The Tide is Turning in the Courts**

While blight designations and the use of eminent domain in urban renewal areas has traditionally been given broad deference by the courts, the expansion of the understanding of blight has caused several courts to give more vigorous review of urban renewal plans.

The Connecticut Supreme Court recently rejected an attempt to expand an older blight designation to allow

condemnation of a local diner for additional commercial development. *See Aposporos v. Urban Redev. Commission*, 259 Conn. 563, 565-68 (2002). The original blight designation dated from 1963. In 1988, the city amended the plan to include additional property for a new project that would compete with a mall that had been constructed in another part of Stamford in the 1980s. The 1963 redevelopment plan was due to expire in 1993, but the city extended it to 2000. 259 Conn. at 565-68. The city finally began condemnations in the new area at the end of 1999. The Connecticut Supreme Court held that a new finding of blight *was* required when new property was added to the project area or when the agency sought to conduct a new project, not originally contemplated. To hold otherwise, the Court found, "would confer on redevelopment agencies an unrestricted and unreviewable power to condemn properties for purposes not authorized by the enabling statute and to convert redevelopment areas into their perpetual fiefdoms." *Id*. at 577.

California courts have been examining blight designations with greater attention and rejecting designations not supported by the evidence. For example, in *Beach-Courchesne v. City of Diamond Bar*, 80 Cal. App. 4th 388, 398 (Ct. App. 2000), the court rejected a blight designation where there was insufficient evidence of physical blight. "[T]here is no evidence that any of the affected parcels contains a building in which it is unsafe or unhealthy for persons to live or work." *Id*. The court in *Graber v. City of Upland*, 2002 Cal. App. Lexis 4296 (Jun. 18, 2002) rejected a similar attempt to designate an area as blighted based on such factors as peeling paint and sagging screens. *Id*. at *31-35.

A Minnesota appellate court similarly rejected a redevelopment area designation, although the Minnesota courts have left the case in a procedural mess. In *Walser Auto Sales v. City of Richfield*, 635 N.W.2d 391 (Minn. App. 2001), *aff'd on divided court*, 2002 Minn. Lexis 353 (May 23, 2002) (*Walser II*), the city found that the buildings in the redevelopment district were structurally substandard because they were not insulated in conformance with the energy conservation standards for new construction. Other errors included extrapolating data about the homes from a small subset and extrapolating negative data but not extrapolating positive data.[8]

Finally, the reinstated opinion in *Henn v. City of Highland Heights*, No. 98-95 (E.D. Ky. March 23, 2001) also finds that a city improperly designated an area as blighted. The case was originally decided by the district court in 1999. *See Henn v. City of Highland Heights*, 69 F. Supp.2d 908 (E.D. Ky. 1999). That decision was then vacated and remanded for certain jurisdictional findings. *See Henn v. City of Highland Heights*, 2001 U.S. App. Lexis 2490 (6th Cir. Feb. 8, 2001). The district court made additional jurisdictional findings and reinstated the original opinion on March 23, 2001. Although the municipality at first appealed the reinstated decision, it voluntarily dismissed the appeal in November 2001, so the *Henn* opinion is now final. In the opinion, the court found that there was no disease, high crime, or poverty in the area but that it was a "normal real estate market of moderately priced housing." The court therefore rejected the blight designation as arbitrary and capricious.

**Conclusion**

Across the country, local governments are labeling thriving neighborhoods "blighted" as an excuse for transferring property to private developers. Keeping cities honest about blight is vital to preserving the rights of ordinary citizens to enjoy their property and their neighborhood in peace.

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**Footnotes**

[1] Susan Vela, *Norwood may ok blight study of development area*, The Cincinnati Enquirer, March 25, 2003.
[2] Data from Lakewood Police Department.
[3] Data from Lakewood Fire Department.
[4] *See* D.B. Hartt, Inc., *Community Development Plan for the West End District* (July 29, 2002).
[5] Data from Cuyahoga County Auditor.
[6] V. David Sartin, *West End deal going to Lakewood council*, The Plain Dealer, Apr. 21, 2003, at B1.
[7] Dana Berliner, *Public Power, Private Gain*, at 159-68 (Institute for Justice April 2003) (available at www.castlecoalition.org/report).
[8] This decision stands in conflict with Housing & Redev. Auth. v. Walser Auto Sales, Inc., 630 N.W.2d 662 (Minn. App. 2001), *aff'd on divided court*, 641 N.W.2d 885 (Minn. 2002) (*Walser I*), which was also affirmed by a divided court. *Walser I* held that the condemnation was for the public purpose of eliminating blight, while *Walser II* held that there was no blight.

# Federalism & Separation of Powers

## Controlling the "Fourth Branch": The Fight Against Agency Capture May be a Losing Battle

*by C. Boyden Gray**

Separation-of-powers issues will always confront politicians, judges and policymakers because the principle of the separation of powers is so central to the constitutional design: each branch will forever be poaching on another branch's turf, as illustrated by the Senate Democrats' recent bold assertion that a President needs sixty votes to confirm a judicial nominee if any Senator so decrees. The most difficult inter-branch problem, however, is much less glamorous and thus much more difficult to resolve—and that involves oversight and control over the so-called "Fourth Branch" of government[1]—the "administrative state" made up of the many regulatory agencies with alphabet titles like EPA, FDA, FCC and SEC.

**The Fourth Branch Checked: Previous Reform Efforts Rolled Back "Agency Capture"**

There is not the space here to go into the history of these agencies, the companion regime of antitrust law or the development of the Administrative Procedure Act of the late l940's, which governs much of the relationship of these agencies to the Congress, the White House and, most importantly, the courts. Suffice it to say that much of the initial impetus for agency regulation came from the regulated community itself, as distinguished from consumer groups or the public, and this legacy has significantly influenced the behavior of the regulatory community ever since.

In part as a result of the special interest parentage, the regulatory agencies—part legislature, part enforcement and part judiciary—were never established to be directly accountable to any one of the Three Branches of Government. Instead, they were designed to be self-contained mini-governments of their own, responsive primarily to the communities they regulate. These agencies were thus not directly accountable to the voter and, not surprisingly, went increasingly out of control.

For example, the impetus for the typical state "PUC"—*i.e.*, the electrical utility or telephone rate-setting body often called a Public Utility Commission—came from the electrical utilities themselves seeking protection from what they perceived to be ruinous competition. The same dynamic explains the ICC and the CAB, and even some of the original support for the antitrust laws, as some companies sought protection from competition that benefited consumers and the public generally.

The phenomenon of agencies responding more to the special interests they were supposed to regulate than to the public has been called the problem of "agency capture." Over time, this misuse of government authority by private interests—sometimes also referred to by economists as "rent seeking"—has been pared back: we no longer have an ICC or a CAB, and the courts have now for many decades interpreted the antitrust laws to protect consumers, not competitors, as the courts had originally viewed these laws in the very early part of last century.

The principal theory of the reform movement was that pure economic and price regulation served virtually no public purpose and should be eliminated. Health and safety regulation survived, of course. But the reformers generally succeeded in limiting the agencies to setting the end goals rather than prescribing the means of compliance (*i.e.*, setting "performance standards"), so that the regulated interests could not manipulate the agencies for their own benefit or to eliminate competition.

It is important to note here that the regulatory reform movement reached its high point in the late 70's and early 80's under Presidents Ford, Carter and Reagan (and generally Democratic Congresses) and was broadly bipartisan. A key leadership role was played by Senator Edward Kennedy on transportation deregulation, aided and abetted by his then chief counsel, Harvard Law Professor—now Justice—Steve Breyer.[2] And the reform movement engaged all three branches. It was the Congress, of course, that eliminated the ICC and the CAB; its other initiative—the legislative veto—represented an effort to look like it was reining in the agencies without actually having to do any heavy lifting and was blessedly struck down by the Supreme Court.[3] For their part, the courts, especially the D.C. Circuit and the Supreme Court, also grappled repeatedly with agency oversight. Finally, the White House entered the fray, especially in the early Reagan years, to make sure that agencies' regulations preserved competition to the extent possible.[4]

An argument could be made that the result made a significant contribution to the great economic expansion that began in l982 under Reagan and continued for nearly two decades until the high-tech bubble burst in 2000. Certainly most experts attribute the significant difference in GDP growth between the United States and Europe to the much more deregulatory climate that prevails in the former than in the latter. The question to be addressed in the remainder of this essay is whether these past gains are endangered by any recent developments. Two developments will be discussed—the effort to create greater harmonization with Europe and the emergence of "regulation by litigation" spawned by the trial lawyers. Both de-

velopments, it will be seen, are heavily influenced by special economic interests involved in rent seeking that endangers the gains of the last two decades.

**The Fourth Branch's New Strength: the European Union and Trial Lawyers**

Although it is too early to be definitive, there are warning signs that Europe may be trying to export its less transparent and flexible regulatory system to the United States in order, perhaps, to reduce the U.S. competitive advantage. The European regulatory system differs from the U.S. system in many respects—but the two most important differences are (1) the extent to which Europe delegates the initial development of regulations to the regulated industry itself in a manner that is not very transparent and that invites rent seeking and "capture" and (2) the general lack of judicial review of regulations. The lack of review, of course, reinforces the lack of transparency as well as the rent seeking. Put another way, the European regulatory approach—influenced as it is by special interests—currently behaves a lot like the U.S. system before the reforms of two decades ago.

Probably the most celebrated example of Europe's approach is its rejection of genetically modified foods (so called "GM" products) in the admitted (by Europe's own technical experts) absence of any human health risk.[5] This rejection has now been exported to Africa, which is experiencing difficulty with its agricultural production and could benefit from technological assistance.[6] One cannot avoid the suspicion that Europe's (especially France's) heavily subsidized farmers are using the regulatory framework to disarm legitimate competition both at home and abroad, to the disadvantage principally of Africa's farmers and consumers and secondarily of American farmers.

The problem extends further, however. In addition to persuading African farmers not to use cost-cutting and productivity-enhancing technology, Europe is also dumping excess food production on Africa through the use of massive export subsidies, which in turn are gravely threatening the Doha Round of trade talks, and thus threatening the free trade system itself. It all has its origins in the capture of government operations by private interests—here farming interests—and then the distortions cascade down the line. This is forcing the U.S. farmer to respond in kind and this, in turn, is beginning to reintroduce the kind of competition-chilling regulatory abuses that the reform movement eliminated two decades ago.

It would be far better for Europe to embrace the new technology and then use it, with the financial help of export subsidies redirected to something productive, to support development of liquid fuel alternatives to crude oil, thus competing with the Saudis rather than the impoverished African farmer. But suspicion of biotechnology extends to new drug development as well. Both Europe and Canada take advantage of the creativity of our highly productive drug companies by slapping their price controls on our drugs and putting all the burden of research on the American consumer. This cannot last forever, because Europe and Canada may succeed in exporting their price controls to us through reimportation, thus eventually killing the goose that has been laying hundreds of golden eggs.

The second example is the mass tort lawsuit perfected by the trial lawyers. Some of these lawyers are quite candid in admitting that they are engaging in "regulation by litigation" to achieve the results that the principles of regulatory reform have denied them both in the regulatory agencies themselves and in Congress. Needless to say, this is not what the Founders had in mind for the judicial system. One illustration is what litigation is doing to the delivery of health care. Tort litigation has so driven up the cost of insurance in some states that some doctors are moving out.[7] In other states, tort suits are disrupting the delivery of drugs to patients and impeding the approval of new therapies.

Thus, the FDA began speeding the approval of AIDS drugs in the late 1980's on the condition that patient groups and drug companies provide adverse side-effect results in a timely and comprehensive fashion so that the FDA could be informed of side effects that might have been missed during the truncated drug approval process. This experiment worked well enough that in 1997 Congress extended the promise of expedited drug approval procedures at FDA, in return for post-approval studies, to all serious and life-threatening diseases.[8] Post-approval studies have, however, not been completed as promptly and thoroughly as expected, which has delayed the speed-up in drug approval. The reason is that prompt post-approval studies can be greatly abused by trial lawyers seeking to file massive class action lawsuits, which in turn also discourage patients from taking drugs they should be taking.

In these examples, it is the trial lawyers who have become the rent-seeking special interests, but the damage is no less than if one competitor captured the power of government to the disadvantage of another. In the other case, it is Europe—or a foreign sovereign power—that is influencing our regulatory agencies at the indirect behest of their vested interests. Could these entities equally and directly influence the Congress itself, which initially delegated the original authority to the regulatory agencies, or the White House, which is responsible for the execution of the delegated law? The answer is that it would be doubtful that U.S. trading partners or trial lawyers could capture the Congress or the White House, which have to face periodic reelection. But what reform measures will now work to make these agencies more responsive to the U.S. voter and less responsive to the trial lawyer or the European farm bureaucrat is not yet clear.

**The Fourth Branch's Future: Reform Must Come from the Other Three Branches**

As was the case with regulatory reform in the l970's and 80's, the reform will have to be imposed on the agencies by one or more of the original three branches—*i.e.*, the federal judiciary, the Congress or the White House, or some combination. For example, the actions of trading partners can be influenced most directly by the White House through the Trade Representative's Office, with Congress also possibly playing a key role. There is not much, by contrast, that the Judiciary can do in the first instance. With respect to mass tort "regulation by litigation," Congress probably has to play the lead role—both to provide for easier removal of the mass tort action at the state level to federal court and to provide for preemption of state tort law where interference is most complete between the tort action and the regulatory regime. The courts will be directly involved, obviously, to rule on implied preemption requests that, in turn, the White House might seek in the absence of explicit congressional direction.

The question, though, is to what extent the trial lawyers and the diplomats can divert the three branches' attention away from the need to regain control of the Fourth Branch of Government from today's special interests. This question really is no different from the question posed more than two decades ago—whether there was political will to regain control of the agencies from the "capture" of these agencies by the then-dominant regulated special interests. The counterattack by reformers to restore accountability to the Three Branches and the public has begun—with the USTR fighting both Europe's retention of export subsidies and its opposition to GM foods,[9] and both the White House and Congress opposing the trial lawyers.[10] But the outcome, at this writing, is still in doubt.

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**Footnotes**

[1] *See also, e.g.*, C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 Tex. Rev. L. & Pol. 1, 2 (2000); *cf.* Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in part and concurring in the judgment).

[2] Senator Kennedy spearheaded transportation deregulation in the U.S. Senate by chairing hearings on deregulating the airlines in 1976. *See Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Admin. Practice & Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 3 (1975); *see also* Brent L. Hoffman, *Justice Stephen G. Breyer, Business Friend and Environmental Foe?: An Analysis of Justice Breyer's Judicial & Non-Judicial Works Concerning Environmental Regulation*, 100 Dick. L. Rev. 211, 212-13 (1995) (discussing then-Professor Breyer's work on transportation deregulation).

[3] *See* INS v. Chadha, 462 U.S. 919 (1983) (striking down Section 244(c)2 of the INS Act).

[4] *See, e.g.*, Exec. Order No. 12,291 (1981) (requiring that federal agencies conduct a Regulatory Impact Analysis (RIA) of proposed major regulations, including *inter alia* their affect on competition).

[5] For a collection of the European Union's directives and guidelines regulating "genetically modified organisms," see http://www.eurunion.org/legislat/Foodstuffs/NovelFoods.htm (last visited Dec. 28, 2003). The European Union's regulations are supported not by known health risks but instead by the "precautionary principle," or the possibility that some human health risk may be revealed in the future. *See, e.g.*, Karen Lowry Miller, *The Battle Over Caution; A Brussels Philosophy Antagonizes the United States and Others*, Newsweek, Dec. 15, 2003, at 38; *see also Compulsory Labeling of Food Produced from Genetically Modified Soya Beans and Maize*, 4 Colum. J. Eur. L. 179, 181 (1998) (stating that the European Commission caved to pressure to devise GM labeling scheme after it determined that GM maize presented *no risk* and initially decided to permit community-wide marketing of the maize).

[6] *See, e.g.*, Robert L. Paarlberg, *African Famine, Made in Europe*, Wall St. J., Aug. 23, 2002, at A12; Press Release, State Department, Evans Addresses Third AGOA Forum (Dec. 10, 2003), *available at* 2003 WL 64739413.

[7] *See, e.g.*, Judith VandeWater, *Soaring Malpractice Insurance Has Doctors Retiring, Relocating; Losing Neurosurgeons Could Cost Patient Lives, Experts Say*, St. Louis Post-Dispatch, Sept. 22, 2003, at A1, *available at* 2003 WL 3610282.

[8] FDA Modernization Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (1997).

[9] *See, e.g.*, *U.S., EU Fail to Settle Dispute Over Biotech; Washington Going to Trade Panel; Canada Likely to Join Challenge*, Toronto Star, June 20, 2003, at D6, *available at* 2003 WL 57342520; Press Release, State Department, Zoellick: Wide Range of Expertise Represented at AGOA Forum—Says it's Now Time to "Get Down to Work" to Solve Africa's Problems (Jan. 16, 2003), *available at* 2003 WL 2045670.

[10] *See* President George W. Bush, *Statement on Class Action Fairness Act*, White House, *at* http://www.whitehouse.gov/news/releases/2003/10/20031023-2.html (Oct. 23, 2003); Press Release, White House, Remarks by the President to the Greater Manchester Chamber of Commerce (Oct. 9, 2003), *available at* 2003 WL 7518272.

# Is There a Duty to Make Judicial Recess Appointments?

*by Todd Gaziano**

The constitutional separation of powers is lubricated by the comity each branch owes to the other two. Comity encompasses due respect for the prerogatives and obligations of other branches. When shared powers are at play, the bare minimum that is required is reciprocal action within a reasonable amount of time. The Constitution defines the time limit for a President's signature or veto of legislation presented to him from Congress and the consequences for his refusal to act within that time limit.[1] No precise time limit exists for other joint actions,[2] and that probably renders one branch's inaction nonjusticiable. It does not follow, however, that there can be no constitutional violation for inaction in all such circumstances.

One branch may violate the separation of powers by acting or purporting to act beyond the scope of its powers or by refusing, or failing, to act on a joint obligation initiated by another branch. The President would violate his constitutional duty if he refused, or failed, to act to enforce a judicial decree within a reasonable amount of time. As was true with the Line Item Veto law in 1996, Congress and the President sometimes create mandatory (and expedited) jurisdiction in the Supreme Court for questions that involve serious separation of powers disputes.[3] The Supreme Court would violate its duty if it refused, or failed, to act on a justiciable case brought under such provision within a reasonable amount of time. Likewise, the Senate violates its constitutional duty when it does not provide its advice and consent to presidential nominations (affirmative or negative) within a reasonable time period. Such a violation is even more troublesome when the Senate fails to act on nominations for lower court judges and other "inferior Officers" whose appointment could be vested in the President alone.[4] With the prolonged filibuster of several important court of appeals nominations, some of which have been pending for over thirty-two months, the Senate is violating its constitutional obligations to the Executive and Judicial branches.[5]

The focus of this essay, however, is whether the Senate's failure to act discharges the President's obligation to temporarily fill judicial vacancies that have existed for many years. The Constitution charges the President with the duty to fill vacancies that arise in the federal judiciary and other high offices. The Treaty/Appointments Clause states that the President "shall have Power" to negotiate treaties, a power he may exercise at his discretion.[6] The obligation to make appointments is not discretionary. The second part of the same clause directs that "he *shall* nominate, and by and with the Advice and Consent of the Senate, *shall* appoint [ambassadors and consuls], Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not . . . otherwise provided for" in the Constitution.[7]

Indeed, the Framers deemed it so important that some offices not remain vacant for extended periods of time that they provided a method for the President to make temporary appointments without Senate action. The Recess Appointments Clause vests the President with the "Power to fill up all Vacancies that may happen [to exist] during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session."[8] The parenthetical in the preceding quote is supplied for clarity because it is well settled that the President may exercise his recess appointment power to fill any vacancy that may happen *to exist* during a long Senate recess, rather than those that may happen *to occur* during such a recess. Whether the Senate itself may have preferred this construction at one point in its history (so that it would not have to extend its sessions to receive and act on nominations for vacancies that arise late in a session) or not,[9] this interpretation has not been the subject of serious dispute since the first Attorney General opinion on the subject was issued in 1823.[10]

A more interesting question is whether the President may exercise his recess appointment power to fill vacancies in Article III courts. Although the power to issue judicial commissions of short duration (typically ten to eighteen months) might seem incongruous with the normal life-tenure of a federal judge, it is also well settled that the President's recess appointment power extends to vacancies in Article III judgeships. The text of the Recess Appointments Clause states that the power to confer temporary commissions extends to "all" vacancies. Thus, the shorter tenure of judges receiving recess appointments has been read as an exception to the normal tenure of Article III judges—rather than a bar to their appointment or exercise of power. This interpretation has withstood judicial review and is also supported by the almost unbroken practice of every President, including George Washington and other Framers of the Constitution. An excellent, short discussion of the constitutional basis, historical practice and practical workings of the recess appointment of judges can be found on the Federalist Society website.[11]

In all, more than 300 federal judges have exercised judicial power as recess appointees.[12] Most of them were also nominated, confirmed and appointed for a regular lifetime term. President Washington made nine recess appointments, including two to the Supreme Court. Although the Senate refused to confirm Chief Justice John Rutledge for a lifetime seat on the Court, it raised no objection to his recess appointment or to the other eight recess appointees who were all confirmed for lifetime positions. The first five Presidents made a total of twenty-nine judicial recess appointments. Fifteen Supreme Court justices, including two Chief Justices, received recess appointments, and all but Rutledge were subsequently

confirmed for lifetime positions. The justices receiving recess appointments in the twentieth century were Chief Justice Earl Warren and Justices Potter Stewart, William Brennan, and Oliver Wendell Holmes. Prior to the Nixon Administration, every President had granted judicial recess appointments except for William Henry Harrison, who died one month after taking office, and his successor, John Tyler.[13]

That the President has the power to make judicial recess appointments does not answer the more pressing questions of whether he should do so and whether he may have a constitutional obligation to do so in particular cases. Questions of prudence and duty in statecraft are rarely cut and dried. Nevertheless, if a duty does exist, a President should not hesitate to fulfill it even if doing so seems politically controversial at the time. President Jefferson's pardon of those still imprisoned for violating the unconstitutional Alien and Sedition Acts presents an analogous example. Although the pardon power is entirely discretionary with respect to violations of legitimate criminal laws, the President's oath to preserve and defend the Constitution "to the best of [his] Ability"[14] may require him to use his power to free those unconstitutionally imprisoned by the federal government. That is true whether the pardons are popular or not.

The recess appointment power is also discretionary in most instances. Yet, the President's nondiscretionary duty to fill vacancies in vital government offices might sometimes create an obligation to use whatever power is reasonably at his disposal to fill them. Given the lengthy debate at the Constitutional Convention regarding the regular appointment power, it is surprising that there was little or no debate regarding the expected uses of the recess appointment power.[15] At a minimum, however, the text and contemporary practice show that the Framers anticipated some circumstances in which it would be necessary for a President to act unilaterally to fill vacancies in important offices.

The necessity to fill a particular vacancy unilaterally does not depend on whether the Senate is unable to meet (the Framers' primary concern) or unable to end a parliamentary filibuster, except that a more lengthy impasse will make the unilateral appointment even more compelling. The Senate is not without the ability to extract a price if the President abuses his recess appointment power, but there is no reason to expect repercussions if the Senate's majority supports the President's choice of appointees.

An obligation to quickly fill important vacancies in the Judicial branch is more likely to arise than an obligation to fill vacancies in the Executive branch for several reasons. The Constitution vests all executive power in the President.[16] Although the President cannot exercise that power without advisers and assistants, he has great flexibility to delegate and re-delegate his authority when vacancies arise. In fact, almost every executive agency has published orders of succession, which are reviewed and revised periodically. One can imagine a situation in which the President might need to appoint a new ambassador to negotiate an alliance in time of war, but in normal circumstances, other officers could step in.

The judicial power, by contrast, is vested in the Supreme Court of the United States (a collegial body at that) and in all inferior courts that Congress creates.[17] Although magistrates and clerks may assist Article III judges, the judicial decision making power itself cannot be delegated. When the law establishing a sixteen-member U.S. Court of Appeals for the Sixth Circuit is thwarted by a handful of senators and vacancies linger for years, the other judges can only do so much to handle the circuit's workload.[18] If evidence emerged that those same senators who thwarted the confirmation of judges were motivated by a desire to manipulate the result in certain cases pending before that circuit,[19] that could easily undermine public confidence in the administration of justice. That would present an example of a dramatic need to quickly fill those vacancies, for there is little else the President could do that would be as effective in restoring confidence in administration of justice.[20]

The obligation of comity to a co-equal branch is the final reason why extended judicial vacancies will more likely present a compelling case for recess appointments than vacancies in the Executive branch. The President owes no obligation of comity to himself, and he is in a much better position to evaluate the needs of the Executive branch (are the duties of the vacant office properly delegated; should they be re-delegated?) than he is of evaluating the needs of the judiciary. If various federal courts are declaring judicial "emergencies," the President normally should take them at their word.

Whether a President should make a judicial recess appointment for constitutional or other purely prudential reasons will still depend on the facts and circumstances of each case. However, it may be helpful to consider three different categories of situations and then try to fit individual cases into this taxonomy:

1. Instances in which the President has the constitutional power to make judicial recess appointments, but it would be improper for him to do so.
2. Instances in which the President has the constitutional power to make judicial recess appointments and neither prudence nor duty dictate a particular result.
3. Instances in which the President has the constitutional power to make judicial recess appointments and either prudence or duty strongly suggest that such appointments be made.

The first category would include instances in which the vacancy does not present a judicial or other similar emergency, and the Senate has already affirmatively rejected the individual for the regular appointment who the President is considering giving a recess appointment. The President would have the constitutional power to grant a recess appointment to anyone during a Senate recess of about two weeks or more,[21] but it would be improper to use this power to install someone—even temporarily—who the Senate has already rejected. Although the President could grant the recess appointment, the Senate might rightly retaliate. In fact, Congress has enacted a law barring the pay of certain recess appointees. That law, which dates to perceived Civil War era abuses of the recess appointment power, has been amended many times but still includes a prohibition on paying certain recess appointees recently rejected by the Senate for a regular appointment.[22] Although that statute, codified at 5 U.S.C. § 5503, is somewhat arcane and complicated, the law supports the notion that some types of recess appointments are offensive to the Senate's rightful prerogatives and are improper.

The second category includes judicial recess appointments of well-qualified individuals who have not yet been nominated (whether they eventually will or not) and those whose pending nomination is likely to be confirmed by the Senate in due time. The importance of the court and the nature of any judicial emergency are also relevant in deciding whether a particular judicial recess appointment is prudent. The informal advice of the Senate leadership and Chairman of the Senate Judiciary Committee would be relevant in ascertaining likely Senate reaction. This is the category where the President's discretion ought to be respected. Depending on how long the vacancy has been pending prior to the recess and other factors, most such recess appointees can be paid under 5 U.S.C. § 5503.

The third category includes instances in which the vacancy is especially long-standing or there is some other judicial need to fill the position and the recess appointee is a qualified person who has not been rejected by the Senate for the regular appointment. The situation is even more compelling if it appears that the Senate is unlikely to take action on a nomination for the lifetime position in the near future—the reason the Framers drafted the Recess Appointments Clause in the first place—or the Senate's inaction is based on an improper motive. A strong case might present itself if there were multiple vacancies on the Supreme Court and the Senate was delaying action on all nominations in order to affect the outcome of cases pending before the Court.

Still more would need to be known about each situation before an argument could be made that the President was neglecting a duty to make recess appointments—and reasonable people may differ about whether a particular fact pattern fits a particular category above. On December 27, 2000, President William Clinton granted a recess appointment to Roger Gregory to serve as a circuit judge on the Fourth Circuit Court of Appeals on facts that make categorization difficult. The vacancy technically was very long-standing (which automatically rendered it a "judicial emergency") but it was for a new seat on the court that had never been filled;[23] indeed, some (including the chief judge of the circuit) argued that the seat was unnecessary and should be eliminated.[24] Roger Gregory's nomination for the regular appointment had not been formally rejected by the Senate, but it had only been pending a few months in the preceding session and there was some indication it would face opposition from senators who thought the seat should not be filled by someone from Virginia—if it was filled at all.

Judge Gregory was subsequently confirmed for a regular appointment because President George W. Bush's renomination of Gregory (which many saw as a good-will gesture) and additional home state support helped change the political dynamics in the Senate. That development does not alter the facts as they existed at the end of President Clinton term, but some would argue that it proves his judgment was correct that Roger Gregory was not offensive to the Senate, and thus, worthy of a recess appointment. Others argue it was an example of improper racial politics, given the justification Clinton made for the nomination and subsequent recess appointment.[25] The discussion of Gregory's appointment above is abbreviated (the racial charges and a debate about nominees from North Carolina are not detailed here),[26] but the existence of a complex case does not mean there are no others that are clear. Facts that would make judicial recess appointments either improper or compelling do exist.

Reasonable people may differ on whether the current minority filibuster involving several important court of appeals vacancies (and other threatened filibusters) fits the second or third categories, but there ought to be widespread agreement that it is not improper for President Bush to make judicial recess appointments for the seats affected by the filibusters. The vacancies are all long-standing. Several of the courts in question have declared judicial emergencies and are handling cases with summary procedures that should not be continued indefinitely.[27] The nominees apparently all have majority support in the Senate such that they would be confirmed for a permanent seat if a final vote were ever taken. There is even evidence that some senators in the minority are manipulating the confirmation process to affect the outcome in particular cases. Whether that charge is true or not, it undermines confidence in the administration of justice in one federal circuit court that is already straining under formal accusations of misconduct.

The argument for President Bush's use of his recess appointment power is also supported by three other facts. First, the President has shown extreme patience (perhaps too much patience) up to now,[28] while he has continued to urge the Senate to discharge its duty. In a public speech on October 30, 2002, he established a time-

table for action on all judicial vacancies.[29] He has kept his word on nominating qualified individuals for each vacancy within a reasonable time period, and he has repeatedly alerted the Senate and the public to the consequences of the Senate's failure to fulfill its responsibilities. No failure of leadership or laches-like argument can be made. The judiciary has also repeated its plea for action in various ways, and the organized Bar (through the left-leaning ABA) has condemned the Senate's inaction as well.

Second, the chance for final action in the Senate on the blocked court of appeals nominees seems extremely remote in 2004. In November 2003, the Senate majority conducted an historic thirty-nine-hour uninterrupted "Justice for Judges" debate. Yet, the Senate appears no closer to ending the minority filibuster. Perhaps the Senate will change its rules in 2004 or issue a parliamentary ruling that extended filibusters of presidential nominations are unconstitutional, but such action does not appear imminent. Thus, all other reasonable options available to the President have been tried and failed.

Finally, although those who support the improper filibuster would likely claim that any judicial recess appointments in 2004 are politically motivated, presidential inaction is also likely to be characterized that way. At almost every one of his campaign stops during the 2002 congressional elections, President Bush lamented his stalled judicial nominees and urged the election of GOP senators to return control of the Senate to the GOP. If the President does little in 2004 to fill the vacancies held up by filibuster except urge the election of more GOP senators, the public may grow increasingly cynical that the judicial impasse is being kept alive for partisan purposes. President Bush's contrary intentions would not matter as much as the perception that is growing with politically active citizens that the White House wants a salient election issue more than it wants to end judicial emergencies.[30]

Politicizing the judicial confirmation process further should be avoided at all cost. Making judicial recess appointments will not do much to solve the confirmation crisis (and cuts both ways with regard to political perceptions), but it would demonstrate that President Bush really cares about the judicial emergencies and he is not merely interested in installing lifetime judges who share his political ideology or using judicial emergencies to dramatize his electoral objectives in the Senate. The ultimate solution to the current confirmation stalemate is a Senate rule change that is inherently non-partisan for the simple reason that it is almost inconceivable in modern times that the filibuster rule, once eliminated or democratized, can be made less democratic again.[31]

If the President did make a recess appointment in 2004, several commentators (including this author) have suggested that the President would be wise to grant temporary commissions to individuals other than those who were nominated for the lifetime position.[32] Many of the nominees whose confirmation is pending might prefer this option. The following additional advantages of this approach are discussed in the Judicial Recess Appointments article relied upon above:

> Such individuals, unlike recess appointees who are also nominees for permanent appointments, would not be under any political pressure to temper their decisions in order to ensure confirmation. And such recess appointments might better highlight the gridlock in the nominations process than appointments of individuals who have already been nominated. Specifically, in making such an appointment, the President points out in a tangible way that a few Senators engaged in the filibuster of a pending nominee are causing the Senate to abdicate its responsibility to provide an up-or-down vote, and because someone else has been only temporarily appointed, the Senate *still* has a duty to cast a vote for the pending nominee.[33]

Another possible advantage of this approach is that it eliminates any incentives senators may have to hold seats open to affect cases in a particular circuit. There may even be an added incentive for obstructionist senators to allow a vote on the permanent nomination, since the confirmation and regular appointment may well end the tenure of a judicial recess appointee.[34]

The larger question remains whether the current stalemate regarding important court of appeals vacancies justifies the President's use of his recess appointment power. One can imagine other facts that would make the use even more compelling, but a very strong case exists now for President Bush to fill several of the vacancies with judicial recess appointments. A President should not suffer an entire four-year term of office with a minority of the Senate holding up the vote on important nominations, and he may owe a duty to the judiciary to see that its work can proceed despite the Senate's conduct.

* Mr. Gaziano is the Director of the Center for Legal and Judicial Studies at The Heritage Foundation and a member of the Executive Committee of the Federalist Society's Federalism & Separation of Powers Practice Group. Between the preparation of this article and press time, President Bush made at least one recess appointment to a federal appellate court. On January 16, 2004, the President recess appointed Charles Pickering to the United States Court of Appeals for the Fifth Circuit. The arguments in this article remain important in evaluating whether recess appointments are appropriate for the vacancies still remaining in federal appellate courts (ten of which were deemed "judicial emergencies" at the time this article went to press).

## Footnotes

[1] U.S. Const. art. I, § 7, cl. 2-3.

[2] Some temporal limits apply indirectly to restrict the ability of one branch to inappropriately augment or diminish the power of another branch. *See, e.g., id.* art. I, § 8, cl. 12 (limiting military appropriations to no longer than two years, a provision that requires congressional action at least biennially to fund the military under the President's command); *id.* art. III, § 1 (preventing Congress and the President from reducing any judge's pay during his or her tenure).

[3] *See* Line Item Veto Act, Pub. L. No. 104-130, § 3, 110 Stat. 1200, 1211 (1996).

[4] *See* U.S. Const. art. II, § 2, cl. 2. Although federal judges serving on district and appellate courts may not consider themselves "inferior Officers" whose appointment may by law be vested in the President alone, a strong argument can be made that they are both inferior judges within the meaning of Article III, § 1, and inferior officers within the meaning of the Appointments Clause. *See*, *e.g.*, *A Judiciary Diminished is Justice Denied: The Constitution, The Senate, and the Vacancy Crisis in the Federal Judiciary: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong. 22 (2002) (testimony of Todd F. Gaziano), *available at* http://www.house.gov/judiciary/82264.PDF [hereinafter Testimony of Todd F. Gaziano]; Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. Rev. 273, 323-24 (1989); *see also* Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev. 747, 807 n.232 (1999); Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 Wm. & Mary Bill Rts. J. 177, 178 n.10 (2001); Paul Taylor, *Filling Judicial Vacancies and Strengthening the Separation of Powers Through the Appointments Clause: A Legislative Proposal*, 1 Geo. J.L. Pub. Pol'y 227 (2003). *But see, e.g.*, Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy: Reflections on the Harris Execution*, 102 Yale L.J. 255, 275 n.103 (1992).

[5] A majority of senators have voted to end each of the filibusters preventing final votes on the confirmation of Miguel Estrada, Priscilla Owen, William Pryor, Charles Pickering, Carolyn Kuhl, and Janice Brown. The possible parliamentary options available to the Senate majority to end the filibusters, other than attaining 60 votes to invoke "cloture" and end debate, have been the subject of much commentary and legislative discussion. *See, e.g.*, *Hearing on Senate Rule XXII and Proposals to Amend This Rule: Before the Senate Comm. on Rules and Admin.*, 108th Cong. (2003), *available at* http://rules.senate.gov/hearings/2003/060503_hearing.htm; *Judicial Nominations, Filibusters, and the Constitution: When a Majority Is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 108th Cong. (2003), *available at* http://judiciary.senate.gov/hearing.cfm?id=744. It is not necessary for purposes of this essay, however, to evaluate whether the Senate majority has done everything it can to fulfill its constitutional obligations. Whether the obstructionist minority deserves all or only a great majority of the blame for the Senate's failure is largely immaterial to the President's remaining options and responsibilities.

[6] U.S. Const. art. II, § 2, cl. 2. Such treaties go into effect if two-thirds of the Senate consent to their ratification. *Id.*

[7] *Id.* (emphasis added).

[8] *Id.* art. II, § 2, cl. 3.

[9] Justice Joseph Story, in his influential *Commentaries on the Constitution*, argued that the wisdom of the Recess Appointments Clause was so obvious that it "can require no elucidation": It eliminated the need for the Senate to "be perpetually in session," which would have been "burthensome to the senate, and expensive to the public." 3 Joseph Story, Commentaries on the Constitution, § 1551 (1833), *available at* http://www.constitution.org/js/js_000.htm.

[10] 1 Op. Att'y Gen. 631 (1823).

[11] Stuart Buck, James C. Ho, Brett H. McGurk, Tara Ross, & Kannon K. Shanmugam, Judicial Recess Appointments: A Survey of the Arguments (2004) (Federalist Soc'y for Law & Pub. Policy Studies, White Paper), *available at* http://www.fed-soc.org/pdf/recapp.pdf [hereinafter Judicial Recess Appointments].

[12] The information in this paragraph is taken from Judicial Recess Appointments, *supra* note 11, at 2 & app. A-C.

[13] *Id*. Appendix C lists every known judicial recess appointee by President, the length of the vacancy prior to appointment and the ultimate action on the judges' subsequent nomination, if any.

[14] U.S. Const. art. II, § 1, cl. 8.

[15] There seems to be no record of any debate at the Constitutional Convention over the Recess Appointments Clause itself. It was added without apparent disagreement on a motion by Richard D. Spaight. *See* James Madison, The Debates in the Federal Convention of 1787, *available at* http://www.constitution.org/dfc/dfc_0907.htm (reciting the debate on Friday, September 7, 1787). The amendment followed a recurrent debate at the Convention regarding the scope of the President's appointment power—or what became the President's appointment power. In some intermediate versions of the Clause, the President would need Senate approval to appoint specified officers, but would have unilateral power to appoint all other officers not otherwise provided for in the Constitution. That proposal was amended to require Senate approval of all appointments except such officers whose appointment by law was vested in another entity (which entities were still being debated at the time of Spaight's amendment, but included the President and the state legislatures).

[16] U.S. Const. art. II, § 1, cl. 1. The Framers wisely rejected a plural executive, preferring "energy in the executive" instead. For a defense of this decision, see The Federalist No. 70 (Alexander Hamilton), *available at* http://memory.loc.gov/const/fed/fed_70-2.html.

[17] U.S. Const. art. III, § 1.

[18] *See, e.g.*, Testimony of Todd F. Gaziano, *supra* note 4, at 8 (discussing the "Effects of Prolonged Judicial Vacancies on the Courts and the Administration of Justice").

[19] *See, e.g.*, Coalition for a Fair Judiciary, *Democrats on Judges*, *at* http://fairjudiciary.campsol.com/cfj_contents/press/judges.pdf (last visited Jan. 8, 2003) (compiling memos from Democratic Senate staff to their employers and discussing evidence that some Democratic Senators may have attempted to manipulate the outcome of the Michigan racial preferences case); *see also* Melanie Kirkpatrick, *The Sound of Silence*, Wall St. J., Dec. 2, 2003, at A18 (discussing Democratic strategy memos on President Bush's blocked appellate court nominees).

[20] *Cf.* Todd F. Gaziano, Heritage Foundation, Judicial Misconduct in the Sixth Circuit: Another Reason to Free the Michigan Four (2003), *available at* http://www.heritage.org/Press/Commentary/ed072803b.cfm; Testimony of Todd F. Gaziano, *supra* note 4, at 28-31 (discussing the harms to the administration of justice when prolonged vacancies occur); *see also* Grutter v. Bollinger, 288 F.3d 732, 810-14 (6th Cir. 2002) (Boggs, J., dissenting) (arguing that the en banc vote in the case was improperly held up until after the resignation of two circuit judges appointed by Republican Presidents).

[21] Supported by several Attorney General and Office of Legal Counsel Opinions, the President has exercised his recess appointment power during both intersession recesses (between sessions) and intrasession recesses (within a given session of the Senate) if the recess is of sufficient length. *See* Judicial Recess Appointments, *supra* note 11, at 8-10. Attorney General opinions have suggested that Senate recesses of thirty days or longer suffice, but

that recesses lasting five or even ten days may be insufficient. *See, e.g.*, President—Appointment of Officers—Holiday Recess, 23 Op. Att'y Gen. 599 (1901), *available at* 1901 U.S. AG LEXIS 1. However, a 1993 Department of Justice suggested that any recess in excess of three days may be sufficient to support a recess appointment. *See* Judicial Recess Appointments, *supra* note 11, at 10. There have been a few recess appointments made during breaks of about ten days, but that practice is relatively recent and has not been subject to court challenge. *See id.*; *see also* Louis Fisher, Congressional Research Service, Recess Appointments of Federal Judges 4 (2001).

[22] The current version is at 5 U.S.C. § 5503 (2000).

[23] *See* Peter Hardin, *Gregory Nominated for Court*, Rich. Times Dispatch, July 1, 2000, at A1 (discussing creation of the new seat in 1990). Although the issue was not raised by any senator at the time of Gregory's recess appointment or subsequent confirmation, senators in the founding era did object to a President's use of the recess appointment power to fill offices that had never had an incumbent office holder, a practice they argued was not authorized by the Recess Appointments Clause. *See* David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801, at 154 n.168 (1997); David P. Currie, The Constitution in Congress: The Jeffersonians, 1801-1829, at 188 & 200 n.62 (2001).

[24] *See* Peter Hardin, *Richmonder Considered for U.S. Court: Gregory Recommended to Fill Vacancy*, Rich. Times Dispatch, June 30, 2000, at B1 (noting that Senator Jesse Helms and the Chief Judge of the Fourth Circuit, J. Harvie Wilkinson III, have both supported shrinking the court); John Wagner, *Clinton Takes Helms to Task*, News & Observer (Raleigh, NC), July 14, 2000, at A1 (reporting Helms' position that more Fourth Circuit judges are unnecessary and, as a matter of fiscal responsibility, unneeded judges should not be added to the federal payroll).

[25] *See, e.g.*, *The Week*, Nat'l Rev., Aug. 14, 2000 ("Within two weeks, Clinton was complaining that Senate Republicans were holding up the nomination because Gregory is black. (Never mind that it took Clinton seven years to come up with a nominee.) . . . Said [Judiciary Chairman Orrin] Hatch, 'I call on President Clinton and Al Gore to put an end to this game of race-baiting politics.'"); Jesse J. Holland, *Senate Accused of Racism on Judges*, Associated Press, July 19, 2000 (noting the push for Gregory to be confirmed, since no African-American had ever been confirmed to the Fourth Circuit).

[26] The North Carolina seat was tied up amid charges and countercharges of delay, which also dated back ten years. Democrats blamed Senator Jesse Helms for the fact that North Carolina would not be represented on the Fourth Circuit, since he had blocked two recent candidates from his state. *See* Holland, *supra* note 25 (quoting Rep. Mel Watt, D-N.C., who stated that "if we can't get an African-American North Carolinian on the court [because of Sen. Helms], [then] we need to at least get one African-American from somewhere on that court"). But Senator Helms had grounds to complain that at least one of the seats should have been filled by nominees who the Democrats blocked in the first Bush Administration. *See, e.g.*, David G. Savage, *Bush's Judicial Nominees Go 28 for 80 in the Senate*, L.A. Times, Dec. 31, 2001, at A12 (discussing the failed nomination of Terrence Boyle to the Fourth Circuit in 1992 and Helms' decision to block Clinton's judicial nominees from North Carolina).

[27] For a discussion of some of these procedures, see Testimony of Todd F. Gaziano, *supra* note 4, at 28-31.

[28] As early as 2002, some commentators began to argue that the President should make judicial recess appointments. *See*, *e.g.*, Chad Groening, *Should Bush Make Pickering a Recess Appointment?*, AgapePress (Mar. 22, 2002), *at* http://headlines.agapepress.org/archive/3/222002c.asp; *see also* Victor Williams, *Why President Bush Should Use Recess Appointments to Fill Wartime Vacancies*, Findlaw.com (Jan. 1, 2002), *at* http://writ.news.findlaw.com/commentary/20020101_williams.html.

[29] President George W. Bush, Remarks by the President on Judicial Confirmations (Oct. 30, 2002) (transcript available at http://www.whitehouse.gov/news/releases/2002/10/20021030-6.html).

[30] *See, e.g.*, Stuart Shepard, *Group Calls for Recess Appointments*, Focus on the Family (Oct. 14, 2003), *at* http://www.family.org/cforum/fnif/news/a0028370.cfm (urging the President to "stop playing political dodgeball"); *see also* Alexander Bolton, *Bush Urged: Seat Judges Over Recess*, The Hill (Nov. 12, 2003), *at* http://www.hillnews.com/news/111203/judges.aspx (discussing the upcoming election and quoting Richard Lessner, the executive director of the American Conservative Union, who stated "A number of conservatives think Bush could dramatize what is happening in the Senate, draw a line in the sand by making a recess appointment or two"); *cf. Pro-Life Group Wants Recess Appointment of Bush Nominees*, Townhall.com (Sept. 17, 2003), *at* http://www.townhall.com/news/politics/200309/POL20030917a.shtml (urging the President to counter judicial "tyranny" by making recess appointments, rather than worrying about political considerations).

[31] *See* Todd Gaziano, *The Senate Can Change*, Nat'l L.J., June 16, 2003.

[32] *See* Paul Rosenzweig & Todd Gaziano, *It's Time to Solve the Judicial Confirmation Crisis*, Townhall.com, (May 9, 2003), *at* http://www.townhall.com/columnists/guestcolumns/Gaziano20030509.shtml; Kate O'Beirne, *The Joy of Recess: An Idea for Countering Democratic Filibustering*, Nat'l Rev., Oct. 13, 2003, at 19.

[33] Judicial Recess Appointments, *supra* note 11, at 14.

[34] For Executive branch recess appointees, the tenure set forth in the Recess Appointments Clause (the end of the Senate's next session) is the outer limit of their lawful commission and provides no protection against their tenure being cut short. This is true whether the regular office holders have an indefinite tenure or a fixed term of years. The matter is more complicated for judicial recess appointees than is even the case for executive branch recess appointees in positions with statutory "for cause" removal protection. There appears to be no record of this issue arising with respect to judicial recess appointees, but a justiciable case could not arise unless a judicial recess appointee refused to resign his commission upon the confirmation and appointment of a judge for the lifetime position.

# *Salerno v. Chevron*: What to Do about Statutory Challenges

*by Stuart Buck**

The *Chevron* standard for judging agency statutory interpretations is ubiquitous in administrative law cases.[1] The prototypical *Chevron* case arises where an agency has promulgated a regulation that takes a particular view of the authorizing statute, and the regulation is then challenged as inconsistent with the statute. At that point, the court is supposed to ask first, whether "Congress has directly spoken to the precise question at issue"[2] and if so, whether the regulation is consistent with the clear meaning of the statute. If the "statute is silent or ambiguous with respect to the specific issue, [then] the question for the court is whether the agency's answer is based on a permissible construction of the statute."[3]

What few, if any, scholars have noticed is that the Supreme Court in 1993 spoke approvingly of a standard that seems to be utterly different from *Chevron*: the *Salerno* standard. In the (in)famous 1987 decision of *United States v. Salerno*,[4] the Court said that no facial challenge to a law can succeed unless the plaintiff demonstrates that there is "*no set of circumstances*" in which the law could be applied constitutionally.[5]

Then came the extension of *Salerno* into the statutory context. In the 1993 decision of *Reno v. Flores*,[6] which involved a facial challenge to an INS regulation, the Court said (quoting *Salerno*) that "respondents 'must establish that no set of circumstances exists under which the [regulation] would be valid.'"[7] This is true, the Court said, "as to both the constitutional challenges *and the statutory challenge*."[8] Surprisingly, *Reno v. Flores* has not been discussed in the scholarly literature of administrative law, despite the confusion it has caused various lower courts.

The D.C. Circuit is, of course, the main venue for challenging administrative rulemakings, and is therefore the main source of law on such challenges.[9] Despite *Reno*, that court has had difficulty coming to a definite conclusion on the very existence of statutory *Salerno*. In one post-*Reno* case,[10] the court said the *Salerno* standard does not apply when a regulation is challenged as facially in violation of a statute: "[W]e hold that the *Salerno* standard does not apply here. The Supreme Court has never adopted a 'no set of circumstances' test to assess the validity of a regulation challenged as facially incompatible with governing statutory law."[11] The court pointed out that the Supreme Court had in one case "upheld a facial challenge under normal *Chevron* standards, despite the existence of clearly valid applications of the regulation."[12] Then the D.C. Circuit Court observed that the Supreme Court had "on several occasions invalidated agency regulations challenged as facially inconsistent with governing statutes despite the presence of easily imaginable valid applications."[13] Based on this analysis, the court concluded that "the normal *Chevron* test is not transformed into an even more lenient 'no valid applications' test just because the attack is facial."[14]

In a later D.C. Circuit opinion,[15] however, the court decided to sidestep the question about whether statutory *Salerno* exists.

> NMA brought the case as a facial challenge to the rules. Yet NMA conceded at oral argument that even by its lights, "the rules" could be constitutionally applied in some cases. Whether that concession should have ended this aspect of the case under the doctrine that a law valid in some of its applications cannot be struck down as invalid on its face is a question we leave to another day.[16]

Soon thereafter, the court was again faced with the question of whether *Salerno* applied in the statutory context.[17] Having noticed the conflicting precedents, the court decided to avoid the question of whether to follow its prior panel decision in the first *National Mining* case, or to follow the Supreme Court's dictum in *Reno v. Flores*.[18] The court thought resolving this question was unnecessary because the petitioners would lose under any of the possible standards.

Thus, the reference to *Salerno* in *Reno v. Flores* has caused great confusion. And no wonder. It is extraordinarily difficult to see how the *Salerno* standard could be consistent with *Chevron*. *Salerno*, at least on its face, is a much more demanding test for a plaintiff to have to meet in order to get an administrative interpretation declared unlawful. While a plaintiff could win under *Chevron* either by showing that the agency had violated a clear directive of Congress, or by showing that the agency interpretation was unreasonable, *Salerno* would seem to dictate that a plaintiff cannot ever win unless he can show that there is "no set of circumstances" in which the regulation would be consistent with the statute. Because it would take an extraordinarily obtuse agency to fail so completely in writing such a regulation, applying *Salerno* in the statutory context would seem to dictate that plaintiffs will always lose. This conception of *Salerno* explains why the D.C. Circuit once held that "the normal *Chevron* test is not transformed into an even more lenient 'no valid applications' test just because the attack is facial."[19]

The problem may, however, lie in the usual view of *Salerno*. Most people think *Salerno* means judges are supposed to count up all possible applications (assuming such a task is possible in the first place), examine the validity of each one, and proceed to facial invalidation only if it turns out that all applications are invalid. One might call this the bottom-up view of *Salerno*, and it seems to be held by legal scholars,[20] circuit courts of appeal,[21]

and Supreme Court Justices.[22] For example, Justice Scalia, the most prominent proponent of *Salerno* as to all contexts, once wrote that a certain statute could not be facially unconstitutional, "since there are apparently some applications of the statute that are perfectly constitutional."[23] In another case, he claimed that the petitioner "can defeat the respondents' facial challenge by conjuring up *a single valid application* of the law."[24]

I argue, relying heavily on the exemplary work of Marc Isserles,[25] that the bottom-up view of *Salerno* is wrong. The main thrust of Isserles's work is that *Salerno* is merely *descriptive*. That is, the "no set of circumstances test" is not a "test" at all, in the normal use of that word. Rather, the phrase "no set of circumstances" merely *describes* what happens when a statute is declared facially invalid. And a ruling of facial invalidity doesn't arise from a process wherein a judge (or his law clerk) laboriously tallies up all the conceivable invalid applications of the statute. Rather, courts rely on various constitutional doctrines that literally look only at the "face" of the statute.

On this top-down theory, facial invalidation comes first, on its own terms, and thereby causes the invalidity of all the statute's applications. The bottom-up theory of *Salerno*, in which the invalidity of all applications causes facial invalidation, gets the causal relationship precisely backwards. As the Court once said, though perhaps unaware of the significance of its phrasing, "There is no reason to limit challenges to case-by-case 'as applied' challenges when the statute on its face *and therefore* in all its applications falls short of constitutional demands."[26]

Moreover, the bottom-up view makes little sense on its face. Any given statute might have innumerable potential applications, many of which might not be foreseeable by a given court or plaintiff. It would be absurd to demand that a plaintiff come up with an affirmative demonstration of the constitutional invalidity of every application of a statute. If that were the requirement, facial invalidation would be practically impossible.[27]

Consider a few examples: The *Lemon* test[28] provides that the Establishment Clause is violated if a law 1) lacks a secular legislative purpose, 2) has the primary effect of advancing or inhibiting religion, or 3) creates excessive governmental entanglement with religion.[29] In one famous case, *Edwards v. Aguillard*,[30] the Court considered a law providing that public school teachers treat creationism equally with evolution.[31] The Court struck this law down on its face, reasoning that the actual purpose was to endorse religion.[32] Note, however, that the facial invalidity was due solely to a consideration of the law's *purpose*, and not to any consideration of every possible application. And this makes sense—an impermissible purpose would presumably affect (and thus invalidate) every possible application. So once the court has figured out that a statute was passed with an unconstitutional purpose, it can rule that the statute is facially invalid.

Consider as well the First Amendment caselaw on content-discrimination. In *Police Department of Chicago v. Mosley*,[33] for example, the Court considered a statute that prohibited picketing except for that inspired by labor concerns.[34] The Court held that this content discrimination necessitated striking down the law on its face.[35] But note: the facial invalidation arose here not by counting up the number of invalid applications, but by looking for a discriminatory effect. And such a discriminatory effect automatically made all applications invalid, even though an evenhanded law could likely be constitutionally applied to all the non-labor picketers.[36]

In short, after a court holds a statute facially invalid, all applications of the statute are indeed invalid. But it is crucial to get the chain of causation correct here: the invalidity of all applications does not *cause* facial invalidity, but rather *flows from* it. Facial considerations come first, and *Salerno* merely describes the ultimate result: the invalidity of all applications.

So, what precisely are the types of statutory challenges that would by nature result in facial invalidation (and hence satisfy *Salerno*)? Isserles theorizes that a "valid rule facial challenge is a challenge alleging that the statutory terms themselves, and not particular statutory applications, trigger constitutional scrutiny."[37] Translating to the administrative context, a facial challenge should allege that the regulation's terms themselves, not particular applications, violate a statutory command in some way that affects all applications.

If this view of *Salerno* is correct, then the analogue in the statutory context is none other than *Chevron* Step One. Under Step One, if a statute is clear as to a particular issue, and the agency's regulation is contrary to the statute, then the regulation is to that extent facially invalid.[38] As a result, the regulation must be vacated on its face and/or remanded to the agency for further consideration. In any event, a facial challenge under Step One is judged not by imagining all possible applications of the regulation, but by a direct "facial" comparison of the regulation and the authorizing statute. Here, as under the modified view of *Salerno*, facial considerations come first, causing the invalidity of all potential applications, not the other way around.

For example, regulations are often struck down because the agency failed to follow some required procedure. Under the Administrative Procedure Act, an informal rulemaking proceeding must satisfy certain procedures: First, notice must be published in the Federal Register, containing a "statement of the time, place, and nature of public rule making proceedings;" a "reference to the legal authority under which the rule is proposed;" and "either the terms or substance of the proposed rule

or a description of the subjects and issues involved."[39] Second, the agency must give all interested persons "an opportunity to participate in the rule making through submission of written data, views, or arguments."[40] Third, the agency "shall incorporate in the rules adopted a concise general statement of their basis and purpose."[41]

Regulations are often challenged on the grounds that the agency failed to meet one or more of these procedural requirements—most often that the notice provided by the agency was insufficient.[42] The court will usually find that the agency's notice was sufficient as long as the ultimate rule is a "logical outgrowth" of the proposed version of the rule.[43] But if the rule is not a logical outgrowth, the court will deem the agency's notice to have been insufficient—and the rule will be facially invalidated, at least as to those provisions affected by the lack of notice.[44]

Note that facial invalidation here does not proceed by asking whether all applications of the regulation are inconsistent with the statute. Indeed, the courts do not even ask whether *any* application is inconsistent with the statute. Rather, the question of validity is decided by the agency's compliance with required procedures— and failure to comply can facially invalidate a regulation even if all applications would otherwise be consistent with the statute. In this respect, administrative cases resemble some constitutional cases. A law passed out of a discriminatory motivation might be facially invalidated even if every application was otherwise constitutional. And there too, the legislature could, at least in theory, constitutionally pass the same law if it had a proper motivation, just as the agency could promulgate the same regulation if it followed the proper procedures. The question of facial invalidity rests not on the validity of any particular applications, but on the agency's compliance with trans-substantive *statutory* norms, or the legislature's compliance with trans-substantive *constitutional* norms.

Another example would be where the regulation outright contradicts the statute on a certain point. Obviously, this is the paradigmatic *Chevron* Step One question. Under *Chevron*, if the statute is clear as to an issue, and the regulation is inconsistent with the statute, then the rule is facially invalid, whether or not particular applications might otherwise be valid if encompassed by a regulation consistent with the statute. As the Court itself said, "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[45] One reaches the same result by applying statutory *Salerno*. Where the regulation flatly contradicts the statute, the contradiction affects every possible application, which is why facial invalidation is appropriate.

A dissent by Justice Scalia gives a colorful example of why this is so.[46] Imagine a statute that says, "No premeditated killing," and a regulation that says merely, "No killing." In such a case, the regulation is facially in violation of the statute, even though the regulation *could* lawfully be applied to the subset of killings that *are* premeditated. Scalia's full discussion of this point is as follows:

> It is one thing to say that a facial challenge to a regulation that omits statutory element *x* must be rejected if there is any set of facts on which the statute *does not require x.* It is something quite different—and unlike any doctrine of "facial challenge" I have ever encountered—to say that the challenge must be rejected if the regulation could be applied to a state of facts in which element *x happens to be present.* On this analysis, the only regulation susceptible to facial attack is one that *not only* is invalid in all its applications, but also does not sweep up *any* person who *could have been* held liable under a proper application of the statute. That is not the law. Suppose a statute that prohibits "premeditated killing of a human being," and an implementing regulation that prohibits "killing a human being." A facial challenge to the regulation would not be rejected on the ground that, after all, it *could* be applied to a killing that happened to be premeditated. It *could not* be applied to such a killing, because it does not require the factfinder to find premeditation, as the statute requires.[47]

What Justice Scalia is getting at here, though not in so many words, is that the fault with the hypothetical regulation is its facial inconsistency with the statute, and that this inconsistency automatically makes all applications invalid. This occurs even though the application to a killing that actually was premeditated would otherwise be in accord with the statute. It is crucial to focus on this aspect—if a court started its reasoning from the "bottom up," that is, by imagining all possible applications and judging their validity in accordance with the statute, the court might well conclude, *contra* Scalia, that the application of the regulation to a genuinely premeditated killing was valid. But it is clear from this passage that Justice Scalia was engaged in "top down" reasoning, in which the validity of various applications are determined by first examining whether the regulation is facially consistent with the statute. If a flat inconsistency is found, all applications are thereby made invalid, just as Isserles hypothesized for the constitutional context.

In numerous cases, courts have facially invalidated a regulation or regulatory provision, based not on a sum total of possible applications, but by using a similar Step One inquiry.[48] If the statute and the regulation conflict over a given point, then the regulation is to that extent facially invalid, and hypothesizing about possible applications is irrelevant.

The role of *Chevron* Step One shows up perhaps most strikingly in those cases where a court strikes down

an agency interpretation, not because the interpretation was inconsistent with the statute, but because the agency wrongly assumed that a particular interpretation was *commanded by* the statute, even though the agency actually had discretion on the particular point. In such cases, a court may facially invalidate the agency interpretation under *Chevron* Step One, even while acknowledging that the agency could turn right around and promulgate an *identical* interpretation in the exercise of its discretion. As the D.C. Circuit has said, "an agency regulation must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it 'was not based on the [agency's] own judgment but rather on the unjustified assumption that it was Congress' judgment that such [a regulation is] desirable.'"[49] Thus, *Chevron* Step One can lead to facial invalidity even where *every application is otherwise valid*.

In sum, *Salerno* has often been misunderstood, even by distinguished judges and scholars, as an extraneous "test" imposed on constitutional adjudication from the outside. It has been seen as requiring the court to hypothesize about all possible circumstances or applications before venturing to declare a statute unconstitutional.

Such a vision of *Salerno* is in sharp conflict with the *Chevron* model of adjudication, in which a regulation will be upheld as long as it neither contradicts the statute nor is unreasonable. Thus, the Supreme Court's holding that *Salerno* applies equally to statutory challenges has caused great confusion.

This conflict between *Salerno* and *Chevron* can be avoided, however, if *Salerno* is reconceptualized (following Marc Isserles) as purely *descriptive*. As I explain above, that reconceptualization makes eminent sense, and indeed is the only way that a seemingly impossible-to-meet *Salerno* "test" can be reconciled with *Chevron*.

* Mr. Buck is an associate at Kellogg, Huber, Hansen, Todd & Evans. A longer version of this article appears at 55 Admin. L. Rev. 427 (2003). The author would like to thank Stephen Williams and Marc Isserles for their helpful comments. The views and opinions expressed herein are those of the author only and do not necessarily reflect the views of Kellogg, Huber, Hansen, Todd & Evans.

**Footnotes**

[1] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). *Chevron*'s importance and counter-intuitiveness are each captured in Cass Sunstein's marvelous aphorism that *Chevron* is the "counter-*Marbury* for the administrative state." Cass R. Sunstein, *Law and Administration After* Chevron, 90 Colum. L. Rev. 2071, 2119 (1990).
[2] *Chevron*, 467 U.S. at 842.
[3] *Id*. at 843.
[4] 481 U.S. 739 (1987).
[5] *Id*. at 745.
[6] 507 U.S. 292 (1993).
[7] *Id*. at 301 (quoting *Salerno*, 481 U.S. at 745) (alteration in original).
[8] *Id*. (citation omitted) (emphasis added).
[9] The Tenth Circuit has followed *Reno v. Flores* in at least one case. *See* Pub. Lands Council v. Babbitt, 167 F.3d 1287, 1293-94 (10th Cir. 1999) (adopting the *Reno v. Flores* interpretation of *Salerno* and applying it to *Chevron* in the court's determination of standard of review).
[10] Nat'l Mining Ass'n v. United States Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998).
[11] *Id*. at 1407.
[12] *Id*. (citing Sullivan v. Zebley, 493 U.S. 521 (1990)).
[13] *Id.* at 1407-08 (citing Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412, 418-20 (D.C. Cir. 1994)).
[14] *Id.* at 1407.
[15] Nat'l Mining Ass'n v. United States Dep't of the Interior, 251 F.3d 1007 (D.C. Cir. 2001).
[16] *Id*. at 1010.
[17] Amfac Resorts, L.L.C. v. United States Dep't of the Interior, 282 F.3d 818 (D.C. Cir. 2002).
[18] *Id.* at 828.
[19] *United States Army Corps of Eng'rs*, 145 F.3d at 1407.
[20] *See, e.g.*, Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 239-40 & n.20 (1994)).
[21] *See, e.g.*, Rancho Viejo, LLC v. Norton, 323 F.3d 1062, 1077-78 (D.C. Cir. 2003) (holding a provision of the Endangered Species Act facially valid under the Commerce Clause because the EPA had shown one particular scenario in which the Act could be constitutionally applied); Chem. Waste Mgmt., Inc. v. EPA, 56 F.3d 1434, 1437 (D.C. Cir. 1995) (holding an EPA rule facially valid because of a "hypothetical scenario" involving a valid application).
[22] *See, e.g.*, Janklow v. Planned Parenthood 517 U.S. 1174, 1176 (1996) (Stevens, J., concurring in denial of cert.).
[23] Ada v. Guam Soc'y. of Obstetricians & Gynecologists, 506 U.S. 1011, 1013 (1992) (Scalia, J., dissenting from denial of *certiorari*).
[24] City of Chicago v. Morales, 527 U.S. 41, 81 (1999) (Scalia, J., dissenting).
[25] Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 Am. U. L. Rev. 359 (1998).
[26] Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 965 n.13 (1984) (emphasis added).
[27] The Fifth Circuit hinted at this possibility in *GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 634-35 (5th Cir. 2003), where it acknowledged that the Supreme Court's recent Commerce Clause decisions would have come out the other way if the Court had hypothesized about possible valid applications.
[28] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[29] *Id.* at 612-13.
[30] 482 U.S. 578 (1987).
[31] *See id.* at 581 (referring to Louisiana's "Creationism Act").
[32] *See id.* at 586-87 (concluding the Act was not designed to further its stated purpose, which was to protect academic freedom).
[33] 408 U.S. 92 (1972).
[34] *See id.* at 92-93.
[35] *See id.* at 102.
[36] *See id.*
[37] Isserles, *supra* note 25, at 428.
[38] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[39] 5 U.S.C. § 553(b)(1)-(3).
[40] *Id.* § 553(c).
[41] *Id*.
[42] *See, e.g.*, 1 Richard J. Pierce, Jr., Administrative Law Treatise

§ 7.3, 426 (2002) (categorizing challenges to the adequacy of agency notice as two types: first, that parties affected by the final rule could not have known its effect on them because the proposed and final rules were substantially different; and second, that the agency did not make known supporting data it used in its decision to affected parties until it had already taken final action).

[43] *See, e.g.*, Natural Res. Def. Council, Inc. v. Thomas, 838 F.2d 1224, 1242 (D.C. Cir. 1988).

[44] *See, e.g.*, Am. Water Works Ass'n v. EPA, 40 F.3d 1266, 1274-75 (D.C. Cir. 1994); Kooritzky v. Reich, 17 F.3d 1509 (D.C. Cir. 1994); Horsehead Res. Dev. Co. v. Browner, 16 F.3d 1246, 1267-68 (D.C. Cir. 1994).

[45] Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-843 (1984).

[46] Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 731-32 (1995) (Scalia, J., dissenting).

[47] *Id*.

[48] *See, e.g.*, Dole v. United Steelworkers of Am., 494 U.S. 26, 42-43 (1990) (invalidating a Department of Labor rule using *Chevron* Step One); Pittston Coal Group v. Sebben, 488 U.S. 105, 113-19 (1988) (invalidating a rule as inconsistent with the statute); INS v. Cardoza-Fonseca, 480 U.S. 421, 430-32, 448-49 (1987) (invalidating an agency interpretation of a rule based on reasoning similar to that of *Chevron* Step One); Conn. Dep't of Income Maint. v. Heckler, 471 U.S. 524, 537-38 (1985) (upholding a rule as consistent with the language of the statute).

[49] Prill v. NLRB, 755 F.2d 941, 948 (D.C. Cir. 1985) (quoting Planned Parenthood Fed'n of Am., Inc. v. Heckler, 712 F.2d 650, 666 (1983) (quoting FCC v. RCA Communications, Inc., 346 U.S. 86, 96 (1953))) (alterations in original).

# Financial Services & E-Commerce

## Basel II Moves Global Banking Towards Self-Regulation

*by Charles M. Miller**

The Basel II Capital Accord is designed to improve the international flow of capital while ensuring the soundness of every internationally active bank. Basel II, like the original Basel Accord, is the product of years of work by banking supervisors of G-10 countries through the Basel Committee on Banking Supervision (BCBS) at the Bank for International Settlements headquartered in Basel, Switzerland.

The original accord, completed in 1988, required a signing country to establish a basic eight percent minimum capital requirement for each internationally active bank that it regulates. Most signing countries applied the eight percent capital requirement to all banks—not just the internationally active ones—because of the simplicity and soundness of the regulation, and to ensure a level playing field among all banks. The success of the original accord is evidenced by its implementation beyond the G-10 to many emerging economies.

The purpose of a capital accord is to ensure that banks maintain sufficient reserves to withstand substantial losses caused by an economic downturn or other financial calamity. A global capital floor is important because of the ease with which capital quickly shifts around the world and the significant number of banks operating in multiple countries. If the regulatory environment was sufficiently favorable in one country, capital transactions could shift to that location, avoiding regulation by countries where those dealing with the bank, or affected by the transaction, are located. Moreover, a banking crisis in one country can adversely affect other banking systems.

A new capital accord is needed because the regulations adopted under the 1988 Accord are too simplistic to fairly regulate the complex operations of today's largest banks. A simple example: Home mortgages have proven to be safe investments. The eight percent regulatory capital requirement is higher than what is demanded by economic principles for these exposures. Banks are induced to shift these exposures to the market via securitization and to retain only those exposures that have an economic capital risk of eight percent or greater. Capital arbitrage, as this is called, benefits the bank by freeing up capital the market views as being overly restricted by banking regulators. However, it also reduces the effectiveness of the static regulatory floor. As banks securitize exposures risk-weighted below eight percent, the regulatory floor no longer ensures that a bank maintains sufficient capital to offset a bank's actual exposure to the remaining higher-risk transactions. Federal Reserve ("Fed") Vice Chairman Roger W. Ferguson, Jr. stated, "Regulatory minimum capital ratios of the larger banks are becoming less and less meaningful, a trend that will only accelerate. Not only are creditors, counterparties, and investors less able to evaluate the capital strength of individual banks from what are supposed to be risk-based capital ratios, but regulations and statutory requirements tied to capital ratios have less meaning as well. Basel I capital ratios neither adequately reflect risk nor measure bank strength at the larger banks."[1]

Capital arbitrage does not necessarily result in banks being under-capitalized. Banks can, and often do, choose to hold capital in excess of the regulatory floor. In the United States, for example, banks routinely are well capitalized, i.e. hold capital in excess of 10 percent. Capital arbitrage is an indication of the simplicity of Basel I, and the potential for regulatory capital to not reflect risk exposures.

The new Basel accord is designed to adjust the regulatory regime to allow banks and supervisors to make full use of available complex, detailed risk-assessments. The accord has been developed over the past five years with the extensive participation of supervisors, banks, and other interested parties from around the world.

The new accord, as detailed in the BCBS's consultative paper CP3, consists of three pillars. Pillar one is designed to make the minimum capital requirements risk sensitive. Pillar two outlines how supervisors should review capital adequacy. Pillar three details the public disclosure of risk profile and regulatory capital information that should occur in a market economy. Pillar one bears the greatest weight. This is especially true in counties, like the United States, where supervisor scrutiny and public disclosure (at least for publicly held banks) are already the norm.

### I. Pillar One

Pillar One is the foremost aspect of the new accord because it allows a bank to have a central role in setting its own regulatory capital requirements. Pillar one is concerned with three types of risk—credit, market, and operational. Credit risk is the loss potential for a particular transaction or category of transactions. Market risk is the risk associated with changing economic conditions. Operational risk is the general loss potential associated with a banking enterprise. Whereas Basel I has a static capital requirement designed to collectively address all risk, under the new accord each type of risk is treated separately.

#### *A. Credit Risk*

Pillar one allows for a bank and its supervisor to select from among three methods of ascertaining the credit risk confronting the bank. The Standardized Approach is similar to Basel I in that the accord itself assigns a weight to the risk faced by a bank. The Standardized Approach improves upon Basel I by assigning the risk weight based upon the category of exposure, rather than assigning a flat eight percent risk

weight to all exposures. It also assigns a higher risk weight to past-due loans. Thus, the Standardized Approach is intended to make regulatory capital more risk sensitive, and thereby more effective and less burdensome.

The Foundational Internal Ratings Based Approach (F-IRB) differs substantially from the Standardized Approach and the current accord. F-IRB utilizes a bank's internal risk assessments as key drivers for establishing the bank's capital requirement. For loans to a corporation or government, a bank will enter its own assessment of the probability of default for each particular exposure into a formula designed by the supervisor to ascertain regulatory capital requirements for that type of exposure.[2] Additionally, the F-IRB allows for a partial offset of the capital required against these exposures for risk mitigation, e.g., collateral and insurance. However, the F-IRB approach will not be available for retail exposures.

Banks with thorough internal rating systems can choose to operate under the Advanced Internal Ratings Based Approach (A-IRB). A-IRB is more intricate than F-IRB. In addition to assessing the probability of default, a bank operating under A-IRB will supply estimates of the duration of the exposure, the amount that will be outstanding at the likely default time, and the percentage of the outstanding exposure that will be lost. The A-IRB can be used for corporate, governmental, and retail exposures. Corporate and governmental loans will be assessed individually.[3] Retail exposures will be assessed in pools.

Under these three new approaches to credit risk, a bank will have a greater role in assessing its credit risk exposure, and thus in determining its regulatory capital requirement. This is especially true under the A-IRB approach, which will likely be adopted by the largest and most active international banks.[4] A bank operating under A-IRB will be its own primary regulator. The bank will determine the risk associated with a particular loan and be expected to allocate capital reserves in accordance with its internal assessments. The role of the bank supervisor will be to review the bank's internal rating system to ensure that the bank honestly assesses the risk it faces.

The A-IRB approach is dynamic. It allows a bank's capital requirement to fluctuate depending upon the bank's view of the risk underlying its portfolio. A-IRB is essentially a requirement that a bank continually evolve its credit risk assessment to reflect the current best practices. "Basel II, at least in its more advanced form, is as much a proposal for strengthening risk management as it is a proposal for improving capital standards; these considerations are, as they should be, inseparable."[5]

The more risk acceptant a bank is, the higher its regulatory capital requirement. A bank with a large concentration of low risk exposures will have an appropriately low regulatory capital requirement. In short, regulatory capital and economic capital will be aligned.[6] The caveat is that to take advantage of this benefit, a bank must be able to maintain a complicated internal rating system and to continually evolve that system to reflect best practices.

*B. Market Risk*

Market risk was not explicitly accounted for in the original 1988 Basel I accord. In 1996, Basel I was amended to include an explicit measure of market risk. This treatment will not be substantially modified under Basel II.

*C. Operational Risk*

Operational risk is the risk of loss resulting from inadequate or failed internal processes, people and systems, or external events. Unlike credit risk, banks have not developed complicated models to quantify operational risk. Basel II encourages banks to accurately quantify operational risk.

It does so by offering banks three means of rating its operational risk. The simplest is the Basic Indicator Approach. A bank that chooses this approach will have an operational risk assessment of 15% of its average gross income over the previous three years. The second approach is the Standardized Approach, which also uses gross income as a proxy for operational risk.[7] However, the Standardized Approach assigns a different risk factor for each business line. Thus, the capital requirement is more tailored to a bank's operational risk under the Standardized Approach than under the Basic Indicator Approach.

The final approach to operational risk is the Advanced Measurement Approach (AMA). A bank operating under the AMA may utilize any means to evaluate its operational risk, so long as the system is comprehensive and systematic. The AMA permits a bank to offset up to 20% of its operational risk capital requirement with insurance. A bank will be able to partially adopt the AMA for only those business lines that the bank has adopted a sufficiently comprehensive analysis. The United States will require its ten largest banks to adopt the AMA.

The AMA is very flexible at this point because banks are just beginning to develop means of accurately measuring operational risk. BCBS wishes to encourage this development, not impede it. "[O]ver time the regulatory capital functions we have hard-wired into Basel II, along with their embedded correlation assumptions, will give way to individual bank-developed models that are verifiable by supervisors," says Ferguson.[8] Thus, banks are given the widest possible latitude to develop an effective measure of operational risk.

This does not mean that there are not complaints about the AMA. Chief among them is the 20 percent offset of operational risk. Large banks label the 20% cap arbitrary and call for the AMA to allow for banks to offset the actual percentage of operational risk that is insured against. Banks that will not adopt the AMA warn that competitive inequities will result if AMA banks are permitted to offset for insurance, while non-AMA banks are not.

Concern has also been expressed regarding the simpler approaches. Because both the Basic Indicator Approach and the Standardized Approach utilize gross income as a proxy for operational risk, a bank's credit risk is being double counted to the extent that profit margins increase with credit risk.

**II. Public Comments**

BCBS requested comments on CP3—over 200 comments were received.[9] Most respondents praised the work of BCBS and expressed support for the goals and principles reflected in CP3. All had at least minor concerns.

*A Implementation Schedule*

The most frequently expressed concern is that the implementation schedule is overly ambitious. The current goal is for signing countries to implement Basel II by the end of 2006. However, the accord will not be finalized until the second half of 2004. This leaves only two years for countries to ratify the accord, complete domestic rulemaking, and allow sufficient time for banks to transition into the new system. Moreover, to qualify for immediate implementation of the AMA, a bank would have to capture relevant data beginning January 2004. Since the new accord is not finalized, a bank cannot know precisely what information it must track.[10]

Despite these concerns, BCBS is sticking to its implementation schedule. Many countries, including the United States, have already begun the rulemaking process in an effort to meet the 2006 deadline.[11]

*B. Cross Border Issues*

Numerous respondents stressed that because of the complexity of the new accord, implementation must be consistent worldwide.[12] A second cross-border concern is that one bank might be required to rate the same transaction under a different reporting standard in a host country than in the home country.

The Australian and New Zealand Banking Group (ANZ) observed:

> [S]ome host supervisors may require our local subsidiaries to be treated at a less sophisticated level than the rest of the bank, resulting in higher regulatory capital required in that jurisdiction. This problem could be exacerbated if the home regulator would not allow this additional capital to be consolidated into the overall total regulatory capital for the group. This has the potential to erode the business justification for compliance at the more advanced levels, as theoretical capital savings at a group level may be frittered away by similar decisions at each jurisdiction, and also has competitive equity issues.[13]

ANZ proposes that a bank be allowed an offset in its home country for capital "trapped" in another country as a result of the regulatory differences.

Subjecting a bank to varying capital standards is exceptionally burdensome because many banks organize their capital based upon business lines, not map lines. Thus, Citi Group and the Hong Kong Association of Bankers recommended that host regulators allow a bank or its subsidiary to adopt the same approach that is adopted in the home country. This has led small countries to express concern that banks will avoid their countries because of higher capital requirements resulting from the increased risk associated with those countries.[14] The Hong Kong Association of Bankers summarized the cross-border issues:

> The large number of alternative approaches and national discretions is potentially a cause for major concern for international banks. Firstly, it imposes additional operating costs on the banks. Secondly, it carries the corollary that banking group's total capital will be the sum of whichever is the higher of home and host requirements throughout their geographic spread rather than an objective assessment of their capital needs on a consistent basis. These in turn could lead banks to conclude that marginal businesses in smaller, emerging economies were not worthwhile, discouraging competition and the spread of best practice.

Prior to these comments, the U.S.'s position was that host country rules should prevail.[15] However, U.S. supervisors have since appeared to be open to the other side. "Operational risk is generally measured on a consolidated basis, often by business line. That... suggests that operational risk estimated [by legal entity] might well add up to more than the total from the top down."[16] Nevertheless, the U.S. maintained that "the understandable focus of supervisors in each jurisdiction [is] on ensuring that the entities under their supervision are sufficiently capitalized to absorb risk."[17]

To address cross border implementation issues, BCBS created the Accord Implementation Group ("AIG"). The AIG is a means by which G-10 countries can communicate how they intend to implement Basel II, and address how banks will be affected by the interplay between the regulations enacted by each country.

In October 2003 BCBS stated that it would review the calibration of the new accord prior to its implementation.[18] On January 15, 2004 BCBS announced that it had reached a consensus on the home/host supervisor issue that balances "adequate capitalization and sound risk management of significant internationally active entities in cross-border banking groups with the need for the practical application of the AMA within these groups."[19] Details of the consensus were not immediately released.

*C. Procyclicality*

The European Central Bank has noted "Concerns about procyclicality of the New Accord might be increased in an

environment of deeper economic and financial integration since vulnerabilities and cycle swings could become more synchronized."[20] Basel II might increase procyclicality because of the precision with which it will require capital to match a bank's risk exposure. When an economic downturn occurs, a bank's risk exposure will increase. Basel II then requires the bank to increase its capital holdings to reflect the heightened risk. The increase in capital holdings will decrease the capital available to the market, thereby increasing lending costs and accelerating the downturn.

*D. Level Playing Field*

Many respondents commented on the effects Basel II will cause to the competitive balance of the banking industry. These "level playing field" concerns are expressed in a variety of different ways. Small banks are

> concerned that smaller institutions that do not possess the resources necessary to develop an IRB system for assessing capital, or do not have business models that would make the costs associated with such a system reasonable in relation to expected benefits, will be left at a competitive disadvantage. Many community banks will end up holding higher capital under the Accord as compared with [banks that adopt an IRB approach]

Some developing countries expressed a similar concern that Basel II will disadvantage their domestic banks which will have higher capital requirements than foreign competitors.[21]

Small banks are also concerned that, if a small bank and a large bank both maintain a high concentration of low risk exposures, the large bank will have a lower capital requirement under the A-IRB approach than the small bank will under the Standardized Approach. Accordingly, the larger bank will have a greater percentage of free capital and, thus, greater market leverage.

Prior to these comments, the U.S. viewed CP3 as striking the appropriate balance.[22] In the interim, the U.S. has moderated its position, agreeing to examine these factors in its next Quantitative Impact Study.[23]

*E. Standard & Poor's Comments*

Standard & Poor's (S&P) voiced the greatest criticism of the new accord.[24] It is concerned that capital levels will fall under Basel II. S&P warned that Basel II will not affect the means by which S&P rates banks. If capital levels fall beneath thresholds that S&P finds relevant, it will downgrade its rating of the offending institution accordingly. S&P's foundational concern is that while Basel II requires banks to maintain sufficient capital to offset expected and unexpected liabilities, it does not require the capital cushion necessary to support the continued operations of the institution. S&P also expresses the view that the stress test provided in CP3 is not stressing enough because it only requires that a bank be able to survive 6-months of zero growth. It questions the relief given to high risk loans based upon the high margins earned on the loans, viewing these margins as a necessary part of high risk lines.[25] S&P posits that the maturity of every loan should be assumed to be at least three years—the typical duration of the trough of an economic downturn. S&P criticized limitations that CP3 places upon credit rating entities, arguing that those entities must have the independence to rate institutions on any given basis and thus allowing the market to select the successful rating processes.

Prior to S&P's submission, the United States expressed its displeasure with predictions of capital short falls under Basel II. Ferguson reassured the Senate Banking Committee:

> Speaking for the Federal Reserve Board, let me underline that we could not support a final Basel II that we felt caused capital to decline to unsafe and unsound levels at the largest banks...At any [stage], if the evidence suggests that capital were declining too much the Federal Reserve Board would insist that Basel II be adjusted or recalibrated, regardless of the difficulties with bankers here and abroad or with supervisors in other countries.[26]

*F. Risk Weight*

Some respondents dedicated substantial time to critiquing the technical aspects of the accord. The technical comments are primarily focused upon the relative risk weights assigned to various exposures. Some view that mortgages are treated too favorably when compared to small business loans. Others believe that home equity loans are given too high of a risk weight when compared to credit cards. Some believe that the capital requirement does not increase sufficiently in line with risk, creating a "flat curve" and an incentive to engage in higher risk activities. On the other side, consumer advocates argue that risk matching will justify what they term "predatory lending." These disagreements are to be expected because there is a degree of subjectivity to risk weighting. Fortunately, the accuracy of risk weighting will only improve with time as larger volumes of data are collected.

**III. U.S. Implementation**

The United States has chosen to only partially implement the new accord. Only the 10 largest, most internationally active U.S. banks will be required to adopt any portion of Basel II.[27] Any other bank may opt-into Basel II, providing that it has the technical ability to adopt the A-IRB and AMA.[28] The U.S. will only partially adopt Basel II because the Basel II accord is concerned only with the international capital market. The U.S. views its current regulation of domestic banks to be highly effective. The cost of applying Basel II to domestic institutions would not be offset by any tangible benefit.

According to Ferguson:

> To begin with, most of our banks have relatively straightforward balance sheets and do not yet need the full panoply of sophisticated risk-management techniques required under the advanced versions of Basel II. In addition, for various reasons, most of our banks now hold considerable capital in excess of regulatory minimums: More than 93 percent have risk-weighted capital ratios in excess of 10 percent—an attained ratio that is 25 percent above the current regulatory minimum. No additional capital would likely have to be held if these institutions were required to adopt Basel II...
>
> Moreover, U.S. banks have long been subject to comprehensive and thorough supervision that is much less common in most other countries planning to implement Basel II...
>
> Thus, when we balanced the costs of imposing a new capital regime on thousands of our banks against the benefits—slightly more risk sensitivity of capital requirements under, say, the standardized version of Basel II for credit risk, and somewhat more disclosure—it did not seem worthwhile to require most of our banks to take that step. Countries with an institutional structure different from ours might clearly find universal application of Basel II to benefit their banking system, but we do not think that imposing Basel II on most of our banks is either necessary or practical.[29]

Although the number of U.S. banks that will adopt Basel II is small, the effect on the domestic capital market is not. The 20 U.S. banks anticipated to adopt Basel II "today account for 99 percent of the foreign assets and two-thirds of all the assets of domestic U.S. banking organizations..."[30] These institutions will be required to adopt the A-IRB approach to credit risk and the AMA for operational risk.[31] The U.S. chose to require the advanced approaches partially because it concluded that most large banks preferred them, and partially to ensure that the top U.S. banks were at the forefront of risk management.[32] Many respondents approve of the U.S. approach. [33]

The Fed expressed its understanding of concerns relating to the short time effected banks will have to implement Basel II. To alleviate this concern, the banks will be permitted as much time as needed to phase into the new accord.[34] Additionally, partial rollouts will be permitted. For example, a bank will be able keep its retail lines under Basel I while it implements Basel II to commercial lines. U.S. banking supervisors appear very flexible regarding the rollout of Basel II. They understand that transitioning to such a complex system is cumbersome and consuming—perhaps better than the banks do.[35] They are willing to give banks an unprecedented amount of leeway to ensure a smooth and successful transition.

U.S. supervisors are flexible because they understand the importance of the sea change underfoot. Under Basel II, a bank will become responsible for its capital regulation. It will determine the risk of its business and establish its own capital requirements. To do this, a bank must develop a precise, accurate and thorough picture of the risk it faces. This picture will be dynamic, changing with ups and downs of a bank's particular exposures. The role of the supervisor will be to monitor the honesty and accuracy of these assessments. The Fed understands this, thus it will allow each bank to implement Basel II on its own schedule. Importantly, the Fed views the rules of Basel II to be less important than the concept it represents. The rules are temporary—lessening in importance as two factors take hold.[36] First, technology will improve allowing internal rating systems to become available and economical for smaller banks. Second, the longer internal rating systems are in use, the more accurate they will become. The better banks regulate themselves, the sounder the banking system becomes.

**IV. Next Steps**

Issues officially remaining to be resolved by BCBS include the treatment of expected losses, securitization, retail credit, and credit risk mitigation. After internalizing the comments on CP3, BCBS addressed the expected losses issue on October 11, 2003.[37] It stated that expected losses would not be a part of the IRB approaches. Rather, expected losses will be tracked separately. If a bank's provisions for expected losses fall short, it will have to offset its capital accordingly. BCBS requested comments on this change by the end of the 2003.

On January 15, 2004, BCBS announced that it received 52 comment letters. "Respondents generally welcomed the Committee's solution and agreed that it will align regulatory capital more closely with the concepts underpinning leading banks' economic capital modeling processes. The Committee believes that these comments will be instrumental in strengthening the quality of the New Accord."[38] BCBS anticipates resolving the remaining issues by the conclusion of its May 2004 meeting.

The new Basel Capital Accord is nearly complete. It will permit the banking markets to utilize the latest technology to evaluate risk, thus increasing the efficient flow of capital worldwide.

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**Footnotes**

[1] Vice Chairman Roger W. Ferguson, Jr., Testimony before the Committee on Banking, Housing, and Urban Affairs, U.S. Senate (June 18, 2003). http://www.federalreserve.gov/boarddocs/testimony/2003/20030618/default.htm

[2] The supervisor's formula will include values for the loss if default would occur, the bank's exposure at the time of loss, and the length of the exposure.

[3] Five categories of specialized lending are treated separately under both IRB approaches. These specialized lending exposures include equity exposures, highly volatile commercial real estate, and other exposures where a bank's return is based on income generated by the loan recipient.

[4] The United States will require its 10 largest banks to utilize the A-IRB approach. Additionally, many large non-American banks have indicated their intent to adopt the A-IRB approach.

[5] Vice Chairman Roger W. Ferguson, Jr., "Concerns and Considerations for the Practical Implementation of the New Basel Accord" at the ICBI Risk Management 2003 Conference, Geneva, Switzerland (December 2, 2003). http://www.federalreserve.gov/BoardDocs/Speeches/2003/20031202/default.htm

[6] "[I]ncreased alignment between regulatory and economic capital measures can create real incentives for all banks to improve their internal risk management systems while contributing to the development of more resilient financial systems. The combination of more risk-sensitive quantitative capital requirements (Pillar One), more robust supervisory approaches tailored to focus on risk characteristics within individual institutions (Pillar Two), and increased transparency (Pillar Three) can accomplish these goals if the new framework is adequately designed and implemented in a pragmatic and commercially sensible manner." Institute of International Finance Response to the Third Consultative Paper of BCBS, pg 21. http://www.bis.org/bcbs/cp3/inofinfi.pdf

[7] BCBS chose to utilize "standardized approach" as a label under both credit risk and operational risk. The standardized approach to credit risk is unrelated to the standardized approach to operational risk.

[8] Ferguson, "Practical Implementation," supra n.5

[9] See http://www.bis.org/bcbs/cp3comments.htm

[10] Response of the Institute of International Bankers (July 31, 2003) http://www.bis.org/bcbs/cp3/inofinba.pdf

[11] http://www.federalreserve.gov/BoardDocs/Press/bcreg/2003/20030804/default.htm

[12] "There is considerable scope for different supervisory interpretations in Pillars 1 and 2, and we are concerned that overly conservative interpretations in one jurisdiction may lead to competitive disadvantage." Response of Australia and New Zealand Banking Group ("ANZ") (July 2003) http://www.bis.org/bcbs/cp3/auannezebagr.pdf

[13] *Id*.

[14] Response of Central Bank of Barbados http://www.bis.org/bcbs/cp3/cebaofba.pdf; Response of Central Bank of Trinidad and Tobago (July 18, 2003) http://www.bis.org/bcbs/cp3/cebaoftranto.pdf

[15] "No doubt some differences in application would be unavoidable across banking systems with different institutional and supervisory structures... [A]s is the case today, U.S. bank subsidiaries of foreign banks would be operating under U.S. rules, just as foreign bank subsidiaries of U.S. banks would be operating under host-country rules." Ferguson, Senate Testimony, *supra* n.1

[16] Ferguson, "Practical Implementation," *supra* n.5

[17] *Id.*

[18] Press Release (Oct. 11, 2003) http://www.bis.org/press/p031011.htm

[19] http://www.bis.org/press/p040115.htm

[20] Reply of the European Central Bank (August 2003) http://www.bis.org/bcbs/cp3/ecb.pdf. "A certain amount of procyclicality is inherent in any risk-sensitive approach to credit risk. However, because the new regulatory capital framework would restrict recognition of the key tools banks use to manage procyclicality (in particular, diversification and prudent provisioning), the regulatory capital requirements generated by the new framework may be excessive." Institute of International Finance http://www.bis.org/bcbs/cp3/inofinfi.pdf

[21] *See* e.g., Response of Central Bank if Trinidad and Tobago (July 18, 2003) http://www.bis.org/bcbs/cp3/cebaoftranto.pdf

[22] "Under the current capital regime, banks with different risk profiles have the same capital requirements, creating now a competitive inequity for the banks that have chosen lower risk profiles." Ferguson Senate Testimony, *supra* n.1. "Basel II banks would have higher capital charges on higher-risk assets and the cost of adopting a new infrastructure, neither of which Basel I banks would have. And any bank that might feel threatened could adopt Basel II if they would make the investment required to reach the qualifying criteria." *Id.*

[23] "[W]e are also trying to determine empirically the evidence for the competitive implications of the U.S. implementation proposals on credit for small and medium-sized business, residential mortgage, and credit card markets." Ferguson, "The Proposed U.S. Approach to Regulatory Capital: An Update" (November 13, 2003) http://www.federalreserve.gov/boarddocs/speeches/2003/20031113/default.htm.

[24] Standard and Poor's Response to BCBS Third Consultative Paper, http://www.bis.org/bcbs/cp3/standardpoors.pdf (August 22, 2003).

[25] S&P's position counters the concern discussed above that the simpler approaches operational risk double taxes high margin lines.

Banks with a large credit card business strongly disagree with S&P. Capital One, for example states "We urge the Committee to mitigate the impact of the proposed capital requirements for QRE portfolios by permitting QRE lenders to use 100% of future margin income ("FMI") to offset expected losses generated by QRE portfolios. Because it is a common industry practice to price QRE loans to cover expected loss, the proposed 75% offset does not fully reflect the risk mitigation that FMI provides for these portfolios. In addition, unlike mortgages or commercial loans, revolving loans have the ability to change terms and conditions throughout the life of the loan as well as revoking the loan commitment. Therefore, if expected loss changes throughout the life of the loan, FMI will change accordingly." Capital One Financial Corp. response (July 31, 2003) http://www.bis.org/bcbs/cp3/caonfico.pdf

[26] Ferguson, Senate Testimony, *supra* n.1

[27] Banks with over $250 billion of managed assets or $10 billion of international exposure will be required to implement Basel II. See Ferguson, "Practical Implementation," *supra* n.5

[28]The Federal Reserve anticipates that, initially, an additional 10-12 banks will voluntarily opt-in to Basel II.

[29] Ferguson, Senate Testimony, *supra* n.1

[30] Ferguson, Senate Testimony, *supra* n.1

[31] "The complex operations of the largest banks have outgrown the existing capital regime, and for them Basel I has become less and less effective. Indeed, in the view of U.S. supervisors, an overhaul of the regulatory capital system for our largest banks would be worthwhile only if the most advanced approaches were used." Ferguson, "An Update," *supra* n.22

[32] "In our view, prudential supervisors and central bankers would be remiss if we did not address the evolving complexity of our largest banks and ensure that modern techniques were being used to manage their risks." Ferguson, Senate Testimony, *supra* n.1

[33] "[W]e have noted with interest the proposals of US regulators to only adopt the advanced methodologies for operational and credit risk and to incept simplified transitional measures between the Basel I rules and these advanced approaches. With appropriate oversight, Barclays believes that such transitional arrangements would serve well in other jurisdictions, facilitating simpler and less costly implementation of the new regime for banks and regulators alike." Barclays Group letter (July 31, 2003) http://www.bis.org/bcbs/cp3/barcgrou.pdf. *See also*, European Central Bank, *supra* n. 18.

[34] "Implementation by the end of 2006 would be desirable, but each bank's plan will be based on a joint assessment by the individual bank and its relevant supervisors of a realistic schedule; for some banks the adoption date may be beyond the end of 2006 because of the complexity of the required changes in systems. It is our preference to have an institution "do it right" rather than "do it quickly". We do not plan to

force any bank into a regime for which it is not ready, but supervisors do expect a formal plan and a reasonable implementation date. At any time during that period, we can slow down the schedule or revise the rules if there is a good reason to do so." Ferguson, Senate Testimony, *supra* n.1

[35] "Managers at some institutions may believe that their institution is already very close to meeting all the prerequisites for Basel II. Although our rules and standards are not yet final, on the basis of pilot reviews and discussions with line supervisors here in the United States, I would advise any institution thinking it has little work remaining to make a careful and frank reassessment of where it stands." Ferguson, "An Update," *supra* n.22

[36] "I believe that over time the regulatory capital functions we have hard-wired into Basel II, along with their embedded correlation assumptions, will give way to individual bank-developed models that are verifiable by supervisors. That development will probably be a central part of the evergreen process." Ferguson, "Practical Implementation" *supra* n.5

[37] http://www.bis.org/press/p031011.htm

[38] http://www.bis.org/press/p040115.htm

# The SEC's New Compliance Program Rule for Investment Advisers: When Procedure Becomes Substance

*by Frederick L. White**

**Introduction**

New rule 206(4)-7 of the Securities and Exchange Commission ("SEC" or "Commission") may be the most significant rule the SEC has adopted for investment advisers, even though it is procedural rather than substantive.[1] The rule requires SEC-registered advisers to:

- Adopt compliance procedures that are reasonably designed, in light of the adviser's business, to prevent violations of the Investment Advisers Act of 1940 (the "Act") and the rules thereunder (the "Rules");
- Appoint a "chief compliance officer" ("CCO") to design and operate the program;
- Review the program at least annually.

The rule does not prohibit any acts or require any substantive conduct, such as disclosure or maintenance of capital requirements. Nevertheless, rule 206(4)-7 will probably have a major impact on how advisers run their businesses.[2] As discussed below, the rule has the potential to:

- Require many advisers to establish comprehensive, detailed and relatively costly compliance programs. (The rule requires advisers to have policies and procedures to prevent the violation of *any* provision of the Act or Rules (collectively, the "Act/Rules") that the adviser could, in light of the nature of its business, violate.)
- Expand the scope of what is considered a violation of the Act/Rules.
- Elevate non-fraud violations of the Act/Rules to fraud violations.
- Give broad discretion to SEC examiners to cite advisers for violations of rule 206(4)-7.
- Dictate to advisers how to operate their compliance programs.
- Create a position within the adviser's organization—the CCO—that in effect reports as much to the SEC as to the adviser's senior management.

The rule's impact on advisers is increased by the fact that it was adopted under the Act's antifraud provision. Thus an adviser who is found to have violated 206(4)-7 will have engaged in "fraud." Fraud violations can have more serious consequences for advisers than non-fraud violations, for example in responding to due diligence questions of prospective clients and in completing regulatory forms such as applications for Commodity Futures Trading Commission ("CFTC") registration.

Moreover, a 206(4)-7 violation is a fraud violation even though the underlying Act/Rule provision is a purely technical, non-fraud requirement. For example, an adviser can violate 206(4)-7 because it doesn't have a procedure for maintaining a required but relatively unimportant record—and even though the adviser in fact maintained the record.

For a rule that will affect advisers so significantly, the rationale for the rule—and the SEC's authority to adopt it—are surprisingly weak.

The main rationale is that compliance programs prevent violations. The SEC infers this from its experience that compliant advisers typically have strong voluntary compliance programs. But the SEC cites no evidence that compliance programs in fact reduce violations and are not merely attributes of compliant advisers.

The main authority for 206(4)-7 is the Commission's power to adopt rules that "define" what are fraudulent acts and prescribe measures that prevent those defined acts.[3] But 206(4)-7 doesn't define what is a fraudulent act and the SEC doesn't appear to be asserting it's fraudulent for an adviser *not* to have a compliance program.

Rule 206(4)-7 continues a recent SEC trend of requiring advisers to establish *procedures* relating to specific types of conduct, as distinguished from the SEC imposing substantive *standards* for that conduct.[4] Perhaps required procedures are preferable to specific prohibitions, but they can be costly, and whether they actually work is questionable. They represent a tendency for the SEC, where it has a concern about a practice but perhaps doesn't know what standards to establish, to "do something" by requiring procedures.

**Discussion**

*The Rationale for Rule 206(4)-7*

The SEC gives three reasons for adopting rule 206(4)-7.

- It's good for advisory clients. Strong compliance systems protect clients because the systems reduce the number of regulatory violations, which hurt clients.
- The rule is good for the securities markets. It will promote capital formation, because it will bolster investor confidence in advisers, and investors will therefore buy more securities.
- The rule is good for the SEC. Advisers with weak compliance are more likely to violate securities laws. The SEC can thus be more efficient in its inspection of advisers, by focusing on the ones with the weaker systems.

As to whether compliance systems reduce violations, the SEC is undoubtedly right that advisers with weak compliance programs are more prone to violate. But the SEC

doesn't cite any statistical or other support for its conclusion that strong compliance systems in fact cause compliance. It seems equally likely that compliance systems are merely attributes of compliance. Advisers that have gone to the trouble of voluntarily establishing comprehensive compliance systems may be violation-free to begin with. Advisers that are violation-prone may continue in their ways even if forced to adopt detailed compliance programs.

In adopting rules under the Act, the SEC is required by Act section 202(c) to consider whether the rule will promote efficiency. If the SEC has little or no evidence that compliance programs reduce violations, its compliance with section 202(c) is questionable. And 206(4)-7 will clearly have some inefficiencies, because of the costs it will impose on many advisers.

As to whether the rule will bolster client confidence in advisers, this seems a curious justification for a requirement that could impose significant costs on advisers. The client confidence concept comes from Act section 202(c), which requires the SEC to consider not only the efficiency of a proposed rule but also whether it will promote capital formation. One would think that section 202(c) was intended mainly as a *restraint* on the SEC—to caution it against adopting potentially burdensome rules that have an *adverse* impact on capital formation. In 206(4)-7, however, the Commission has turned this around, citing capital formation as a reason for adopting a potentially costly new rule. Under this reasoning, the SEC could apparently justify some very burdensome requirements, on the ground that they will increase client confidence in advisers.

As to whether the rule will make SEC examinations more efficient, this objective may make the most sense. SEC inspections can undoubtedly uncover violations, and yet at the same time can be burdensome. If 206(4)-7 creates a reliable indicator for the SEC to allocate its inspections more efficiently, the rule can help the more compliant firms. The issue is whether the burdens imposed by the rule outweigh this benefit.

*Antifraud Violation*

Although 206(4)-7 deals solely with procedure, it is an antifraud rule. It was adopted under the Act's antifraud section and a violation of the rule will constitute fraud. The consequences of a fraud violation can be significant. For example, a violator would probably have to answer yes to the due diligence question of a prospective client about whether the adviser had ever engaged in fraud. Similarly, if applying for CFTC registration, the adviser would have to answer yes to the question on the CFTC registration form about whether it had engaged in a fraud violation. There are probably other potentially applicable regulatory schemes that distinguish between fraud and non-fraud violations.

The antifraud nature of the rule is troublesome because an adviser could violate the rule by failing to have a procedure to prevent a violation of a non-fraud provision of the Act/Rules, even though the adviser never violated the provision. In effect, 206(4)-7 can convert a "non violation" if you will of a technical SEC rule into a fraud violation, with its potentially serious consequences.

Take an extreme example. SEC rule 204-2(a)(2) requires advisers to keep for five years auxiliary ledgers reflecting capital accounts. Suppose an adviser was in full compliance with the requirement but failed to have a procedure providing for the ledgers to be kept for the full five years. This would probably violate 206(4)-7, and thus constitute fraud. It's hard to imagine the SEC charging a 206(4)-7 violation in such situations. But the possibility exists, raising questions of fundamental fairness and due process.

This ability of 206(4)-7 to create an antifraud violation out of a non-fraud violation also calls into question the SEC's use of Act section 206(4) as authority for the rule. That section says the Commission can adopt rules that define what are fraudulent acts, and establish requirements to prevent such acts. But many of the acts that 206(4)-7 prevents, such as the failure to keep records, aren't fraudulent.

*Power to the SEC*

Rule 206(4)-7 probably gives the SEC more discretion in charging a regulatory violation than any other Rule, or any provision of the Act. All the SEC need find is a single respect in which the adviser's compliance program isn't, in the SEC's view, "reasonably designed" to prevent a violation of the Act/Rules. Such a finding shouldn't be difficult—if the SEC wants to make it. Some advisers are subject to relatively few provisions of the Act/Rules. But for most advisers there are many potential violations.

It's highly unlikely the SEC would sue an adviser for a technical violation of 206(4)-7. But advisers can't be sure of that. Many will feel compelled to devote appreciable resources to building and maintaining compliance programs so that they will be perceived by SEC examiners as fully addressing every potential violation. And many advisers may do this not so much to avert SEC lawsuits as to avoid embarrassing written findings of possible 206(4)-7 violations by SEC examiners—findings that may have to be disclosed to existing or prospective clients.

Rightly or wrongly, advisers will be concerned about such findings, from a perception that it will be easier for an examiner to note a possible violation of 206(4)-7 than detect a violation of an underlying, substantive provision of the Act/Rules.

*Expanding the Scope of What Is a Violation*

A potentially troublesome aspect of 206(4)-7 is that it could become a device for the SEC to expand significantly the scope of what is an Act/Rule violation. Because of the generality of various Act/Rule provisions (such as the antifraud sections) there is often uncertainty whether a questionable act rises to the level of an Act/Rule violation, as distinguished from merely being an unsafe or unsound prac-

tice. The SEC generally exercises its regulatory discretion to view the closer calls as violations. There are two ways that 206(4)-7 could expand that discretion.

First, in charging a 206(4)-7 violation, the SEC need not establish that the activity for which the adviser lacked a prevention procedure was in fact an Act/Rule violation. Probably all the SEC need have is a belief that the underlying activity was a violation. This gives the SEC wide latitude in determining what is an underlying violation for 206(4)-7 purposes. Presumably an adviser could rebut a 206(4)-7 charge by establishing that the underlying activity wouldn't have been a violation. But this isn't completely clear, and by then the reputational damage would likely have occurred.

Second, in the course of interpreting 206(4)-7 the Commission and its staff are likely to specify activities that advisers should address in their compliance programs. Even if some of these activities are not in fact violations of the Act/Rules, the interpretations could have the effect of making them violations. Advisers will thus have to treat the activities as if they were violations in designing their compliance programs.

*Chief Compliance Officer ("CCO")*

The CCO provisions of 206(4)-7 represent the first time the SEC has told advisers how to run a part of their business—in this case their compliance operations. The CCO provisions establish various details of how investment advisers must organize their internal operations to comply with 206(4)-7. Specifically:

- Each adviser must appoint a CCO to design and carry out the compliance program mandated by 206(4)-7.
- The CCO must be "empowered" with "full responsibility and authority" to create the program.
- The CCO must have a position of "sufficient authority" to "compel others" in the adviser's organization to follow the program.
- An adviser may have only one CCO.
- The CCO must be "competent" and "knowledgeable" about the Act.

While the Commission had previously required advisers to maintain compliance procedures in several specific areas (such as electronic storage of records), it had not dictated how those procedures should be carried out. The CCO provisions of 206(4)-7, however, tend to micro-manage the compliance process, specifying who within the organization must design and monitor the procedures, that individual's level of responsibility within the organization, and even his job qualifications.

The SEC has arguably created in the CCO a position within each adviser's organization who reports as much to the SEC as the adviser's senior management. This is because:

- The CCO will likely have personal liability for a 206(4)-7 violation if the adviser doesn't allow him to operate a program that complies with 206(4)-7.
- In that case the CCO will have to resign as CCO, or perhaps resign altogether from the adviser.
- 206(4)-7 requires advisers to report to the SEC changes in their CCOs.
- A CCO change will alert the SEC to a possible violation of 206(4)-7.

This independence of the CCO could create various internal tensions within the adviser's organization. Suppose the CCO says he'll quit if he doesn't get a pay raise. Ordinarily such a threat would be a routine personnel matter for the adviser to deal with. But if a CCO quits, the stakes for the adviser can be much higher, as noted above. Or suppose the adviser wants to fire the CCO for incompetence or inappropriate job-related conduct. Again, this will cause a reportable change in CCOs, with possible adverse consequences for the adviser. While these examples are perhaps far-fetched, they illustrate how the CCO provisions of 206(4)-7 reach into an adviser's internal operations.

*The Proceduralization of Compliance*

SEC compliance for advisers is increasingly a matter of adopting, maintaining and reviewing procedures, and having those procedures inspected by SEC examiners. The procedures an adviser must maintain are as follows:

- To prevent the use of insider trading information.[5]
- To safeguard records that are stored electronically.[6]
- To establish policies for the voting of proxies on client-held securities.[7]
- To safeguard the privacy of client information held by the adviser.[8]
- To prevent and detect violations of the Act or Rules.[9]

This proceduralization of compliance has several regulatory policy implications. First, there is obviously the human nature danger that the emphasis on procedure will detract from compliance with substantive requirements, particularly the important provisions such as conflict of interest disclosure. And it will be understandable for advisers to focus on procedure compliance. They will likely conclude—probably correctly—that they run a greater risk of being charged with a 206(4)-7 violation than underlying Act/Rule violations, simply because it will generally be easier for SEC examiners to detect 206(4)-7 violations.

Second, required procedures tend to promote rigidity. And they tend not to reward creativity and flexibility, which can be the key to preventing violations of important general requirements, such as full disclosure and acting in a fiduciary capacity. It's often difficult to reduce these subjective but vital principles to checklists and policy manuals. Yet rules

like 206(4)-7 tend toward such pigeonholing.

Third, required procedures typically lack the ability to prioritize violation risk. But some Act/Rule violations are clearly more harmful to clients than others. For example, compare an adviser's failure to disclose its aggressive use of soft dollars with a failure to keep a relatively unimportant record. Yet under 206(4)-7, these failures have roughly equal significance. They both violate 206(4)-7 and subject the adviser to reputational damage and SEC sanctions.

Fourth, as discussed above, it's by no means clear that compliance procedures in fact prevent violations, and procedures clearly impose regulatory costs.

Fifth, required compliance procedures may promote a uniformity that can be counter-productive. To comply with 206(4)-7, many small and mid-sized advisers may find it more efficient to buy compliance procedure packages (basically manuals and checklists) from compliance vendors, rather than create their own compliance programs that are tailored to their businesses. These packages will likely be standardized, one-size-fits-all documents. They will probably have features that allow the adviser to customize them to its operations. But advisers may have little incentive to customize. This will require effort, and there will be safety in numbers in using one of the industry-standard compliance packages that many others are using. As a result, there will be a sameness of compliance policies and procedures that probably won't serve the industry very well.

*Statutory Authority*

The Commission's authority to adopt 206(4)-7 isn't altogether clear. The Commission cites as authority Act sections 206(4) and 211(a).

Act section 206(4) prohibits advisers from engaging in "fraudulent, deceptive or manipulative" acts and directs the SEC to adopt rules that "define" what acts are "fraudulent, deceptive or manipulative" and prescribe means that are designed to prevent those defined acts. But rule 206(4)-7 doesn't purport to "define" what is a fraudulent act. Rather, it's aimed at preventing acts that have either been defined in previous SEC rules as fraudulent, or that are prohibited by non-fraud provisions of the Act/Rules. The SEC does not appear to be asserting it's fraudulent for an adviser *not* to have a compliance program. It's therefore hard to see how rule 206(4)-7 satisfies the "define" requirement of Act section 206(4).

Another problem with basing rule 206(4)-7 on Act section 206(4) is that 206(4) applies to all advisers, whether registered or not. Rule 206(4)-7 affects only SEC-registered advisers. It's hard to see how the Act section is authority for the rule if the rule doesn't apply equally to unregistered advisers.

Act Section 211(a), also cited by the SEC, authorizes the SEC to adopt rules that are "appropriate to the exercise of the functions and powers conferred upon the Commission elsewhere" in the Act. The "elsewheres" cited by the SEC are Act section 203 (power to discipline advisers), 204 (power to examine advisers) and 209 (power to enforce the Act). But this seems like a tenuous connection. The SEC hardly needs to require advisers to have extensive compliance programs to assist the Commission in these areas.

* Frederick L. White is General Counsel for Deerfield Capital Management, LLC. The opinions expressed herein are entirely those of the author and do not represent the views of Deerfield Capital Management.

**Footnotes**

[1] The release of the Securities and Exchange Commission ("SEC" or "Commission") announcing the adoption of the rule (the "Release") is Investment Adviser Act Release No. 2204; Investment Company Act Release No. 26299, Dec. 18, 2003, at http://www.sec.gov/rules/finalia-2204.htm.

[2] This article does not address the companion rule to 206(4)-7, new SEC rule 38-1.

[3] Section 206(4) of the Investment Advisers Act of 1940 (the "Act").

[4] E.g., SEC rule 204-2(g)(3), which requires advisers that use electronic media to store required records, establish and maintain procedures to maintain and preserve the records, so as to reasonably safeguard them from loss, alteration, or destruction, limit access to the records to properly authorized personnel, and to reasonably ensure that any reproduction of a non-electronic original record on electronic storage media is complete, true, and legible when retrieved; and SEC rule 206(4)-6, which states that if an adviser exercises voting authority over client securities, it must adopt and implement written policies and procedures that are reasonably designed to ensure that the securities are voted in the best interest of clients (the procedures must include how the adviser would address material conflicts that may arise between its interests and those of the client), disclose to clients how to get information from the adviser about how it voted their securities, and describe to clients its proxy voting policies and procedures.

[5] Act section 204A.

[6] SEC rule 204-2(g)(3).

[7] SEC rule 206(4)-6.

[8] SEC regulation S-P.

[9] SEC rule 206(4)-7.

# Free Speech & Election Law

## Campaign Finance Reform in the Supreme Court: Selections from the Federalist Society's 2003 National Lawyers Convention*

The Honorable Trevor Potter, Caplin & Drysdale
The Honorable Kenneth W. Starr, Kirkland & Ellis

**MR. POTTER:** Thank you very much, Judge. It's a pleasure to be here. I recognize the context of this discussion. I understand that not everybody in the room is already sold on the virtues of BCRA. I don't know how it is that Ken Starr talks me into these settings where I feel slightly as if I'm about to be scalped. But I will do my best nonetheless to raise some questions on your mind that might upset whatever certainties you have that this law is facially a bad idea. I personally think the founding fathers would be appalled by the soft money system that has led to this law, so that's probably a good place to start. What I'd like to do is lay out for you initially and briefly what it is that the Supreme Court has before it now by way of a description of the system, the evidence of corruption, and the arguments before it.

The soft money system begins with a law enacted in 1907, almost a century ago, prohibiting corporate involvement in federal elections, corporate contributions to political candidates and parties. That law was then revised and extended in 1974 as part of the post-Watergate reforms. Up until the late '70s, it was interpreted to mean exactly what it had said, which is that corporations (and separately from the 1947 law, unions) could not give funds to national party committees.

However, the Federal Election Commission, starting in the late '70s, responding to advisory opinion requests, first said that it was permissible for state parties to accept corporate funds and spend them on state activities such as registering people to vote, even though those state activities might also have some incidental affect on federal elections. Less obviously, the Commission then said, "Well, if state parties can do that, we suppose it's all right for national parties to take money that can't be spent in federal elections from sources like corporations and unions and put it in a separate account, provided they spend it on non-federal activities like state elections." That permission was extended to the national House and Senate Campaign Committees, even though their stated purpose is simply to elect federal candidates, their members.

Running forward over a period of years, that system went from what I have just described to a very different spectacle, highlighted for everybody in this room, I think, by the activities in connection with the Clinton Reelection Campaign in 1996. There you had, as reported by the Thompson Committee, fundraising by an incumbent president in the White House, with the famous sleepovers and the seats on Air Force One and the rest of it, of very large sums of money from individuals, corporations, and unions. That money was raised for the party committees and spent on advertising featuring the party's presidential candidate talking about how terrible a person called Dole-Gingrich was. And those ads, the targeting of those ads and the content, were approved by the party's nominee. All of this, mind you, from money that's not spent in federal elections. Senator Thompson filed an *amicus* brief with the Court and laid out, again, the findings of his committee.

The culmination of it, from a legal viewpoint, is epitomized by the Clinton 2000 Joint Committee, a fundraising committee created by now-Senator Clinton in New York, which had her raising contributions, at $100,000 a contribution, at a time when her campaign could only accept $1,000 per donor. That money was then split between her committee-to-elect, the state party, and the national party. And all of that money was spent on broadcast ads, created in some cases by the same advertising agency and by the same media advisors who were advising her, and those ads featured her talking about New York issues.

So, we had gone from, "Yes, a state party in Illinois can raise money and spend it on state elections," to "a federal candidate can raise unlimited contributions and contributions from corporations and unions which by law cannot participate in federal elections, and Federal candidates control the spending, and have the spending be advertising featuring them." And somehow, it was outside of the existing constitutionally-approved limits on spending and contributions in federal elections. Five hundred million dollars was raised and spent in this way through the National Party Committees alone in 2000. So, that's the problem, if I can define the problem in soft money being the raising and spending of these corporate and union funds outside of federal limits, and the spending of it on federal election activities.

Why is that a problem? Well, the problem was corruption and the appearance of corruption. The Supreme Court has said that it is permissible for Congress to regulate to prevent corruption and the appearance of corruption in federal campaigns. Some of the justices in majority opinions noted that in their view, it is self-evident that raising and spending large sums of money is potentially corrupting when done by federal office-holders and candidates. Again, we have the record of the Thompson hearing, with the types of people who were raising money seeking specific legislative outcomes, testimony about the White House being a turnstile, where you put your money in and you get your action out the other end, etc. Granted, there were complaints that it was a faulty, corrupt turnstile because it didn't always pro-

duce the result that was paid for. But that doesn't necessarily mean that the system is going to appear any less corrupt. We have first-person testimony from current and former House and Senate members about the pressure to vote based on large donations, about specific attempts to move legislation because of the identity of donors to party committees; testimony that the entire party legislative agenda in Congress was affected by these large donations. Remember, again, that House and Senate election committees are comprised of members of the House and Senate, so they had a very personal interest in what was given to those committees.

In addition to that testimony, there was evidence presented in the case involving charities. Specifically, the instance you may recall from the press, of $1 million being offered to President Clinton during his reelection campaign, which was then diverted by the White House to a 501(c)(3) charity, which could use it for get-out-the-vote activity. And on the Republican side, evidence that foreign nationals and Hong Kong contributors played their own part. They had given substantially to a 501(c)(3) created by actions of the officials of the Republican National Committee.

So, what's presented before the Court is a system that allows these large contributions, and the evidence of the problems—the potential for corruption, and in some instances the actual corruption—that Congress pointed to in saying, "We need to change this funding system." The solution that the Court is currently looking at in this area is essentially two-fold. In terms of the national parties, the new law has a ban on national party committees accepting, depositing, raising, and transferring soft money contributions. That includes, any money not permitted in federal elections, from corporations, from unions, or in excess of party limits. It's not often focused on, but I would note that the new law raised the amount that individuals can give to party committees, raised the aggregate, as well, of what individuals can give in a given year. I think that's one of the reasons why party hard money fundraising, since the new law, has done substantially better than before the law, because the limits are higher for hard money.

But, in any case, no soft money may now go to the party committees. Party committees may continue as they did before to involve themselves in state and local elections, but they have to do so with the money that they have in their coffers that they're permitted to raise — so the contributions come from individuals, not from corporations and unions. I note that because I think one of the red herrings out there is that parties are banned from engaging in state and local activities under the new law. National parties aren't, but they have to use the money that they have raised under the federal limits. So, that's the national party soft money ban.

The state party soft money regulations are, by nature of our federal system, of course, different because state and local parties participate in state and local elections, as well as in federal election activity. And for the states, they may raise and spend whatever they want for activity affecting just state elections. But there is a provision in the law that says that if they engage in federal election activities, then they have to use money raised under the federal system, deposited into their own federal account. That activity is public communications that attack, support, or oppose a federal candidate, and certain voter registration get-out-the-vote and voter ID activities that directly affect or are in connection with an election for federal office. So, that's the regulatory process for a state party. They can do whatever they want for state elections. If they are doing things that this Act defines as being "federal election activity," then they have to use federal money.

The issues raised before the Supreme Court by all of what I've just stated are, first, is the Court going to revisit what corruption is, the difference between the appearance of corruption and *quid pro quo* corruption? Second, is the Court going to have a problem with the congressional regulation of activity that affects both state and federal elections, like the generic activity by state parties that I just discussed? And in both of those, the question before the Court is going to be to what extent will they allow Congress to enact anti-circumvention legislation, legislation that is designed to prevent the circumvention of federal law by having these requirements on state parties, as well?

Other issues the Court is going to look at in connection with soft money are whether it's permissible for the Act to regulate political parties differently than other actors not controlled by members of Congress and officeholders who participate in the system, like the NRA or the Sierra Club. It also is clearly looking at the constitutional basis for the underlying ban on corporate and labor political activity, and perhaps at any distinctions they may want to draw between such a ban on for-profit corporations versus not-for-profit corporations.

Underneath all of this is a question of the degree to which the Court is going to defer to Congress, as it has in the past when it has upheld campaign finance laws. It did so on the basis that Congress, after all, knows a great deal about this and has first-hand experience with the dangers of corruption here. Or is the Court going to look at this and say, "Well this is a law passed by people who are peculiarly self-interested in their own elections, and therefore we ought to be more skeptical rather than less when Congress is regulating its own elections." That's a quick summary of the hot issues that the Court faces as it decides this case.

**JUDGE STARR:** Thank you, Judge Smith. It's a privilege for me to be here, and my thanks to the Federalist Society and the organizers of this particular gathering. This is a very important issue to our democratic order and our system of liberty, so I'm all the more grateful for this opportunity for us to come and to reflect on this together.

Full disclosure — I have the privilege and honor, through my law firm, of representing the Southeastern Legal

Foundation, a plaintiff in the litigation. Its general counsel, Valle Dutcher, is in the audience as we speak. And I also serve as co-counsel to Senator McConnell in *McConnell v. the Federal Election Commission*. We are working on this case along with Floyd Abrams, I believe the premier First Amendment lawyer of the age; Dean Kathleen Sullivan of the Stanford Law School; and Jan Baran, one of the great election law leaders in the country. This is a matter that has brought together a wide range of folks under the same umbrella. I mentioned the Southeastern Legal Foundation. I work with David Thompson who has been mentioned. You'll be hearing from David momentarily. Aligned on the same side are the ACLU, the California Democratic Party, the National Right to Life Committee, and the California Republican Party.

Trevor, in his observations, suggested concerns, abuses, of the recent past, and it needs to be said at the outset that there are certain provisions of BCRA that are good, that are well informed, and indeed that are not subject to challenge. He mentioned abuses of fundraising on federal property. That, indeed, needed to be tightened up. Some might remember "no controlling legal authority." There is now a controlling legal authority, and three cheers for it. There is absolutely no doubt whatsoever, that Lincoln bedroom sleepovers and White House coffees are out. So, too, are certain vague associations with folks from other countries. Those restrictions have been clarified. It's always nice to go to community events, but at least it should be a community event, and one should be careful about who's making the contribution to a candidate.

But there is much that is quite, in my judgment, profoundly wrong about McCain-Feingold because it is, by its very nature, a set of restrictions on fundamental democratic values. Take a simple reading of this law — but there is no such thing as a simple reading of the law. You see, it's 102 pages. Chuck Bell, the General Counsel of the California Republican Party, is smiling. We've read the law, haven't we, Chuck? I'm reminded of the Roman Emperor's tactic of putting the laws high above, out of sight, so no one could read them. All he needed to do was hire BCRA's draftspersons. One doesn't have a clue, other than one knows that whatever one does in politics these days is likely to be a felony. It is wildly overdone, almost comically so, except sentencing guidelines don't seem terribly humorous.

There are two fundamental reasons in our constitutional order why the so-called soft money ban should fall. But let's be clear about what we're talking about; we're talking about funds that are regulated by the states. Some states choose heavy-handed regulation, others are more gentle. And the Commonwealth of Virginia actually believes in freedom. Can you imagine, in this day in time?

The first concern is the First Amendment itself. We are regulating, indeed prohibiting, a basic right of individuals in a free society to come together under the mantel of an association called the political party and organize so as to communicate, to persuade, and then to mobilize, all consistent with state law. Parties exist to bring together like-minded persons, to articulate a philosophy or world view, and, if all goes well and people work hard, to see that philosophy triumph at the polls, in this vast commercial republic, as Mr. Madison envisioned it and described it. That takes—can you imagine?—money. And it takes lots of it, particularly in California, as to which the record is so elaborate in this case.

Now, some of our friends believe that the money dimension changes the world. They're really quite wrong, and they're rebuked by an elaborate body of First Amendment law, with which they otherwise cheerfully and full-throatedly agree. It should be viewed as settled — let me go ahead and summon *New York Times v. Sullivan*. You don't even have to agree with the actual holding to agree with the Court's round rejection of the proposition that the strength of the First Amendment interest in the case was diluted by the fact that it was a paid commercial ad. Let's pause for a moment to reflect on *New York Times v. Sullivan*.

A group of citizens came together, associated with one another, organized, pooled their resources, went to an advertising agency in New York, and purchased through the advertising department of the *New York Times* an ad that might be known as a negative ad, an attack ad. It accused Commissioner Sullivan of crimes, perhaps of violation of BCRA. No, nothing quite so serious, just police brutality. But this group of citizens took out this ad called "Heed Their Rising Voices," and Mr. Sullivan's very able lawyers said, "Well, see there? It's just a commercial transaction." Now, scroll back in time and recall that the law of commercial speech had not developed. The argument was that this is commerce and not protected. But that fell on deaf judicial ears even at the time. It was swept aside, the idea of the value of this communication, even though it was paid for.

Now, let there be no doubt that the activity that we're talking about today is a First Amendment activity and that there's going to be a shrinkage of it. There is going to be less speech by political parties. That is not seriously contested in the record that was developed in this case. And the principal example of that, ironically in terms of the politics, is the California Democratic Party, in light of the expense of communicating statewide. It is absolutely clear.

And yet, McCain-Feingold is strangely incomplete. It attacks and weakens political parties while at the same time, rightly, doing nothing about other groups and organizations that do many of the same things. See, for example, the NAACP and its $10 million voter mobilization effort in the year 2000. This is the same activity as political parties; but here there are no limitations. And we now know from the record before the Court that McCain-Feingold saps political parties of their strength while empowering two new classes of power brokers: the super-wealthy — have you heard of George Soros?; and the organizers and facilitators who know the super-wealthy — have you heard of Harold Dickies and perhaps Ms. Malcolm of Emily's List fame? Those are the new power brokers in the United States.

The weakening of the political parties is a very, very bad thing. We think it has constitutional dimensions of a very high order. The parties, at a broader political and political-cultural level, have served the nation well, contributing to a political culture that, for all of its failings, has been characterized by remarkable stability and durability. McCain-Feingold changes all that, and very much for the worse.

The second reason, more briefly, that McCain-Feingold's scheme should fall lies in the very structure of our institutions. One need not agree with the Court's 11th Amendment jurisprudence or the reading of the limits of Congress' power. That's just the *Lopez* case. You can agree with *Lopez*, but you can even disagree with it and still conclude that McCain-Feingold exceeds Congress' enumerated powers. Article I, Section 4 provides very simply (and this is the operative clause so I ask you to listen carefully, as well as respectfully, to the Constitution): "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each state by the legislature thereof, but the Congress may, at any time, by law, alter such regulations."

The discussion has already shown McCain-Feingold goes far, far beyond the world of elections of representatives and senators. It regulates directly and overtly, the national parties. And it does so — and this is a clear example of its excess and overbreadth — even in off-year elections when no federal election of a senator or representative is on the ballot.

The example that became a very familiar one in the litigation was this. It would have been a crime for the then-chair of the RNC, Governor Racicot, or his successor, Mr. Gillespie, to send a letter asking Republicans around the country to send a contribution of any amount, to the gubernatorial campaign of his friend Haley Barbour. Now, that is an off-year state election, just as Louisiana is having tomorrow, and yet Congress is purporting to regulate it, to regulate the activity of parties in connection with that election.

Over 40 states have some form of election during off years, including very important mayoral contests in cities as small as New York and Los Angeles. McCain-Feingold sweeps in all the election activity by political parties at all levels and subjects those activities to federal law and regulation, displacing in the process entire bodies of state law. That can't be right.

So, what is right, in closing, and what is the answer? Virginia once again shows the nation. It takes a bit of Mr. Jefferson, who believed in the idea of liberty, and it takes a nice dose of Louis Brandeis, who believed in sunshine as the disinfectant, and the wonderful result is freedom with disclosure, Internet disclosure. Anyone can contribute unlimited amounts to a party, to a candidate, and guess what? Virginia has a very vibrant political system free of any suggestion of corruption.

* These selections were taken from a panel entitled "Campaign Finance Reform in the Supreme Court," sponsored by the Federalist Society's Free Speech & Election Law Practice Group at the Federalist Society's 2003 National Lawyers Convention on November 14, 2003. The panel was moderated by Hon. Jerry E. Smith of the U.S. Court of Appeals for the Fifth Circuit, and also featured Prof. Daniel R. Ortiz from the University of Virginia School of Law and Mr. David Thompson of Cooper and Kirk. A full transcript of the discussion will be published in the next issue of *Engage*.

# Child Pornography and the Slippery Slopes of *Ashcroft v. Free Speech Coalition*

*An Address Given by Hon. A. Raymond Randolph at the 2002 National Lawyers Convention**

There are many visions of the slippery slope. I have a personal favorite stemming from an incident in my early childhood, when I lived near a river. To me, the slippery slope is a structure where the law of gravity takes over from the rule of law, a steep incline on which you cannot stop until you come to rest with a splash. Slippery slopes in law and public policy are common. Unlike my vision, some have exit ramps, to be ignored at one's peril. Those who were around in the 1960's and early 1970's watched as "nondiscrimination became equal opportunity became affirmative action became goals became quotas became 'equality of outcomes'"[1] – splash!

Arguments based on the image are also common. When you start paying attention to slippery slope arguments you begin to spot them everywhere. I bagged a particularly fine specimen the other day. Professor Michael Bellesiles of Emory University gained acclaim with his book *Arming America*, revealing that – contrary to popular belief — gun ownership in colonial America was not widespread. Trouble is he fabricated his evidence and, a few weeks ago, was forced to resign. His resignation statement tried to erect a slippery slope. "I believe," he said, "that if we begin investigating every scholar who challenges received truth, it will not be long before no challenging scholarly books are published."[2] This is of course balderdash; the only scholars who have to worry are those who falsify their data; and that is for the good.

As this example shows, some slippery slope arguments are valid and some are not. There is nothing very fancy about this kind of argument. The central idea is simply that one thing leads to another. It is an argument from consequences, resting on a prediction of outcomes. Why one thing supposedly will lead to another will of course vary. The reason may be empirical; it may be causal; it may be because attitudes will change as a result of the initial steps; or because no non-arbitrary line can be drawn, or some combination of these. The argument is a negative one, used to show why an action should not be taken in view of the action's undesirable consequences.

Freedom of speech cases are particularly prone to slippery slope arguments. A cluster of doctrines and dogma comprise modern free speech analysis. Clear and present danger, content discrimination, strict scrutiny, narrow tailoring, chilling effect, and overbreadth – especially overbreadth – now move the Court into ever more abstract adjudications. Rather than cases having concrete facts, the Supreme Court often has before it little else than a statute fresh from the legislature, attacked before it has been enforced. In this abstract setting, the Court gives free reign to its creativity, thinking up hypothetical future applications of the statute to imagined parties in imagined settings. The lawyers pro and con, but mostly con, argue slippery slopes and so do the Justices, in their questions from the bench and in their opinions. The arguments take the form of "if this . . . then that." If you take this step, terrible consequences will ensue. The more undesirable the consequences, and the more likely they will follow from the first step, the more powerful the argument will seem. In free speech cases, the bottom of the slope will contain what Professor Van Alystne aptly calls the irresistible counterexample, a result no one is willing to defend.[3]

Which brings me to *Ashcroft v. Free Speech Coalition*,[4] decided last term. Most of the First Amendment doctrines I just mentioned came into play, as the Supreme Court held that child pornography was within "the freedom of speech" when real children were not used in the production. In other words, the Free Speech Clause of the First Amendment protects computer-generated images of children having sex (usually with adults) even though the images are indistinguishable from real children.

The Supreme Court's decision, as you might have guessed, did not purport to rest on the original intent of the Framers.

The government contended, among other things, that this sort of material was devoid of value, that pedophiles use child pornography to seduce children by making them think this activity is common and acceptable, and that pedophiles use the material to whet their appetites. At oral argument, a Justice asked government counsel the following question:

> it seems that this is a big step . . . from . . . injury to an actual child to the effect on the viewer and the same thing could be said for women with respect to pornography, portraying women in a degrading way. The same thing could be said for hate speech. So . . . where there is no actual child victim, where it's a picture and you're talking about the effect of that on the viewer, why is it the same for all these other things that can have a very bad effect on the viewer?
>
> The government attorney responded thus:
>
> Well, I think there are two principal reasons why you shouldn't be worried about that particular slippery slope.[5]

He then gave the two reasons – one, the Court had already embarked on the slope when it relied on the seduction rationale in an earlier child pornography case,[6] and two, the government could successfully prosecute only when the child pornography created with computers

was indistinguishable from the real thing.

Was there another response? I believe so. Slippery slope arguments often can be turned against themselves. Potentially, for each slippery slope there is an opposing slope.[7] "As in all arguments from consequences, drawing attention to the [supposed] bad outcomes of one course of action is not enough; one has to show that the alternative courses of action don't have just as bad or even worse consequences themselves."[8]

Implicit in the Justice's question was the proposition that government cannot base its regulation on the effect of "speech" on viewers and listeners. Here is the opposing slope. If laws cannot rest on the effect on viewers and listeners, then the entire law of defamation would collapse. And so would a good many others as the Court began the slide. Laws against inciting riots would be swept away. Laws against indecent exposure and public nudity would fall.[9] Prohibitions against obscenity[10] would be cast aside. Professors of philosophy are fond of placing slippery slopes in categories. This particular opposing slope could be of the line drawing variety; it asks "Where do you draw the line?" and the answer is that there is no non-arbitrary place to draw it.

The Court's opinion striking down the federal law contained a number of slippery slope arguments, although some were not fully developed. In response to the government's argument that pedophiles will show child pornography to children to break down their resistance, the Court answered with two slippery slopes of its own devising. Here is the first:[11]

> [The government] argues that [the statute] is necessary because pedophiles may use virtual child pornography to seduce children. There are many things innocent in themselves, however, such as cartoons, video games, and candy, that might be used for immoral purposes, yet we would not expect those to be prohibited because they can be misused.

This is what one noted philosopher describes as a "precedent slippery slope argument."[12] The Court has stated a rule – things innocent (innocuous?) in themselves may not be banned simply because they may be misused. And so if the Court made an exception for the ban on virtual kiddie porn, it would also have to permit the banning of candy and cartoons because these too can be misused to seduce children. The argument is fallacious. The Court has answered the government's contention by generalizing it. It is not just seduction, but seduction in a particular way – namely, by showing a child graphic depictions of other children "having fun" while engaged in sexual activity. (Congress made a specific finding to this effect.)[13] Candy cannot be used in the same way. Moreover, where does the Court get the idea that child pornography is "innocent in itself," as "innocent" and innocuous as candy and cartoons?

The Court's second answer to the seduction claim invoked "the important First Amendment principle that the State could not 'reduce the adult population . . . to reading only what is fit for children.'"[14] This too is a slippery slope argument, although the sequence is not fully spelled out. The Court has deployed it in many cases. I think the child pornography opinion abused the argument, for two reasons. An empirical slippery slope argument is not plausible unless the empirical premises on which it rests are plausible. The premises here are completely implausible. How likely was it that if the Court upheld the statute outlawing computer-generated depictions of children having sex, adults would eventually be forced to view only material suitable for minors? Statutes punishing producers, distributors and possessors of child pornography involving real children — statutes the Court has upheld — have not resulted in the adult population watching material fit only for children. Far from it. There is a second problem with the Court's point. It begs the question. It assumes that virtual child pornography is "fit" for adults – by which the Court means this material is protected by the First Amendment. That of course was the issue before the Court.

The *Free Speech Coalition* opinion contains other assertions that are, I believe, fairly refuted by slippery slope arguments. Child pornography, the Court announces, "might have significant value."[15] Of what does valuable child pornography consist? The Court gives several examples, again imagining parties and situations not before it. Thus, there could be a "picture appearing in a psychology manual" or a "movie depicting the horrors of sexual abuse" of children.[16] If I understand this passage correctly, the Court has stepped onto a very slimy slope. It is telling us that visual depictions of children having sex, say with adults, can have value because they show how horrible this activity is. But on that rationale, the bottom of the slope is a cesspool. Movies and photographs and computer images of bestiality and sadism and incest, and who knows what else, would — on the Court's theory — have redeeming social value because the public would be able to see for itself how awful this stuff is.

At another point the Court says the statute "proscribes the visual depiction of an idea . . . that is a fact of modern society . . .."[17] An "idea"? What about an "activity"? That aside, consider the proposition embodied in this passage. If visual depictions are within the freedom of speech because they show a "fact of modern society," then there is no stopping point. Everything is protected speech. Every other perversion you can imagine, and many you cannot imagine, are "facts of modern society."

There is, I believe, another slope looming in the child pornography case, one the Court did not acknowledge, and perhaps did not see. It involves the "Fallacy of the Altered Standpoint." This "is the belief that, because some action or attitude is universally considered abhorrent, it will always remain so; the fallacy lies in what happens when the standpoint from which that belief derives

is altered. The view changes; from the new standpoint it is possible to believe that what was once unthinkable can now be thought; all too often, what can be thought is thought, and shortly afterwards what is thought is put into practice."[18] In reading the Supreme Court's opinion, Mary Eberstadt's articles, one in 1996 entitled "Pedophilia Chic,"[19] and a followup article last year[20] immediately came to mind. Ms. Eberstadt described a growing trend of so-called "enlightened voices" being "raised in defense of giving pedophilia itself a second look." The "social consensus against the sexual exploitation of children and adolescents . . . is apparently eroding," she reported, and "the defense of adult-child sex — more accurately, man-boy sex — is now out in the open."

The campaign is being waged not just by the organization known as the North American Man Boy Love Association. Newspapers have carried Calvin Klein underwear ads showing youngsters in suggestive poses. Front page articles have reported the so-called scientific evidence that consensual man-boy sex is not harmful. New euphemisms have been coined: we now have "ageism" and "intergenerational sexual relations." And just as the Supreme Court was issuing its *Free Speech Coalition* opinion, the University of Minnesota Press released a book entitled *Harmful to Minors: The Perils of Protecting Children from Sex*.

What the Court wrote in its opinion and the result it reached tends to legitimate such views, and by doing so pushes us further down the slope of cultural decline. The Court had little to say negatively about virtual child porn and a good deal to say in its favor. The opinion pointed out that *Romeo and Juliet* was about teenage lovers, one of whom was just 13 years old; no matter that Shakespeare did not visually depict sex; according to the Court (again using its imagination), a modern director might want to be more graphic, using computer images to mimic reality.[21] And, the Court noted, there are contemporary movies like *Traffic*, which was nominated for an Academy Award, as if that is a measure of constitutionality.[22] "The right to think," said the Court, "is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[23] This last statement is an eye-popper – "speech is the beginning of thought." I always believed it was the other way around. Besides, look at the context. Is child pornography "the beginning of thought"? And what is the thought that this so-called speech triggers?

In the end, the Court dismissed the evidence that child pornography whetted the appetites of pedophiles and was used by them to seduce children. The Court cited no contrary evidence. It simply pronounced that these effects were too "contingent and remote" to outweigh what it called the "significant value" of some child pornography.[24]

Perhaps I am wrong about the effect of *Free Speech Coalition*. Perhaps we are not being propelled down the slope. Perhaps the Court's opinion will not have any lasting impact on our society. But the point of the Fallacy of the Altered Standpoint is "that until the standpoint has been altered, no one can safely predict what the view from the new one will be."[25] Still, "there is a clue. So far as I know, there is not one example of a new standpoint being less disturbing than its predecessor; the alteration invariably goes further, in the matter of actions that had previously been ruled out, towards danger."[26] And I know one other thing. A person who wants the stuff the Supreme Court has now protected under the mantle of the First Amendment is, by definition, someone who is sexually interested in children.

I will end with verse:

You are not on the Road to Hell
You tell me with fanatic glee:
Vain boaster, what shall that avail
If Hell is on the road to thee?

* Hon. A. Raymond Randolph serves as a judge on the United States Court of Appeals for the District of Columbia Circuit.

[1] Martin Mayer, Today and Tomorrow in America 4 (1976).
[2] *The Washington Times*, Oct. 28, 2002, p. A14.
[3] William Van Alystne, *A Graphic View of the Free Speech Clause*, 70 Cal. L. Rev. 107, 113 (1982).
[4] Ashcroft v. Free Speech Coalition 198 F.3d (9th Cir. 2002) *affirmed*, 535 U.S. 234 (2002).
[5] One might say the Justice's question was not technically about a slippery slope, but I will treat it that way, as did government counsel. *See* Schauer, *supra*, 99 Harv. L. Rev. at 366, contending that an "argument against the excess breadth of a principle" differs from a slippery slope argument.
[6] *Osborne v. Ohio,* 495 U.S. 103 (1990).
[7] *See* Frederick Schauer, *Slippery Slopes*, 99 Harv. L. Rev. 361, 382 (1985).
[8] David Enoch, *Once You Start Using Slippery Slope Arguments, You're on a Very Slippery Slope* 10-11 [Available at: http://www.nyu.edu/gsas/dept/philo/students/enoch/papers/slopes.pdf]
[9] See also the Court's "Seven Dirty Words" case, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).
[10] *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973).
[11] 122 S. Ct. at 1402.
[12] Douglas Walton, Slippery Slope Arguments 115-159 (1992).
[13] 18 U.S.C. § 2251 note (Supp. V 1999).
[14] 122 S. Ct. at 1402, quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957).
[15] 122 S. Ct. at 1402.
[16] *Id*. 1400.
[17] *Id*. 1400.
[18] Bernard Levin, *A Little Something in the Bank for Life Eternal*, The Times of London, April 19, 1990.
[19] The Weekly Standard Magazine, June 17, 1996.
[20] *"Pedophilia Chic" Reconsidered,* The Weekly Standard Magazine, Jan. 1, 2001.
[21] *Id.* 1400.
[22] *Id.*
[23] *Id.* 1403.
[24] *Id.* 1402. The Court said that in *Ferber* it "recognized" that "some works in this category" — child pornography — "might have significant value," citing page 761 of the *Ferber* opinion (458 U.S. at 761). I have read this page of the *Ferber* opinion several times and I cannot find anything that remotely supports that statement.
[25] Levin
[26] *Id*.

# Intellectual Property

## *Knorr-Bremse*: An Opportunity to Modify the Opinion of Counsel Defense in Patent Law

*By Arun Chandra**

It is not uncommon for one's client to learn that another's patent might implicate its product or process. This knowledge, under current patent law, triggers a duty to exercise due care to avoid patent infringement. Failure to exercise the requisite due care can be disastrous: if one is found to have infringed the patent, that infringement may be deemed willful and the patent owner may be awarded treble damages.

To rebut a charge of willful infringement, the accused infringer must demonstrate that – under the given circumstances – it satisfactorily discharged its affirmative duty of exercising due care to avoid infringing the asserted patent.[1] The U.S. Court of Appeals for the Federal Circuit (hereinafter Federal Circuit) has suggested that advice of counsel, usually in the form of a written opinion letter,[2] is necessary to rebut a charge of willful infringement.[3] In fact, not only must the infringer obtain and rely on an opinion of counsel, the Federal Circuit has suggested that it must produce its opinion letter to the adversary.[4] Worse yet, reliance on counsel's opinion as a defense to willful infringement results in a waiver of attorney-client privilege and work product immunity with respect to all privileged communications relating to the asserted patent, sometimes including advice and strategy of trial counsel.[5]

Patent law is peculiar in this regard. In most other areas of law, there is rarely a duty to seek opinion of counsel prior to an actual litigation. Where one does obtain advice of counsel, there is no requirement that it be produced to the adversary in litigation,[6] unless the advice of counsel is voluntarily put at issue. To address this conflict, the Federal Circuit has granted *en banc* review in *Knorr-Bremse Systeme Fuer Nutzfahrzeuge Gmbh v. Dana Corp*.[7]

**Brief Overview of the Current Law**

Under current patent law, federal district courts are permitted to "increase the damages [resulting from patent infringement] up to three times the amount found or assessed."[8] Willful infringement is one basis for increasing damages.[9] Patent infringement is willful if, at the time of the infringing activity, the accused infringer had no reasonable basis for believing that it had a right to practice the patented invention.[10] The basic test is "whether, under all the circumstances, a reasonable person would prudently conduct himself with any confidence that a court might hold the patent invalid or not infringed."[11]

The Federal Circuit has enunciated a number of factors to evaluate whether an infringement is willful.[12] These factors include, *inter alia*, deliberate copying by the accused infringer, infringer's investigation and good-faith belief of invalidity or non-infringement, litigation conduct by the accused infringer, duration of the infringer's misconduct, the extent of any remedial actions taken by the infringer, infringer's motivation for harm, and the infringer's attempt to conceal its misconduct.[13] Despite these factors, courts often concentrate on whether the accused infringer exercised due care "by seeking the advice of competent and objective counsel, and receiving exculpatory advice."[14] Generally, the exculpatory opinion must establish that either the issued patent is invalid or unenforceable, or the product or process at issue is non-infringing. While the Federal Circuit has noted that it is not necessary to rely solely on an opinion letter to show good faith in practicing the claimed invention,[15] the court's pronouncements have, nevertheless, created an impression that such an opinion letter is very important.[16]

One must obtain and rely on an exculpatory opinion letter blessing the use of the product or process at issue. And, this opinion letter must be produced to the adversary if there is a patent infringement litigation involving that patent. The Federal Circuit has noted that a failure to produce the opinion letter may result in a negative inference:

> Where the infringer fails to introduce an exculpatory opinion of counsel at trial, a court must be free to infer that either no opinion was obtained or, if an opinion were obtained, it was contrary to the infringer's desire to initiate or continue its use of the patentee's invention.[17]

To preempt the negative inference, the accused infringer must assert an advice of counsel defense and produce an exculpatory opinion letter to its adversary. This, however, waives attorney-client privilege and work product immunity with respect to the opinion and other related communications.[18] The waiver may involve all privileged information related to the opinion – not just the opinion letter.[19] For example, courts have found a waiver to include communications relating to unasserted (but related) patents,[20] as well as to all defenses for which the accused infringer sought to rely on advice of counsel.[21] In some cases, the scope of the waiver has extended to any and all conversations between the infringer and its counsel.[22]

Not only can one end up waiving attorney-client privilege, but also work product immunity by relying on an advice of counsel defense. While some courts have held that work product protection is waived only with respect to work product communicated to the client,[23] others have gone further and held that the protection is waived for *all* work product – regardless of whether it is communicated to the client.[24]

In many cases, courts find a waiver of immunity over trial counsel's – not just opinion counsel's – communications with the accused infringer, and require that work product shared with the client be produced to the other side, if it is inconsistent with the opinion.[25] Some courts have gone further and held that *all* attorney work product from the trial counsel must be produced to the other side.[26]

**Problems with the Current Law**

The current Federal Circuit law on willful infringement is most problematic because it requires an exculpatory opinion of counsel upon learning of another's patent that could potentially cover its product or process. Such a coerced duty to obtain an opinion of counsel appears to ignore economic realities. For example, a business may have legitimate reasons for not seeking an opinion of counsel, such as when the business' (non-legal) staff genuinely makes a determination that an existing patent does not cover the product or operative process at issue. Alternately, a business may not have expendable resources to seek advice of counsel every time a patentee provides notice of a patent that may be related to its line of business.[27] Of course, forcing businesses to seek opinion letters every time they receive notice of an issued patent adds costs, sometimes unnecessarily, which are ultimately passed on to the consumers, resulting in market inefficiency.

One's predicament does not end with seeking advice of counsel. Should the accused infringer be hauled into court for patent infringement, it must face a Hobson's choice regarding claiming an advice of counsel defense: either rely on advice of counsel and waive attorney-client privilege as well as work product immunity, or not rely on advice of counsel but face a negative inference. The Federal Circuit has recognized this quandary:

> [A]n accused infringer…must choose between the lawful assertion of the attorney-client privilege and avoidance of a willfulness finding if infringement is found…An accused infringer [may] be forced to choose between waiving the privilege in order to protect itself from a willfulness finding, in which case it may risk prejudicing itself on the question of liability, and maintaining the privilege, in which case it may risk being found to be a willful infringer if liability is found.[28]

The waivers required by those asserting the advice of counsel defense are quite expansive, and often cover confidential documents relating to litigation strategies.[29] In such instances, damage suffered by the waiver of attorney-client privilege and work product immunity is severe – not just to the accused infringer but to the legal system:

> In performing his various duties,…it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways – aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[30]

Attorney-client privilege is "one of the pillars that supports the edifice that is our adversary system"[31] by encouraging clients to seek legal counsel without fearing public disclosure. Similarly, work product doctrine is another pillar supporting our adversary system, because "[a]bsent such protection, attorneys would fear their work product will be used against their clients, and may become overly circumspect in preparing for litigation thereby reducing their effectiveness as advocates."[32] Clearly, any rule that collides with attorney-client privilege or work product doctrine is antithetical to the American legal system, and must be restrained.

**Conclusion**

As a result of the current Federal Circuit law on the advice of counsel defense, an accused infringer must choose between either relying on an exculpatory opinion letter to protect itself from a charge of willfulness but waive attorney-client privilege and work product immunity, or suffer a negative inference while retaining attor-

ney-client privilege and work product immunity. In light of the importance given to an exculpatory opinion letter in fighting a charge of willful infringment, the two choices available to the accused infringer really amount to either effectively waiving its defense against a charge of willfulness – not just suffering a negative inference – or waiving its attorney-client privilege and work product immunity.

The Federal Circuit should make the advice of counsel defense optional in rebutting a charge of willfulness. Failure to obtain or disclose the opinion of counsel to the adversary should not result in an adverse inference. If, however, the accused infringer chooses to rely on the advice of counsel defense for rebutting a charge of willfulness, then it must disclose that opinion as well as waive attorney-client privilege and work product immunity over the subject matter of the opinion.[33] This change would conform the Federal Circuit law on the advice of counsel defense with that of the other circuits' laws on this defense.

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**Footnotes**

[1] *See* Crystal Semiconductor Corp. v. Tritech Microelectronics Int'l, Inc., 246 F.3d 1336, 1351 (Fed. Cir. 2001).

[2] *See* Minnesota Min. and Mfg. v. Johnson & Johnson Orthopaedics, Inc., 976 F.2d 1559, 1580 (Fed. Cir. 1992) (noting that defendant had no reasonable basis to rely on oral opinion because it was oral and not objective, and because oral opinions "carry less weight, for example, because they have to be proved perhaps years after the event, based only on testimony which may be affected by faded memories and the forces of contemporaneous litigation.").

[3] *See* Vulcan Eng'g Co., Inc. v. FATA Aluminum, Inc., 278 F.3d 1366, 1378 (Fed. Cir. 2002) ("The tort of willful infringement arises upon deliberate disregard for the property rights of the patentee. Thus the focus is generally on whether the infringer exercised due care to avoid infringement, usually by seeking the advice of competent and objective counsel, and receiving exculpatory advice.").

[4] *See* Fromson v. Western Litho Plate and Supply Co., 853 F.2d 1568, 1572-73 (Fed. Cir. 1988).

[5] *See* Quantum Corp. v. Tandon Corp., 940 F.2d 642, 643-44 (Fed. Cir. 1991).

[6] *See* Rudy-Glanzer ex rel Doe v. Glanzer, 232 F.3d 1258, 1265 (9th Cir. 2000); *see also* Nabisco, Inc. v. PF Brands, Inc., 191 F.3d 208, 225-26 (2d Cir. 1999); Lucent Information Management, Inc. v. Lucent Technologies, Inc., 186 F.3d 311, 318 (3rd Cir. 1999); In re Tudor Assocs., Ltd., II, 20 F.3d 115, 120 (4th Cir. 1994); Parker v. Prudential Ins. Co., 900 F.2d 772, 775 (4th Cir. 1990).

[7] 344 F.3d 1336 (Fed. Cir. 2003).

[8] 35 U.S.C. § 284.

[9] *See, e.g.*, State Indus., Inc. v. Mor-Flo Indus., Inc., 883 F.2d 1573, 1581-82 (Fed. Cir. 1989).

[10] *See* Stickle v. Heublein, Inc., 716 F.2d 1550, 1665 (Fed. Cir. 1983).

[11] *State Indus.*, 883 F.2d at 1581 (citation omitted).

[12] Read Corp. v. Portec Inc., 970 F.2d 816, 826-28 (Fed. Cir. 1992).

[13] *Id*. at 826-27.

[14] *Vulcan*, 278 F.3d at 1378.

[15] *See* Kloster Speedsteel AB v. Crucible Inc., 793 F.2d 1565, 1579 (Fed. Cir. 1986) ("[N]ot every failure to seek an opinion of competent counsel will mandate an ultimate finding of willfulness.").

[16] *See* Spindelfabrik Suessen-Schurr Stahlecker & Grill, GmbH v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft, 829 F.2d 1075, 1084 (Fed. Cir. 1987) (noting that "affirmative duty [to exercise due care] will normally entail the obtaining of competent legal advice before engaging in any potentially infringing activity or continuing such activity"); *see also* Underwater Devices Inc. v. Morrison-Knudsen Co., 717 F.2d 1380, 1389-1390 (Fed. Cir. 1983) ("[A]n affirmative duty [to exercise due care] includes, *inter alia*, the duty to seek and obtain competent legal advice from counsel before the initiation of any possible infringing activity.").

[17] *Fromson*, 853 F.2d at 1572-73.

[18] *See Quantum*, 940 F.2d at 643-44 (discussing waiver of attorney-client privilege stemming from assertion of an opinion of counsel defense).

[19] *See* Chiron Corp. v. Genentech, Inc., 179 F. Supp. 2d 1182, 1187 (E.D. Cal. 2001); *Thorn EMI N. Am. v. Micron Tech., Inc.*, 837 F. Supp. 616, 621 (D. Del. 1993).

[20] *See* Steelcase Inc. v. Haworth, Inc., 954 F. Supp. 1195, 1200 (W.D. Mich. 1997).

[21] *See id*. at 1198 ("[A] defendant asserting an advice-of-counsel defense must be deemed to have waived the privilege as to all communications between counsel and client concerning the subject matter of the opinion.").

[22] *See* Novartis Pharms. Corp. v. Eon Labs Mfg., Inc., 206 F.R.D. 396, 399 (D. Del. 2002) (holding that the waiver of the attorney-client privilege applies "broadly to any and all materials available to the attorneys rendering the legal advice."); Mushroom Associates v. Monterey Mushrooms, Inc., 24 U.S.P.Q.2d 1767, 1770-71 (N.D. Cal. 1992) (holding the attorney-client privilege waived with respect to all documents pertaining to the patent in suit and requiring production of all documents containing work product relevant to the infringement issue, whether or not communicated to client).

[23] *See, e.g.*, Nitinol Medical Technologies, Inc. v. AGA Medical Corp., 135 F. Supp. 2d 212, 218 (D. Mass. 2000); *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361, 363-64 (D. Mass. 1995); *Thorn EMI*, 837 F. Supp. at 621-22.

[24] *See Novartis*, 206 F.R.D. 396; *see also* Dunhall Pharmaceuticals, Inc. v. Discus Dental, Inc., 994 F. Supp. 1202, 1209 n.3 (C.D. Cal. 1998) (waiver of all work product that "refer[s] or reflect[s] … rejection or intentional disregard of the original opinion, including but not limited to contrary opinions from different counsel."); Kelsey-Hayes Co. v. Motor Wheel Corp., 155 F.R.D. 170, 172 (W.D. Mich. 1991) (requiring that infringer produce any attorney opinions that "support, contradict or weaken" the relied upon opinion, and any other evidence that would go to the defendant's "good faith reliance" on the opinion); *Mushroom Associates*, 24 U.S.P.Q.2d at 1770-71.

[25] Beneficial Franchise Co., Inc. v. Bank One, N.A., 205 F.R.D. 212, 218 (N.D. Ill. 2001) (holding that attorney work product that casts doubt or contradicts attorney opinions can be accessed "even if prepared by trial counsel after suit was commended."); *see also Micron Separations*, 159 F.R.D. at 364.

[26] *See* Akeva L.L.C. v. Mizuno Corp., 243 F. Supp. 2d 418, 424-25 (M.D.N.C. 2003).

[27] This problem is not an abstract hypothetical situation. Large corporations often receive letters from patentees advising them of issued patents. Such notices require them to seek opinion of counsel. Though an opinion letter may not always be necessary, since some of the issued patents may not implicate their business, a company must play it safe and get advice of counsel. Because a written opinion of counsel can be expensive, *see* Matthew D. Powers & Steven C. Carlson, *The Evolution and Impact of the Doctrine of Willful Patent Infringement*, 51 Syr. L. Rev. 53, 102 (2001), the corporation's legal costs in obtaining opinion letters may be quite high.

[28] *Quantum*, 940 F.2d at 643-44.

[29] *See* Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

[30] *See id.*; *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure."); *Parker*, 900 F.2d at 775 ("An individual in a free society should be encouraged to consult with his attorney whose function is to counsel and advise him and he should be free from apprehension of compelled disclosures by his legal advisor. To protect that interest, a client asserting the privilege should not face a negative inference about the substance of the information sought").

[31] *In re* Ford Motor Co., 110 F.3d 954, 962 (3d Cir. 1997).

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

[33] *See* Baker v. General Motors Corp., 209 F.3d 1051, 1055 (8th Cir. 2000) (noting that there is a privilege waiver "when a client uses reliance on legal advice as a defense."); *see also* Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 537 (3d Cir. 1996) (assertion of defense directly implicating advice of counsel waives attorney-client privilege as to that issue); Rhone-Poulenc Rorer, Inc. v. Home Indem. *Co.*, 32 F.3d 851, 863 (3d Cir. 1994) ("There is authority for the proposition that a party can waive the attorney client privilege by asserting claims or defenses that put his or her attorney's advice in issue in the litigation."); Panter v. Marshall Field & Co., 80 F.R.D. 718, 721 (N.D. Ill. 1978) ("Where ... a party asserts as an essential element of his defense reliance upon the advice of counsel, we believe the party waives the attorney-client privilege with respect to all communications, whether written or oral, to or from counsel concerning the transactions for which counsel's advice was sought.").

# Public Choice, Patents, and the FTC: Comments on the Commission's October 2003 Report on the Interface between Patents and Antitrust

*By F. Scott Kieff**

In October, 2003, after conducting a year of joint hearings with the Department of Justice's ("DOJ") Antitrust Division "to develop a better understanding of how to manage the issues that arise at the intersection of antitrust and intellectual property law and policy,"[1] the Federal Trade Commission ("FTC") issued a report of over 300 pages that appears to represent only the patent portion of only its own (not the DOJ's) conclusions and recommendations.[2] The comments in this essay are based on the belief that the FTC is a well-intentioned, well-organized, and well-run government agency operating with the benefit of adequate resources including a well-intentioned, well-trained, and well-operating staff. Nevertheless, the comments hope to point out how even with precisely such seemingly optimal conditions at least in this case and for this form of action, "government is the problem."[3] The FTC Report represents a substantial amount of action by one government agency that has been given no express role in administering patent laws and only a shared role in administering the antitrust laws.[4] Its core recommendations largely increase the overall footprint of government in commerce, and have the paradoxical effect of generally frustrating the market entry that these laws are designed to facilitate.

Concerns that patent rights may somehow go too far are not new and not unique,[5] even for new technical fields such as biotechnology,[6] or special areas of public interest such as the environment.[7] Indeed, the bottom line reason for the government to make available to market actors the right to exclude given by a patent is precisely because this right to exclude use protected by a property-like rule of exclusion turns out to be essential for ensuring maximal use of inventions that are indeed new and non-obvious.[8] The patent right to exclude facilitates the complex coordination that is necessary to allow downstream commercialization of these inventions.[9]

To be sure, a number of difficult issues do arise at the interfaces patent law shares with other disciplines, such as contract law and antitrust law. But it is important to remember that these issues have long been present and have previously been considered, and indeed were the impetus for specific legislative deliberation and action in response – such as the present patent system itself in the form of the 1952 Patent Act.[10] The approach Congress adopted focuses on the basics of both patent law and antitrust law; and such a "basics matters" approach best resolves these issues.[11]

If it turns out that such a system based on the basics is not working as society perhaps would like, then it certainly makes sense to ask how it was designed to operate in the first place, and what exactly is meant by the basics. Patent system critics express concern that the system may be in steep decline due to an increase in the number of patents issued by the U.S. Patent and Trademark Office that these critics suggest do not meet the proper patentability standards and, as a result, are too broad or too narrow, unduly tax and retard negotiations, or frustrate competition.[12]

But it turns out that no patent system could do a better job of examining patents for several reasons.[13] Because the information needed to determine patentability over the prior art for making determinations of novelty under Section 102 and nonobviousness under Section 103 is diffuse throughout the market, even the best equipped, staffed, and funded patent office would not find it as easily and inexpensively as the private market. Indeed, the present Patent Office is not resource constrained – it turns a profit of roughly $100 million annually. Moreover, more scrutinizing examination brings with it a host of other serious errors, such as the creation of various judge-made or agency-made legal theories like the so-called exclusions for patents in fields like biotechnology and high technology, which crept into the system under the Warren Court and had to be eliminated by the Burger Court.[14]

As discussed at length in other work, a more simple and more modest reform that would better address the pernicious impact of issued patents that are presumed to be valid but would be found invalid by a court is to just decrease or eliminate the presumption of validity and allow patent challengers to get enhanced damages or attorney fees from patentees who baselessly assert invalid patents.[15] Although ultimately the subject of an empirical question for further research, the costs associated with these reform proposals are likely to be less than the costs under the existing system—costs associated with those pernicious issued patents presumed to be valid but likely to be held invalid if tested in court.[16] The combined effect would be positive in several respects. For those patents that are pernicious under the present regime because of the litigation and *in terrorem* costs they impose on third parties, the proposed reforms would allow third parties to bear only the lower costs associated with markets for opinions of counsel on validity and infringement, including costs and benefits of the fee-shifting techniques. For those patents that have proper scope in that they avoid the prior art and satisfy the disclosure requirement, the proposed reforms would allow patentees to have essentially the same costs as under the present system associated with patent drafting and litigation, except that the costs of opinions will decrease slightly (or quality improve slightly) as the market for

them becomes more developed.[17] Finally, one effect that may be seen as positive or negative, depending on point of view, is that there will be a slight decrease in the value of all patents due to the costs to patentees associated with the new need to litigate their own affirmative validity cases. Interestingly, all of these effects combine to yield a system that may be comparatively advantageous over the present system for small players in particular for several reasons: it will save them from the *in terrorem* effect of junk patents, it will save them their own patent prosecution costs, and they will have ready access to markets to facilitate with funding or strategic partnerships in their own litigation and commercialization efforts when needed. Therefore, those dissatisfied with the pernicious impact of invalid patents should favor a change in our system that makes it more like registration by adopting the proposed reforms of weakened or no presumption of validity, fee shifting, and enhanced reliance on opinions of counsel (for both patentees and competitors) rather than the more scrutinizing examination approaches offered by others.

These reforms proposed here stand largely in contrast to several of the recommendations in the recent FTC Report. To be sure, some of the FTC recommendations, such as publication of patents,[18] make great sense because they will help the market best assess patents for both validity and infringement. Other FTC recommendations, such as elimination of the substantive presumption of validity and post-grant review of patents,[19] may be consistent with the reforms proposed here and would be great if properly implemented.[20] But, the bulk of the recommendations should be avoided.

Most of the recommendations in the FTC Report should be avoided because they will frustrate the market entry that the competition laws – patent and antitrust – are designed to facilitate. These include the recommendations for a change in the patent-obtaining rules relating to nonobviousness, utility, and subject matter, as well as the vague concern about economic impact, a change in the patent enforcement rules relating to notice and so-called prior user rights, increased funding for the Patent Office, more involved examination, and increased deference to Patent Office decisions.[21] The proposed changes on nonobviousness, utility, subject matter, economic impact, more involved examination, and deference, are entirely analogous to areas of judge-made and agency-made law that (1) were the driving forces behind and were reversed by the 1952 Act that was adopted by Congress; (2) were the driving forces behind and were reversed by the Burger Court cases; and (3) expose small and medium-sized patentees to the realization of concentrated public choice pressures that created these pernicious judge-made and agency-made laws in the first place.[22] The proposed changes on increased funding would at worst raise the same objections and at best simply lead to waste because the information needed to determine validity over the prior art is more inexpensively provided by private parties in litigation.[23] The proposed change to give prior user rights for parties who infringe claims that are disclosed in a published application but not actually added to the claims portion of a patent application until after publication should be avoided because they would totally pervert the nuanced and smooth interaction between patent law's disclosure rules and the notice function of patents.[24] Lastly, the proposed requirement for written notice or deliberate copying before a patentee could win enhanced damages for willful infringement should be avoided because they would make the patent right more like a liability rule and less like a property rule in ways that particularly favor bigger parties.[25]

Interestingly, the recommendations in the FTC Report closely correlate to data recently gathered and reported by Iain M. Cockburn of the Boston University School of Management and the National Bureau of Economic Research and Rebecca Henderson of the Massachusetts Institute of Technology's Sloan School and also of the National Bureau of Economic Research.[26] This information was gathered from a survey conducted in the late summer of 2002 of senior intellectual property managers at large companies and was sponsored by the Intellectual Property Owners Association. This close correlation between the recommendations in the FTC Report and the results of the survey is consistent with the view that some leaders in the field think the agency "got it right." But this data does not speak to whether the agency "got it right" in the view of the same people at a different time or other people situated differently, such as those who work in small and medium-sized businesses, or those who endeavor to approach the issue without any specific client with a present specific agenda in mind. Indeed, the close correlation between the views of large patent holders and the FTC Report is totally consistent with a public choice agency capture story and only support the perception that the recommendations of the FTC Report will lead to a more Keiretsu-like approach for the U.S. patent system than ever before, in which large players could regularly trade large numbers of low value patents with each other while market entry is basically avoided.

In the final analysis, patents are rather simple things. They are rights to exclude over which private parties can bargain rather well. The rules on novelty and nonobviousness prevent valid patents from issuing on things others are otherwise doing or about to do. The disclosure rules help all market actors – patentees and their competitors – best order their affairs and bargain. Patent laws work best when kept simple. Sometimes less is more. That is certainly true for the laws regulating patents. The basic rules for obtaining and enforcing patents are time-tested; and they work. The problem with government here is that it is responding to requests to look in a piece-wise fashion at perceived problems with components of the patent system while overlooking that these problems were part of the larger deliberations that led to the nuanced statutory framework of the present

patent system – the 1952 Patent Act. When regulators are asked to so look, we should not be surprised to see them regulate more.[27] Although in this case the agency action may seem less like rent seeking on the part of the FTC because the bulk of its recommendations appear to give a greater role to the Patent Office, these recommendations can also be viewed as erecting more hurdles for the patent system generally, if not the Patent Office specifically, and the FTC has already shown its willingness to intervene when it perceives problems with patents.[28]

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**Footnotes**

[1] *See* Notice of Public Hearings Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy, 66 Fed. Reg. 58,146, 58,147 (Nov. 20, 2001) (announcing joint hearings and explaining the reasons for them); *see also* Press Release, Federal Trade Commission, Muris Announces Plans for Intellectual Property Hearings (Nov. 15, 2001) (collecting sources, including links to Federal Register Notice and to speech by Chairman Timothy Muris, and questioning these and other aspects of the patent system), *available at* http://www.ftc.gov/opa/2001/11/iprelease.htm (last visited Nov. 13, 2003).

[2] Fed. Trade Comm'n, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (2003) [hereinafter "FTC Report"], *available at* http://www.ftc. gov/os/2003/10/innovationrpt.pdf (last visited Nov. 13, 2003). For an excellent and easily accessible brief review of the report and its main recommendations see Constance K. Robinson, James L. Ewing, IV, and Peter M. Boyle, *IP and Antitrust: US antitrust enforcement agency proposes changes to US patent law*, Competition Law Insight, 20 (Dec., 2003/Jan., 2004).

[3] *See* Milton Friedman, *Why Government is the Problem,* Hoover Institution Essays on Public Policy (1993), 1:

> This text leaves me two tasks: one easy, one difficult. The first task is to demonstrate that government is the problem; that's the easy task. The hard task is to understand why government is the problem. Why is it that able, public-spirited people produce such different results according to whether they operate in the political or economic market? Why is it that if a random sample of the people who read this essay and are not present in Washington were to replace those who are in Washington, our policies would likely not be improved? This is the real puzzle for me.

[4] Indeed, for even the one government agency that is given by statute some limited role in administering the patent laws, the Patent and Trademark Office, the courts have recognized that it should not get deference on questions of law or policy because it is not vested with sufficient statutory authority. *See* Merck & Co. v. Kessler, 80 F.3d 1543, 1549–50 (Fed. Cir. 1996), in which the U.S. Court of Appeals for the Federal Circuit stated the following:

> As we have previously held, the broadest of the [Patent Office]'s rulemaking powers—35 U.S.C. §6(a)—authorizes the Commissioner to promulgate regulations directed only to "the conduct of proceedings in the [Patent Office];" it does *not* grant the Commissioner the authority to issue substantive rules. Because Congress has not vested the Commissioner with any general substantive rulemaking power, the "Final Determination" at issue in this case cannot possibly have the "force and effect of law." Thus, the rule of controlling deference set forth in *Chevron* does not apply.

(footnotes and internal citations omitted) (holding that the Patent Office is not entitled to the deference given other administrative agencies, which are vested with sufficient power by Congress, under the U.S. Supreme Court's decision in Chevron, USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984)). See also Orin S. Kerr, *Rethinking Patent Law in the Administrative State*, 42 Wm. & Mary L. Rev. 127, 127–33 (2000) (arguing that administrative law doctrines should not apply to patent law); In re Lueders, 111 F.3d 1569, 1574–79 (Fed. Cir. 1997) (Rich, J.) (reviewing reasons for not applying enhanced deference to the Patent Office).

[5] *See*, *e.g.*, Donald S. Chisum, Craig Allen Nard, Herbert F. Schwartz, Pauline Newman, & F. Scott Kieff, Principles of Patent Law 1-72 (2nd ed. 2001) (reviewing history, philosophy, and economics of patent law, and collecting sources).

[6] *See*, *e.g.*, F. Scott Kieff, *Facilitating Scientific Research: Intellectual Property Rights and the Norms of Science - A Response to Rai & Eisenberg*, 95 NW. U. L. Rev. 691 (2001); F. Scott Kieff, Perspectives on Properties of the Human Genome Project (Academic Press, an imprint of Elsevier) (2003).

[7] *See*, *e.g.*, F. Scott Kieff, *Patents for Environmentalists*, 9 Wash. U. J.L. & Pol'y 307 (2002).

[8] F. Scott Kieff, *Property Rights and Property Rules for Commercializing Inventions*, 85 Minn. L. Rev. 697 (2001) (discussing the core view by Judge Rich, the central framer of the present patent system, which is the 1952 Patent Act, that patents are best viewed and best used as tools for facilitating downstream commercialization of inventions rather than as tools for providing incentives to invent; and showing how this property right protected by a property rule of exclusion best achieves this goal).

[9] *Id*.

[10] F. Scott Kieff & Gerald J. Mossinghoff, *A Reemergence of Regulation at the Interface Between Patents and Antitrust*, 4 Engage 97 (2003) (discussing history of patent and antitrust interface and the important legislative changes brought by the 1952 Act in response to the many complex issues at this interface).

[11] F. Scott Kieff & Troy Paredes, *The Basics Matter: At the Periphery of Intellectual Property*, Stanford Law School John M. Olin Program in Law and Economics Working Papers Series # 275, *available at* http://olin.stanford.edu/workingpapers/index.html (last visited Feb. 12, 2004) (explaining how a basics approach best resolves the seemingly complex problems at the interface between patents and antitrust, such as patent misuse, tying, etc.).

[12] For a collection of academic and popular literature making these criticisms, see Mark A. Lemley, *Rational Ignorance at the Patent Office*, 95 Nw. U. L. Rev. 1495, 1495 n.1 (2001). For a schedule of the commentators who testified before the FTC/DOJ joint hearings and the topics they covered see http://www. ftc.gov/opp/intellect/detailsandparticipants.htm (last visited Nov. 13, 2003).

[13] *See* F. Scott Kieff, *The Case for Registering Patents and the Law and Economics of Present Patent-Obtaining Rules*, 45 B.C. L. Rev. 55 (2003) (showing how the rules for patentability operate and why with a proper understanding of how they operate it makes better sense to move more towards a registration system than a more scrutinizing examination system) [hereinafter Kieff, *Registering Patents*];

F. Scott Kieff, *Comments Regarding Competition & Intellectual Property, Summary of Proposed Testimony* (same) *available at* http://www.ftc.gov/os/comments/intelpropertycomments/harvardlaw.pdf (2001) (last visited Nov. 13, 2003).

[14] Examples of Burger Court fixes include Diamond v. Diehr, 450 U.S. 175, 187 (1981) ("A claim drawn to subject matter otherwise statutory does not become nonstatutory simply because it uses a mathematical formula, computer program, or digital computer.") and Diamond v. Chakrabarty, 447 U.S. 303, 309–18 (1980) (holding living organisms not per se unpatentable). *See also* Kieff & Paredes, *supra* note 11 (reviewing several other one-off judge-made bodies of law at the interface between patents and antitrust).

[15] *See generally*, Kieff, *Registering Patents*, *supra* note 13 (describing how markets for opinions of counsel and fee shifting techniques would operate).

[16] Although these reforms are likely to lead to some duplication in the costs associated with searching the art and writing opinions, they will avoid much of the costs under the present system that are associated with litigation or its in terrorem effect. In addition, a broadening of the market for opinions of counsel for both patentees and competitors will help resolve several of the difficult questions associated with opinions of counsel for potential infringers under the present system. For example, the Federal Circuit recently decided to consider en banc the role of adverse inferences when attorney-client privilege or work product immunity is asserted to prevent disclosure of an opinion of counsel and when no opinion has been offered in a case. *See* Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp., 344 F.3d 1336, 1336–37 (Fed. Cir. 2003) (per curiam). The privilege and immunity problems are sharpest when they relate to opinions by litigating counsel, and the presence of a broader market for opinions will make it less likely that the pertinent opinion will happen to be from litigating counsel. The problem of no opinion similarly will be mitigated as the broader market for opinions makes them more widely and cheaply available.

[17] In addition, if we switched all the way to a registration system, the private costs as well as the public administrative costs associated with patent prosecution and examination would be eliminated for all patents.

[18] *See* FTC Report, supra note 2, at 15–16 (Recommendation 7).

19 Id. at 7–10 (Recommendations 1–2).

[20] The elimination of the presumption of validity certainly makes sense for the reasons explored here. The various post grant review procedures that are suggested may not make sense for reasons explored at greater length in Kieff, *Registering Patents, supra* note 13, at 115-122.

[21] *See* FTC Report, supra note 2, at 10–17 (Recommendations 3–6, 8–10). *But see*, Kieff, *Registering Patents*, *supra* note 13 at 122, n.291 (discussing FTC Report).

[22] *See* Kieff *supra* note at 13 at 105-122 (discussing the history and impact of these approaches and the reasons for eschewing each).

[23] *Id*. at 74-98.

[24] The disclosure rules allow a patentee to claim as broadly as the initially filed disclosure will support. However, during the back and forth process of patent prosecution and examination the scope of the presently active claims at any given time regularly fluctuates. This works when both the Patent Office and the applicant know that it is only the finally issued claims that will matter. But if it is the claims that get published during the interim that matter then this give and take process will not work. What is more, given a basic understanding of the disclosure rules no reasonable third party would think that an initially filed application would not eventually lead to the maximally supported claim scope. To the extent the prosecution and examination process takes longer than the 18-month publication window – it typically takes three years – this delay is most often due to the Patent Office and indeed the applicant pays for it in that its patent term is measured from the filing date, not the issue date. Lastly, it is important to note that under a full registration system, none of these delays would be relevant.

[25] *See* Kieff *supra* note 8 (discussing the importance of enforcing patents with property rules not liability rules).

[26] The author is grateful to Iain and Rebecca for generously sharing the results of their data. Interview with Iain M. Cockburn, Professor of Finance and Economics, Boston University School of Management, in Boston, Mass. (Nov. 11, 2003).

[27] *See* Friedman, *supra* note 3, at 7-13:

> The general rule is that government undertakes an activity that seems desirable at the time. Once the activity begins, whether it proves desirable or not, people in both the government and the private sector acquire a vested interest in it. If the initial reason for undertaking the activity disappears, they have a strong incentive to find another justification for its continued existence.
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> * * *
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> Again, let me emphasize, the problem is not that bureaucrats are bad people. The problem, as Marxists would say, is with the system, not with the people.

[28] For an excellent and easily accessible review of other recent FTC activities see Stanley M. Gorinson, James L. Ewing, IV, and Peter M. Boyle, *Federal Antitrust Enforcers Focus on Intellectual Property Abuses*, Intellectual Property Law Today 38 (Aug. 2003).

# International & National Security Law

## The Campaign to "De-Weaponize" Space: Why America Needs to Defend our Space Assets and our Right to Deploy a Space-Based ABM System

*By Robert F. Turner**

On December 13, 2001, President Bush announced that the United States was withdrawing from the 1972 Anti-Ballistic Missile [ABM] Treaty, pursuant to the terms of Article XV of that bilateral accord.[1] The withdrawal became legally effective at the expiration of a six-month period of notice.

The termination of the ABM Treaty removed the only legal prohibition against the United States developing a space-based ABM system to protect itself and other countries against rogue states or terrorist groups who might either seek to slaughter large numbers of innocent people with Weapons of Mass Destruction (WMD) delivered via ballistic missile, or seek to use the potential of such an attack to blackmail the United States into abandoning an ally or making other concessions to tyranny or terror. Although a detailed discussion of the relative benefits of a space-based ABM system is beyond the scope of this article, it should be noted that many technical experts believe that such a system would be by far the most effective approach.

The issue being addressed here is broader than the ABM debate. The United States military in the twenty-first century is tremendously dependent upon space-based assets. We fight wars using precision munitions delivered to the war zone by aircraft guided by the Global Positioning System (GPS) and guided to within a few feet of their target by signals from multiple GPS satellites. Targeting instructions, weather, and numerous other data are provided to decision makers by other satellites. These satellites are undefended at present, and the technology already exists to destroy them.

Indeed, it is no secret that the People's Republic of China has been working on an advanced anti-satellite system of "parasitic satellites" designed to destroy key American military satellites during periods of crisis.[2] In June, 2000, the chairmen and ranking minority members of the House and Senate Armed Services Committee appointed eleven members to the Commission on the Organization of National Security Space, created pursuant to the National Defense Authorization Act for FY 2000.[3] Two other members were appointed by Secretary of Defense William S. Cohen in consultation with the Director of Central Intelligence. On January 11, 2001, the Commission—chaired by Donald Rumsfeld—issued its report, which concluded, *inter alia*:

> Space systems are vulnerable to a range of attacks that could disrupt or destroy the ground stations, launch systems or satellites on orbit. The political, economic and military value of space systems makes them attractive targets for state and non-state actors hostile to the United States and its interests. . . .
>
> The U.S. is more dependent on space than any other nation. Yet, the threat to the U.S. and its allies in and from space does not command the attention it merits from the departments and agencies of the U.S. Government charged with national security responsibilities. . . . The reality is that there are many extant capabilities to deny, disrupt or physically destroy space systems and the ground facilities that use and control them. Examples include denial and deception, interference with satellite systems, jamming satellites on orbit, use of microsatellites for hostile action and detonation of a nuclear weapon in space. . . .
>
> As harmful as the loss of commercial satellites or damage to civil assets would be, an attack on intelligence and military satellites would be even more serious for the nation in time of crisis or conflict. As history has shown—whether at Pearl Harbor, the killing of 241 Marines in their barracks in Lebanon or the attack on the *USS Cole* in Yemen—if the U.S. offers an inviting target, it may well pay the price of attack. With the growing commercial and national security use of space, U.S. assets in space and on the ground offer just such targets. The U.S. is an attractive candidate for a "space Pearl Harbor."[4]

We have been warned, but forces are currently at work that would deny America the ability to defend its space-based assets. A few argue that such measures are already unlawful, but most legal experts—even those deeply committed to arms control—recognize that U.S. options can only be curtailed by making new law. So, both within the United States and around the world, a campaign is underway to pressure the United States to negotiate and ratify a new multilateral treaty prohibiting the militarization or "weaponization" of space. Support for such an effort is widespread around the globe, with Russia, China, and Canada playing prominent roles. Domestically, at least one announced presidential candidate has introduced legislation endeavoring to compel the

President to join in this effort.[5] On its face—without understanding the nature of the existing threat and our inability to verify compliance with such a treaty if we do leave our space resources vulnerable—the idea of "preventing a new arms race" in space will be attractive to a large number of Americans and their representatives.

It is therefore important for civic-minded members of the legal profession to be aware of these developments and to understand some of their ramifications. To that end, this article will briefly examine the existing legal regime governing military uses of outer space and the effort to bring into force new limitations—limitations motivated in large part by a perceived need to prevent the United States from building an effective anti-ballistic missile system now that the 1972 ABM Treaty has been terminated.

**1. Legal Arguments Against Space-Based Ballistic-Missile Defense**

Any effort to promote an effective ballistic-missile defense program, or other defensive systems involving the use of space, will undoubtedly face two related, but inconsistent, challenges. A few will contend that the *corpus juris spatialis*—the international law governing outer space—already prohibits the "militarization" or "weaponization" of space.[6] This contention is so devoid of legal merit that all but the most hard-core opponents of BMD will fall back to the argument that international law *ought* to ban such uses of space, and going forward with a U.S. space-based ABM program will forever preclude that possibility and thus undermine "world peace" for eternity. But, as will be shown, this argument, too, is unpersuasive.

In reality, the "militarization" of space began with the first Sputnik launch in 1957, and virtually every space platform has at least some potential military use. Indeed, precisely because they have been used for military purposes, the existence of space-based platforms has contributed *tremendously* to the maintenance of international peace and security, upholding the UN Charter, and the promotion of fundamental humanitarian values.

For example, when the UN Security Council in November 1990 authorized the use of armed force in response to Iraq's blatant aggression against neighboring Kuwait, the United States and its allies made regular use of satellites both to accomplish their military missions expeditiously and effectively and to reduce both "friendly fire" loses and "collateral damage" to innocent civilians to a minimum.

Most weapons systems are inanimate objects deriving any moral character from the purpose and manner in which they are used. A pistol in the hands of a policeman may prevent murder and uphold the rule of law. The same handgun could become an instrument of great evil in other hands. Large numbers of tanks, howitzers, and aircraft—backed up by the threat of nuclear retaliation by the United States—kept most of Europe free during the more than four decades of the Cold War. There is evidence that the threat of a nuclear response dissuaded Saddam Hussein from using weapons of mass destruction against United Nations coalition forces during Operation Desert Storm.[7]

The debate over whether the United States should enter into a treaty prohibiting it from protecting its people and military forces—and, to the extent possible, protecting innocent potential victims in other countries as well—from attack by totalitarian rogue states or international terrorists will not likely be a short one. At present, neither the President nor two-thirds of the United States Senate seem so inclined. But, in the meantime, it is important to understand that a space-based ballistic missile defense system would not even arguably be in violation of America's current obligations under international law, and moving to protect our people for growing catastrophic threats will not preclude a future decision to ratify a "non-weaponization" treaty any more than our initial investment in a rudimentary ABM system in the late 1960s prevented us from entering into the 1972 ABM Treaty with the Soviet Union.[8]

**2. The Prohibition Against National Ballistic Missile Defense**

Until June 13, 2002, the United States was bound by treaty obligation "not to deploy ABM systems for a defense of the territory of its country"[9] and "not to develop, test, or deploy ABM systems or components which are . . . space-based,"[10] but that obligation ceased to exist when the United States acted pursuant to Article XV and withdrew from the 1972 ABM Treaty. Since that date, there have been no domestic or international legal obligations prohibiting the United States from developing and deploying a space-based ABM system. The provisions of Article 2(4)[11] of the UN Charter would, of course, prohibit the aggressive use of such a system.

**3. The 1967 Outer Space Treaty**

By far the most important treaty governing the use of outer space is the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies (more commonly known as the "Outer Space Treaty"), which entered into force in October 1967 and currently has nearly 100 parties. It has been characterized by legal scholars as the "Magna Carta of Outer Space Law,"[12] the "constitution of outer space,"[13] and "the foundation for international legal order in outer space."[14] And because some have alleged that it prohibits a space-based ABM system, it is important to look at least briefly at the Treaty.

The lengthy preamble recognizes "the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes," but preambles are not binding under international law. The key operative language commonly relied upon by those who contend the Outer Space Treaty prohibits military activities is contained in Article IV, which provides:

> States Parties to the Treaty undertake not to place in orbit around the Earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner.
>
> The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the Moon and other celestial bodies shall also not be prohibited.

As the text suggests, the first paragraph of Article IV prohibits the orbiting or installation of weapons of mass destruction—that is, nuclear, chemical, or biological weapons—in space. Since none of the ballistic-missile defense proposals being considered by the United States involve the use of WMD, our focus should be on paragraph two, which is limited to "[t]he Moon and other [natural] celestial bodies." Again, space-based BMD systems currently under discussion do not involve the "establishment of military bases, installations and fortifications," the "testing of any type of weapons" or "the conduct of military maneuvers on celestial bodies." So paragraph two of Article IV is also no impediment.

Many critics of ballistic missile defense would like to interpret the "peaceful purposes" language more broadly than its clear context permits. But the record of the treaty negotiations shows that several states pointed out that the "peaceful purposes" language applied only to activities on celestial bodies, and the text was not changed.[15] This was thus not an oversight.

It is also important to understand that the term "peaceful purposes" in the Outer Space Treaty was understood to mean "non-aggressive" rather than "non-military." This is clear both from the *travaux preparatorie* (preparatory works or negotiating history) of the Treaty and from its context, as it would have made no sense at all to place specific limits on bases, maneuvers, or weapons of mass destruction if *all* military uses of space were being outlawed. Further, Article IV makes specific reference to the permitted use of "military personnel" in space.

The point is sufficiently important that a bit of background may be useful. The term "exclusively for peaceful purposes" in connection with outer space first appeared in (nonbinding[16]) UN General Assembly Resolution 1348 (XII), which was introduced by the United States and approved by the General Assembly on November 14, 1957. When it was first introduced, the United States subjectively contemplated a regime in which all military uses of outer space would be prohibited, and this view was endorsed by several other states as well. But the American view changed sometime between late 1958 and 1959, and the United States has since 1959 consistently taken the view that "peaceful purposes" means "non-aggressive" rather than "non-military" purposes.[17] Indeed, in the early 1960s the United States Air Force began working on a Manned Orbiting Laboratory (MOL), and this program was ongoing when the Outer Space Treaty was negotiated.[18] As the late Senator Albert Gore (father of the former vice president by the same name) told the United Nations General Assembly more than four decades ago, the "test of any space activities must not be whether it is military or non-military, but whether or not it is consistent with the United Nations Charter and other obligations of law."[19] It is noteworthy that during more than four decades no country has formally objected to the American definition that "peaceful purposes" means "non-aggressive" rather than "non-military."[20]

The Soviet Union also had ongoing military programs involving space in the late 1950s and early 1960s, but they were highly secret and—for propaganda reasons, as well as to try to block American space programs—Moscow argued that "peaceful purposes" precluded any military uses of space. But as Soviet programs became more visible Moscow gradually acquiesced in the American position, which was clearly reflected in the text of the Outer Space Treaty.[21]

Today, there is near universal agreement among states that the Outer Space Treaty does not ban non-aggressive military activities in outer space that do not involve weapons of mass destruction or take place on celestial bodies. This is evident in the behavior of even the strongest critics of any effort by the United States to deploy a space-based anti-ballistic missile defense system, because, rather than alleging such a program would be unlawful, they are calling for a new treaty that would either "demilitarize" or "de-weaponize" outer space.

**4. "Peaceful Purposes," the Antarctica Treaty, and the UN Charter**

The "peaceful purposes" language of Article IV(2) of the Outer Space Treaty follows a pattern established by the 1959 Antarctica Treaty, and it is clear from even a casual examination of their texts that the Outer Space Treaty was in many respects patterned after the Antarctica Treaty. But rather than proving (as some argue) that the Outer Space Treaty was intended to preclude all military uses of space, the 1959 treaty demonstrates that the world community knew how to "demilitarize" a region when it so wished, and the *departure* from the language employed in the treaty they were using as a model clearly reflects an intention to depart from its meaning. Thus, Article I of the Antarctic Treaty provides:

> Antarctica shall be used for peaceful purposes only. There shall be prohibited, *inter alia*, any measures of a military nature, such as the establishment of military bases and fortifications, the carrying out of military maneuvers, as well as the testing of any type of weapons.[22]

The negotiators of the 1967 Outer Space Treaty clearly elected to apply this demilitarization regime only to "celestial bodies" like the Moon, and *not* to outer space in general.

It is also noteworthy that the language in question refers to peaceful *purposes*, and not to capabilities or uses. Purposes clearly refers to the subjective intentions of the actor, and thus a dual-use technology can presumably be used even on a celestial body if the purpose for which it is placed there is non-aggressive (and it does not otherwise violate an expressed prohibition of the Outer Space Treaty). As Major Christopher Petras, at the time Chief of Operational Law at U.S. Space Command, observed in a recent law review article: "Like a truck, a telephone, or a pair of binoculars, orbiting space stations have no inherent characteristics that make them civil or military; rather, it is how the space station is utilized that is key to determining its civil or military potential."[23]

A far better analogy than the Antarctica Treaty in understanding the current *corpus juris spatialis* is the 1982 UN Convention on the Law of the Sea, which in Article 88 provides simply: "The high seas shall be reserved for peaceful purposes."[24] This does not prohibit warships from traveling the high seas at will, from launching aircraft or transporting combat forces. It doesn't prohibit parties to the Convention from using their warships to launch missiles at the territory of other states so long as the operation is non-aggressive in nature.

Does this mean that it is lawful under the Outer Space Treaty for the United States to carry out activities in space that are not "peaceful" so long as they do not take place on celestial bodies? Certainly *not*, in the sense that this term is used in the Treaty. Because Article 2(4) of a different treaty, the United Nations Charter, clearly prohibits all aggressive uses of military force by states. This point is (unnecessarily) affirmed by Article III of the Outer Space Treaty, which provides:

> States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the moon and other celestial bodies, in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international co-operation and understanding.

The fallacy of the argument that any capability to use military force is contrary to international law and a threat to world peace is apparent from the very first article of the UN Charter, which declares the organization's primary purpose to be the maintenance of "international peace and security" by taking "effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace . . . ."[25] When the United States joined with other peace-loving nations in 1991 and used armed force to eject Iraqi forces from Kuwait, they were using military force to *preserve* international peace—clearly a "peaceful" purpose.

Among the oldest principles of international law is that states may use military force when necessary to defend themselves from aggression. This principle was not limited by the UN Charter, and indeed is expressly affirmed by Article 51.[26] And measures taken by the United States to defend its territory, its people, its armed forces, or even its satellites in space from foreign attack are lawful both under the Outer Space Treaty and the UN Charter.

**5. Opponents of American Ballistic-Defense Programs Admit Non-Nuclear Ballistic-Missile Defense is Not Contrary to International Law**

After President Ronald Reagan announced in 1983 that the United States would seek to develop a national ballistic-missile defense system, Moscow announced an intention to seek a ban on space-based defenses through a new multilateral treaty.[27] More recently, in order to "demilitarize the space environment," Russia "has put a series of proposals before the United Nations that would have the effect of imposing a prohibition on the testing, deployment, and use of space weapons."[28]

More recently, at a May 2003 Pugwash Workshop in Spain, Andrey Vinnik of the Russian Ministry of Foreign Affairs lamented:

> The military activities currently prohibited in outer space by the international law are as follows:
>
> • placement of nuclear and other WMD on orbit around the Earth, their installation on celestial bodies or stationing in outer space;
> • nuclear weapons testing;
> • establishment of military bases, installations and fortifications and conduct of military manoeuvres on celestial bodies (except for the Earth) or orbits around them;
> • hostile activities or use of force on celestial bodies or orbits around them;
> • military or any other hostile use of environmental modification techniques in outer space.
>
> However insufficient perfection of the international legal regime, which carries out regulation of military space activity, nevertheless leaves an opportunity to place into outer space separate kinds of weapons.

> The international law does not prohibit such kinds of military activity, for example, as placement in outer space of anti-satellite weapons; development and deployment in outer space of optical-electronic and radio-electronic jamming devices, etc.[29]

Similarly, on June 7, 2001, Ambassador Hu Xiaodi of the People's Republic of China submitted a working paper to the UN Conference on Disarmament entitled "Possible Elements of the Future International Legal Instrument on the Prevention of the Weaponization of Outer Space."[30] Obviously, if the Outer Space Treaty had prohibited the "weaponization of outer space" such a "future international legal instrument" would be unnecessary.

**6. Leading Arms Control Proponents Acknowledge Space-Based Defenses are Not Illegal**

With a few notable exceptions, some of the strongest opponents of American ballistic-missile defense programs have acknowledged that current international law does not constrain the kinds of programs being discussed in this paper. For example, during a panel discussion on April 14, 1998, John Pike—Director of the Space Policy Project of the Federation of American Scientists—responded to a question by observing:

> Under the Outer Space Treaty weapons of mass destruction, in practice nuclear weapons, are prohibited from being placed in orbit. There are currently no restrictions on ground-based anti-satellite systems. . . . Everything in between that, space lasers, a lot of the missile defense stuff, is more or less up for grabs. The presumption is that we are either currently permitted to or could rearrange the ABM restrictions to facilitate deployment of just about everything as long as it was not a nuclear weapon in space.[31]

Writing about the Outer Space Treaty in the February 2001 issue of the Center for Defense Information's *Defense Monitor*, Dr. Nicholas Berry acknowledged:

> What is noticeable is what the Treaty leaves out. The defensive use of ballistic missiles with nuclear warheads—assuming compliance with self-defense provisions of Article 51 of the UN Charter—are not illegal . . . . Ballistic missiles do not orbit and they were purposely excluded. Weapons other than nuclear or of mass destruction are also allowed and can be placed in orbit. Lasers, conventional explosives, and kinetic devices can be deployed in space as an SAT system or as a launching pad for space-to-ground or space-to-air attacks.[32]

The self-described "progressive" British American Security Information Council (BASIC) has acknowledged that the U.S. withdrawal from the ABM Treaty "will leave the 1967 Outer Space Treaty (OST) as the only current legal bar on space weaponization. However, while the OST bans the placing of weapons of mass destruction in space, on the moon or other celestial bodies, it has no prohibitions on other weapons systems."[33]

At the above-mentioned May 2003 Pugwash conference, a paper prepared by experts from the United States, Norway, and the United Kingdom observed:

> A decision to deploy space weapons would not face many constraints . . . .
>
> The legal framework governing space weapons is minimal. The only explicit rules regarding space weapons are those prohibiting conventional weapons on celestial bodies and weapons of mass destruction everywhere in space. Conventional space weapons are therefore legal as long as they are based on a satellite rather than the moon. The legal framework has been further weakened by the abolition of the Anti-Ballistic Missile Treaty. Law is therefore no obstacle to deployment.[34]

In March 2003, a spokesperson for Project Ploughshares (an agency of the Canadian Council of Churches devoted to "peace and justice") gave a press briefing in which she asserted:

> We are currently standing at a crossroads in the development of outer space. First called for by US President Eisenhower in 1958, the principle that space would be used for peaceful purposes has been accepted for nearly 50 years. Although the term "peaceful purposes" was never clearly defined, it was accepted that this included military, communications, commercial, and scientific uses. But there is strong movement within the U.S. military establishment to expand the military uses of space to include war-fighting capabilities, to go beyond the accepted parameters of "peaceful uses" and the norm against placing weapons in space. . .
>
> There is a broad international consensus opposing the weaponization of space and supporting the creation of a legal instrument banning the placement of weapons in outer space. Still, little progress has been made towards achieving this ban, while space has become increasingly militarized and the U.S. is taking steps to make space weapons a reality. . . .
>
> Space has been "militarized" since the earliest communications satellites were launched into orbit. Today, militaries worldwide rely heavily on satellites for command and control, commu-

> nications, reconnaissance and monitoring, early warning, treaty verification, and navigation with the Global Positioning System (GPS). Research and development is frequently funded by defence contracts. States accept that "peaceful purposes" include military use, even that which is not particularly peaceful, and space is considered a sanctuary only in that no weapons are deployed there.[35]

Indeed, the relatively few serious assertions that are made that the Outer Space Treaty bans either the "militarization" or "weaponization" of space tend to either come from exuberate neophytes (such as in notes by law students) or are so obviously strained by the writers' policy commitments as to be totally unpersuasive.

Professor Mark Markoff, of the University of Fribourg, Switzerland, has long asserted that Article I of the Outer Space Treaty precludes military use of outer space. Article I reads in full:

> The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

The theory here apparently is that the "common interest" concept embodied in Article I is inherently inconsistent with any military use of space. But as the UN Charter makes clear, it is difficult to imagine any "common interest" of greater importance than maintaining international peace and deterring aggression. As already discussed, the contributions made by military uses of space during the 1991 effort by the world community to bring an end to Iraqi armed aggression against Kuwait belie any seriousness in such an argument.

Particularly unpersuasive is a letter to the editor of the June 2002 issue of *Arms Control Today*, in which two senior arms control lawyers argued that the Outer Space Treaty prohibited the "stationing of strike weapons of any sort in low-Earth orbit, including kinetic kill vehicles and lasers." Noting that a 1963 UN General Assembly declaration of legal principles stated that "the use of space shall be carried on for the benefit and in the interests of all mankind…," John Rhinelander and George Bunn reasoned:

> The Outer Space Treaty was intended to implement this principle. Its first article says that the use of space "shall be carried out for the benefit and in the interests of all countries." The only weapons it explicitly bans from orbiting around Earth are nuclear and other weapons of mass destruction because they were the primary concern in 1967. . . In fact, the Outer Space Treaty contains one overall rule: space shall be preserved for peaceful purposes for all countries. It requires any state considering activities that "would cause potentially harmful interference" with other states' activities to undertake appropriate consultations. Similarly, other states may request consultations.
>
> Further provisions for consultation were included to give the parties realistic opportunities to achieve post-1967 agreements on what the general provisions should mean in the future. For instance, if a state decided to test and possibly orbit in space an anti-satellite weapon (ASAT) utilizing a laser or kinetic kill vehicle, other states parties to the space treaty could request consultations. They could conclude that the treaty prohibits the orbiting of the proposed ASAT. We believe that such an interpretation could be a permissible interpretation of the treaty. Indeed, space testing or deployment of other future strike weapons that are inconsistent with "the benefit and in the interests of all countries," within the meaning of the Outer Space Treaty, might produce a similar interpretation.[36]

This proposal from two of the most highly-regarded champions of arms control is truly alarming. To suggest that a state may be legally bound by a treaty to new terms clearly not contained in the treaty text and clearly opposed by that state during the negotiation process simply because a majority of parties decades later elect to "interpret" the treaty to incorporate a fundamentally broader scope—particularly a treaty affecting the fundamental right of sovereign states to defend themselves—would be a prescription to end the process of treaty-making by any rational state. This is not the law, and it should not *become* the law. It is true that, if they so wish, the parties to the Outer Space Treaty may alter its meaning and prohibit either the weaponization or even the militarization of outer space, but this could only be done by an *amendment* that would not be binding upon the United States without its consent.

**7. Customary International Law Does Not Prohibit ABM Programs**

International legal rules result both from written treaties and from what is called "customary international law," as evidenced by a long-standing practice of states accompanied by a belief (*opinio juris*) that their conduct is legally required. The most authoritative behavior in determining the existence of such a rule are the practices of the states most affected by the alleged rule.

Obviously, the United States and the Soviet Union/Russia are by far the two states with the most active programs in space. And if either of them felt that space-

based ballistic-missile defense systems were already barred by either conventional or customary international law they would have found no need to enter into a new treaty in 1972 prohibiting such conduct. The ban they created through that treaty—binding only the United States and the Soviet Union—lasted for three decades, but ceased to exist with the expiration of the ABM Treaty in June 2002.

The use of military satellites by the United States, Russia, and many other states also clearly refutes any suggestion that—despite the clear terms of the Outer Space Treaty—there has somehow developed a rule of customary international law prohibiting any military or defensive uses of outer space beyond those spelled out in the 1967 treaty.

**8. The Logical Consequences of Prohibiting the "Militarization" or "Weaponization" of Space**

At first impression, the idea of preventing any military use of outer space may seem attractive. No one *likes* war, and virtually anyone familiar with the George Lucas *Star Wars* fantasies would favor a more peaceful future for the world. But more serious reflection reveals the hidden "costs" that would accompany any effective prohibition against military uses of outer space.

One might start by considering the GPS, a system of two-dozen satellites that became fully operational in March 1994 and was designed by the U.S. military to pinpoint locations around the globe within a matter of feet. The *primary purpose* of GPS was to facilitate navigation and combat operations by the American military. It is used to guide missiles, bombers, fighters, tanks, and even foot soldiers as they engage an armed enemy in combat.

In part because of the remarkable accuracy of this then-incomplete technology, in 1991 the international coalition authorized by the UN Security Council was able to end Iraqi aggression against Kuwait in six weeks with only a tiny fraction of the predicted casualties on both sides. The old TERCOM (terrain contour matching) guidance system of earlier generations of cruise missiles was largely ineffective over the shifting sands of vast deserts. GPS guidance put them right on target time and again. Using satellite guidance systems, American tanks were able to charge across the barren terrain of the Arabian Desert while their Iraqi counterparts were confined largely to main roads. Search-and-Rescue operations were facilitated and minefields cleared with the use of GPS satellites.[37]

Satellites handled eighty-five percent of the communications needs of coalition forces in 1991, including more than 700,000 telephone calls each day. Joint Chiefs of Staff Chairman General Colin Powell asserted that satellites were "the single most important factor" that enabled the Coalition forces to build the command, control, and communications networks for Operation Desert Shield.[38]

General Norman Schwarzkopf's brilliant "left hook" maneuver into Iraq in February 1991 was made possible in part because of satellite microwave imagery that analyzed the moisture content of the soil and found routes that could support the sixty-eight ton M-1 Abrams main battle tanks that led the attack.[39] And when Saddam Hussein tried to counter by firing Scud missiles into other countries in the region, satellites detected the launches and helped coordinate the defensive responses[40]—which, nevertheless, often failed because the United States had done little to prepare in advance to defend against ballistic-missile attacks.

None of this would have been possible had military uses of outer space been outlawed. And, obviously, if GPS satellites must be destroyed in the name of demilitarizing space, their beneficial contributions to human safety and convenience in scores of other ways—from helping commercial ships and aircraft plot their course and avoid collisions, to helping lost recreational boaters and hikers find their way to safety when they lose their way or the sun goes down—will also be terminated.

Such a rule would also ban any use of satellites for meteorology, communications, imagery, and virtually any other purpose that might also serve a military end. Those unfortunate enough to live too far from local broadcast towers would no longer be able to access news or entertainment by satellite television, and any foreign news they could access would likely be days late in arriving in the absence of satellite communications.

Speaking at a panel discussion on April 14, 1998, sponsored by the NGO Committee on Disarmament at the United Nations, Ron Cleminson, Senior Adviser for Verification in the Canadian Department of Foreign Affairs, observed:

> We talk about 'weaponization of space' and 'the use of space for military purposes,' but it is also indispensable to the whole arms control process. Without the use of space-based imagery, and space-based monitoring, we would not have any significant arms control treaties. In the early days of the Cold War between the U.S. and the Soviet Union, the major arms control treaties, the SALT treaties, the ABM Treaty, were monitored and verified by the use of space-based equipment and space-based sensors only. . . . Without the use of military satellites there would not be an ABM Treaty, SALT or START treaties. So from an arms control perspective the military use of space can be beneficial.[41]

Nor would many of the benefits of military space platforms be preserved if a new treaty prohibiting the "weaponization" of space were to enter into force. Because GPS satellites are an integral component of nu-

merous weapons systems—every bit as important in getting ordinance to its target as the bombs themselves or the aircraft that deliver them. And drawing artificial distinctions between gun sights, magazines, and bullets, or bombers and the communications systems that tell them when to attack what targets and provide the necessary GPS coordinates, makes little practical sense.

In a 1793 letter to James Monroe, Thomas Jefferson wrote:

> I believe that through all America there has been but a single sentiment on the subject of peace & war, which was in favor of the former. The Executive here has cherished it with equal & unanimous desire. We have differed perhaps as to the tone of conduct exactly adapted to the securing it.[42]

That sentiment is as valid today as it was 210 years ago, but it could be expanded to include not only "all America" but the entire world save for a small number of totalitarian tyrants. We should have learned on September 11, 2001, that—again to quote Jefferson—"[w]eakness provokes insult and injury, while a condition to punish, often prevents them."[43] Only the truly foolish, or those who for their own political agendas wish to see America weakened, would contend that to utilize our technological superiority to protect ourselves and other peace-loving peoples from attacks by terrorists and tyrants is a threat to international peace.

Those who recognize the legitimacy of an ABM system yet advocate outlawing such a program would do well to consider its demonstrated potential to defeat and deter aggression.Space-based platforms helped the U.S.-led coalition in 1991 bring Iraqi aggression to an end, uphold the rule of law, and restore peace to Kuwait. Countless additional lives would likely have been placed in jeopardy in the absence of this technology. To step backwards from that proud record of accomplishment and intentionally blind and weaken those forces that exist for our defense—in the process greatly increasing the risks of unnecessary collateral damage and friendly-fire loses when peace must be preserved—would neither promote world peace nor sound U.S. national security policy.

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In summary, it is clear the the *corpus juris spatialis* at present does not prohibit the United States from taking appropriate defensive measures to safeguard its space-based assets or to protect its population or that of its allies against weapons of mass destruction attacks using ballistic missiles, save for the prohibitions in the Outer Space Treaty prohibiting military activities on the moon or other natural celestial bodies and banning the orbiting of weapons of mass destruction. Nor is there currently in force a legal regime prohibiting the "militarization" or "weaponization" of space. On the contrary, the United States and many other countries have incorporated space-based assets into military activities and weapons systems for many decades.

As a policy matter, particularly in light of the tremendous dependence of U.S. military forces today on space-based systems, anyone arguing that the United States should agree to a new legal regime that would leave our defensive assets at the mercy of hostile actions by any of a number of known or unknown potential adversaries—while giving us little of obvious value in return—must bear the burden of explaining why this is in America's interest. Unfortunately, a campaign is now underway to pressure our government to acquiesce in just such a regime—driven at least in part by countries and groups that perceive "unchecked American military power" as the greatest threat to world peace in the foreseeable future.

It is important that members of the legal profession be aware of this campaign and advise policy makers and civic groups alike to look carefully at such proposals before jumping on any bandwagons in the name of peace or to "prevent Star Wars." Our long-term ability to protect our people and the ability of our military to accomplish their missions in the years ahead may well be at risk if this campaign to "demilitarize" or "deweaponize" outer space is successful.

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**Footnotes**

[1] Article XV of the ABM Treaty provided:

> 1. This Treaty shall be of unlimited duration.
> 2. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of this Treaty have jeopardized its supreme interests. It shall give notice of its decision to the other Party six months prior to withdrawal from the Treaty.

Such notice shall include a statement of the extraordinary events the notifying Party regards as having jeopardized its supreme interests.

[2] *See, e.g.,* Sing Tao Jih Pao [Hong Kong], Jan. 5, 2001, citing "well-informed sources" as saying "To ensure winning in a future high-tech war, China's military has been quietly working hard to develop asymmetrical combat capability so that it will become capable of completely paralyzing the enemy's fighting system when necessary by 'attacking selected vital points' in the enemy's key areas. The development of the reliable anti-satellite 'parasitic satellite' is an important part of the efforts in this regard." http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=01-P_04.

[3] PUB. L. 106-65 (2000).

[4] REPORT OF THE COMMISSION ON THE ORGANIZATION OF NATIONAL SECURITY SPACE, Executive Summary, Jan. 11, 2001, at xii-xiii.

[5] *See, e.g.,* Space Preservation Act of 2002, HR 3616, 107th Cong., 2nd Sess., 2002 (introduced by Representative Dennis Kucinich).

[6] The terms "militarization" and "weaponization" are distinct concepts, the first referring to preventing the use of space for "military purposes" and the second—a subcategory of the first—to preventing the basing in space of military weapons or major components of weapons systems.

[7] *See, e.g*., Robert F. Turner, *Nuclear Weapons and the World Court*, in THE LAW OF MILITARY OPERATIONS 309, 340-42 (Michael N. Schmitt, ed. 1998).

[8] Indeed, when the United States first proposed the idea of an arms control agreement limiting ABM systems the Soviet Union rejected the idea, noting that such systems were inherently "defensive" in character. It was only after Moscow realized that America was moving forward with developing such a system, and because of our superior technology were likely to surpass the Soviet system then being developed, that Moscow not only agreed to limit such weapons but insisted that it be done by formal treaty instead of the executive agreement format used for the SALT I agreement on offensive arms.

[9] Treaty Between the United States of America and the Union of Soviet Socialist Republics on the Limitation of Anti-Ballistic Missile Systems, Signed at Moscow May 26, 1972, 944 U.N.T.S. 13, entered into force Oct. 3, 1972.

[10] *Id.* Art. V.

[11] U.N. CHARTER, Art. 2(4) ("All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.").

[12] *See, e.g*., Richard A. Morgan, *Military Use of Commercial Communication Satellites: A New Look*, 60 JOURNAL OF AIR LAW AND COMMERCE 237, Sept-Oct 1994 at 237; and Maj. Douglas S. Anderson, *A Military Look Into Space: The Ultimate High Ground,* ARMY LAWYER, Nov. 1995, text at n.51.

[13] Christopher M. Petras, *The Use of Force in Response to Cyber-Attack on Commercial Space Systems,* 67 JOURNAL OF AIR LAW AND COMMERCE 1213 (2002) at 1249.

[14] Christopher M. Petras, *"Space Force Alpha" Military Use of the International Space Station and the Concept of "Peaceful Purposes,"* 53 AIR FORCE LAW REVIEW 135 (2002) at 149

[15] *See, e.g*., Richard A. Morgan, *Military Use of Commercial Communication Satellites: A New Look*, 60 JOURNAL OF AIR LAW AND COMMERCE 237, Sept-Oct 1994 at text accompanying note 335; and Maj. Robert A. Ramey, *Armed Conflict on the Final Frontier*, 48 AFLR 1 (2000) at 81.

[16] UN General Assembly resolutions do not by themselves have the force of law, although they may be used to establish the existence of customary international law in certain circumstances.

[17] Ramey, *Armed Conflict on the Final Frontier* 79.

[18] Christopher M. Petras, *"Space Force Alpha" Military Use of the International Space Station and the Concept of "Peaceful Purposes,"* 53 AIR FORCE LAW REVIEW 135, 135 (2002). The MOL program was cancelled in June 1969 because of the high costs of the Vietnam war. *Id*. *See also*, Maj. Douglas S. Anderson, *A Military Look Into Space: The Ultimate High Ground,* ARMY LAWYER, Nov. 1995, note 62 and accompanying text.

[19] *Quoted in* Anderson, *A Military Look Into Space*, note 78 and accompanying text.

[20] Richard A. Morgan, *Military Use of Commercial Communication Satellites: A New Look,* JOURNAL OF AIR LAW AND COMMERCE, Sept.-Oct. 1994, at text accompanying notes 308 & 394; Petras, *Space Force Alpha" Military Use of the International Space Station and the Concept of "Peaceful Purposes,* at 171.

[21] Military scientific research is expressly envisioned by Article IV of the Treaty.

[22] Antarctic Treaty, 402 U.N.T.S. 71, signed at Washington, DC, on 1 December 1959, entered into force on 23 June 1961, Art. I.

[23] Petras, *"Space Force Alpha"*at 180.

[24] Article 88 of the UN Law of the Sea Convention provides "The high seas shall be reserved for peaceful purposes." United Nations Convention on the Law of the Sea, concluded at Montego Bay, Jamaica, on 10 December 1982, UN Doc A/CONF. 62/122 (1982); 21 ILM 1261.

[25] UN CHARTER, Art. I(1).

[26] "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security." U.N. CHARTER, Art. 51.

[27] Pavel Podvig, *A History of the ABM Treaty in Russia* (Moscow Institute of Physics and Technology, Feb. 2000, PONARS POLICY MEMO 109, at 1.

[28] David Tan, *Towards a New Regime for the Protection of Outer Space as the "Province of All Mankind,"* 25 YALE JOURNAL OF INT'L LAW 145, 167-68 (2000).

[29] Andrey Vinnik, *Russia's Approaches to Strengthening the International Legal Regime Prohibiting the Weaponization of Outer Space and Efforts for Building an International Coalition in This Sphere*, Pugwash Meeting no. 283, Castellón de la Plana, Spain, 22-24 May 2003, available on line at: http://www.pugwash.org/reports/nw/space2003-vinnik.htm.

[30] Available on line at: http://www.china-un.ch/eng/12869.html.

[31] Available on line at http://disarm.igc.org/outersp.html.

[32] Dr. Nicholas Berry, *Existing Legal Constraints on Space Weaponry*, DEFENSE MONITOR, Vol. XXX, No. 2, Feb. 2001, at 2.

[33] David Grahame, A Question of Intent: Missile Defense and the Weaponization of Space, BASIC NOTES, 1 May 2002, at 1-2.

[34] Available on line at http://www.pugwash.org/reports/nw/space2003-marshall-sy.htm.

[35] Available on line at: http://www.ploughshares.ca/CONTENT/BRIEFINGS/brf033.html.

[36] George Bunn & John B. Rhinelander, *Outer Space Treaty May Ban Strike Weapons,* ARMS CONTROL TODAY, June 2002, available on line at http://www.armscontrol.org/act/2002_06/letterjune02.asp. George Bunn was General Counsel to the Arms Control and Disarmament Agency at the time the Outer Space Treaty was negotiated, and John Rhinelander served as Legal Adviser to the U.S. delegation to the SALT I negotiations in Moscow.

[37] Maj. Douglas S. Anderson, *A Military Look Into Space: The Ultimate High Ground,* ARMY LAWYER, Nov. 1995, text accompanying notes 15-20.

[38] *Quoted in id*., note 23 and accompanying text.

[39] *Id.* at note 26 and accompanying text.

[40] *Id.* at note 27 and accompanying text. [[Maj. Douglas S. Anderson, *A Military Look Into Space: The Ultimate High Ground,* ARMY LAWYER, Nov. 1995,]]

[41] Transcript available on line at: *http://disarm.igc.org/outersp.html*.

[42] *Jefferson to Monroe*, June 28, 1793, 26 PAPERS OF THOMAS JEFFERSON 392 (John Catanzariti, ed. 1995).

[43] *Jefferson to Jay,* Aug. 23, 1785, 8 *Papers of Thomas Jefferson* 426, 427 (1953).

# Labor & Employment Law

## Making Windows into Litigants' Souls: The Pernicious Potential of Gilpin v. AFSCME

*By W. James Young**

**I. Introduction—*Hudson* and Its Significance**

Since 1968, the National Right to Work Legal Defense Foundation ("Foundation") has provided free legal aid to the plaintiffs in almost every case litigated about workers' rights not to subsidize union political and other nonbargaining activities. The best known such case is *Communications Workers v. Beck*,[1] which involved private-sector employees. For public-sector employees, the most important of these cases is *Teachers Local 1 v. Hudson*.[2]

Labor unions are not entitled to act as collective bargaining agents for public employees absent monopoly bargaining power granted by statute.[3] Likewise, the state-granted monopoly bargaining privilege does not by itself carry authority to force nonmembers financially to support the representative's bargaining activities. That, too, is a statutorily-granted privilege. Thus, certain well-defined conditions must be satisfied before a public employee union may compel nonmembers to subsidize even its bargaining activities.

First, the legislature must authorize so-called "union-security," *i.e.*, forced-unionism, agreements.[4] Second, under most statutory schemes, a union and employer must agree to impose such a requirement in their monopoly bargaining agreement.[5] *Hudson* imposes a third requirement: that the union and employer must comply with "the constitutional requirements for the . . . collection of agency fees."[6] Absent satisfaction of any of these three prerequisites, unions lack lawful authority to exact monies from nonmembers.[7]

The third set of requirements is imposed by the Constitution itself, because forced-unionism schemes clearly impinge on nonmembers' First-Amendment rights:

> To compel employees financially to support their collective-bargaining representative has an impact upon their First Amendment interests. . . . To be required to help finance the union as a collective-bargaining agent might well be thought, therefore, to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit.[8]

Nonunion public employees can be compelled, consistent with the Constitution, to bear only their *pro rata* share of the costs of collective bargaining, contract administration, and grievance adjustment.[9] However, *before* a union and/or a public employer are entitled to enforce such an obligation, they must comply fully with "the constitutional requirements for the . . . *collection* of agency fees."[10] The First and Fourteenth Amendments require that certain procedural protections be provided to public employees—"potential objectors"[11]—who have exercised their right to refrain from membership in employee organizations, but are subjected to a forced-unionism agreement by their public employer.[12]

The four procedural safeguards that "the government and union have a responsibility to provide"[13] to all nonmembers are: (1) a good-faith advance reduction of the fee to no more than that portion of the union's expenditures required to perform its duties as the nonmembers' exclusive bargaining representative; (2) financial disclosure adequate to allow nonmembers to gauge the propriety of the union's fee and to decide intelligently whether to challenge the fee calculation; (3) an opportunity to challenge the calculation before an impartial decisionmaker; and (4) an escrow of the amounts reasonably in dispute during such challenges.[14]

Procedural safeguards serve two goals. First, they insure that the fees demanded and/or collected include only the employee's *pro rata* share of constitutionally chargeable costs. *Hudson*'s holding—setting forth "the constitutional requirements for the Union's *collection* of agency fees"[15]—insures against both misuse of collected funds and excessive collections.[16] Second, procedural safeguards "facilitate a nonunion employee's ability to protect his rights."[17]

Like most Supreme Court decisions, however, *Hudson* is not self-enforcing. Moreover, as the Court recognized in *Hudson* itself, there is a danger that labor unions will "keep employees in the dark."[18] Thus, a significant portion of the Foundation's litigation program in the seventeen years since *Hudson* was decided has been devoted to insuring that public-sector labor unions have complied with *Hudson*'s requirements.

**II. The Class Action as a Tool for *Hudson* Enforcement**

The class action device is an important weapon in enforcing *Hudson* for workers. As in other contexts, its "major advantage to the courts, attorneys, and litigants is the judicial economy and efficiency [it] can achieve."[19] This "uniquely American procedural device . . . allows plaintiffs to sue not only for injury done to themselves but also on behalf of other persons similarly situated for injury done to them."[20]

Like good intelligence on the battlefield, the class device is a "combat multiplier." It permits a successful litigant to obtain relief for dozens, hundreds, or possibly thousands of similarly-situated injured individuals, while reducing the costs per individual aided and, thus, the economic barriers to obtaining relief, particularly in mass-tort and civil-rights contexts.[21]

*Hudson* cases fall into both categories, because the collection of agency fees as a condition of employment is, absent *Hudson* compliance, a "constitutional tort"[22] under the Civil Rights Act of 1871.[23] In enforcing *Hudson*'s requirements, Foundation attorneys have pursued class actions, mostly successfully, to give classes of identically-situated workers the benefits of Foundation-supported litigation, thus expanding the scope of relief provided by the expenditure of limited Foundation resources.[24] Without class actions, few workers would obtain relief, given the relatively small amount at stake for each individual nonmember.[25]

But neither labor unions nor their advocates and partisans (including government officials acting in concert with them) are fools. Recognizing that class actions "greatly compound[] the defendant's risk of loss,"[26] they have usually vigorously opposed class certification to limit the damages for their constitutional torts.

*A. Early Class Action Litigation under* Hudson

Federal Rule of Civil Procedure 23 establishes the standards for class actions in the federal courts.[27] For a plaintiff class to be certified, there are four predicate requirements: (1) a sufficiently numerous class; (2) questions of law or fact common to the class; (3) representatives whose claims are typical of the class; and (4) representatives who will fairly and adequately protect the class' interests.[28] Additionally, the court must find that at least one of the three further requirements contained in Rule 23(b) have been met. In *Hudson* cases, certification is typically sought under Rule 23(b)(1)(A) and 23(b)(2).[29]

Litigants seeking class-wide relief for claims under *Hudson* faced a significant initial problem: class-wide claims had been rejected in early forced-unionism litigation. In *Railway Clerks v. Allen*, a challenge to a requirement under the Railway Labor Act[30] that workers pay full union dues, including portions expended for political and ideological activities, the Supreme Court held that:

> This is not and cannot be a class action. . . . "The union receiving money exacted from an employee under a union-shop agreement should not in fairness be subjected to sanctions in favor of an employee who makes no complaint of the use of his money for such activities."[31]

This initial hurdle was overcome by the courts' recognition that, "unlike *Allen*, which addressed substantive safeguards for [objecting] nonunion employees, [a *Hudson*-enforcement] case focuses on procedural rights of nonunion employees" that "'apply to all non-union employees . . . and . . . any violation of these constitutional requirements . . . affect[s] all non-members. . . .'"[32]

In *Hudson* itself, the Supreme Court intimated that it contemplated application of its decision to large classes of nonunion employees subject to forced-unionism agreements:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the *potential objectors* be given sufficient information to gauge the propriety of the union's fee. Leaving the *nonunion employees* in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.[33]

Because all nonmembers are "potential objectors," the federal courts initially had no difficulty in certifying large classes of public employees in *Hudson*-enforcement cases. As the first district court certifying such a class action recognized, it "is clear that the constitutional mandates of *Hudson* apply to all non-union employees . . . and that any violation of these constitutional requirements by [the public employer and union] affect[s] all nonmembers. . . ."[34] In the first five years after *Hudson* was decided, a number of cases brought to enforce *Hudson* were quickly certified as class actions.[35]

Virtually from the beginning of post-*Hudson* class action litigation, unions[36] argued that the typicality and adequacy of representation prongs of Rule 23(a)(3) and (4) could not be met where named plaintiffs are represented by attorneys provided by the National Right to Work Legal Defense Foundation. For instance, in *George v. Baltimore City Schools*, the Baltimore affiliate of the American Federation of Teachers argued that:

> plaintiffs are unable to fulfill either requirement because they are represented by staff counsel from the National Right to Work Legal Defense Foundation. . . . Defendants suggest several conflicts of interest between plaintiffs and other members of the proposed class, namely that the Foundation is paying plaintiffs' legal costs, that plaintiffs have signed a "Retainer Authorization" in which they have agreed not to waive any legitimate attorneys' fee claim as part of settlement, and that plaintiffs have signed a "Disclosure Agreement" in which they have agreed not to accept a settlement which forbids the Foundation from disclosing the case history and settlement terms. Accordingly, defendants ar-

> gue that, in reality, the Foundation controls this litigation to the detriment of the proposed class.[37]

In rejecting this argument, the district court relied upon a decision of the United States Court of Appeals for the District of Columbia that "the Foundation is a 'bona fide, independent legal aid organization,'"[38] and the fact that the Foundation had "successfully sponsored class action litigation in the Supreme Court."[39]

The *George* court explicitly rejected the notion that "the Foundation's 'Retainer Authorization' and 'Disclosure Agreement' . . . demonstrate how this organization controls plaintiffs' case":

> The "Retainer Authorization" insures that plaintiffs do not waive an attorney's fees claim in settlement. This provides the Foundation with an opportunity to regain the money it has given out for use with future causes. The "Disclosure Agreement" insures that plaintiff[s] will not forfeit in settlement the right to disclose the case history and settlement terms. This enables the Foundation to publicize its recent legal aid advances. *Neither document allows the Foundation to control plaintiffs' case.*[40]

*B. The* Gilpin *Decision*

Most courts have certified classes in *Hudson*-enforcement cases.[41] However, a small minority have either evaded the issue[42] or rejected certification outright. The most frequent—and pernicious—basis for the latter course was first enunciated, *sua sponte*, by the United States Court of Appeals for the Seventh Circuit in *Gilpin v. AFSCME*.[43]

The district court denied class certification in *Gilpin* on the ground that it was unnecessary, because any injunctive relief would protect all nonmembers in the bargaining unit.[44] On the merits, however, the court entered judgment for the nonmembers, holding that the union had failed to satisfy all of *Hudson*'s requirements.[45] On appeal, the nonmembers challenged several of the district court's determinations that other features of the union procedures did not violate *Hudson*, the district court's remedial scheme, and the denial of class certification. The Seventh Circuit affirmed the district court in all particulars.

*Gilpin*'s greatest significance has been as the basis for opposition to class certification in *Hudson* litigation. The *Gilpin* panel affirmed the denial of class certification based on Rule 23(a)(4)'s requirement of adequate representation. The panel speculated that a "potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately."[46] Citing no record evidence, the panel declared:

> Two distinct types of employee will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee.[47]

The court then criticized the remedy sought:[48]

> Not only would the "restitution" that the Foundation seeks confer a windfall on the nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The National Right to Work Foundation is not an adequate litigation representative of those employees.[49]

Ironically, *Gilpin* was not brought initially with Foundation legal aid.[50] The plaintiff employees of the Illinois Department of Public Aid were initially represented only by a local attorney.[51] It was not until the appeal that a Foundation attorney represented the nonmembers.[52]

*Gilpin* is notable, not for the rigor of its legal reasoning, but rather, for its indifference to a broad range of controlling legal principles and its flawed economic analysis. The leading treatise on class actions has dismissed *Gilpin* as an aberrant, "logically unsound" approach to class certification, one not stating the general rule.[53] Subsequent class action litigation in its wake has demonstrated its deficiencies as a framework for analysis in *Hudson* enforcement litigation.

Moreover, were its reasoning to be applied more broadly than just in *Hudson* enforcement cases, *Gilpin* could destroy the class action as an effective litigation tool for actions pursued in the public interest seeking relief for mass injuries. *Gilpin*'s analysis of the "adequacy of representation" prong of the class-action rule would defeat certification of virtually any class when there is judicial hostility to particular claims, classes of litigants, their counsel, or the charitable legal aid organization rendering assistance.

*C.* Gilpin*'s Legal Errors*

The *Gilpin* panel's first legal error was its reliance on speculation about absent class members. Mere "speculation as to conflicts that may develop . . . is insufficient to support denial of initial class certification."[54] There must be *evidence* of an actual conflict of interests within the class.[55] *Gilpin*'s ruminations about absent class members were entirely speculative. One searches the decision in vain for even the remotest reference to evidence confirming the presumed views of either the prospective class representatives or absent class members, probably because the case's record contains no such evidence.

Moreover, even where "a real possibility of antagonism exists," class certification should be granted where "the possibility of collusion is virtually nil, and we can rely on the defendant to present to the court the arguments supporting the contention of any dissident absentees."[56] That is clearly the situation where nonmembers bring suit against a union challenging its seizure of compulsory fees from them.

Another prevailing principle is that "[n]either the personality nor the motives of the plaintiffs is determinative of whether they will provide vigorous advocacy for the members of the class."[57] Nowhere does *Gilpin* even reference this rule. Neither does it explain how its application of the Federal Rules of Civil Procedure to deny class certification because of the presumed goals of the National Right to Work Legal Defense Foundation's legal advocacy program[58] can be squared with "strict scrutiny" under the First Amendment.[59] To disqualify Foundation-assisted litigants as class representatives because of their presumed political and ideological views, or because they have associated with the Foundation, would impermissibly impair their First-Amendment rights of freedom of belief and association.

That an organization with an ideological point of view is not disqualified as a legal aid organization is long established. In *NAACP v. Button*, the record showed that the activities of the National Association for the Advancement of Colored People ("NAACP") included both "extensive educational and lobbying activities" and funding of litigation "consistent with the NAACP's policies."[60] Its litigation program included "advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation."[61] Because the NAACP's litigation program was "a form of political expression" protected by the First Amendment, the Court held that there was nothing unprofessional about "the NAACP activities disclosed by this record."[62]

Similarly, the record in *In re Primus* showed that the activities of the American Civil Liberties Union ("ACLU") "range[d] from litigation and lobbying to educational campaigns in support of its avowed goals."[63] Again, precisely because the "ACLU engages in litigation as a vehicle for effective political expression and association," an ACLU attorney's solicitation of a prospective plaintiff was constitutionally protected under the First Amendment.[64]

That an organization has a *particular* ideological point of view—such as the Foundation's opposition to compulsory unionism—does not disqualify it as a legal aid organization, either. That, too, was settled in *Button*: "the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered."[65]

The only relevant question in determining the ethical *bona fides* of a legal aid organization is whether there is "a 'serious danger' of conflict of interest" or "organizational interference with the *actual* conduct of the litigation."[66] That the NAACP's attorneys were required to "agree to abide by the policies of the NAACP" and "would derive personal satisfaction from participation in litigation on behalf of Negro rights" was insufficient to show either in *Button*.[67]

The same principles apply in determining whether attorneys are adequate class counsel, because an allegation of conflicts posits that they have violated (or will violate) their ethical responsibility to exercise "independence of professional judgment" on behalf of a client.[68] In *McGlothlin v. Connors*, three beneficiaries of a miners' benefit plan brought a class action against the plan's trustees and a multiemployer bargaining group; the United Mine Workers ("UMW") intervened as a plaintiff. The multiemployer group and UMW contended that the plaintiffs' attorneys were not adequate class counsel because another group of coal companies, that had legislative interests conflicting with those of the beneficiaries, was funding the litigation. The court held that the attorneys nonetheless were adequate class counsel, because there was no evidence that contradicted the attorneys' affirmation that they were representing only their clients' interests or that showed that third parties actually controlled the litigation, and because the attorneys had "diligently and forcefully argued the beneficiaries' position at every stage."[69]

Of course, the Foundation's *bona fides* as a charitable legal aid organization have been judicially recognized when challenged on a factual record.[70]

Next, *Gilpin* failed even to address the fact that each class member could opt-out by voluntarily returning any refund obtained as a result of the litigation. This would fully—but in a manner depriving the union and state of the coercion previously enjoyed—avoid the "conflict" that the *Gilpin* court presumed.

Finally, the *Gilpin* panel was indifferent to the Seventh Circuit's prior decisionmaking. With another union before it, that court had observed that:

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class," . . . it is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house.[71]

However, when it rejected the efforts of nonmembers seeking certification of a class of "potential objectors" under *Hudson*,[72] the Seventh Circuit found the union's countenance positively angelic.

*D.* Gilpin*'s Economic Errors*

Perhaps the most glaring of *Gilpin*'s errors is its seriously flawed economic analysis.

The heart of *Gilpin*'s reasoning is its false distinction between the nonmember seeking restitution of all fees (who purportedly "wants to weaken and if possible destroy the union")[73] and the so-called "free rider" (who "wants merely to shift as much of the cost of representation as possible to other workers").[74] That analysis ignores that the "union hater" seeking restitution and the mere "free rider" seeking to minimize his own costs are economically indistinguishable. The ultimate cost-minimization for the "free rider" is to zero, which is precisely the result if a court awards the full restitution the "union hater" seeks.

Equally faulty is *Gilpin*'s presumption that catastrophic results would flow from the restitution remedy sought by the prospective class representatives, *i.e.*, restitution of all monies seized in violation of *Hudson*. *Gilpin* does not explain how such "restitution"—even awarded to the entire class of nonmembers—is commensurate with the goal of "weakening or if possible destroying the union."

Because imposition of *any* damage award against a defendant can be described as "weakening" it, that element of the court's analysis was mere rhetorical flourish. Thus, *Gilpin*'s only substantial charge is that the "union hater" seeks to destroy the union.

But how is this possible if all that he would deny the union are the monies involuntarily (and illegally) seized from nonmembers? Does not the union possess voluntary members whose contributions are not the subject of the litigation and would remain untouched?

Actual experience demonstrates that *Gilpin*'s presumptions protect not the so-called "free rider" from anti-union fanatics, but rather labor unions and public employers from bearing the cost for the full measure of their wrongs. No groundswell of opposition from any proposed class has ever manifested itself in any case in which National Right to Work Foundation attorneys have represented plaintiffs. At most, a few unions have secured affidavits or declarations from a tiny percentage of the class, a rather meager result given the unions' virtual monopoly over communications with class members.[75]

In cases in which class-wide relief was sought, one finds little support for *Gilpin*'s theory that there exists some "free rider" who, while not joining the union, is nevertheless content to have money for it involuntarily seized from his wages and opposes the efforts of others to recover that money for him. Typical is *Cummings v. Connell*, in which no evidence was submitted that *any* of the 37,000 State of California employees in the class opposed the named plaintiffs' efforts to recover full restitution.[76]

Even where there is suspicion that there might be such persons, the rules enable the courts to protect their interests through notice to the class and opt-out procedures.[77] For example, in a case involving a class of nearly five hundred schoolteachers in Anchorage, Alaska,[78] notice was ordered, giving class members the opportunity to opt-out of any relief obtained.[79] Only five individuals opted out of the relief sought, which included full restitution of all fees seized.[80]

In another class action, the named plaintiffs negotiated a settlement that returned more than 80% of their previously seized fees to a class of ninety-three city employees and stopped all deductions until the union complied with *Hudson* in the future. In approving the proposed settlement, after notice and opportunity to object was given to the class members, Judge Stewart Dalzell of the Eastern District of Pennsylvania implicitly rejected the *Gilpin* panel's assumption that some nonmembers want to pay union "representation" fees. Judge Dalzell noted that, because "the settlement is so positive for the class," it was "not surprising that no class member has objected to this settlement."[81]

Thus, both logic and experience teach that *Gilpin*'s economic analysis was erroneous.

*E. The Record After* Gilpin

While *Gilpin* provides a weapon to unions seeking to avoid the full measure of damages for their defiance of the Supreme Court's *Hudson* mandate, it has proven to be a weapon of only limited utility, not followed in most cases. The three early decisions, issued more than a decade ago, that cited *Gilpin* favorably did so without critical analysis and actually denied certification on other grounds.

In *Kidwell v. Trasportation Communications International Union*, the Fourth Circuit affirmed denial of class certification, but not due to a perceived conflict of interest. Rather, the court did so on the grounds that typicality and commonality were lacking, because the named

plaintiffs' claims, but not all class members', had all been either already rejected, fully remedied, or waived by failure to appeal a district court ruling.[82] The court then gratuitously quoted *Gilpin* in *dicta*, "with absolutely no reasoning."[83]

In *Weaver v. University of Cincinnati*, when the Sixth Circuit affirmed the denial of class certification, it did not merely parrot *Gilpin*'s speculation about class members' desire to fund union activities and pronounce it as gospel. Rather, the Sixth Circuit relied on record evidence of an *actual* conflict of interest, *i.e.*, the fact that some nonmembers (presumably named plaintiffs) were trying to oust the union from the bargaining unit, and on the plaintiffs' refusal to answer deposition questions about their reasons for not joining the union and filing the lawsuit.[84]

Similarly, while the Tenth Circuit cited *Gilpin* in a case where it affirmed the denial of class certification, it did so only for the general proposition that a district court does not abuse its discretion by denying certification where the plaintiffs "have not demonstrated that they met" their "burden of showing the adequacy of representation."[85] Moreover, certification was denied there because of actual evidence, the fact that "one of the plaintiffs sent out a misleading letter to potential class members."[86]

Since 1992, no court has denied class certification based on *Gilpin*, and many have declined to follow its reasoning.[87]

In *Murray v. AFSCME Local 2620*, Chief Judge Patel of the Northern District of California gave two reasons for finding *Gilpin* and its progeny unpersuasive. "First, the factual scenarios in all four cases differ substantially from this case and many cases in which similar classes were certified." Judge Patel distinguished *Gilpin* because the court there "found no harm after fees had been returned to all non-members and the [union's] policies changed" to comply with *Hudson*.[88] She distinguished *Gilpin*'s progeny essentially for the reasons discussed above.[89]

Judge Patel's second reason for finding *Gilpin* unpersuasive was that "the Ninth Circuit has not denied class certification based on the types of reasoning and arguments used in *Gilpin*," and "several district courts and the D.C. Circuit have explicitly rejected the *Gilpin* line of cases."[90] Judge Patel cited the reasoning of the D.C. Circuit in *Abrams v. Communications Workers*[91] and "two district courts within the Ninth Circuit" "that all members of the proposed class had a common interest in ensuring compliance with *Hudson*."[92] The two Ninth Circuit district court decisions that Judge Patel cited are cases in which the court also "concluded that because punitive remedies were not available, divergent goals within the class did not exist and certification was proper."[93] Judge Patel went further and certified a class of all nonmembers even though the plaintiff sought punitive damages, because at the "early phase" of class certification, "the common issues of law and fact outweigh speculation about a possible conflict during the damages portion of the trial."[94] Judge Patel also suggested that she might "certify a subclass of employees seeking punitive damages if there appears to be a conflict of interest between members of the larger class" of all nonmembers at the damages stage.[95]

Since *Murray*, the Ninth Circuit itself has rejected *Gilpin*'s notion that speculative potential conflicts can form the basis for a valid denial of class certification in a *Hudson* enforcement case. The Ninth Circuit "does not favor denial of class certification on the basis of speculative conflicts."[96] Therefore, in *Cummings v. Connell*, that court held that "the district court did not abuse its discretion by granting class certification," because the "Union produced no evidence that class members actually possess opposing views regarding the [named plaintiffs'] pursuit of the punitive remedy" of full restitution of all fees paid before the union complied with *Hudson*.[97] Later, the Ninth Circuit again declined to follow *Gilpin* in *Harik v. California Teachers Ass'n*, this time because no conflict within the class was possible there, "where the plaintiffs seek only injunctive relief requiring the unions to comply with their constitutional duties as set forth in *Hudson*."[98]

The more recent cases also have rejected *Gilpin*'s hostility to National Right to Work Legal Defense Foundation attorneys as class counsel. Foundation attorneys were certified as adequate class counsel in all of the many post-*Gilpin* cases that declined to follow *Gilpin*.[99]

In *Bromley v. Michigan Education Ass'n*, the court explained why "the motivation[s] of plaintiffs' counsel or the National Right to Work Foundation . . . are irrelevant" to class certification:

> As long as the Foundation has no [e]ffect on the litigation of this matter, its doctrine and goals do not disqualify it from funding plaintiffs' assertion and protection of their First Amendment rights. Likewise, plaintiffs' counsel are bound by the same rules of procedure and conduct as are all counsel in federal court actions. Counsels' personal beliefs are irrelevant so long as they do not result in conduct violative of the applicable court rules. Should any party discover or suffer from any improper conduct, there are appropriate means for challenging and, if necessary, sanctioning such activity.[100]

In *Murray*, the court similarly rejected a union's opposition to class certification based upon the Foundation's purported goals:

> Defendants attack plaintiffs' counsel as inadequate because the Right to Work Legal Defense Foundation . . . represents people who are hostile to unions. . . .
>
> . . . . [P]laintiff's counsel are bound by the same ethical and procedural rules as defense counsel. The Foundation's political activities are wholly divorced from this case. This court does not find this to be a sufficient basis for disqualification of the Foundation [attorneys] as counsel.[101]

**III. *Gilpin*'s Pernicious Potential**

It is not surprising that *Gilpin*'s analysis has been quickly disregarded. First, the opinion cannot be sustained of its own weight, because of its many legal and economic errors. Moreover, it places in the hands of mass tortfeasors a weapon of enormous potential for mischief, independent of the merits of any particular class action.

*Gilpin* was not the first effort by a party opposing class certification to avoid liability for the full measure of damages by citing possible ideological conflicts among the class that were irrelevant to the claim pursued and the relief sought. Even assuming that pursuit of the complete relief sought in *Gilpin* evidences "hostility," similar arguments were made and rejected in a class action brought by taxpayers seeking refunds of allegedly excess charges against an electric utility ("LILCO") that the plaintiffs claimed had made misrepresentations about its nuclear power projects to get rate increases approved. The court rejected an argument that litigants could not adequately represent the class because they had "political motivations that conflict with the predominately economic interests of the class" of all ratepayers:

> that various of the ratepayer plaintiffs may oppose the commercial operation of the [nuclear] plant, favor the takeover of LILCO by a public authority or take any other positions with regard to LILCO and the other defendants is not by itself an indication that the economic interests of the class will or might be sacrificed in order to realize purely political objectives.[102]

The court also rejected an argument that litigants were not adequate class representatives because they were "unduly antagonistic toward the defendants":

> To expect these plaintiffs to be completely neutral when they allege that the defendants have defrauded them and others . . . is to expect too much. Here there is nothing to suggest that whatever antagonism the ratepayer plaintiffs might bear towards the defendants will interfere with their duty to fairly and adequately represent the interests of the class.[103]

In almost any context, it would be almost impossible to find plaintiffs who are not "hostile" to their litigation opponents. After all, litigation exists to right wrongs. In *Hudson* cases, the effort is to insure that unions comply with "the constitutional requirements for the . . . collection of agency fees."[104] As one court said, "principle, coupled with the hope of rectifying a claimed loss . . ., may be as strong a spur to vigorous prosecution as many other motivations."[105]

One can only imagine the potential for discovery of class litigants and their beliefs under the regime *Gilpin* proposed. Will prospective class representatives in litigation against tobacco companies by examined for their views as to that vile weed? Will prospective class representatives in litigation against automobile manufacturers have to produce evidence regarding their contributions to environmental organizations, to root out those prospective class representatives who are actually Luddites seeking to "weaken and if possible destroy"[106] automobile manufacturers? In mass tort litigation, will prospective class representatives and their counsel be disqualified because the actual purpose of their litigation—no matter the remedial scheme proposed—is to "embarrass" or "ruin"[107] chemical companies, or asbestos manufacturers, or producers of miracle drugs?

One of *Gilpin*'s delicious ironies is that, once discovered by attorneys defending against class certification in other contexts, it will be a vital weapon against the political and ideological allies of the very labor organizations that now use it to defend against being held accountable for the full measure of their misdeeds. And once that happens, it is not unreasonable to assume that those on the ideological left will promptly disparage and disavow *Gilpin*. But until and unless *Gilpin*'s reasoning becomes a weapon not only for labor unions defending their constitutional torts, but also for business and commercial interests resisting class litigation either purposefully or coincidentally filed to "weaken and if possible destroy" them, *Gilpin* will remain a labor union exception to normal principles of class action law.

**IV. Conclusion**

In the fourteen years since it was issued, *Gilpin* has enjoyed more popularity among the union bar than it has among the federal courts. Moreover, its flawed reasoning has been virtually ignored in litigation other than *Hudson* cases, despite its potential applications in many contexts.[108] That may explain why *Gilpin* has not been generally attacked and, so far, remains available for union attorneys to use against the victims of forced-unionism abuses who bring class actions.

*Gilpin* critically speculated about the motives of litigants against forced-unionism schemes and their advocates, generally considered to be political conservatives and libertarians. Yet, it is easy to foresee the results were similar charges leveled against legal-aid or advocacy organizations generally viewed as liberal. Were ju-

rists to express similar sentiments about the American Civil Liberties Union (ACLU), the National Association for the Advancement of Colored People (NAACP) Legal Defense and Education Fund, the American Trial Lawyers Association, or the Sierra Club, there is little doubt that a legal and media firestorm would ensue. It is not unrealistic to expect that epithets such as "racist" or "right-wing extremist" would be applied to jurists accusing the NAACP Legal Defense Fund or ACLU of motives like those that *Gilpin* attributed to the National Right to Work Legal Defense Foundation and its attorneys' clients. Almost certainly, such judges would be immediately disqualified from consideration for appointment to higher courts; one need not look beyond the recent treatment of well-qualified conservative judicial nominees in the United States Senate to recognize that danger.

Hopefully, *Gilpin*'s lack of principled legal reasoning, its unsound economic logic, and its potential for mischief in many contexts, will eventually doom it to oblivion.

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**Footnotes**

[1] 487 U.S. 735 (1988). In *Beck*, the Supreme Court held that the National Labor Relations Act "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Id.* at 762-63 (quoting Ellis v. Railway Clerks, 466 U.S. 435, 448 (1984)).

[2] 475 U.S. 292 (1986). Other cases litigated by Foundation attorneys before the Supreme Court include Abood v. Detroit Board of Education, 431 U.S. 209 (1977), Minnesota State Board for Community Colleges v. Knight, 465 U.S. 271 (1984), Ellis, Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507 (1991), Air Line Pilots Ass'n v. Miller, 523 U.S. 866 (1998), and Marquez v. Screen Actors Guild, 525 U.S. 33 (1998).

[3] City of Charlotte v. Local 660, International Ass'n of Firefighters, 426 U.S. 283, 286-88 (1976).

[4] Wessel v. City of Albuquerque, 299 F.3d 1186, 1190 (10th Cir. 2002). Examples of such legislative authorizations are 29 U.S.C. § 158(a)(3) (National Labor Relations Act); 45 U.S.C. § 152, Eleventh (Railway Labor Act). *See also Abood*, 431 U.S. at 223-25 (explaining governmental interests held to justify allowance of agency shop).

[5] Three states impose forced unionism upon public employees represented by an exclusive bargaining agent without the necessity of the employer's agreement. Haw. Rev. Stat. § 89-4(a) (all public employees); N.Y. Civ. Serv. Law § 208.3(b) (McKinney) (same); Cal. Govt. Code §§ 3543(a) (school employees), 3563.5 (university employees).

[6] 475 U.S. at 310. The Court explicitly recognized that this a joint responsibility. "Since the agency shop itself is 'a significant impingement on First Amendment rights,' *Ellis*, 466 U.S. at 455, *the government and the union* have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." *Hudson*, 475 U.S. at 307 n.20 (emphasis added).

[7] *See* Knight v. Kenai Peninsula Borough Sch. Dist., 131 F.3d 807, 815 (9th Cir. 1997) ("Because it provided inadequate notice, [the union] failed to satisfy *Hudson*'s requirements and was not entitled to the fees that it collected"); Weaver v. University of Cincinnati, 942 F.2d 1039, 1045 (6th Cir. 1991) ("*no* fees may be collected in the absence of constitutionally adequate notice and procedures"); *cf.* Dean v. Trans World Airlines, Inc., 924 F.2d 805, 809 (9th Cir. 1991) (nonmember under Railway Labor Act is privileged to withhold dues from union failing to comply with *Hudson*'s requirements); *but see* Prescott v. County of El Dorado, 177 F.2d 1102, 1109-10 (9th Cir. 1999) (full restitution inappropriate in that circumstance), *vacated & remanded on other grounds*, 528 U.S. 1111, *reinstated in pertinent part*, 204 F.3d 893 (9th Cir. 2000), *further proceedings*, 298 F.3d 844 (9th Cir. 2002), *cert. denied*, 123 S. Ct. 1251 (2003); Weaver v. University of Cincinnati, 970 F.2d 1523, 1534 (6th Cir. 1992) (same, absent "willful or malicious constitutional violations of *Hudson*'s procedures").

[8] *Abood*, 431 U.S. at 222.

[9] *Id.* at 232-37.

[10] *Hudson*, 475 U.S. at 310 (emphasis added).

[11] *Id.* at 306.

[12] Tierney v. City of Toledo, 824 F.2d 1497, 1502 (6th Cir. 1987); *see Hudson*, 475 U.S. at 306, 310; *see also id*. at 304 n.13 ("in this context, the procedures required by the First Amendment also provide the protections necessary for any deprivation of property").

[13] *Hudson*, 475 U.S. at 307 n.20.

[14] *Id*. at 306-10. Escrow alone is insufficient to render collection of fees constitutional. *Id*. at 309.

[15] *Id.* at 310 (emphasis added).

[16] *See* Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 876 n.4 (1998); *Prescott*, 177 F.3d at 1108.

[17] *Hudson*, 475 U.S. at 307 n.20; *see id.* at 303.

[18] *Hudson*, 475 U.S. at 306.

[19] Alba Conte & Herbert Newberg, 1 Newberg on Class Actions § 1.1 (4th ed. 2002) (footnote omitted). This treatise is probably the most comprehensive secondary source on the history, theory, and practice of class actions.

[20] Edward F. Sherman, *Class Actions*, *in* Oxford Companion to American Law 118 (2002).

[21] The interests class action litigation serves are numerous, for both litigants and society. "It serves the interests of economy by avoiding trying the same issues again and again in separate cases. It serves the interests of consistency and finality by avoiding the possible inconsistent outcomes in separate jury trials and by resolving the claims in a single case that is binding on all class members." *Id*. However, because "class suits can have far-reaching effects to bring about institutional or governmental change, to internalize substantial environmental costs that the public would otherwise pay, or to disgorge significant profits arising from unlawful or tortuous [*sic*] conduct, class actions are controversial." 1 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 1.1, at 3 (4th ed. 2002).

[22] See Memphis Community School Dist. v. Stachura, 477 U.S.

299, 307 & n.10 (1986); *Monell v. Dep't of Social Services*, 436 U.S. 658, 691 (1978).

[23] 42 U.S.C. § 1983.

[24] Courts have certified class actions in nearly a score of *Hudson*-enforcement cases in which the Foundation has provided workers free legal aid. *E.g.*, Harik v. California Teachers Ass'n, 326 F.3d 1042, 1047 (9th Cir.) (statewide class of teachers), *cert denied*, 124 S.Ct. 429 (2003)*;* Abrams v. Communications Workers, 59 F.3d 1373, 1378 (D.C. Cir. 1995) (directing certification of nationwide nonmember class); Swanson v. University of Haw. Prof'l Assembly, 212 F.R.D. 574 (D. Haw. 2003) (600 university faculty); Wagner v. Professional Eng'rs, 2002 WL 398818 (E.D. Cal. Feb. 22, 2002) (statewide class of 1700 public engineers); Lutz v. Machinists, 196 F.R.D. 447 (E.D. Va. 2000) (1,000 airline employees); Murray v. AFSCME Local 2620, 192 F.R.D. 629 (N.D. Cal. 2000) (1,000 state employees); Baird v. California Faculty Ass'n, 166 L.R.R.M. (BNA) 2491 (E.D. Cal. 2000) (18,000 higher education employees); Friedman v. California State Employees Ass'n, 163 L.R.R.M. (BNA) 2924 (E.D. Cal. 2000) (10,000 school employees); Cummings v. Connell, 163 L.R.R.M. (BNA) 2086 (E.D. Cal. 1999) (37,000 state employees), *aff'd in pertinent part*, 316 F.3d 886 (9th Cir.), *cert. denied*, 123 S. Ct. 2577 (2003); Hunter v. City of Philadelphia, 161 L.R.R.M. (BNA) 2664, 2667 (E.D. Pa. 1999) (200 firefighters); Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 453 (W.D. Wash. 1997) (nonmember teachers); Mitchell v. Los Angeles Unified Sch. Dist., 744 F. Supp. 938 (C.D. Cal. 1990) (8,000 nonunion school teachers), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992); Hohe v. Casey, 128 F.R.D. 68 (M.D. Pa. 1989) (18,000 state employees); George v. Baltimore City Pub. Schs., 117 F.R.D. 368 (D. Md. 1987) (1,000 teachers); Damiano v. Matish, 644 F. Supp. 1058, 1059 (W.D. Mich. 1986)(200 state employees), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987). *See also* Bromley v. Michigan Educ. Ass'n, 178 F.R.D. 148, 161-63 (E.D. Mich. 1998) (235 objecting nonmembers certified in case challenging amount of agency fees).

[25] Union dues are typically only several hundred dollars a year per person. *See*, *e.g.*, Carlson v. United Academics, 265 F.3d 778, 780 (9th Cir. 2001) ($720 per year).

[26] Sherman, *supra* note 20, at 118.

[27] Rule 23 favors the maintenance of class actions. *E.g.*, Blackie v. Barrack, 524 F.2d 891, 903 (9th Cir. 1975); King v. Kansas City Southern Indus., 519 F.2d 20, 26 (7th Cir. 1975); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); *see also* Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 487 (5th Cir. 1982) (mere existence of class device suggests policy in favor of making it available to litigants when possible).

[28] Fed. R. Civ. P. 23(a).

[29] Rule 23(b)(1)(A) authorizes class actions where "the prosecution of separate actions . . . would create a risk of . . . inconsistent or varying adjudications . . . which would establish incompatible standards of conduct for the party opposing the class. . . ." Rule 23(b)(2) authorizes class actions where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . ."

[30] 45 U.S.C. § 151 *et seq*.

[31] 373 U.S. 113, 119 (1963) (quoting *Machinists v. Street*, 367 U.S. 740, 774 (1961)).

[32] George v. Baltimore City Pub. Schs., 117 F.R.D. 368, 371-72 (D. Md. 1987) (quoting Damiano v. Matish, 644 F. Supp. 1058, 1060 (W.D. Mich. 1986), *rev'd on other grounds*, 830 F.2d 1363 (6th Cir. 1987)); *see* Abrams v. Communications Workers, 59 F.3d 1373, 1378 (D.C. Cir. 1995) ("the district court committed reversible error" by " misapplying the holdings in *Street* and *Allen*" to deny class certification for *Hudson* claims); *see also Hohe v. Casey*, 128 F.R.D. 68, 70 (M.D. Pa. 1989) (rejecting a "union's claim that the plaintiffs' interests parallel those of only about 500 nonunion employees who have challenged the *amount* of the fee").

[33] 475 U.S. at 306 (emphasis added) (referring to *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977)).

[34] *Damiano*, 644 F. Supp. at 1060.

[35] Mitchell v. Los Angeles Unified Sch. Dist., 744 F. Supp. 938, 939-40 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992); *Hohe*, 128 F.R.D. at 70-72; *George*, 117 F.R.D. at 369-72; *Damiano*, 644 F. Supp. at 1059-60.

[36] Although public employers and/or officials also are sued in most of these cases, they invariably merely adopt the unions' arguments.

[37] *George*, 117 F.R.D. at 370 (footnote omitted).

[38] *Id.* at 371 (quoting Auto Workers v. National Right to Work Legal Def. & Educ. Found., 781 F.2d 928, 932-34 (D.C. Cir.1986)).

[39] *Id.* (citing *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), and *Abood*).

[40] *Id.* (emphasis added).

[41] *See supra* note 24.

[42] *See*, *e.g.*, Carlson v. United Academics, 265 F.3d 778 (9th Cir. 2001). In *Carlson*, the Ninth Circuit declared that review of the denial of class certification would "serve no purpose," because it had "affirm[ed] the district court judgment for the Union on the merits." *Id*. at 787. The court ignored that class members should have received the nominal damages the district court awarded to the named plaintiffs, *see* Carlson v. United Academics, 171 L.R.R.M. (BNA) 2305, 2306 (D. Alaska 2002) (awarding plaintiffs attorneys' fees). *See also* Jibson v. Michigan Educ. Ass'n, 30 F.3d 723, 734 (6th Cir. 1994) (declining to reverse denial of class certification as moot while affirming district court's grant of summary judgment for union).

[43] 875 F.2d 1310 (7th Cir. 1989).

[44] Transcript of Excerpts of Proceedings at 50-53, Gilpin v. AFSCME, No. 85-3479 (C.D. Ill. Oct 18, 1985), *aff'd*, 875 F.2d 1310 (7th Cir. 1989).

[45] Gilpin v. AFSCME, 643 F. Supp. 733, 737-38 (C.D. Ill. 1986), *aff'd*, 875 F.2d 1310 (7th Cir. 1989).

[46] *Gilpin*, 875 F.2d at 1313.

[47] *Id*.

[48] The remedy sought was "repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest)." The court declared this inappropriate because "the Foundation has not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986." *Id*.

[49] *Id*.

[50] Obviously, the Foundation does not hold a monopoly on bringing *Hudson*-enforcement cases. However, given the costs involved and the expertise necessary to litigate such cases effectively, the vast majority of such cases have been brought with the Foundation's support.

[51] *See Gilpin*, 643 F. Supp. at 734.

[52] *See Gilpin*, 875 F.2d at 1311.

[53] 1 Herbert Newberg & Alba Conte, Newberg on Class Actions § 3.30, at 3-151 (3d ed. 1992).

[54] Service Employees Local 535 v. County of Santa Clara, 609 F.2d 944, 948 (9th Cir. 1979).

[55] *See, e.g.*, Chisholm v. United States Postal Serv., 665 F.2d 482, 493 n.12 (4th Cir. 1981); *Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975).

[56] Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 485-88 (5th Cir. 1982).

[57] Dorfman v. First Boston Corp., 62 F.R.D. 466, 473 (E.D. Pa. 1974). This is the "prevailing" rule. 1 Alba Conte & Herbert Newberg, Newberg on Class Actions, § 3.38, at 515 (4th ed. 2002).

[58] *See Gilpin*, 875 F.2d at 1313.

[59] The Federal Rules of Civil Procedure, like any statute or government regulation, must be construed consistently with the First Amendment if at all possible. In one case, an employer and some of its employees brought a class action against a union pension fund. The fund argued that the class was improperly certified, because the employer had solicited the employees' suit. That argument was rejected. Decertification of the class on that ground "would impair the associational rights of employers and employees and meaningful access to the courts." Fentron Indus. v. National Shopmen Pension Fund, 674 F.2d 1300, 1305 (9th Cir. 1982) (citation omitted).

[60] 371 U.S. 415, 419-21 (1963).

[61] *Id*. at 447 (White, J., concurring in part); *see id.* at 419-22.

[62] *See id.* at 429-31, 438-44.

[63] 436 U.S. 412, 414 n.2 (1978).

[64] *See id*., at 431, 434-38.

[65] 371 U.S. at 444-45.

[66] *In re Primus*, 436 U.S. at 436 (emphasis added) (quoting *Button*, 371 U.S. at 443).

[67] 371 U.S. at 420, 442-44.

[68] ABA Model R. Prof'l Conduct 1.8(f)(2).

[69] 142 F.R.D. 626, 637-39 (W.D. Va. 1992); *see also* Fox v. Massey-Ferguson, Inc., 172 F.R.D. 653, 663-64 (E.D. Mich. 1995) (that an attorney's fees were paid by a union with which he had "a long-standing relationship" did not by itself disqualify him as class counsel in a suit against an employer).

[70] Auto Workers v. National Right to Work Legal Defense & Educ. Found., 781 F.2d 928, 932-34 (D.C. Cir. 1986); National Right to Work Legal Defense & Educ. Found. v. United States, 487 F. Supp. 801, 803 (E.D.N.C. 1979).

[71] Eggleston v. Plumbers' Local *130*, 657 F.2d 890, 895 (7th Cir. 1981).

[72] 475 U.S. at 306.

[73] For shorthand purposes, let us call this individual "the union hater." However, like the euphemism "union security" or "agency shop" used for forced-unionism schemes, this is a value-laden term that disparages the employee who may neither want nor need union representation and may, indeed, be able to negotiate more favorable terms and conditions of employment for himself or herself.

[74] 875 F.2d at 1313.

[75] E.g., Wagner v. Professional Eng'rs, 2002 WL 398818, at *1 (E.D. Cal. Feb. 22, 2002) (union's evidence "indicates that about 44 potential class members (out of a potential class estimated to exceed 1,700 individuals) are not interested in pursuing the 'fair share fees' at issue").

[76] 316 F.3d 886, 896 (9th Cir.), *cert. denied*, 123 S. Ct. 2577, *on remand*, 281 F. Supp. 2d 1187, 1191 (E.D. Cal. 2003).

[77] *See*, *e.g.*, Friedman v. California State Employees Ass'n, 163 L.R.R.M. (BNA) 2924, 2930 (E.D. Cal. 2000); Fed. R. Civ. P. 23(d)(2).

[78] Patterson v. Anchorage Sch. Dist., No. A93-0189-CV (HRH), Docket No. 157 (D. Alaska Nov. 30, 1998).

[79] *Id.*, Docket Nos. 160, 167, & 172 (Jan. 12, Apr. 1, May 19, 1999, respectively).

[80] *Id.*, Docket Nos. 174 & 179 (July 23 & Aug. 9, 1999, respectively).

[81] Hunter v. City of Philadelphia, 161 L.R.R.M. (BNA) 2667, 2669 (E.D. Pa. 1999).

[82] *See* Kidwell v. Transportation Communications Int'l, 136 L.R.R.M. (BNA) 2434, 2436-37 (D. Md. 1990), *aff'd in pertinent part*, 946 F.2d 283, 305 (4th Cir. 1991); *see also* Murray v. AFSCME Local 2620, 192 F.R.D. 629, 633 (N.D. Cal. 2000) ("[i]n *Kidwell*, the court . . . denied the expansion of the class certification because some objectors had received refunds and some had not").

[83] *Murray*, 192 F.R.D. at 635; *see Kidwell*, 946 F.2d at 305-06. *Kidwell*'s quotation of *Gilpin*'s speculation about conflicts was inconsistent with the Fourth Circuit's earlier rejection of the notion that class certification may be denied on the basis of speculative conflicts. *See* Chisholm v. United States Postal Serv., 665 F.2d 482, 493 n.12 (4th Cir. 1981).

[84] 970 F.2d 1523, 1530-31 (6th Cir. 1992).

[85] Pilots Against Illegal Dues v. Airline Pilots Ass'n, 938 F.2d 1123, 1134 (10th Cir. 1991).

[86] *Id*.

[87] The courts have declined to follow *Gilpin* (or union arguments based on it) in: Harik v. California Teachers Ass'n, 326 F.3d 1042, 1052 (9th Cir.), *cert. denied* 124 S. Ct. 429 (2003); Swanson v. University of Haw. Prof'l Assembly, 212 F.R.D. 574, 577 (D. Haw. 2003); Wagner v. Professional Eng'rs, 2002 WL 398818, at *1-*2 (E.D. Cal. Feb. 22, 2002); Lutz v. Machinists, 196 F.R.D. 447, 453 (E.D. Va. 2000); Murray v. AFSCME Local 2620, 192 F.R.D. 629, 633-36 (N.D. Cal. 2000); Baird v. California Faculty Ass'n, 166 L.R.R.M. (BNA) 2491, 2494-95 (E.D. Cal. 2000); Friedman v. California State Employees Ass'n, 163 L.R.R.M. (BNA) 2924, 2928-29 (E.D. Cal. 2000); Cummings v. Connell, 163 L.R.R.M. (BNA) 2086, 2091 (E.D. Cal. 1999), *aff'd in pertinent part*, 316 F.3d 886, 895-96 (9th Cir.), *cert. denied*, 123 S. Ct. 2577 (2003); Bromley v. Michigan Educ. Ass'n, 178 F.R.D. 148, 162 (E.D. Mich. 1998); Leer v. Washington Educ. Ass'n, 172 F.R.D. 439, 444-47 (W.D. Wash. 1997).

[88] 192 F.R.D. 629, 633 (N.D. Cal. 2000). Judge Patel also reasoned that *Gilpin*'s "language distinguishing the two groups [of 'union haters' and 'free riders'] was pure dicta." *Id.*

[89] *See id*.

[90] *Id*. at 633-34.

[91] 59 F.3d 1373, 1378 (D.C. Cir. 1995).

[92] *Murray*, 192 F.R.D. at 634.

[93] *Id*.

[94] *Id*. at 634-35.

[95] *Id*. at 634.

[96] Cummings v. Connell, 316 F.3d 886, 896 (9th Cir. 2003), *cert. denied*, 123 S. Ct. 2577 (2003); *see* Service Employees Local 535 v. County of Santa Clara, 609 F.2d 944, 948 (9th Cir. 1979); Blackie v. Barrack, 524 F.2d 891, 909 (9th Cir. 1975).

[97] *Cummings*, 316 F.3d at 895-96.

[98] 326 F.3d 1042, 1052 (9th Cir.), *cert. denied*, 124 S. Ct. 429 (2003).

[99] *See* cases cited *supra* note 87.

[100] 178 F.R.D. 148, 162 (E.D. Mich. 1998).

[101] 192 F.R.D. at 635-36 (citation omitted).

[102] County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1407, 1416 (E.D.N.Y. 1989)

[103] *Id.* at 1415-16.

[104] *Hudson*, 475 U.S. at 310.

[105] Dorfman v. First Boston Corp., 62 F.R.D. 466, 473 (E.D. Pa. 1974); *see also* Haroco v. American Nat'l Bank & Trust, 121 F.R.D. 664, 670 (N.D. Ill. 1988) ("If bad blood between the litigants has fueled this lawsuit, it does not detract from the fortitude required for class action litigation").

[106] *Gilpin*, 875 F.2d at 1313.

[107] *Id*.

[108] *But see* Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 338-39 (4th Cir. 1998) (citing *Gilpin* in finding conflicts precluding class certification in a non-labor law context); Clay v. American Tobacco Co., 188 F.R.D. 483, 493 (S.D. Ill. 1999) (same).

# Federalism and ERISA: A Return to First Principles

*By Michael J. Collins**

The Supreme Court takes federalism seriously. In a series of 5-4 decisions, the current Court has been the first post-New Deal court to attempt to ensure that the federal government does not exceed its enumerated powers or unduly intrude upon state authority. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy and Thomas have, over biting dissents from the Court's four liberals, restricted Congress's authority in ways that were previously unimaginable.

Despite the Court's professed solicitude for federalism, the Court has not yet attempted to apply its reasoning to most federal legislation. In particular, the Court seems not to have even considered whether the application of the broad preemption provisions of the Employee Retirement Income Security Act (ERISA) are a proper exercise of federal power. As described below, there are good arguments that ERISA's preemption clause, as currently interpreted, exceeds Congress's authority under the Commerce Clause.

**The Federalism Cases**

There are two main currents to the Court's federalism decisions. First, Congress does not have an unlimited right to impose uniform national rules on the states without the states' consent. Second, the Court no longer allows Congress to regulate any area it chooses simply by citing to its authority under the Commerce Clause.

The first glimmer of the Court's potential concern for preserving states' traditional prerogatives was *National League of Cities v. Usery.*[1] In *National League of Cities*, the Court invalidated legislation extending the minimum wage and maximum hour provisions of the Fair Labor Standards Act to the states. Writing for the Court, then-Justice Rehnquist stated that "Congress may not exercise [its Commerce Clause powers] so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made."[2] However, nine years later, in *Garcia v. San Antonio Metropolitan Transportation Authority,*[3] the Court overruled *National League of Cities* and upheld the application of the FLSA to state and local governments. The Court adopted a "process based" approach, stating that the "Framers chose to rely on a federal system in which special restraints on federal power over the States inhered primarily in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority."[4]

In later cases, the Court has appeared to return to the concerns expressed in *National League of Cities*, and has shown an increased skepticism to Congress's ability to subject the states to various enactments. In *New York v. United States,*[5] the Court invalidated a federal statute that, among other things, required individual states either to enact legislation regulating low-level radioactive waste generated within their borders or to take title to the waste. The Court held that Congress may not commandeer the legislative processes of the states by compelling them to enact and enforce a federal regulatory program. Similarly, in *Printz v. United States,*[6] the Court struck down the portion of the "Brady Bill" that required state law enforcement officers to conduct background checks on handgun purchasers. The Court held that Congress may not conscript state officers to enforce a federal regulatory program. The holdings from *New York* and *Printz* are commonly referred to as the "anti-commandeering" rule.

In addition to the holdings that Congress lacks the authority to regulate the states qua states in certain cases, the Court has also rolled back its previous holdings, epitomized by *Wickard v. Filburn,*[7] that Congress's right to regulate interstate commerce provides almost unlimited police power authority that is circumscribed only by the Bill of Rights. In *United States v. Lopez,*[8] the Court invalidated the federal Gun Free School Zones Act, which purported to prohibit the possession of guns in and around school grounds, as beyond the reach of Congress's authority under the Commerce Clause. *Lopez* was the first case in almost six decades in which the Court struck down a federal law on that ground. The Court held that the Commerce Clause allows Congress to regulate (1) the use of channels of interstate commerce, (2) instrumentalities of interstate commerce, including persons or things in interstate commerce, and (3) activities that "substantially affect" interstate commerce. *Lopez* signified that Congress no longer has a free pass to regulate what it chooses by virtue of the Commerce Clause.

*United States v. Morrison*[9] followed up on and clarified *Lopez*. In *Morrison*, the Court invalidated the civil remedies provision of the 1994 Violence against Women Act, which authorized the victims of gender-motivated violence to sue their aggressors for damages in federal court. In the course of holding that neither the Fourteenth Amendment nor the Commerce Clause authorizes Congress to enact that provision, the Court clarified *Lopez* to provide that Congress may not regulate "non-economic" conduct under the Commerce Clause, but otherwise generally left *Lopez* intact.

The Court has not yet decided how its federalism cases apply to purely economic conduct. However, it can be persuasively argued that the Commerce Clause does not grant Congress *carte blanche* authority to regulate any area it chooses as long as the area falls within the economic realm. By allowing Congress to regulate any "economic" activity, the Court destroys the ability of the states to experiment with different approaches to regulating medical benefits and other areas in which the states

are precluded from innovating due to ERISA's broad preemptive reach.

**ERISA Preemption**

After more than ten years of hearings and debate, Congress enacted ERISA in 1974 in response to perceived failures in the private pension system. The most prominent example given for the need for greater regulation of private pensions was the situation involving Studebaker Corporation's employees. In December, 1963, following years of losses, Studebaker decided to close its manufacturing plant in South Bend, Indiana. The plant closing resulted in the dismissal of more than 5,000 workers and the termination of a pension plan covering 11,000 members of the United Automobile Workers (UAW). The assets of the plan were far less than needed to provide the benefits that had vested under the plan. Ultimately, Studebaker and the UAW agreed to allocate the plan's assets in accordance with default priorities specified in the plan. Approximately 3,600 retirees and active workers who had reached age sixty received the full pension promised under the plan, and roughly 4,000 other vested employees received lump-sum distributions of roughly 15% of the value of their accrued benefits. The remaining employees, whose interest had not yet vested in any benefits under the plan, received nothing.

Although the driving force behind ERISA was the desire to more closely regulate private pension plans and prevent recurrences of the issues raised by Studebaker, ERISA also applies to welfare benefit plans, such as medical and disability plans offered by employers. Perhaps the best known part of ERISA that applies to welfare benefit plans is the "COBRA" health continuation coverage rule.

A last-minute addition to ERISA was section 514, ERISA's preemption clause. The addition of the preemption clause was supported by both large employers and labor unions. Employers wanted to avoid a patchwork of state regulation that would require more expensive administration of their plans. Labor unions were concerned that state laws regulating the legal profession would affect collectively-bargained legal services plans. Thus, section 514(a) of ERISA (29 U.S.C. § 1144(a)) provides that, subject to certain limited exceptions, ERISA preempts any state law that "relate[s] to" an ERISA-covered plan. The most important exception to preemption is that state laws regulating insurance are not preempted. For example, state laws regulating health maintenance organizations (HMOs) have been held not to be preempted even when employee benefit plans offer benefits through HMOs because, at base, those laws regulate insurance.

The Court frequently decides ERISA preemption cases; it is a rare term when there is not at least one such case. In recognition of the burdens that conflicting state laws may place on ERISA-covered plans, the Court has held that ERISA preempts any state law that has a "connection with" or "reference to" an ERISA plan, as determined by reference to "'the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive,' as well as to the nature of the effect of the state law on ERISA plans."[10] Not every state law that affects ERISA plans has a connection with an ERISA plan. However, state laws are preempted if they implicate Congress's objective "to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans."[11] Laws that are preempted by ERISA include, *inter alia*, those that regulate "employee benefit structures or their administration."

Before 1995, the Court routinely held that ERISA preempts state laws with even a tenuous connection to an ERISA-covered plan. However, beginning with *Travelers*, the Court has applied a less expansive reading of ERISA preemption. For example, Justice Scalia has suggested that the Court should explicitly recognize that ERISA's preemptive reach is now limited to ordinary field and conflict preemption.[12] However, even with the recent trend toward a somewhat more narrow reading of ERISA preemption, its preemptive scope is still wider than virtually any other federal law.

**The States' Concerns with ERISA Preemption**

ERISA imposes few substantive requirements on medical and other "welfare" plans. Given consumer unhappiness with HMOs and other "managed care" arrangements, states have felt pressure to impose ever more regulations on providers of medical benefits. For example, many states have imposed "independent review" requirements on medical decisions and have required HMOs to cover specified procedures such as mastectomies and *in vitro* fertilization.

These laws generally escape ERISA's preemptive reach when they regulate HMOs. However, many employers, especially large employers, "self-insure" their plans, and the exception for laws regulating insurance does not apply in those cases. Thus, employees whose medical benefits are provided through HMOs may have substantially different legal rights than those whose (otherwise identical) benefits are provided directly by their employer.

As another example, the Court held in *Boggs v. Boggs* that ERISA preempts a state community property law that would allow pension benefits to be subject to the will of a deceased spouse of a plan participant. In that case, the Louisiana law allowed an employee's spouse to transfer by will to her children her interest in her husband's undistributed pension plan benefits. The Court found that a state law permitting such a transfer directly conflicted with ERISA and frustrated ERISA's purposes. The Court wrote: "[c]onventional conflict preemption principles require pre-emption 'where compliance with both federal and state regulations is a physical impossibility . . . or where state law stands as an obstacle to

the accomplishment and execution of the full purposes and objectives of Congress.'" Thus, ERISA's preemptive reach has been read to extend even to family law, an area traditionally reserved to the states.

**ERISA and Federalism**

The wide sweep of ERISA's preemption clause is not self-evident. Section 514 does not have to be read as broadly as it has been. ERISA was enacted in 1974, and the cases that serve as the foundation for the Court's preemption jurisprudence were decided by a Court much more deferential to federal authority than the current Court.

If asked whether the wide sweep of ERISA preemption is consistent with the Court's federalism jurisprudence, the Justices responsible for that jurisprudence would surely reply that it is. They presumably would state that ERISA is within the scope of Congress's delegated authority, and that there is no need to go beyond that surface inquiry. Because ERISA itself is a permissible regulation of commerce, they might argue, interpreting the preemption clause to have a wide sweep is not at all inconsistent with the Court's federalism jurisprudence.

**A New ERISA Federalism Jurisprudence**

The Court's federalism jurisprudence teaches that Congress should respect the fact that states are separate sovereigns. The Court should keep that in mind when deciding ERISA preemption cases. Is the preemption of a specific state law consistent with the authority delegated to Congress by the Commerce Clause? If not, the law should survive the preemption analysis. For example, it is at best arguable that an interpretation of ERISA that, in effect, prohibits states from requiring health plans to cover mastectomies comports with a proper reading of Congress's power under the Commerce Clause.

Of particular relevance, Congress recognizes the need for systemic changes to the provision of health care. This is best demonstrated by the addition of "health savings accounts" (HSAs) pursuant to the 2003 Medicare prescription drug legislation. HSAs, which are tax-free medical savings accounts that individuals may use in their discretion to pay certain medical expenses, may have the effect of encouraging preventive care and restraining double-digit annual inflation in medical costs.

Unfortunately, as currently interpreted, ERISA's preemption clause precludes similar innovations by the states. To be sure, if left more discretion, states may impose laws that are unpalatable to many who otherwise support federalism. In particular, states may impose mandates that increase the cost of medical coverage for employers and therefore ultimately add to the millions of uninsured in the United States. However, that is a necessary cost of a federal system, and experience has taught that the states as "laboratories of democracy" are more often right than wrong.

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**Footnotes**

[1] 426 U.S. 833 (1976).
[2] *Id.* at 855.
[3] 469 U.S. 528 (1985).
[4] *Id.* at 552.
[5] 105 U.S. 144 (1992).
[6] 521 U.S. 898 (1997).
[7] 317 U.S. 111 (1942).
[8] 514 U.S. 549 (1995).
[9] 529 U.S. 598 (2000).
[10] California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., 519 U.S. 316, 325 (1997).
[11] New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 657 (1995).
[12] *Dillingham* at 336 (Scalia, J., concurring).

# LITIGATION

## SILICA LITIGATION:
## CONTROLS ARE NEEDED TO CURB THE POTENTIAL FOR UNWARRANTED CLAIMS

*BY VICTOR E. SCHWARTZ, LEAH LORBER, AND EMILY LAIRD**

The number of personal injury lawsuits alleging injuries from occupational exposure to respirable silica, or industrial sand, has risen markedly. The recent increase in silica lawsuits after years of relatively stable dockets may reflect efforts by plaintiffs' lawyers to "beat the clock" and file their cases before new tort reform legislation takes effect in a number of states.[1] It may also reflect efforts by members of the asbestos personal injury plaintiffs' bar to diversify their portfolio of cases in light of potential asbestos litigation reforms at the federal and state levels. In fact, many of the lawsuit-generating tactics and mechanisms used in asbestos cases, such as mass medical screenings, are now being redirected toward silica defendants.[2]

There are, however, important differences between asbestos and silica litigation. Silica litigation should never become "the next asbestos" or produce the same problems as asbestos litigation – lost jobs, bankrupt companies, and a dwindling pool of money to pay the claims of legitimately injured people – if courts apply traditional law and procedures. This article describes silica litigation as it is today and offers suggestions for courts to avoid repeating practices that created the current "asbestos-litigation crisis."[3]

**What Is Silica?**

Silica, more commonly known as quartz, covers beaches and fills children's sandboxes.[4] It is the major portion of all rocks, sands, and clays.[5] Silica is a naturally occurring substance, not an engineered or designed product. It commonly forms in nature because it is made up of oxygen and silicon atoms, the first and second most abundant elements in the earth's crust, respectively.[6]

As such a ubiquitous mineral, silica appears in a wide variety of industries. These industries include mining, foundries, ceramics, metal products, shipbuilding and repair, rubber and plastics, roofing, masonry, concrete and stonework and plastering, services to dwellings, agricultural chemicals, utility services, and automotive repair.[7]

**What Are The Potential Health Risks of Overexposure to Silica?**

The potential health risks from overexposure to silica sand arise in certain industries, such as abrasive blasting or concrete demolition, where silica produces respirable dust particles that can be hazardous when inhaled.[8] Such exposures can result in the disease silicosis,[9] as well as shortness of breath, coughing, wheezing, and various chest illnesses.[10] Scholars disagree about whether overexposure to silica dust may cause lung cancer.[11]

Plaintiffs in silica cases generally assert that they developed silicosis because they were exposed to silica dust at their workplaces.[12] They often claim that defendant industrial sand sellers failed to adequately warn them about the potential health risks of silica exposure. Plaintiffs allege that such risks were known to the medical and silica industry before the industry issued warnings or employer alerts.[13]

**Silica Risks Were Well-Known and Heavily Regulated For Decades**

The potential health risks of silica have been known for over a century in the United States and have been well publicized.[14] In 1908, the U.S. Bureau of Labor recognized the health risks of dust for hard-rock miners, stonecutters, potters, glass workers, sandblasters, and foundry workers.[15] By the 1930s the problem of silicosis was so well-known that it was recognized as an industrial disease,[16] the Department of Labor held its first National Silicosis Conference,[17] and medical reports recognized the "harmfulness of silica dust" and the "firmly established" link between silica and silicosis.[18] National public awareness of the potential health risks increased dramatically after 1936, when between 700[19] and 1,500[20] miners died near the town of Gauley Bridge, West Virginia, after breathing silica dust. In the 1940s, the United States Supreme Court stated, "It is a matter of common knowledge that it is injurious to the lungs and dangerous to the health to work in silica dust, a fact which [a] defendant [is] bound to know."[21] Today, public awareness of the potential health risks from silica overexposure is so universal that courts note that it is common knowledge.[22]

In response to the known potential health risks of silica inhalation, federal and state governments began early on to regulate silica workplace safety. By the 1930s, the federal government launched a silica awareness campaign after investigating, testing, and certifying respiratory protection equipment for abrasive blasting.[23] Similarly, during the early twentieth century, state governments passed legislation regarding workplace ventilation and recognizing respiratory diseases as compensable under Workers' Compensation statutes.[24] Federal regulations and state statutes regarding appropriate exposure levels and safety measures have been in place for decades.[25] Currently, OSHA provides detailed regulations requiring employers to protect employees from silica exposure.[26]

**Silica Litigation: Where It Stands Now**

For years, silica litigation was stable, with only a slow and steady low number of litigants pursuing silica

claims in any given year.[27] But, recently, the number of silica lawsuit filings has jumped. The same lawyers and law firms who for years have specialized in bringing asbestos personal injury lawsuits have brought many of the cases.[28]

During the first six months of 2003, for example, nearly 15,300 new claims were filed against U.S. Silica Co., one of America's largest suppliers of industrial sand, up from about 5,200 claims for all of 2002 and roughly 1,400 claims in 2001.[29] One large insurance company currently is handling more than 25,000 silica claims in twenty-eight states – a tenfold increase from August 2002.[30] These claims are against both major and minor silica players alike. As the *Financial Times* has reported, "Silicosis claims [in the United States] are climbing at such a rate that one company has 17,000 suits against it – and it just makes masks designed to protect people from silica dust."[31]

Despite the recent increase in lawsuit filings, there has been no evidence of a burgeoning silica medical crisis. The National Institute for Occupational Safety and Health (NIOSH) has studied silica-related injuries since the 1930s. Since that time, silica-related deaths have declined dramatically. Findings of silicosis cases today are so rare that one specialist has said, "[s]ilicosis is becoming more of a radiology curiosity."[32] In fact, NIOSH reports that over the past thirty years, the annual number of silica related deaths has dropped nearly eighty-four percent, from 1,157 in 1968, to 308 in 1990, to 187 in 1999.[33] To put these figures into context, the U.S. Centers for Disease Control and Prevention report that on average, 400 people in the United States die each year from extreme heat.[34] The Bureau of Labor Statistics reports that 155 workers die annually in falls from rooftops.[35]

One might expect that a medical crisis would also reveal a national pattern of lawsuit filings in large and populous states, such as California, Michigan, New York, and Illinois, or in states with the highest silica-related mortality rates (*i.e.*, West Virginia, Vermont, Colorado, and Pennsylvania).[36] But, just as with asbestos cases,[37] most silica cases are clustered in Texas and Mississippi[38] and other so-called "magic jurisdictions" where plaintiffs are likely to make a big recovery.[39]

As stated, the same lawsuit-generating tactics and mechanisms that were used by the asbestos personal injury bar to generate claims are now being exploited in the industrial sand context, such as plaintiff recruitment through mobile internet websites, mobile x-ray vans, and mass screenings.[40] The examples of such abuses are extensive.

For example, one mass marketing brochure sent by a medical screening company to a plaintiffs' law firm suggested it could increase the firm's business if it hired the screeners, showcasing its number of positive screenings in other states and asking for the opportunity to produce the same "remarkable results for your law firm."[41] A former director of the NIOSH laboratory for lung disease research believes that when law firms pay for plaintiff screenings, screeners are pressured to find disease.[42] Some plaintiffs' lawyers have forced patients at mass screenings to sign attorney fee contracts or documents giving power of attorney to the law firms sponsoring the screening.[43]

It appears that the plaintiffs' bar is trying to turn silica into the next family of moneymaking toxic tort litigation after asbestos.[44] It is, therefore, important for courts to provide just and appropriate safeguards against unwarranted silica lawsuits. We will briefly summarize the problems created by uncontrolled asbestos litigation to show why courts should establish clear rules for silica litigation now.

**The Lessons of Asbestos Litigation**

The problems created by asbestos litigation are well documented.[45] Over 600,000 people nationwide filed asbestos personal-injury claims against 8,400 defendants by 2003, up sharply from the estimated 21,000 claims against 300 defendants in 1982.[46] The number of asbestos cases pending in the United States doubled from 100,000 to more than 200,000 during the 1990s. More than 90,000 new cases were filed in 2001 alone.

Experts agree that the litigation will worsen and predict that the number of claims yet to be filed could range from one million to three million.[47] Increasingly, most of these claimants are not sick and may never develop an asbestos-related disease.[48] Some estimates put the number of claims filed by unimpaired or only mildly impaired claimants as high as ninety percent.[49] Trial consolidations and other procedures can force defendants to settle these meritless or unripe claims.

The litigation has left unprecedented devastation in its wake, including seventy-eight bankruptcies and counting.[50] Besides bankrupt companies, asbestos suits have resulted in approximately 60,000 jobs lost; eroded pension funds and stock prices; clogged court dockets; and lengthy delays for compensation of the truly injured because of claims by litigants who are not sick.[51] Lawsuits are now piling up against companies that have only a peripheral connection to the litigation. Indeed, "the litigation has spread to touch almost every type of economic activity in the U.S."[52]

Estimates of the total future cost of the litigation range from $200 to $275 billion.[53] To put these sums into perspective, former United States Attorney General Griffin Bell has explained that they exceed current estimates of the cost of "all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks."[54]

How did the asbestos litigation problem get so bad? Early in the litigation, courts began to treat asbestos cases

differently from other product liability cases, changing both substantive and procedural rules. By lowering the legal barriers and moving the cases along quickly, the hope was that asbestos claims would disappear. These attempts to promote efficiency in the handling of asbestos cases instead attracted more and more plaintiffs with weaker claims.[55] The lesson of asbestos is instructive, because silica litigation is at a tipping point.

**What Can Be Done?**

Apply Well-Considered Substantive Legal Tools

Substantively, courts should continue to apply hornbook law to silica personal injury claims – the sophisticated user and bulk supplier doctrines.

*The Sophisticated User Doctrine*

The bright-line "sophisticated user doctrine" provides that a manufacturer or supplier has no duty to warn users when it supplies its product to a user who knows or reasonably should know of the product's dangers.[56] According to the Restatement (Second) of Torts, the supplier of a product does not have to warn product users unless: (1) the supplier knows or has reason to know the product is likely to be dangerous for the use for which it is supplied; (2) the supplier has no reason to believe that product users will realize the product's dangerous condition; and (3) the supplier fails to exercise reasonable care to inform the product users of the product's dangerous condition.[57] The sophisticated user doctrine applies when a warning would have little or no deterrent effect because sophisticated users are already aware of a product's potential risks.

The sophisticated user doctrine derives from a comment in the Restatement (Second), which recognizes that often, products do not pass directly from the supplier to the end-user.[58] Instead, products frequently pass through one or more intermediary users (*e.g.*, wholesalers, distributors, retailers, and employers) before winding up in the hands of the end-user. If the intermediary user is sufficiently aware of the risks of the product, the supplier or manufacturer has no duty to warn the intermediary.

Applying this doctrine puts the burden of warning those exposed to silica on those who have the best ability to prevent the harm – intermediary employers – rather than on more remote suppliers and manufacturers, who do not know as well as employers the form and manner in which employees may be exposed to silica. As such, the burden falls on those who are in the best position to know of the product's potential uses, thereby enabling that party to communicate safety information to the ultimate user based upon the specific use to which the product will be put.[59]

It is particularly appropriate for courts to apply the sophisticated user doctrine in silica litigation because the potential health risks of silica exposure have been widespread common knowledge for almost a century. As a result, sand producers should have no duty to warn sophisticated employers of silica plaintiffs as a matter of law.[60] Absent such a bright-line test, courts will be forced to parse out—for potentially thousands of silica sand plaintiffs—questions of fact in case after case concerning the parties' individual, subjective awareness of the hazards of working with and around silica sand.

*The Bulk Supplier Doctrine*

The bulk supplier doctrine, set forth in the Restatement Third, Torts: Products Liability, allows a supplier of bulk products who delivers to an intermediary vendee to discharge its duty to warn the end users of a product.[61] The reason is that bulk suppliers sell to a wide variety of users who put the product to a great number of different uses. The bulk supplier cannot readily identify the intended end-use of the product, and it cannot easily label the product to warn the end user of its potential hazards. As the reporters of the Restatement Third explained, "To impose a duty to warn would require the seller to develop expertise regarding a multitude of different end-products and to investigate the actual use of raw materials by [employers] over whom the supplier has no control."[62] The doctrine places liability on the person in the best position to warn the end users and to take steps to ensure they are not injured: the intermediary employer, who is in direct contact with the plaintiff end user.

This doctrine should be applied in silica litigation because in many cases, industrial sand is provided to employers in bulk. Moreover, industrial sand suppliers and other similarly situated businesses that ship raw materials to diverse industries cannot easily identify how their products will be used in a given workplace, who will use it, and what warnings would be appropriate under the circumstances.[63]

Apply Innovative Procedural Tools

Courts considering silica lawsuits can and should look to steps taken by innovative courts in the asbestos litigation to ensure that people who are truly sick are compensated and that frivolous claims are rejected. The choices that courts make will have a critical effect on the direction of the litigation.[64] It is imperative that courts carry lessons learned in the asbestos context into the silica litigation front. Steps courts can take include enacting inactive docket programs and rejecting the shoddy practice of mass "medical" screenings to recruit new plaintiffs.[65]

*Inactive Docket Programs: A Proven Track Record of Long-Term Success*

Inactive docket programs, also known as deferral registries or pleural registries, are judicially managed docketing systems that allow claims of impaired claimants to be heard more promptly by deferring the claims of unimpaired claimants to an "inactive docket" until the individual develops an actual impairment.[66] No plaintiff loses

a cause of action; once someone becomes sick, his or her claim can proceed.[67]

Docket management plans give trial priority to the truly sick. Inactive dockets also benefit currently unimpaired individuals by protecting their claims from being time-barred should a silica-related disease later develop. Plaintiffs and defendants are relieved of legal costs under inactive docket plans because all discovery is stayed until the claimant manifests impairment.

Inactive dockets can also reduce the specter of more employers being driven into bankruptcy, thereby helping to ensure adequate resources remain for impaired claimants in the future. Courts, relieved of having to address claims by the non-sick, can dedicate greater resources to those most in need of judicial assistance – the truly sick.

Inactive dockets have existed with success for over a decade in asbestos cases in several large cities – Boston, Chicago, and Baltimore. According to a recent article in HarrisMartin's *Columns: Asbestos*, judges in all three jurisdictions believe that the inactive docket plans are working well for all parties involved.[68] Recently, courts in New York City, Syracuse, and Seattle adopted inactive asbestos dockets.[69] The Michigan Supreme Court is currently considering whether to implement a statewide inactive asbestos docket.[70]

*Reject Shoddy Plaintiff-Recruitment Practices*

Courts should reject claims by silica plaintiffs recruited through mass "medical" screenings, and should require evidence of silica exposure to allow silica claims to proceed. This is a lesson from the asbestos litigation, in which mass screenings are so badly abused that even prominent asbestos plaintiffs' trial lawyers acknowledge that the practice threatens payments to the truly sick.[71] Some plaintiffs' experts agree. As one plaintiffs' expert medical witness remarked regarding the way mass screenings are interpreted by the plaintiff-hired screeners, "I was amazed to discover that, in some of the screenings, the worker's x-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one."[72]

The asbestos litigation taught the lesson that such mass screenings produce droves of non-impaired and uninjured plaintiffs, a practice lawyers who file suits for truly injured plaintiffs have strongly questioned. Dallas asbestos lawyer Peter Kraus, who files suits on behalf of asbestos cancer victims, condemns rivals who represent claimants who are not sick. He has said, "[t]hey're sucking the money away from the truly impaired."[73]

Mississippi tort king Richard Scruggs has said, "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."[74]

Mass screenings in silica litigation have already increased "immeasurably" during the past few years.[75] One way courts can stop this abuse is by following the example of Senior U.S. District Judge Charles Weiner of the Eastern District of Pennsylvania, the manager of the federal asbestos docket. In January 2002, Judge Weiner found that "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."[76] Accordingly, Judge Weiner acted to administratively dismiss without prejudice (and toll the applicable statutes of limitations of) all asbestos cases initiated through mass screenings.

The federal court recently appointed to manage the federal silica multidistrict litigation should adopt Judge Weiner's approach.[77] Though only one silica company has become bankrupt as a result of silica litigation to date,[78] the lessons of asbestos cases are instructive. Courts facing silica suits should implement policies whereby they reject claims filed as a result of mass screenings, and only allow cases to proceed with evidence of impairment using objective medical criteria.

**Conclusion**

The recent increase in silica lawsuit filings suggests that good judicial controls are needed to curb potential adverse consequences from unwarranted, excessive litigation in the future. We strongly believe that careful judicial controls along the lines of those we have suggested will help keep the silica litigation dockets fair and just, and in line with the hornbook law. Learning from the errors that resulted in the current asbestos litigation crisis, courts can both stem the tide of lawyer-generated silica litigation and provide justice to those injured parties who deserve it.

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**Footnotes**

[1] *See Silica Lawsuits Jump in Mississippi*, AP Newswires, Oct. 19, 2003.

[2] *See* Sue Reisinger, *Mounting Silica Suits Pose New Threat to Industrial Companies*, 13:136 Corp. Legal Times, Mar. 2003, at col. 1 (Texas firm provides free medical screening for workers who may have been exposed to silica).

[3] Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 597 (1997).

[4] *See* Susan Warren, *Silicosis Suits Rise Like Dust: Lawyers in Asbestos Cases Target Many of the Same Companies*, Wall St. J., Sept. 4, 2003, at B5, *available at* 2003 WL-WSJ 3978694.

[5] *See* U.S. Dep't of the Interior & U.S. Bureau of Mines, Crystalline Silica Primer, Special Publication 5 (1992).

[6] *Id.* at 2.

[7] *See* Thomas A. Gilligan, Jr., *Silica Litigation From Both Sides of the Bar: Is Silica the Next Asbestos? The Defendant's Prospective*, 1:5 MEALEY'S LITIG. REP.: SILICA 19, 23 (Jan. 2003).

[8] *See id*.

[9] *See* U.S. Dep't of Health & Human Servs., *Health Effects of Occupational Exposure to Respirable Crystalline Silica*, Exec. Summ. V (Apr. 2002).

[10] *See* U.S. Dep't of Health, Education & Welfare, *Occupational Exposure to Crystalline Silica* 21 (1974).

[11] *See* Jonathan D. Glater, *Suits on Silica Being Compared to Asbestos Cases*, N.Y. TIMES, Sept. 6, 2003, at C1.

[12] *See* Warren, *supra* note 4, at B5.

[13] *See id*.

[14] Dresser Indus., Inc. v. Lee, 880 S.W.2d 750, 751 (Tex. 1993).

[15] *See* Gilligan, *supra* note 7, at 20 (citing U.S. BUREAU OF LABOR, bull. no. 79: THE MORTALITY FROM CONSUMPTION IN DUSTY TRADES 633-875 (1908)).

[16] *See id*.

[17] Haase v. Badger Mining Corp., 669 N.W.2d 737, 745 n.2 (Wis. Ct. App. 2003) (noting that the National Silicosis Conference was held in 1937, which featured the film "Stop Silicosis," and the report of which addressed silicosis prevention in industrial settings, recommending measures for employers to take on behalf of their workers).

[18] W.J. McConnell & J.W. Fehnel, *Health Hazards in the Foundry*, 16 J. IND. HYG. 227-51 (Jul. 1934).

[19] John M. Black, *Silicosis is Still a Problem: Recognized as an Occupational Threat to Health Since the 1930's, Exposures to Silica Continue Today*, 170 N.J.L.J. 824 (2002).

[20] *See NIOSH Issues Nationwide Alert on Silicosis*, (Nat'l Inst. for Occupational Safety & Health, U.S. Dep't of Health and Human Servs., Washington, D.C.), Nov. 18, 1992, *available at* http://www.cdc.gov/niosh/93-123.html (last visited Oct. 1, 2003).

[21] Urie v. Thompson, 337 U.S. 163, 180 (1949).

[22] *See Dresser Ind.,* 880 S.W.2d at 751. This theme runs through many silica cases. *See, e.g.,* Smith v. Walter C. Best, 927 F.2d 736, 741 (3rd Cir. 1990) ("it was reasonable for the sand suppliers to assume [the intermediary] knew of the dangers of silica given the state of *common medical knowledge* at all relevant times [and] the various statutes and regulations governing silica . . . .") (emphasis added); Bergfeld v. Unimin Corp., 319 F.3d 350, 354 (8th Cir. 2003) (describing one intermediary's knowledge of the dangers of silica going back to the 1930s, as well as the "generalized industry knowledge"); Goodbar v. Whitehead Bros., 591 F. Supp. 552, 561-62 (W.D. Va. 1984) (finding "a plethora of material" showing the "extensive knowledge of the hazards of inhaling silica dust, the disease of silicosis, and proper dust control methods" dating back to the early 1930s), *aff'd sub nom*. Beale v. Hardy, 769 F.2d 213 (4th Cir. 1985); Gray v. Badger Mining Corp., 664 N.W.2d 881, 884 (Minn. Ct. App. 2003) (observing that for over 100 years, the foundry industry has been aware of some health risks from the inhalation of silica), *review granted* (Minn. Sept. 24, 2003); Humble Sand & Gravel, Inc. v. Gomez, 48 S.W.3d 487, 493 (Tex. Ct. App. 2001) ("The connection between silica sand and silicosis has been well documented and known in the abrasives industry since the 1920's. Safety codes were enacted as early as 1938 . . . ."), *review granted* (Tex. May 30, 2002).

[23] *See* Warren, *supra* note 4, at B5.

[24] Gilligan, *supra* note 7, at 20.

[25] 41 C.F.R. § 50-204.50 (1971) (establishing appropriate threshold limit value for silica); 29 C.F.R. § 1910.94(a)(5)(ii) (1974) (extending safety regulations for government contractors to all employers).

[26] *See* 29 C.F.R. §§ 1901.94, 1910.1000, 1910.134, 1915.34, 1915.1000, 1926.55, 1926.57 (2003).

[27] Black, *supra* note 19, at 824.

[28] *See Ingredients Might Be In Place To Make Silica The Next Asbestos*, BEST'S INS. WIRE, Sept. 10, 2003, *available at* 2003 WL 59121078.

[29] *See* Glater, *supra* note 11, at C1.

[30] *See* Warren, *supra* note 4, at B5.

[31] Bob Sherwood, *Weighing The Risk From Food and Phones*, FIN. TIMES, Apr. 28, 2003, at 12, *available at* 2003 WL 15525812.

[32] Jerry Mitchell, *Silica Suits Latest to Hit Miss. Courts: More than 17,000 Plaintiffs Claim to have Incurable Lung Disease*, CLARION-LEDGER, Oct. 19, 2003, at 1A, *available at* 2003 WL 60127248.

[33] *See* Nat'l Inst. for Occupational Safety & Health, U.S. Dep't of Health & Human Servs., *Work-Related Lung Disease Surveillance Report 2002* xxiv, 53, 54 (2002); Warren, *supra* note 4, at B5.

[34] *See* Centers for Disease Control & Prevention, *Extreme Heat*, http://www.cdc.gov/nceh/hsb/extremeheat/ (last visited Nov. 6, 2003).

[35] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *National Census of Fatal Occupational Injuries in 2002*, Sept. 17, 2002, at 7.

[36] *See* NIOSH, *Work-Related Lung Disease Surveillance Report 2002*, xxiv, 58 (age-adjusted mortality rates).

[37] *See* Stephen Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report* vi (RAND Inst. for Civil Justice, Sept. 2002) (66 percent of asbestos filings between 1998 and 2000 were in just five states – Mississippi, New York, West Virginia, Ohio and Texas – which accounted for just nine percent of cases before 1988) [hereinafter "RAND Report"].

[38] *See* Glater, *supra* note 11, at C1; James Doran & Helen Leonard, *Claims Surge as U.S. Lawyers See Silica as the New Asbestos*, THE TIMES (London), Sept. 10, 2003, at 4M.

[39] *Medical Monitoring and Asbestos Litigation – A Discussion With Richard Scruggs and Victor Schwartz*, 17 MEALEY'S LITIG. REP.: ASBESTOS, Mar. 1, 2002, at 1, 6 (remarks by Mr. Scruggs) [hereinafter Scruggs & Schwartz].

[40] *See Increase in Screening for Silica Exposure Victims Evident in Texas*, Vol. 1, No. 2 MEALEY'S LITIG. REP.: SILICA 31 (Oct. 18, 2002).

[41] Letter from Lloyd Criss, Gulf Coast Marketing, to Mr. M. Davis Ready (May 9, 2003) (on file with authors).

[42] *See* Mitchell, *supra* note 32, at 1A.

[43] *See Increase in Screening for Silica Exposure Victims Evident in Texas*, *supra* note 40, at 10.

[44] *See* Norman L. Haase, *Current Silica Landscape—The Jurisdictions, The Defendants and Beyond*, Vol. 1, No. 6 MEALEY'S LITIG. REP.: SILICA 19, 20 (Feb. 2003).

[45] *See, e.g.*, Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, 6:6 BRIEFLY (June 2002) (Nat'l Legal Center for the Pub. Interest monograph), <http://www.nlcpi.org> (visited Nov. 24, 2003); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 BAYLOR L. REV. 331 (2002).

[46] *See* Stephen Carroll & Deborah Hensler, *Facts and Figures About Asbestos Litigation: Highlights from the New Rand Study* 2 (RAND Inst. for Civil Justice, Jan. 2003).

[47] *See* RAND Report*, supra* note 37, at 77.

[48] *See id.*; Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. TIMES, Apr. 10, 2002, at A1.

[49] *See* Jennifer Biggs et al.*, Overview of Asbestos Issues and Trends* 3 (Dec. 2001), *available at* <http://www.actuary.org/mono.htm> (last visited Nov. 24, 2003).

[50] *See* Editorial, *Asbestos Dreams*, WALL ST. J., Oct. 17, 2003, at A10, *available at* 2003 WL-WSJ 3982978.

[51] *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities*

*on Workers in Bankrupt Firms*, 12 J. Bankr. L. & Prac. 51 (2003); Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003).

[52] RAND Report, *supra* note 37, at vii.

[53] *See id*. at vii; Biggs, *supra* note 49, at 4.

[54] Bell, *supra* note 45, at 4.

[55] *See* Victor E. Schwartz & Leah Lorber, *A Letter to the Nation's Trial Judges: How the Focus on Efficiency Is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. of Trial Advoc. 248, 249-50, 253-60 (2000).

[56] *See* Gilligan, *supra* note 7, at 25 (citing Hoffman v. Houghton Chem. v. Corp., 751 N.E.2d 848, 854 (Mass. 2001)).

[57] Restatement (Second) of Torts § 388 (1965).

[58] *See id.* at cmt. n.

[59] *See Haase*, 2003 WL 21800493, at *21; Singleton v. Manitowoc Co., 727 F. Supp. 217, 226 (D. Md. 1989) (holding that employer was in better position to convey warnings to the ultimate users of the product – its employees – and to enforce attendance at safety meetings and adherence to safety policies); Phillips v. A.P. Green Refractories Co., 630 A.2d 874, 881 (Pa. Super. Ct. 1993) (holding, in a silica sand case, that it would be prohibitively expensive and unduly burdensome to require suppliers to warn each worker and continually monitor them to make sure they were wearing their respirators; therefore, the silica sand suppliers could not feasibly reduce the risk to end-users).

[60] *See Dresser Indus*., 880 S.W.2d at 751.

[61] Gilligan, *supra* note 7, at 25 (citations omitted).

[62] Restatement (Third) of Torts: Products Liability § 5 cmt. c (1997).

[63] *See, e.g.,* Smith v. Walter C. Best, Inc., 927 F.2d 736, 740 (3d Cir. 1990) (explaining that because sand was delivered in bulk and the plaintiffs did not participate in the delivery process, the employer was in a better position to convey warnings to its employees).

[64] *See* Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

[65] *See* David M. Setter et al., *Why We have To Defend Against Screened Cases: Now Is The Time For A Change*, Vol. 18, No. 20, Mealey's Litig. Rep.: Asbestos (Nov. 12, 2003).

[66] *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol'y 541 (1992).

[67] *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs,* 33 Tex. Tech. L. Rev. 1 (2001).

[68] *See Inactive Asbestos Dockets: Are They Easing the Flow of Litigation*?, HarrisMartin's Columns: Asbestos, Feb. 2002, at 2. *See also In re* USG Corp., No. 01-2094, Memo. Op. and Order, at 8 n.3 (Bankr. Del. Feb. 19, 2003) ("The practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in many jurisdictions.").

[69] *See* Steve Brostoff, *Asbestos Fixes at State Level; Groups Look to Michigan for Inactive Docket Test*, Nat'l Underwriter: Prop. & Casualty/Risk & Benefits Mgmt. Edition, Sept. 15, 2003, at 19.

[70] *See In re* Pet. for an Admin. Order, No. 124213 (Mich. 2003).

[71] *See* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341.

[72] *See* Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Plain Dealer (Cleveland, Ohio), Nov. 5, 2002, at A1, *available at* 2002 WL 6382801.

[73] Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2002, at A1, *available at* 2002 WL-WSJ 3025073; *see also* Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6, *available at* 2001 WL-WSJ 29680683.

[74] *See* Scruggs & Schwartz, *supra* note 39, at 39.

[75] *See Increase in Screening for Silica Exposure Victims Evident in Texas*, *supra* note 40, at 10.

[76] *In re* Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Admin. Order No. 8, at 1-2 (E.D. Pa. Jan. 14, 2002).

[77] *In re* Silica Prods. Liab. Litig., 280 F. Supp. 2d 1381 (J.P.M.D.L. 2003) (As of September 4, 2003, Judge Janis Graham Jack of the United States District Court for the Southern District of Texas will centralize pre-trial oversight of many federal silica cases.).

[78] *See Courtroom News*, HarrisMartin's Columns: Silica, Aug. 2003, at 11 (internal citation omitted).

# Guidance on e-Discovery in the Federal Courts Percolating out of the Civil Rules Advisory Committee

*By Donald A. Daugherty, Jr.**

**Introduction**

Among the numerous challenges that the information age has thrust on courts and practitioners across jurisdictions is the handling of "e-discovery." Simply and more specifically put, how can parties to litigation deal reasonably, rationally and cost-effectively with discovery of computer-based information, which can now be created and stored in near-infinite quantities, as well as in an abundance of new forms? One example of e-discovery problems: although the overwhelming majority of a litigant's digitally-stored information may likely be irrelevant to the issues involved in a lawsuit, parties often try to devise effective yet practical ways to review the entire universe of information because it is that needle in the haystack upon which many lawsuits turn.

While a growing number of federal courts are providing some guidance through decisions[1] and local rules,[2] comprehensive, uniform direction may be coming next year in proposed amendments to the Federal Rules of Civil Procedure.

Over the past several years, the Civil Rules Advisory Committee ("the Committee") to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, and its Discovery Subcommittee ("the Subcommittee"), have been considering whether to amend the rules of civil procedure to encompass electronic discovery issues expressly. The Subcommittee identified and studied various issues relating to electronic discovery and its initial efforts culminated in an April 2003 report.[3] The Committee endorsed the report and authorized the Subcommittee to continue examining e-discovery issues. The Subcommittee reported back in October 2003, but the minutes from that meeting have not yet been published. The next step in the deliberative process is a February 2004 conference to be held at Fordham University's Law School, at which comments on the Subcommittee's work will be solicited from a broader audience.[4]

To this point, the Subcommittee has not drafted proposed amendments for public review but is still considering whether promulgating new, special rules for dealing with e-discovery is appropriate in the first place. The Committee could decide to let the courts continue to work through these fascinating but thorny issues and then, at some later point, draw on the best practices for creating rules. However, this seems unlikely and, at the least, the Subcommittee's work thus far identifies the most significant e-discovery issues and provides some persuasive authority for how to approach them.

**Areas of Primary Concern and Possible Responses**

In the April report and October meeting, the Committee and Subcommittee have focused on essentially six areas of concern.

*(1) Including Discussion of E-Discovery Issues in Early Discovery Planning*

Rule 26(f) requires parties "to confer to consider the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case."[5] The Subcommittee firmly believes that "thoughtful attention at this early point to the likely needs of discovery of digital information can reduce or eliminate a number of problems that might otherwise arise later."[6] Consequently, the Subcommittee is considering amendments to Rule 26(f), 16(b) and possibly Form 35.

In its April report, the Subcommittee also considered expanding initial disclosures required under Rule 26(a). For example, Rule 26 could be amended to require disclosure regarding each party's electronic data storage and communication systems. However, from the draft October meeting minutes, it appears that the Committee may drop further consideration of amending Rule 26(a).[7]

*(2) Definition of Document—Rule 34*

"Document," as defined in Rule 34, includes "writings, drawings, graphs, charts, photographs, phono-records, and *other data compilations from which information can be obtained*…."[8] While this definition should include computer-based information, it could be revised to "include a more modern and accurate definition of the various types of digital data that can be sought through discovery."[9] For example, are voicemails received through Voice Over Internet Protocols and/or stored electronically considered "documents"? Similarly, does a "document" include the meta-data and embedded data automatically generated when the document is created?

The Subcommittee has acknowledged that devising a new definition will be difficult.[10] Furthermore, given the speed of technical innovation, any new definition might quickly be made obsolete by developments like non-electronic computing through chemical or biological methods. One possible option is to create a Rule 34.1, which would specifically apply to electronic discovery.[11] Alternatively, the Committee could adopt the "Texas approach," which would define document as "those things accessible during the normal course of business."[12]

*(3) Form of Production*

The Subcommittee is considering amending Rule 34 to address disputes that often arise over the form of production of electronic discovery.[13] For example, hard copies may leave out important data (*e.g.,* meta-data) and may be more difficult to search than digital versions. At the same time, electronic versions of data may be difficult

to use without particular software to which the requesting party does not have access or which may even be proprietary software of the responding party.

One approach would be to amend Rule 34(b) to require that the requesting party specify the form to be used. Another approach would be to establish a default rule as to the form. If the Committee decides to propose amendments to Rule 34, an amendment to Rule 33(d) (which allows a party to respond to an interrogatory by producing business records) will also be necessary.

The Subcommittee has acknowledged that trying to grapple with these issues is challenging because "every case is different...Perhaps the best thing is to prod people to discuss these issues up front rather than trying to specify what to do with them."[14]

*(4) The Burden of Retrieving, Reviewing And Producing Data That The Responding Party Uses Rarely Or Never*

Although the rules presume that the responding party will bear its discovery costs, e-discovery presents problems that might justify disturbing this presumption. Computer backup systems preserve enormous amounts of data that are "never intended to be used absent a catastrophic event."[15] Moreover, the lack of any organization to data bytes stored on backup tapes and the like may encumber locating materials on a specific topic; consequently, reviewing it may require "heroic efforts" with attendant heroic costs.[16]

The Subcommittee has made clear that it believes the rules "should protect against the burden of producing 'inaccessible' data unless a court determines that the burden is justified."[17] The rub, of course, is determining when data is truly inaccessible and the extent of the burden that can be imposed to retrieve it. To reach all modes of discovery, the Subcommittee has been considering addressing this issue through new Rule 26 provisions, including a proviso that would allow a court to order the production of "inaccessible" data.[18]

One option discussed by the Subcommittee is adopting the "Texas principle:" under this approach, one must decide whether the data is "reasonably available to the responding party in its ordinary course of business."[19] A second option is found in ABA Discovery Standard 29(b)(iii), which provides that the party seeking discovery "generally should bear any special expenses incurred by the responding party in producing the requested information."[20]

A related issue concerns the extent to which amendments to the rules will affect how businesses preserve "discarded" information and what archive practices and systems should be promoted.[21]

Notwithstanding the practical significance of these issues, from the minutes of the October meeting, the Committee appears to be far from reaching clear answers on how to address them.[22] Although the Subcommittee had considered changes to Rule 26 to address these issues,[23] it ultimately may allow parties and courts to continue to handle them on a case-by-case basis.

*(5) Inadvertent Waiver of Privileges*

Producing massive quantities of data in a form that cannot be reviewed by the naked eye increases the risk of disclosure of privileged information (not to mention production of information that does not respond to any request by opposing counsel).[24] Such inadvertent disclosure could include not only attorney-client material, but also trade secrets or confidential business information. And the costs to the responding party of screening such massive quantities can be enormous. In order to address this risk of inadvertent waiver of applicable privileges, the Subcommittee has drafted a new provision for Rule 34(b). The provision permits courts to enter an order that would "insulate mistaken production against the waiver consequence."[25] The Subcommittee is also considering other approaches, such as adopting the "quick peek" approach often used in cases involving discovery of huge amounts of paper, or an amendment that would incorporate the multi-factor tests already developed by the courts to limit the effects of inadvertent waiver.[26]

*(6) Adopting a "Safe Harbor" For The Preservation of Electronic Data*

Along with the issue of who bears the costs of production, the most significant, practical e-discovery concern faced by litigants and their counsel is when and for how long must these gigabytes of information be stored in order to avoid claims of spoliation.

Thus, the Subcommittee has drafted a "preservation protocol" in response to two specific concerns:

> (1)Important data is either deleted or lost by the time it is sought for litigation purposes; and
> (2)"[E]ntities from which data are sought say they can't foresee what methods of data preservation will be deemed sufficient by courts."[27]

Under the safe harbor protocol considered by the Subcommittee, sanctions would be limited against a party that has fully complied with it. The protocol would be included in a new Rule 34.1, an addition to Rule 26, and/or a new Rule 37.[28] The protocol would make clear the duty to preserve information, but would recognize the responding party's good faith operation of disaster recovery or other systems. The protocol would also require that, before sanctions can be imposed, the destruction of data must be willful or reckless and not merely negligent.[29]

**Conclusion**

E-discovery issues remain ripe for further consideration by the Committee. Undoubtedly, both the difficulty of "solving" these concerns (especially given that they

will continue to mutate rapidly) and the risk of unintended consequences are major. Yet practitioners in the trenches want guidance.[30] If the Committee concludes that amendments are necessary and appropriate, the proposed amendments will be drafted and made available for public comment in the Summer of 2004.

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**Footnotes**

[1] An especially influential series of decisions on e-discovery issues comes from Judge Schira Scheindlin of the Southern District of New York. *See* Zubulake v. UBS Warburg*, LLC*, 2003 WL 21087884 (S.D.N.Y. May 13, 2003); Zubulake v. UBS Warburg*, LLC*, No. 02-Civ-1243, 2003 WL 210876136 (S.D.N.Y. May 13, 2003); Zubulake v. UBS Warburg, LLC, 216 F.R.D. 280 (S.D.N.Y. July 24, 2003); *see also* In Re Ford Motor Co., 345 F. 3d (11th Cir. 2003), 2003 WL 22171712 (11th Cir. September 22, 2003); Fennell v. First Step Designs, Ltd., 83 F.3d 526 (1st Cir. 1996); Stallings-Daniel v. Northern Trust Co*.,* 202 WL 385566 (N.D. Ill. 2002).

[2] *E.g.,* E. & W. D. Ark. R. 26.1; D. Wyo. R. 26.1(d)(3).

[3] *See* Lynk & Marcus, *Discovery Subcommittee Report on Electronic Discovery*, (April 14, 2003) [hereinafter *April Report*].

[4] Civil Rules Advisory Committee, Draft Minutes of October 2-3, 2003 Meeting, at 30 [hereinafter *October Minutes*].

[5] Fed. R. Civ. Pro. 26(f).

[6] *April Report, supra* note 3, at 8.

[7] *October Minutes*, *supra* note 4, at 31.

[8] Fed. R. Civ. Pro. 34 (emphasis added).

[9] *April Report*, *supra* note 3, at 10.

[10] *October Minutes*, *supra* note 4, at 34-37; *April Report*, *supra* note 3, at 11.

[11] *April Report*, *supra* note 3, at 11.

[12] *Id.*

[13] *October Minutes*, *supra* note 4, at 37-39; *April Report*, *supra* note 3, at 11-12.

[14] *April Report*, *supra* note 3, at 12; *see also October Minutes*, *supra* note 4, at 38.

[15] *April Report*, *supra* note 3, at 13; *see also October Minutes*, *supra* note 4, at 40-42.

[16] *April Report*, *supra* note 3, at 13 n.7 (discussing *McPeek v. Ashcroft*, 212 F.R.D. 33 (D.D.C. 2003)).

[17] *October Minutes*, *supra* note 4, at 39; *see also April Report*, *supra* note 3, at 13-14.

[18] *October Minutes*, *supra* note 4, at 39-40.

[19] *April Report*, *supra* note 3, at 14; *see also October Minutes*, *supra* note 4, at 40-41.

[20] *April Report*, *supra* note 3, at 14.

[21] *October Minutes*, *supra* note 4, at 38-39.

[22] *Id.* at 37-39.

[23] *October Minutes*, *supra* note 4, at 40-42.

[24] This risk became unfortunate reality for the federal government in an ongoing, high-profile prosecution, where grand jury material and other privileged information contained in a government paralegal's computer network account was mistakenly attached to a hard drive provided to defense counsel. *See* United States v. Rigas, 02 Cr. 1236 (S.D.N.Y. Sept. 2003)(Sand, J.) (ordering defendants to return privileged information).

[25] *April Report*, *supra* note 3, at 14.

[26] *October Minutes*, *supra* note 4, at 43-44.

[27] *April Report*, *supra* note 3, at 16; *see also October Minutes*, *supra* note 4, at 45-46.

[28] *October Minutes*, *supra* note 4, at 45-46; *April Report*, *supra* note 3, at 16.

[29] *October Minutes*, *supra* note 4, at 45.

[30] For additional information on the challenges presented by e-discovery, *see Draft Amendments to ABA Civil Discovery Standards*, A.B.A. Lit. Section (November 17, 2003); Thomas Y. Allman, A Preservation Safe Harbor in E-Discovery (July 13, 2003); Sedona Conference WGS, *The Sedona Principles for Electronic Document Production* (March 2003).

# Mississippi's New Limitations on the Discovery of Electronic Data

By John P. Sneed and Justin L. Matheny*

The unpleasant question that nags at the back of the Mississippi practitioner's mind as he or she either conducts or responds to discovery at a time in which the unprecedented growth - and freedom - in personal and corporate communications and information storage and retrieval methods intersects head-on with mass tort hysteria is, "How can I be *sure* that I've gotten *everything* I've asked for?", whether from opposing counsel or the client. To be sure, this is not a new question, nor is it one prompted only by the glut of information that even the most techno-averse lawyer finds at his or her fingertips. But this question arises with more and more frequency in this age of electronically stored information, and the seemingly infinite amount of data and meta-data, or bytes and megabytes (to name just a "bit"), which create a very real potential for discoverable information overload.

In the eye of the litigation storm, the attorney expecting a wealth of documentary "smoking guns" from her finely-crafted discovery requests might well pause to wonder, when the return mail brings a paucity of relevant documents, just where those "missing" e-mail chains are in which mid-level executives gnash their collective teeth over the dismal performance of their company's product in internal safety trials. Where, she might ask, are the statistical tables parsing the cost - down to the tenth of a penny - of building a "child-safe" widget? Where, indeed, are the reams of research data supporting [or undermining] the company's risk-utility analysis? And, if the attorney is attempting to faithfully respond to his adversary's rather pointed document requests, only to be met with the blank stares of his client's employees, he might well begin to question whether that client has been entirely forthcoming in its responses.

Until recently, attorneys in Mississippi conducting and responding to discovery aimed at electronically-stored data did so with little assurance that the net they cast would be broad enough, or specific enough, to bring in evidence that literally does not exist "on paper." Moreover, in those cases in which certain discoverable information was *known* to exist in an electronic format, the practitioner could expect a long, and likely an expensive, battle to compel production of that material. In actual practice, electronic data has long been given short shrift, if not completely overlooked, by both requesting and responding attorneys in the conduct of discovery in "routine" cases - *i.e.*, in those cases in which *known* electronic data was not itself in issue. While document requests would frequently net some printed e-mail exchanges, anything approaching a systematic search of the responding parties' e-mail database has been the rare exception, in the experience of this practitioner.

Indeed, as in the federal court system, the discovery of electronic data - "e-discovery" - in Mississippi was, until mid-2003, governed solely by the civil procedure rule permitting and requiring the production of "documents." That rule in Mississippi is Miss. R. Civ. P. 34, which, like its federal counterpart, deals with the production of "documents and things and entry upon land for inspection and other purposes." Of course, Rule 34 has long permitted the inspection and copying of, in addition to "hard" documents, any "other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably useable form."[1] And, in practice, "standard" definitions accompanying most sets of document requests routinely defined "document" to include virtually any type of recorded information. Nevertheless, anecdotal evidence, at worst, suggests that many practitioners remain ill-prepared to delve very deeply into the world of cyber-documents, and the courts have been even less well-equipped to fairly resolve discovery battles over what "documents" *might* exist in electronic form.

On May 29, 2003, however, the Mississippi Supreme Court attempted to bring some clarity to the haphazard process by which e-discovery had heretofore been conducted in the state courts, by amending Miss. R. Civ. P. 26 to engraft a specific provision tailored to the discovery of electronic data. Significantly, the court's chosen means of clarification, new Rule 26(b)(5), acts primarily as a *limitation* upon e-discovery.[2] But just as the court's earlier "limitation" on the scope of discovery of expert opinions, through its adoption of Miss. R. Civ. P. 26(b)(4), set the standard in Mississippi for what is minimally acceptable in the way of expert witness disclosures,[3] in *limiting* e-discovery in the manner that it now has, the Mississippi Supreme Court has attempted to achieve a "middle ground" fairness, by illuminating that which is, or which ought to be, minimally possible in the future conduct of e-discovery.

The new Mississippi Rule 26(b)(5) provides that in order to obtain discovery of electronic data, the requesting party must "*specifically* request production of electronic or magnetic data and specify the form in which the requesting party wants it produced."[4] Presumably, the practice of defining the word "document" in the request for production broadly enough to include electronic and/or magnetic data will no longer suffice to compel production of electronic data; rather, the request itself must specifically describe the electronic data to be produced. The responding party is required to produce the responsive data that is reasonably available to it in the ordinary course of business.

Rule 26(b)(5)'s provision that a responding party need only produce electronic data that is both responsive to a specific request and is "reasonably available to the responding party in the ordinary course of business"

provides an obvious safe harbor to the respondent – but one which is almost certain to engender new disputes that the Mississippi courts will have to resolve. Even the purported limitations of the rule intended to assist Mississippi courts in the 21st century leave room for old-fashioned advocacy. What, precisely, does "reasonably available" mean?[5] And while "in the ordinary course of [the respondent's] business" might appear to be self-explanatory, it is equally clear that the employment of a subjective standard will also likely result in a case-by-case, fact-intensive inquiry before any definitive guidelines emerge from the Mississippi courts.[6] Rule 26(b)(5) further provides that "[i]f the responding party cannot – *through reasonable efforts* – retrieve [the requested] data [. . .] or produce it in the form requested," the respondent is obliged to "state an objection *complying with these rules*."[7]

Finally, the new rule incorporates an explicit cost-shifting mechanism in its last sentence. Upon granting a motion to compel production of e-discovery materials, Mississippi courts are empowered – but not required – to "order that the requesting party pay the *reasonable* expenses of any *extraordinary* steps required to retrieve and produce the information."[8] The Comment to Rule 26(b)(5) makes clear that the award of reasonable retrieval costs is in *addition* to those costs the court may assess under Rule 26(d)(9).[9]

In their parting words on the new rule, the commentators also made it quite clear that the limitations of Rule 26(b)(5) operate to restrict "the production of data compilations which [would otherwise be] subject to production under Rule 34." In other words, a party may not attempt an "end run" around Rule 26(b)(5) by couching an e-discovery request in terms of Rule 34. But just as Rule 34 production requests must now be filtered through the lens of Rule 26(b)(5), the new rule, when read in conjunction with Rule 34, clearly makes practicable a targeted Rule 34 request for inspection of an opposing party's computer files.

While Mississippi's newly-adopted e-discovery rule will not put to rest all the nagging questions about whether an adversary – or client – has in fact produced *everything* it was required to produce in discovery, Miss. R. Civ. P. 26 (b)(5) provides a welcome assist in establishing reasonable guidelines where few previously existed. In waging and responding to e-discovery under the new Mississippi rule, the practitioner would be well-advised to keep these basic points in mind:

> 1. Know the universe of potentially available and responsive data, as well as the various formats in which that data can be readily produced;
>
> 2. Be prepared to employ a consultant to assist in crafting and responding to specifically targeted e-discovery and understand that an e-discovery request might trigger a responsive invoice for services rendered; and
>
> 3. Understand that unless electronic or magnetic data is *specifically* requested, an "old style" blanket document request will carry with it no corresponding obligation on the part of the responding party to conduct *any* search of its computer files.

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**Footnotes**

[1] For thorough discussions of e-discovery under the traditional discovery approach of Fed. R. Civ. P. 34, *see generally* Carol E. Heckman and Jerauld E. Bridges, *Winning Electronic Discovery Motions*, 4 Sedona Conf. J. 151 (2003); Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L. J. 561 (2001); Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B. C. L. Rev. 327 (2000).

[2] Rule 26(b)(1) was also amended to include "electronic or magnetic data" in the list of items generally available through discovery. The text of new Rule 26(b)(5) states:

> *Electronic Data*. To obtain discovery of data or information that exists in electronic or magnetic form, the requesting party must specifically request production of electronic or magnetic data and specify the form in which the requesting party wants it produced. The responding party must produce the electronic or magnetic data that is responsive to the request and is reasonably available to the responding party in its ordinary course of business. If the responding party cannot-through reasonable efforts-retrieve the data or information requested or produce it in the form requested, the responding party must state an objection complying with these rules. If the court orders the responding party to comply with the request, the court may also order that the requesting party pay the reasonable expenses of any extraordinary steps required to retrieve and produce the information.

[3] With fairness as its goal, Rule 26(b)(4) was crafted to prevent "surprise" opinion testimony from coming out only at trial and to prevent a party from using discovery obtained through an opponent's expert to prepare her own case for trial. *See* 1 Jeffrey Jackson, Mississippi Civil Procedure § 8:1 (3rd ed. 2002). Thus, the rule makes certain limited expert discovery fair game, while placing expert depositions beyond the scope of permissible discovery absent court order. *See* Miss. R. Civ. P. 26(b)(4).

[4] Miss. R. Civ. P. 26(b)(5) (emphasis added).

[5] Commentators suggest that e-discovery has been, and will continue to be, viewed interchangeably with traditional discovery methods. *See* Redish, *supra* note 1, at 572-574. At best, one can expect that e-discovery disputes will be treated in a manner consistent with "ordinary" discovery challenges in which practitioners oppose requests. Due to the past experience of bench and bar

(or perhaps lack thereof in the realm of cyberspace), it is reasonable to anticipate *ad hoc* determinations without more concrete guidance from Mississippi rules or opinions. By way of illustration, the phrase "reasonably available" appears in only one other instance in the Mississippi Rules of Civil Procedure or its official comments, in referencing the information discoverable from a corporate or organizational party through deposition pursuant to MISS. R. CIV. P. 30(b)(6). The phrase does not appear to have been defined with any precision by the state appellate courts.

[6] This phrase may also be treated expansively by Mississippi courts, only in this instance with somewhat more guidance from existing case law. Analogously, Mississippi opinions interpreting MISS. R. EVID. 803(6), which provides a hearsay exception for data compilations kept "in the course of a regularly conducted business activity," have permitted a wide range of evidence to come within the scope of that rule. *See*, *e.g.*, *Mississippi Gaming Comm'n v. Freeman*, 747 So. 2d 231 (Miss. 1999) (employee's written reports); *Wells v. State*, 604 So. 2d 271 (Miss. 1992) (bank deposits, cash register tapes and accounting sheets); *Ormand v. State*, 599 So. 2d 1299 (Miss. 1992) (physician's laboratory results); *Butler v. Pembroke*, 568 So. 2d 296 (Miss. 1990) (daily receipt logs and bookkeeper's summary); *Watson v. State*, 521 So. 2d 1290 (Miss. 1988) (customer complaints).

[7] MISS. R. CIV. P. 26 (b)(5) (emphasis added). In addition to those grounds for objection to discovery found (or implied) elsewhere in the Mississippi Rules of Civil Procedure, *e.g.,* the requested discovery is not reasonably calculated to lead to the discovery of admissible evidence (MISS. R. CIV. P. 26 (b)(1)); the requested discovery seeks material protected from disclosure by the work-product doctrine (MISS. R. CIV. P. 26(b)(3)); or compliance with a particular discovery request would be unduly burdensome, oppressive or expensive (MISS. R. CIV. P. 26(d)(9)), Rule 26(b)(5) itself suggests as viable grounds for objection the fact that the information sought:

> (a) is not reasonably available in the ordinary course of respondent's business;
> (b) cannot be retrieved through reasonable efforts; or
> (c) cannot, through reasonable effort, be produced in the form requested.

[8] *Id.* (emphasis added). Of course, the utilization of such cost-shifting measures in discovery are not new, although the express inclusion of such a mechanism in the text of the rule is unusual and should serve as a red flag to overzealous counsel to take care in what they request, as they may not only get what they asked for, but have to pay for it as well. *Cf.* MISS. R. CIV P. 26 (d)(9) (on motion for protective order, authorizing court to require payment of expenses attendant to discovery by requesting party). *See also* Redish, *supra* note 1, at 608-19.

[9] *See* MISS. R. CIV. P. 26 cmt.

# Arbitration or Class Actions: Can the Courts Provide Access to Justice?

*By Edward C. Anderson**

The use of arbitration to resolve civil disputes is sweeping American commerce. Where once arbitration was restricted to highly technical disputes within narrow groups of professionals, today, a growing range of disputes are resolved by the arbitration process, rather than the long slog through the morass of a lawsuit. Federal and state courts have offered broad support to this availability of a route to resolve claims. In hundreds of cases since 1984, they have rejected every attack on arbitration.

This growth in arbitration is primarily a result of pre-dispute arbitration agreements – contracts to arbitrate, rather than litigate, future disputes. The proliferation of these arbitration clauses has been described by attorneys on both sides of these issues as the most important development in dispute resolution in the last decade.[1] Reflection on dispute resolution leads to the conclusion that it could not be otherwise. Once a dispute occurs, the parties are unlikely to agree on a dispute resolution system, other than that to which they are already committed. It is inevitable that one party or the other and, likely, both lawyers[2] will fear some disadvantage in an alternative system. In fact, research confirms this common sense evaluation; there are almost no "post-dispute" agreements for arbitration among litigants who have not agreed beforehand to arbitrate their dispute.[3]

These changes have resulted in both the growing refinement of the arbitration process and increasing judicial approval of arbitration.[4] But, in actual fact, the expansion of arbitration is the outgrowth of the increasing unavailability of the lawsuit process to most Americans. The cost, complexity and risk associated with the lawsuit process have put our most common form of dispute resolution beyond the reach of all but the richest Americans. According to Judge Higganbotham of the Fifth Circuit Court of Appeals, "Our civil process before and during trial…is a masterpiece of complexity that dazzles in its details – in discovery, in the use of experts, in the preparation and presentation of evidence, in the selection of the fact finder and the choreography of the trial. But few litigants or courts can afford it…"[5]

The lack of access to justice in United States is striking. The American Bar Association ("ABA"), the largest association of legal professionals, has estimated that the lawsuit process is beyond the means of at least 100 million Americans.[6] *The ABA Journal*, the monthly magazine of the ABA, has concluded that members cannot undertake representation in a litigation matter worth less than $20,000.[7] This is an amount to which few disputes rise and is, in fact, likely a low estimate, when one considers the expense and complexity of modern American litigation and the increasing inability of any professional or observer to predict the outcome in the process. In fact, commentators have calculated, based on surveys of practitioners, that the minimum value of a plaintiff's employment case must be $60,000, before an attorney can justify representation.[8] This results in 19 out of 20 aggrieved employees being locked out of the court system, because they cannot obtain counsel.[9]

The "real world" lawsuit system serves as an effective bar to justice for all but the richest Americans.

**The 1960s Response - Federal Rules of Civil Procedure - Rule 23**

Although this lack of justice for most Americans has become more pronounced as litigation has become more complex, time consuming, expensive and risky, these hurdles have existed for many years. In 1966, the drafters of the "new" Federal Rules of Civil Procedure made one attempt to relieve courts of these burdens and, thereby, enable more Americans to use the courts. The creation of the "opt out" class action in FRCP 23 was intended to provide access to justice for Americans with relatively minor claims and to relieve the courts from having to serially address thousands of similar claims.[10] State courts acted rapidly to adopt similar rules.[11]

Before the 1966 amendments, Rule 23 did not directly address the issue of whether all potential class members were excluded unless they affirmatively "opted in" or whether all potential class members were included unless they affirmatively "opted out."[12]

Despite this silence, courts quite logically concluded that individuals could not be forced into a lawsuit to which they had not consented. Until the changes in 1966, it was well established that the default standard was exclusion. One court observed, "Prior to the 1966 amendment to the Rule, an individual could wait to see the outcome of the litigation before deciding whether or not to become a party."[13]

This changed when the new Rule 23 permitted "opt-out" classes, which bound every potential claimant to the judgment, unless they affirmatively "opted" out. The Supreme Court noted that, because the change would bind all class members save those who opt out, "[Rule 23 § (b)(3)] was the most adventuresome innovation of the 1966 Amendments."[14]

Rule 23 was reflective of a 1960's faith that the courts could resolve all issues, but there were also plausible practical justifications for the change. The principal problem with the earlier "opt-in" requirement was that large numbers of people might not even realize they had a claim. It is difficult to communicate effectively with large num-

bers of potential class members. An affirmative "opt-in" requirement was an impediment to class formation and could leave claimants without a remedy.

There were also potential problems for defendants in the "opt in" system. "Opt-in" classes could lead to serial litigation as claimants manipulated the system, waiting to see what would happen in a given case before they committed. An "opt-out" regime was expected to alleviate these concerns. It also allowed classes to be created more quickly and was expected to facilitate the prompt adjudication of claims.[15]

Notwithstanding the fact that the opt-out mechanism would consolidate the claims of largely silent class members, the drafters expected that the actual claimants would remain the real parties in interest. As the Ninth Circuit Court of Appeals described the anticipated result,

> "there is nothing in the Advisory Committee's Note that suggests that the amendments had as their purpose the authorization of massive class actions conducted by attorneys engaged by near-nominal plaintiffs."[16]

There were, however, two logical flaws in the "opt-out" scheme that were not recognized in 1966:

> Claimants must still "opt-in" at some point, if they ever are ever to be compensated. If the class claim is successful, the matter will be resolved by a settlement or verdict that creates a fund for class members. To take advantage of that fund, individual class members must identify themselves and demonstrate affirmatively that they are entitled to a share.
>
> Moreover, claimants who merely remain passive are bound by the actions of their supposed "representative," despite the fact that experience and common sense teach us that almost no one reads or can decipher the notices that precede the decision to stay in or opt out. Thousands of claimants with valid causes of action are bound by the settlement decisions of their "representative," with whom they have never had the slightest real contact.

Since individual class members are still required to "opt-in," Rule 23 only postpones, but does not eliminate notice to class members, who are still likely to remain uninformed and indifferent. The actual opt-in rates for class action settlements are educational. In *Strong v. BellSouth Telecommunications, Inc.*,[17] the negotiated settlement provided class members with a service plan or a credit. Although the settlement was asserted to provide $64 million in compensation, the credit requests submitted by class members amounted to less than $2 million.

The practical result is that lawyers, rather than the claimants, are the real parties in interest in a Rule 23 action. As Bill Lerach, one of America's most successful and famous class action lawyers observed, "I have the best practice in the world; I have no clients."[18]

When claimants were required to "opt-in" before class certification, class action attorneys had *bona fide* clients to whom they had to be attentive and responsive. Because the absent class members are not identified until the remedy phase, modern Rule 23 attorneys effectively act on their own. If the response rate is minimal at the remedy phase, the lawyers remain the real parties in interest throughout the case.

Rule 23, therefore, permits lawyers to speak for immense classes of individual claimants who have not selected them - - who may in fact, be entirely unaware that they are parties to a lawsuit or might even be opposed to making the claim. In theory, individual notice to class members is required if it can be done with reasonable effort, so that absent claimants will have the opportunity to opt-out.[19] In practice, this requirement is not strictly applied and, even if it were, experience shows that most people do not pay attention and have little incentive to opt-out. The Rule 23 lawyer speaks on behalf of an army of possible claimants and automatically acquires substantial bargaining power.

Judge Posner, of the Seventh Circuit Court of Appeals, described the resultant settlements by quoting Judge Henry Friendly:

> Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment, in a class action, "blackmail settlements".[20]

In the final analysis, Rule 23 does not afford access to justice. For both sides, class actions actually reflect the lack of access to justice described by Judge Higganbotham, writ large.[21] No actual claimant, without massive resources, can bring a class action. The individual class members become, of necessity, mere procedural necessities for the Rule 23 attorneys who can afford to fund the litigation. The defendants, likewise, are deprived of their day in court by the costs of litigation and magnitude of the exposure, regardless of the merits of the defense.

Rule 23 lawyers, who have borne the burden of the litigation and, as a result, have achieved the power bestowed by representing the class, must redeem their investment. It is irrational to expect that, having spent their own resources on the litigation, they will always be able to sublimate their own interests in favor the interests of "clients" they have never met. There are always conflicts issues in multiparty litigation; the "opt-out" class institutionalizes the conflict between Rule 23 lawyers and class members.[22]

Because, under Rule 23, the "opt-in" is delayed until the fund is achieved and because, in the real world, response rates are very low, class action litigation is effectively converted from the purpose of compensation of victims to the goal of punishing alleged wrongdoers. In class action practice, victims receive a very small proportion of their claims.[23]

There is nothing perverse about the goal of punishment, in theory. Punishment is a powerful weapon that serves important public purposes – retribution and deterring future misconduct. The problem is that this terrible weapon has been placed in the hands of lawyers who act, in effect, as private bounty hunters. They may be primarily concerned with public interest; they likely are not. As noted above, they (not the "clients") have borne the heavy burden of the litigation. They answer to no public authority in bringing or settling these "private" actions. Once the class is certified, they get paid whether they net a guilty or innocent party, because the defendant must acquiesce.[24]

As a result, these class actions may deter the wrong conduct or the wrong parties or not deter at all. In actions against business entities, class action expenses and settlements merely add to the costs to be paid by future customers. This can result in a transfer of wealth from one group of consumers to another; more often, in current practice, it is the transfer of wealth from future customers to present lawyers.

The overwhelming majority of class actions are settled before trial.[25] When response rates and actual payouts are low, however, there is the potential for a substantial pool of unclaimed funds. This surplus can, in effect, be split between plaintiffs' lawyers, who are essentially free agents, and the defendants. Recurring features of Rule 23 settlements indicate compromises that subordinate the interests of the absent claimants.

> Two common examples are:
> (1) so-called "coupon" settlements, where class members receive discounts on future purchases from the defendants, rather than cash; and,
> (2) settlements where class counsel and other non-parties get an inordinately large share of the recovery.

Even a cursory review of current class action practice suggests that non-cash compensation to class members is only representative of a larger problem. Defendants can easily agree on coupons which generate additional sales or are unlikely to be redeemed. The net cost is minimal or negative. Such a settlement minimizes the deterrent effect. Of course, no real plaintiff with a real claim would accept a coupon, for even the same value, as an alternative to cash. In reality, the value of these coupons or discounts represent a tiny fraction of the value of claims made in the litigation, if the claims are meritorious.[26]

Nonetheless, Rule 23 attorneys, who have made massive expenditures to support the litigation and must commit even more to continue the case, are naturally tempted to make such a settlement, provided that the coupons, discounts or changes in procedures appear valuable enough to justify substantial attorneys' fees, which are infrequently paid in the same script.

Two, of many, reported examples illustrate the negative impact of such settlements on the absent class members. In the *Kamilewicz v. Bank of Boston*, the bank was accused of over-collecting escrow money from mortgage borrowers and profiting from the excess float. The settlement paid up to $8.76 to each absent class member, and $8.5 million in fees to attorneys. The absent members were bound by the settlement judgment. The settlement provided that the fees were to be paid by deductions from class members' accounts, resulting in net losses for class members.[27]

In another national settlement, the defendant was accused of extracting excessive late-payment fees from customers. Under the settlement, the Rule 23 lawyers got $5.5 million in fees. Customers got a new late-payment policy and a choice of various free services, but they also got larger monthly bills. One class member analyzed the result: "Please don't sue anyone else on my behalf. I can't afford any more of these brilliant legal victories."[28]

Where the true parties in interest are the Rule 23 lawyers and the defendant, these settlements reflect the optimal result of the litigation for those parties. The defendant minimizes the outlay to resolve the matter. The Rule 23 attorneys reduce the investment risk by settling and can induce the defendant to put a greater portion of their reduced loss toward attorneys' fees. The court removes a docket burden that limits the judge's ability to serve other litigants.

But, as *USA Today* editorialized: "Token settlements and high fees benefit everyone involved in class action suits except damaged parties."[29]

**The Alternative: Arbitration**

For most litigants, even those with a small claim, arbitration presents an attractive alternative to a potential lawsuit. It is simpler, less expensive, more easily scheduled, and more likely to generate a rational result.[30] Courts, too, have been receptive to the growth of arbitration as an alternative to the lawsuit. Courts have overwhelmingly supported pre-dispute agreements to arbitrate future claims.[31] Moreover, many courts now mandate arbitration of claims that have been brought as lawsuits, in an attempt to avoid the most burdensome aspects of the civil justice process.[32]

Growing research demonstrates that all parties save significant time and money in the arbitration process.[33] Equally importantly, individuals do as well or better in arbitration as they do in equivalent lawsuits.[34] These pragmatic results have led to growing public acceptance of arbitration as the preferred method for resolving disputes.[35]

**Opposition to Arbitration**

While the courts, the public and transaction lawyers have become increasingly enthusiastic about arbitration, litigation practitioners have been understandably reluctant to embrace a system that reduces litigation expenditures.[36] This has led to legal attacks on arbitration on grounds of the enforceability of the Federal Arbitration Act ("FAA"),[37] cost of arbitration,[38] mutuality of arbitration contracts,[39] pre-emption of the FAA by other federal statutes,[40] and other alleged infirmities of the arbitration process.[41]

The federal and state courts have rejected each of these attacks,[42] while, at the same time, providing substantial guidelines for the basic fairness of an acceptable arbitration process.[43]

*Arbitration and Class Actions*

Current attacks are based on the relationship of the FAA and FRCP 23 and its state progeny.[44] These attacks on arbitration clauses take two forms:

> The assertion that, under the authority of the court, Rule 23 must be overlaid onto arbitration procedure to provide for "class" arbitration;[45] or, alternatively,
>
> The claim that, if the arbitration clause prohibits class actions or the arbitration rules do not provide for the procedural equivalent of "class" treatment, the arbitration clause is "unconscionable" under state contract law.[46]

*"Class" Arbitration*

Plaintiffs have frequently sought "class" certification in arbitration. Federal courts which have addressed the issue squarely have held that where the arbitration rules did not specifically provide for arbitration on a class basis, under Section 4 of the FAA, "class" arbitration is not permitted.[47] Most state courts have taken the same position. For instance, the Supreme Court of Alabama rejected the "class" assertions of parties who had agreed to arbitration.[48]

> "Arbitration agreements cannot be forced into the mold of class action treatment without defeating the parties' contractual rights; a rule of civil procedure providing for class actions cannot overcome binding arbitration agreements." [49]

Similarly, an Illinois appellate court concluded that individual arbitrations under fair set of arbitration rules further the exact purposes for which Rule 23 was adopted.[50]

The overwhelming majority of judicial decisions have held that such a limitation in an arbitration rule structure is enforceable.[51] Every federal court that has addressed the issue has concluded that the waiver of the class action process (a court rule of procedure) is inherent in an agreement to arbitrate.[52]

However, some California courts and, recently, the Supreme Court of South Carolina, have held that, where the arbitration agreement or rules are silent on the subject, a class arbitration can be ordered by the court.[53] At least one California court ordered a "class" arbitration, relying on the silence of the rules of the American Arbitration Association on the subject.[54]

The United States Supreme Court was recently offered the opportunity to clearly resolve this first line of attack.[55] In *Bazzle,* the Court addressed two related cases in which the arbitration clause was arguably silent on the issue of "class" treatment in arbitration. In one, the trial court had ordered "class" arbitration; in the other, the arbitrator had followed suit and ordered "class" arbitration. The defendant asserted that FAA §4 required enforcement of the contract as written and that the contract language did not allow "class" arbitration.[56] The plaintiff asserted (and the South Carolina Supreme Court agreed)[57] that the contract language was ambiguous on the subject and, absent an agreement of the parties to prohibit "class" arbitration, the courts of South Carolina could create a "class" arbitration, as a matter of local law.[58]

The Supreme Court, in a plurality opinion, punted. The Court agreed that the contract language was ambiguous, but held that the interpretation of the ambiguous language was for the arbitrator.[59] The decision reversed the judgment of the South Carolina Supreme Court and returned the matter to the *arbitrator* for contract interpretation, to determine whether the contract language prohibited "class" arbitration.[60]

Notably, the four justice plurality seemed to accept that, if the arbitrator ultimately concluded that the contract prohibited "class" arbitration, that prohibition would be enforced under FAA §4.[61] Additionally, a three justice minority concluded that the language was not, in fact, ambiguous, did prohibit "class" arbitration, and should have been enforced under Section 4.[62] At oral argument, Justice Stevens made the point that, given the very nature of the litigation, there would not likely be another arbitration clause ambiguous on this subject matter.[63] The opinions in *Bazzle* suggest that, when faced with an unambiguous prohibition on "class" arbitration, the United States Supreme Court will not allow the creation of a "class" in arbitration.

*Arbitration Prevents Class Actions*

The other attack on arbitration agreements through Rule 23 is more direct, although no more widely accepted. Alabama and California state courts and the Ninth Circuit Court of Appeals (interpreting and applying California state law) have concluded that a prohibition of a "class" in arbitration, if enforced "as written", is "unconscionable" as a matter of state law.[64] These decisions have been based either, somewhat incongruously, on the supposed cost of bringing an individual claim in arbitration[65] or an apparent conclusion that some litigants have a substantive right to bring class actions, of which they are deprived by an arbitration process that adjudicates claims individually.[66]

Although it is clear that courts can refuse enforcement arbitration clauses because of the costs associated with arbitration,[67] that action requires a specific determination that the costs are prohibitive.[68] Only the *Leonard* court, in a 4-3 decision, has leapt from the class action prohibition present in an arbitration clause to a conclusion that only through a Rule 23 action could the plaintiff's claim be economically pursued.[69]

The best available research shows that arbitration is less costly than litigation.[70] If the cost of arbitration led directly to the creation of a Rule 23 action, so, too, should the cost of an individual lawsuit. Of course, under Rule 23, the actual procedural prerequisites to "class" certification (as opposed to the underlying justification for the Rule) have little to do with the alternative cost of the individual lawsuit.[71]

Moreover, most national arbitration rules provide for shifting of costs from individual claimants to the business that propound the arbitration agreement.[72] This is an effective judicial requirement for arbitration, as a growing number of courts have held that businesses must defray the cost of arbitration for individuals, so that actual cost to the individual cannot exceed the cost of the court process.[73]

In this direct attack on arbitration procedures that do not provide for a "class" in arbitration, lower California courts have held that a prohibition on "class" treatment, contained in an arbitration clause, was "unconscionable, as a matter of state law."[74] However, other California courts have reached the opposite conclusion.[75]

The Ninth Circuit Court of Appeals adopted the *Szetela* position on California law and concluded that an arbitration agreement that clearly prohibited "class" treatment of claims was "substantively unconscionable" and would not be enforced.[76] The *Ting* clause did contain some additional infirmities that made it more offensive to that court.[77] While it is theoretically possible that the California law on "unconscionability" could be different than other states, in the context of the FAA, these decisions appear to violate Section 4 of the FAA and are inconsistent with those of the Third, Fourth, Seventh, Eigth, and Eleventh Circuits.[78] The resolution of this conflict remains for the Supreme Court.

*The Result*

The Supreme Court has effectively applied the FAA to all arbitrations.[79] The Court has directly held that the FAA preempts federal statutes that appear to favor class actions or create a right to class actions.[80] The Supreme Court and other federal appeals courts have held that any such procedural rights are waived by a party who agrees to arbitration.[81] In a different context, a separate panel of the Ninth Circuit Court of Appeals has agreed with the other Circuits on this issue.[82]

Additionally, a decision that a contract is "unconscionable" with regard to the named plaintiff would apparently be pyhrric. Courts have consistently held that even if the named plaintiff was not bound by an arbitration agreement, where absent "class" members had agreed to arbitrate, individual arbitrations for those claimants would be ordered.[83]

Courts, including the U.S. Supreme Court, have also held that "class type" remedies provided for in statutes for protection for specific classes of plaintiffs do not prevent the referral of claims under such a statute to arbitration.[84] The California appellate courts sent a California §17200 (injunctive relief on behalf of the state) claim to arbitration.[85]

The current status of the law is that the FAA covers all but the most unusual arbitration agreements.[86] Section 4 of the FAA provides that arbitration agreements shall be enforced as written.[87] Under the FAA, the authority to consolidate claims is limited by the agreement of the parties and the incorporated rules of arbitration.[88]

Beyond the conflict with of the majority of federal appellate courts, the *Ting* decision seems to ignore the contractual rights, not only of the defendant, but of the absent class members. Justice Thomas, dissenting in *EEOC v. Waffle House*, made the point that the failure to enforce the arbitration agreement exposed the defendant to "two bites at the apple" by a plaintiff who was not restricted to his arbitration remedies.[89] The appellant in *Bazzle* noted that, despite the "class" resolution of the claims, all of the absent class members retained their right to seek arbitration remedies against the defendant.[90] The only way to avoid these anamolous results would be to deprive both defendant and all of the absent class members of the benefit of their arbitration agreements, solely to create leverage for the Rule 23 lawyers in the case before the court.

In the cases where these few courts have held an arbitration contract "unconscionable" with regard to a named plaintiff (a very individual analysis), absent "class" members have never asserted that their similar contract is

unfair or unenforceable with regard to them. These courts, while holding that the named plaintiffs had not effectively waived their right to bring a class action, have thus far not held that the absent "class" members, who have agreed to arbitration, are prohibited from proceeding to arbitration. In fact, other courts have specifically held that those who sign a mandatory arbitration agreement are excluded from a class action brought by similarly situated plaintiffs (whowere not bound by an arbitration agreement).[91] A plaintiff who is excused from his contract by reason of "unconscionability" is the only party unbound; if a court is going to extend that determination to every contracting party, it would seem to require an individual analysis for every potential "class" member.[92]

Additionally, regardless of an arbitration agreement, the punishment objectives and power to change behavior that are the real purposes of the modern class actions are still exercised by the proper authorities.[93] For this reason, it seems likely that the Supreme Court will retain its current balance between the "right" to bring a Rule 23 action and the "as written" provisions of the FAA, as outlined in *Gilmer*:

> It is also argued that arbitration procedures cannot adequately further the purposes of the ADEA because they do not provide for broad equitable relief and class actions… But even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator, the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred. (Internal citations omitted). Finally, it should be remembered that arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief. [94]

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**Footnotes**

[1] *F. Paul Bland, Jr.: Pursuing a Passion for Law and Life*, Consumer Financial Services Law Report, Oct. 9, 2002, at 3; *Alan S. Kaplinksy: Providing Guidance for Clients and Colleagues*, Consumer Financial Services Law Report, Sept. 25, 2002, at 3.

[2] David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail To Fix The Problems Associated With Employment Discrimination Law Adjudication,* 24 Berkeley J. Emp. & L. 1, 31-32 (2003).

[3] *Id.*; Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-DisputeEmployment Arbitration Agreements*, 30 Wm. Mitchell L. Rev. 313, 314 (2003).

[4] *See e.g.* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995); Armendariz v. Foundation Health Psychare Services, Inc., 6 P.3d 669 (Cal. 2000).

[5] Judge Patrick E. Higginbotham, Ainsworth Lecture at Loyola University School of Law, (April 6, 2001) (quoting Kent D. Syverud, *ADR and the Decline of the American Civil Jury*, 44 UCLA L. Rev. 1935, 1935 (1997)).

[6] *Public Loses As Lawyers Block Access to Cheaper Legal Help*, USA Today, Feb. 29, 1999, at 14A.

[7] Jill Schachner Chanen, *Pumping Up Small Claims: Reformers Seek $20K Court Limits – With No Lawyers*, 84 A.B.A. J. 18, 18 (Dec. 1998).

[8] Lewis Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 57 (1998).

[9] *Id.* at 58.

[10] Fed. R. Civ. Pro. 23 advisory committee's note.

[11] *E.g.* Minn. R. Civ. P. 23.

[12] *See* text of the pre- and post-amendment versions of Rule 23. *See also* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure*, 81 Harv. L. Rev. 356 (1967).

[13] Chrapliwy v. Uniroyal, Inc., 71 F.R.D. 461, 463 (N.D. Ind. 1976).

[14] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 592 (1997).

[15] Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 226 (2003).

[16] La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 465 (9th Cir. 1973).

[17] 173 F.R.D. 167, 172 (W.D. La. 1997).

[18] William P. Barrett, *I Have No Clients*, Forbes, Oct. 11, 1993.

[19] Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974).

[20] In the Matter of Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (1995) (Posner, J.) (quoting Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)).

[21] Higginbotham, s*upra* note v.

[22] *See generally* Lawrence B. Solum, *Legal Theory Blog Political Science Association*, *at* http://lsolum.blogspot.com/2003_10_01_lsolum_archive.html (Dec. 8, 2003).

[23] Cornerstone Research, *Post-Reform Act Securities Case Settlements: Cases Reported Through Dec. 2002*, at 5, *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2002/Through2002.pdf (Dec. 8, 2003).

[24] *In the Matter of Rhone-Poulenc Rorer, Inc.*, *supra* note xx.

[25] *See e.g.*, Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 Ind. L.J. 497, 501 (1987) (concluding that "most class actions, like most litigation, settle prior to trial" based on a 78% settlement rate - - 36 out of 46 - - in a sample of certified class actions).

[26] Cornerstone Research, *Post-Reform Act Securities Case Settlements: Cases Reported Through Dec. 2002*, at 15, *available at* http://securities.stanford.edu/Settlements/REVIEW_1995-2002/Through2002.pdf (Dec. 8, 2003).

[27] Joe Stephens, *Coupons Create Cash for Lawyers: Class Action 'Paper' Settlements Mean Little to Individual Plaintiffs*, Wash. Post, Nov. 14, 1999, at A1.

[28] Bryan Bruggerman, *Hall of Shame Announced for Class-Action Lawsuits in County*, Bellevill News-Democrat, Sept. 6, 2002, at A40.

[29] Editorial, *Class-Action Plaintiffs Deserve More than Coupons*, USA Today, Oct. 9, 2002.

[30] *Allied-Bruce*, 513 U.S. at 280.

[31] *See* Green Tree Fin. Corp. v. Bazzle, 123 S. Ct. 2402 (2003); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996); *Allied-Bruce*, 513 U.S. 265; Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62 (1995); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468 (1989).

[32] Cal. Civ. Pro. Code § 1141.11 (2002).

[33] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 30, 55 (1998); Steven J. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A.J. 78, 79-80 (1985); *Allied-Bruce*, 513 U.S. at 280 (quoting HR Rep. No. 97-542, p.13 (1982)).

[34] *See* Lewis Maltby, *Employment Arbitration: Is It Really Second Class Justice?*, 6 DISP. RESOL. MAG., Fall 1999, at 23.

[35] Roper ASW, *Legal Dispute Study* (April 2003), *available at* http://adrinstitute.com/adri-lds2.pdf (Dec. 5, 2003).

[36] Erika Birg, *Waging War Against Binding Arbitration: Will Trial Lawyers Win the Battle?*, ENGAGE, May 2003, at 112.

[37] *See Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce*, 513 U.S. 265 (1995).

[38] *See Randolph*, 531 U.S. 79 (2000).

[39] *See Armendariz*, 6 P.3d 669 (2000).

[40] *See Circuit City*, 532 U.S. 105 (2001); *Mastrobuono*, 514 U.S. 52 (1995); *Gilmer*, 500 U.S. 20 (1991).

[41] *See* Ting v. AT&T, 319 F.3d 1126 (2002); Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003).

[42] *See* cases cited *supra* notes xxxiv-xxxviii.

[43] *See Gilmer*, 500 U.S. 20 (1991); *Volt,* 489 U.S. 468 (1989); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).

[44] *See Bazzle*, 123 S. Ct. 2402 (2003), *Ting,* 319 F.3d 1126 (2002).

[45] Bazzle v. Green Tree Financial. Corp., 569 S.E.2d 349, 360-61 (S.C. 2002)

[46] *Ting*, 319 F.3d at 1150.

[47] Dominium Austin Ptnrs., 248 F.3d 720, 723 (8th Cir. 2001); Champ v. Siegel Trading Co., 55 F.3d 269, 270 (7th Cir. 1995); *Arriaga*, 163 F. Supp. 2d 1189, 1195 (S.D.Cal. 2001); McCarthy v. Providential Corp., 1994 WL 387852, at *8 (N.D. Cal. 1994); Gammaro v. Thorp Consumer Disc. Co., 828 F. Supp. 673, 674 (D. Minn. 1993), *app. dism'd*., 15 F.3d 93 (8th Cir. 1994) . *Gammaro* and *Arriaga* involved agreements that incorporated the *Code of Procedure* of the National Arbitration Forum. As in *Randolph*, *supra*, and *Johnson*, *supra*, although the claims were both "common" and "typical", Forum Rule 19 was held to allow consolidation, but not as a "class", in the style of Rule 23.

[48] Ex parte Green Tree Financial Corp., 723 So. 2d 6, 11 (Ala. 1998).

[49] *Id.* at 10 n.3.

[50] Hutcherson v. Sears Roebuck & Co., 793 N.E. 2d 886, 896 (Ill. App. 2003).

[51] *E.g.* Snowden v. Checkpoint Check Cashing, 290 F.3d 631, 638 (4th Cir. 2002); Lloyd v. MBNA Am. Bank, 2001 WL 194300 *3 (D.Del.), *aff'd* (3d Cir. Jan. 7, 2002) (No. 01-1752); Goetsch v. Shell Oil Co., 197, 578 F.R.D. 574 (W.D.N.C. 2000); Doctor's Assocs. v. Hollingsworth, 949 F.Supp. 77, 85 (D.Conn. 1996); Coleman v. Nat'l Movie-Dine, Inc., 449 F. Supp. 945, 948 (E.D. Pa 1978).

[52] *E.g. Gilmer*, 500 U.S. at 31; Bowen v. First Family Fin. Svcs., 233 F.3d 1331, 1338 (11th Cir. 2000); *Johnson*, 225 F.3d at 377-378; *Champ*, 55 F.3d at 276.

[53] *Bazzle*, 569 S.E.2d at 360; Keating v. Superior Court, 645 P.2d 1192, 1209 (Cal. 1982).

[54] Blue Cross v. Superior Court, 78 Cal. Rptr. 2d 779, 790 (Ct. App. 1998).

[55] *See Bazzle*, 123 S. Ct. 2402 (2003).

[56] Reply Brief at *5,. *Bazzle*, 123 S. Ct. 2402 (2003) (No. 02-634).

[57] *Bazzle*, 569 S.E.2d at 360.

[58] *Id.*

[59] *Bazzle*, 123 S. Ct. at 2407.

[60] *Id.*

[61] *Id.* at 2408.

[62] *Bazzle*, 123 S. Ct. at 2409-2410.

[63] Oral Argument at *55, *Bazzle*, 123 S. Ct. 2402 (2003) WL 1989562.

[64] *Ting*, 319 F.3d 1126, 1150 (2002); Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002); Leonard v. Terminix, 854 So. 2d 529, 538 (Ala. 2002).

[65] *Leonard*, 854 So. 2d at 535.

[66] *Ting*, 319 F.3d at 1150.

[67] *Randolph*, 531 U.S. at 90.

[68] *Id.* at 92.

[69] *Leonard*, 854 So. 2d at 538-539.

[70] *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 55 (1998); *Allied-Bruce*, 513 U.S. at 280 (quoting HR Rep. No. 97-542, p.13 (1982).

[71] *See* Fed. R. Civ. P. 23.

[72] National Arbitration Forum, *Code of Procedure*, Rule 44(I), *available at* http://www.arb-forum.com/code/part7.asp; American Arbitration Association, *Supplementary Procedures for Consumer-related Disputes*, C-8, *available at* http://www.adr.org/index2.1.jsp?JSPssid= 15747&JSPsrc=upload\LIVESITE\Rules_Procedures\ National_International\..\..\focusArea\consumer\ AAA236 current.htm.

[73] *E.g. Armendariz*, 6 P.3d 669, 687 (Cal. 2000).

[74] *E.g. Szetela*, 118 Cal. Rptr. 2d at 867.

[75] *E.g.* Discover Bank v. Superior Court, 129 Cal. Rptr. 2d 393, 396 (Ct. App. 2003).

[76] *Ting*, 319 F.3d at 1150.

[77] *Id.* at 1151-52.

[78] *See Snowden*, 290 F.3d 631 (4th Cir. 2002); *Dominium*, 248 F.3d 720 (8th Cir. 2001); Baron v. Best Buy, 260 F.3d 625 (11th Cir. 2001); Johnson v. West Suburban Bank, 225 F.3d 366 (3d Cir. 2000) *cert. denied*, 121 S. Ct. 1081 (2001); *Champ*, 55 F.3d 269 (7th Cir. 1995).

[79] *See* Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037, 2040 (2003) ("We have interpreted the term "involving commerce" in the FAA as the functional equivalent of the more familiar term "affecting commerce"—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power.")

[80] *Mastrobuono*, 514 U.S. at 62; *Gilmer*, 500 U.S. at 32; *et al*.

[81] *E.g. Gilmer*, 500 U.S. at 31; *Bowen v. First Family Fin. Svcs.*, 233 F.3d 1331, 1338 (11th Cir. 2000); *Johnson*, 225 F.3d at 377-378; *Champ*, 55 F.3d at 276.

[82] *See* E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 747-50 (9th Cir. 2003).

[83] *Snowden*, 290 F.3d 631, 639 (4th Cir. 2002); *Lloyd*, 2001 WL 194300 *5 (D.Del.); *Goetsch*, 197 F.R.D. 574, 578 (W.D.N.C. 2000); *Hollingsworth*, 949 F.Supp. 77, 85-86 (D.Conn. 1996); *Coleman*, 449 F. Supp. 945, 948 (E.D. Pa 1978).

[84] *Circuit City*, 532 U.S. at 123; *Gilmer*, 500 U.S. at 32.

[85] *Arriaga*, 163 F. Supp. 2d at 1201.

[86] *See* Citizens Bank v. Alafabco, Inc., 123 S. Ct. 2037 (2003).

[87] 9 U.S.C. § 4 (2000).

[88] Weyerhaeuser v. W. Seas Shipping, 743 F.2d 635, 637 (9th Cir. 1984).

[89] *E.E.O.C. v. Waffle House*, 534 U.S. 279, 310 (2002).

[90] Reply Brief at *15-16, *Bazzle*, 123 S. Ct. 2402 (2003) (No. 02-634).

[91] Collins v. Int'l Dairy Queen, Inc., 169 F.R.D. 690, 692 (M.D. Ga. 1997).

[92] McManus v. CIBC World Markets Corp., 134 Cal. Rptr. 2d 446, 455-456 (Cal. App. 2d 2003).

[93] *See Waffle House*, 534 U.S. at 288 (2002); *Gilmer*, 500 U.S. at 28 (1991).

[94] *Gilmer*, 500 U.S. at 32.

# Professional Responsibility

## Judicial Impartiality and Judicial Campaign Contributions: Evaluating the Data

*By Prof. Ronald D. Rotunda**

**Introduction**

Money, it is said, is the mother's milk of politics. When judges run for election, they also drink of this milk. As a recent New York *Times* story gave this account — although one would think that what it reports is not really "news" —

> In New York, where State Supreme Court judges are elected rather than appointed, the dominant political party in a county can virtually dictate who goes on the bench, and further, who fills hundreds of courthouse jobs. Not surprisingly, those in the courthouses and those hoping to become judges make sure to donate to the party, interviews and campaign finance records show. . . . Most clerks bought at least a few tickets to the [fundraising] parties, at $200 to $300 apiece. The clerk jobs, which are filled by lawyers who act as aides to judges, are traditionally stepping stones to judgeships controlled by the party.[1]

That is no way to choose judges, one might say, which is why an overwhelming number of academics have long supported merit selection of judges, as in the federal system.[2] When judges are elected they may too readily reflect the politics of the moment rather than the objective needs of justice. Richard Scruggs, a famous plaintiff's lawyer who has made millions in the asbestos and tobacco cases has conceded that in jurisdictions where the judiciary is elected and the judges and electorate are, in his words, "populous," and there are "large populations of voters who are in on the deal," it is "a political force in their jurisdiction and it's almost impossible to get a fair trial if you're a defendant in some of those places." In some of these jurisdictions, "the jury is going to come back with a large number and the judge is going to let it go to the jury."[3] Yes, this is a problem, but the problem is not campaign contributions so much as it is the problem with the way that the judges are selected and the free rein that they give to the jurors.

Given the decision to choose judges by popular vote, one should not be surprised that judicial candidates are active in politics, attend fund-raisers, and are, for the most part, party loyalists who contribute to the party. While the *Times* criticized the present system, it found no connection between judicial campaign contributions and corrupt judicial decision-making. Yet, the article intimated that the system was corrupt.

That viewpoint is hardly an orphan. A recent ABA poll concluded that "72 percent of all Americans are concerned that the impartiality of judges is compromised by their need to raise campaign contributions," with over half of the respondents saying that "they were 'extremely' or 'very' concerned."[4] Last year, a poll by the North Carolina Center for Voter Education revealed that 84% of likely voters surveyed were "concerned about how judges raise money for their elections." And, nearly three-quarters of the respondents (74%) believed that campaign contributions "influence judicial decisions."[5] Two years ago, the President of the Chicago Bar Association said that he was "very concerned that the public questions the propriety of that system," and also "had doubts about the impartiality of the judges involved."[6] Only 7% of Illinois voters believe that judicial rulings are "never influenced" by campaign cash.[7]

If voters believe that judicial campaign contributions have this improper influence on a tribunal's judgments, states can eliminate the contributions simply by choosing to appoint their judges. There would be no judicial campaign contributions if there were no judicial campaigns. But voters do not appear to be interested in changing their minds. For example, a North Carolina poll showed that 81% of the respondents still preferred the election of judges over their selection by the merit system.[8] While the federal system chooses its judges by merit selection instead of elections, most states (39 at last count) reject that alternative in favor of popular elections.[9]

These poll results raise serious concern, for an impartial judiciary is crucial to the rule of law. Yet, do the polls reflect the way things are in fact, or merely the way that many people fear that they may be?

This question is of more than academic interest. If empirical data do not support the assumption that campaign contributions have a corrosive, corrupting affect on judicial decision making, that will undercut the constitutional bases for enacting laws regulating and restricting campaign contributions. Laws restricting contributions and expenditures on campaign financing must be measured against various U.S. Supreme Court cases that apply the First Amendment to protect campaign financing as a form of free speech.[10] Money talks, both literally and figuratively. As Justice Souter noted in the campaign financing case of *Nixon v. Shrink Missouri Government PAC*: "This Court has never accepted mere conjecture as adequate to carry a First Amendment burden . . . ."[11]

**Examining the Possible Relationship Between Campaign Contributions and Judicial Decisions**

*Introduction*

Rigorous economic studies of campaign contributions outside of judicial elections give us results that are

counter-intuitive, that is, results that are contrary to the assertions that are easily made and too easily accepted in this area of the law.

For example, people (particularly politicians) often assert that the high cost of broadcast advertising is responsible for the increased costs of political campaigns. The typical contested House of Representatives race cost (in 1990 dollars) $385,000; by 2000 that figure had increased to $973,000 (also in 1990 dollars). "It is widely believed that candidates 'must' campaign on television to win, so the rising price of television time drives up election spending."[12] Based on that assumption, Senator John McCain (R-Ariz.) and others have introduced S. 1497, "The Our Democracy, Our Airwaves Act of 2003." The bill will force broadcasters to provide free airtime to political candidates and parties. This bill is a form of tax on broadcasters, and the amounts involved are hardly peanuts. The bill expects giving candidates for Congress and the presidency $750 million in free airtime in just one year, 2004.

Yet, the empirical research does not support the basic assumption on which this bill is based. A rigorous study from MIT and Yale economists found that higher television advertising prices "have no effect on total campaign spending levels." Moreover, higher television advertising prices also "have no significant effect on incumbent vote margins or victory rates." In short: "The advent of television in campaigns has had little effect on spending levels or vote margins in congressional elections."[13]

Advocates who propose limiting campaign contributions and campaign expenditures also routinely assert that those who give the money corrupt the recipients. The old saw tells us that he who pays the piper calls the tune, but that old saw does not cut the timber of political platforms.

Yet another study, by three MIT economists, examined this assertion, looked at the empirical evidence, and concluded:

> The evidence that campaign contributions lead to a substantial influence on votes is rather thin. Legislators' votes depend almost entirely on their own beliefs and the preferences of their voters and their party. . . . Interest group contributions account for at most a small amount of the variation. In fact, after controlling adequately for legislator ideology, these contributions have *no* detectable effects on legislative behavior.[14]

The economists titled their paper, *Why Is There So Little Money in U.S. Politics?*. Their purpose was not merely to be provocative. Instead, they looked at what was as stake. Building on earlier work by Gordon Tullock,[15] the authors concluded that one cannot explain why people give so little in political campaigns *if* one assumes that the givers intend to change the behavior of the politicians. For example, consider sugar subsidies. A GAO study found that government rules, statutes, and regulations had the effect of transferring from consumers to sugar producers and processors $1.1 billion a year from 1989 to 1991. Or, "$192,000 worth of contributions in 1985 bought more $5 billion worth of value for the industry over a five year period."[16]

If one believes that he who pays the piper calls the tune, one cannot explain why contributors do not give more money because what is contributed earns an excellent rate of return. One would expect, "given the value of policy at stake," that firms and other interest groups should give a lot more.

In addition, competition should reduce the marginal value of what is bought as more firms enter the political marketplace to reap these windfall gains. "If a relatively small investment of approximately $200,000 brings a return of $1 billion, or even one-thousandth that amount, then any investor should want to shift assets out of other investments and enter the political market." Instead, we find that a "surprisingly large number of firms (even firms in the Fortune 500) do not participate at all, even though there are virtually no barriers to entry."[17]

Why then do contributors contribute? The economists' answer, after an extensive econometric analysis, is that political campaign contributions are a form of consumption, like giving to the United Way, except that individuals give less to politicians than they do to charity. And, as a percentage of their income, contributors give very little indeed. "Political contributions in 2000 were just 4 hundredths of one percent of national income."[18]

Those who advocate greater regulation of campaign contributions typically assert that the problem is recent or growing. Yet, campaign contributions as a percent of GDP have not risen appreciably in over 100 years. Rigorous econometric analysis shows "little relationship between money and legislator votes." The studies simply do not support "the popular notion that contributions buy legislators' votes."[19]

But can contributions buy judges' votes? Let us now turn to that topic.

*Correlating Judicial Decision Making with Judicial Campaign Contributions*

One would think that it should be straightforward to examine as a statistical matter the charge that campaign contributions affect judicial decision making. Indeed, it should be easier to examine this link than the possible link between campaign contributions to legislators and members of the Executive Branch. While legislators or members of the Executive Branch deal with many issues and interest groups, judges deal with specific parties involving particular matters. Hence, if these parties (or their lawyers) give the judges campaign contributions, and then the judges rule in favor of

these parties (or their lawyers), that does not necessarily mean that judges are corrupt, but it does mean that people's fear regarding the impartiality of judges is not unreasonable.

There is little rigorous empirical work in this area, but what exists is quite interesting. The results are tentative, and the experience of a few states may not mimic the experience of others. Yet, it is still intriguing that thus far, studies of several states do not support a statistical conclusion that judicial campaign contributions may be corrosive. These studies mirror the broader studies discussed above focusing on legislators.

*A Look at the Illinois Experience*

Let us turn first to the State of Illinois and examine litigants (a party or an organization involved in litigation or the lawyers for any litigant) who have given campaign contributions to judges before whom they have cases. We will call these people (the litigants or their lawyers) the "contributor-litigants." The question is whether one can find any evidence of a *tacit quid pro quo* where the judges favor or tilt towards the contributor-litigants.

Illinois has witnessed corrupt judges, whom the government has prosecuted for bribery, an *explicit quid pro quo*.[20] Our inquiry is different: Do judicial campaign contributions constitute or appear to constitute a *tacit quid pro quo* —where the judges favor or tilt towards the contributor-litigants? We have a fair sample of cases to investigate because, over three election cycles (1990, 1992, and 1994), 34% of the cases that the Illinois Supreme Court decided involved a contributor-litigant.[21] During these three elections, each of the seven members of the Supreme Court participated in at least one election.[22] In this sample of cases and election cycles that are selected, can one find evidence that judges are biased in favor of those who have given them campaign contributions?

Granted, the vast majority of people who made campaign contributions to Illinois Supreme Court Justices had no cases before the high court, and the vast majority of litigants who appeared before the Illinois Supreme Court Justices had not made any campaign contributions. Yet, even though contributor-litigants were contributors in only about one-third of the cases, that figure may be more significant if the amounts of the contributions— rather than the raw number of the contributors—were great.

So, let us take a look at the funds contributed by *all* parties appearing before the Illinois Supreme Court. It turns out that the total amount of money that the contributor-litigants gave is not large, and appears to be even less significant when compared to the total amount of all campaign contributions that non-contributor-litigants gave. The contributor-litigants as a group gave only 6.6% of the money that the candidates raised.

Moreover, the amount that the judges gave themselves dwarfed the amount that the contributor-litigants gave them. In other words, the judicial candidates contributed to their own campaigns two and one-half times *more* than all of the contributions of the contributor-litigants.[23] "Self-contribution" is significant because there is *no* risk of corruption when judicial candidates contribute to their own campaigns.[24] The justices are not litigants before their own court and they do not need to spend money to influence themselves.

If we look more closely at which individuals comprise the list of contributor-litigants, there is even less there than meets the eye. Remember, in the eight year period between 1991 and 1999, 34% of the cases that the Illinois Supreme Court heard involved a party, lawyer, or organization that made a campaign contribution to a Supreme Court justice in the prior election cycles. However, more than two-thirds of those cases involve *public* attorneys representing the state. The state's lawyers were giving judicial campaign contributions, but they do not have the same interest in litigation as private lawyers. The publicly-employed do not work on contingent fees; they are not billing by the hour; they do not worry about losing their client.[25] Indeed, state's prosecutors should not even worry about losing their cases because: "The duty of the prosecutor is to seek justice, not merely to convict."[26] The sovereign wins whenever justice is done, which is why the prosecutor in the Perry Mason novels was probably a very happy man.[27] By the way, when the state-employed contributors appeared before the Court, they were more often on the *losing* side than the winning side of the case.[28]

In our statistical analysis, if we remove these publicly-employed lawyers from the list of contributors, because their interests are different in kind than the interest of privately-employed lawyers, and their success or failure in litigation before that court is not likely to be related to their contributions, then the percentage of cases before that court where a contributor-litigant made a campaign contribution drops to just 10.7%. And when we turn to that 10.7%, we find that those contributors were more likely to be on the *losing* side than the winning side of the case.[29] In other words, to the extent that there is a statistical correlation, it is negative.

In short, fewer than 4% of the lawyers who appeared before the Illinois Supreme Court made a contribution to a winning candidate, and one-third of the judicial campaign funds came from an unlikely source of corruption: the candidates themselves or from the political parties who backed the candidates.[30] The U.S. Supreme Court has rejected restrictions on campaign financing when an anti-corruption rationale is unlikely to exist.[31] Just as a candidate who gives money to his own campaign is not influencing his views, the concept that the political party can "corrupt" the views of its candidates is equally peculiar, because the party's candidates are *its* candidates.[32]

What of contributors who were more generous? Let us look specifically as to whether major contributors who had cases before the Illinois Supreme Court were more

likely to win. While the average contribution was only $645, there were 68 contributors who gave $5,000 or more in the three election cycles. Of these major contributors, only seven appeared before the Court, and they lost as many cases as they had won.[33]

Instead of looking at particular cases and the contributor-litigants, we can look at a class of cases and a class of people who contributed to the justices. The Chicago Daily Law Bulletin analyzed a series of tort opinions and concluded that there was no correlation between campaign contributions and favoritism to plaintiff-tort lawyers who had contributed to the judicial campaigns of the Illinois Supreme Court Justices.[34] Tort plaintiffs lost in nearly two-thirds of the tort cases the justices decided since February 2001, although tort plaintiff lawyers were heavy contributors to the Democratic-controlled Illinois Supreme Court. Indeed, "[s]carcely a member of the court has been elected without the financial backing of the state's trial lawyers." The personal-injury lawyers often support more than one candidate in a contest, and then "reward primary winners with even more money to help the candidates in November, even when they face no serious threats in the general elections."[35] But these contributions did not lead to plaintiff-friendly judges.

Money talks but it often does not persuade, as illustrated by this example: in the year 2000 alone, Chicago personal-injury lawyer Joseph A. Power, Jr. and his law firm and partners gave financial support to three Illinois Supreme Court candidates to the tune of $63,000. His reaction to the empirical study: "Had I known ahead of time that the candidates were going to take two-thirds of the cases and decide them in favor of [the defense], I would have donated the money to a good charity."[36] Whatever his intentions may have been (whether he spoke in jest or in earnest), he clearly did not influence the results.

Of course, the fact that there is no statistical correlation between the major contributors to the campaigns of justices of the Illinois Supreme Court and success before that court--the fact that major contributors were just as likely to lose cases before these justices[37]--does not preclude an argument that the contributions are corrupting. Perhaps, if the contributors had given less, they would have lost even more than half cases. Yet, the statistical evidence is still relevant because it does demonstrate that in Illinois, at least, there is no statistical evidence supporting the assertion of corruption. Yet, that assertion is often repeated as if it had the certainly of a law of physics, just as the night follows the day.

*A Look at the Michigan Experience*

One robin does not make a spring, to coin a phrase (or to repeat one coined a long time ago), and one state, even one as populous as Illinois, does not demonstrate a trend. Let us turn to a study of the Supreme Court of the State of Michigan. This analysis included a complete campaign profile of the state supreme court that included at least one election for each of the sitting justices. The investigators collected data for an eight-year period, 1990 to 1998.[38] The conclusions are similar: the data do not support any claim that the judges favored or leaned towards the contributor-litigants.

During an eight-year period covering five election cycles, 89 percent of the cases that the Michigan Supreme Court decided involved a contributor who was either a party or was an attorney. Yet, when we look more closely, we find that more than half of those cases involved a state-employed attorney who had made a campaign contribution and who was representing the state, not a private client, before the court.[39] Lawyers constituted 23% of the contributors, but at least 80% of these lawyers never appeared before the court during the entire time of the study. In Michigan, the judicial candidates contributed only 2% of the total funds raised.

In Michigan, like Illinois, one cannot find a statistical linkage between judicial campaign contributions and outcomes favorable to those who gave the contributions. For example, one law firm (and its 53 individual lawyers) contributed the most to judicial candidates over the five election cycles; they gave a total of $344,403. However, only $41,735 (12 %) of that amount went to candidates who won and then became Supreme Court justices. The nine lawyers from that firm who actually argued cases before the Court gave just $4,532 to members of the Court. The law firm was involved in 23 cases during that period, four of them by filing an amicus brief. If we turn to the 19 cases in which they represented a litigant, we find that they won three, lost 12, and got split decisions in four.[40]

Maybe the law firm fared so poorly because it gave only $41,735 to the candidates who won. And, if the contributor-litigants had not given any money, one might argue that they might have lost even more frequently. All we know from the statistical evidence is that it does not suggest that the Justices favored these contributor-litigants who were four times more likely to lose than to win. These statistics cannot reveal the inner workings of the judicial mind. They are only evidence that one cannot find a statistical linkage between litigants who contribute to judges and judges ruling in favor of the litigants. Or, more precisely, to the extent that there is any statistical linkage it is negative; that is, to the extent a litigant (or the litigant's attorney) gave to a judge's campaign fund, that litigant was more likely to lose the case.

*A Look at the Wisconsin Experience*

The results in Wisconsin are similar to Illinois and Michigan. If we examine a lengthy period covering several election cycles, the results are similar to those for Illinois and Michigan. For example, during a 10-year period under review, there were 95 cases involving attorney discipline. Nine of these cases involved attorneys who had contributed to the justices, and in all nine of these cases, the lawyers lost their appeals. One law firm with eight lawyers was

one of the largest contributors in the state. It contributed a total of $8,150 to six Justices. That firm argued seven cases before the state, winning two and losing five.

The available data, as best as can be determined, do not support any inference that judges tilt towards those litigants who contributed to their judicial campaigns. One can always claim that the judicial campaign contributions cause judicial bias, but the figures and statistics do not support this inference.[41]

**Summary**

These statistics from three major states may not necessarily represent what we might find in other jurisdictions. In addition, cases that go before appellate courts are often complex, so that it may be difficult to determine if a decision is a complete victory for any party. A party may win, but the ruling of law may not be exactly what the party desired and may come back to haunt that party's long-term interests, particularly if the party is an institutional litigant often before a court, like a union or a major corporation. In addition, if a contributor wins a case, one can argue that he or she might have won anyway, so that the contribution was superfluous.

Nonetheless, these statistical studies do show that that charges of corruption can only be proven by looking at specific situations and motivations, not by painting with a broad brush and postulating as fact the claim that there is a linkage between campaign contributions and judicial decision making.

And finally, the data that fail to show that judges are corrupted by campaign contributions do not argue that the people should continue to choose their judges by popular election. If judicial campaign contributions do not cause judges to change their vote on cases before them, that fact alone does not mean that one should favor popular elections and oppose merit selection. It does mean that if the citizens of a state do not want their judges to run for office, they could move to merit system, where there would be no need for judges to raise any campaign contributions from litigants or lawyers who later appear before the judge. The American Judicature Society, the ABA, and academic commentators have favored merit selection for many years, and it is the easiest way to avoid issues related to the judges' need to raise campaign funds.

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**Footnotes**

[1] Clifford J. Levy, *Where Parties Select Judges, Donor List Is a Court Roll Call*, New York Times, Aug. 18, 2003.

[2] Like other academics, I also support merit selection of judges.

[3] Richard Scruggs, *Asbestos for Lunch*, Prudential Financial Research Services Group Conference, June 11, 2002, reprinted in, Asbestos Litigation and the Role of Courts 21 (Federalist Society, April 2003).

[4] ABA Journal E-report, August 16, 2002, http://www.abanet.org/journal/ereport/au16conf.html

[5] J. Barlow Herget, Op-ed, *It's Time for Judicial Reform*, Charlotte (N.C.) Observer, May 31, 2002, http://www.charlotte.com/mld/observer/news/3369889.htm

[6] Quoted in, John Flynn Rooney, *Not All Warm To Limits On Judicial Races*, Chicago Daily Law Bulletin (March 15, 2001) at 1.

[7] Daniel C. Vock, *Voters Leery On Judicial-Race Funding: Survey*, Chicago Daily Law Bulletin (October 25, 2000), at p.1.

[8] J. Barlow Herget, Op-ed, *It's Time for Judicial Reform*, Charlotte (N.C.) Observer, May 31, 2002, http://www.charlotte.com/mld/observer/news/3369889.htm

[9] American Judicature Society, Judicial Selection in the States: Appellate and General Jurisdiction Courts (Apr.2002).

[10] *See*, 4 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure §§ 20.51-20.51 (West Group, 3rd ed. 1999).

[11] 528 U.S. 377, 397 (2000).

[12] *Does TV Advertising Explain the Rise of Campaign Spending?—A Study of Campaign Spending and Broadcast Advertising Prices in US House Elections the 1990s and the 1970s* (October, 2001), by Stephen Ansolabehere, MIT, Alan S. Gerber, Yale, & James M. Snyder, Jr., MIT, at, 2, http://econ-www.mit.edu/faculty/snyder/files/TV_and_Spending_LSQ.pdf

[13] Does TV Advertising Explain the Rise of Campaign Spending?—A Study of Campaign Spending and Broadcast Advertising Prices in US House Elections the 1990s and the 1970s (October, 2001), by Stephen Ansolabehere, MIT, Alan S. Gerber, Yale, & James M. Snyder, Jr., MIT, at, 1, http://econ-www.mit.edu/faculty/snyder/files/TV_and_Spending_LSQ.pdf

[14] Stephen Ansolabehere, John de Figueiredo, and James M. Snyder Jr., *Why Is There So Little* Money *in U.S. Politics?* 17 Journal of Economic Perspectives (Winter 2003), at 115–117 (emphasis added). This article may also be found at: http://econ-www.mit.edu/faculty/snyder/files/CF_JEP_Final.pdf

[15] Gordon Tullock, *The Purchase of Politicians*." 10 Western Economic Journal 354-55 (1972).

[16] http://econ-www.mit.edu/faculty/snyder/files/CF_JEP_Final.pdf, at p. 4.

[17] Stephen Ansolabehere, John de Figueiredo, and James M. Snyder Jr., *Why Is There So Little Money in U.S. Politics?* 17 Journal of Economic Perspectives (Winter 2003), at 115–117 (emphasis added). This article may also be found at: http://econ-www.mit.edu/faculty/snyder/files/CF_JEP_Final.pdf

[18] http://econ-www.mit.edu/faculty/snyder/files/CF_JEP_Final.pdf, at p. 25.

[19] http://econ-www.mit.edu/faculty/snyder/files/CF_JEP_Final.pdf, at p. 2.

[20] The "Operation Greylord" series of criminal prosecutions uncovered evidence of a few judges accepting bribes. *See, e.g., United States v. Maloney,* 71 F.3d 645 (7th Cir. 1995), *cert. denied*, 519 U.S. 927 (1996); *Bracy v. Gramley*, 520 U.S. 899 (1997).

[21] *See*, Samantha Sanchez, *Illinois Supreme Court: Money in Judicial Elections,* The National Institute on Money in State Politics, http://www.followthemoney.org/reports/il/20020129/IL.phtml. The National Institute on Money in State Politics developed the *Money in Judicial Politics Project* to track contributions and spending in Supreme Court elections in a number of states, including Illinois. To compile a complete campaign profile of the court that included at least one election for each of the seven sitting Justices, the Project collected data for three election cycles: 1990, 1992 and 1994. In these election cycles, 32 candidates sought one of the seven positions. In the supreme court

races of 2000, which we do not consider, 12 candidates spent $7.7 million.

[22] There were no Supreme Court elections in 1996 or 1998, and the election of 2000 is not considered because those who were elected have not yet participated in enough cases to make a useful statistical analysis of contributors and litigants.

[23] http://www.followthemoney.org/reports/il/20020129/IL.phtml

[24] *See*, *Buckley v. Valeo*, 424 U.S 1, 53 (1976) (per curiam) (footnotes omitted) (internal citation omitted), which invalidated federal limits on a candidate spending his or her own money because the there is no danger of real or apparent corruption when candidates use their own funds:

> "The primary governmental interest served by the Act the prevention of actual and apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds. As the Court of Appeals concluded: 'Manifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family.' Indeed, the use of personal funds reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."

[25] http://www.followthemoney.org/reports/il/20020129/IL.phtml: "If the publicly employed attorneys are removed from consideration, on the theory that their success before the Court is unlikely to be related to their contributions, just 10.7 percent of cases before the Supreme Court involved a contributor.

[26] ABA Standards Relating to the Administration of Justice, Standard 3-1.2(c), "The Function of the Prosecutor," (ABA, 3rd ed. Feb. 3, 1992).

[27] Ronald D. Rotunda, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 12-4 (ABA-West Group 2nd ed. 2002).

[28] http://www.followthemoney.org/reports/il/20020129/IL.phtml

[29] *Id*.

[30] *Id*.

[31] *See*, *Federal Election Commission v. MCFL*, 479 U.S. 238, 263 (1986) (striking limits on campaign expenditures by incorporated political associations because spending by such groups "does not pose [any] threat" of corruption); *Federal Election Commission v. NCPAC*, 470 U.S. 480 (1985) (invalidating limits on independent expenditures by political action committees because, in that context, "a quid pro quo for improper commitments" was only a "hypothetical possibility*"); Citizens Against Rent Control/ Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 297 (1981) (reaffirming that "*Buckley* does not support limitations on contributions to committees formed to favor or oppose ballot measures" because an anticorruption rationale is inapplicable); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978) (holding that limits on referendum speech by corporations violate First Amendment because "[t]he risk of corruption ... simply is not present").

[32] *Cf., Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 646-47 (1996), holding that the First Amendment prohibits the application of Federal Election Campaign Act's party expenditure provision to expenditures that the political party has made independently, without coordination with any candidate. A separate opinion of Justice Thomas, joined as to this part by Chief Justice Rehnquist and Justice Scalia, also concluded that the anticorruption rationale justifying campaign restrictions is inapplicable in the context of political parties funding campaigns because there is only a minimal threat of corruption when a party spends to support its candidate or to oppose the competitor to its candidate, even if that expenditure is made in concert with the candidate. 518 U.S. 604, 646-47.

[33]http://www.followthemoney.org/reports/il/20020129/IL.phtml

[34] Daniel C. Vock, *Dem Majority Aside, High Court Leans Right*, Chicago Daily Law Bulletin (September 3, 2002), at p. 1. The Chicago Daily Law Bulletin's "conclusions are part of a comprehensive Law Bulletin analysis of every high court decision issued in the last 19 months. The rulings were broken into a number of factors, and each variable was entered in a computer database to examine how the judges rule in different types of cases, their tendencies toward various types of litigants and how the justices rule in relation to each other."

[35] *Id.*

[36] Quoted in Daniel C. Vock, *Dem Majority Aside, High Court Leans Right*, Chicago Daily Law Bulletin (September 3, 2002)..

[37] The private attorneys who contributed to at least one member of the Illinois Supreme Court and later appeared before that court, in order of funds contributed, are:

- Jerome Mirza gave $11,264, appeared in three cases and lost all three;
- Robert A Clifford gave $9,500, appeared in two cases and lost both;
- Leonard M. Ring, gave $7,750, appeared in two cases, lost one and received a split decision in the second;
- Philip H. Corboy gave $4,450, appeared in three cases, lost one and had two split decisions;
- Joseph Curcio gave $4,100 and appeared in one case which he won; and, Patrick A. Salvi gave $3,030 and appeared in only one case, filing an amicus brief.
- Amiel Stephen Cueto gave $3,000 and appeared in one case, which he lost.
- 66 other attorneys who gave less than $3,000 each and had similar mixed results.

[38] Samantha Sanchez, Illinois Supreme Court: Money in Judicial Elections, The National Institute on Money in State Politics, http://www.followthemoney.org/reports/mi/20020129/MI.phtml. "Databases were created of all campaign contributions to all winning candidates during the study period, and those contributors' names were matched against a database of the parties and attorneys whose cases were heard by the Supreme Court from 1991 through 1999. During that time, 26 candidates sought one of the seven positions, several of them more than once, and raised a total of $9,536,710. The 2000 Supreme Court races, where nine candidates spent a total of $6,352,002 in just one election, are not included in this study because those elected have not yet participated in enough cases to make the process of matching contributors and litigants worthwhile."

[39] http://www.followthemoney.org/reports/mi/20020129/MI.phtml.

[40] *Id.*

[41] Samantha Sanchez, Campaign Contributions and the Wisconsin Supreme Court, The National Institute on Money in State Politics, May 9, 2001, http://www.followthemoney.org/reports/wi/20010509/WI.phtml.

# Order your Freedom Fries Before it's too Late: Maryland Considers Adopting an Attorney Speech Code

*By Scott R. Haiber**

**Introduction**

As I considered drafting an article regarding a proposed revision to the Maryland Rules of Professional Conduct, I had to suppress a strong urge to call the local courthouse cafeteria and request that they strike the term "French Fries" from their menu and replace it with "Freedom Fries." I should explain that I have no particular obsession with cafeteria food. Nor do I share the currently popular anti-Gallic sentiment that has swept the nation; if anything, I am something of a Francophile. No, the only reason I considered making a statement reflecting a prejudice against the French is that I soon may lose the right to make such a statement at all. For if a committee appointed by the Maryland Court of Appeals has its way, Maryland lawyers soon may find it impossible to express their true views regarding the French — or the rich, the poor, homosexuals, heterosexuals, the opposite sex, the same sex, the old, the young or any other of innumerable classes. Instead, Maryland soon may enact a comprehensive speech code regulating the opinions that Maryland lawyers may express when acting in a "professional capacity."

Surprisingly, there has been relatively little outcry from the Maryland Bar about the censorship that soon may be visited upon its members. This silence could indicate that a majority of the Maryland Bar acquiesces in the curtailment of its liberties. More likely, the relative quiet could reflect that most Maryland attorneys have absolutely no idea that their speech rights are threatened. Either way, it is profoundly disturbing that a proposal laden with such significant constitutional and public policy concerns should proceed with such little scrutiny or public debate.

**The Proposed Speech Code for Maryland Lawyers**

In July 2002, a Special Ethics 2002 Committee appointed by the Maryland Court of Appeals (commonly called the "Rodowsky Committee") circulated proposed amendments to the Maryland Rules of Professional Conduct.[1] Buried on page 141 of the Rodowsky Committee's 153 page draft rules is a little publicized proposal to revise Rule 8.4 to make it professional misconduct for a Maryland lawyer to "knowingly manifest when acting in a professional capacity, by *words or conduct*, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status when such actions are prejudicial to the administration of justice, provided, however, that legitimate advocacy is not a violation . . .".[2] Notably, the existing Maryland rules already prohibit all *conduct* prejudicial to the administration of justice.[3] Thus, the sole effect of the proposed change will be to extend the reach of the disciplinary rules beyond conduct and into the realm of pure speech. Moreover, the proposed rule will regulate speech in a selective way that targets only certain viewpoints on certain topics. In other words, the Rodowsky Committee proposes the adoption of a comprehensive speech code for Maryland attorneys. Or, as a leading proponent of the proposed rule has stated, it would create "[a] black-letter ethics rule condemning bias as lawyer misconduct . . .".[4]

The origins of the proposed attorney speech code go back to 1994. At that time, the ABA's Young Lawyers' Division and its Standing Committee on Ethics and Professional Responsibility proposed alternative rules that would have barred certain forms of discriminatory speech.[5] Those proposals received a skeptical reception because of what many perceived to be serious First Amendment issues raised by outright restrictions on lawyer speech.[6] Eventually, even the Standing Committee itself acknowledged that an outright rule restricting speech might violate the First Amendment.[7] Accordingly, the ABA concluded that the wiser course was to implement only a policy statement. Although that policy statement essentially was incorporated into later commentary to Model Rule 8.4,[8] the ABA has steadfastly refused to place a restriction on discriminatory speech in an ethical rule itself.

Since 1995, a number of states have amended the commentary to their disciplinary rules to include language that tracks the revised commentary to Model Rule 8.4(d).[9] Maryland now may rush in where the ABA fears to tread by placing an attorney speech code not merely in a policy statement or official comment, but in the text of a disciplinary rule. In fact, a member of the Rodowsky Committee already has publicly indicated that the proposed attorney speech code will be recommended to the Maryland Court of Appeals.[10] That recommendation was forwarded to Maryland's highest court on December 16, 2003.[11]

**Constitutional Issues Raised by the Proposed Speech Code**

Although the ABA treaded cautiously with respect to Model Rule 8.4 because of a deep concern over the First Amendment implications of prohibiting views and opinions by attorneys, the proponents of the new Maryland rule have provided no evidence that they share such concerns over constitutional niceties. Instead, they point to evidence of continuing discrimination in the legal profession and argue that such conduct undermines respect for the entire legal profession and is inconsistent with a lawyer's commitment to justice.[12] Implicit in their argument is the suggestion that lawyers, as members of a regulated profession, have special duties and obligations that

allow for the curtailment of their speech rights.[13] Of course, the notion that lawyers have inferior First Amendment rights is, to put it lightly, highly suspect.[14] Indeed, although courts may enact reasonable restrictions designed to protect the judicial process and/or the right of an accused to a fair trial,[15] no court ever has suggested that broad viewpoint-based restrictions on attorney speech are permissible.[16]

Although the Rodowsky Committee seeks to further the worthy goal of eliminating discrimination in the legal profession, it has not explained how a speech code will further this goal in a constitutionally permissible manner. And the constitutional hurdles appear formidable. In the landmark case of *R.A.V. v. City of St. Paul*,[17] the United States Supreme Court set forth the constitutional principles applicable to speech codes in language that makes it difficult to understand how the Rodowsky Committee could expect its proposed rule to pass muster. In *R.A.V.,* the Court struck down an ordinance prohibiting the display of a symbol which a defendant would or should know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender."[18] Such a statute violated the fundamental principle that the government may not regulate speech based on either hostility or favoritism to the message expressed.[19] Moreover, the statute at issue could not be sustained as a valid restriction on "fighting words" because it did not prohibit all such expressions, but only those regarding certain topics.[20] Content-based selectivity, however, did not comport with the requirements of the Constitution: "The point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[21]

Following *R.A.V.,* federal courts repeatedly have struck down speech codes as violative of the First Amendment.[22] Most recently, a federal district court in Pennsylvania enjoined Shippensburg University from enforcing its campus speech code. [23] Although sympathetic to the University's objective of preventing discrimination, the court struck down the statute as overbroad and quoted Justice Jackson's famous statement on viewpoint-based speech restrictions:

> "[i]f there is any fixed star in our constitution, it is that no official, high or petty, can prescribe what will be orthodox in politics, nationalism, religion or matters of opinion or force citizens to confess by word or act their faith therein." [24]

The Rodowsky Committee appears to have lost sight of this fixed star.

In any event, in addition to concerns of overbreadth and viewpoint selectivity, the proposed Maryland rule, like all attorney speech codes, faces an additional constitutional problem: How do you draft such a rule in a way that adequately advises attorneys what speech is prohibited? Consider, for example, the problem a lawyer will face in trying to ascertain whether he is speaking in a "professional capacity" and therefore subject to the rule. Does a lawyer act in a "professional capacity" when he gives a speech at a Federalist Society debate? Does he do so when he testifies at judicial confirmation hearings? Or how about when he writes an article on a proposed speech code for *Engage*? A similar litany of questions could be raised over other imprecise terms in the proposed rule — most notably "legitimate advocacy" and "socio-economic status."[25] The result is that prudent Maryland lawyers, who can only guess at the meaning of the vague speech code, will both self-censor speech that is not prohibited by the rule and commit unwilling violations of a rule they do not understand. Thus, the proposed revision will cause precisely the kind of chilling effect that has led to the demise of other speech codes brought before the federal courts.

**A Noble Profession that Censors its Own?**

The constitutional issues raised by the proposed Maryland rule also suggest broader public policy concerns involved in the regulation of attorney speech. It seems inherently inappropriate for the legal profession to act as censor of its own members. Historically, courageous lawyers have protected the rights of socialists, anarchists, religious dissenters, racial bigots and other unpopular actors to express their views. Moreover, members of the bar perform this public service even when they are personally repelled by the underlying speech they help to protect. Jewish lawyers have defended the rights of Nazis to march in Illinois. African-American lawyers have defended the free expression rights of the Ku Klux Klan.

Of course, none of this means that lawyers condone offensive, hateful or prejudicial speech. Rather, it simply reflects a fundamental belief by many members of the profession that freedom of speech and conscience can survive only if we protect those freedoms even for the most despicable of actors seeking to peddle the most noxious of doctrines. As Ron Rotunda has explained, a rule that prevents Nazis from marching in Skokie could just as easily be manipulated by another jurisdiction into a rule that prohibits Martin Luther King, Jr., from marching in Selma.[26] Nadine Strossen, the President of the ACLU, made a similar point when she explained that organization's role in protecting free speech:

> "We don't defend the Klan. We defend the Klan's right to engage in peaceful protests or to express its own views. We would never substantively defend its ideas. It may seem like a small distinction, but it really is a significant difference."[27]

Nevertheless, one need not defend the rights of the Klan or Nazis to oppose the proposed rule revision under

consideration in Maryland. For the proposed speech code will stifle a much broader range of expression. For example, it will reach, on its face, expressions of opinion on topics as diverse as the propriety of same sex marriage, the inherent greed of the wealthy, or whether the Young Lawyer's Division of the Maryland State Bar Association should continue to have an age restriction. And because the proposed rule contains no exception for privileged communications, it could chill discussions between a lawyer and his client over such matters as venue selection or the fact that an octogenarian opposing counsel is not as formidable an attorney as he once may have been.

* * *

As of the date this article is written, there is no way of knowing whether the Maryland Court of Appeals will follow the Rodowsky Committee's recommendation and adopt a speech code for Maryland attorneys. Hopefully, the Court of Appeals will recognize the dangers of silencing lawyers — professionals who traditionally have played a leading role in public debate. Or, at a minimum, perhaps the Court will note the long list of speech codes that have been invalidated on First Amendment grounds and decide that it is ill-advised to adopt an unconstitutional rule for Maryland attorneys. But just in case, I'd order those Freedom Fries before it's too late.

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**Footnotes**

[1] *See* www.msba.org/articles/archives.htm (proposed rules).
[2] *Id*. at pg. 141 (emphasis added).
[3] *See* Maryland Rule of Professional Conduct 8.4(d).
[4] Pamela J. White, *Holistic Approach to Professionalism*, XXXVI The Maryland Bar Journal No. 5, 23 (Sept./Oct. 2003).
[5] *See generally* Andrew E. Taslitz & Sharon Styles Anderson, *Still Officers Of The Court: Why The First Amendment Is No Bar To Challenging Racism, Sexism And Ethnic Bias In The Legal Profession*, 9 Geo. J. Leg. Ethics 781 (1996).
[6] *See Id.* at 795-80 (discussing First Amendment concerns raised in response to the proposals).
[7] *See* Taslitz & Anderson, *supra* note 5 at 801 (noting that Committee believed a disciplinary rule would undoubtedly run afoul of the First Amendment).
[8] *See* Geoffrey C. Hazard, Jr. & W. William Hodes, 2 The Law of Lawyering at 65-5. (3d Ed. 2003 Supp.) (describing adoption of language in official comment as a "compromise").
[9] Delaware, for example, recently amended its official commentary to track that of Rule 8.4. *See* Delaware Rule of Professional Conduct 8.4 (official comment).
[10] White, *supra* note 4 at 21.
[11] *See A Civil Debate*, The Daily Record, 1B (Dec. 12, 2003).
[12] *See generally* White, *supra* note 4 at 19-21.
[13] *See, e.g*., *A Civil Debate*, *supra* note 11 at 1B (quoting proponent of speech code as stating that "[l]awyers have a special responsibility to understand their obligation of nondiscrimination [because] they take an oath to act fairly as an attorney.")
[14] *See, e.g.,* NAACP v. Button, 371 U.S. 415, 439 1963) ("For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights"); Conant v. Walters, 309 F.3d 629, 637 (9th Cir. 2002) ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights").
[15] *See generally* Gentile v. State Bar of Nevada, 111 St. Ct. 2720 (1991).
[16] *See, e.g.,* In re Morissey, 168 F.3d 134, 140 (4th Cir. 1999) (restrictions on attorney speech must be viewpoint neutral).
[17] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
[18] *Id*. at 380.
[19] *Id*. at 382.
[20] *Id.* 387-88.
[21] *Id*.
[22] *See, e.g.,* Saxe v. State College Area School Dist., 240 F.3d 2000 (3d Cir. 2001); Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); UVW Post, Inc. v. Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989); *see also* IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993) (overturning on First Amendment grounds university's sanctions on a fraternity for conducting an event with "racist and sexist" overtones).
[23] Bair v. Shippensburg University, 280 F. Supp. 2d 357 (M.D. Pa. 2003).
[24] *Id.* at 361 (quoting West Virginia Board of Ed. v. Barnette, 319 U.S. 624, 642 (1943)).
[25] As Professor Rotunda has noted, "[t]he neighbors of Atticus Finch, in *To Kill A Mockingbird*, no doubt thought that his advocacy was illegitimate." *See* Ronald D. Rotunda, *Racist Speech and Lawyer Discipline*, 6 Professional Lawyer 1 (No. 2, Feb. 1995).
[26] *See* Rotunda, *supra* note 25.
[27] *Nadine Strossen and Freedom of Expression: A Dialogue With The ACLU's Top noteCard-Carrying Member*, 13 Geo. Mason Civ. Rts. L.J. 185, 203 (2003).

# Religious Liberties

## The Prodigal Argument: *McCollum v. Board of Education*

*Introduction by Gerard V. Bradley**

Judges, lawyers, and scholars all cite the 1947 case, *Everson v. Board of Education,* as the cornerstone of Establishment Clause doctrine. They are right to do so. The *Everson* Court took two path-breaking steps: incorporation and strict separation. The justices there held, for the first time, that the Fourteenth Amendment made the Establishment Clause applicable to state action. Then they offered a novel account of what non-establishment meant. In sweeping language (which you can find at 330 U.S. 15 - 16) they held that it meant more than equality among religions. By requiring that all government authority in the United States be neutral as well between religion and non-religion, the *Everson* Court called for a secular public square.

*Everson* was a curious platform for such grand pronouncements. The case had neither been briefed nor argued as an Establishment Clause dispute. The issue brought to the Supreme Court was instead whether New Jersey's paying for Catholic schools kids' bus rides was a public expenditure for a "private" purpose. The most relevant case was *Cochran v. Board of Education,* a Louisiana textbook matter decided in 1931. Perhaps most curiously, the school kids *won* in *Everson.* Under what we would call a "child-benefit" doctrine – and much resembling the Court's non-discrimination analysis in later cases such as *Rosenberger* – a bare majority upheld the law.

All these factors made for a showdown the next term. The Court agreed to decide whether Champaign, Illinois public school authorities could constitutionally invite local religious leaders into the schools for voluntary religious instruction. One local free-thinker thought not. Vashti McCollum sued on behalf of her son, who was obliged by her beliefs to wait outside the classroom while the instruction took place. (Another of her sons—Daniel—grew up to be Mayor of Champaign.) The Illinois courts upheld local practice. The Supreme Court reversed.

*McCollum v. Board of Education* is really the decisive Establishment Clause case. Why? The result in *Everson* left many wondering just what non-establishment meant. The worriers included the dissenting justices. They welcomed *McCollum* as a chance to consolidate the rhetorical beachhead carved out in *Everson.* They succeeded.

Champaign's lawyers argued that *Everson's* expansive language was *dictum.* They seized the opportunity to supply the briefing *Everson* lacked. They argued, too, in a masterful 168 page brief by an extraordinarily able local lawyer named John Franklin, that non-establishment did not entail secularism, the godless public square. (Incorporation was challenged, too, but with much less vigor.) The other side responded with briefs nearly as able. A full dress rehearsal of all the relevant history was placed before the Court. This central question – whether the Clause originally meant sect equality, or neutrality between belief and unbelief – was never before so well presented. And it has not been since.

Hugo Black had written the majority opinion in *Everson,* and he wrote it again in *McCollum.* He laid out (at 333 U.S. 211) Franklin's contentions: *dictum,* dis-incorporation, and, by far the most urgently pressed, that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions."

The Court's response, just about in its entirety: "After giving full consideration to the arguments presented we are unable to accept either of these contentions".

*McCollum* was surely *received* as decisive – to the relief of some, and to the chagrin and anger of many. The nation's religious leaders responded to it – and not to *Everson* – as the clarion call. A typical reaction is recorded in John McGreevy's excellent book, *Catholicism and American Freedom.* McGreevy himself asserts that *McCollum* "erected a putative 'wall of separation' between church and state". He reports on an "off-the-record meeting of religious leaders held in the wake of "the decision." At the meeting, John Courtney Murray, one of the leading American Catholic intellectuals of that, or any other time, "emphasized that the *McCollum* decision was a victory for secularism and as such should be of great concern to Catholics, Jews and Protestants." It was.

We have always had the briefs in *McCollum*. You can get them, probably off microfiche, at any good law library. Now, with this issue of *Engage,* we have the Oral Argument, too. Through hard work and sheer luck I secured recently a copy of the transcript, and made it available to the Federalist Society. I do not think you can get it anywhere else.

Here is the short story of our quest. For a research project a couple years ago – and not knowing any better – I blithely asked my research assistant (Anthony Deardurff, Notre Dame Law Class of 2003) to get me a copy of the oral argument in *McCollum*. I had seen reference to it in one other scholarly work, James O'Neill's book, *Religion and Education Under the Constitution.* From what O'Neill said, it was obvious that he had seen a transcript. When Anthony reported that no copy could be found (the Court did not preserve arguments in those days) I was surprised and disappointed. And determined. The search was on.

We enlisted the able help of Librarian Dwight King. He and Anthony trailed many leads to dead ends. Dwight tried, for example, to locate O'Neill's survivors, or anyone at Brooklyn College (where he taught) who might have access to his papers. Nothing. I tried to locate someone in the McCollum family who might help. No one knew anything about the case files. From O'Neill's reference we knew that one Althea Arcenau, a shorthand reporter whose address was listed as the National Press Building, took the argument down. She, too, had disappeared without a trace we could find. No one we talked to in DC had any idea where her notes might be.

Finally I suggested to Anthony that he check and see if Franklin's law firm in Champaign was still around. It was not. But, because I had lived there for nine years while teaching at Illinois, I figured out that an extant firm was, basically, the successor to Franklin's outfit. A legal secretary there (almost miraculously) remembered that many of Mr. Franklin's papers were lodged in a storage shed on the edge of town. She generously agreed to go out there and look.

The fruits of her good deed appear below:

**OPENING ARGUMENT ON BEHALF OF APPELLANT.**

MR. DODD: May it please the Court:

This Court has presented to it for the first time the issue as to whether freedom of religion as guaranteed by the Fourteenth Amendment, and interpreted to make the prohibitions of the First Amendment applicable to state action, permits sectarian teaching in public schools, during school hours, and in regular school rooms.

The more essential facts apply to the fourth, fifth and sixth grades of the grade schools. Religious teachers come in for a half hour each week to take over the public school classes. Solicitation to become a religious class member is through a parent's Request Card, bearing the name of the Champaign Council of Religious Education, asking the parent to "please permit" the pupil to attend a class in Religious Education. The cards are distributed by the public school teachers and are collected by the public school teachers.

MR. JUSTICE FRANKFURTER: Asking the parent to permit, or the parent asking the teachers to permit?

MR. DODD: The Request Card goes to the parent from the public school teachers, asking that the parent permit the child to be admitted to the religious class.

MR. JUSTICE RUTLEDGE: Asking "that" or asking "whether"?

MR. DODD: The card says, "please permit" the pupil, naming the pupil, to attend a class in Religious Education.

MR. JUSTICE FRANKFURTER: But the request comes from the parent?

MR. DODD: I would say the request is made through the school. The public school teacher gives to the pupil a card to take home, and the card says "please permit" the pupil to attend a class in Religious Education, and the teacher is supposed to get that card back.

MR. JUSTICE REED: Who signs the card?

MR. DODD: The parent signs the card.

MR. JUSTICE REED: Then the parent asks the school to permit the child to attend a class in religious instruction?

MR. DODD: Yes. The form is "please permit" your child.

MR. JUSTICE REED: "Your" child or "my" child?

MR. DODD: Whichever you may prefer.

MR. JUSTICE FRANKFURTER: Mr. Dodd, isn't the fact that these cards are circulated through the school, through a method of circulation, but they get into the parent's hands so that the parent may express a desire that the child attend this class? Isn't that the fact?

MR. DODD: No. Your Honor, it isn't.

MR. JUSTICE FRANKFURTER: Then please state what is the fact.

MR. DODD: The school organization distributes the cards through the public school teachers.

MR. JUSTICE REED: Does the school pay for the printing?

MR. DODD: Well, they did some printing once on their own paper, for which this Religious Council paid, I believe, $1.25 for certain expense of photostating, or something of that sort.

MR. JUSTICE REED: What are you contending here, that the school pays for the printing of the cards, or the Religious Council pays for the printing of the cards?

MR. DODD: The Religious Council paid for the cost of printing. The school furnished the paper. The school furnishes the rooms, and it furnishes the organization to have the cards circulated.

MR. JUSTICE REED: Is that by order of the School Board?

MR. DODD: No. I will come to some further facts about that in just a moment.

I am going to repeat, just for a moment, the statement that I had made here:

Solicitation to become a religious class member is through a parent's Request Card, bearing the name of the Champaign Council of Religious Education, asking the parent to "please permit" the pupil to attend a class in Religious Education.

MR. JUSTICE FRANKFURTER: Your opening statement was that the school asked the parent to allow its child to attend religious classes, but from the little I knew about it, I assumed the contrary, that the request came from the parents of the students.

MR. DODD: The cards are given by the teachers to the pupils, asking the parents to "please permit" and the card is supposed to be returned to the teacher.

MR. JUSTICE FRANKFURTER: The form of the card is "Please permit Johnny Jones to attend" and the signature is Maria Jones?

MR. DODD: Yes. They are asking the parent to approve the card. The cards are distributed by the public school teachers and are collected by them.

The religious teacher takes over a classroom during regular school hours, and the public school teacher sponsors the teaching by remaining in the room, if substantially all of her pupils have joined the class.

Small Catholic classes are almost always moved to small rooms, and no public school teachers join them.

In this school district there were about 850 Protestants and between 18 and 22 Catholics, and although the Jews had been a part of this plan originally, there had been no Jewish instruction since the second year.

MR. JUSTICE FRANKFURTER: Did the Catholics avail themselves of this religious teaching?

MR. DODD: There were from 18 to 22 Catholic pupils who went to little meetings on their own.

MR. JUSTICE FRANKFURTER: In the school building?

MR. DODD: Yes.

MR. JUSTICE FRANKFURTER: And they had a religious teacher?

MR. DODD: Yes.

MR. JUSTICE FRANKFURTER: Did the religious teacher wear a religious garb?

MR. DODD: I don't know. If a Father in the Catholic church were doing the teaching, I think you can be sure he would have the costume of a Father.

MR. JUSTICE REED: Who were the Protestant religious teachers?

MR. DODD: I will come to that later.

The religious teacher takes over a classroom during regular school hours, and the public school teacher sponsors the teaching by remaining in the room, if substantially all of her pupils have joined the class.

MR. JUSTICE REED: Do all regular school activities such as reading, writing and arithmetic cease during this time?

MR. DODD: What happens is this: A definite program is provided for each of these religious meetings. The religious meetings are by grades and by the schedules. Here is, let us say, a fifth grade of 30 pupils, and all 30 have been "permitted" as the cards state, to attend. The religious teacher comes for a fixed half hour, takes over the class, and if there aren't other pupils to look after, the public school teacher remains with the class.

MR. JUSTICE REED: Was there any room where all pupils in the room elected to take this religious instruction?

MR. DODD: I think so, and in others all but one or two.

MR. JUSTICE REED: Let us say there is a room of 30 pupils and one of the 30 is not taking the instruction. As I understand, only those whose parents have requested that they be given religious instruction get it. What happens if one boy's parent does not permit him to take the instruction?

MR. DODD: That is one of the things important in this case. I don't like to reach all the facts in the first paragraph. But what happened to the son of the appellant here was the first time he was sent out in the corridor. Later times he was put in a music room, where he was alone. Later, under objections and complaints, there were two classes of the same grade, and he was sent up the other one. I was going to speak of that later.

I spoke of the small Catholic classes being practically always moved to smaller rooms, because they were smaller in number. There was no occasion on which a whole class would be made up of Catholics. The Jews have had no class since the second year from the beginning.

Through a taxpayer's action, appellant sought a mandamus to compel discontinuance of the religious classes. Such mandamus was denied by the trial court, and its judgment was sustained by the Supreme Court of Illinois.

In view of the close interrelation between church and state in this case, and of its close relation to the performance of the most important function of government, the Appellees base their argument mainly on a contention that a state may establish and maintain religion, provided it treat all religious sects equally. That is, it must treat the various groups equally.

Appellant denies any state right to establish and maintain religion, and also contends that if there were power to establish religion there is no possibility of treating all sects equally so long as some dominate in numbers and some exist only in small numbers.

The case is largely one of fact. The state here operates sectarian teaching in the public schools and must do so in proportion to the sectarian numbers.

In connection with some of the more detailed facts:

This case involves the Board of Education of the City of Champaign, Illinois.

MR. JUSTICE REED: Are there any regulations of the School Board in connection with this religious education?

MR. DODD: No such regulations were issued.

MR. JUSTICE REED: And none appear in this record?

MR. DODD: None appear in this record, and I think it is clear from the record that none were issued.

Champaign, Illinois, has a city population of about 25,000. There are ten grade schools and one junior high school in that school area.

The Champaign Council of Religious Education was created in 1940. This is the body with which we are dealing. Permission was given on June 6, 1940, to send religious teachers into the public schools.

MR. JUSTICE JACKSON: How was that permission given?

MR. DODD: By an action on the part of the School Board.

MR. JUSTICE JACKSON: Then there is some documentary evidence?

MR. DODD: What you have is this: The Chairman, or President, of the School Board testified that their records show that on June 6, 1940, they approved these religious teachers coming into the schools.

CHIEF JUSTICE VINSON: Can you give us the record on that?

MR. DODD: I think so. Record 127.

MR. JUSTICE REED: but no one called upon them to produce the record?

MR. DODD: He was called upon to indicate what they had done.

MR. JUSTICE REED: They did it by resolution, I take it?

MR. DODD: I assume that they did, but the testimony did not show any specific resolution.

CHIEF JUSTICE VINSON: It does show that the minutes show that?

MR. DODD: It shows that the minutes show the granting of permission on June 6, 1940, to send religious teachers into the public schools. That was testimony by the presiding officer of the organization. Also, it is the basis on which they have operated since then.

CHIEF JUSTICE VINSON: Was there anything in writ-

ing presented to the School Board upon which this action was taken?

MR. DODD: I don't think the record gives any indication of that. They applied to the Board and the minutes agreed to it.

MR. JUSTICE FRANKFURTER: You have an underlying statute of Illinois that authorizes the School Board to do that, do you not?

MR. DODD: No.

MR. JUSTICE FRANKFURTER: No statute at all?

MR. DODD: There are a number of school statutes which authorize the local school boards to make regulations. There isn't any one that specifically authorizes religious teaching.

MR. JSUTICE FRANKFURTER: The authority of the School Board is derived from the general education law of the state?

MR. DODD: Yes.

MR. JUSTICE FRANTFURTER: Under that general education law of the state there is a certain amount of home rule by the Board of Education?

MR. DODD: That is right; that is true.

MR. JUSTICE FRANKFURTER: And this action was taken by reason of discretionary authority on the part of the School Board

MR. DODD: Yes, that is true.

As I have indicated, the religious teaching was for the fourth, fifth, and sixth grades in the grade schools, and the seventh, eighth, and ninth grades in junior high school, but it had primarily to do with the grade schools.

MR. JUSTICE REED: Are the facts you have stated uncontradicted?

MR. DODD: I think the facts I have stated are uncontradicted.

MR. JUSTICE REED: Are there any findings of fact by the court?

MR. DODD: There are a number of findings by the trial court, which are quoted in the briefs.

MR. JUSTICE JACKSON: Is there any dispute about those?

MR. DODD: I would say substantially no dispute. What I was trying to do was to give a sort of preliminary notion of what the facts are.

MR. JUSTICE REED: I think it would be better to have a copy of the resolution.

MR. JUSTICE FRANKFURTER: There isn't any dispute, is there, as between the two sides, that in this city there was an inter-faith Council whereby parents would request that their children be admitted to one of three forms of religious instruction – Catholic, Protestant generally, and Jewish – and as a result of that, religious teachers of the different sects did in fact give religious instruction to the children of the three faiths? Is that the situation?

MR. DODD: There is one thing I wish to add, and that is that the distribution of the cards was by the public school teachers, who would receive the cards back; and also the fact that where practically all of a grade group obtained the cards, then the public school teacher usually remained in the classroom.

MR. JUSTICE FRANKFURTER: Would it make any difference to your position if the cards, signed by the parents and addressed to the school authorities, had come entirely from without; if the circulation of those cards had been though the inter-faith Council and the first the school knew about the cards was when it received them from the parents? Would that make any difference?

MR. DODD: I would say yes. If the situation there is common to that which exists throughout the country, the teacher has an influence with the pupils.

MR. JUSTICE FRANKFURTER: Would it make any difference if the teacher were out of it?

MR. DODD: I think it would make some difference. I don't think it would be controlling. Do you get my point?

MR. JUSTICE FRANKFURTER: I get it.

MR. JUSTICE REED: You said pupils of the Protestant; Catholic, and Jewish faiths would be given this religious instruction. Does that mean the other faiths did not occur in this school?

MR. DODD: I would like to speak of that relationship, but first I want to indicate how the Council was made up.

MR. JUSTICE REED: Do you mean that only three faiths occurred in this school – Protestant, Catholic and Jewish?

MR. DODD: The Protestant group was the general Protestant group.

MR. JUSTICE REED: That is one; then the Catholics and the Jews; taking those as three. What about the Buddhists, Confucians, and so forth? Didn't they occur in this school?

MR. DODD: I will indicate in just a moment that the head of the School Board and the school superintendent stated that any bodies could come in the school who wished to.

MR. JUSTICE REED: Do you contradict that?

MR. DODD: There are some things in the record that I think would indicate there was not the same encouragement given all groups.

MR. JUSTICE REED: Who paid the teachers?

MR. DODD: The religious teachers?

MR. JUSTICE REED: Yes.

MR. DODD: They are paid by this Council of Religious Education.

MR. JUSTICE REED: Have they indicated if there was a Buddhist at the school they had a teacher for this group?

MR. DODD: I wish to refer to one case of that type, if I may. Your point is whether they are treating all possible groups alike?

MR. JUSTICE REED: Yes. I assume the School Board passed a resolution saying that any religious group could have religious education on school property during school hours if they applied.

MR. DODD: I think the whole record shows that the action has been almost continuously through this body. The superintendent of schools did make a statement as a witness to the effect that it would be very difficult to work with the individual organizations, and therefore it was practically necessary to work through an organization of this character. But I did wish to refer to an instance of operation with reference to that.

This Council of Religious Education was made up, as I have indicated, of Jews, Catholics, and Protestants. The

Jews were to have separate teaching, which they have been unable to continue after the first two years. The Catholics have separated teaching with, as I have indicated, between 18 and 22 pupils. The Protestant group is composed of Methodists, Presbyterians, Episcopalians, Disciples of Christ, Baptists, Congregationalists, Four Square Gospel, United Brethren, and Christian.

The churches, which were not in the original plan and may not come into it, are: Lutheran, Christian Science, Unitarian, Jehovah's Witnesses, Quakers, and Twin-City Bible Church.

MR. JUSTICE FRANKFURTER: Do I understand there is intercommunication between all those Protestant faiths, associated together to form a Protestant group?

MR. DODD: You mean the group of Protestant churches I mentioned as being in the Council?

MR. JUSTICE FRANKFURTER: Yes. You gave us a list of various Protestant faiths. Do they represent the population of Champaign?

MR. DODD: They are listed in their statement of the original creation, but the two I noted last were different.

MR. JUSTICE FRANKFURTER: The various Protestant sects clubbed together to form a religious body?

MR. DODD: No. They are a part of this Council of Religious Education.

MR. JUSTICE FRANKFURTER: But when Protestant children are to be taught, they are all clubbed together?

MR. DODD: They are grouped together except for the ones I speak of. I want it borne in mind it is not all of them.

MR. JUSTICE FRANKFURTER: There are some twelve or fourteen Protestant sects in Champaign, and the religious teaching the Protestant children get is not individualized as to the various Protestant sects; is that right?

MR. DODD: Yes. I believe there are nine instead of twelve.

CHIEF JUSTICE VINSON: I understand there are some Protestant sects that are not in and never were in the teaching plan. Do the Protestant children who are not members of the group who formed the Council get the teaching of their sects?

MR. DODD: Well, they could get cards and they could join.

CHIEF JUSTICE VINSON: Join what?

MR. DODD: In any of these classes that were operated by this group.

MR. JUSTICE FRANKFURTER: But as to the Protestants there is a common denominator of religious instruction?

MR. DODD: Well, they say any others, Jehovah's Witnesses, and so forth, are permitted to do their baptizing in one of the school buildings. Several other churches are not in this Council. They could come in separately and won't.

MR. JUSTICE FRANKFURTER: In a separate room?

MR. DODD: I will come to that.

MR. JUSTICE REED: I don't see why it would be difficult to furnish us the record of what this plan was. I don't understand what it is.

MR. DODD: The plan to a large extent has to be shown by the way it is operated. There was nothing brought into the record, which showed any definite outline in writing of the plan, and it seems to me that it is necessary to proceed on the basis of how it was operated.

MR. JUSTICE REED: Was there any exception to the superintendent's ruling that he would let any sect in the school who wanted to?

MR. DODD: Both he and the head of the School board said that all of the space was available to any bodies.

MR. JUSTICE REED: Somebody had something to say about what religious teachers could come in the door and start teaching. What was that?

MR. DODD: The superintendent.

MR. JUSTICE REED: How did the religious teachers get into the school? Did they apply to the superintendent?

MR. DODD: What was done was that this group of Protestants worked as a common group, and they had a committee on personnel.

MR. JUSTICE REED: Whom did they go see if they wanted a religious teacher to come into the school?

MR. DODD: They handled that with the superintendent; and so far I think there has been nothing except what might be regarded as an immediate acceptance of those who have been offered. The plan seems to have operated without serious difficulty as to the teachers.

I repeat that the group of Protestants who constitute the group I spoke of, this Council, organized within themselves for the getting of teachers and the paying of teachers and the determination of what the teachers should teach. They take that up with the superintendent, and there has been very little question as to the teachers whom they recommended. I should not say "recommended", but whom they offered and whom they paid.

MR. JUSTICE REED: Who determined what they should teach?

MR. DODD: They had a curriculum committee that determined that. The Catholics determined what they should teach the Catholics, and the Jews – there was just a handful – determined what they should teach. The Protestant group had a curriculum committee.

MR. JUSTICE REED: Is their curriculum in the record?

MR. DODD: No.

MR. JUSTICE REED: That is not in the record?

MR. DODD: No.

MR. JUSTICE REED: Then we don't know what they taught?

MR. JUSTICE FRANKFURTER: Presumably, a Catholic teacher would teach Catholicism, a Rabbi would teach Judaism; and a Protestant teacher would teach Protestantism.

MR. DODD: I presume so.

A good many of the questions asked me have been regarding matters I was at the point of trying to reach. I had wanted to outline the more general things and they get into the more specific things, if I could do so.

I want to add that there were 35 of these religious classes in the regular school system of this district in 1945. That is shown in the record at pages 91 to 150. Three of the 35 classes were Catholic, and one of the three was in junior high school.

The classes were for thirty minutes in grade school and

fifty minutes in junior high school.

There were six Protestant classes in one grade school.

As to the practice of religious instruction – I have referred to this and wish to proceed because I am afraid that the time is restricted – I think we can say this:

The religious teachers come from outside – the Catholic teachers from their church and the Protestant teachers from the personnel committee of the Protestants in the Champaign Council of Religious Education.

Pupils are registered through distribution to and collection from them by the public school teachers of parent's Request Cards, asking the parent to "please permit" the pupil to attend a class in Religious Education.

Rooms for classes are determined by school authorities, who usually determine the regular public school classroom if all or nearly all have registered; but there is no such possibility with respect to the Catholics.

Where all or nearly all pupils attend the religious class, the public school teacher remains in the room, but here again there is no such possibility with respect to the Catholics.

It is alleged that this is voluntary religious education, and I wish to make a remark or two about that.

The Supreme Court of Illinois says that the religious classes are conducted "upon a purely voluntary basis." Solicitation by the regular class teachers and presence by such teachers at the religious lessons would, under this view, be free from the influence, which school teachers usually have with their young pupils.

Nor is weight given to embarrassment resulting from withdrawal from the room – in one case, as to appellant's son, withdrawal to sit alone in the corridor. In this case the boy's teacher recommended to his mother that the son take the religious work. You can say it is voluntary, but you do have some factors that make it look otherwise.

The trial court recognized the embarrassment which came from one leaving the room, and the statement by the Supreme Court of Illinois in *Ring* v. *Board of Education*, 245 Ill. 334, decided in 1910, until recently the law of Illinois, is still a true statement supported by the highest courts of Missouri, Iowa, Louisiana and Wisconsin, with respect to voluntary absence from religious services in public schools:

"The exclusion of the pupil for this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

The Attorney General of Illinois has put in an amicus curiae brief in which he has made reference to this, that this was a compulsory plan.

With reference to the development of religious friction, the trial court in this case said:

"The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teachings of the Catholic religion, and are not shared by other students who are Protestants or Jews. The teaching in the Protestant classes would undoubtedly, from the evidence, teach some doctrines that would not be accepted by the other two religions."

Anti-Semitic and anti-Catholic views may be trained into children at the age when such education is a danger not only to them but to the future of this country. And such result will be accomplished by religious segregation in the grade schools.

Jehovah's Witnesses may come to public school without saluting the flag, and they have been permitted to have baptisms and some other practices in these buildings, but if they were permitted to come in –

MR. JUSTICE FRANKFURTER: They are not before us. We can't argue that.

MR. DODD: They may have a right to come in, but if they did come in and were permitted to create a class for the purpose of teaching against the saluting of the flag, that would add to the friction of the organization.

This Court fully recognizes the right to have religious or non-religious views. Appellees say:

"The law does not protect against any social consequences of choosing atheism." (Appellees' Brief, p. 23.)

This has to do with the consequences in public schools, and appellees' view applies to all groups, religious or non-religious.

Now, it is claimed that there is equality as to all sects. The President of the School Board testified that all religious groups were to be treated alike, and the superintendent of schools said that classrooms are available to a person who believes in no religion, and that "the school buildings are now available to all religious denominations in this community to be used while they are being used by students."

MR. JUSTICE RUTLEDGE: I take it from that they would not be allowed to use the school buildings for the teaching of atheism?

MR. DODD: It would appear that way.

More reasonably, the superintendent added that it would be hard "to work with a lot of different groups" and that "all the groups should work together." He would permit Jehovah's Witnesses, but appeared in doubt as to saluting the flag.

The trial court found from the evidence that a group must make application to the superintendent of schools "who in turn determines whether or not it is practical for said group to teach in said school system." This covers one point that was being raised on me just a moment ago. You will notice a discretion in the superintendent.

But the record shows a dominance of the Protestant members of the Champaign Council of Religious Education in the right to teach and what is to be taught. The minister of the Lutheran Church met with the Council to suggest separate teaching of the children of his faith. He said as a witness:

"When I offered this suggestion, no action was taken on the part of the Council, but I was assured that if and when there were sufficient children desiring instruction according to the Lutheran faith, time would be granted us."

There were between 25 and 30 children of Lutheran faith, and that, presumably, was not enough.

A Presbyterian minister, who was chairman of the personnel committee of the Council, testified at page 162 of the transcript:

"I said that the Lutherans may participate in the organization and may teach in the schools too. I do not know whether they want to do so now or not. I said I heard it. I am

ready to approve to them sending a teacher into the school. I would welcome the Lutherans but the Council"

–this big Protestant body–

"reserves the right in its cooperative movement with the Lutherans represented upon it, that no prejudicial personalities or materials be put in the course."

The Lutheran Church could have continued its religious education at its church on Saturday morning, but a smaller group would be in difficulty unless it joined with the Protestant majority.

Appellees say that the conduct of the Council is immaterial.

Even if it were assumed that each religious or non-religious group or individual has an equal right to instruction as to its views in public schools and during school hours, it is obvious that such groups cannot be treated equally, for several reasons:

(1) There is not separate space enough for such teaching and the regular school work.

MR. JUSTICE REED: Is this testimony?

MR. DODD: No. I am speaking of what I have already indicated as to what is happening. I was seeking to summarize that. To repeat:

(1) There is not separate space enough for such teaching and the regular school work.

(2) Except for a consolidation of religious groups, as among the larger Protestant groups in Champaign, there will not be pupils enough in each group for religious classes, and there will be a shortage of religious teachers to meet the approval of the superintendent of schools. Jewish teaching was abandoned for these reasons.

(3) The mere presence and sponsorship of the public school teacher who obtained the child's registration and who lives with the child on every school day, has an essential effect upon the child.

(4) The use of regular classrooms and removal of those not participating in the religious class subjects them to a religious stigma referred to by the Supreme Court of Illinois in the *Ring* case; and the transfer of small groups or of individuals elsewhere establishes a sectarian grouping which often brings religious prejudices among children, especially with respect to a small group of Catholics in the basement, and one boy of the class being placed in the corridor.

MR. JUSTICE FRANKFURTER: Is there anything in the record to show that the school authority uses any judgment – I wanted to use "control" but that is a loaded word – is there anything in the record to show that the school authority uses any judgment in passing on the curriculum that the religious teachers employ? I gather from the record that the curriculum is formulated by this curriculum committee.

MR. DODD: The record shows that those are matters for this organization and not for the superintendent.

MR. JUSTICE FRANKFURTER: Is there anything in this record that shows any veto power or any kind of collaboration by the school authority, or does the school authority accept the teacher who turns up, selected by the personnel committee?

MR. DODD: There is a general statement on the part of the superintendent that they must be able to use good English.

MR. FRANKFURTER: And he passes on that?

MR. DODD: Apparently they had no difficulty on that, because the teachers chosen were college graduates and presumably knew how to read, although I am not altogether sure.

The time is limited, but I wish to make one or two other statements:

Under the plan in the Champaign School District, there were in the religious classes of the grad schools more than 80 of the Protestant group who largely remained in their regular school rooms with the presence of their public school teachers; about 20 who went from their regular school rooms to separate rooms for Catholic instruction; and a small number of Jews who bore the stigma of leaving their classrooms when the religious teachers arrived.

You have there a situation, which is likely to continue. If sectarian groups are permitted to teach in the public schools, there will always be a dominating group of that character.

It is obvious that a state establishment and maintenance of religion will give a control to the religious group that has the greater number of members, or to the groups which may unite into such greater numbers.

A state has no power to establish a religion or to maintain religious groups, and such power, if it did exist, cannot be exercised in the effort to establish or maintain religion without giving an advantage to the religion or religions that are dominant. The aid to such religions through the resources of public schools constitutes in fact an establishment of religion, which violates the Fourteenth Amendment both directly and as embracing the liberties guaranteed by the First Amendment.

Even if the elaborate discussion by appellees should cause all members of this Court to change their opinions and to determine that the First Amendment does not apply to states, in their construction of the Fourteenth Amendment, this Court, in order to maintain freedom of religion in the states, must find the same principle against "an establishment of religion" in the Fourteenth Amendment itself.

MR. JUSTICE BURTON: Can we disapprove the plan now before us without interfering with the New York plan, which does not use school buildings?

MR. DODD: I don't think so.

There is a brief filed by Mr. Charles H. Tuttle of New York, which gives a description of the New York plan. New York specifically prohibits any transactions of this kind within the schools.

MR. JUSTICE REED: What is the New York plan?

MR. DODD: They have a plan that lets the pupils out one hour early on Wednesday to permit them to attend classes in religious instruction outside the school buildings and grounds.

MR. JUSTICE FRANKFURTER: That would apply to all students, would it not?

MR. JUSTICE REED: In New York, the school children take religious instruction outside of school hours?

MR. DODD: Yes, and he must do it under the statute of New York.

MR. JUSTICE REED: You don't mean that, do you, that the statute of New York requires him to rake religious instructions?

MR. DODD: The statute of New York permits him to take that hour off. Mr. Justice Frankfurter said: "That would apply to all students, would it not?"

MR. JUSTICE REED: Otherwise would they have to stay in the schools and study?

MR. DODD: Ordinarily that has been the situation.

In California that situation came up, and it was said that the children who did not go to religious instruction could, if they desired, remain at school and continue their school work. That is perhaps unusual.

I wish to make one more remark now, and perhaps to have a few minutes later.

Appellees specifically recognize and say, at page 159 of their brief:

"We have pointed out in our argument on the meaning of the 'establishment of religion' cause of the First Amendment that no law, whether it imposes a tax or not, is invalid under such amendment unless in addition to or as a part of the imposition of the tax, ir prefers one religion over another."

Appellees have already excluded non-religions, and their position that "The law does not protest against any social consequences of choosing atheism" necessarily applies to any unpopular religions just as well. What you practically have is, they say there may be a state establishment of religion, with a tax in support, but only with religions as members, and non-religions paying a part of the taxes.

Can this Court, or can any other court, approve of a plan of that sort?

This Court has recognized that there is a public duty to children of school age, whether they go to public or private schools. Equality of educational facilities may be required in all religious schools, with use of the same textbooks. And perhaps there could be no objection to vocational education made equally accessible to all. This Court has sustained equality in transportation, and may face equality in school lunches; but it has never indicated a use of public schools for sectarian education, which is what is shown in this case.

MR. JUSTICE JACKSON: If your position is sustained, how would that affect the Released Time Plan in New York?

MR. DODD: The Released Time Plan has been sustained since 1929 in New York. It has recently been sustained in Illinois, and more recently sustained in California. I don't think it would be affected by an adverse decision relative to this situation.

MR. JUSTICE FRANKFURTER: Would you mind stating in your own words what you deem to be the crucial elements which, in combination, make this an infringement of the First Amendment and the fourteenth Amendment, separating church from state?

MR. DODD: It is establishing a religious organization in your public school system which is almost of necessity, by virtue of its numbers, going to control the situation.

MR. JUSTICE FRANKFURTER: You said the New York system could survive although this system should fall. What are the decisive elements that differentiate the two?

MR. DODD: The point is that, here they are to take their religious lessons in groups in the schools, where there will be, somewhat of necessity, unless the world has changes as to religion, some development of friction and trouble as between religious groups.

MR. JUSTICE FRANKFRUTER: Is one of the crucial factors that there must necessarily be some collaboration between the school authorities and the Religious Council?

MR. DODD: You can't have religious work of this sort without that collaboration.

MR. JUSTICE FRANKFURTER: That is true in New York. You have to have collaboration. What is the crucial thing? Is it the use of the school buildings? Is it the fact the card goes to the parent from the school?

MR. DODD: The first thing I would say is that which was said by the Supreme Court of Illinois in the statement I quoted from the *Ring* case. If you have what may almost be a play-up between the pupils in the regular school day, you are going to have an effect, which is quite different from that of letting the group go out an hour early.

Take the matter referred to in the *Ring* case, of which I spoke. Here is a religious service. The youngster is permitted to get an excuse to be excused from the religious service. He gets excused, and every other pupil in the class sees it, and unfortunately our human relationships are such that the youngsters make a good deal out of it.

CHIEF JUSTICE VINSON: Mr. Dodd, you may have an additional 15 minutes if you so desire. Do you want it now?

MR. DODD: I would prefer some time for my conclusion, but I am wondering somewhat about the point Mr. Justice Frankfurter has made.

The general experience, I think, is that in certain parts of this country, and some in Illinois, a sharpening of the difference between the Jewish and non-Jewish pupils oftentimes leads to serious difficulty. There is some anti-Catholic sentiment also.

MR. JUSTICE JACKSON: Does the state have the right to commandeer the time of a pupil and then rebate part of it?

MR. DODD: That is right; and can a state establish a religious system as a part of its public school system?

MR. JUSTICE FRANKFURTER: Mr. Dodd, this Court has held, in the *Pierce* case, that the child's time in the parents' and not the state's, except that the state may require certain educational standards. Why can't the parents work out a scheme whereby they will divide the time with the state and give the state what the law requires for a secular education. One way is to divide the time with the state, or take it all.

MR. DODD: Your education in the public schools, unless you go to a private school that is approved, is compulsory.

MR. JUSTICE FRANKFURTER: It is compulsory, but the state says it is not compulsory except for so many years.

MR. DODD: May I terminate now, because I will need some extra time.

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**ORAL ARGUMENT ON BEHALF OF APPELLEE BOARD OF EDUCATON OF SCHOOL DISTRICT No. 17, CHAMPAIGN COUNTY, ILLINOIS**

MR. FRANKLIN: May it please the Court:

I represent the Board of Education of School District No. 71, Champaign County, Illinois. My colleague, Mr. Rall, represents the other appellees, Mr. And Mrs. Elmer C. Bash and their minor child Wanda I. Bash, who are citizens and residents of this School District. Mr. Rall and I will divide our

time before the Court in this argument.

Your Honors, I am not here because of any profound legal ability on my part. I am the School Board attorney. I took part in the trial of this case. It is quite understandable that Mr. Dodd is not thoroughly acquainted with the facts because he did not have that advantage.

I should be helpful to Your Honors on factual questions, if not on the law, and I will try to state what the facts are in this case; and though it is not necessary, I would like your questions on the facts to be sure the Court understands those facts.

The Champaign Council of Religious Education is a Council made up of all religious faiths in the school district who desire to affiliate themselves with this kind of program.

MR. JUSTICE REED: You invited questions. How do you know that?

MR. FRANKLIN: The record tells you so.

MR. JUSTICE REED: Where?

MR. FRANKLIN: You Honor, I suppose I bit off too much. I do not have it offhand in mind. The record shows it.

Let me say to Your Honors that this is not such a record as Your Honors are used to in handling corporate or business litigation. This record does not set forth any verbatim resolution of the Board of Education. Your Honors will have to bear with our record, because the record in the first instance was made by the appellant, who introduced her case with a dissertation on her atheistic views, and her record was developed as her attorneys wished it developed, and we had to accept the record as the appellant made it.

MR. JUSTICE FRANKFURTER: Weren't you allowed to develop your side?

MR. FRANKLIN: Yes, Your Honor.

MR. JUSTICE REED: Do I understand there is no resolution of the School Board by which we can tell what authority the principal has to allow the religious teachers into the school?

MR. FRANKLIN: There is no verbatim resolution in the record. There is the testimony of the President of the School Board that application was made by this group and that it was granted.

MR. JUSTICE REED: Do you know what the group is?

MR. FRANKLIN: The group is the Champaign Council of Religious Education, made up, as Mr. Dodd has said, of representatives of nine different religious faiths in the community.

MR. JUSTICE REED: There are only nine faiths in the community?

MR. FRANKLIN: No, but only nine are represented on the Council.

MR. JUSTICE REED: Can the tenth faith come in if it wants to?

MR. FRANKLIN: Yes, the tenth, eleventh and fifteenth.

MR. JUSTICE REED: How do we know that?

MR. FRANKLIN: Because the record says that. The record says an invitation was sent to the representatives of every faith in the community, and they were invited to participate, and the record says time after time, in testimony by the President of the Board of Education and the superintendent of schools, that no application on the part of any faith, or on the part of any atheistic group, has ever been denied or discouraged.

CHIEF JUSTICE VINSON: Do you infer that some of the groups did not want to come in?

MR. FRANKLIN: I don't know, what inference may be validly drawn. I see nothing in the record to indicate that any adherents of any faith, actual residents of School District No. 71, did not come in because they did not want to. It is very much like it is in any organization. If an organization is doing precisely what you want done, and doing it very well, you don't go out of your way to send representatives to it.

The record shows very clearly that 31 different faiths – which so far as the record shows and I know are every one of the faiths of those going to school in School District No. 71 – actually participated in the program by sending their children to it.

MR. JUSTICE BURTON: That is not what Mr. Dodd said.

MR. FRANKLIN: Mr. Dodd said the Lutherans had not send instructors. I didn't understand him to say they refused to participate in the program.

CHIEF JUSTICE VINSON: Is there a Lutheran Church in your community?

MR. FRANKLIN: There is a Lutheran Church. There is no Lutheran instructor that I know of. The Council employs but two teachers. What their religion is, I am not sure, except that they are Protestants.

MR. JUSTICE FRANKFURTER: You have some in the school who profess the Lutheran faith?

MR. FRANKLIN: Yes.

MR. JUSTICE FRANKFURTER: And it is a fact the Lutherans are not represented on the Council, whatever the reason?

MR. FRANKLIN: That is right.

MR. JUSTICE FRANKFURTER: And there are Quakers in the community?

MR. FRANKLIN: Not that I know of, but they found a Quaker in a neighboring town whom they brought in as a witness, and he said he did not care to participate, but he was not a resident of Champaign and not a part of the school district.

MR. JUSTICE RUTLEDGE: Let us say the Lutheran group does not want to participate in the Protestant group, but wants to participate in the program: Is there any provision in the plan whereby they could have the same services as the cooperating Protestant groups?

MR. FRANKLIN: When you say in the plan —

MR. JUSTICE RUTLEDGE: In the Council.

MR. FRANKLIN: In the Council, which the School Board has nothing to do with except it permits use of the school buildings.

MR. JUSTICE RUTLEDGE: Well, that is something.

MR. FRANKLIN: That is right. But the plan is not the School Board's plan. The plan is that of the Council of Religious Education.

MR. JUSTICE RUTLEDGE: Does the School Board extend identical privileges to non-cooperative sects?

MR. FRANKLIN. It does, Your Honor.

MR. JUSTICE RUTLEDGE: Could the Lutherans go to the superintendent of the School Board and say: "We don't want to play ball with this group, with this Council. We want

the same distribution of cards and services." Does the School Board permit that?

MR. FRANKLIN: Yes. The record affirmatively and repeatedly says that.

MR. JUSTICE RUTLEDGE: In addition to those who cooperate through the joint effort?

MR. FRANKLIN: The record repeatedly says that any and every organization that desires to make use of the public school buildings for that purpose may do so.

MR. JUSTICE FRANKFURTER: May we pursue the Chief Justice's question? May this Court take judicial notice of the fact that some sects, as a matter of conscience, are opposed to this scheme, and oppose collaboration, because they think it violates something very precious to them?

MR. FRANKLIN: Your Honors may take judicial notice of what the religious faiths have represented to you in their briefs.

MR. JUSTICE FRANKFURTER: The testimony of Rev. Alva R. Cartlidge refers to the Lutherans' plan to start a Lutheran group. He says: "I have not observed the attitude of the Seventh Day Adventists toward the religious educational program in the Champaign schools. I did not even know they had expressed any attitude. I am not acquainted with them. I surmised there might be some in town but I do not know any of them. I do not claim to have taken in any of their doctrines into instruction because they have never applied to our Council for membership. I have not inquired as to the attitude of the Quakers with reference to the religious education in the schools because they have never inquired of us."

It does not say whether you have Quakers or not.

"I have heard about the Unitarian church in Champaign."

So there are four sects that he testified about that have communicants in your community that are not affiliated with the Council.

MR. FRANKLIN: Not exactly, Your Honor. He says he does not know if there are any Quakers.

MR. JUSTICE FRANKFURTER: There are some, possibly?

MR. FRANKLIN: Very possibly.

MR. JUSTICE FRANKFURTER: And this being very fluid testimony, I go back to the Chief Justice's question: The fact they say they welcome any group raises a question whereby a choice must be made.

MR. FRANKLIN: Would it help to say that in the five years of the operation of this plan, not a single protest or objection was made by anyone except the appellant?

MR. JUSTICE FRANKFURTER: That would not help me.

MR. FRANKLIN: May I suggest to Your Honors that this case is one involving constitutional law. I believe a very great deal has been set forth in the briefs, particularly in the briefs of the friends of the Court, which has to do with the wisdom of the this scheme, or the wisdom of this plan, rather than any question of its constitutionality.

CHIEF JUSTICE VINSON: If you will permit, I would like to get clear on this: Did the Pastor of a Lutheran Church go before the Council?

MR. FRANKLIN: No, Your Honor.

CHIEF JUSTICE VINSON: Doesn't the testimony show he did appear and indicated he wanted an instructor for the Lutherans, and they said they would consider it, and did nothing about it? That is the way I understood Mr. Dodd.

MR. FRANKLIN: I did not know that was the fact. At the recess time I will check the testimony very carefully.

I would like to go forward with an explanation of the facts.

This program was instituted in 1940 in a rather informal manner. The Council sent a delegation to the School Board, the School Board granted the use of school rooms for thirty minutes each week, and agreed that if the parents of any particular child signed a card specifically requesting that the child be excused from participation in the program for the space of thirty minutes each week, the request would be honored.

MR. JUSTICE REED: Was that action of the School Board informal also?

MR. FRANKLIN: No. There was Board action on it.

MR. JUSTICE REED: In the form of a written resolution?

MR. FRANKLIN: I understand there was, but it does not appear in the record.

MR. JUSTICE REED: Then we will have to treat it as an informal agreement. What was the form of the agreement?

MR. FRANKLIN: It was in the form of permission to use school buildings, the same as permission is granted for all manner of civic organizations that seek to use their property.

MR. JUSTICE RUTLEDGE: I don't understand you to contend either that this is not Board action or State action?

MR. FRANKLIN: No, but the plan is no part of the School Board's action.

MR. JUSTICE FRANKFURTER: The plan could not live and work except with the consent and collaboration of the School Board.

MR. FRANKLIN: That is right, but if a person applied to the sponsors of this plan and was denied participation, that does not charge the School Board with any lack of equality, because the School Board stands ready to grant the same free use of its facilities to all organizations, religious, or non-religious.

MR. JUSTICE RUTLEDGE: Then the Lutheran minister did not go far enough. He should have gone to the School Board?

MR. FRANKLIN: I don't believe he was discouraged by the Council, but he could have gotten permission very readily by going to the School Board.

MR. JUSTICE RUTLEDGE: There is no contention that this is not the School Board's or the State's action?

MR. FRANKLIN: There is no such contention as that in the brief.

MR. JUSTICE RUTLEDGE: If, after the recess, you can reconcile the last two answers you have given, I will be glad to hear you on it.

(thereupon, at 2:00 p.m., a recess was taken until 2:30 p.m.)

**AFTER RECESS**

MR. FRANKLIN: Mr. Justice Rutledge, may I address myself to the seeming inconsistency which you found in my last two answers?

MR. JUSTICE RUTLEDGE: Yes.

MR. FRANKLIN: I must confess that I did not see the obvious inconsistency in them. Let me say this, if it will help to explain my point of view to Your Honor:

I do not believe that the plan of the Religious Education Council is in any sense that of the School Board. All that the School Board has done is to grant permission to this Council, in common with many other organizations, to make use of its school rooms at various times, and it has said that it would recognize an excuse from school attendance as an excuse from attendance at these religious education classes.

May I say on that point that the excuses which the Board of Education recognizes for non-attendance at school are myriad. They include measles, attendance at grandmother's funeral, dancing lessons, music lessons, and so forth. I do not believe it can be said that the compulsory school law is placed behind attendance at religious classes any more than it is placed behind measles or funerals or anything else.

MR. JUSTICE RUTLEDGE: He can't go to school if he has measles.

MR. FRANKLIN: But it is one of the excuses recognized by the Board of Education.

MR. JUSTICE JACKSON: Suppose a boy's people are not religious people and he does not have to attend the religious education classes, and he is put in a separate room and he starts home. The truant officer has to bring him back, doesn't he?

MR. FRANKLIN: That is a hypothetical case. That never has happened.

MR. JUSTICE JACKSON: What would you expect to happen?

MR. FRANKLIN: I have no doubt that the school authorities would recognize the parents, wishes and permit the child to go home during that time.

May I say the occasion mentioned by the appellant when her son was sent out in the corridor occurred but once, on one day, and promptly upon the mother's pointing it out, it was discontinued. I believe the evidence shows he was sent to the music room more than one day, but immediately upon this being pointed out by the mother, it was discontinued.

MR. JUSTICE FRANTFURTER: The practical considerations are that the arrangements for this religious instruction are made by the Religious Council and not by the School Board?

MR. FRANKLIN: That is right.

MR. JUSTICE FRANKFURTER: And the practical considerations of the Religious Council are their interests?

MR. FRANKLIN: I would say they had no interests other than those of the children.

MR. JUSTICE FRANKFURTER: The choices they made, as to which the School board is an indispensable part, would be those consistent with the laudable interests of the Council?

MR. FRANKLIN: If Your Honor wishes to suggest it is the interests of the Council that are paramount, rather than the interests of the children, that is a conclusion, Your Honor, has to draw for yourself.

MR. JUSTICE FRANKFURTER: I don't mean the interest is unworthy, but the interest is the presupposition that religious education is most desirable?

MR. FRANKLIN: Undoubtedly.

MR. JUSTICE FRANKFURTER: The Religious Council is the instrument of promoting that purpose, and therefore they work out a scheme that best carries out that purpose. The school becomes a part of it, dictated not by the secular interest of the school, but dictated by the interest that the Religious Council has.

MR. FRANKLIN: I cannot agree this is a joint undertaking.

MR. JUSTICE FRANKFURTER: It could not be in effect without the collaboration of the School Board.

MR. FRANKLIN: I freely agree with that.

MR. JUSTICE FRANKFURTER: Go ahead.

MR. FRANKLIN: Mr. Justice Rutledge, is there anything unanswered in the question you put to me?

MR. JUSTICE RUTLEDGE: I won't take your time. Maybe your answer on the Lutherans will answer that.

MR. FRANKLIN: The record does not show that the Lutherans have in any way been incapacitated or that any obstacle has been put in their way.

Let me read two excerpts from the record.

At page 159 of the transcript, Rev. Alva R. Cartlidge said:

"I stated that not all denominations or religious beliefs are represented in the council. All are free to participate, and we are anxious to have them. No religious denomination or recognized church or belief has ever sought membership or participation in that council whose membership has not been freely accepted. All denominations that we knew about in the community were invited to participate. Letters were sent to all that we could find and personal calls were made. The St. John's Lutheran Church of the Missouri Synod, whose Pastor is Reverend Kaiser, is welcome to participate, and we would be delighted to have them."

Now, may I refer to what Reverend Kaiser himself said on that subject, so that we may be sure we have the whole picture. At page 121 of the transcript, Reverend Kaiser, who is the minister of this St. John's Lutheran Church mentioned by Reverend Cartlidge, said:

"The system first came to my attention at the organization of this religious council. Pastor Carlidge of the First Presbyterian Church consulted me about the formation of this council for the purpose of religious education in our public schools. That was some three years ago. I did not attend any of the meetings of the council until this past summer. I approached the council to grant to the Roman Catholic people and other people of that faith in our community their separate instruction, and also to the people of the Jewish faith, or the Reformed Orthodox Church had an instructor. They would permit a flexible program, exceptionally so; they would allow these children of the Lutheran faith to receive instructions according to that faith. I have not as yet arranged to provide a teacher."

Then further on the same page, 121, he said:

"I have not made application to the Board of Education of School District No. 71 in connection with this matter, nor

have I pursued it any further than the religious Council. That is because I believe sufficient children must be in an individual school who desire Lutheran instruction before the Board of Education acts. I do not know how many there would be. The Lutherans do not now have a teacher of religious education in the public schools of Champaign."

We submit to Your Honors that the record shows the Lutherans have always been welcome to participate in this program just as fully and as quickly as they will, and the evidence is that they intended to participate.

MR. JUSTICE REED: Do I understand it is only when there are sufficient children of a faith to make a class in that faith worthwhile that a teacher is admitted?

MR. FRANKLIN: No, Your Honor.

MR. JUSTICE REED: That is what I understood you to read.

MR. FRANKLIN: No. The minister was saying he did not think there were sufficient children desiring Lutheran instruction to warrant an instructor. That is the way I understand it.

MR. JUSTICE REED: If all religious sects sent an instructor, would there be room in the school buildings to take care of them?

MR. FRANKLIN: That is a hypothetical bugaboo, raised by the briefs, that there are 358 sects, and if they all wanted to send instructors, there wouldn't be room for them. That is true of automobiles; if they all wanted to use the highways at the same time, there wouldn't be room for them. Or if all organizations wanted to hold a meeting in the public park at the same time there wouldn't be room for them. But there is no evidence that there has not at all times been sufficient and ample facilities for all the religious education classes that were requested to be held in the schools. Does that answer your question?

MR. JUSTICE REED: Am I right in assuming that whatever child takes this religious instruction loses that time from his school work?

MR. FRANKLIN: I would like to offer the testimony of Mrs. Lakie B. Munson on that point. She points out there is a flexibility in the school system which more than allows for the time used in the religious classes. I think it was said that fifteen minutes are allowed for opening exercises, and only five minutes used, for example.

MR. JUSTICE REED: Suppose there are two children, one taking religious instruction, and one not. How many hours a week of school are required?

MR. FRANKLIN: I don't know.

MR. JUSTICE REED: Let us assume thirty hours a week. If one child takes religious instruction, he loses that time from his secular studies.

MR. FRANKLIN: I don't think we crowd our program with secular studies as closely as Your Honor seems to think. There are times not filled with secular education. The children do not go to school and study every minute. They are placed on their own resources very frequently to employ their time as they think best, in order to build healthy minds.

During certain times of the day there are library facilities, and they are free to study on their own account, without pursuing any course of study.

MR. JUSTICE REED: Do the pupils who take religious training have less time for library study?

MR. FRANKLIN: It gives them less time. But the laws of the State of Illinois do not require the children to go to school any particular number of hours a week. Some states do require a specific number of hours a week. Illinois does not. That is a matter of complete discretion in the local schools. If they wanted to, they could dismiss everybody at the end of 29 ½ hours and violate no statute. So this is a matter of absolute discretion on the part of the local School Board, and some pupils, in taking certain work, stay at school longer than others.

MR. JUSTICE REED: Would having the religious instruction outside of school hours satisfy the opposition?

MR. FRANKLIN: My impression is that nothing would satisfy the opposition that promoted religion in any way. I think Your Honor would find there still would be opposition to this program.

MR. JUSTICE BURTON: Would there be objection if school buildings were not used?

MR. FRANKLIN: The opposition lives in a community where we make use of the school buildings for many purposes. In appellant's brief they say it isn't the use of the school buildings that they object to, so I am not sure what it is they object to. On page 25 of appellant's brief they say:

"As a matter of fact it is not the use of public school buildings and of public school teachers which violates the constitution; it is the maintenance of instruction by religious groups in the public schools through the use of the resources of such schools."

That does not draw a distinction that I can grasp.

Perhaps we have spent enough time on the facts of this case, except as they become incidental to the argument I would like to be heard upon.

MR. JUSTICE FRANKFURTER: May I ask this question. As far as I could gather from your argument up to this point, I did not detect any difference of opinion as between you and Mr. Dodd as to the basic facts. If there are any differences, I would be obliged if you would point them out. This is an attack upon a practice. Therefore, I was wondering if you had any disagreement with Mr. Dodd as to the practice.

MR. FRANKLIN: I will stop at this pint to go over the things I disagree with Mr. Dodd on. I understood Mr. Dodd to say the public school teacher sponsors the classes of religious education by customarily remaining in the school room during the religious education classes. We do not believe the record substantiates any such statement. It is true the record shows isolated instances where the public school teacher remained working at her desk in the classroom while the pupils attended a religious class seems to be to be misleading.

I want to say that the trial court, made up of three judges, wrote a lengthy, and I believe Your Honors will find a careful, opinion setting forth the facts as they found them, and I understood Mr. Dodd to say he had no quarrel with those facts, and that is the best place to get the facts in this case, where they are assembled in an orderly fashion.

Mr. Dodd did not know whether Catholic instructors

wore the clerical garb. I understand the two Catholic instructors wore clerical garb—clerical collar, collar reversed, and clerical vest.

MR. JUSTICE FRANKFURTER: Is that in the record?

MR. FRANKLIN: I think it is. If it isn't, I want the Court to know that it is the fact.

I perhaps need to straighten out one answer I made to the Court this morning. I did not mean to say there is a written resolution on this matter in the School Board minutes. The record shows that the President of the School Board testified that permission was granted to the Council on June 6, 1940, and I assume the minutes reflect the fact of that action, but it was not in the form of a resolution or any formal writing.

MR.. JUSTICE REED: Does the School Board have a right to grant such permission?

MR. FRANKLIN: We believe in the State of Illinois, in general, that the public buildings should be open to all people and all organizations, regardless of religious faith. We have a statute in the State of Illinois which requires every public official charged with the care of public property to make the facilities under his charge open to all persons, regardless of race, religion, or creed. We do not believe that any public official has a right to require a religious test of any person before he opens up the public facilities.

It has been a practice in our State for one hundred years to hold church services on Sunday in school buildings in scattered communities where other facilities were not available. It has been our custom to open up the school buildings as community centers much more frequently than any other type of public building, and it has not been our practice to administer religious tests in connection with that practice.

MR. JUSTICE FRANKFURTER: Do they allow political meetings to be held in the school buildings?

MR. FRANKLIN: Yes. The school buildings are used for political meetings: Jehovah's Witnesses use the swimming pool for baptisms; the P-TA uses the buildings; it has been the practice to permit the use of the school buildings for every inoffensive purpose.

To be more specific in answer to your question, perhaps if Your Honor would put it more pointedly I could answer it.

MR. JUSTICE REED: Is it perfectly all right from your point of view for the religious instruction to go so far as to receive the child into a particular church?

MR. FRANKLIN: Why no, Your Honor.

MR. JUSTICE REED: Why not?

MR. FRANKLIN: Perhaps I did not understand you, but we do not believe it would be a proper use of school premises to hold a revival meeting, we will say, during school hours. I think the Court should know that the record in this case shows that the curriculum was one of education in religion rather than doctrinal or creedal matters. It was not for the purpose of getting the children to accept a doctrine or church. That is what is eliminated from the Protestant part of the program. There was no reference to how Baptists baptized or how Presbyterians baptized, but it was a course of study in the bible. For instance, there is no prayer saying, no hymn singing, in these classes. They are kept on an educational level.

MR. JUSTICE FRANKFURTER: How are you in a position, as counsel for the School Board, to make these characterizations of what was taught to the religious classes unless the School Board passed on it?

MR. FRANKLIN: It is particularly easy, Your Honor, because we have a 300 or 400-page record here in which anything and everything that might have been considered offensive by the appellant has been brought out and reduced to writing in testimony in court.

MR. JUSTICE FRANKFURTER: But the School Board wasn't present when a Rabbi taught the Jewish religion or a Father taught the Catholic religion. How do you know what was taught?

MR. FRANKLIN: We do not censor or supervise in any way –

MR. JUSTICE FRANKFURTER: You suggested that this religious instruction was not of a creedal nature but of an educational nature.

MR. FRANKLIN: As nearly as it could be, but in the Protestant classes there were things taught with which pupils of Catholic faith could not agree.

MR. JUSTICE FRANKFURTER: Then the classes could not be taught to the school children generally?

MR. FRANKLIN: No.

MR. JUSTICE FRANKFURTER: In these religious classes, what we call theological subjects were taught?

MR. FRANKLIN: Yes, except it was on the basis of interdenominational.

MR. JUSTICE FRANKFURTER: It couldn't be interdenominational, because it was broken into three groups.

MR. FRANKLIN: To that extent I agree with you.

MR. JUSTICE REED: My difficulty is to know just what was said and done in these classes.

MR. FRANKLIN: They teach principally the content of the bible, biblical stories, biblical verses committed to memory.

MR. JUSTICE REED: You tell me that, and I accept what you say, but can that be found in the record?

MR. FRANKLIN: Yes, Your Honor, you will find it set out lengthily; too lengthily, perhaps, relative to the curriculum.

MR. JUSTICE FRANKFURTER: Why do you not answer –

MR. FRANKLIN: I am sorry if I haven't, Your Honor.

MR. JUSTICE FRANKFURTER: I am asking this not to be critical of you, but why do you not answer a question like that of Mr. Justice Reed by saying it is none of the Board's business to know what is being taught, that all you do is hand over that hour out of the school's time so that the religious teachers can teach what they want to?

MR. FRANKLIN: It might be a very good answer, but it is this Court's business, and Mr. Justice Reed's business, to know what was going on.

MR. JUSTICE FRANKFURTER: You can't tell what was going on in the Catholic or Jewish classes, other than the Catholics were being taught the long historical background that represents Catholicism, and the Jews were being taught Judaism.

MR. FRANKLIN: All I can tell you is what is in the record.

MR. JUSTICE FRANKFURTER: Wasn't religious dogma taught in these classes, by various people with various ecclesiastical beliefs?

MR. FRANKLIN: I don't think that is a fair statement of what was taught, except if Your Honor means that everything in the bible is dogmatic. The bible is not all concerned with beliefs. The bible is concerned with history.

MR. JUSTICE FRANKFURTER: Here are three great religious groups, representing Judaism, Catholicism, and Protestantism. They combine to give adherents to those three great faiths religious education. How can we sit here and ascertain what the loyal representative of those three great faiths teach their children? What is the point of it?

MR. FRANKLIN: I think it is unimportant. I think as citizens of the United States and residents of this School District, they have the right to make use of this school property.

MR. JUSTICE REED: If they teach the children to join the Methodist Church, that is all right?

MR. FRANLKIN: Well, they do not do it, Your Honor. That is the only way I can answer that. It is not the purpose nor the plan. I don't want to go farther. I haven't given enough thought to that, since it is not involved in the record.

MR. JUSTICE REED: The teaching of religion is involved.

MR. FRANKLIN: The teaching of the contents of the bible is involved.

MR. JUSTICE REED: Biblical matter?

MR. FRANKLIN: Not strictly so. I think all sorts of things are taught in the Protestant classes, such as the divinity of Jesus Christ. In that, Mr. Justice Frankfurter is correct in saying it is dogmatic; but it is not correct to say that what the Baptists believe, as distinguished from what the Catholics believe, is taught, because it is not.

MR. JUSTICE BLACK: They teach nothing not in accordance with their own faith?

MR. FRANKLIN: That is true of the Catholic teacher and the Protestant teacher, they teach nothing not in accordance with their own faith. But in the Protestant group no effort is made to teach the particular beliefs of one Protestant religion as distinguished from another.

MR. JUSTICE FRANKFURTER: You say that the School Board of Champaign cannot discriminate against any faith that wishes to utilize the facilities and machinery of the schools, to the extent they are used by the School Board, for study and devotion to their own faith. You say that would be bad. But you say so long as there is no discrimination, so long a the School Board works out a system of working out a plan with all faiths, that is all right?

MR. FRANKLIN: That is right.

We are here only on the question of the interpretation of the American Constitution. The highest court of the State of Illinois has said that this offends nothing in the Constitution of the State of Illinois.

We are here asked to meet a new issue, and that is whether or not the First Amendment to the Constitution of the United States was violated. We are called upon to meet for the first time the issue that in some way the fact that the School Board had the unwritten reservation that these teachers of religious classes must use the English language well constituted censorship. That issue was not raised in the courts of Illinois, but we are asked to answer it here.

It is our contention that the First Amendment of the Constitution does not prevent all aid of government to religion, but on the contrary means that government shall treat all religious groups equally.

MR. JUSTICE BLACK: Do I understand you to take the position that if the State of Illinois wanted to contribute five million dollars a year to religion they could do so, so long as they provided the same to every faith?

MR. FRANKLIN: Yes, and the State of Illinois does contribute five million dollars annually to religious faiths, equally, and more than five million dollars, and has during its entire history.

MR. JUSTICE BLACK: How does it do it?

MR. FRANKLIN: By tax exemptions specifically granted to religious organizations.

MR. JUSTICE BLACK: Your position is that they could grant five million dollars a year to religion, if they wanted to, out of the taxpayers' money, so long as they treated all faiths the same?

MR. FRANKLIN: Yes, Your Honor. That is our interpretation of the meaning of the first clause of the First Amendment.

MR. JUSTICE BLACK: Suppose, instead of a half hour, these religious teachers spent four hours in schools. Would that make a difference?

MR. FRANKLIN: No constitutional difference.

MR. JUSTICE BLACK: Or six hours?

MR. FRANKLIN: Or six hours.

MR. JUSTICE BLACK: It would not make a difference?

MR. FRANKLIN: No constitutional difference.

MR. JUSTICE BLACK: Suppose the children had one-half hour of secular work and 7 ½ hours of religious training, and the pupils who did not take the religious training had to study 8 hours and the others one-half hour, in your judgment the Federal Constitution would not prohibit that?

MR. FRANKLIN: No. It would be extremely unwise, but it would not be in violation of the Federal Constitution.

MR. JUSTICE RUTLEDGE: What does the First Amendment of the Constitution prohibit?

MR. FRANKLIN: It prohibits the preferment by law in any degree of one religion over another and one sect over another.

MR. JUSTICE RUTLEDGE: Is that the ruling of the *Everson* case?

MR. FRANKLIN: I believe the decision in the *Everson* case was only dicta.

MR. JUSTICE RUTLEDGE: Does the *Everson* case say that, or something else?

MR. FRANKLIN: I do not understand that the case was decided on that ground, so I believe that question still to be an open one for decision by Your Honors.

While I realize Your Honors have been deciding every case as it comes before you, I don't think it would hurt to consider in whole whether we shall interpret the First Amendment to mean that government can confer no benefit on religion, or that it means Congress shall pass no law relating to religion.

Above Your Honors' heads in the central frieze is a figure which indicates that the Chief Justice of this Court then sitting believed that Justice was supported by the Ten Commandments; that Justice depended on it. Our whole Constitution has been based on respect for and interest in religion.

If you were to say that no public money may be spent for religion, and that no law may be passed relating to religion, you must not only strike out the printing on these cards that have been referred to by Mr. Dodd, but you must strike out the words "In God we Trust" on the coins minted by the United States, which coins have borne those words since 1865. Not only do you endanger if not wiped out all tax exemption on the part of religions, but you condemn the Congress of the United States for employing Chaplains which they have done continuously since the First Amendment was framed. On the same day, the First Amendment was framed, the Congress appointed a committee, on which James Madison served, which started the Chaplaincy, and every Congress since has employed a Chaplain, not to teach dogmatic religious education, but to worship, say prayers, open the legislative bodies with public worship.

Your Honors cannot strike down all of these things without striking a great deal more down.

What distinction, so far as the Federal Constitution is concerned, applies between the use of public parks and public school buildings? If Father Couglin wants to use a public park, as he wanted to use Soldier's Field in Chicago, do you ask what his religion is?

Your Honors cannot strike out interest in religion, religious motivation, or religious opinion or expression.

MR. JUSTICE JACKSON: I think you are going too far. I understand a lot of people who are religious believe religion should not be supported by public funds and should not be under any form of compulsion.

MR. FRANKLIN: I do not mean to make any such suggestion. I mean you impair people's ability to express their religious beliefs once you adopt the constitutional theory that government cannot aid religion, cooperate with religion, or extend any benefit to religion. Every purpose of national government is served by interpreting the first clause of the First Amendment to require absolute equality of treatment of all religious faiths. In our brief we have treated this matter very extensively, because of the dicta in the *Everson* case. We feel we have demonstrated that was the historical meaning to the framers of the First Amendment in 1789 and has been the meaning ever since, as elucidated by public practices, some of which I have mentioned; and now, 160 years after the framing, is too late to change it.

MR. JUSTICE JACKSON: Do I understand your contention is that you can establish religions, but you can't prefer one over another?

MR. FRANKLIN: No. Perhaps in my flight of oratory, I did not make myself clear. I believe the phrase "establishment of religion" had as well defined a meaning at that time as now, namely, the establishment of one particular church or religion, creating a monopoly. The framers could not have selected a better clause than "establishment of religion" if they had searched all the lexicons.

MR. JUSTICE BLACK: In your judgment, can this practice stand under the Constitution and be consistent with what was said, either in the majority or minority opinion, in the *Everson* case?

MR. FRANKLIN: Yes.

MR. JUSTICE BLACK: How?

MR. FRANKLIN: For the reason that the farthest the dicta has gone in that case is to say that if a tax is actually levied that is for the benefit of religion, it cannot stand in the face of the first clause of the First Amendment. But Your Honors did not say that once public facilities are established, religious organizations cannot enjoy the benefits of them. Thank God that was not said!

MR. JUSTICE FRANKFURTER; Your flight of oratory did not seem to me to be too flighty. I am led to ask this: Suppose everything you say is so about the place of religion in this country, another question arises of whether the public schools of the Untied States, bearing the relation that they do to the democratic way of life, are a good place to introduce it?

MR. FRANKLIN: This is not a group of legislative censors before whom I am arguing today. Your Honors have only the constitutional questions.

MR. JUSTIC FRANKFURTER: I put my question again: We have a school system of the Untied States on the one hand, and the relation it has to the democratic way of life. On the other hand, we have the religious beliefs of our people. The question is whether any kind of scheme which introduced religious teaching into the public school system is the kind of thing we should have in our democratic institutions?

MR. FRANKLIN: That is a proper question to ask. May I ask, though, that you depend to some extent on the record in this case for what is the proven result of this program. Variations of this program are in effect in at least one thousand school districts in 46 states, and there is nothing in this record or any actual facts pointed out in the briefs of the friends of the court to support the proposition —-

MR. JUSTICE FRANKFURTER: You have a half dozen religious groups opposing this as offensive.

MR. FRANKLIN: Your Honor knows I am not permitted to argue the extent to which the briefs represent the feeling of those they purport to represent.

MR. JUSTICE FRANKFURTER: The very fact you raised this question shows that this kind of thing projects the public schools into religious controversy. What I am saying is that we have these briefs by the religious bodies. We can't go behind them. They purport to speak for those sects.

MR. FRANKLIN: May I ask you to consider only the law in those briefs and not consider them a supplement to the record?

One of the briefs we saw as we walked into the Clerk's office this morning, for the first time. One we saw two days ago for the first time. Your Honors can't charge us with the law they cite in them, least of all the facts.

CHIEF JUSTICE VINSON: Do you want some time in which to reply to those briefs filed today and a couple days ago?

MR. FRANKLIN: If, at the end of these arguments, we feel there is anything either not answered in the argument or not answered by our own brief, we would appreciate it very

much, but we have not had a chance to read them, so we do not know. Thank you very much for the offer, Your Honor.

Your Honors, I am very much embarrassed for taking up so much time.

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**ORAL ARGUMENT ON BEHALF OF APPELLEES ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, a minor, by ELMER C. BAHS, her father and next friend.**

MR. RALL: If Your Honors please:

We have made no sharp division of time.

I represent the interveners Mr. And Mrs. Elmer C. Bash and their minor daughter, Wanda I. Bash, who believe this is a proper exercise of authority by the School Board, and who believe the plan is a good one for them.

We call attention to the fact that parents in the state of Illinois have the care, custody and tuition of their children, notwithstanding the existence of free public education.

As long ago as 1877, the Supreme Court of Illinois held a child was not a creature of the state, and that parents had control of the child's educational program to the extent that it did not interfere with the education of others.

We submit the rights involved are not absolute rights. This is not a question between the authority and the individual. This requires a balancing of rights.

On the one hand, we have 850 students and 850 sets of parents in the situation of my clients, who have approved this plan and wish it continued.

On the other hand, we have only one objector. I do not mean to say that if the plan is constitutionally invalid, that one objector should not be heard, but I say the rights are relative, and that in considering the action of the Court, the religious liberty of the 850 must also be put in the balance when the question of religious liberty as a matter of constitutional law is being decided.

This concerns the public schools, and of course we all have our personal views as to what is wise and what is unwise.

The State of Illinois gives very close local control to matters of educational policy, and traditionally this Court has done the same. We submit, if the Court pleases, that the wisdom of this plan – and practically all of the objections that are made run to the wisdom rather than the constitutionality – should be left to the School Board. There is no institution more carefully watched, there is no political body more carefully policed, than the School Board.

We do not believe this is a matter of constitutional law to be handled at the national level.

Thank you.

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**CLOSING ARGUMENT ON BEHALF OF APPELLANT**

MR. DODD: May it please the Court:

May I be sure of the amount of time that is available?

CHIEF JUSTICE VINSON: You have eleven minutes.

MR. DODD: Thank you. I will proceed at once.

With respect to one matter regarding briefs, I received three briefs this morning from the Clerk of the United States Supreme Court by visiting his office, and the night before I received a brief from the Attorney General of Illinois in opposition to the position we have taken. I understood that briefs are to be replied to. It may have to work both ways.

CHIEF JUSTICE VINSON: If there are any legal propositions in the briefs that have been recently received that you wish to reply to, you may have a few days to do it.

MR. DODD: Thank you.

I wanted merely to make one or two remarks about matters of fact. There are some differences of opinion, apparently, as to matters of fact; for instance, as to the regular school teachers attending in the rooms where the religious meetings are going on. There is a substantial amount of evidence on the part of the public school teachers and on the part of the religious teachers that that was being done.

With reference to this equality matter, I would ask the members of the Court to remember the quotations that I made from the transcript with reference to what the Lutheran minister said he accomplished by visiting this Council; and the statement of the gentleman in charge of personnel, saying explicitly that they would not let them in unless they could arrange agreements as to the principles to be considered.

We must remember also that the superintendent of schools, while he said that anybody could come in, explicitly said at the same time that it would practically be necessary to act in groups because it would be practically impossible to act otherwise.

I think those are the matters where there was perhaps some degree of difference.

Now if there is a little time available, I would like for Mr. Burke to close this case on our part.

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MR. BURKE: May it please the Court:

I would like to address myself, in the few moments that remain, primarily to the recent decision of this Court in the *Everson* case.

It seems to me that without any hesitancy, it can be said that unless this Court is now prepared to delete from the opinions in that case the strong language that was used, unless it is prepared to renounce the principles set out by the majority – and so far as that is concerned concurred in by the minority — then the decision in this case must necessarily be in favor of the appellant.

The *Everson* case is authority for the proposition – I don't think there is any question of that – that the states, no less than the Federal Government, must respect the right of the citizen to be free from the imposition of any religion, and must respect the right of the private citizen to enjoy complete from in religion; and I believe that is broad enough to include one who espouses no religion, whatever the belief may be.

The decision in the *Everson* case leaves no doubt in the mind of the reader that every member of this Court saw this matter of religious freedom in quite a different light than do the appellees in this case. Both the majority opinion and the

minority opinion refer to the two-fold problem, that of aid to the sectarian school, and that of the introduction of religious training in the public schools. And all join in saying that this wall of separation between church and state must not be breached by a violation of either of these provisions.

There is a significant statement in the appellees' brief, but before referring to that, in the light of the interpretation of this Court of the First Amendment, and the clear exposition of the signification of law respecting the establishment of religion, it seems to us it is not significant to determine whether or not there is a proved separation of Church and State. What the Constitution of the United States prohibits, and what the State Constitution prohibits, is the making of any law, or action of any governmental authority in pursuance of such law, that involves the interlocking of official functions of the State with official functions of the Church.

Apply that test to the several examples referred to by counsel for appellees:

First, Congress selects a Chaplain. The House and Senate there are dealing with individuals. No arrangement is made with any Catholic, Jewish, or other religious body. There is no interlocking of official functions of the State with official functions of the Church. The same can be said of Chaplains for the Army.

So far as the exemption of property of religious and charitable bodies from taxation, that does not mean they are given a voice in the affairs of government. There is no interlocking of official functions of the State with official functions of the Church.

But when the state, acting through school boards, gives to a religious organization for the carrying on of its institutional functions public funds raised by taxation, however small the amount, it is giving tax funds to a religious organization by government to dispose of according to its own regulations.

On page 13 of appellees' brief, counsel uses this language: "The object (of the program) is to acquaint children with the history and factual content of religion on the same basis as other subjects such a philosophy, economics or history are taught in the school program, thus affording them a true and balanced picture of the relative place and importance of religion in life."

I see my time has expired. I will only say that if that were true, it would be unnecessary to set up this Council of Religious Education, because that kind of course could be given by the public school teachers themselves.

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(Thereupon, at 3:30 p.m., oral arguments in the above entitled cause were concluded.)

*Gerard V. Bradley is a Professor at the University of Notre Dame School of Law.

# TELECOMMUNICATIONS

## THE FCC ISSUES A GROUNDBREAKING DECISION TO ALLOW SPECTRUM LEASING

BY R. EDWARD PRICE*

In October 2003 the Federal Communications Commission (FCC) released a landmark decision that will allow radio spectrum to be leased by companies that hold FCC spectrum licenses.[1] This decision offers wireless communication providers new ways to unlock the market value of their licensed spectrum and will free up new sources of spectrum for companies wishing to offer innovative new communications services.

The new FCC spectrum leasing rules authorize most wireless carriers, including cellular, PCS and microwave radio licensees, to lease their spectrum to other qualified service providers or investment groups that may, in turn, sublease the spectrum to other qualified parties. This marks a historic change in the FCC's thinking about spectrum. Until now, the agency generally considered spectrum leasing to be inconsistent with the managerial responsibilities of a licensee under the Communications Act of 1934. Moreover, the Commission has traditionally taken a "command and control" approach to spectrum management — licensing specific spectrum blocks to specific licensees for specific types of services. The new rules should therefore have a wide-ranging impact. They will provide eligible wireless licensees with a much needed means of trading spectrum among themselves so as to improve their service footprints or restructure their businesses. Additionally, spectrum leasing is likely to offer carriers and investment groups a new method for financing the cost of spectrum.

This paper discusses the FCC's spectrum leasing decision and summarizes the types of spectrum leases that the new rules will permit.

**I. Permissible Spectrum Leases Under the New FCC Rules**

The FCC's *Spectrum Leasing Order* permits eligible wireless service providers to enter into two different types of leases for all or part of their spectrum (e.g., for a certain area or at certain times). The first type of lease is called a "spectrum manager" lease. It requires the licensee to retain ultimate control over the spectrum and be responsible for compliance with all FCC regulations, but permits the lessee to operate facilities on a day-to-day basis for providing a communications service to customers.[2] The second type of lease is called a "*de facto* transfer" lease. It permits the licensee to grant complete authority over its spectrum, and FCC rule compliance, to the lessee.[3]

Prior FCC authority is required for a *de facto* transfer lease, whereas notice to the FCC is all that is needed for a spectrum manager lease. Under both types of leases, however, a lessee (or sub-lessee) can only use the leased spectrum for the type of radio communication services that are covered by the FCC license of the lessor. For example, a cellular mobile licensee may not lease out its spectrum for broadcasting services; nor may a microwave network operator lease its spectrum for mobile communications.

Despite these limitations, the new rules represent a significant departure from past practice. Until now, FCC precedent — specifically, the agency's 1963 *Intermountain Microwave* decision[4] — generally prevented a licensee from leasing or sharing its spectrum rights with another party. Allowing a non-licensee to have control over licensed facilities was viewed as inconsistent with Section 310(d) of the Communications Act,[5] which bars the direct or indirect transfer of a radio licensee without prior FCC approval. The *Spectrum Leasing Order*, however, reinterprets Section 310(d) to allow lessees to control licensed radio facilities so long as the licensee retains ultimate responsibility for the underlying spectrum (as in spectrum manager leasing) or obtains prior FCC approval for the lease (as in *de facto* transfer leasing).[6]

The requirements for each type of lease are described more fully below.

*A. Spectrum Manager Leasing*

Under a spectrum manager lease, a licensee may lease spectrum without prior FCC approval — only notice to the FCC is required — as long as the licensee retains *de facto* control over the leased spectrum. To retain *de facto* control, the licensee must: (1) ensure the lessee complies with the Communications Act and FCC regulations on an ongoing basis; (2) continue to be responsible for all interactions with the FCC required under the license; and (3) remain directly accountable, along with the lessee, to the FCC for any rule violations by the lessee.

To qualify as a spectrum lessee, a party also must meet the same ownership requirements that apply to licensees under the Communications Act and prior FCC policies. Accordingly, if a lessee will provide a common carrier service, it may not be more than 20% owned by non-U.S. parties or, absent prior FCC consent, have greater than 25% indirect ownership by non-U.S. parties.[7] Spectrum obtained by parties that were granted special preferences in past spectrum auctions (e.g., by being classified as a small business or a minority-owned "designated entity") cannot be leased to entities which themselves do not also meet those qualifications (except for short-term *de facto* transfer leases described below). Additionally, as noted above, lessees must comply with all of the ser-

vice rules that apply to the licensee and may not use leased spectrum for a service that would be inconsistent with the license.

No FCC approval is required for spectrum manager leases. The licensee need only provide notice to the FCC within 14 days after entering into a spectrum manager lease, and at least 21 days before the lessee commences operations (or 10 days in the case of a lease that lasts for less than one year). The FCC retains the right to investigate and terminate any spectrum manager lease arrangements that it deems to violate the public interest.

*B.* De Facto *Transfer Leasing*

Licensees may also enter into leases where *de facto* control over the spectrum is transferred to the lessee. A *de facto* transfer lease frees the lessor from the obligation to oversee the lessee's FCC compliance. The lessee is thus responsible for interacting with the FCC, complying with the rules and making all required regulatory filings. As with spectrum manager leasing, a *de facto* transfer lessee must be compliant with applicable foreign ownership restrictions and must qualify as a small business or designated entity if the license was originally granted based on special preferences for those types of entities.

Prior FCC approval is needed for *de facto* transfer leases, but the agency has established streamlined procedures for such approvals. For *de facto* transfer leases with a duration of more than 360 days ("long-term" leases), the application will be placed on public notice "promptly," and interested parties will have 14 days to file petitions to deny. Within 21 days of the public notice date, the FCC will consent to the application or "offline" it for further examination, in which case a decision still must ordinarily be made within 90 days.

For *de facto* transfer leases with a duration of 360 days or less ("short-term" leases), the FCC will approve applications within 10 days. Short-term *de facto* transfer leases may only be approved for an initial period of up to 180 days, and then renewed for additional periods so that the entire lease does not exceed a total of 360 days. Any leases of a duration beyond 360 days must be approved under the long-term *de facto* transfer lease procedures.

**II. FCC Proposals for Future Spectrum-Related Rule Changes**

As part of its *Spectrum Leasing Order*, the FCC also proposed some additional rule changes that may further widen the scope for spectrum leasing in 2005 and beyond.[8] For example, the FCC may become involved in creating a clearinghouse for spectrum or otherwise help to facilitate lease arrangements. It also asked interested parties whether it should further change its rules to expand the scope of wireless services eligible to take advantage of the new leasing rules (e.g., by including satellite services) and to permit all types of leasing arrangements (not just spectrum manager arrangements) to be entered into without prior agency approval.

In making these proposals, the FCC pointed out that new technologies are now being developed and, in some cases, deployed — including software-defined radio, frequency-agile radio and spread spectrum technologies — to allow devices to search out and operate in spectrum not being used by others. The rulemaking notice therefore asks interested parties (who were asked to file comments with the agency in December 2003 and January 2004 on these matters) whether additional changes are needed to the new leasing rules to encourage the development and use of these technologies across broad portions of the radio spectrum which may now be occupied by multiple licensees.[9]

**III. New Services and Financing That May Result from Spectrum Leasing**

The FCC's decision to allow spectrum leasing is significant for many reasons. As noted above, it will give existing licensees access to new spectrum to augment their existing services and allow carriers that are not fully using their spectrum in the near term to lease it out to other carriers. Likewise, the new rules should provide new market entrants wishing to offer wireless services a way to gain access to spectrum not previously available.

Some of the most significant long-term impacts of the FCC's new leasing rules may result from new financing options that the rules appear to create. For example, wireless carriers may be able to reduce the cost of spectrum access (e.g., in connection with the auction of new third generation spectrum licenses to be offered in 2004 and 2005) by using properly structured leasing arrangements that are underwritten by independent investors or financial institutions. A wireless carrier might also choose to use the new rules to refinance its existing network by leasing out spectrum to a new network operator in return for lease payments that are backed by customer revenues.

The specific types of spectrum lease and financing arrangements that will emerge will of course depend on the way the new rules are interpreted and enforced. But it is clear that new opportunities are going to be available for existing wireless carriers, new service providers and the providers of financing for wireless services as a result of the FCC's spectrum leasing decision.

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**Footnotes**

[1] *See In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, WT Docket No. 00-230, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 03-113 (released Oct. 6, 2003) (*Spectrum Leasing Order*).
[2] *Id.* ¶¶ 94-125.
[3] *Id.* ¶¶ 126-181.

[4] 12 FCC 2d 559 (1963).
[5] 47 U.S.C. § 310(d).
[6] *See Spectrum Leasing Order* ¶¶ 51-81.
[7] *See* 47 U.S.C. § 310(b).
[8] *See Spectrum Leasing Order*, ¶¶ 213-323.
[9] In addition to the further rule changes the FCC is considering, five petitions for reconsideration have been filed with the FCC concerning the *Spectrum Leasing Order*. The petitioners all support spectrum leasing, but ask the Commission to change or clarify certain aspects of the order.

# Book Reviews

## The Tempting of Western Civilization: a Review of Robert H. Bork's *Coercing Virtue: The Worldwide Rule of Judges*

*by William H. Pryor Jr.**

Judge Robert Bork's latest book, *Coercing Virtue: The Worldwide Rule of Judges*, is by far his slimmest volume (139 pages plus endnotes), and it is a variation on his long-running criticisms of judicial activism. This latest variation is nevertheless important and not well understood. In an introduction and four short chapters, Bork explains and dissects the problem of international judicial overreach.

Bork begins with the observation, "Judicial activism results from the enlistment of judges on one side of the culture war in every Western nation." He explains that liberal elites from the news media, academia, arts and entertainment industry, mainline churches, and environmental lobby have formed what Bork calls a "New Class" to wage a cultural revolution. Bork charges that the New Class has enlisted successfully the judiciary in promoting an agenda of socialism and hostility to religion and traditional morality.

Bork observes this agenda first in the context of international law, which he argues "is not law but politics." Bork lays out his case that the international law of human rights is a tool of the cultural left and the international law of the use of armed force is a dangerous instrument of anti-Americanism. Bork concludes, "international law poses a real threat to every nation's ability to make its domestic laws and to act abroad as its national interests dictate."

Bork then turns to case studies of judicial activism in three Western countries: the United States, Canada, and Israel. He compares and contrasts this phenomenon in controversies about freedom of speech, religion, homosexuality, and feminism, among others. Bork's discussion of judicial activism in the United States is a well-worn subject, but its contrast with the judicial chicanery in Canada and Israel is startling. Although the United States gave birth to judicial activism, its abuses are, Bork argues, surpassed in other countries, especially in Israel, under the leadership of Aharon Barak, President of the Supreme Court of Israel. The judicial involvement in matters of national security in Israel is especially surprising.

If you desire to shun a rosy scenario, Bork, as usual, does not disappoint. He revisits the subject of censorship, with which he still sympathizes, and legislative review of judicial decisions, which he now views as impractical. Bork also discusses other remedies for judicial activism, but discounts the likelihood of success. Recent events underscore the course for Bork's pessimism.

*Coercing Virtue* was written before the decision of the Supreme Court of the United States in *Lawrence v. Texas*, which recognized a constitutional right to engage in consensual homosexual sodomy. In the light of Bork's critique of *Romer v. Evans*, one can imagine Bork's lament of *Lawrence* and especially the reliance by the Court on the laws of other nations. It is ironic that, in *Coercing Virtue*, Bork singles out for praise the author of the majority opinion in *Lawrence*, Justice Anthony Kennedy, who at the annual meeting of the American Bar Association in London in 2000 rejected the critique of a London barrister regarding the need for American courts to cite the decisions of Europeans courts. Bork writes, "Kennedy, to his credit, did not succumb to this combination of insolent foreign browbeating and pusillanimous American response."

Bork's description of Justice Kennedy's defense of the American judiciary is worth repeating. Bork recounts, "If American courts cede authority to remote courts unknown to the public, [Kennedy] said, there is a risk of losing the allegiance of the people." Bork's gloomy retort probably would be "Don't bet on it."

For those concerned about both American sovereignty and judicial activism, an afternoon reading of Judge Bork's latest work is both enlightening and sobering. This book also serves well as an introduction for students to international law and the role of the judiciary, from a conservative perspective. Judge Bork provides a solid foundation for even more work, which will surely follow.

*The Honorable William H. Pryor Jr. served as the Attorney General of the State of Alabama from 1997-2004. In February of 2004, he was appointed as Judge on the United States Court of Appeals for the Eleventh Circuit. He is Chairman of the Federalist Society's Federalism and Separation of Powers Practice Group.

# *You Can't Say That!: the Growing Threat to Civil Liberties from Antidiscrimination Laws* by David Bernstein

*Reviewed by Thor Halvorssen**

A judge in Pennsylvania ruled that by printing Christian-themed verses on company paychecks, a trucking company had "harassed" a Jewish employee. In Ohio, a Dairy Mart manager was fired for removing from store shelves *Playboy* and other periodicals that had offended her Christian sensibilities. With the support of a religious conservative foundation, she sued for religious and sex discrimination, claiming that the magazines subjected her to a "hostile workplace environment." The plaintiff received hundreds of thousands of dollars in an out-of-court settlement. In California, Krissy Keefer, a self-described "radical feminist," filed a complaint against the San Francisco Ballet for "height and weight discrimination" when her daughter Fredrika was not admitted to ballet school. The school requires successful candidates to be healthy children with a "well-proportioned body," "supple spine," "slender legs and torso"; Fredrika was judged not to meet these requirements. The matter of Fredrika's corpulence versus the ballet company's First Amendment rights is still pending and may cost the Ballet the grant it receives from the city.

In contemporary America, an increasing number of citizens, judges, and government officials seem to believe that people—especially women, minorities, and other "historically disadvantaged" groups—have a right not to be offended and that this right supercedes the freedom of speech and association rights of others. As this belief gains wider acceptance, it threatens to have tragic consequences for the First Amendment to the U.S. Constitution. David Bernstein's magnificent book, *You Can't Say That!; The Growing Threat to Civil Liberties from Antidiscrimination Laws* (CATO Institute, 2003), addresses this urgent problem by analyzing its historical, social, and legal roots and by stressing the exceptional importance of resolving this conflict to the advantage of liberty.

As a matter of full disclosure, I should mention that in his book David Bernstein calls the Foundation for Individual Rights in Education (FIRE)—where I was CEO—an effective force countering the assault on civil liberties. I have never met or spoken to Mr. Bernstein; regardless of his praise for FIRE, he has produced a wonderfully written, profoundly significant, and timely work.

Bernstein, a George Mason University law professor, accurately defines the problem as the trend toward redefining civil liberties to include protection from any conceivably discriminatory behavior and offensive speech. According to Bernstein, this redefinition creates an arena where new "civil liberties" conflict with traditional constitutional freedoms: freedom of speech, freedom of association, and freedom of religion. The clash between old and new "liberties" has produced laws, regulations, and government actions that impinge on the freedom of expression protected by the First Amendment, jeopardizing, for example, a club's right to choose its own members or an artist's right to display provocative and controversial images.

Although the author is not a trained historian, he begins the book with a concise and comprehensive history of how the concept of discrimination developed as a threat to civil liberties. Bernstein opens by discussing the insight and consistency of the civil rights champions who, in 1945, opposed laws forcing the private sector to engage in fair employment practices. *The Nation* publisher and NAACP cofounder Oswald Garrison Villard insisted that it was best to "rely on the force of slow but steadily growing public opinion," instead of government coercion, to end racial discrimination in the private sector. In 1959, Hannah Arendt, no friend of bigotry and racial intolerance, observed that "discrimination is as indispensable a social right as equality is a political right." Civil rights organizations at the time understood the shortsightedness of eviscerating civil liberties in the name of civil rights; this explains why the American Jewish Congress and NAACP fiercely opposed hate speech laws.

Bernstein explains that the 1964 Civil Rights Act compromised freedom of association by making it illegal for certain businesses to engage in racial discrimination. Bernstein argues that the Act did not end discrimination and that *The Nation*'s publisher was right in his conviction that public opinion is an infinitely better alternative to force; he nevertheless acknowledges that "within a few years of the passage of the 1964 Civil Rights Act, racial exclusion and segregation by hotels, restaurants, theatres, and other commercial spaces virtually disappeared," and that by 1974 employers were aggressively recruiting minority job applicants. With the dismantling of the racial caste system, new groups (among them senior citizens, gays, and the disabled) began to use civil rights terminology to further their own agendas; in the process, discrimination in all of its forms came to be considered a moral evil.

From the 1970s onward, antidiscrimination laws began to seep into every nook and cranny of local, state, and federal government; a zealous bureaucracy of self-appointed "human rights" practitioners began to root out the perceived evil of discrimination without regard for the consequences. In their fervor, they tried to weaken the freedoms that would protect an individual accused of discrimination—freedom of speech, association, and conscience. The dogmatic demonization of discrimination was so effective that even the first President Bush character-

ized discrimination as a "fundamental evil" in a 1990 address.

Bernstein's book catalogues the myriad ways antidiscrimination law conflicts with constitutionally-protected freedoms, offering cases ranging from religious primary schools to public colleges, from political speech to artistic expression, and from workplace harassment law to privacy rights. Bernstein provides dozens of carefully footnoted examples, at every level of government, where the kindly inquisitors have struck against civil liberties.

The extent to which artistic freedom has been limited by discrimination laws becomes clear when we note that Francisco Goya's *Naked Maja* was found to create a hostile environment for a Penn State English professor. Meanwhile, pictures of interracial kissing shown in an art class so offended a University of Southern Florida college freshman that she later accused the "African-American male" in the photograph of "sexual harassment." In this day and age, a plaintiff can win a $125,000 judgement for alleging that "misogynistic" rap lyrics and sexually charged music videos create a "hostile environment" in the workplace.

We can see the extent to which political speech and freedom of the press are threatened by antidiscrimination law in cases such as the one in which the director of the St. Paul, Minnesota Human Rights Office sought to punish the St. Paul *Pioneer Press* for publishing a cartoon, charging that it created a "hostile public environment" that "discriminated" against black athletes. It made no difference that the newspaper's cartoon actually protested the perceived exploitation of black athletes by the University of Minnesota.

"Hostile work environment" regulations threaten free expression in the workplace, but rarely with any identifiable consistency. Bernstein holds forth on various contradictory and bewildering cases, noting in particular how *Playboy* was found to create a hostile environment in Alaskan firehouses while it enjoys First Amendment protection at Los Angeles firehouses and prisons.

Bernstein's book contains a first-rate chapter on the phenomenon of campus speech codes, analyzing their genesis and charting their proliferation at hundreds of universities. College and university administrators' attempts to create an inoffensive campus climate free from "discriminatory language" have led to "hostile environment"–motivated restrictions on academic freedom and freedom of speech. Worse still, the selective enforcement of speech codes entails the patronizing notion that some individuals, because of their color or gender, are simply too weak to study in an environment where an honest disagreement may offend them. We are teaching the next generation that the proper response to speech one doesn't like is repression and censorship, not vociferous debate and moral witness.

Bernstein's discussion rightly recognizes that private and sectarian colleges and universities have a right to limit the free speech and association rights of their students. However, Bernstein mistakenly analogizes religious universities with elite private universities when he suggests that the latter, when "controlled by politically correct administrators," can enforce speech codes at will. In fact, while private universities may not have to honour the constitutional protections of freedom of speech, they may not violate common law.

While religious institutions announce to incoming students what they can expect in the matter of their free speech rights, elite private institutions overwhelmingly advertise themselves in glowing terms as centers of vigorous debate, unfettered discussion, and academic freedom. Cal Tech, Harvard, and Northwestern, for example, do not advertise themselves as politically biased institutions whose partisan speech codes deprive students of their free speech rights—an omission that may well constitute actionable false advertising and breach of contract. Speech codes at elite secular institutions should only get a free pass when these schools make it clear to their current and prospective students that they enjoy fewer free speech rights on campus than students at the local community college.

Although verbal behavior that offends or hurts people's feelings is an inevitable (if undesirable) by-product of a free society, it would be disastrous to allow government to try to police offensive expression. One undeniable fact of American history is that the civil rights movement could not have happened without the right to free speech. Bernstein stresses that advocates for the governmental policing of citizens' thoughts and attitudes should remember Albert Jay Nock's admonition that whatever power you give the State to do things *for* you carries with it the equivalent power to do things *to* you.

During the past ten years, the First Amendment has been battered by the civil rights establishment. Sadly, the censors on the authoritarian left have sometimes joined with religious conservatives in a vision of a world where only their ideological enemies are silenced. Ironically, as Bernstein notes, it is Christians, particularly in school and university settings, who are increasingly the targets of anti-discrimination zealots.

The First Amendment needs philosophically and strategically consistent advocates. The same law that protects a Dairy Mart's right to dismiss an employee for refusing to sell *Playboy* magazine will also protect the Dayton Christian School's right to fire a teacher who flouts church doctrine and violates the "Biblical Chain of Command." The First Amendment will also protect a religious landlord who refuses to rent to tenants whose behavior could, in the landlord's opinion, place her eternal soul at risk.

Despite having good reason for pessimism, Bernstein is immensely cheered by the *Boy Scouts v. Dale* (2000) decision, in which the Supreme Court granted an expressive organization the right to be selective in its membership. While this decision will protect the Ku Klux Klan's right to maintain its racist, sexist, anti-Semitic profile, it will also protect forward-thinking organizations' associational rights. Bernstein sees the *Dale* decision as a new bulwark for pluralism and the safeguarding of diverse viewpoints.

Bernstein's chapter "The ACLU and the Abandonment of Civil Liberties" gives credit to that organization for years of defense of civil liberties. It also singles out the ACLU for failing to protect civil liberties and too often spearheading the assault on them. He lists internal schisms that have weakened the organization, noting in particular that state chapters and the national office cannot agree on issues of discrimination. According to Bernstein, the ACLU has become fissured and ideologically incoherent, some chapters protecting the Bill of Rights, others privileging a dubious civil rights agenda over civil liberties. It is worth noting that ACLU President Nadine Strossen, whom the book celebrates, contests some of Bernstein's claims. For example, Bernstein states that the ACLU gave an "honorary position" to censorship advocate Mari Matsuda, a Georgetown University law professor. Strossen denies the accuracy of that description.

Bernstein concludes by passionately reminding the reader that civil liberties must remain inviolate. He asks us to look at the frightening experiences of other English-speaking democracies where the thought police have taken control of public policy, and calls on American citizens to defend their precious civil liberties from similar erosion.

This is a persuasive, well-researched, thoughtful, and cutting-edge study. It deserves serious consideration by all friends of liberty, regardless of their political, ideological, or religious persuasions.

*Thor Halvorssen is an Advisor and former CEO to the Foundation for Individual Rights in Education, a non-profit educational foundation devoted to free speech, individual liberty, religious freedom, the rights of conscience, legal equality, due process, and academic freedom on our nation's campuses.

## *Substantial Similarity in Copyright Law*

### by Robert C. Osterberg and Eric C. Osterberg

*Reviewed by David Applegate**

Copyright law, like the law of contracts, is deceptively complex. What appear on the surface as straightforward propositions often prove, in practice, full of subtle nuance and deeper meaning, often difficult to discern. Just as the familiar contract formation principles of offer, acceptance, consideration, and a legal object can lead to months, if not years, of frustrating litigation to determine if a valid contract even exists, so too can even the most seemingly basic precepts of copyright law befuddle the inexperienced practitioner or confuse the court.

Take, for example, the basic test of copyright infringement: ownership of a valid copyright plus copying, which may in turn be proved either by direct evidence of copying or by proof of access and substantial similarity. Access may be difficult or easy to show, depending on the facts, but how does one decide "substantial similarity?" Despite its importance in copyright infringement litigation, as the authors of this new book on the topic point out in their Preface, substantial similarity "remains one of the most elusive concepts in copyright law."

Why, for example, does the 1985 movie *Pale Rider* not infringe 1953's classic *Shane*? (Why, for that matter, doesn't *Terminator 2*?) Both feature local small farmers or miners struggling against powerful local interests, encouraged in their resistance by a stranger who rides into town, stays with a local family, becomes idolized by the family's child, and triumphs in a showdown with an evil gunslinger hired by the powerful interests before riding away, leaving grateful townsfolk and a very sad child. Why, on the other hand, was "Wonderman" found to infringe the copyright on "Superman"? Now copyright litigators have a book that not only tells us, but also shows us, the answer to such questions.

The first work to focus exclusively on the topic, Robert C. and Eric C. Osterberg's *Substantial Similarity in Copyright Law* (PLI 2003) bridges the gap between academic treatise and practitioner's handbook. Bound in loose-leaf format for easy updating, it features a comprehensive summary of legal principles, Circuit-by-Circuit analysis of their application in practice, topical discussions by subject matter, and, most helpfully, an appendix of photographs and illustrations that show just what counted as substantial similarity in over a dozen and a half reported cases.

The authors organize *Substantial Similarity* into three major sections and seventeen chapters, followed by appendices, a table of cases, and an index. The first section focuses on defining legal standards.

In Chapter 1, the authors take on the legal definition of "substantial similarity" and two related concepts, "probative" similarity and "striking" similarity. Coined by the late Alan Latman in a Columbia Law Review article, "probative similarity" is the kind of similarity that helps prove a defendant in fact copied material from a plaintiff, and need not involve copyrighted portions of the material at all. As the Osterbergs point out, a persuasive way of proving that a defendant has copied a computer program is often to show that the defendant has replicated portions of plaintiff's code that are inefficient, superfluous, or just plain erroneous. "Striking" similarity, on the other hand, is similarity "of the most impressive kind:" similarity that can be explained only by copying, rather than by independent creation, coincidence, or common prior source.

In Chapter 2, the authors discuss the principles of substantial similarity, including the *de minimus* threshold for copyright infringement, the many categories of unprotected material, qualitative and quantitative requirements, dissimilarities, and the two kinds of similarities: verbatim (including paraphrases) and total concept and "feel." "Quantitative" copying refers solely to the amount of copyrighted material that a plaintiff has copied; "qualitative" to the value of the copied material to the *plaintiff's* work. (If you don't copy much of the work, but only its heart and soul, you can still be found liable for infringement.)

Chapter 3 is a Circuit-by-Circuit survey of "substantial similarity" standards applied around the country, with special attention to the requirement for obtaining a preliminary injunction. In the Second Circuit, for example, the court applies the "ordinary observer" test where the work allegedly copied is wholly original, and the "more discerning ordinary observer" test where the work involves both protectible and unprotectible elements. Under the former, giving the works the same degree of scrutiny that a hypothetical ordinary observer would give them, the trier of fact must determine whether an ordinary lay person would recognize the accused copy as having been appropriated from the copyrighted work. Under the latter, the finder of fact must attempt to extract the unprotectible elements (ideas, facts, *scenes a faire*, clichés, titles, quotations from others, and uncopyrighted material), then determine whether the protectible elements, as a whole, are substantially similar. These are questions of fact, except when no reasonable person could find more than one way on the undisputed material facts, in which case the court will grant summary judgment.

In the Ninth Circuit, on the other hand, courts apply the "extrinsic/intrinsic test." First, applying the "extrinsic" part of the test, the court determines if the alleged infringing work is even of a type that could possi-

bly be "substantially similar" to the copyrighted work, based on specific analytical criteria and, if appropriate, expert testimony. In the case of a copyrighted sculpture of a nude human figure, for example, according to the Ninth Circuit, neither a statue of a horse nor a painting of nude human figure could infringe under the "extrinsic" part of the test. But if the extrinsic portion of the test is met, then the court applies the intrinsic portion: whether, depending on the response of the ordinary reasonable observer, the total concept and the feel of the two works are substantially similar. Here, however, the test is subjective, and no expert testimony is permitted. Other Circuits follow one or both of these approaches to greater or lesser degrees.

Turning to the second section, a topical analysis of specific subject matters consumes the bulk of the book, with chapters devoted to fictional literary and dramatic works, characters, nonfiction, audiovisual works, computer programs, musical works and sound recordings, works of visual art, architectural works, choreography, compilations and collective works, works in different media and formats, and derivative works. Readers will be unsurprised to learn that each of these is decided on a case-by-case basis or, as one court has put it, that the analysis is "inevitably *ad hoc*." The authors nonetheless struggle mightily to discern governing principles from diverse cases involving such colorful facts or properties as Sam Spade, Star Wars toys, Lone Wolf McQuade, Sylvester Stallone, and a famous x-rated underground comic book featuring easily recognizable Walt Disney characters.

In the third section of the book, the authors deal with selected trial and appellate issues, including the proper role and scope of expert testimony, lay opinion and audience reaction, and surveys, each topic treated succinctly but clearly, with ample citations.

But the heart and soul of this book resides in Appendix A, which illustrates in color and in black and white what courts have found to be substantially similar (or not) in nineteen cases involving drawings, photographs, sculpture, scripts, song lyrics, forms, architecture, insignia and fabric designs, and useful articles such as belt buckles, wristwatches, and furniture. Here the reader can experience firsthand the "look and feel" of copyrighted and infringing articles and begin to discern viscerally what some of the tests discussed in the text actually mean in practice.

Jury instructions, a table of cases, and a topical index follow. Rather than attempt to provide a comprehensive model instruction distilled from their own analysis, the authors present instead sample instructions from six reported cases in five different Circuits for consideration by the reader. Although one wishes for something more definitive, that is probably not possible given the differing tests in different courts. The index and the table of cases are unremarkable but useful.

In a complicated and confusing area, this is an eminently useful book. From the standpoint of a practitioner, there can be no higher praise.

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## *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers*
### by Eugene Volokh
*Reviewed by Reid Alan Cox*

In the forward to Professor Eugene Volokh's new book, *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers*, Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit observes that, while published legal articles can "be quite useful and influential in the development of the law," most law review pieces "are read by no one beyond the [author's] immediate family and cause hardly an eddy among the currents of the law." This reality prompts Judge Kozinski to rhetorically ask: "Why do so many published [academic legal articles] fail in their essential purpose?" The answer is obvious to Judge Kozinski — and to the many law students and attorneys who share in the experience of publishing a law review piece only to be forever archived on library shelves and the Westlaw and LexisNexis electronic databases. "Most students [and lawyers] have no clue what to write about, or how to go about writing it," Judge Kozinski explains. But this should be true no more, thanks to Professor Volokh's new book, which lifts the veil on how to successfully navigate the process of framing, writing, and publishing law review notes, comments, and articles.

In short, *Academic Legal Writing* is a "how-to" book, and it is hard to imagine an author better suited to demystifying the scholarly legal writing and publishing process. Professor Volokh is a leading member of the new legal academy, graduating from the UCLA Law School in 1992 and then clerking for the aforementioned Judge Kozinski on the U.S. Court of Appeals for the Ninth Circuit and Justice Sandra Day O'Connor on the U.S. Supreme Court before returning to his *alma mater* as a professor of law. Professor Volokh has published more than 30 law review articles covering such diverse areas of the law as constitutional law, cyberspace law, free speech, intellectual property, information privacy, religious freedom, religious/sexual/racial harassment, affirmative action, gun control and firearms rights, and the Supreme Court, and he uses his experience to teach the reader about every twist and turn in writing and publishing an academic legal work. In fact, Professor Volokh's article entitled *Freedom of Speech and Workplace Harassment*, which he wrote as a law student and published in the *UCLA Law Review*, has been cited in more than 140 other academic works and by judges in 10 court cases. And he has followed up on this early success by becoming the third most cited law professor among those who entered teaching since 1992, according to a 2002 survey of law review citations by Professor Brian Leiter of the University of Texas.

No part of the writing and publishing process is left out in *Academic Legal Writing*. Professor Volokh begins by counseling the reader in "choosing a claim" and follows up by coaching the reader through "research," "writing," "cite-checking," and "publishing and publicizing." In fact, Professor Volokh has designed his book to be a partner in the writing and publishing process. Each part of the book "relate[s] to different stages of [the] process," and Professor Volokh "suggest[s]" reading and using the various sections in sequence as the reader faces the difficulties of writing and publishing. Thus, in the first part, *Academic Legal Writing* teaches the publishing novice about "the basics" of law review articles and student notes by explaining that any "[g]ood legal scholarship should make (1) a claim that is (2) novel, (3) nonobvious, (4) useful, (5) sound, and (6) [be] seen by the reader to be novel, nonobvious, useful, and sound," and follows up with instruction about "organizing the article," and "converting practical work — such as law firm memos — into academic articles" (a welcome topic for all of us busy lawyers out there). Successive parts of Professor Volokh's "how-to" guide teach the reader about such subjects as "knowing when to shift from research to writing" and the fact that "if you need to reread something to understand it, [you need to] rewrite it." Perhaps most importantly for numerous law students and attorneys who have little experience in scholarly publication, Professor Volokh includes an entire chapter about "publishing and publicizing" a law review article. This chapter blows all the cobwebs off both how and where you should try to get your article published. Professor Volokh directs you to an electronic list of mailing addresses of law reviews and even includes an appendix of sample cover letters the reader may use to submit articles for publication and to inform other interested persons about the published scholarship.

Perhaps the best feature of *Academic Legal Writing* is the practicality of Professor Volokh's approach. While there is plenty of instruction and pointers packed into these 200 pages, Professor Volokh understands that most law students and attorneys need to learn an efficient path from a blank page and a mind full of ideas to a published law review article or student note. Thus, each section of *Academic Legal Writing* offers the aspiring scholar roadmaps and checklists to follow in order to reach the goal of a final publication. These simple but practical ways of tackling each part of the legal writing and publishing process not only make the final goal of law review publication seem possible, but also instruct the reader just how to achieve what previously seemed to be a hard-to-understand and impossible mission.

Just as the *Blue Book* has become an indispensable companion for law students and lawyers alike when it comes to legal citation, Professor Volokh's *Academic Legal Writing* should be close at hand for everyone who

wants to tackle the task of entering the world of academic legal scholarship. It now takes its place on my desk right next to my well-worn *Blue Book*, *Black's Law Dictionary*, and copy of the U.S. Constitution.

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