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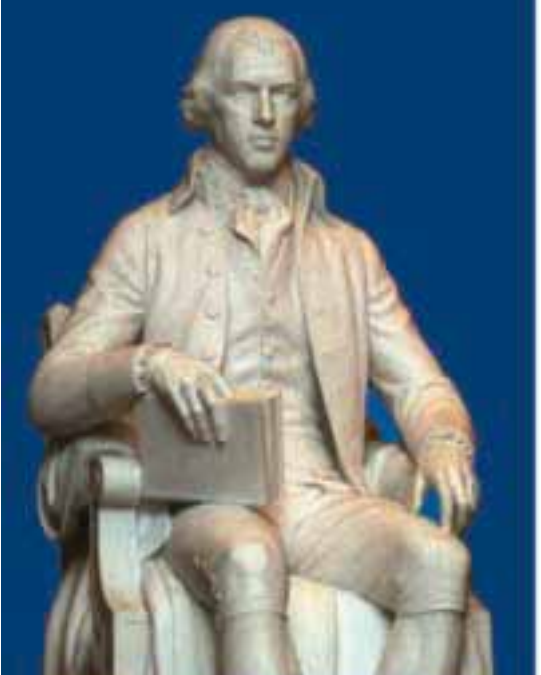
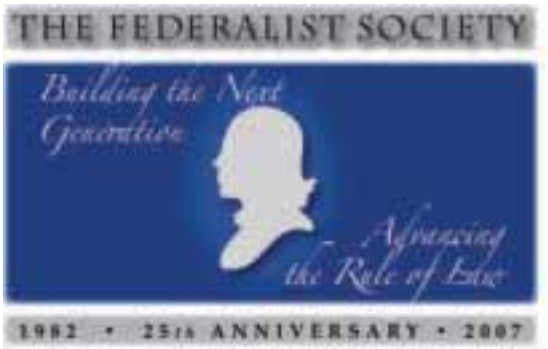


The Journal of the Federalist Society Practice Groups



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The Federalist Society for Law and Public Policy Studies is an organization of 40,000 lawyers, law students, scholars and other individuals located in every state and law school in the nation who are interested in the current state of the legal order. The Society takes no position on particular legal or public policy questions, but is founded on the principles that the State exists to preserve freedom, that the separation of governmental powers is central to our Constitution and that it is emphatically the province and duty of the Judiciary to say what the law is, not what it should be.

The Federalist Society takes seriously its responsibility as a non-partisan institution engaged in fostering a serious dialogue about legal issues in the public square. We publish original scholarship on timely and contentious issues in the legal or public policy world, in an effort to widen understanding of the facts and principles involved and to continue that dialogue.

Positions taken on specific issues in publications, however, are those of the author, not reflective of an organization stance. ENGAGE presents articles, white papers, speeches, reprints and panels on a number of important issues, but these are contributions to larger ongoing conversations. We invite readers to submit opposing perspectives or views to be considered for publication, and to share their general responses, thoughts and criticisms by writing to us at info@fed-soc.org. Additionally, we happily consider letters to the editor.

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ENGAGE

Vol. 8, Issue 3

Letter from the Editor . . .

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

This issue is the third in our twenty-fifth anniversary year, which began at the November 2006 National Lawyers Convention. The transcripts from that event's many panels appeared on our website in May as the second issue of the current volume. We are pleased to announce that nearly all of the panels which appear there have been taken by various law reviews (listed on the opening page in ENGAGE 8.2), and have already been, or will soon be, printed around the country. This is also the first time that we have been able to produce a third edition of ENGAGE in a single volume.

The following pages feature articles discussing only the most pertinent issues in these fifteen areas of law and policy. February's issue contained a great number of articles dealing with the "war on terror." A more common theme in this edition is proper jurisdiction, or questions of federalism, national sovereignty and separation of powers. Considering The Federalist Society's mission statement, this seems altogether fitting.

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

Volume 8, Issue 3 *June 2007*

Engage

Administrative Law and Regulation

Gasoline, Markets, and Regulators

*By Andrew P. Morriss**

Does gasoline cost too much, or too little? Recently we have heard that gasoline costs too much. As gas prices soared in 2005, for example, the Sierra Club called on Congress to force prices lower and "put money back in the pockets of Americans who need it, not in the coffers of multinational oil companies."[1] Prices that are "too high" are held responsible for everything from funding terrorism to pushing Americans into poverty. Yet, we also regularly hear that gasoline costs too little. In 2006, for example, *New York Times* pundit Thomas Friedman demanded a $1/gallon tax to force gasoline prices high enough to make "the most promising alternatives—ethanol, biodiesel, coal gasification, solar energy, nuclear energy and wind" able to compete economically with gasoline.[2] Prices that are "too low" are alleged to be responsible for ills from suburban sprawl to global warming.

In a free market economy, the "too high" or "too low" debate would be easily settled. As Friedrich Hayek showed in his seminal article "The Use of Knowledge in Society," markets compress considerable information into prices, enabling resource users and suppliers to make decisions without needing to know more than the price of a good.[3] Prices do this by serving as signals about resource availability. When they rise, they signal increasing scarcity; when they fall, they signal greater abundance. Asking whether the price of anything is "too high" or "too low" is thus a meaningless question.

Unfortunately gasoline markets are buried in layers of regulation that obstruct the normal market processes that generate these signals to balance supply and demand. Because the aims of these regulations are often mutually contradictory, the impact of the thicket of regulation is even worse than first appears, distorting decisions on everything from the search for oil to investments in refineries. The legacy of more than a century of federal and state interference in market processes is that gasoline markets are vulnerable to price spikes and shortages. However, rather than prompting a public outcry to clear the thicket, these conditions inevitably trigger demands for yet more regulations to correct the distortions introduced by the earlier interventions. The current demands by politicians for windfall profits taxes, reductions in oil imports, increases in use of ethanol, and fuel economy mandates reflect their failure to fully understand the legacy of failed regulation that shaped today's energy markets.

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When markets are allowed to work, the result has been substantial improvements in fuel quality and availability, demonstrating the costly nature of the persistent tendency toward intervention. One of the most dramatic examples of this comes from the earliest days of the American oil industry. The primary product from the first, simple "tea kettle" refineries was kerosene, sold for use in lamps and stoves. Gasoline was simply "the portion of crude petroleum too volatile to be included in kerosene" and early refiners "had no use for it and often dumped an accumulation of gasoline into the creek or river that was always nearby."[4] (Standard Oil even attempted to create demand for gasoline by marketing gasoline stoves.) With the appearance of the internal combustion engine, however, the waste product became a valuable commodity. By 1910, gasoline production exceeded kerosene production, and the refiners worried about a gasoline shortage, rather than how to dispose of the surplus gasoline. Similarly, when increasingly sophisticated cracking operations increased gasoline yields in the 1930s, byproduct gases that initially had no economic value and were disposed of by venting or burning also increased.[5] The development of polymerization processes enabled refineries to turn these gases into octane-enhancing feedstocks, again converting a waste to a valuable product. As early as 1941, one technical review concluded that "[t]he constant practical application of chemical and engineering research to refining operations has resulted not only in improvement of products to meet changing conditions and requirements but in the reduction of waste in processing and in the manufacture of an almost infinite variety of products."[6] Refineries today continue to find ways to reduce costs by making use of waste products, and other improvements in product quality, including higher octane and more consistent properties, resulted from the relatively unregulated gasoline market of the late 1930s and early 1950s.[7]

As Congress, various state legislatures, and environmental regulators once again debate measures from outright price-controls to additional formulation requirements on fuels, it is useful to revisit past experiences with similar measures. This article unpacks the regulatory history of gasoline markets to shed light on the current policy debate. It first examines the competing and often contradictory policy goals invoked in regulatory debates, and then turns to the impact of the various policies on gasoline production. Finally the article suggests some paths out of the regulatory jungle and towards a regime that allows market forces to operate.

I. Competing Policy Goals Produce Rent-Seeking

Four policy goals compete for the attention of regulators whenever the subject of gasoline, or energy generally, is raised: anti-monopoly, restraint of "excess competition," energy security, and environmental protection. That these goals often require contradictory measures has not prevented them

from being pursued simultaneously, rendering statutes in this area even more opaque than the average federal statute. Not surprisingly, all four of these policies often conveniently serve to mask rent-seeking by interest groups.

Concern over energy monopolies goes back to the beginning of the domestic oil industry and the attack on Standard Oil by both the federal and state governments. The conventional antitrust story is a familiar one: predatory monopolists or oligopolists conspire to raise prices above the competitive level, "gouging" consumers at the pump. Virtually every significant gasoline price increase prompts congressional and state legislative concern over energy monopolies. When these anti-monopoly concerns rise to the top of the legislative agenda, policies to restrict price increases appear, as they did in the 1970s under the Nixon-Ford price controls, and have again in recent proposals by several senators to allow "price caps" to restrain "gouging" by oil companies; (North Dakota's Byron Dorgan is particularly active on this issue.)

When fierce competition appears in gasoline markets, however, governments do not rejoice, but instead focus their concern on restraining "excess" competition. This concern surfaced in the 1920s, for example, as new oil discoveries increased supply rapidly enough to push prices downward even as demand for gasoline grew as automobile ownership spread. Oil producers did not care for the resulting low prices and conservation groups worried that oil reserves were being depleted too rapidly. State efforts to limit production fell short and production continued to increase during the Depression years. In response, the Roosevelt Administration introduced measures to reinforce state-created production quotas and cartelize the same industry the federal government had so energetically sought to force to compete more vigorously just two decades earlier in the Standard Oil antitrust case. Similar concern that there is "too much" competition is invoked today by regulators bent on restricting the freedom of energy companies to control franchisees such as service stations as well as to justify production constraints on domestic oil producers and limits on imports.

Energy security issues, relating to ensuring adequate supply, also have a lengthy pedigree. They first surfaced during World War I, when the Navy sought secure domestic oil supplies for oil-fueled warships. They have also served to justify everything from the Mandatory Oil Import Program of 1959-1973 to the disastrous 1970s energy policies of Presidents Nixon, Ford, and Carter to current efforts to raise corporate average fuel economy ("CAFÉ") standards. Energy security concerns usually motivate legislatures to demand differential treatment of at least some foreign sources of oil. They also serve as justification for a grab bag of policies that spring up in response to the distortions introduced by import restrictions.

Environmental concerns are of a more recent vintage. Restrictions on refinery location and operation, obstacles to new refinery construction, limits on pipeline routings, restrictions on drilling in sensitive areas (e.g. the Alaska National Wildlife Refuge), and fuel formulation requirements to reduce mobile source emissions (e.g. boutique fuels) are among the many policies justified by environmental concerns.

Different interest groups have different policy agendas. Pursuing a coalition to enact any given proposal thus can lead to provisions promoting conflicting policies. Thus in the Energy Policy and Conservation Act (EPCA) of 1975, Congress passed in an incoherent omnibus energy bill that "included provisions both to reduce and to raise the price of oil."[8] Most importantly, the regular reworking of regulations to emphasize first one policy and then another provides legislatures with almost continuous opportunities to serve special interests under the cover of advancing the policy concern of the moment.

II. The Impact of Changes In Crude Oil Price & Quality

Today, roughly half the cost of a gallon of gasoline is the cost of purchasing the crude oil from which to refine it.[9] Crude prices vary considerably depending upon world events that affect producing nations' political stability, natural disasters that can temporarily shut down production, the discovery of new oil fields and the exhaustion of old ones, and the varying degree of OPEC members' willingness to abide by the cartel's efforts to limit production. As a result, much of the fluctuation in gasoline prices is caused by changes in crude oil prices.

Changes in crude markets have another impact that is increasingly important—oil production is shifting from "sweeter" crudes to more "sour" crudes.[10] Many earlier major oil fields, such as those in West Texas and Iran were low in sulfur and other minerals ("sweet"), while many of newer major sources of oil, such as Alaskan North Slope crude and the Alberta tar sands, had more of these minerals ("sour"). This shift required refiners to make major investments to enable their refineries to process sour crudes. For example, investments in hydrotreating in the 1970s and 1980s allowed the Gulf Coast refiners to process cheaper, sour crudes but roughly trebled their capital expenditures.[11] Adding to costs, this trend toward sour inputs into refining coincided with increasing regulatory demands to tighten mobile source emissions standards in order to reduce sulfur in the fuels produced. The combination of these increased regulatory requirements for reduced sulfur in fuels and the high cost of upgrading refineries to handle sour crudes led many smaller refineries optimized for low sulfur crudes to shut down rather than incur the cost of modifications these two trends required.[12]

III. The Impact of Changes In Refining on Gasoline Markets

The first oil refineries were similar to whiskey stills, separating fractions of the oil by a simple distillation process. When this process yielded too little gasoline to satisfy the growing demand in the 1910s, refiners developed technological innovations such as thermal and catalytic cracking to break heavier hydrocarbon molecules into more desirable ones that could be used in gasoline. One example of technological progress shows how dramatically refining changed under demand pressures. In the early 1930s, the 100 octane reference fuel "was a rare chemical costing $25 per gallon in the small quantities necessary for anti-knock testing purposes." But by 1941, "the industry [was] manufacturing millions of gallons

of isooctane for use directly as aviation fuel at little more than 25 cents per gallon."[13] Today, the technology has advanced to the point that "[a]ny hydrocarbon can be converted into any other hydrocarbon by the appropriate application of energy, chemistry, and technology."[14]

The result is that gasoline production has evolved into a complex process, built around production of a variety of specific chemicals from crude oil. These are then blended together to produce gasolines with specific performance and environmental characteristics. As the complexity of gasoline production has grown, so too has the scale of refining operations, with many refiners today operating networks of refineries as virtual single units to produce the needed proportions of each blendstock.[15] An important consequence is that refiners' investments in technology have soared in recent years.[16] The payoff from this investment has been significant. U.S. gasoline production grew from 4.1 million barrels per day in 1960 to 8.3 million barrels per day in 2005.[17]

The expansion in capacity since the 1970s has come even as the number of refineries has declined. Indeed, no new "greenfield" refinery has been built in the United States since 1976, with capacity growth coming from the expansion of existing facilities and advances in technology that increase yields. One important reason for refiners' decisions to increase the capacity of existing refineries rather than build new ones lies with regulatory policy. Price controls and quotas, discussed in more detail below, led to construction of numerous small, simple refineries in the 1960s and 1970s, primarily as a means to obtain valuable government permits that allowed importation of foreign oil and subsidies for small refineries. Those same programs also deterred consolidation in the refinery industry by reducing benefits when one refiner bought another. When price and allocation controls were ended by President Reagan in January 1981, the rationale for operating these small, inefficient plants evaporated and the number of refineries fell dramatically.

The investment necessary to expand capacity, process the increasingly "sour" crudes that make up oil production today, and produce fuels with the ever-lengthening list of characteristics demanded by regulators, is considerable. The need for such investments has made refining an increasingly capital-intensive business. In addition to the substantial investment required to build a modern refinery, regulatory hurdles have played a role in blocking new refinery construction. The only serious effort to build a greenfield refinery in recent years is Arizona Clean Fuels' efforts to do so outside Yuma, Arizona and the story of the company's efforts to date illustrates the obstacles faced by anyone contemplating building a new refinery.[18] In 1999, Arizona Clean Fuels initially sought the permits necessary to build a $2-3 billion refinery in Maricopa County, but the emissions restrictions and ozone noncompliance status in that location prompted the company to shift its plans to a remote location in Yuma County in southwestern Arizona. In addition to finding investors and a source of oil, the company had to procure "two dozen" local, state, and federal permits. Of course, obtaining the various regulatory approvals involved multiple public hearings and lengthy review by assorted governmental bodies. More than seven years of regulatory efforts to date have cost the company over $30 million without producing any physical steps toward construction. With such a record, it is little surprise that there have been few other efforts to build new domestic refineries. (There has been considerable investment in new ethanol plants, proving that politics can drive investment.)

IV. Import Restrictions

When gasoline rationing ended after World War II, demand for gasoline soared. Refineries shifted from war fuel production to making automobile gasoline, but the growth in demand soon outpaced the growth in domestic refinery capacity. The General Agreement on Tariffs and Trade in 1947 led to reduced tariffs on both crude oil and refined products, allowing imports of both to grow to help meet the new demand. The subsequent increase in imports made the U.S. a net importer of oil for the first time in 1947. Soaring demand also led to higher gasoline prices, which induced increases in production capacity. Tax incentives for refinery projects, nominally motivated by national security concerns, also contributed to the boom in refinery expansion and construction, especially among small refiners. The result was the creation of "an intensely competitive industry" focused on "find[ing] ways of increasing efficiency and reducing operating cost."[19]

One key response to this competition was that the major oil companies invested heavily in foreign sources, tanker fleets, shipping facilities, and coastal refineries, bringing cheaper crude to their U.S. refineries, and thereby gaining a major cost advantage over those domestic refiners that did not make such investments and remained reliant on higher cost U.S. sources of crude. Imports as a percentage of rising demand reached 18% in 1957, up from 11% just eight years earlier.[20]

The rise in crude imports, expansion of refining capacity, and investment in infrastructure to expand the sources of crude were all responses to market conditions. Entrepreneurs identified opportunities, made investments and prepared to reap their rewards in the marketplace. These investments drove down gas prices through "hard competition."[21] Left alone, the interplay of market forces would have provided American consumers with more, better, cheaper gasoline. Unfortunately life is never that simple in the energy markets.

A. The Demand for Quotas

The rise in imports and the growing cost-advantage of the refiners who had access to cheaper foreign oil roiled domestic oil politics. Oil imports undercut the prorationing programs in oil producing states like Texas and Oklahoma, angering both American oil producers who found themselves cut out of markets and state regulators who resented their loss of control. The rise of imports should have surprised no one as it was the very success of the prorationing programs at raising domestic crude oil prices that drew the increasing amounts of foreign crude into the American market. Together with those refiners who had not invested in gaining access to foreign oil, the domestic oil producers and state regulators in the oil patch created a potent coalition to demand import restrictions. They

invoked anti-monopoly concerns (it was "Big Oil" that was doing the importing) and national security (dependence on foreign sources) to insist on restrictions on imports of foreign oil. The Suez Canal crisis in 1956 strengthened their position by highlighting the vulnerability of foreign supplies. In 1957, the Eisenhower Administration initiated a voluntary quota system for crude imports. The voluntary quotas failed to restrain imports, however. They failed, in part because of the enormous profits available from cheaper foreign oil,[22] and, ironically, because the oil companies feared antitrust prosecutions if they cooperated.[23]

When the economy weakened in 1958, domestic demand for crude fell while imports continued to increase, creating unstoppable momentum for mandatory import controls. Powerful Texas and Oklahoma politicians like Senate Majority Leader Lyndon Johnson, House Speaker Sam Rayburn, and Oklahoma Senator Robert Kerr, pushed hard to restrict imports to protect U.S. oil producers from price competition. Speaking directly to the major importers, Louisiana Senator Russell Long stated:

> I believe your industry would make a great mistake not to realize that; as far as the government is concerned, as far as the fair treatment you are entitled to expect from your government is concerned, the people who will be your advocates are people who are very much interested in domestic oil… It is very much to your advantage to have a very healthy domestic industry and do everything within your power to cooperate to that end."[24]

Facing such a line up, the Eisenhower administration abandoned its commitment to free markets and adopted controls.

B. Quotas in Practice

The quota system, known as the Mandatory Oil Import Program (MOIP), was in effect from 1959 to April 1973.[25] The MOIP became "the single most important energy policy in the postwar era."[26] Unfortunately, it was a regulatory approach that resolutely ignored shifts in supply and demand. Rather than focusing on the economics of energy, the MOIP quickly became where a "roll call of the special interest groups in energy policy" found opportunities to profit at the public's expense.[27] The MOIP also produced one of the most ironic unintended consequences of any federal program—concern over the impact of the program spurred Venezuela to convene the first meeting of the organization that eventually became OPEC.[28]

Under the MOIP, refiners received permits to import crude oil, with the total amount allowed to be imported held below the amount that would have been imported in a free market. Allocations were adjusted based on "[r]efinery location, capital decisions, marketing arrangements and production and supply patterns" in attempts to achieve various policy goals and reward particular interest groups.[29] The result of the MOIP was that domestic crude prices were higher than they would have been in the absence of the quota system and the right to import the cheaper foreign crude attached to the quota "tickets" became valuable.

Moving from the market to politics had several important consequences for refiners. MOIP affected "virtually all major aspects of refinery operation—entry, plant siting, plant size, merger and acquisition policy, product mix, and, of course, profitability."[30] In refining, it "discouraged the expansion of domestic refinery capacity, altered refinery location within the United States, altered the mix of the final products, encouraged investment in cracking capacity, and discouraged investment in capacity to handle high-sulfur feedstocks."[31] The quota system failed to reward those oil companies that had invested heavily in foreign supplies, tanker fleets, and coastal refineries in anticipation of a growing reliance on imports. And MOIP quotas were valuable enough to affect refinery investment decisions, shifting construction from larger to smaller refineries because it rewarded each new refinery with a quota. Unfortunately, the new small refiners were often the least technologically sophisticated, and so later proved unable to handle the shift to sour crudes. The MOIP's bias toward small refiners also discouraged consolidation of ownership in refineries, preventing buyouts of these refiners by the larger companies that could have increased efficiency.

The MOIP also produced extensive special interest lobbying. Refiners were allowed to trade their import quotas, and many inland and independent refiners did, using them to gain access to domestic crude owned by rivals.[32] In many respects, therefore, the program was simply a transfer of wealth from the large, integrated oil companies to the smaller, inland refiners.[33] One academic review of the program concluded that, "[h]owever intricately wrought and carefully articulated the rationales for each action [under the MOIP], the impression was inescapable that the mandatory quota program was being treated as a source of unappropriated funds available for a variety of putative public purposes."[34] The interest group maneuvering produced a program so complex that "[f]ew other regulatory schemes in America's history can match the Mandatory Oil Import Program for labyrinthine complexity, or for the distortion of markets and interest-group dissension that it caused."[35]

One particular chain of distortions deserves extended discussion, because it illustrates particularly well how government interventions distort markets. Under the MOIP, every refiner received a share of the initial quotas, including the group of largely inland refiners who imported Canadian oil via pipeline. Of course, one of the major stated justifications for the MOIP was the national security concern over reliance on imported energy. Canada, joined by refiners using Canadian oil in the northern Midwest objected to the requirement of quota tickets for Canadian oil, pointing out that the oil came into the United States across a land pipeline from a close ally. The MOIP was accordingly modified to exempt Canadian oil imported via land. (The change left the Midwestern U.S. refiners using Canadian oil with surplus quota tickets, which they then sold to others for an added benefit.)

The exemption for Canadian oil provoked complaints from Mexico that its oil was disadvantaged. Mexican oil came to the United States via tanker in the Gulf of Mexico and so did not qualify for the overland exemption. Pointing to its friendly relations with the United States and the security of Caribbean shipping, Mexico asked for an exemption similar to Canada's. Thus began one of the most vivid of the MOIP

distortions: the "Brownsville U-Turn" or "Mexican Merry-Go-Round."[36] Through creative lawyering, and with the assistance of the State Department, a "crevice" in the import regulations was used to bring Mexican oil in as "overland" oil exempt from import quotas.[37]

> Mexican crude was moved by tanker from its producing regions to the U.S. port of Brownsville, Texas, on the Mexican border, unloaded in [customs] bond and then shipped into Mexico in trucks, which made a U-turn, and promptly reentered the United States. On reentry, the crude was taken out of bond, duty was paid on it, and it officially entered the United States under the overland exemption. Because a market for only a fraction of the Mexican oil existed in Brownsville, most of it was reloaded upon tankers and shipped to the East Coast U.S. ports as "domestic" oil.[38]

This strategy boosted Mexican exports to the U.S. from 7,000 to 40,000 barrels per day.[39]

Unsurprisingly, this special treatment of Mexican oil then provoked complaints from Venezuela, which produced heavy crude with a primary market in the United States. As a U.S. ally shipping through the secure Caribbean area, Venezuela felt it deserved the sort of special consideration received by Mexico and Canada. To satisfy Venezuela, the U.S. gave it a special deal on residual fuel exports. ("Resid" is a heavy fraction of crude oil.) This exemption "altered the product mix capability of domestic refineries and created a special dependence on imports of heavy fuels."[40] Predictably, U.S. production of resid fell after 1960 from 332,200,000 barrels of production with 233,200,000 barrels of imports, a ratio of 1.42, to production of 257,500,000 barrels with 557,800,000 barrels of imports, a ratio of 0.46. The resid provisions encouraged utilities and industrial users in the northeast to favor resid over alternatives and domestic refiners to alter their production away from such products. Further suggesting the quota-driven nature of resid use, consumption declined after the MOIP ended, with natural gas and distillates taking its place.[41]

C. The Impact of Quotas

The period between the end of World War II and the end of the 1950s was an era of comparatively light regulatory intervention in U.S. energy markets. The result was a rapid improvement in the quantity and quality of fuel available in the American marketplace. U.S. refineries boosted output and increased the octane and consistency of the fuels they sold. Responding to shortages of cheap crude oil, energy companies made substantial investments in tanker fleets, pipelines, terminal facilities, foreign oil concessions, and refineries capable of handling new types of crudes, all of which benefited American consumers.

The creation of the MOIP in 1959 transformed business decisions in gasoline and oil markets into political issues where the profitability of investments would be determined by the grant of government privileges rather than by success in the marketplace. Instead of focusing on creating new business opportunities in the marketplace, "[b]usiness and government were preoccupied with the tactical issues of administering [policy]: import quotas and 'prorationing' for crude oil."[42] This changed the refining landscape dramatically by preventing cheaper foreign oil from forcing down domestic oil prices and driving marginal crude producers out of business. In refining, the MOIP's microeconomic impacts included preventing the major international oil companies with access to foreign oil from gaining as much market share as they otherwise would have and allowing "several dozen, relatively inefficient independent refiners to stay in business."[43]

Not only did the shift of entrepreneurial energy from creating value in the market to mining the *Federal Register* for profits create absurdities like the "Mexican Merry-Go-Round" and blatant wealth transfers like the grant of quotas to non-importing refineries, it undermined the security of investments in refining capacity. For example, when oil companies raised the price of gasoline in February 1967, an unnamed administration official was quoted as saying that the government would flood the country with imported gasoline if the prices were not rolled back. Unsurprisingly, some prices were immediately reduced.[44] Such threats undoubtedly discouraged investment, a phenomenon that can clearly be seen in the decline of U.S. capacity relative to U.S. demand. Unlike in the 1950s, when domestic refinery capacity had exceeded domestic demand for refined products, refinery capacity between 1960 and 1970 increased at about half the rate of domestic product consumption, converting the U.S. from a refined product exporter to a refined product importer. The MOIP played a major role in this by encouraging the migration of refinery capacity to foreign locations.

V. Price Controls

It is almost impossible to describe in less than a book-length manuscript the complex system of price and import controls imposed on energy in the 1970s during the Nixon, Ford, and Carter Administrations. These energy measures came about in part because, by the beginning of the 1970s, the cumulative impact of the various special interest exemptions granted under the MOIP had dramatically eroded that program's effectiveness and oil imports had accordingly risen sharply. As a result, those who had benefited from the MOIP's restrictions on imports were thus looking for an excuse to replace it with more effective controls. Moreover, when the federal government turned to wage and price controls, oil was critical to the price controls since it affected so many other prices. Rising oil prices in 1970 prompted the administration to investigate oil companies, Nixon himself to denounce the oil companies, and a relaxation of the MOIP quota restrictions to lower prices.[45]

A. Imposing Price Controls

When voluntary measures proved insufficient to control inflation, Nixon imposed a general wage and price freeze on the entire economy from August to November 1971 (what came to be known as "Phase I").[46] Of course, while the U.S. government was able to order domestic oil producers and gasoline sellers to freeze prices, its orders had no impact on world energy prices, and so the uncontrolled international price of gasoline and crude oil began to diverge from the controlled domestic prices, putting firms selling gasoline domestically made from imported oil at a severe disadvantage.

"Phase II" of the price controls, which lasted from

November 1971 until January 1973, limited wholesale price increases to no more than three percent annually.[47] In an effort to allow multiproduct firms, including refineries, some limited flexibility, special "Term Limit Pricing" (TLP) agreements were permitted. These allowed companies to meet the Phase II 3% rule by keeping the average of prices across products (rather than each individual price) within the guidelines. Politics kept gasoline, home heating oil, and residual oil off the list of commodities that could be included in the TLP agreements, however, and so refiners wishing to recoup the increased costs of imported oil had to do so through price increases for their other refined products. Several oil companies were told that a price increase for a 'visible' product would require public hearings and lead to protracted delays.[48] Thus even before the Arab oil embargo in 1973, price controls were having a major impact on gasoline markets by keeping prices artificially low and discouraging gasoline production. Shortages began to appear in late 1972 and early 1973, months before the Arab oil embargo.[49] Moreover, the differences in prices for crude from different sources created political pressure for a government allocation program to allocate access to cheap crude.

When the 1973 Middle Eastern war began in October 1973, approximately 17% of U.S. oil supplies derived from Arab sources.[50] The Organization of Arab Petroleum Exporting Countries halted exports to the United States and several other countries in retaliation for their support for Israel, exacerbating the already existing supply disruptions caused by the price controls. Although a bill creating an import allocation system was already moving toward passage in Congress before the embargo, the additional supply disruptions caused by the embargo provided the political excuse for controlling the distribution of both crude oil and refined products.[51]

Responding to the various interest groups' demands, Congress quickly adapted the existing proposals into the Emergency Petroleum Allocation Act (EPAA) in 1973.[52] The resulting rules were "almost unimaginably complicated and wide-ranging" and "[a]ll assessments of the period agree that, viewed *in toto,* these allocation regulations aggravated consumer suffering stemming from the embargo."[53] For example, the federal government pressured refiners to produce more home heating oil at the expense of gasoline because it feared a shortage of the former in the next winter. But the government overestimated demand for heating oil and underestimated demand for gasoline, and so its intervention exacerbated gasoline shortages and produced a surplus of heating oil. The allocation system also "assured, perversely, that gasoline could not be shifted from an area already well-supplied to one where it was needed."[54] In short, the federal response to the embargo eliminated the market's ability to adjust, substituting an administrative allocation system that worsened the crude supply disruptions and limiting responsiveness through price controls. Yet, in response to each of these problems, the federal government regularly added additional controls. For example, when a tentative step toward decontrol in Phase III of the price controls in January 1973 produced a 7.4% rise in gasoline prices by March, controls were re-imposed on oil products.[55] Phase IV introduced a regulatory distinction between new and existing sources of domestic crude and allowed higher prices for the former in an effort to boost crude supplies. While the oil price controls were supposed to end in 1974 along with the other "temporary" price controls, the Arab oil embargo's price pressure led to an extension into the Mandatory Petroleum Price Regulations which continued them after the end of price controls generally.

With the Energy Policy and Conservation Act (EPCA) of 1975,[56] Congress revised the EPAA scheme in an incoherent omnibus energy bill that "included provisions both to reduce and to raise the price of oil."[57] EPCA expanded the Phase IV pricing classifications as part of an effort to prevent "windfall" profits to domestic oil producers from the decontrol of "new" crude prices. The profits available from reclassifying oil into the market-price categories from the controlled price categories produced a number of successful schemes to do so. Economic analysts concluded that the EPCA created problems "infinitely worse" than the system it replaced.[58] And, in efficiency terms, the 1970s allocation program, under which the Federal Energy Administration set prices, was a step backwards from the MOIP, which had at least allowed the price of quotas to be set in the marketplace. As a result, "the Federal Register became more important than the geologist's report."[59]

The regulations also created incentives to operate inefficient refineries simply to get the entitlements to crude oil that owning a refinery produced: "the result was the bringing out of mothballs any piece of 'refining junk' that could be found—leading to the return of hopelessly inefficient 'tea kettle' refineries of the kind that had not been seen since the flood of oil in the East Texas field in the early 1930s."[60] Further modification of the program gave the small refiners additional entitlements based on a sliding scale in an attempt to reduce the cost advantages of the larger, more efficient refiners.[61] As a result, smaller, less efficient refiners profited at the expense of larger, more efficient refiners, and additional new inefficient firms entered the refinery industry.[62] The gains were substantial: $17 billion in 1979.[63] And "[t]he prospect of a transfer of $17 billion per year induces political competition for its acquisition among producers, refiners, and consumers. The entitlements program is an outcome of this process of competition and is the mechanism by which eventual ownership of the windfall gains that arise under crude oil price controls is resolved."[64]

When the Carter Administration took office, its initial policy goal was to find a way to decontrol domestic oil prices "so that consumers could react to correct price signals."[65] However, Carter's attempts to reform energy policy quickly became mired in special interest politics and decontrol proved elusive. As Daniel Yergin summarized, the Carter Administration got "a firsthand education in how special interests operate in the American system, including liberals, conservatives, oil producers, consumer groups, automobile companies, pro- and anti-nuclear activists, coal producers, utility companies, and environmentalists—all with conflicting agendas."[66]

Like Eisenhower and Nixon before him, Carter also attempted "voluntary" wage and price guidelines, "backed by moral suasion, publicity, and the denial of Federal contracts to firms that violated them. At least initially, this was taken to

include denial of the right to bid on Federal oil leases," which induced "voluntary" compliance by many oil companies.[67] There is at least some evidence that these controls caused refinery-level shortages, and, because the price controls did not account for the interrelationships of products produced by refineries, they also produced shortages in non-controlled products.[68]

B. Decontrol

When President Ronald Reagan decontrolled oil prices in January 1981, the rationale for operating small inefficient refineries dissipated and the number of refineries declined quickly and dramatically.[69] With deregulation, the oil industry went through "a wholesale corporate reorganization from which no major company was immune."[70] Twenty-three small refiners shut down in 1981 alone.[71] Falling real prices and the rise of institutional investors interested in rapid returns forced oil companies to become leaner and more profitable quickly.[72] The shift from a regulatory program that encouraged a proliferation of refineries focused on domestic crude sources and kept small, less efficient refineries open, to a marketplace that punished inefficiency led many refineries to close in the 1980s.

VI. Formulation Controls

Federal formulation requirements date to the removal of lead octane enhancers, a lengthy phase-out that began in the 1970s. Prior to that time, the formulation of gasoline had been left to market forces, which produced increased octane, engine performance enhancing additives, regional fuel variations that increased performance, and overall standardization of fuel quality.

Unsurprisingly, given the regulatory history in other areas, the lead phase out involved exemptions and preferences for small refiners. Between 1979 and 1982, "a small subindustry of 'blenders'" firms known as "blenders" arose, "to take advantage of the small refiner exemptions." These firms "would purchase inexpensive, low-octane gas from foreign markets and blend in just enough high-octane leaded gas to stay within the small-refiner exemption."[73] Government involvement in formulation increased starting in the late 1980s, when both state and federal governments began to mandate various fuel characteristics to reduce air pollution emissions from cars. Restrictions on volatility were introduced for many areas in 1989 in an effort to reduce evaporation and the 1990 Clean Air Act Amendments added requirements for the addition of oxygenates to gasoline, nominally to reduce carbon monoxide emissions.[74] The requirement was promoted primarily by farm state representatives to boost demand for ethanol, however, and was not based on any serious scientific analysis.[75] Complying with the volatility, oxygenate, and sulfur requirements required significant capital investments by refiners.

In addition to federal formulation restrictions imposed by EPA, state and local governments have also imposed restrictions on gasolines sold in their jurisdictions.[76] Although there is no comprehensive list of formulations mandated by all levels of government, there appear to be at least seventeen different formulations—a major increase from the single standard (the lead standard) in place in the mid-1980s.[77] In addition, some state and local governments have imposed "biofuel" requirements.

The market-fragmenting nature of the various boutique fuel requirements is easy to grasp: by making gasoline sold in Phoenix different from gasoline sold in Tucson, boutique fuel requirements limit the depth of markets by preventing owners of Phoenix-formulated gasoline from selling their gasoline in Tucson and vice versa. The impacts of these requirements go well beyond these first order effects. The broader fuel formulation requirements also have an impact, however. The ultra-low sulfur restrictions all reduced refinery capacity by helping push marginal refiners out of the marketplace and raising the barriers to entry by increasing the capital requirements for refining.[78] Where additional capital investment is needed to produce the boutique fuels, the regulations limit the number of current plants able to produce a particular fuel, create incentives to exit boutique markets, and create barriers to entry into boutique markets. Econometric investigations into these requirements, comparing prices and price volatility between matched pairs of boutique and non-boutique cities, found that not only is there evidence that boutique fuel requirements raise the cost of gasoline, but that the price impact varies with the geographic isolation and degree of competition in the relevant market.[79] Boutique fuel requirements also result in increasing difference between U.S. market and non-U.S. market gasoline, thus limiting the possibility of importing gasoline from some foreign refineries and reducing the ability of those refineries to supply gasoline when there are spot shortages.

Perhaps the simplest way to grasp the impact of boutique fuel requirements is to think of operating a modern refinery as essentially solving a complex optimization problem. Refiners must find the solution that creates the highest value mix of end products by creating streams of intermediate products manufactured at different stages and blending them into final products. Boutique fuel requirements add additional constraints to the problem. If the constraints are binding, then they have costs.

VII. Fragmented Markets & The Policy Horizon

Energy policy debates generally treat gasoline as a fungible commodity, one widely traded in national and international markets. From the consumer point of view, this looks about right. You can fill up anywhere from pumps that look much the same from city to city and your car will run without noticeable differences in performance regardless of where you bought the gas. Unfortunately, the combined legacy of past energy policies means that gasoline markets are increasingly fragmented. The MOIP and 1970s price and allocation controls distorted the market by subsidizing inefficient refineries and maintaining isolated regional markets, thereby discouraging investment directed at broadening the markets. Worse, these programs rewarded rent-seeking, rather than exploration and innovation, pushing energy companies to divert resources to lobbying from providing energy to consumers. The periodic anti-monopoly campaigns against at energy companies, relieved only by demands that they restrict "destructive" competition, periodically threw energy markets into turmoil. With the increasing number of boutique fuel formulation requirements was added to the policy mix, energy markets have begun to reach their breaking point.

Markets function best when they have many participants and the materials traded in the market are relatively standardized. This basic premise undergirds virtually all economic discussions of the efficiency of competitive markets. When markets become fragmented, they cannot function as effectively. Boutique fuel requirements reduce competition in regional markets. And the price spikes following the Gulf Coast refinery closures caused by Hurricanes Rita and Katrina demonstrated that our gasoline markets are vulnerable.[80]

Energy policy is once again in the news and Congress is considering legislation in two areas that are likely to further damage energy markets. First, populist pressure is growing for measures to reduce energy company profits. Ignoring the importance of market signals for inducing investment and the disastrous history of price controls in the 1970s, a number of windfall profit tax and price control proposals have been filed. North Dakota Senator Byron Dorgan and Washington Senator Maria Cantwell have led the charge for measures to restrict "price gouging" by energy companies. They have done so despite the lack of evidence that inappropriate pricing practices exist, even after multiple Federal Trade Commission and other agency studies over the past decade. The lack of evidence does not mean there will not be action, however. When asked in 2005 if price gouging existed, for example, Senator Cantwell said "Absolutely. I just don't have the document to prove it."[81]

We know what price controls will do. They produce shortages. And shortages produce political pressure for more action. The history of the Nixon-Ford-Carter energy price controls, from Phase I to Phase IV to the EPAA and the EPCA demonstrates that. The only benefit of such controls is that they educate a generation about the irrationality of price controls, preventing their return for thirty years.

The second set of policy initiatives on the table are aimed at increasing government intervention into fuel production. These range from boutique formulation requirements that reduce emissions to expansion of ethanol requirements. The trend toward additional boutique formulations ignores three important facts about the state of the refining industry in America. First, refinery capacity is already strained by existing demand. The United States now imports significant amounts of gasoline from Europe (which has excess gasoline because of the greater reliance on diesel engines there.) As American gasoline specifications become more demanding, however, some of these refiners may opt to sell their excess gasoline to growing markets elsewhere (e.g. China), rather than invest in the equipment necessary to meet the U.S. boutique standards. Second, the combination of the increasing investment demands to meet the Clean Air Act's requirements for refinery operations and the capital investment necessary to meet boutique standards crowds out investment in expanding capacity. Third, as the Arizona Clean Fuels' experience shows, it is unlikely that major new refineries will be built anytime soon. As for the expansion of ethanol requirements, proponents promise both reduced emissions and increased energy security through reduced imports of oil and gasoline and reduced emissions. There are serious questions about the science behind both claims, however. Demands for increased ethanol usage (like boutique requirements) distort energy markets by diverting investment into the production, distribution, and storage made necessary to keep specialized fuels separate and away from improving refineries' net energy yields.

Unfortunately, it is unlikely that the politics of energy will shift in a market direction anytime soon. Given that, how can we escape the regulatory thicket? Three steps in particular would improve gasoline markets:

- *Streamline regulations that create barriers to entry.* Arizona Clean Fuel's experience should be a wake-up call that regulations have created a virtually impenetrable wall around the refinery industry. We need more refining capacity and we cannot rely solely on expansion of existing facilities to get it. The dozens of permits necessary for permission to build a refinery could be reduced in number and complexity without sacrificing environmental protection.

- *Focus regulations on performance standards.* The refining industry has demonstrated enormous innovative ability over the past 100 years. It has dramatically increased octane, quantity, consistency, and efficiency of operation. A focus on performance rather than on fuel composition would create incentives to innovate in boosting environmental quality. (Of course, it would not necessarily increase corn prices as ethanol mandates do.)

- *Encourage cooperation between auto makers and gasoline refiners.* There is much we do not know about the fuel-engine interaction. There have been some preliminary efforts at cooperative research between the two industries, including the $40 million Auto/Oil Air Quality Improvement Research Program that began in 1989. This effort demonstrated that the impact of the composition of gasoline varied considerably across vehicle types and ages.[82] Unfortunately, such cooperation is limited by the energy companies' well-founded fear of antitrust prosecutions. Encouraging such research through clear restrictions on antitrust actions against companies that undertake them could vastly expand our knowledge of how fuel composition affects the environment.

Despite a history of government intervention in pursuit of inconsistent policies and a burden of numerous complex regulations facilitating rent-seeking that few industries can match, Americans enjoy access to relatively inexpensive and convenient transportation fuels. To preserve that access, we need to address the fragmentation of gasoline markets before the next crisis creates political momentum for a twenty-first century version of the MOIP or the Nixon-Ford-Carter price and allocation controls that would irreparably damage the market structure.

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Civil Rights

The Legal Implications of Complying With Race- And Gender-Based Client Preferences

*By Curt A. Levey**

Over forty years ago, Congress enacted the Civil Rights Act, a milestone in the fight against racial discrimination. One of the Act's most controversial provisions was Title VII, which prohibits racial discrimination by employers with more than fifteen employees.[1] Some critics of this provision were concerned about employers who did not want to discriminate on the basis of race but were forced to do so because their customers demanded it. These opponents were worried that some employers who were forbidden from using race to make employment decisions would be driven out of business because some customers preferred to interact with employees only of particular races. They tried to amend Title VII with an exception that would permit employers to discriminate on the basis of race to satisfy customer preferences.[2]

This amendment was defeated, and it is not difficult to see today that America is better off for it. Title VII was not just about changing the attitudes of employers, but about changing the attitudes of their customers as well. When all employers are forbidden from catering to the discriminatory preferences of their customers, consumers have nowhere to turn and are forced to interact with employees of all races. The hope of Title VII was that these forced interactions would teach people that skin color should be irrelevant to doing a good job.[3]

One of the unfortunate realities of the civil rights movement, however, is that old habits die hard. Although many people over the last forty years have indeed given up the racial demands they make on employers, not all have. Moreover, many of the contemporary demands for employees of a particular race come from surprising quarters.

This article is about one of these quarters: Fortune 500 companies that hire outside legal counsel. Over the last few years, large corporations have placed considerable pressure on the law firms they hire to provide them with legal teams of a particular racial composition.[4] I describe these demands and explain why law firms that acquiesce to them violate federal anti-discrimination laws, both Title VII and 42 U.S.C. §1981. Many of the same large corporate clients that are pressuring law firms to provide attorneys on the basis of race are also pressuring to provide them on the basis of gender. Acquiescing to these demands violates Title VII as well.

In short, the law today is still as it was in 1984, when Justice Powell declared in a Title VII suit against a law firm: "In admission decisions made by law firms, it is now widely recognized—as it should be—that in fact neither race nor sex is relevant. The qualities of mind, capacity to reason logically, ability to work under pressure, leadership, and the like are unrelated to race or sex."[5]

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I. Corporations Are Making Racial And Gender Demands On the Law Firms They Hire

Over the last few years, law firms have come under considerable pressure from some of their largest clients to use racial and gender preferences in hiring, promoting, and assigning work to their lawyers. These clients have begun asking for data on the racial composition of the attorneys at the law firms in order to decide whether to continue sending business to the firms.[6]

For example, a number of major corporations have begun asking their law firms to report the race and gender of every attorney assigned to their matters.[7] In May 2005, more than sixty law firms signed a pact agreeing to report this information to over twenty corporate clients.[8] Companies are interested not only in the racial and gender composition of the attorneys assigned to their matters; they are also interested in the racial and gender composition of the law firms they hire as a whole. Thus, companies are also asking law firms to report the race and gender of all of their attorneys, as well as the race and gender of those who have been promoted to partner.[9]

The companies are using this data to decide how much business to send to each law firm.[10] Over 500 corporations have signed a statement pledging to "give significant weight" to law firms' racial and gender compositions in selecting outside counsel.[11] The corporations have made clear that "the failure to adequately diversify legal teams… could mean the difference between retaining business or being dropped."[12] As the general counsel for one company put it, "if your numbers don't add up, you're history."[13] Several companies have already admitted to firing law firms because they did not approve of the racial and gender compositions of the firms; other law firms are reportedly teetering on the firing block for the same reason.[14]

Law firms appear to have received the message and are complying with their clients' demands to assemble teams of attorneys of the desired racial and gender compositions. A partner at one major corporate law firm noted that, although "[p]eople don't always think about gender and race when they staff matters," the new pressure by clients will be "a good reminder" to do so.[15] A partner at another firm has said that race and gender have "become[ ] part of law firms' consciousness about what it takes to get business."[16] Although looking at their colleagues through the prism of race and gender is "still outside of some people's comfort zone," this partner noted, "give them a business reason to do it, and it will happen."[17] As a partner at another firm put it, law firms will "do what they have to do" in order to retain business.[18]

Doing what they have to sometimes involves creating diversity committees and hiring diversity consultants.[19] Too often, it also involves using a different hiring standard for black and Hispanic attorneys than that for other races.[20]

Law firms would be wise to be cautious in the face of these new client demands. If corporate clients were demanding that law firms increase the number of white or male attorneys on legal teams, firms would surely refuse on the ground that their clients were asking them to violate the law. As explained below, law firms that use race and gender to make hiring, promotion, and work assignment decisions in response to client pressure to increase the number of minority and female attorneys also run afoul of federal anti-discrimination statutes.[21]

II. Catering To the Racial Preferences of Clients Violates Federal Law

There are two federal statutes that prohibit discrimination on the basis of race in the workplace: Title VII of the Civil Rights Act of 1964 and §1981 of the Civil Rights Act of 1866. Title VII makes it "an unlawful employment practice for an employer… to fail or refuse to hire… any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race.…"[22] Title VII also makes it unlawful "to limit… or classify… employees… in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race.…"[23] There is no doubt that these prohibitions apply to the relationships between law firms and their attorneys.[24]

Similarly, Section 1981 guarantees "[a]ll persons… the same right… to make and enforce contracts… as is enjoyed by white citizens.…"[25] Although worded somewhat awkwardly, §1981 has been interpreted to bar private as well as public entities[26] from discriminating on the basis of any race[27] in the making of employment and other contracts. In the Civil Rights Act of 1991, Congress broadened §1981 to prohibit racial discrimination with regard to "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."[28] Under §1981, not only may a law firm be liable for discrimination, but so may be the individual employees and partners at the law firm that participated in the discriminatory decisions.[29]

A law firm that hires new associates on the basis of race, promotes associates to partner on the basis of race, or assigns associates and partners to particular clients on the basis of race will fall within the prohibitions of both Title VII and §1981. Hiring and promoting based on race are the classic practices prohibited by these Acts. Moreover, a number of courts have held that work assignments fall within the "terms, conditions, or privileges of employment" language in Title VII.[30] As one commentator has put it, "[i]t is well established that making work assignments along the lines of race… is forbidden."[31] Although these cases are specific to Title VII, the general view is that, after the amendments by the 1991 Civil Rights Act, "§1981's prohibition extends to the same broad range of employment actions and conditions as in the case of Title VII."[32] Indeed, the cases on work assignment have special force in the context of law firms. The ability to service the firm's largest clients is a significant factor on which other decisions at the firm are based, such as the amount of the year-end bonus a lawyer might receive or whether the lawyer will be promoted to partner. Those lawyers assigned to the firm's most important clients will have material advantages over those lawyers who are not. Access to these career-advancing clients, therefore, constitute the "privileges" and "benefits" of employment at the law firm.[33]

It is clear that a law firm will not be able to defend race-based hiring, promotion, and work assignments by arguing that it had to discriminate in order to satisfy client demands. Congress specifically considered whether to make any customer preferences a defense to Title VII when it debated whether to create an exception to liability whenever race is a "bona fide occupational qualification."[34] Southern congressmen who opposed Title VII altogether argued in favor of this exception; they reasoned that black employees might sell better to black customers, and white employees might sell better to white customers, and, thus, in cases of business necessity, employers should be permitted to respond to the preferences of their customers.[35] The proponents of Title VII opposed the exception on the ground that racial preferences by customers would never be overcome if businesses were permitted to acquiesce to them, and their arguments carried the day.[36] Accordingly, all the courts to address the issue have held that satisfying customers does not justify racial discrimination otherwise prohibited by Title VII.[37]

The conclusion is the same under §1981. According to recent Supreme Court precedent, §1981 claims—at very least those against a public entity—are analyzed under an Equal Protection standard.[38] That is, racial discrimination is permissible only if it would be excused under the Equal Protection Clause, which is even less forgiving than Title VII. Racial discrimination is permissible under the Equal Protection Clause only if it satisfies "strict scrutiny," which requires that the discrimination serve a "compelling" interest and be "narrowly tailored" to achieve that interest.[39] The Supreme Court has recognized only three compelling interests sufficient to justify intentional racial discrimination: a national security emergency,[40] remedying past discrimination,[41] and fostering the educational benefits of racial diversity on a university campus.[42] It should be obvious that the satisfaction of race-based customer preferences does not fall into any of these three categories, but the next section discusses, more generally, why law firms will be unable to take advantage of any of the three compelling interests. In addition, some lower courts have, in the words of the Seventh Circuit, "left open a small window [in Equal Protection analysis] for forms of discrimination that are supported by compelling public safety concerns, such as affirmative action in the staffing of police departments and correctional institutions."[43] However, it would be a great stretch for law firms to argue that acquiescing to clients' race-based demands is a compelling public safety concern.

Several courts have treated §1981 as coextensive with Title VII in discrimination actions against private entities.[44] Under that analysis, satisfying customer preferences is not a defense to liability under §1981 precisely because it is not a defense under Title VII. More generally, the courts have held

that there is no bona fide occupational qualification defense to §1981 claims.[45] Thus, under any analysis, client preferences will not save law firms from §1981 liability.

III. Using Race to Assign, Hire, and Promote Attorneys Violates Federal Law Even Without Client Pressure

Part II should be the end of the analysis for any law firm that makes discriminatory hiring, promotion, and work assignment decisions in order to cater to client preferences. When considering allegations of racial discrimination under both Title VII[46] and the Equal Protection Clause (and thereby §1981), courts consider as defenses only the *actual* reason the employer made the discriminatory decisions; post hoc rationalizations and reasons created for litigation are not credited.[47] Thus, law firms that discriminate in response to client pressure will be liable for racial discrimination.

What if law firms refused to make discriminatory personnel decisions in order to retain their clients' business, but the firms nonetheless wanted to consider changing the racial composition of their lawyers? Are there any reasons that the law firms could offer in good faith to justify their racial discrimination? The answer to this question is no. Although there are narrow exceptions created by case law to Title VII and §1981, it is unlikely that the firms could take advantage of them.

With respect to Title VII, racial discrimination is permitted in only one circumstance: to overcome a "manifest racial imbalances in traditionally segregated job categories."[48] This is known as the "*Weber* exception" to Title VII. In order to take advantage of this exception, law firms will have to demonstrate four things: 1) "traditional patterns of racial segregation" in the job category in which minorities are now being favored,[49] 2) a manifest—that is, substantial—imbalance between the racial composition of the lawyers at the law firm and the racial composition of the qualified labor market,[50] 3) the discrimination is temporary and "not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance,"[51] and 4) the discrimination "does not unnecessarily trammel the interests of white employees."[52]

It appears fairly clear that large corporate law firms will fail this test. This is the case because there is no existing manifest imbalance—no less evidence of segregation—between the racial composition of the lawyers who are at large corporate law firms and the racial composition of the qualified labor market. In fact, the available evidence indicates that large corporate law firms hire black attorneys in numbers that exceed their proportion among law students.[53] It is clear that continued discrimination by law firms can, at best, only seek to maintain, rather than attain, a balanced workforce.[54] And, in the words of one commentator, "[t]he Supreme Court has emphasized that affirmative action plans are permissible only if designed to attain, not maintain, balanced workforces."[55] Indeed, it is significant that "in the two cases to come before the Court where the avowed purpose of the preference at issue was the maintenance of prior affirmative action gains, the plans were rejected."[56]

With respect to §1981, as was explained above, courts will apply either a Title VII or Equal Protection analysis. Under the former, law firms will not be able justify their racial discrimination under §1981 precisely because they cannot do so under Title VII. Firms will fare no better under an Equal Protection analysis. In fact, most commentators have concluded that the circumstances in which an employer can engage in racial discrimination under the Equal Protection Clause are even narrower than the circumstances permitted by Title VII.[57] The strict scrutiny test requires a "compelling interest," and the Supreme Court has recognized only three compelling interests that can justify racial discrimination: a national security emergency,[58] remedying past discrimination,[59] and fostering the educational benefits of racial diversity on a university campus.[60]

It is clear that law firms will be unable to take advantage of the first two interests. There is no reason to believe that national security depends on a particular racial composition of the attorneys at corporate law firms. In addition, law firms are permitted to discriminate not to remedy "societal discrimination," but rather only in order to remedy their own discrimination.[61] Given the over-representation of blacks among new associates at most large law firms,[62] it will be difficult for a firm to show that there has been any racial discrimination to remedy, no less to show the gross racial disparities required to justify affirmative action under equal protection standards.[63] Even if such a showing could be made, it is doubtful that many law firms will want to admit to discriminating in the past.

For at least six reasons, it is also unlikely that law firms will be able to take advantage of the third interest, the educational benefits of diversity:[64]

First, the Supreme Court has only recognized diversity as a compelling interest for its educational benefits and in the context of selecting students; it has not recognized diversity as a compelling interest for its workplace benefits nor in the context of selecting employees.[65]

Second, the reasons the Supreme Court set forth for recognizing diversity as compelling interest in the educational context do not carry over to the workplace context. The Court noted that there was a "tradition" under the First Amendment "of giving a degree of deference to a university's academic decisions;" in light of this deference, the Court "presumed" that racial diversity did indeed yield educational benefits, and that reaping these benefits was "essential" to the mission of a university.[66] While in university admissions the First Amendment value of academic freedom must be weighed against the right to equal protection, there is no such countervailing constitutional interest or presumption with respect to law firms or employers in general. In addition, the Court noted that racial diversity fosters "cross-racial understanding, helps to break down racial stereotypes, and enables [students] to better understand persons of different races," all arguably integral to the mission of an educational institution, but far removed from the core mission of a law firm.[67] Finally, the Court observed that education is "pivotal to sustaining our political and cultural heritage with a fundamental role in maintaining the fabric of society," and, indeed, "is the very foundation of good citizenship."[68] "For

this reason," the Court said, "the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity."[69] As important as large corporate law firms are to the American economy, it is difficult to believe that they are "the very foundation of good citizenship" in the same way education—even college education—is.

Third, the Supreme Court's recognition of diversity as a compelling interest in education was grounded in its belief that an extensive collection of studies, expert reports, and other empirical evidence demonstrated the educational benefits of a diverse student body.[70] There is no comparable body of scientifically developed evidence for the benefits of diversity in law firms or the workplace in general.

Fourth, the reasons racial diversity might be an asset in the workplace context are little more than "customer preferences" by another name. That is, law firms might argue that racial diversity is important to the firm because attorneys of a particular race might better understand or better persuade clients, judges, or jurors of the same race.[71] But that is akin to assigning black salespersons to black customers, and white salespersons to white customers. As explained above, such customer preferences are not a defense to intentional racial discrimination under an Equal Protection analysis.

Fifth, the Supreme Court held that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[72] This is unlike the narrow type of diversity—defined primarily by race and gender—demanded by corporate clients and implemented by law firms.

Sixth, for these and other reasons, courts that have considered the question have decided that the workplace benefits of racial diversity do not rise to the level of a compelling interest.[73]

Moreover, even if a law firm could find a way to survive the compelling-interest prong of strict scrutiny, the firm would not escape liability under an Equal Protection analysis unless it could also prove that its discriminatory decisions were narrowly tailored to achieve the compelling interest. The firm would have to show that its discrimination satisfies the following factors: 1) the racial composition of the lawyers it hires, promotes, and assigns work to is justified by the racial composition of the qualified labor pool, 2) there are no race-neutral alternatives that can achieve the benefits of diversity equally effectively, 3) the discriminatory policies are of only temporary duration, and 4) the discrimination does not burden lawyers of other races unduly.[74] It will be difficult for law firms to make these showings, especially in light of the evidence indicating that black lawyers are hired by large firms in numbers greater than their proportion in the qualified labor pool.[75]

In sum, whether a court applies an Equal Protection or Title VII analysis to a §1981 claim, law firms will have no defense to their racial discrimination.

IV. Using Gender to Assign, Hire, and Promote Attorneys Violates Federal Law

Up until this point, the focus of this paper has been on racial discrimination. As noted in Part I, however, corporate clients have also threatened law firms with termination if they do not have the desired number of female associates and partners. Firms that acquiesce in these demands will violate Title VII's prohibition on sex discrimination.[76] As it does with race, Title VII makes it "an unlawful employment practice for an employer… to fail or refuse to hire… any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's… sex.…"[77] Title VII also makes it unlawful "to limit… or classify… employees… in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's… sex.…"[78] For the same reasons advanced in Part II, it is clear that gender-based employment decisions such as hiring, promotion to partner, and assignment to certain clients will fall within the purview of Title VII's prohibitions. Thus, the only question is whether law firms have any defense under Title VII to save them from liability.

One possible defense is the "bona fide occupational qualification" exception to intentional sex discrimination.[79] Although, Congress rejected this defense with regard to race, as noted in Part II, Congress accepted it with regard to sex (as well as religion and national origin).[80] In order to take advantage of this exception, law firms will have to show that "sex is a bona fide occupational qualification reasonably necessary to the normal operation" of the firm.[81]

Satisfying the demands of customers is necessary to the operation of any for-profit enterprise, but courts have held that most customer-based gender preferences do not qualify as "bona fide occupational qualifications."[82] As one commentator has noted "[c]ustomer preference in general will not support a BFOQ for sex discrimination."[83] The reason for this was stated long ago by the Fifth Circuit in *Diaz v. Pan American World Airways, Inc.*[84] In this case, an airline discriminated against men in hiring flight attendants on the basis of a survey of its customers showing that 79% of them—85% of male passengers and 69% of female passengers—preferred female flight attendants. The Fifth Circuit found the practice in violation of Title VII because "it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function of service it offers."[85]

Accordingly, courts have found an employee's gender to constitute a bona fide occupational qualification only when 1) all or substantially all of the other sex cannot perform the duties of the job, or it is highly impracticable to determine on an individual basis whether members of the other sex can perform the duties of the job,[86] 2) the required job qualification goes to the essence of the business operation,[87] and 3) there

are no less-discriminatory alternatives that would make the sex discrimination unnecessary.[88] Courts have generally found gender to meet these requirements in only three circumstances: where an essential job function would be performed more safely with employees of only one sex,[89] where an essential job function is related to sexual privacy,[90] or where the primary function of the employer is to sell sex-based services.[91] It seems clear that the outside counsel hired by large corporations do not fall into any of these categories. Moreover, the fact that corporations do not demand lawyers of only a single gender—but are simply seeking lawyers of a desired gender ratio—demonstrates clearly that acquiescing to these demands will not satisfy the first prong of the BFOQ test, i.e., that all or substantially all of the other sex cannot perform the job.

It should be noted that one commentator has argued that client preferences for law firm lawyers of a particular gender should meet the BFOQ test.[92] This commentator argues that the attorney-client relationship is one built on intimate trust, and, analogizing from the privacy cases, further argues that if a client is psychologically uncomfortable with lawyers of a certain gender, then the client should be respected.[93] Even this theory, however, would be unavailable to law firms trying to escape liability under Title VII. In light of the fact that corporate clients are happy to work with lawyers of both genders—so long as they are kept in proper balance—it is clear that the clients are not psychologically uncomfortable with lawyers of a certain gender.

As with racial discrimination, this should be the end of the analysis under Title VII, because law firms will be held accountable for the real reason they are discriminating on the basis of gender—client preferences—and that reason will not save them from liability. However, even if a firm's reason for sex discrimination had nothing to do with client pressure, it bears noting that, as with racial discrimination, the firm would be unable to take advantage of the one exception to Title VII: correcting a "manifest imbalance" in a "traditionally segregated job category."[94] As with race, that is because there is no evidence of a manifest gender imbalance at large corporate law firms—women are represented at these firms in approximate proportion to the qualified labor pool.[95]

CONCLUSION

Although law firms have indicated they are willing to acquiesce to client demands concerning the race and gender of attorneys, they would be wise to reconsider. Law firms that hire, promote, and assign lawyers based on race and gender violate federal anti-discrimination laws and expose themselves to legal liability. Indeed, some organizations have already begun to solicit potential plaintiffs to sue law firms for this very practice.[96]

Even putting the law aside, there is growing evidence that the use of preferences by law firms has unfortunate consequences. Racial preferences lead to disparities in expectations and performance that harm a firm's minority attorneys and ultimately *decrease* the firm's diversity.[97] Although it is beyond the scope of this paper to discuss these consequences in detail, they are explored at length in Professor Richard Sander's recent law review article, "The Racial Paradox of the Corporate Law Firm."[98] He ultimately concludes that:

> The set of problems that plausibly stem from the aggressive use of racial preferences by law firms are therefore considerable: the frustration and sense of failure they foster among minority associates; the reinforcement of negative racial stereotypes among majority associates and partners; the likely crippling of human capital development among many of the most able young minority attorneys; substantial economic costs and inefficiencies at the firms themselves; and, of course, the failure of the underlying goal of this whole process—the integration of elite firms at the partnership level. It would be hard to imagine a more counterproductive policy.[99]

Thus, for both legal and practical reasons, it would seem that the better course is the one blazed decades ago by someone who fully understood the goals of our nation's civil rights laws: judge people not "by the color of their skin but by the content of their character."[100]

Endnotes

1 42 U.S.C. § 2000e et seq.

2 In the House of Representatives, John Williams, a Democrat from Mississippi, offered an amendment to Title VII that would have permitted employers to discriminate on the basis of race whenever skin color was a "bona fide occupational qualification." He worried that "multimillion-dollar businesses which cater exclusively to a Negro clientele" would be destroyed. 110 Cong. Rec. 2550 (1964). Others argued that the amendment was necessary because "a Negro salesman would be best in dealing with selling to Negros" or even because "Negro customers will not do business with Negro salesman." *Id.* at 2559, 2563 (statements of Representatives Curtis and Whitten). They argued that discrimination is such cases would "be a bona fide reason, it would not be racial bigotry." *Id.* at 2559. Williams's amendment was defeated 108 to 70. A similar amendment was offered in the Senate by John McClellan, a Democrat from Arkansas. It would have permitted racial discrimination whenever "the employer believes, on the basis of substantial evidence, that the hiring of such individual… will be more beneficial to the normal operation of the particular business enterprise involved or to the good will thereof…." This amendment was defeated 61 to 30. *See generally*, William R. Bryant, Note, *Justifiable Discrimination: The Need for a Statutory Bona Fide Occupational Qualification Defense for Race Discrimination*, 33 Ga. L. Rev. 211, 213-18 (1998).

3 *See* 110 Cong. Rec. 2563 (statement of Representative Roosevelt) (noting that companies had discovered that "they could send out a Negro on a selling job or on a service job in an entirely white community, and if he did a good job he was as fully accepted as any white person who might go into that particular community," and arguing that "all we are trying to do is break down this unfortunate idea—this wrong idea—which unfortunately is prevalent in many areas of the country" that "white people could serve white customers and, therefore, they should be allowed to have only white servicemen or white salesmen").

4 *See* Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. Times (July 21, 2006).

5 Hishon v. King & Spalding, 467 U.S. 69, 81 (1984) (Powell, J., concurring).

6 *See* Donovan, *supra* note 4.

7 *See* Nathan Koppel, *Shell's Reward for Diversity: Work*, Legal Times (Jun. 28, 2004); Thomas Adcock, *Firms Agree to Give Clients Diversity Data on Lawyers*, New York L. J. (May 13, 2005).

8 *See* Adcock, *supra* note 7.

9 *See* Koppel, *supra* note 7; Meredith Hobbs, *Wal-Mart Diversity Program Sweeps in 40 New Firm Relationship Partners*, Fulton County Daily Report (Oct. 25, 2005).

10 *See* Donovan, *supra* note 4.

11 Koppel, *supra* note 7.

12 *See* Adcock, *supra* note 7.

13 *Id.*

14 *See* Kris Hudson, *Wal-Mart Presses Suppliers To Enhance Their Diversity*, Wall St. J. (Feb. 23, 2007) (reporting that "Wal-Mart has fired three outside [law] firms and reduced the workloads of two others for failing to show progress on diversity matters"); Kellie Schmitt, *A Little Diversity Speech Goes a Very Long Way*, Recorder (Dec. 26, 2006) (reporting that McKesson Corp. fired the law firm Gibson Dunn because it was unhappy with the racial composition of the firm); Koppel, *supra* note 7 (reporting that "at least one [law] firm that had worked for Shell in the past… was bounced simply because it did not have the right stuff on diversity").

15 Koppel, *supra* note 7.

16 *Id.*

17 *Id.*

18 Adcock, *supra* note 7.

19 *See* Natasha G. Kohne, *The Integrated Workplace: Ending Marginalization*, New York L. J. (February 24, 2006).

20 *See* Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C.L. Rev. 1755, 1780-87 (2006). As an illustration of the large racial disparity in hiring standards, consider that "whites going into large firms had grades substantially above class averages. Conversely, blacks going into large firms tended to have grades… far below the medians at their schools." *Id.* at 1787. Specifically, in a database for thirty elite law schools, the median first-year law school GPA of white attorneys at large firms was in the 75th percentile, while the median GPA of black attorneys was in the 18th percentile. *Id.* at 1786.

21 It is worth noting that the corporations that hire or fire law firms on the basis of their racial compositions run afoul of federal law as well. Under § 1981, corporations can be liable for hiring or firing independent contractors on the basis of race. *See*, *e.g.*, Danco, Inc. v. Wal-Mart Stores, Inc., 178 F.3d 8, 14 (1st Cir.1999) ("Section 1981 does not limit itself, or even refer, to employment contracts but embraces all contracts and therefore includes contracts by which a[n]… independent contractor… provides service to another.").

22 42 U.S.C. § 2000e-2(a)(1).

23 *Id.* § 2000e-2(a)(2).

24 *See*, *e.g.*, Hishon v. King & Spalding, 467 U.S. 69 (1984).

25 43 U.S.C. § 1981(a).

26 *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

27 *See* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976) (recognizing that § 1981 prohibits discrimination against white employees).

28 42 U.S.C. § 1981(b).

29 *See* Employment Discrimination Law 697 (3d ed. Supp. 2002, C. Geoffrey Weirich, ed.) ("Employees, such as supervisors who make or recommend employment decisions, are subject to individual liability under § 1981."). *See*, *e.g.*, Williams v. United Dairy Farmers, 20 F.Supp.2d 1193, 1202 (S.D. Ohio 1998); Dalton v. Jefferson Smurfit Corp., 979 F.Supp. 1187, 1202-03 (S.D. Ohio 1997); Richard v. Bell Atlantic Corp., 946 F.Supp. 54, 74 (D.D.C. 1996); Vakharia v. Little Co. of Mary Hosp. & Health Care Ctrs., 917 F.Supp. 1282, 1293 (N.D. Ill. 1996); Leige v. Capitol Chevrolet, Inc., 895 F.Supp. 289, 293 (M.D. Ga. 1994).

30 *See* Judie v. Hamilton, 872 F.2d 919 (9th Cir. 1989); Smith v. Texas Dep't of Water Resources, 799 F.2d 1026 (5th Cir. 1986); Eubanks v. Pickens-Bond Constr. Co., 635 F.2d 1341 (8th Cir. 1980); Jones v. Sch. Dist., 198 F.3d 403, 412 (3d Cir. 1999) (holding that a school's failure to assign a teacher to physics classes and instead assigning him to teach science classes he regarded as less desirable was cognizable under the employment discrimination laws); Satz v. ITT Fin. Corp., 619 F.2d 738, 745 n.13 (8th Cir. 1980) (noting that a female's allegations that her employer transferred certain of her job assignments to a male employee, if true, would constitute a prima facie case of discrimination).

31 Lex Larson, Employment Discrimination § 15.04 (Matthew Bender, 2d ed. 2006).

32 *Id.* at § 101.01[4].

33 *Id.* at § 15.04 ("Job assignments may also be challenged when they result in a lower chance for advancement.").

34 *See* 110 Cong. Rec., *supra* note 2.

35 *See*, *e.g.*, 110 Cong. Rec. 2559 (1964) (statements of Representatives Curtis) ("[A] Negro salesman would be best in dealing with selling to Negros. That would be a bona fide reason, it would not be racial bigotry.").

36 *See* 110 Cong. Rec. 2563 (statement of Representative Roosevelt) (noting that companies had discovered that "they could send out a Negro on a selling job or on a service job in an entirely white community, and if he did a good job he was as fully accepted as any white person who might go into that particular community," and arguing that "all we are trying to do is break down this unfortunate idea—this wrong idea—which unfortunately is prevalent in many areas of the country" that "white people could serve white customers and, therefore, they should be allowed to have only white servicemen or white salesmen").

37 *See*, *e.g.*, Knight v. Nassau County Civil Service Comm'n, 649 F.2d 157 (2d Cir. 1981) (holding that an employer could not assign black employees to minority recruitment because it thought the employee would be more successful at recruiting than white employees); Bermudez v. TRC Holdings, Inc., 138 F.3d 1176, 1178 (7th Cir. 1999) (finding "[t]he idea of a minority office catering to minority business, run by minority workers" to be unlawful); Burwell v. E. Air Lines, 633 F.2d 361, 370 n.13 (4th Cir. 1980) (holding that statutory BFOQ defense is not available for race discrimination).

38 *See* Gratz v. Bollinger, 539 U.S. 244, 276 n. 23 (2003) (stating that "purposeful discrimination that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981"); Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (noting that "the prohibition against discrimination in § 1981 is co-extensive with the Equal Protection Clause").

39 *Gratz*, 539 U.S. at 270 (2003).

40 *See* Korematsu v. United States, 323 U.S. 214 (1944).

41 *See* United States v. Paradise, 480 U.S. 149 (1987).

42 *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

43 Reynolds v. City of Chicago, 296 F.3d 524, 530 (7th Cir. 2002); *but see, e.g.,* Haynes v. City of Charlotte, 10 F.3d 207, 214 (4th Cir. 1993) (holding that "confidence and acceptance" of the community was not a compelling interest under the Equal Protection Clause justifying the city's use of race in selecting a police officers).

44 *See*, *e.g.*, Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 498-99 (3d Cir. 1999); Frost v. Chrysler Motor Corp., 826 F.Supp. 1290, 1294 (W.D. Okla. 1993).

45 *See* Ferrill v. Parker Group, Inc., 168 F.3d 468, 473 (11th Cir. 1999) (upholding jury verdict under § 1981 for black telemarketing employee who had been assigned to call only black voters); Ernest F. Lidge, *Law Firm Employment Discrimination in Case Assignments At the Client's Insistence: A Bona Fide Occupational Qualification?*, 38 Conn. L. Rev. 159, 182 (2005) ("§ 1981 does not contain a BFOQ defense.").

46 *See*, *e.g.*, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993) (noting that, under Title VII, the defendant will be liable for racial discrimination if its "proffered reason was not the true reason for the employment decision").

47 *See* Shaw v. Hunt, 517 U.S. 899, 908 n.4 (1996) ("To be a compelling interest, the State must show that the alleged objective was the legislature's 'actual purpose'…."); Miller v. Johnson, 515 U.S. 900, 921 (1995) (considering only the "State's true interest" for purposes of "compelling interest" determination).

48 United Steelworkers of America, AFL-CIO-CLC v. Weber, 443 U.S.

193, 197 (1979); *see* Taxman v. Bd. of Educ. Township, 91 F.3d 1547 (3d Cir. 1996) (rejecting diversity exception, and holding that the *Weber* exception is the only exception to Title VII).

49 *Weber*, 443 U.S. at 201; *see* Johnson v. Transp. Agency, 480 U.S. 616, 632 (1987) ("The requirement that the 'manifest imbalance' relate to a 'traditionally segregated job category' provides assurance both that sex or race will be taken into account in a manner consistent with Title VII's purpose of *eliminating the effects of employment discrimination*, and that the interests of those employees not benefiting from the plan will not be unduly infringed.") (emphasis added).

50 *See Johnson*, 480 U.S. at 621, 632 (*Weber* exception applicable where "women were represented in numbers *far less* than their proportion of the County labor force." "Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications.") (emphasis added); *Schurr*, 196 F.3d at 496-98 (3d Cir. 1999) (holding that casino could not prefer black applicants to white applicants because there was no finding of a manifest imbalance in a relevant job category).

51 *Weber*, 443 U.S. at 208.

52 *Id.*

53 *See* Sander, *supra* note 20, at 1780-81.

54 Where minorities are overrepresented, law firms that engage in racial preferences are actually seeking a less balanced workforce.

55 1 Barbara Lindemann & Paul Grossman, Employment Discrimination Law 1070 (3d ed. 1996).

56 *Id.* at 1070 n.182 (citing Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984) Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)).

57 *See* Larson, *supra* note 31, at §62.12[1] ("The best reading of these decisions … is that voluntary affirmative action… is permissible under the Constitution … under narrower circumstances than permitted by *Weber*.").

58 *See* Korematsu v. United States, 323 U.S. 214 (1944).

59 *See* United States v. Paradise, 480 U.S. 149 (1987).

60 *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

61 *See* Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

62 *See* Sander, *supra* note 20, at 1780-81.

63 *See* Honadle v. Univ. of Vermont & State Agric. College, 56 F.Supp. 2d 419, 429 (D. Vt. 1999) (stating that evidence of gross statistical disparities is required to withstand an equal protection challenge to an affirmative action plan) (citing City of Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989)).

64 As noted above, courts have already rejected diversity as a defense to Title VII claims. *See*, *e.g.*, Taxman v. Piscataway Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996).

65 *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

66 *Id.* at 328-29.

67 *Id.* at 330 (internal quotation marks omitted and alteration in original).

68 *Id.* at 331 (internal quotation marks omitted).

69 *Id.*

70 *Id.* at 330 (stating that the University of Michigan Law School's claim of a compelling interest is supported by "expert studies and reports entered into evidence at trial [and] numerous studies show[ing] that student body diversity promotes learning").

71 *Cf.* Amicus Brief of General Motors Corporation as Amicus Curiae in Support of Respondents in *Gratz*, 539 U.S. at 12-13 (arguing that businesses need a sufficient number of minority managers in order to be successful at "identifying and satisfying the needs of diverse customers… and forming and fostering productive working relationships with business partners and subsidiaries around the globe").

72 *Grutter*, 539 U.S. at 325 (quoting Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

73 *See*, *e.g.*, Lomack v. City of Newark, 463 F.3d 303, 310 (3d Cir. 2006) (noting that the Supreme Court has endorsed only "the narrow premise that the educational benefits of diversity can be a compelling interest to an institution whose mission is to educate"); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).

74 *See Paradise*, 480 U.S. at 171 (plurality opinion); Hayes v. North State Law Enforcement Officers Ass'n, 10 F.3d 207, 216 (4th Cir. 1993); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) (reaffirming the *Paradise* factors by requiring racial classifications to pass "the 'narrow tailoring' test this Court has set out in previous cases"); Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 26 (2004) (noting that "[c]ourts weigh all of these factors, and any significant departure from the standards… can render a racial classification unconstitutional").

75 *See* Sander, *supra* note 20, at 1780-81.

76 Section 1981 is not applicable to this Part because it prohibits only discrimination on the basis of race.

77 42 U.S.C. § 2000e-2(a)(1).

78 *Id.* § 2000e-2(a)(2).

79 42 U.S.C. § 2000e-2(e)(1) ("[I]t shall not be an unlawful employment practice for an employer to hire and employ employees… on the basis of… sex… in those certain instances where… sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.…").

80 *See id.*

81 *Id.*

82 *See, e.g.,* Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting the conclusion of the court below that, under Title VII, "customer preferences rise to the [level] of a bona fide occupational qualification if 'no customer will do business with a member of one sex either because it would destroy the essence of the business or would create serious safety and efficacy problems'").

83 1 Employment Discrimination Law, *supra* note 55, at 408.

84 442 F.2d 385 (5th Cir. 1971).

85 *Id.* at 389.

86 *See* Auto Workers v. Johnson Controls, Inc., 499 U.S. 187, 207 (1991) (rejecting BFOQ defense because "Johnson Controls has shown no 'factual basis for believing that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.'").

87 *See id.* at 203 ("[I]n order to qualify as a BFOQ, a job qualification must relate to the 'essence' or to 'the central mission of the employer's business.'").

88 1 Employment Discrimination Law, *supra* note 55, at 402-03 (citing cases).

89 *See, e.g.*, *Johnson Controls*, 499 U.S. at 203 (citing prison security guards).

90 *See, e.g.*, 1 Employment Discrimination Law, *supra* note 55, at 407 (citing restroom custodians and hospital nurses).

91 *See, e.g.*, *id.* at 409 (citing Playboy bunnies).

92 *See* Lidge, *supra* note 45, at 176-78.

93 *See id.*

94 *See Johnson*, 480 U.S. at 632 (discussing the "requirement that the 'manifest imbalance' relate to a 'traditionally segregated job category'" with respect to both sex and race).

95 At the nation's largest law firms (more than 500 attorneys), women comprise 48% of summer associates and 45% of associates. In comparison, the percentage of women among law school graduates "has ranged from 40% to almost half since the late 1980s." Press Release, Nat'l Ass'n for Law Placement, *Women and Attorneys of Color Continue to Make Small Gains at Large Law Firms* (Nov. 17, 2005), *at* http://www.nalp.org/press/details.php?id=57 (last visited March 5, 2007) (based on data in the 2005-2006 NALP Directory of Legal Employers).

A Call to Action: Diversity in the Legal Profession

*By Rick Palmore**

In 1999, the Chief Legal Officers of about 500 major corporations signed a document entitled *Diversity in the Workplace—A Statement of Principle.* The Statement evidenced the commitment of the signatory corporations to diversity in the legal profession. In particular, it was intended to be a mandate for law firms to make immediate and sustained improvement in this area. Unfortunately, however, all objective assessments show that the collective efforts and gains of law firms in diversity have reached a disappointing plateau.

As Chief Legal Officers, we hereby reaffirm our commitment to diversity in the legal profession. Our action is based on the need to enhance opportunity in the legal profession and our recognition that the legal and business interests of our clients require legal representation that reflects the diversity of our employees, customers and the communities where we do business. In furtherance of this renewed commitment, this is intended to be a call to action for the profession generally and in particular for our law departments and for the law firms with which our companies do business.

In an effort to realize a truly diverse profession and to promote diversity in law firms, we commit to taking action consistent with the referenced Statement. To that end, in addition to our abiding commitment to diversity in our own departments, we pledge that we will make decisions regarding which law firms represent our companies based in significant part on the diversity performance of the firms. We intend to look for opportunities for firms we regularly use which positively distinguish themselves in this area. We further intend to end or limit our relationships with firms whose performance consistently evidences a lack of meaningful interest in being diverse.

** Rick Palmore is the Chief Legal Officer of Sara Lee Corp., and a member of the Board of Directors of the Association of Corporate Counsel (ACCA). This piece appeared on ACCA's website in October 2004. Approximately ninety generals counsel have signed on to date; the list can be found at www.clocalltoaction.com. The referenced Statement of Principle can be also be found on ACCA's website, though the signatory list is dated at 1999.*

Gonzales v. Carhart: What Hath Kennedy Wrought?

*By Hadley Arkes**

Once more the question echoes: What hath Justice Kennedy wrought? This time in the decision upholding the federal bill on partial-birth abortion. My friends in the Federalist Society are likely to know of my own absorbing interest in this issue over the last twenty years, for I have been identified with the strategy of "incrementalism" or taking "the most modest first steps" in legislating on abortion. The federal bill on partial-birth abortion sprung directly from that strategy, but as the work of Douglas Johnson at National Right to Life. That bill had been preceded by the Born-Alive Infants' Protection Act (2002), the Act that cast the protections of the law on the child who *survived* an abortion. In the aftermath of Justice Kennedy's opinion for the Court in *Gonzales v. Carhart*, that first legislative act promises to become ever more important as the main lever in the hands of the government in seeking to extend the protections of the law to children in the womb. But that point becomes clearer as one looks closely at the decision that Justice Kennedy has shaped for the Court in *Carhart.* And Kennedy's moves may in turn become clearer in their import when they are set against the kind of decision I had been mapping out in my own hopes for the case, in the pieces I wrote as the case made its way to the Supreme Court.

I had made the point in those pieces that the Court was highly unlikely to use this case as the occasion for overruling *Roe v. Wade*, the outcome that some pro-lifers seemed genuinely to expect, and some defenders of abortion rights seemed genuinely to fear. A move of that kind did not strike me as a prudent move at this moment; nor did it seem necessary. If the Court could simply have flipped the decision on partial-birth from seven years earlier, in *Stenberg v. Carhart*, that would have been enough, I said. That decision could mark the end of the regime of *Roe v. Wade,* even if the Court did not pronounce that decision overruled. For the judgment could simply convey this cardinal point: that the Court is now in business to begin weighing seriously, and sustaining, restrictions on abortion. And in a chain of enactments they would begin coming from the states. They might be measures to bar abortions for the sake of "sex-selection" (getting rid of females), abortions on minors without the consent of parents, or abortions performed because the child might be deaf or afflicted with other disabilities. Each measure would have the support of about 70 per cent of the country, including people who called themselves pro-choice. That sense of things would be conveyed more clearly if the federal bill on partial-birth abortion had been sustained in a firm opinion, written by Chief Justice Roberts, without taking the occasion to sing again the praises of *Roe v. Wade*. And all the better if the decision gave a clear direction to the lower federal courts that the Supreme Court wanted this matter to be regarded as settled. No loose ends, no looking for alternative paths to litigate this issue, yet again.

But that kind of decision seemed foreclosed by the oral argument on the case in November. It became clear that Justice Kennedy, as the new swing vote, would make ample use of his leverage. He had been in strong dissent when the Supreme Court had struck down the law on partial-birth abortion in Nebraska in *Stenberg v. Carhart*. But now he seemed to be wavering, expressing concern for the pregnant woman affected with cancer who might have thinner membranes in the uterine wall, and perhaps more at risk with procedures that involved the insertion of instruments into the uterus. After the oral argument, I sketched for the journal *First Things* the shape of the opinion that the Court did in fact come to hand down: Justice Kennedy would write the opinion, and he would compel his colleagues to settle the judgment on the narrow (but quite useful) point of rejecting facial challenges to these bills on partial-birth abortion. In other kinds of cases, the Court will not strike down legislative enactments on their face unless there is no conceivable set of circumstances on which the Act could be constitutional. But the complaint, emanating even from federal judges, is that the rules have been entirely reversed for laws restricting abortion: Those laws will be struck down on their face if there is any conceivable set of circumstances in which they might—*might*—be unconstitutional. Justice Kennedy would reverse that rule, which would be no small accomplishment for the people who seek to legislate restrictions on abortion. But Kennedy would keep the question open for a "preenforcement challenge," a challenge brought by a woman who could plausibly contend now, in a concrete case, that her own, demonstrable condition made a partial-birth abortion the surgery of choice. Fair enough, for those kinds of cases would be exceedingly hard to find, and in the meantime, the bill on partial-birth would be confirmed in the law.

Still, this mode of "settling" the case seemed to contain the ingredients for unsettling it. There was the prospect, ever lively, that the same litigants who had claimed to be "chilled" by the laws on partial-abortion in the states, and chilled again by the federal law, would find some other pretext for challenging the law on yet other grounds. The old, implausible charge of "vagueness" could be rolled out again, and one could count on Judge Richard Kopf in Nebraska to sustain that claim, or virtually any other colorable ground that people were audacious enough to offer as a ground for challenging the law. Perhaps even the clause on Letters of Marque and Reprisal would offer some tangential reason to challenge this law. In that path, as I argued, lay debility. I feared that the bill on partial-birth abortion would be ground down in litigation as the federal judges, who saw themselves now as "forming the regime," made it clear that they just would not have any of this.

And yet, that path was decisively foreclosed by Justice Kennedy in his opinion, along with several other paths for countering this legislation and enjoining its enforcement. Kennedy made it clear that there was not the slightest doubt on the part of doctors as to when they were performing these abortions. They had to make provisions in advance for the dilation of the cervix and the turning of the child in a breech birth. But even more critically, Kennedy forestalled that ready

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and implausible appeal to a "health exception" to encumber this legislation. Justice Scalia had remarked years earlier in the *Stenberg* case that any attachment of a "health exception" virtually rendered the law null. As Scalia wrote, the requirement of a "health exception" would simply invite the abortionist "to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?)." And to attach that requirement is "to give live-birth abortion free rein." The law already contained an exception for the cases, exceedingly rare, when a woman's life would be in danger. And if a partial-birth procedure did not seem "indicated," the federal court of appeals in New York had noted that the abortion could take place in the ways now common or conventional, and so there were other, safe methods still available. The claim that partial-birth abortions were safer forms of surgery had been found, by Judge Casey in New York, to be a claim wholly speculative and theoretical, without any evidence offered in support. In the meantime, said Justice Kennedy "medical uncertainty does not foreclose the exercise of legislative power." He seemed content then to respect the judgment of Congress that the banning of this hideous procedure should not be withheld on the possibility, quite unlikely, that this surgery would ever be necessary for the health of any woman.

With these moves, Kennedy seemed to block off the kinds of challenges that could keep this Act tied up in litigation for years. On the other hand, he seemed to close off at the same time that modest opening I had been hoping for: As Kennedy carefully limited the holding, he seemed to close off virtually any possibility of taking this decision as the ground for pressing even modest restrictions on abortion earlier in the pregnancy. Kennedy made a high point of the fact that the federal bill on partial-birth abortion marked off, quite precisely, the standards for judging whether a child was substantially removed from the birth canal, in a state of partial delivery. The critical points involved the "anatomical landmarks," where "either the fetal head or the fetal trunk past the navel is outside the body of the mother." If the child has not come out that far, then all restraints were virtually off: abortionists would be as free as ever to dismember the child in the familiar "D & E [Dilation and Evacuation] procedure in which the fetus is removed in parts." And beyond that, Kennedy lingered to note, there was a serious requirement of "scienter" with this bill. The Act barred doctors who "deliberately and intentionally" delivered a child to one of the anatomical landmarks before killing it. But if there was any inadvertence or accident, it would be quite hard to prove a deliberate intent to kill a live child at the point of birth. As Kennedy assured his readers on the pro-choice, this was the kind of bill that seriously narrowed the discretion of a prosecutor. This might have been taken as Kennedy's "wink from the bench": he had made the bill almost impossible to challenge further in the courts, but at the same time, he indicated how remarkably easy it might be to avoid prosecution, even if there were an Administration interested in enforcing the bill with any vigor.

This was not, to put it mildly, the kind of decision for which I had been pining. To make matters worse, Justice Kennedy took the occasion, not to invite further, incremental moves to protect the child in the womb; he used the occasion rather to trumpet the point yet again that *Roe v. Wade* and *Casey v. Planned Parenthood*, are still reigning unimpaired, still defining (he insisted) the law of the land. This was the kind of opinion, in the past, virtually certain to elicit from Justice Scalia one of his legendary, inspired dissents. One could have expected here at least a controlled explosion of outrage. That separate, concurring opinion did arrive, but it was a notably muted affair. Justices Scalia and Thomas noted that of course they rejected everything about *Roe v. Wade* apart from its font, and regarded *Casey v. Planned Parenthood* as so much extraneous rubbish. But this was an opinion, remarkably brief, written by Justice Thomas, with Scalia signing on. No separate opinion from Scalia.

My own surmise offered two possibilities: The silence of Scalia might have been extorted by Kennedy, as the price of Kennedy joining the band of five to sustain the bill on partial-birth abortion. Without that emphatic affirmation of *Roe* and *Casey*, Kennedy could have shaded the same opinion in a slightly different way to explain a vote on the other side, as he wrote for the same Court in striking down the federal bill on partial-birth abortion. The second possibility was that the new Chief, John Roberts, had prevailed upon Scalia not to unleash his terrible, swift sword: just let this decision be carried for the judgment it delivered, as cabined, as constricted, as it was. For this was the first time since *Roe v. Wade* that the Supreme Court would actually sustain a restriction on the freedom to order and perform an abortion. That is the point that evidently came through to the partisans of "abortion rights," and set them off in a cascade of invective, mingled with panic. Kennedy had sought so carefully to limit this judgment, and purge it of any significance spilling over to affect any other case of abortion. And yet the partisans of abortion understood this to be the first assault in series virtually invited now, and virtually certain to come.

But what might come from a decision so crabbed? For one thing, about thirty states had passed laws on partial-birth abortion before they were invalidated in *Stenberg v. Carhart* in 2000. The states can now pass their own version of the federal bill, just tracking the language of that bill. That is all good practice. And once legislators get used to legislating again, other things may readily follow, along the lines marked off by Justice Kennedy. The partisans of abortion rights had become his constituency, but the Justice managed to elicit now the most scathing reactions from them when he remarked in his opinion on the regrets, and the other deep misgivings suffered by women who had been through abortions. Many of them, he thought, would like to have had more precise information about the surgery they were ordering, and the condition of the child they were aborting. Kennedy seemed to invite then some serious measures under the head of "informed consent." He pointed out that the Court in *Casey* had upheld the requirements of informed consent. The legislatures could now start enacting those provisions again—most notably, they could provide for the use of sonograms to assure that the pregnant woman has something more than a vague impression of the child she is carrying. The viewing of a sonogram could be required, or it may simply be offered in the interest of letting a woman know what she is choosing.

In India, the use of sonograms has penetrated even poor areas, and brought the beginnings of a demographic crisis: Families anxious for sons have been altogether too willing to abort female babies. A provision on informed consent may quickly beget a decision to bar abortions carried out solely because of the gender of the child. With that move, the public mind could be prepared for reasoning about the next step: barring abortions based on the disability of the child. In surveys in the past, more than half of the public were opposed to aborting a child if the child was likely to be born deaf. The opposition seemed to be invariant by the period of gestation. My own reading was that, if people thought it was wrong to kill someone because of his deafness, they did not think that the wrong varied with the age of the victim.

Here the legislatures could invoke the body of their laws dealing with discriminations against the disabled. And then perhaps they could get to the point of banning abortions after the onset of a beating heart. That beating can actually be detected now only about twenty-one days after conception. Whether the broad public is aware of the fact or not, one survey recently found that around 62 per cent of the public would support that kind of restriction. It is worth noticing, too, that in none of these cases except that of the beating heart, would the legislation start offering protections based on trimesters or the age of the child. There would be no need to play along, and confirm, the perverse fiction that the child somehow becomes more human somewhere in this scale of age, or that it is legitimate to kill smaller people with reasons less compelling than the reasons we would need in killing bigger people. But the main point, on political and judicial statecraft, is that each of these moves would command the support of about 70 per cent of the public, including people who describe themselves as pro-choice. In the aftermath of the *Carhart* case, there were reports of the legislature in Alabama moving to ban all abortions. That would be, in my judgment, a serious mistake, and it would lose the possibilities now opened in *Gonzales v. Carhart*. One step, modestly framed, may follow another; each one draws wide support in the public; and step by step people become accustomed again to the notion that it is reasonable to deliberate about the grounds on which abortions may be justified and unjustified. And what is more, the judgments that people arrive at in this way may be enacted now, in legislatures, with the force of law.

But in the meantime, that procedure partial-birth abortion had not sprung from thin air. Behind the genius contriving the procedure was a motive and an incentive. And that animating motive has now been elevated by the liberal members of the Court into a need and even a cause. Justice Breyer sounded the theme in the *Stenberg* case, and it has been picked up now by Justice Ginsburg in her dissent in *Gonzales*: The procedure on partial-birth abortion promises to be safer for certain women simply because there are fewer insertions of instruments into the uterus, where a slip could cause harm. And beyond that, there are no parts of the dismembered fetus left behind in the womb, where they could cause infection. But of course, by this reckoning, there is no procedure as "safe" as the "live birth abortion": the baby is delivered alive, and placed in a refuse room of the hospital, usually uncovered, until it dies. That procedure had been practiced, famously, at the Christ Hospital in Oak Lawn, Illinois, and it became one of the points of evidence in the case for the Born-Alive Infants' Protection Act. Jill Stanek, a nurse at the Christ Hospital, blew the whistle on this procedure, and she had joined me in testifying for the bill. Since the passage of the Act in 2002, we have come to discover that this procedure, which we had thought quite rare, has been far more prevalent than we had supposed. In fact, from the testimony coming in from nurses in different states, Ms. Stanek has come to the sobering recognition that this procedure is quickly becoming the procedure of choice for certain upper middle class families, who would prefer a cleaner, safer mode of disposing of children; a method that can be performed in reputable hospitals, with real doctors offering cover.

Two years ago, a nurse at a hospital in New Jersey came forth with evidence of these "terminations" at her hospital. A lawyer took her deposition, relayed it to the Department of Justice, and there the case has languished. It has been undone in part by an investigator from the career staff, and by a White House that has shown no interest or leadership. And yet, as a result of the efforts of that nurse, the hospital has moved to rid itself of these "terminations," even while the administrators have been delivered from their fears that the Department of Justice may actually do something here.

In the aftermath of *Gonzales v. Carhart*, the Born-Alive Infants' Protection Act, that most modest of all measures, may be the most powerful and serviceable lever available to the pro-life side. The framers of the bill had deliberately removed any criminal penalties, so that the bill could function mainly to teach and plant premises. But that absence of criminal penalties had turned out to be a handicap, for it turns out to be far more complicated to enforce a law that threatens, at most, a withdrawal of federal funds from hospitals and clinics. Still, that threat is no trifling matter. Nor is the prospect of removing tax exemptions from clinics and hospitals that may stand now, as saying goes, in opposition to our "public policy," by standing in violation of a real law of the United States.

It must surely be an irony that, in the aftermath of this dramatic case in *Carhart*, that the most serviceable law will not be the law on partial-birth abortion, but the simplest law of all, the law that merely sought to protect the child born alive, after an abortion. That law is there, planted, where it could yield an immense effect even for an Administration that seeks to use it sparingly. What it requires, however, is the advent of an Administration that takes the matter seriously, as its own work, its own responsibility—rather than an Administration that prefers to hand off these vexing issues to the courts. The leading figures in the Republican party typically rail against activist judges, but they have been quite content to put on conservative judges a political burden they cannot bear. The promise of conservative appointments to the courts is that one day, perhaps, the Supreme Court will overturn *Roe v. Wade*. And with that move, the issue of abortion would be returned to the political arena. But the curious state right now of the conservative political class is that most of its members have no idea as to what they would propose—or do—on the stunning day that finally happens.

Corporations, Securities & Antitrust

The Scope of the SEC's Authority Over Shareholder Voting Rights

*By Stephen M. Bainbridge**

In May 2007, the Securities and Exchange Commission (SEC, or "Commission") held a series of roundtables on the proxy process.[1] At the first of those meetings, the SEC posed the following question for discussion:

> What should be the relationship of federal and state law with respect to shareholders' voting rights and ability to govern the corporation?
>
> Background: Regulation of the proxy process is a core function of the Commission and one of the original responsibilities assigned to the Commission upon its creation in the Securities Exchange Act of 1934. When Congress charged the Commission with regulating the proxy process, it created a federal role in vindicating shareholders' state law rights. The federal interests include the importance of fair corporate suffrage and the prevention of abuses that would frustrate the free exercise of shareholders' voting rights. At the same time, however, Congress also recognized the traditional role of state corporation law, particularly with respect to the board's powers to manage the company's affairs. While the Commission has sought to use its authority in a manner that does not conflict with the primary role of the states in regulating corporate governance, some observers have expressed concern that federal regulation increasingly intrudes upon corporate matters that historically have been the province of state law. Other commenters believe the federal role should be enlarged.[2]

As an administrative agency, the SEC legitimately may formulate policy and adopt rules to fill statutory gaps.[3] Because the Commission's rules have the full force and effect of federal law, they properly may preempt conflicting state laws.[4] In enacting such rules, however, the SEC must not exceed the scope of its statutory authority.[5] The answer to the question posed by the SEC thus depends on the extent to which Congress has delegated authority to the Commission to regulate corporate voting rights.

The leading precedent on point is *Business Roundtable v. SEC*, in which the D.C. Circuit struck down an SEC attempt to regulate dual class stock (i.e., corporate capital structures in which the firm creates two or more classes of common stock each having different voting rights).[6] The Court held that the Commission has no authority to regulate generally corporate governance and that the Commission's authority to regulate proxies did not create an exception to that rule with respect to shareholder voting rights.

This essay reviews the legislative history of §14(a) and of the Securities Exchange Act generally, as well as the leading judicial precedents. It concludes that the *Business Roundtable* decision reached the correct result. Accordingly, as a general rule of thumb, federal law appropriately is concerned mainly with disclosure obligations, as well as procedural and antifraud rules designed to make disclosure more effective. In contrast, regulating the substance of corporate governance standards is a matter for state corporation law.

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The Historical Background

Shares of common stock represent a bundle of ownership interests: a set of economic rights, such as the right to receive dividends declared by the board of directors; and a right to vote on certain corporate decisions. For over a century, those rights typically have been packaged in a single class of common stock possessing equal economic rights and one vote per share. Yet, it was not always so, and even today state statutes allow corporations to derogate from the one vote-one share norm. Because the *Business Roundtable* decision focused on the SEC's effort to limit departures from that norm, a brief examination of the evolution of the relevant state law rules will help put the problem into context.

A Brief History of Corporate Voting Rights

One share-one vote may be the modern standard, but it was not the sole historical pattern. To the contrary, limitations on shareholder voting rights in fact are as old as the corporate form itself. Prior to the adoption of general incorporation statutes in the mid-1800s, the best evidence as to corporate voting rights is found in individual corporate charters granted by legislatures. Three distinct systems can be seen in those charters. A few adopted a one share-one vote rule.[7] Many charters went to the opposite extreme, providing one vote per shareholder without regard to the number of shares owned.[8] Most followed a middle path, limiting the voting rights of large shareholders. Some charters in the latter category simply imposed a maximum number of votes to which any individual shareholder was entitled. Others specified a complicated formula decreasing per share voting rights as the size of the investor's holdings increased. These charters also often imposed a cap on the number of votes any one shareholder could cast.

Gradually, however, a trend towards a one share-one vote standard emerged. Maryland's experience was typical of the pattern followed in most states, although the precise dates varied widely. Virtually all charters granted by the Maryland legislature between 1784 and 1818 used a weighted voting system. After 1819, however, most charters provided for one vote per share, although approximately 40 percent of the charters granted between 1819 and 1852 retained a maximum number of votes per shareholder. Finally, in 1852, Maryland's first general incorporation statute adopted the modern one vote per share standard. [9]

Legislative suspicion of the corporate form and fear of the concentrated economic power it represented probably motivated the early efforts to limit shareholder voting rights. A variety of factors, however, combined to drive the legal system towards the one share-one vote standard. Because efforts to change the law were almost invariably led by corporations, it may be assumed that one factor was a desire to encourage large

scale capital investment. The ease with which restrictive voting rules could be evaded also undermined the more restrictive rules. Large shareholders simply transferred shares to straw-men, who thereupon voted the shares as the true owner directed.[10] Finally, while other factors also contributed, the most important factor probably was the fading of public prejudice towards corporations.

By 1900, the vast majority of U.S. corporations had moved to one vote per share.[11] State corporation statutes of the period, however, merely established the one share-one vote principle as a default rule.[12] Corporations were free to deviate from the statutory standard, and during the first two decades of the 1900s the trend towards one share-one vote began to reverse.[13] In particular, corporations began making renewed use of dual class capital structures having one class of common stock with voting rights and one class of non-voting common stock. By issuing the former to insiders and the latter to the public, promoters could raise considerable sums without losing control of the enterprise.[14]

While disparate voting rights plans were gaining popularity with corporate managers in the 1920s, and investors showed a surprising willingness to purchase large amounts of nonvoting common stock, an increasingly vocal opposition also began emerging. William Z. Ripley, a Harvard professor of political economy, was the most prominent (or at least the most outspoken) proponent of equal voting rights. In a series of speeches and articles, eventually collected in a justly famous book, he argued that non-voting stock was the "crowning infamy" in a series of developments designed to disenfranchise public investors.[15]

The opposition to non-voting common stock came to a head with the NYSE's 1925 decision to list Dodge Brothers, Inc. for trading. Dodge sold a total of $130 million worth of bonds, preferred stock and nonvoting common shares to the public. Dodge was controlled, however, by an investment banking firm, which had paid only $2.25 million for its voting common stock.[16] In January 1926, the NYSE responded to the resulting public outcry by announcing a new position: "Without at this time attempting to formulate a definite policy, attention should be drawn to the fact that in the future the [listing] committee, in considering applications for the listing of securities, will give careful thought to the matter of voting control." This policy gradually hardened, until the NYSE in 1940 formally announced a flat rule against listing nonvoting common stock. Although there were occasional exceptions, the most prominent being the 1956 listing of Ford Motor Company despite its dual class capital structure, the basic policy remained in effect until the mid-1980s.

State Law Today

As it has long done, state law today generally provides corporations with considerable flexibility with respect to allocation of voting rights. Virtually all state corporate codes adopt one vote per common share as the default rule, but allow corporations to depart from the norm by adopting appropriate provisions in their organic documents. Hence, for example, dual class capital structures are routinely upheld by courts.[17] As a practical matter, however, the Great Depression, with an assist from the opposition led by Ripley and the NYSE's growing resistance, had effectively killed off most disparate voting rights plans.

Rule 19c-4: The SEC's Failed Attempt To Regulate Voting Rights

The foregoing historical background set the stage for the SEC's first attempt to regulate directly the substance of shareholder voting rights. To be sure, pursuant to the authority granted it under Securities Exchange Act §14(a), the SEC had already affected shareholder voting rights to a considerable degree. Even so, however, most of the SEC's proxy rules are related to disclosure.[18] To the extent the SEC proxy rules extended beyond disclosure, they related mainly to the procedures by which the proxies are to be prepared, solicited, and used.[19] For example, Rule 14a-4 restricts management's use of discretionary power to cast votes obtained by a proxy solicitation.[20] Rule 14a-7 requires management cooperation in transmitting an insurgent's proxy materials to shareholders.[21] Rule 14a-8 requires management to include qualified shareholder proposals in the corporation's proxy statement at the firm's expense.[22]

In 1988, however, the SEC for the first time attempted to regulate directly the substantive voting rights of shareholders. As we saw above, one vote per share long was the norm in the United States, although state law freely allows departures from that norm. During the 1980s, departures from that norm became increasingly common as companies recognized the potential power of dual class stock schemes as a defense against hostile takeover bids.[23] Incumbents who cannot be outvoted, after all, cannot be ousted.

Consider, for example, the simplest type of dual class stock plan; namely, a charter amendment creating two classes of common stock. The Class A shares are simply the preexisting common stock, having one vote per share. The newly created Class B shares, distributed to the shareholders as a stock dividend, have most of the attributes of regular common stock, but possess an abnormally large number of votes (usually ten) per share. Class B shares typically are not transferable, but may be converted into Class A shares for sale. Normal shareholder turnover thus concentrates the superior voting shares in the hands of long-term investors, especially incumbent managers, eventually perhaps even giving them voting control of the company.

In response to the active market for corporate control of the 1980s, managers who saw their firms as being vulnerable to takeovers began lobbying the NYSE and Amex to liberalize their rules on shareholder voting rights. In July 1988, the SEC responded by adopting Rule 19c-4, which effectively prohibited public corporations from issuing securities or taking other corporate action nullifying, restricting, or disparately reducing the voting rights of existing shareholders.[24] While not a strict one-share-one-vote standard, Rule 19c-4 placed substantial limitations on the ability of U.S. corporations to adopt disparate voting rights plans.[25]

The Business Roundtable challenged the Rule, arguing that corporate governance regulation is primarily a matter for state law and that the SEC therefore had no authority to adopt rules affecting substantive aspects of corporate voting rights. The D.C. Circuit agreed, striking down the rule as beyond the Commission's regulatory authority.[26]

The Commission based its authority to adopt Rule 19c-4 on its powers under Securities Exchange Act §19(c), which permits it to amend exchange rules provided that the Commission's action furthers the Act's purposes. Rule 19c-4 fell because the D.C. Circuit determined that its attempt to regulate corporate voting rights furthered none of the Exchange Act's purposes. In defending Rule 19c-4, the SEC trotted out its long-standing view that §14(a) was intended to promote corporate democracy. In striking down the Rule, however, the D.C. Circuit adopted a much narrower view of §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. §14(a)'s purposes, however, do not include regulating substantive aspects of shareholder voting.[27]

The remaining sections of this essay argue that the *Business Roundtable* decision stuck the correct balance between the state and federal roles in regulating shareholder voting rights.[28]

The Legislative History of §14(a)

During the litigation over the validity of Rule 19c-4, the SEC conceded that it does not have "unlimited authority to amend SRO rules in areas of 'corporate governance.'"[29] Nevertheless, the SEC claimed that when Securities Exchange Act §14(a) and its legislative history are read against the backdrop of the nonvoting common stock controversy of the 1920s, a congressional intent to broadly authorize the SEC to prevent shareholder disenfranchisement emerges. As specifically applied to Rule 19c-4, Congress in 1934 supposedly adopted the NYSE policy on corporate voting rights as one of the Securities Exchange Act's purposes and gave the SEC authority to prevent subsequent erosion of that policy.

Although Congress did have evidence before it as to the NYSE's policy, references to nonvoting stock in the legislative history of the Securities Exchange Act occur only in the hearings and these are scanty indeed.[30] As for exchange listing standards generally, the Senate Banking and Currency Committee's report on the results of the Pecora Hearings identified the major flaw in this area as the exchanges' laxity in investigating listing applications from dubious companies. In explaining the need for regulation of listing requirements, the Committee focused solely on the need for periodic corporate disclosures from issuers.[31] The Committee simply did not address regulation of exchange listing standards affecting such matters as corporate voting rights.

In defending Rule 19c-4, the Commission argued that Congress did not need to address regulation of corporate voting rights in light of the NYSE's policy against nonvoting common stock. As the NYSE was the principal secondary trading market, Congress could assume that shareholders would have effective voting rights. The SEC thus read Congress' silence on dual class stock as reflecting an implicit assumption that shareholders would not be disenfranchised and an implicit intent to prevent shareholder disenfranchisement.[32]

The Commission's interpretation of the legislative history was flawed on several grounds. If true, it would suggest only that the SEC has authority over voting rights to the extent of requiring NYSE to maintain its 1934 policy intact or to force other SROs to adopt the NYSE's 1934 policy (neither of which is what Rule 19c-4 did, of course). More important, the SEC's argument was inconsistent with the attitudes of the Exchange Act's drafters towards exchange regulation. If Congress was concerned with dual class stock, it undoubtedly would have thought the mere use of SRO rules would not achieve the desired result. In the House debates, for example, Chairman Rayburn recognized that many exchanges did not have the same bargaining power vis-à-vis issuers as the NYSE. He further observed that exchange regulation could "only go so far before selfish managements" refused to comply.[33] While he made these observations in the context of disclosure obligations, they are consistent with the then prevailing view that self-regulation by the exchanges was inadequate to resolve the economic problems Congress had identified. If Congress had wanted to graft the NYSE's nonvoting common stock policy onto the Act, it therefore would have said so explicitly. Congress' inaction, accordingly, should be read as leaving voting rights in the hands of the states and the exchanges, especially when considered in light of the repeated congressional rejections of proposals to federalize corporate law.

In 1937-38, for example, the Senate held extensive hearings on proposals to federalize corporate law.[34] Mandating a federal one-share/one-vote standard was among the items under consideration.[35] At one of the hearings, the SEC's Assistant Director of Registration was asked whether the federal securities laws prohibited the use of nonvoting stock. He replied that "they only require that an adequate disclosure of the material facts concerning that structure be made."[36] As the Business Roundtable therefore bluntly stated, the SEC staff "most familiar with the events of 1934… had no illusions that Congress had somehow sought to preserve the NYSE's 1926 so-called 'policy' concerning nonvoting stock or that Congress had authorized the Commission to do."[37]

In assessing Congress' intentions in 1934 one also should consider what it was actually told about shareholder voting rights during the hearings that lead up to the Securities Exchange Act. Recall that Ripley and others had announced the demise of nonvoting common stock as early as 1926. Frank Altschul, the Chairman of the NYSE's Committee on Stock List, repeated that claim before Congress, claiming that "the period of the creation of nonvoting common stocks came to an end" with the NYSE's action in 1926.[38] As far as Congress knew in 1934, nonvoting stock was a dead issue. On the other hand, Altschul's testimony made clear that the NYSE continued to list voting trust certificates.[39] As influential Senate Banking and Currency Committee chief counsel Ferdinand Pecora pointed out, they were a device used to deprive stockholders of an effective voice in management—"an evil comparable to that

of nonvoting stock, except that the evil is limited as to time."[40] Accordingly, it is quite striking that Congress did not attempt to regulate voting trusts. If Congress had been concerned with protecting the substance of shareholder voting rights, surely it would have struck at those perceived abuses permitted by the NYSE's policy. Again, the more logical reading of Congress' silence on voting rights thus is that it simply did not intend to regulate the substance of voting rights.

Turning from the specifics of stock exchange voting rights standards to the legislative history of §14(a) generally, proponents of an expansive federal role in regulating stockholder voting rights long have placed great weight on a House Committee Report statement that "[f]air corporate suffrage is an important right that should attach to every equity security bought on a public exchange."[41] The same report also stated: "Inasmuch as only the exchanges make it possible for securities to be widely distributed among the investing public, it follows as a corollary that the use of the exchanges should involve a corresponding duty of according shareholders fair suffrage."[42] Read in context, however, these references to fair corporate suffrage in fact relate to an entirely different set of issues than the substance of shareholder voting rights. Instead, as the D.C. Circuit recognized, Congress was talking about the need for full disclosure and fair solicitation procedures.[43]

The passage from which the fair corporate suffrage language is torn emphasized that management should not be able to perpetuate itself in office through "misuse" of corporate proxies.[44] It noted that insiders were using the proxy system to retain control "without adequate disclosure."[45] It protested that insiders were soliciting proxies "without fairly informing" shareholders of the purpose of the solicitation.[46] The passage concluded by stating that in light of these abuses §14(a) gives the "Commission power to control the conditions under which proxies may be solicited…."[47] In sum, the passage says nothing about the substance of the shareholders' voting rights. Instead, the focus is solely on enabling shareholders to make effective use of whatever voting rights they possess by virtue of state law.[48]

The historical context in which §14(a) was adopted supports this interpretation. When the Securities Exchange Act was first being considered, state corporate law was largely silent on the issue of corporate communications with shareholders. It required only that the corporation send shareholders a notice of a shareholders meeting, stating where and when the meeting would be held and briefly stating the issues to come before the meeting. By that time, of course, the proxy system of voting was well-established; so too were complaints about its operation. One common concern was that corporate managers were soliciting proxies from shareholders without giving shareholders enough information on which to make an informed voting decision. Another was that management used its control of the proxy process to ensure that only those directors who were acceptable to management were elected. Finally, there were a variety of widespread procedural abuses. For example, proxy cards often failed to give shareholders the option of voting against a proposal. If the shareholder did not wish to support the proposal, his only option was to refrain from returning the proxy.

Congress was made aware of these concerns in some detail. Thomas Corcoran, for example, told the House Committee that "[p]roxies, as solicitations are made now, are a joke."[49] He testified at length about the lack of disclosure provided to shareholders and abuses of the proxy solicitation process.[50] In answer to a question as to how these abuses could be prevented, he referred solely to the need for better disclosures.[51] Similarly, in a brief supporting the Exchange Act's constitutionality, Corcoran and Benjamin Cohen stated that the proxy provisions were "designed to make available to the investor reasonable information regarding the possibility of control of the corporation…."[52] Other favorable references to §14 in the hearings are to like effect.[53] In sum, the fairest reading of the relevant legislative history thus strongly supports the line drawn in *Business Roundtable*.[54]

Corporate Governance and the Legislative History of the Securities Exchange Act

In striking down Rule 19c-4, the D.C. Circuit closely tied the question of the scope of the SEC's authority over voting rights to the broader question of the SEC's authority over the substance of corporate governance generally. As the court observed, nothing in the legislative history "comes near to saying, 'The purposes of this act, although they generally will not involve the Commission in corporate governance, do include preservation of the one share/one vote principle.' And even [if any did] we doubt that such a statement in the legislative history could support a special and anomalous exception to the Act's otherwise intelligible conceptual line excluding the Commission from corporate governance."[55] Accordingly, it is appropriate to devote some attention to the evidence supporting that "conceptual line."

On its face, the Securities Exchange Act says nothing about regulation of corporate governance. Instead, the Act's focus is on trading of securities and securities pricing. Virtually all of its provisions address such matters as the production and distribution of information about issuers and their securities, the flow of funds in the market, and the basic structure of the market.

This approach resulted from Congress' interpretation of the Great Crash and the subsequent Depression. Rightly or wrongly, many people believed that excessive stock market speculation and the collapse of the stock market had caused the Great Depression. The Securities Exchange Act's drafters thus were primarily concerned with preventing a recurrence of the speculative excesses that they believed had caused the market's collapse.[56]

Disclosure was the chief vehicle by which the Act's drafters intended to regulate the markets. Brandeis' famous dictum—"Sunlight is… the best of disinfectants; electric light the most efficient policeman"[57]—was well-accepted by the 1930s; indeed, it was the basic concept around which the federal securities laws were ultimately drafted.[58] Because state securities laws could not effectively assure full disclosure, federal intervention was widely accepted as essential to maintaining the national capital markets.

Opponents of the Securities Exchange Act, however, claimed that it went far beyond its stated purposes. According to Richard Whitney, President of the NYSE and a leading opponent of the bill, a number of provisions, including the predecessor to §19(c), collectively gave the Commission "powers… so extensive that they might be used to control the management of all listed companies,"[59] a charge repeated by Congressional opponents of the bill.[60]

The bill's supporters strenuously denied that they intended to regulate corporate management. The Senate Banking and Currency Committee went to the length of adding a proposed §13(d) to the bill, which provided: "[n]othing in this Act shall be construed as authorizing the Commission to interfere with the management of the affairs of an issuer."[61] The Conference Committee deleted the provision because it was seen "as unnecessary, since it is not believed that the bill is open to misconstruction in this respect."[62]

Admittedly, this debate need not be read as going to preemption of state corporate law. After all, interference with management might mean a variety of things. Perhaps the debate was really about charges of creeping socialism. Opposition to New Deal legislation typically included charges of radicalism and collectivism. The Exchange Act was no different. Even with this gloss, however, the legislative history still suggests that Congress' focus was mainly on regulating the securities industry, not listed companies. Moreover, the same Congress that insisted it was not trying to regiment industry also rejected explicit proposals for establishing a federal law of corporations.

During the New Deal era there were a number of efforts to grant the SEC authority over corporate governance. While the Exchange Act was being drafted, the Roosevelt administration considered developing a comprehensive federal corporation law. The Senate Banking and Currency Committee's report on stock exchange practices also suggested that the cure for the nation's "corporate ailments… may lie in a national incorporation act."[63] In the late 1930s, then SEC Chairman William O. Douglas orchestrated yet another effort to replace state corporate law with a set of federal rules administered by the SEC. In this, he was anticipated and assisted by Senators Borah and O'Mahoney who introduced a series of bills designed to regulate corporate internal affairs.[64]

Proposals for a federal corporation statute did not stop when the New Deal ended.[65] In the 1970s, the SEC considered imposing a variety of corporate governance reforms, as a matter of federal law.[66] After vigorous objections that the Commission had exceeded its statutory authority, the rules were substantially modified before adoption.[67]

Consequently, none of these proposals ever came to fruition. Legislative inaction is inherently ambiguous, even when that inaction takes the form of rejecting a specific proposal. All that can be said with certainty is that Congress chose not to act. However, while the evidence admittedly is not conclusive, there is considerable reason to believe that the Seventy-third Congress did not intend for the SEC's power over listing standards to extend to matters of corporate governance. Granted, the New Deal era Congress did not expressly state any such limitation. But Congress apparently did not believe it was necessary to do so. True, arguments based on rejections of proposed amendments must be taken with a grain of salt, especially those made after enactment of the original legislation. But surely the Congress that repeatedly denied any intent to regiment corporate management, and later repeatedly rejected proposals to federalize corporate law, did not intend to sneak those powers back into the bill through the back door by authorizing the SEC to adopt corporate governance rules. More important for present purposes, however, there is no reason to believe that Congress intended to carve out the substance of voting rights as a single exception to this general rule.

The Pertinent Case Law

There is some loose language in a few judicial opinions that some read as supporting an expansive federal role in regulating shareholder voting rights. In *Medical Committee for Human Rights v. SEC*,[68] for example, the D.C. Circuit opined that §14(a)'s principal purpose is assuring "corporate shareholders the ability to exercise their right—some would say their duty—to control the important decisions which affect them in their capacity as stockholders and owners of the corporation."[69] This comment was made in the context of the shareholder proposal rule, however, which does give the shareholders some control over the agenda. The court's emphasis on the shareholder's ability to exercise voting rights, moreover, seems consistent with the view that §14 was intended solely to assure that shareholders could make effective use of whatever voting rights state law provides.[70]

This view is confirmed by *Business Roundtable v. SEC*. As the D.C. Circuit observed therein, validating rule 19c-4 would have overturned or at least impinged "severely on the tradition of state regulation of corporate law."[71] In a series of cases, the Supreme Court has made clear that this is not a step to be taken lightly.

In *Santa Fe Industries v. Green*, the Supreme Court applied the brakes to efforts to give SEC Rule 10b-5 an increasingly expansive reading that in time might have led to a federal common law of corporations. The Court did so by holding that the fundamental purpose of the Securities Exchange Act is to assure full disclosure.[72] Once complete disclosure is made, the transaction's fairness and terms do not become issues under federal law, instead they are a matter for state corporate law.[73] The Court's analysis was driven by a concern that a broader view of the Act's purposes would result in federalizing much of state corporate law, overriding well-established state policies of corporate regulation.[74]

In *CTS Corp. v. Dynamics Corp*., the Supreme Court again drew a sharp line between the state and federal role, this time with specific application to the problem at hand.[75] The Court recognized that states have a legitimate interest in defining the attributes of their corporations and protecting shareholders of their corporations.[76] Specifically, the Court strongly indicated that the substance of corporate voting rights is solely a matter of state concern: "No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."[77]

The cases in this line of precedent confirm that the Supreme Court views the states as the principal regulators of corporate governance.[78] Federal law is seen as placing a gloss on the underlying background of state corporate law, but not as replacing it.[79] Absent a clear expression of congressional intent, the Court has been reluctant to federalize questions traditionally within the state sphere.[80] Given the absence of any indication of congressional intent to preempt state laws governing shareholder voting rights, it is therefore unlikely that the Supreme Court would support an expansive view of the SEC's authority to regulate the substance of shareholder voting rights. To the contrary, it seems far more likely that the Court would embrace the line drawn by *Business Roundtable*.

Does the Supreme Court's defense of what might be called "corporate federalism" make policy sense? Those who believe in the so-called "race to the bottom" hypothesis will argue that it does not, but the empirical evidence on that purported race, while mixed, tends to favor the competing race to the top hypothesis.[81] In the absence of compelling evidence on the competing race hypotheses, we do well to consider the Supreme Court's argument that states have a number of legitimate interests in regulating such matters. The corporation is a creature of the state, "whose very existence and attributes are a product of state law."[82] States therefore were said to have an interest in overseeing the firms they create. States also have an interest in protecting the shareholders of their corporations. Finally, states have a legitimate "interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs." If so, state regulation not only protects shareholders, but also protects investor and entrepreneurial confidence in the fairness and effectiveness of the state corporation law.[83]

The Supreme Court has suggested that the country as a whole benefits from state regulation in this area, as well. The markets that facilitate national and international participation in ownership of corporations are essential for providing capital not only for new enterprises but also for established companies that need to expand their businesses. This beneficial free market system depends at its core upon the fact that corporations generally are organized under, and governed by, the law of the state of their incorporation.[84]

This is so in large part because ousting the states from their traditional role as the primary regulators of corporate governance would eliminate a valuable opportunity for experimentation with alternative solutions to the many difficult regulatory problems that arise in corporate law. As Justice Brandeis pointed out many years ago, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of country."[85] So long as state legislation is limited to regulation of firms incorporated within the state, as it generally is, there is no risk of conflicting rules applying to the same corporation. Experimentation thus does not result in confusion, but may well lead to more efficient corporate law rules.

Where then do we draw the line between the state and federal regulatory regimes? As a general rule of thumb, federal law appropriately is concerned mainly with disclosure obligations, as well as procedural and antifraud rules designed to make disclosure more effective. In contrast, regulating the substance of corporate governance standards is appropriately left to the states.

CONCLUSION

Slippery slope arguments are often the last refuge of those with no better case, but Rule 19c-4 was indeed the proverbial camel's nose. There simply was no firebreak between substantive federal regulation of dual class stock and a host of other corporate voting issues raising similar concerns. Nor did laws affecting shareholder voting rights differ in principle or theory from any other corporate governance rules. Having once entered the field of corporate governance regulation, the SEC would have been hard-pressed to justify stopping with dual class stock. Creeping federalization of corporate law was a plausible outcome. The D.C. Circuit quite properly foreclosed this possibility. The SEC therefore must continue respecting the line drawn by *Business Roundtable*.

Endnotes

1 SEC Announces Roundtable Discussions Regarding Proxy Process (April 24, 2007), *at* http://www.sec.gov/news/press/2007/2007-71.htm.

2 *Briefing Paper: Roundtable on the Federal Proxy Rules and State Corporation Law* (May 7, 2007), *available at* http://www.sec.gov/spotlight/proxyprocess/proxy-briefing050707.htm.

3 Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984).

4 Fidelity Federal Savings & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153-54 (1982).

5 Conference of State Bank Supervisors v. Conover, 710 F.2d 878, 882-83 (D.C. Cir. 1983).

6 Bus. Roundtable v. SEC, 905 F.2d 406 (D.C. 1990).

7 *See* 4 Joseph S. Davis, Essays in the Earlier History of American Corporations 324 (1912); 1 William R. Scott, The Constitution and Finance of English, Scottish and Irish Joint-Stock Companies to 1720, at 228 (1912).

8 Samuel Williston, *History of the Law of Business Corporations Before 1800 (Part II)*, 2 Harv. L. Rev. 149, 156 (1888). Taylor v. Griswold, 14 N.J.L. 222 (1834), is often cited for the proposition that the common law rule, in the absence of controlling statute or charter provisions, was one vote per shareholder. *E.g.,* Jeffrey Kerbel, *An Examination of Nonvoting and Limited Voting Common Stock—Their History, Legality and Validity*, 15 Sec. Reg. L.J. 37, 47 (1987). *But see* David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 Cornell L. Rev. 1, 9-11 (1970) (arguing that the common law in fact had no fixed rule as to corporate voting rights).

9 Joseph G. Blandi, Maryland Business Corporations 1783-1852 (1934).

10 In Maryland, for example, the legislature felt it necessary to require each voting shareholder to swear an oath that the shares he was voting were his property and had not been acquired with the intent of increasing the number of votes to which the shares were entitled. 1836 Md. Laws ch. 264. *See also*

Annals of Cong. 923 (1819) (resolution proposing to prohibit transfers of stock made for the purpose of evading the limits on voting rights of shares in the first Bank of the United States).

11 W.H.S. Stevens, *Stockholders' Voting Rights and the Centralization of Voting Control*, 40 Q.J. Econ. 353, 354 (1926).

12 New York's General Corporation Law of 1909, for example, entitled each shareholder to one vote per share "[u]nless otherwise provided in the certificate of incorporation." 1909 N.Y. Laws, ch. 28, § 23, *reprinted in* Joseph A. Arnold, New York Business Corporations 39 (4th ed. 1911).

13 *E.g.*, St. Regis Candies, Inc. v. Hovas, 3 S.W.2d 429 (Tex. App. 1928); General Inv. Co. v. Bethlehem Steel Corp., 100 A. 347 (N.J. Ch. 1917); People ex rel. Browne v. Keonig, 118 N.Y.S. 136 (A.D. 1909); Bartlett v. Fourton, 38 So. 882 (La. 1905).

14 Adolf A. Berle & Gardiner C. Means, The Modern Corporation and Private Property 75-76 (1932).

15 William Z. Ripley, Main Street and Wall Street 77 (1927).

16 *See* Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 Geo. Wash. L. Rev. 687, 694-97 (1986).

17 *E.g.,* Groves v. Rosemound Improvement Ass'n, Inc., 413 So.2d 925, 927 (La. App. 1982); Providence & Worcester Co. v. Baker, 378 A.2d 121, 122-24 (Del. 1977); Hampton v. Tri-State Fin. Corp., 495 P.2d 566, 569 (Colo. App. 1972); Shapiro v. Tropicana Lanes, Inc., 371 S.W.2d 237, 241-42 (Mo. 1963): Deskins v. Lawrence County Fair & Dev. Corp., 321 S.W.2d 408, 409 (Ky. 1959). For an overview of the various forms of dual class stock plans, *see* Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19c-4*, 69 Wash. U. L.Q. 565, 568-75 (1991)

18 Bainbridge, *supra* note 17, at 609.

19 *Id*. at 609-10.

20 17 C.F.R. § 240.14a-4.

21 17 C.F.R. § 240.14a-7.

22 17 C.F.R. § 240.14a-8.

23 *See generally* Bainbridge, *supra* note 19, at 571-75 (discussing the anti-takeover potential of dual class stock plans).

24 As a technical matter, Rule 19c-4 did not directly regulate voting rights. Instead, it added a new rule to the listing standards of each national securities exchange making available transaction reports under Exchange Act Rule 11Aa3-1, 17 C.F.R. § 240.11Aa3-1, and each national securities association registered under Exchange Act § 15A, 15 U.S.C. § 78o-3. (Registered exchanges and securities associations are collectively referred to as self-regulatory organizations (SROs)). *See* 15 U.S.C. § 78c(a)(26).)

The listing standards created by Rule 19c-4 prohibited a covered exchange from listing or continuing to list the equity securities of an issuer that takes one of the prohibited actions. The Rule likewise prohibited a covered securities association from authorizing the equity securities of such an issuer for quotation and/or transaction reporting on an automated quotation system. The Intermountain and Spokane Stock Exchanges were the only national securities exchanges excluded from coverage. The National Association of Securities Dealers (NASD) was the only securities association affected by the rule, just as the NASDAQ system was the only affected automated quotation system. Finally, only those issuers registered with the SEC pursuant to Exchange Act § 12, 15 U.S.C. § 781, were covered by the rule. Exchange Act Release No. 25891 (July 7, 1988), [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,247 at 89,208-09 [*hereinafter* Adopting Release].

25 For an overview of corporate actions prohibited and permitted by the Rule, *see* Bainbridge, *supra* note 17, at 578-85.

26 Bus. Roundtable v. SEC, 905 F.2d 406 (D.C. 1990).

27 In Chevron USA Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), the Supreme Court opined that where Congress has "left a gap for the agency to fill," the agency's regulations will be "given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 843-44. The D.C. Circuit questioned whether *Chevron* even applied to the Rule 19c-4 litigation, since the Business Roundtable's challenge "might be characterized as involving a limit on the SEC's jurisdiction" as to which deference may be inappropriate. Although the D.C. Circuit nonetheless assumed that the SEC was entitled to deference, it held that the Rule was contrary to the clearly expressed will of Congress and thus invalid even under *Chevron*. Bus. Roundtable v. SEC, 905 F.2d 406, 408 (D.C. 1990).

28 There is a very troubling epilogue to the Rule 19c-4 story. After the Rule was struck down, the Commission invoked informal powers that have been aptly called the "raised eyebrow." *See* Donald E. Schwartz, *Federalism and Corporate Governance*, 45 Ohio St. L.J. 545, 571 (1984) (explaining that the SEC has considerable informal influence over SRO rulemaking). Specifically, SEC Chairman Arthur Levitt successfully pressured the three principal domestic securities exchanges—NYSE, AMEX, and NASDAQ—to adopt a uniform voting rights policy essentially tracking Rule 19c-4. Stephen M. Bainbridge, *Revisiting the One-Share/One-Vote Controversy: The Exchanges' Uniform Voting Rights Policy*, 22 Sec. Reg. L.J. 175 (1994).

The SEC's use of its "raised eyebrow" powers in this context is troubling. Rather than obeying the law applicable to it, the Commission chose to end-run *Business Roundtable* by pressuring the exchanges to adopt "voluntary" listing standards modeled on Rule 19c-4. In doing so, the SEC also did an end-run around both Congress and the Supreme Court to create uniform, national corporate governance standards. As *Business Roundtable* confirmed, the SEC lacked authority to directly regulate dual class stock. Suspecting that the front door was locked, the Commission tried using Rule 19c-4 to sneak federal regulation through the back door. In Business Roundtable, however, the court squarely barred the Commission from doing indirectly what it could not do directly. Finding the back door to be locked as well, the SEC therefore sneaked through the cellar window. In doing so, it ran roughshod over the clear Congressional intent that the SEC was not to regulate corporate governance generally or the substance of shareholder voting rights in particular.

29 Brief for Respondent at 13, Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) [*hereinafter* SEC Brief]. The legislative history of § 14(a) is relatively sparse, in large part because the controversy over federal proxy regulation was resolved early in the legislative process. As originally introduced, the proxy provision mandated substantial disclosures and gave the SEC authority to adopt additional disclosure requirements. H.R. 7852, 73d Cong., 2d Sess. § 13(a) (1934). The proposal met with substantial criticism. In redrafting § 14(a) in response to these criticisms, Congress did what it often does when it has a tough problem to solve: it told somebody else to solve it. In effect, the Act simply made it unlawful to solicit proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." Securities Exchange Act, Pub. L. No. 73-291, § 14(a), 48 Stat. 881, 895 (1934).

30 Out of the thousands of pages of House and Senate hearings, the sole reference to the NYSE policy is the testimony of Frank Altschul, Chairman of the NYSE Committee on Stock List. Stock Exchange Practices: Hearings before the Senate Comm. on Banking and Currency, 73d Cong, 1st Sess. 6677-80 (1934) [*hereinafter* Pecora Hearings]. In colloquy with Altschul, Ferdinand Pecora referred to nonvoting common stock as an "evil." *Id*. at 6679. He had earlier in the hearings also raised questions as to the use of nonvoting preferred stock. *Id*. at 6661-62. Pecora's comments are entitled to some weight in light of the significant role he played in creating the federal securities laws, SEC v. Falstaff Brewing Corp., 629 F.2d 62, 69 (D.C. Cir.), cert. denied, 449 U.S. 1012 (1980), but not every matter Pecora identified as an evil was subjected to federal regulation.

The Senate Banking Committee's report on the Pecora Hearings contains some widely scattered discussion of voting rights issues, but only in the context of condemning the abuses of investment trusts and holding company structures prevalent at the time. S. Rep. No. 1455, 73d Cong., 2d Sess. 333-91 (1934).

31 *Id*. at 70-73.

32 Adopting Release, *supra* note 24, at 89,231.

33 78 Cong. Rec. 7698 (1934).

34 *Federal Licensing of Corporations: Hearings Before the Senate Judiciary Comm.*, 75th Cong., 1st & 3d Sess. (1937 & 1938) [*hereinafter* Federal Licensing of Corporations].

35 S. 3072, 75th Cong., 3d Sess. § 5(g) (1938).

36 Federal Licensing of Corporations, *supra* note 34, at 373.

37 Reply Brief for Petitioner at 9, Business Roundtable v. SEC, 905 F.2d 406 (D.C. Cir. 1990) (No. 88-1651) [*hereinafter* BRT Reply Brief].

38 Pecora Hearings, *supra* note 30, at 6677.

39 *Id*. at 6679.

40 *Id*.

41 H.R. Rep. No. 1383, 73d Cong., 2d Sess. 13 (1934).

42 *Id*. at 14.

43 Business Roundtable, 905 F.2d at 410-11.

44 H.R. Rep. No. 1383, *supra* note 41, at 13.

45 *Id*.

46 *Id*. at 14.

47 *Id*.

48 The Senate Committee's report on stock exchange practices likewise focused on disclosure concerns. It noted that management frequently asked shareholders to grant proxies without explanation of the matters to be acted upon. S. Rep. No. 1455, *supra* note 30, at 74. *See also* S. Rep. No. 792, 73d Cong., 2d Sess. 12 (1934) ("Too often proxies are solicited without explanation to the shareholder of the real nature of the questions for which authority to cast his vote is sought."). The report emphasized the need for adequate shareholder knowledge about both the company's financial position and matters of policy. S. Rep. No. 1455, *supra* note 32, at 74. Finally, in describing the intent of § 14(a), the report contemplated that the SEC's rules thereunder would "protect investors from promiscuous solicitation of their proxies." *Id*. at 77.

49 *Stock Exchange Regulation: Hearings Before the House Interstate and Foreign Commerce Comm.*, 73d Cong., 2d Sess. 140 (1934) [*hereinafter* House Hearings].

50 *Id*. at 138-49.

51 *Id*. at 140.

52 *Id*. at 937.

53 *E.g.*, Pecora Hearings, *supra* note 30, at 6543-46 (comments of Thomas Corcoran); *id*. at 6697 (comments of Frank Altschul); *see also id.* at 7710-18 (testimony of Samuel Untermyer).

54 *Cf.* Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 504 (7th Cir. 1989) (dictum to the effect that the proxy rules do not preempt state laws permitting dual class stock).

55 *Business Roundtable*, 905 F.2d at 413.

56 *See* Securities Exchange Act, Pub. L. No. 73-291, § 2, 48 Stat. 881, 881-82 (1934); S. Rep. No. 792, 73d Cong., 2d Sess. 3 (1934) (need to control excessive stock market speculation that had "brought in its train social and economic evils which have affected the security and prosperity of the entire country."); 78 Cong. Rec. 7921-22 (1934) (Rep. Mapes) (the Act had two objectives: to prevent excessive speculation and to provide a fair and honest market for securities transactions).

57 Louis D. Brandeis, Other People's Money 92 (1914).

58 Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

59 Letter from Richard Whitney to all NYSE members (Feb. 14, 1934), *reprinted in* 78 Cong. Rec. 2827 (Feb. 20, 1934).

60 *E.g.*, 78 Cong. Rec. 8271 (1934) (Sen. Steiwer); *id*. at 8012 (Rep. McGugin); *id*. at 7937 (Rep. Bakewell); *id*. at 7710 (Rep. Britten); *id*. at 7691 (Rep. Crowther); *id*. at 7690 (Rep. Cooper). Others Congressional leaders acknowledged that early drafts of the legislation had justifiably raised such concerns, but argued the legislation had been redrafted so as to eliminate any legitimate fears on this score. *E.g.*, 78 Cong. Rec. 7863 (1934) (Rep. Wolverton); *id*. at 7716-17 (Rep. Ford); *id*. at 7713 (Rep. Wadsworth).

61 S. 3420, 73d Cong., 2d Sess. § 13(d) (1934).

62 H.R. Conf. Rep. No. 1838, 73d Cong., 2d Sess. 35 (1934).

63 S. Rep. No. 1455, 73d Cong., 2d Sess. 391 (1934).

64 Joseph C. O'Mahoney, *Federal Charters to Save Free Enterprise*, 1949 Wis. L. Rev. 407.

65 *E.g.*, *Protection of Shareholders' Rights Act of 1980: Hearing before the Subcomm. on Securities of the Sen. Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. (1980); The Role of the Shareholder in the Corporate World: Hearings before the Subcomm. on Citizens and Shareholders Rights and Remedies of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess. (1977).

66 Exchange Act Rel. No. 14,970 (July 18, 1978).

67 Exchange Act Release No. 15, 384 (Dec. 6, 1978). *See generally* Homer Kripke, *The SEC, Corporate Governance, and the Real Issues*, 36 Bus. Law. 173 (1981).

68 Medical Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), vacated as moot, 404 U.S. 403 (1972).

69 *Id*. at 680-81.

70 As the Supreme Court once put it: "The purpose of § 14(a) is to prevent management or others from obtaining authorization for corporate action by means of deceptive or inadequate disclosure in proxy solicitation." J.I. Case Co. v. Borak, 377 U.S. 426, 431 (1964). Other judicial interpretations of § 14 are also consistent with the notion that it was directed at assuring full disclosure and a fair opportunity to exercise corporate voting rights (of course, these decisions were rendered in cases in which it was those aspects of the rules that were at issue). *E.g.*, Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 (1970); Greater Iowa Corp. v. McLendon, 378 F.2d 783, 795 (8th Cir. 1967); Dann v. Studebaker-Packard Corp., 288 F.2d 201, 208 (6th Cir. 1961); SEC v. Transamerica Corp., 163 F.2d 511, 518 (3d Cir. 1947), cert. denied, 332 U.S. 847 (1948); NUI Corp. v. Kimmelman, 593 F. Supp. 1457, 1469 (D.N.J. 1984), rev'd, 765 F.2d 399 (3d Cir. 1985); Freedman v. Barrow, 427 F. Supp. 1129, 1145 (S.D.N.Y. 1976); Leighton v. American Telephone & Telegraph Co., 397 F. Supp. 133, 138 (S.D.N.Y. 1975); Studebaker Corp. v. Allied Products Corp., 256 F. Supp. 173, 188-89 (W.D. Mich. 1966).

71 *Supra* note 6, at 413.

72 *Id*. at 477-78.

73 *Id*. at 478-80.

74 *See id.* at 478-79.

75 481 U.S. 69 (1987).

76 *Id*. at 90-92.

77 *Id*. at 89.

78 "[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law." *Id*.

79 Burks v. Lasker, 441 U.S. 471, 478 (1979).

80 Santa Fe Indus., v. Green, 430 U.S. 462, 479 (1977); Cort v. Ash, 422 U.S. 66, 84 (1975); *Business Roundtable*, 905 F.2d at 413.

81 *See* Stephen M. Bainbridge, *The Creeping Federalization of Corporate Law, Regulation*, Spring 2003, at 26 (summarizing the debate).

82 CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89 (1987).

83 Some argue that the state also has an interest in corporations that make a substantial contribution to the state. Corporations provide employment and a crucial tax base, sell and purchase goods and services, and supply support for community activities. This interest in any corporation will vary from case to case, but it is a real interest, deriving from the corporation's existence as a tangible economic entity created by state law. *See* Mark A. Sargent, *Do the Second Generation State Takeover Statutes Violate the Commerce Clause?*, 8 Corp. L. Rev. 3, 23 (1985).

84 CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 90 (1987).

85 New State Ice Co v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Dark Side of Fare Wars: The Sixth Circuit Takes a Fresh Look at Predatory Pricing Claims Under Section 2 of the Sherman Antitrust Act

*By J. Gregory Grisham**

It is a truism that public policy favors robust competition and that consumers generally benefit from lower prices as a result. Consequently, "predatory pricing claims present particularly difficult questions given that price cutting is one of the socially desirable forms of competition that the antitrust laws seek to promote."[1] For well over a century, federal law has prohibited the establishment of and attempts to establish monopolies in interstate trade and commerce.[2] Section 2 of the Sherman Antitrust Act ("Section 2") prohibits "Monopolization" and states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.[3]

Given the favored status of competition, courts have taken a cautious approach when considering claims of predatory pricing.[4] One court has referred to a "predatory pricing scheme [as] 'the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.'"[5]

In a recent case involving the airline industry, the U.S. Court of Appeals for the Sixth Circuit considered claims of predatory pricing and other predatory tactics made by a so-called "low-cost carrier" against a "legacy" carrier.[6] In this case, the plaintiff, Spirit Airlines, filed a lawsuit against Northwest Airlines under Section 2, claiming monopolization and attempted monopolization based on alleged "predatory pricing and other predatory tactics in the leisure passenger airlines markets for the Detroit-Boston and Detroit-Philadelphia routes."[7] Spirit, a small Detroit-based airline, "targeted local leisure or price-sensitive passengers whose travel is generally discretionary… [by providing] a price incentive with unrestricted, but non-refundable fares."[8] Spirit had difficulty acquiring additional gates at Detroit's Metropolitan Airport ("Detroit Metro") when it attempted to expand its service because Northwest controlled the majority of the gates and was forced to pay higher landing fees.[9] In December, 1995, Spirit started offering a daily non-stop flight to Philadelphia at $49 and added a second daily non-stop flight in June 1996.[10] It also added a daily non-stop to Boston in April 1996 at fares of $69, $89 and $109.[11]

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Northwest, by comparison, was in 1995 the fourth largest air passenger carrier in the United States.[12] At its Detroit Metro hub, Northwest controlled sixty-four of the airport's eighty-six gates and had 78 percent of all passenger travel at the airport.[13] Unlike Spirit, Northwest offered connecting service to passengers as well as "restricted and unrestricted tickets, airport clubs, frequent flyer benefits, advanced seat selection, first and other classes of service, and on-board meals."[14] Prior to Spirit's entry, Northwest offered non-stop service from Detroit to Philadelphia and Boston holding 72 percent and 89 percent market shares, respectively, for these routes and charged much higher fares.[15]

Northwest had developed an analytical model called "New Competitive Equilibrium Analysis" ("NCEA") as a tool to guide its response to a new competitor coming into an existing market it served.[16] In April 1996, Northwest took action in response to Spirit's entry into the Detroit-Boston market. Northwest cut its lowest fare to $69, offering it on all Detroit-to-Boston flights, increased the number of daily non-stops in the market from 8.5 to 10.5 and added a 289-seat DC-10 to the route.[17] Following the fare reduction, in July 1996, 74 percent of Northwest passengers flew at or below $69 on the Detroit-Boston route, which had declined to 67 percent by September 1996.[18] These actions by Northwest had a dramatic negative impact on Spirit. After the Northwest fare reduction and increase in capacity on the Detroit-Boston route, Spirit's monthly average passenger load fell to 18 percent in April, 1996, 21 percent in May, 24 percent in June, 31 percent in July, 29 percent in August and to 17 percent in September.[19] As a result, Spirit finally abandoned the route in the fourth quarter of 1996.[20]

In June 1996, Northwest responded on the Detroit-Philadelphia route, reducing its lowest fares to $49 on all Northwest flights. Within two months, Spirit suspended its second Detroit-Philadelphia daily non-stop flight and on September 30 it abandoned the Detroit-Philadelphia route.[21] Once Spirit dropped out of the market, Northwest again became the only carrier with non-stop service on the Detroit-Philadelphia route and initially raised its lowest unrestricted fare to $271, which later increased to $461.[22]

Spirit filed a lawsuit against Northwest in March 2000 in the Eastern District of Michigan at Detroit, asserting violations of Section 2 of the Sherman Antitrust Act, alleging "anti-competitive and exclusionary practices, including, but not limited to, predatory pricing."[23]

After discovery, Northwest filed a motion for summary judgment, arguing that (1) the relevant market was all passengers (local and connecting) on the Detroit-Boston and Detroit-Philadelphia routes, (2) Northwest's revenues exceeded its average variable costs on the two routes at all relevant times, (3) even if a leisure-traveler market was appropriate, Northwest's total revenues on the routes exceeded its relevant

costs, and finally (4) Northwest, by reducing its fares in the two markets, was simply responding to Spirit's entry into the two markets.[24] Spirit, in opposition to the motion for summary judgment, argued, based on testimony from its expert and the facts adduced from the record, that a "price-sensitive or leisure fare traveler" on the Detroit-Boston and Detroit-Philadelphia routes was the relevant service or product market.[25] Spirit further argued that the appropriate measure of costs was "Northwest's incremental costs" in adding capacity on the two routes and that by using these standards, "Northwest's prices on these routes were below its average variable costs."[26] Spirit also argued that after it stopped service on the two routes in question, Northwest raised its fares and reduced capacity and successfully recouped its losses.[27] The district court, following discovery, granted Northwest's motion for summary judgment.[28] The district court rejected Spirit's expert's definition of the "relevant product or services market," but concluded that even if a "price-sensitive" market was appropriate, the evidence showed that Northwest "operated profitably on both the Detroit-Boston and Detroit-Philadelphia routes during the entire period of alleged predation."[29] Spirit appealed the district court's grant of summary judgment to the Court of Appeals for Sixth Circuit.

The court of appeals began its analysis of the summary judgment record by looking at the "Market Characteristics of the Passenger Airline Industry."[30] The court noted that the record included a U.S. Department of Transportation (DOT) study relied upon by an expert witness for Spirit, which stated, among other things, that the presence of low-fare carriers in a market results in lower fares and higher traffic levels.[31] The court also cited another study, which had found that the availability of low fares in a market resulted in an increase in passenger traffic and that airlines, in addition to pricing, use multiple competitive tools to attract passengers, such as:

> the number of flights a day and the timing of those flights; the characteristics of the flight itinerary such as whether the flight is nonstop, continuing single-plane service, or connecting service; rebates to the traveler in the form of frequent flier programs or corporate discounts; [and] in-flight amenities including food service and how closely the seats are spaced together; ground amenities including club lounges; and so forth.[32]

The study also found that "the presence of a low-fare carrier such as Southwest reduces an airline's ability to extract high fares from travelers" and that a low-fare carrier's entry into a market increases the number of tickets sold in the low fare category.[33] The court of appeals noted that access to gates at airports is a "substantial barrier to entry" for a new entrant into the market, and that such access is "not determined by open competition."[34] The Sixth Circuit also reviewed the testimony of another of Spirit's expert witnesses, Dr. Keith B. Leffler, who had analyzed the reports of Northwest's own experts in a prior lawsuit filed by Northwest against American Airlines, and concluded that Northwest's experts in the prior case had opined that:

> (a) air travel between city-pairs are relevant economic markets in the airline industry;
>
> (b) predatory pricing can be a rational economic strategy in the airline industry;
>
> (c) recoupment from predatory pricing is likely for an airline dominant in a relevant economic market in the airline industry;
>
> (d) there are substantial barriers to entry into the airline industry;
>
> (e) business travelers constitute a distinct market segment in the airline industry; [and]
>
> (f) the measure of the average variable cost in the airline industry should include the cost of changing capacity.[35]

The court of appeals also reviewed the "market power" of Northwest, noting from the record that at the time Spirit entered the Detroit-Boston and Detroit-Philadelphia markets, Northwest had over two-thirds of the passenger traffic from Detroit Metro and over 80 percent of the gates at the airport.[36] The court also noted that Spirit's expert, Professor Elzinga, concluded based on his review of the market that "Northwest possessed sufficient market power on the Detroit-Boston and Detroit-Philadelphia routes 'to make predatory pricing plausible.'"[37] The Sixth Circuit then turned to a review of the "Relevant Market." The court found from the record that Northwest recognized a distinct and relevant "low price or price sensitive traveler" or "leisure traveler" market in the industry which had also been identified by two federal regulators who had studied the market.[38] In addition, Spirit's experts found a distinct "leisure traveler" market and concluded that this was the market in which Spirit and Northwest actually competed.[39] The court also reviewed the record evidence of "Northwest's Strategy" with respect to new market entrants. It noted statements made by Northwest's CEO that Detroit Metro was the company's "most unique strategic asset," which he said the company must protect "at almost all costs."[40] In addition, the court found that a Northwest study had concluded that competition with low-fare carriers would cost the company in the range of $250 to $375 million in annual revenue at its three hubs and that Spirit was identified as one of the low-fare carriers.[41] The court also noted an article published by Northwest's executive vice-president in 1987 setting forth a strategy to respond to the entry of low-fare carriers into the market, which included meeting or beating the new entrant's lowest unrestricted fare and then making sure Northwest had enough seats to handle the increased traffic.[42] The court also noted a DOT study of the airline industry that concluded, among other things, that "Northwest's response forced Spirit's exit from this market and was designed to do so."[43] Turning its review of the summary judgment record to the issue of "recoupment," the Sixth Circuit noted the opinion of another Spirit expert, Professor David Mills, who had explained that it is "the predator's view of below cost pricing as 'an investment strategy' that is the core of Elzinga-Mills recoupment test for predatory pricing."[44] Professor Mills testified that "Northwest had successfully recouped its lost revenue within months after Spirit's departure from these routes." The court further reviewed testimony regarding alleged "non-price predatory

practices," specifically the matching of Spirit's low fares in conjunction with the expansion of capacity on the Detroit-Boston and Detroit-Philadelphia routes which were deemed by Professor Elzinga to be the "keys to Northwest's successful predation against Spirit."[45]

After completing its review of the summary judgment record, the Sixth Circuit moved to a review of the legal sufficiency of Spirit's Section 2 claims.[46] The court began its analysis by reviewing the language of Section 2 and its purpose:

> Section 2 of the Sherman Act, in pertinent part, makes it unlawful to "monopolize, or attempt to monopolize… any part of the trade or commerce among the several States…." 15 U.S.C. § 2. "[Section] 2 addresses the actions of single firms that monopolize or attempt to monopolize… The purpose of the Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." Spectrum Sports Inc. v. McQuillan, 506 U.S. 447, 454, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993).[47]

The court continued its analysis by setting forth the required elements for Spirit's Section 2 claims of monopolization and attempted monopolization which are: "(1) the possession of monopoly power in a relevant market; and (2) the willful acquisition, maintenance, or use of that power by anti-competitive or exclusionary means as opposed to "growth or development resulting from a superior product, business acumen, or historic accident."[48]

After reviewing the language of Section 2 and the essential elements of the claims presented by Spirit, the Sixth Circuit turned to the first issue, namely the "relevant product and geographic markets in which [plaintiff] competes with the alleged monopolizer, and with respect to the monopolization claim, to show that the defendant, in fact, possesses monopoly power."[49] The court of appeals found that there was no dispute that the relevant geographic markets were "the Detroit-Boston and Detroit-Philadelphia route."[50] With respect to the related issue of the appropriate "product or service market," the district court had adopted Northwest's position that the relevant product or service market "includes 'local' passengers who travel from Detroit on these non-stop flights to either Philadelphia or Boston and "connecting" passengers from other Northwest flights who travel to these cities from the Detroit airport."[51] The Sixth Circuit reviewed U.S. Supreme Court precedent and revisited the summary judgment record in evaluating the district court's ruling on the issue. It noted that the Supreme Court had recognized that a product or service market may have "submarkets."[52]

The Sixth Circuit concluded that a reasonable trier of fact could conclude that both parties recognized the existence of "leisure" or "price-sensitive" passengers as a distinct market in the airline passenger market under Section 2.[53] Central to the court of appeals' finding was evidence that Northwest recognized the "leisure" traveler as a separate market, including Northwest's fare structure during the relevant period, the deposition testimony of a Northwest manager, the report of two Northwest experts in its predatory pricing lawsuit against American Airlines, and comments by a consultant retained by Northwest in connection with proposed enforcement by DOT.[54] In reaching this conclusion, the Sixth Circuit also relied on the opinion of Spirit's expert Professor Elzinga.[55]

The court next considered the issue of whether Northwest had monopoly power in the relevant markets, defined as the "the ability of a single seller to raise price and restrict output"[56] or "control prices or exclude competition."[57] It noted that monopoly power can usually be inferred where the alleged predator has a predominant market share.[58] Turning to the facts in the record, the court of appeals found that Northwest was the predominate carrier in each market, with an 89 percent share in the Detroit-Boston market and a share greater than 70 percent in the Detroit-Philadelphia market at the time of Spirit's entry.[59] In addition, Northwest controlled 78 percent of all passengers traveling from Detroit Metro and controlled sixty-four of the eighty-six gates at the airport under long term leases.[60] The court found that Northwest reduced the number of flights in the two markets and increased fares significantly after Spirit's departure, which "could reasonably be interpreted as a clear exercise of monopoly power."[61] It found that the opinion of Professor Elzinga that Northwest had sufficient market power to achieve success at predatory pricing, was a "reasonable economic conclusion based upon the proof."[62]

Next, the court turned to the issue of the appropriate measure of costs to determine whether Northwest's response was predatory. It began its inquiry by recognizing that a claim of predatory pricing under Section 2 requires that the plaintiff prove "that the prices complained of are below an appropriate measure of its rival's costs."[63] Noting that there was a split among the circuits (which the Supreme Court had declined to resolve in *Brooke Group*) over the appropriate measure of costs, the court set forth the test that had been earlier adopted in the Sixth Circuit in predatory pricing cases, which focused on average variable costs, but left open the possibility that a firm with above-average variable cost pricing might be guilty of predatory pricing.[64] The court also noted a later Sixth Circuit decision that held that if "the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they may have on competitors."[65] The court of appeals then turned to a review of the opinions of Spirit's experts on this issue.[66] Spirit's experts had analyzed the incremental costs incurred by Northwest in response to Spirit's entry and compared these costs to the extra revenue that Northwest received from its response.[67] The court noted that the analysis employed "focuses on revenue from the additional flights (i.e., the extra capacity) that Northwest added (at discounted fares) because the alleged predation was executed through those additional flights."[68] Another Spirit expert, Dr. Daniel Kaplan, had used Northwest's own internal data to determine its average variable costs for price sensitive passengers on the Detroit-Boston and Detroit-Philadelphia routes.[69] Dr. Kaplan, in calculating average variable costs, included "flight costs, passenger costs, and gate and ticket-counter costs."[70] The court noted that Dr. Kaplan included as flight costs "fuel and labor" and the cost of the additional airplanes Northwest

used on each route; and as passenger costs the costs associated with processing tickets and boarding, the cost of flight food and beverages, liability insurance costs, and the incremental cost of fuel to carry each passenger.[71] Additional costs used to determine average variable costs were costs for pilots, flight attendants, gates and counter space.[72] The court noted that Dr. Kaplan calculated the monthly average variable costs for the Detroit-Boston route for the April-September 1996 period as ranging from $65.87 to $85.24 and the monthly average variable cost range for the Detroit-Philadelphia route for the July-September period to be from $53.47 to $60.17.[73] The Sixth Circuit considered Dr. Kaplan's findings that on all passenger service on the two routes during the relevant time period (1) net passenger revenue on the Detroit-Boston route was $10.75 below Northwest's average variable cost; and (2) net passenger revenue on the Detroit-Philadelphia route was $11.86 below Northwest's average variable cost.[74] In addition, Dr. Kaplan had concluded that for the "price-sensitive traveler" Northwest's net passenger revenue was $8.07 below average variable costs on the Detroit-Boston route and $6.53 below average variable costs on the Detroit-Philadelphia route.[75] The court of appeals noted that Northwest's expert had reached different conclusions, although he also relied on the same internal Northwest data as the Spirit experts.[76] Northwest's expert Professor Janusz A. Ordover, in his analysis, "considered total revenue from all passengers, leisure travelers as well as connecting passengers, earned from these routes and compared those revenues to Northwest's variable costs for those flights."[77] Professor Ordover used several of the same cost elements as Dr. Kaplan to determine average variable cost.[78] The Sixth Circuit noted Professor Ordover's conclusion that after deducting average variable costs from passenger revenue, Northwest's "average fares on the routes exceeded its average variable costs" and that "Northwest's pricing response to Spirit's entry would have been profitable even if Spirit had continued to serve the markets."[79] The court also noted the rebuttal reports of Spirit's experts that criticized Dr. Ordover for including all passenger revenue on each route, since in their opinion local passengers (i.e., the leisure traveler market) were the passengers that Northwest was attempting to divert from Spirit.[80]

After reviewing the record, including the opinions of all experts, the Sixth Circuit concluded that a reasonable trier of fact could accept the Spirit expert's "definition and calculation of Northwest's incremental costs to attract the leisure travel passengers on these routes as the appropriate measure of Northwest's average variable costs for deciding Spirit's Section 2 claim against Northwest."[81] The court held that summary judgment was inappropriate, since the "intellectual disagreement" created material factual disputes on the issues of the "relevant market" and the "appropriate measure of costs."[82]

The Sixth Circuit also concluded based on the record that a reasonable trier of fact could conclude that significant barriers to entry existed based on Northwest's control of sixty-four of the eighty-six gates at Detroit Metro under long term leases and the fact that Spirit had to pay $100,000 to access a gate and 25 percent higher landing fees than airlines with long term leases, such as Northwest.[83]

The court then moved to consider whether the essential element of recoupment was met in the case before it.[84] The Sixth Circuit reviewed the Supreme Court's decision in *Brooke Group*,[85] and summarized the relevant inquiries as follows:

> The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb. If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory pricing scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.…
>
> Likewise, we have required proof of an injury to competition by a firm's predatory pricing, to sustain a Section 2 claim of monopolization.…
>
> In Conwood, we deemed a predator's conduct causing 'higher prices and reduced consumer choice… harmful to competition.'[86]

After setting forth the applicable legal standard, the court of appeals examined the testimony offered by Spirit's expert on the issue, Professor Mills, who had concluded that Northwest was able to recoup its losses from predatory pricing within a few months of Spirit's exit from the markets.[87] The Sixth Circuit found that a trier of fact could reasonably find that Northwest was able to recoup any losses within a short time of Spirit's exit from the two markets, noting that Northwest increased its fares seven times above the level existing during Spirit's presence in the markets.[88] The court also found that a trier of fact could reasonably conclude that competitive injury occurred as a result of Northwest's actions, citing higher fares paid by travelers on the two routes.[89]

The Sixth Circuit also examined Spirit's assertion that a key aspect of Northwest's policy of monopolization and its predatory strategy was expansion of capacity on the two routes, a claim that was not considered by the district court, which had ruled that proof that revenue exceeded average variable cost ended the inquiry.[90] The court of appeals disagreed with this analysis, and found that the opinion of Spirit's experts that the increase in capacity was essential for Northwest to succeed in its predatory pricing scheme was a "reasonable economic explanation of the anticompetitive effects of Northwest's two-prong response to Spirit's entry on these routes, that included a rapid expansion of Northwest's capacity on these routes."[91] The court stated that a party could violate Section 2 even where its prices are not below its average variable costs.[92]

The court of appeals, in reversing and remanding the case to the district court, concluded that "even if the jury were to find that Northwest's prices exceeded an appropriate measure of average variable costs, the jury must also consider the market structure in this controversy to determine if Northwest's deep price discounts in response to Spirit's entry and the accompanying expansion of its capacity on these routes injured competition by causing Spirit's departure from

this market and allowing Northwest to recoup its losses and to enjoy monopoly power as a result."[93]

The Sixth Circuit's decision in Spirit may represent a new judicial willingness to move away from the rigid application of economic theory to a more realistic market-based approach where "facts demonstrating economic effect trump theory."[94]

Endnotes

1 M. Denger, et al., *Predatory Pricing and Practices*, 1583 PLI/Corp. 293, 300 (Jan.-Feb. 2007) (*hereinafter* Predatory Pricing). *See also* D. Crane, *The Paradox of Predatory Pricing*, 91 Cornell L. Rev. 1 (2005) ("The paradox of predatory pricing law is that even an analytically perfect specification of the line between predatory and innocent price cuts would result in deviations from optimal pricing because the very recognition of a predatory pricing offense will induce some firms to forgo innocent price cuts.").

2 *See* 15 U.S.C. §2. The Sherman Antitrust Act was originally enacted in 1890 with later amendments in 1955, 1974, 1990 and 2004. *Id*.

3 *Id*. Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1 prohibits "contract[s], combinations in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations…" Section 1 further provides that "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $ 100,000,000 if a corporation, or, if any other person, $ 1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court." Sections 1 and 2 are independent from each other, although objects of conspiracies may overlap to some degree. *See* American Tobacco Co. v United States, 328 US 781, 90 L Ed 1575, 66 S Ct 1125 (1946). A monopoly under Section 2 is a species of restraint of trade under Section 1. *Id*.

4 ILC Peripherals Leasing Corp. v. Int'l Bus. Machines Corp., 458 F Supp 423, 1978-2 CCH Trade Cases P 62177, 26 FR Serv. 2d 1048, (N.D. Cal. 1978), aff'd, (9th Cir. 1980)(holding that the defendant should not be found guilty of predatory pricing, regardless of its cost, when it reduces prices to meet lower prices already being charged by its competitors, since to force the defendant to maintain noncompetitive prices would create the kind of market position that the prohibition of predatory pricing was meant to preclude).

5 Predatory Pricing, at 299 (quoting AD/SAT v. Associated Press, 920 F. Supp. 1287, 1301 (S.D.N.Y. 1996), aff'd, 181 F. 3d 216 (2d Cir. 1999)).

6 Spirit Airlines, Inc. v. Northwest Airlines, Inc., 431 F. 3d 917 (6th Cir. 2005), rehearing and rehearing en banc denied, 2006 U.S. App. LEXIS 10603 (6th Cir. 2006), motion to direct the Clerk to file a petition for writ of certiorari out of time denied, 127 S. Ct. 340, 166 L. Ed. 2d 12 (2006).

7 *Id*. at 921.

8 *Id*. at 922. The so-called "local leisure" or "price-sensitive" passengers are individuals whose travel plans are generally discretionary "such as passengers visiting friends and relatives, and tourists or vacationers who might not otherwise fly." *Id*. These passengers may decide to travel by air, as opposed to driving, based on the availability of lower fares. The "local leisure" or "price sensitive" passengers can be distinguished from business travelers who are often required to fly on short notice without regard to the availability of low fares. Spirit did not offer passengers "first-class" seating, a frequent flyer program or connecting service. *Id*. Spirit started out in 1992 serving four cities and expanded service in 1993 to cities in Florida. *Id*.

9 *Id*. Spirit was unable to secure a permanent gate arrangement, but was permitted to use gates formerly used by "Trump Shuttle and Charter," and obtained short term leases from two other legacy carriers serving Detroit Metro. *Id*.

10 Spirit experienced a "load-factor" of nearly 75% in December 1995, which increased to 88.5% in June 1996 when the second daily non-stop to Philadelphia was added. *Id*. The term "load factor" in the aviation context refers to the ratio of "revenue passenger miles" to "available seat miles" of a particular flight. *See* http://www.reference.com/browse/wiki/Load_factor.

11 *Id*.

12 *Id*. at 923. Northwest has "hubs" in Minneapolis, Detroit and Memphis. Spirit by comparison had annual revenues of $62.9 million as of June 1996. Id.

13 *Id*.

14 *Id*. Northwest policy seeks "to maximize the revenue that [Northwest] earn[s] for [its] domestic network… and… [to] try to sell every seat at its highest possible fare." *Id*.

15 *Id*. Northwest's only competitor in the Detroit-to-Philadelphia market was U.S. Airways. Northwest offered six daily non-stops from Detroit to Philadelphia while U.S. Airways offered four. *Id*. When Spirit entered the Detroit-Philadelphia market, Northwest's lowest unrestricted fare was $355 and its lowest restricted fare was $125 one-way. Before Spirit entered the Detroit-to-Boston market, Northwest provided non-stop passenger service with 8.5 daily round trips; its lowest unrestricted fare was $411 and its lowest restricted fare was $189. *Id*. U.S. Airways had fares comparable to Northwest on the Detroit-Philadelphia route. *Id*. At the time of Spirit's initial entry into the Detroit to Philadelphia market, neither Northwest nor U.S. Airways reduced its fares to match Spirit's lower fares or increased capacity on the route. *Id*. Northwest was planning to reduce capacity on the Detroit-Boston route in the summer of 1996 before Spirit entered the market. *Id*.

16 *Id*. This two-step model involved considering "the impact of the new entrant's service on Northwest's revenue" and deciding "whether to add capacity on the route." *Id*.

17 *Id*. at 924. The DC-10 had more than three-times as many seats as Spirit's entire daily capacity on the route. *Id*.

18 *Id*. After the reduction, Northwest passengers flying the Detroit-Boston route paid less for fares than Spirit passengers on the same route on 93.9 percent of the days on which Spirit flew the route. *Id*.

19 *Id*. Northwest averaged over 30,000 passengers per month on the route, in the April to September 1996 time period, while Spirit's monthly high was 17,000. *Id*.

20 *Id*. at 925.

21 *Id*.

22 *Id*. After the Northwest fare reductions on the Detroit-Philadelphia route in June 1996, Spirit's monthly passenger load dropped to 43 percent in July, 1996, 36 percent in August, and 31 percent in September. *Id*. Northwest implemented its $279 (lowest) unrestricted fare on the Detroit-Philadelphia route on October 28, 1996, which later rose to $416 on April 20, 1998. *Id*.

23 *Id*. at 924-25.

24 *Id*. at 925.

25 *Id*.

26 *Id*.

27 *Id*. In addition to its arguments regarding the appropriate product or service market, the appropriate cost model, and recoupment, Spirit argued that Northwest's control of gates at Detroit Metro created a significant barrier to competition which assisted Northwest in its predatory pricing scheme. *Id*.

28 *Id*. at 925-26.

29 *Id*. The district court, in granting the defendant's motion for summary judgment, cited the Supreme Court's decision in *Brooke Group Ltd. v. Brown and Williamson Tobacco Group* as the controlling authority for its decision. 509 U.S. 209, 113 S.Ct 2578, 125 L.Ed. 2d 168 (1993).

30 *Spirit*, 431 F. 3d at 926.

31 *Id*. The report cited by the court of appeals was DOT's study "The Low Cost Airline Service Revolution" (April 1996), *at* http://ostpxweb.dot.gov/aviation/domav/lcs.pdf.

32 *Spirit*, 431 F. 3d at 926-27 (quoting C. Oster & J. Strong, *Predatory Pricing in the U.S. Airline Industry*) (*hereinafter* Oster-Strong Study). The Oster-Strong study cited Northwest's third quarter 1996 response to Spirit in the Detroit-Philadelphia market as an example of an airline making more seats available in the lower fare category. *Id*.

33 *Id*. at 927.

34 *Id*. at 928. The testimony of Spirit's expert, Professor Kenneth Elzinga, noted that local governments control access to gates and runways and that access is allocated "without a formal market mechanism." *Id*. (quoting Gautam Gowrisankaran, *Competition and Regulation in the Airline Industry*, Federal Reserve Board of San Francisco Economic Letter, Number 2002-01, at 1). Professor Elzinga further noted that most airport gates "are controlled by long-term exclusive-use leases with the local airport authority." *Id*. at 928. The court of appeals also noted that a Northwest expert witness, in the company's prior lawsuit against American Airlines for predatory pricing, recognized that new entrants in a market face a "higher cost of entry" since existing airlines "obtained their initial awareness and facilities base pursuant to governmental regulations that protect them from competition." *Id*. at 928.

35 *Id*.

36 *Id*.

37 *Id*. at 929.

38 *Id*.

39 *Id*.

40 *Id*.

41 *Id*.

42 *Id*. (quoting Levine, *Airline Competition In Deregulated Markets*, 4 Yale J. On Reg. 393, 476-78 (1987)). The strategy mapped out in the article was called "new competitive equilibrium analysis." *Id*.

43 *Id*. at 929.

44 *Id*. at 930. The "Elzinga-Mills" test looks at the profit that the alleged predator would earn if the "target" of the predatory pricing remained in the market as a fair benchmark of the alleged predator's "reasonably expected gains and losses." *Id*. In applying the "Elzinga-Mills" test to the facts before the court, Professor Mills opined that three factors needed to be considered:

> [T]he first task is to compare Northwest's average fares during the months when Spirit operated its flights on the [Detroit-Boston] route to the average fares that would have prevailed on the route, but for Northwest's alleged predation. This factor measures the monthly financial sacrifice the airline shouldered by charging prices below the otherwise prevailing level. The second task… compares the average fares Northwest would expect to charge, during the months immediately after Spirit exited the market, to the average fares that otherwise would have prevailed in the market. This second factor measures the monthly financial return Northwest could achieve by driving Spirit from the market with its predatory pricing. The third factor compares the anticipated monthly sacrifice during predation with the anticipated monthly return during recoupment to understand whether predatory pricing plausibly would have been a profitable option for Northwest to exercise.

45 *Id*. The court of appeals also noted the opinion of another Spirit expert, Dr. Daniel Kaplan, who opined that Northwest analysts deviated from the company's "price-out model forecast" in justifying the addition of a DC-10 on the Detroit-Boston route. *Id*.

46 *Id*. at 930-31. The court of appeals discussed the proper standard for summary judgment in an antitrust lawsuit. The court cited the U.S. Supreme Court's decision in *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, which stated that summary judgment should be granted where the alleged antitrust violation "simply makes no economic sense." 504 U.S. 451, 467, 112 S. Ct 2072, 119 L. Ed. 2d 265 (1992). The court of appeals then reviewed a subsequent Supreme Court decision, *Brooke Group Ltd. v. Brown and Williamson Tobacco Group*, and concluded, based on the holding in *Brooke Group*, that "where the market is highly concentrated, the barriers to entry are high, the defendant has market power and excess capacity, and evidence of actual recoupment is present, summary judgment is inappropriate." 509 U.S. 209, 226, 113 S. Ct. 2578, 125 L.Ed.2d 168 (1993). *Spirit*, 431 F. 3d at 931.

47 *Id*. at 931-32.

48 *Spirit*, 431 F. 3d at 932 (quoting Conwood Co., L.P. v. U.S. Tobacco Co., 290 F.3d 768, 782 (6th Cir. 2002)).

49 *Id*. at 932.

50 *Id*. at 933.

51 *Id*.

52 *Spirit*, 431 F. 3d at 933.

53 *Id*.

54 *Id*. at 933-34. Internal Northwest documents showed that the company made a distinction between business and leisure travel. *Id*. at 933. The Northwest manager for domestic pricing testified that the company viewed the business and leisure markets as separate markets. *Id*. at 934. One Northwest expert in the American Airlines lawsuit opined that "there were at least two relevant product market segments in which airlines compete: business and discretionary and leisure travel." *Id*.

55 *Id*. at 935. Professor Elzinga, in his analysis of the cost-revenue comparison, used the leisure traveler as the relevant market. *Id*. The court of appeals noted the impressive credentials of Professor Elzinga, including his prior government service as an economist in the United States Department of Justice and as a consultant to the Federal Trade Commission and his writings on predatory pricing which have been cited by the U.S. Supreme Court in antitrust cases. *Id*. at 934.

56 *Id*. at 935 (quoting *Eastman Kodak*, 504 U.S. at 464)(in turn quoting Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)).

57 *Spirit*, 431 F. 3d at 935 (quoting United States v. E.I. du Pont Nemours & Co., 351 U.S. 377, 391, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)).

58 *Spirit*, 431 F. 3d at 935. *See Eastman Kodak*, 504 U.S. at 464, 481 ("possession of over two-thirds of the market is a monopoly," citing American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946)).

59 *Spirit*, 431 F. 3d at 935.

60 *Id*.

61 *Id*. at 935-36.

62 *Id*. at 936. The court of appeals, in finding that Northwest possessed the requisite market power to engage in predatory conduct, also cited an article by Professor Paul Stephen Dempsey, that the court found touched on the issues in the case and that, among other things, quoted Northwest's Michael Levine as stating "I believe predation is possible and that it occurs… [I]t is possible for an incumbent to impose on prospective entrants nonrecoverable costs by pricing in a way that seeks to ensure that they do not attract a significant share of passengers regardless of the incumbent's own costs." *Id*. at 936 (quoting *Predation, Competition & Antitrust Law: Turbulence In The Airline Industry*, 67 J. Air L. & Com. 685, 708 (2002)). *Id*.

63 *Id*. at 937 (quoting *Brooke Group*, 509 U.S. at 222). In *Brooke Group*, the Supreme Court used "the average variable cost standard" in the case before it because the parties had stipulated it was the appropriate measure. *Id*. at 223.

64 *Id*. at 937-38. The Sixth Circuit had earlier, in *D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1436-37 (6th Cir. 1983), adopted a modified version of the Ninth Circuit's test in *William Inglis v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035-36 (9th Cir. 1981)("[w]e hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves

that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.").

65 *Spirit*, 431 F. 3d at 938 (quoting Arthur S. Langenderfer Inc., v. S.E. Johnson Co., 729 F.2d 1050, 1056 (6th Cir. 1984) (in turn quoting Inglis, 668 F.2d at 1035-36). *See also* Directory Sales Mgmt Corp. v. Ohio Bell Tel. Co., 833 F. 2d 606, 613 n. 13 (6th Cir. 1987).

66 The court noted that Spirit's experts, Professors Elzinga and Mills used the same tests for predation and recoupment in the case before it that were cited by the Supreme Court in *Brooke Group. Spirit*, 431 F. 3d at 939.

67 *Id.*

68 *Id.*

69 *Id.* Dr. Kaplan used Northwest's "Flight Profitability System" ("FPS") which, among other things, analyzes the costs and revenues of each Northwest flight. *Id.* Dr. Kaplan also studied the Northwest fare structure for the Detroit-Boston and Detroit-Philadelphia routes for 1996 to determine the appropriate dividing line between price-sensitive travelers and other travelers on these routes, which he determined was a fare of $225. *Id.* at 940.

70 *Id.* Dr. Kaplan opined that gate and ticket counter costs would be reflected in depreciation and amortization expenses. *Id.*

71 *Id.*

72 *Id.*

73 *Id.* Dr. Kaplan divided the sum of the cost factors identified as variable by Northwest's FPS and the aircraft market value by "the total number of passengers traveling on that segment during the relevant time periods." *Id.*

74 *Id.* at 940-41.

75 *Id.* at 941.

76 *Id.* at 941-46.

77 *Id.* at 942.

78 *Id.* In his average variable cost analysis, Dr. Ordover declined to use the commercial lease rates for the aircraft used by Northwest on the routes in question, instead choosing "the opportunity costs of the aircraft and its least attractive alternative deployment within the airline's system." *Id.*

79 *Id.* at 943.

80 *Id.* The court noted that Northwest's FPS and its "Price Out Model" did not consider differences between leisure travelers and other classes of travelers to be meaningful for purposes of calculating average variable costs. *Id.* at 946.

81 *Id.* at 945.

82 *Id.* The court of appeals rejected the district court's finding that the opinion of Spirit's expert made "no economic sense" and found that a reasonable trier of fact could find the opinion reasonable based on the facts in the record and economic principles. *Id.* The court of appeals also distinguished the cases cited by Northwest. *Id.* at 946-47. Unlike in *United States v. AMR Corp.*, 335 F. 3d 1109 (10th Cir 2003) (a predatory pricing case against American Airlines), where the Tenth Circuit found that none of the tests that the government utilized was a true measure of the incremental cost of adding extra passengers on the route in question, Northwest did not contend that Spirit's price-cost test was flawed; in addition, Spirit's price-cost analysis was based on Northwest's FPS system which Northwest admitted calculated a reasonable approximation of average variable costs for a route. *Spirit*, 431 F. 3d at 946. The court of appeals also noted that other courts have accepted average variable costs as the proper measure of costs in predatory pricing cases. *Id.*

83 *Id.* at 947. The court of appeals noted that the presence of high barriers to entry is a factor to consider because high barriers make it more likely that an incumbent will be able to price "predatorily." *Id.* at 946 (citing Richter Concrete Corp. v. Hilltop Concrete Corp., 691 F. 2d 818, 824 (6th Cir. 1982)).

84 *Spirit*, 431 F. 3d at 947-48. "The second perquisite under § 2 of the Sherman Act, is proof that the competitor recovered or had a reasonable prospect or a dangerous probability of recouping its investment in below-cost prices." *Id.* (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986)).

85 509 U.S. at 224-26.

86 *Spirit*, 431 F. 3d at 948-49 (quoting *Conwood*, 290 F. 3d at 789).

87 *Spirit*, 431 F. 3d at 949-50. For example, Professor Mills looked at Northwest's monthly sacrifice during predation and its monthly returns after predation in the Detroit-Philadelphia market and determined under different scenarios whether recoupment was plausible and, if so, the time necessary for recoupment. *Id.* He concluded that recoupment was plausible and that the time necessary for recoupment would vary between one and seven months based on factors such as prevailing prices and the anticipated period for predation. *Id.*

88 *Id.* at 951.

89 *Id.*

90 *Id.*

91 *Id.* at 952. Professor Elzinga opined that a fare decrease by Northwest was not sufficient to run Spirit out of the markets, since capacity was presumably optimized before Spirit entered the market so that Northwest "could not add a large number of additional passengers even at lower prices unless it also increased capacity." *Id.*

92 *Id.* The Sixth Circuit stated that a finding that revenue exceeds average variable costs is not sufficient to end the inquiry where the record and "market realities" reflect the existence of a predatory pricing scheme:

> *Brooke Group* emphasized that even where theory suggests that predatory pricing is rare, "however unlikely that possibility may be as a general matter, when the realities of the market and the record facts indicate that [a predatory pricing scheme] has occurred and was likely to have succeeded, theory will not stand in the way of liability." 509 U.S. at 229 (citing *Eastman Kodak*, 504 U.S. at 466, 467). In *Conwood*, we explained "'anticompetitive conduct' can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties." 290 F.3d at 784 (quoting Carribean Broad. Sys. Ltd. v. Cable & Wireless PLC, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1087 (D.C. Cir. 1998)). Moreover, in *D.E. Rogers*, we adopted the Inglis rule that "acknowledges that in certain situations, a firm selling above average variable cost could be guilty of predation." 718 F.2d at 1436 (citing *Inglis* 668 F.2d at 1035).

Spirit, 431 F. 3d at 952.

93 *Id.* at 953. Circuit Judge Karen Nelson Moore wrote a concurring opinion. *Id.* at 953-59. To date, at least two district courts have cited the Sixth Circuit's analysis in *Spirit* with respect to claims under Section 2. *See, e.g.,* Ky. Speedway, LLC v. NASCAR, 410 F. Supp. 2d 592, 596 (E.D. Ky 2006) (noting that the relevant market may be narrowly defined); Invacare Corp. v. Respironics, Inc., 2006 U.S. Dist. LEXIS 77312 at *25 (N.D. Ohio 2006) ("Spirit Airlines does not hold that a party could show predatory pricing without any type of below-cost pricing.") *See also* D. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 Emory L.J. 423, 477 n. 229 (2006) (citing *Spirit* in discussion of differing approaches for determining the appropriate measure of costs in predatory pricing cases).

94 *Cf.* W. Michael, *Holmes and the Bald Man: Why Rule of Reason Should Be the Standard in Sherman Act Section 2 Cases*, 4 Pierce L. Rev. 359, 370-71, n. 75 (2006).

Criminal Law and Procedure

Universal Jurisdiction: The German Case Against Donald Rumsfeld

*By Tom Gede**

Straftaten sind auch Straftaten, wenn sie von besonders mächtigen Verbrechern wie Herrn [Donald] Rumsfeld begangen werden.

- Wolfgang Kaleck, Die Zeit On-Line Interview[1]

On April 27, 2007, the German Federal Prosecutor General announced that she would not commence an investigation against former U.S. Defense Secretary Donald Rumsfeld and others for international human rights violations associated with the handling of prisoners at Abu Ghraib in Iraq and Guantánamo in Cuba.[2] For the second time within the last two years, the Federal Public Prosecutor's office declined to commence an investigation against Rumsfeld, based upon a criminal accusation filed by German human rights lawyer Wolfgang Kaleck, on behalf of the Center for Constitutional Rights (CCR) and other organizations and individuals. Kaleck argued for, among other things, the application of Germany's Code of Crimes Against International Law (CCAIL), a controversial law adopted in 2002 that purports to extend Germany's domestic criminal law jurisdiction to crimes against international law, specifically genocide, crimes against humanity and war crimes.[3] While the German law restrains itself in significant ways, providing the discretion used by the prosecutor in Karlsruhe to dismiss the Rumsfeld complaint, it nonetheless purports to do what most "universal jurisdiction" laws do: apply criminal jurisdiction over persons whose alleged crimes against international law occurred outside of the prosecuting state, regardless of nationality, residence or relation to the prosecuting country.

The Rumsfeld complaint in Germany illustrates a number of legal and juridical dilemmas faced by countries adopting pure universal jurisdiction statutes. Aside from jurisdictional challenges, such as presence in the prosecuting country, immunity for current or former heads of state or government, limitations periods and the concept of subsidiarity, serious questions persist as to the mere exercise of universal jurisdiction by one state over the nationals of another state where no legitimizing link to the investigating state exists and where no treaty or other international positive law governs.[4] Foremost among these is the core problem, at once political and legal, of breaching the sovereignty of another state. No doubt a breach arises where a foreign suspect is investigated and/or charged with a crime, whether against humanity or otherwise, committed outside the prosecuting country, and where there is no ostensible connection to the prosecuting country, such as the suspect residing in the prosecuting country, or the victim of the alleged crime residing in or being a national of the prosecuting country, and in the absence of an extradition, relevant treaty arrangement, or the use of an international tribunal to which the suspect's state has already surrendered a portion of its judicial sovereignty. Thus, where the International Criminal Court (ICC) and other international justice tribunals may assume jurisdiction to address genocide, crimes against humanity or war crimes, their jurisdiction derives from consenting or member states, or from the transfer of political or judicial authority to a successor body or tribunal, as in the case of the Nuremburg Trials, where such authority was transferred to the Allied Control Council under the Instrument of Surrender of Germany.[5]

However, when a sovereign state unilaterally assumes jurisdiction to try non-nationals for crimes (no matter how heinous) that occurred elsewhere, with no connection to the prosecuting state, what should be raised is the warning flag. While a principal legal objection to the exercise of universal jurisdiction may be that the prosecuting state does not have a proper sovereign interest in the matter, the core political objection is that the exercise, in its rawest form, with no connection to the prosecuting state, threatens the sovereignty of another state. At its worst it can be an excuse for kidnapping, detaining and prosecuting the citizen of another state, quite possibly for a politically-motivated show trial, without the benefit of a treaty or international mechanism to turn over that citizen to the court of another state. At its most benign, it still affronts the notion of national sovereignty sufficiently to call into question whether it is an instrument of international law or of extraordinary international politics.

Proponents of universal jurisdiction make the argument that certain crimes are so heinous and repugnant to the international community that they are in fact crimes against all, and therefore, punishable by any. Amnesty International, for example, calls on all states to:

> Enact and use universal jurisdiction legislation for the crimes of genocide, crimes against humanity, war crimes, torture, extra-judicial executions and "disappearances", in order that their national courts can investigate and, if there is sufficient admissible evidence, prosecute anyone who enters its territory suspected of these crimes, regardless of where the crime was committed or the nationality of the accused or the victim.[6]

Thus, it seems proponents argue that a state does in fact have a proper sovereign interest in such prosecutions, namely to "end[] impunity to the perpetrators of the worst crimes known to humanity." Beyond wishful thinking and political activism, however, there is little support or law to suggest that this is contrary to accepted international law. Assuming customary is that which is generally accepted, there is serious doubt that the above principle is customary international law, given that few nations have adopted it as their own. Even in Germany, where it is nominally adopted, it is subject to key restraints, codified rules of reasonableness, which call into question whether it is truly a universal jurisdiction statute. This paper argues that the German Code of Crimes Against International Law (CCAIL), to the extent that it provides the prosecutor with discretion to dismiss a complaint based on accepted rules of reasonableness relating to the exercise of extraterritorial jurisdiction, becomes

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simply another form of an extraterritorial jurisdiction statute. However, to the extent it is employed to prosecute a foreigner for serious offenses committed in a foreign setting, where the suspect is present in Germany, perhaps even only stepping foot in Germany, it would match the vision of its proponents, but, in such a case, it would constitute a serious breach of another state's sovereignty, and perhaps international comity and order.

Opponents of universal jurisdiction point to the idea, cherished in the United Nations Charter, that all states are equal in sovereignty, and that, accordingly, no state has authority to try a crime wholly within the cognizance of another state's jurisdiction. Indeed, in the governing principles in article 2 of the Charter, it states that the "[o]rganization is based on the principle of the sovereign equality of all its Members." It calls for respect of the "territorial integrity [and] political independence of [the] state," and generally disclaims the authority of the organization to "intervene in matters which are essentially within the domestic jurisdiction of any state." Universal jurisdiction, as defined above, allows a state to arrogate to itself judicial authority not surrendered by another state. It is difficult to see how it does not but disrespect the territorial integrity, political independence and domestic powers of a state which does have a legitimate link to the human rights violation or alleged war crime. As multiple states arrogate universal judicial power unto themselves, they will have to compete for the honor of enforcing international humanitarian law. A better answer lies in the reliance upon existing bi-lateral and multi-lateral treaties, charters and agreements that permit extradition, or in the use of international tribunals established through compact, treaty or other internationally recognized instruments. Even the traditional exercise of better-understood extraterritorial jurisdiction is preferable to the unilateral arrogation of universal judicial power by individual states.

By way of background, it is worth examining how universal jurisdiction differs from, or is perhaps an extension of, recognized forms of extraterritorial jurisdiction. It is often simply cast as one type of extraterritorial jurisdiction. Generally, the authority of a state to adjudicate and to compel persons to a domestic judicial process is dependent upon that state's jurisdiction to prescribe, or in the case of criminal law, proscribe, certain conduct.[7] Under commonly understood notions of territorial jurisdiction, a state has jurisdiction to prescribe laws affecting persons within the boundaries of that state,[8] but also may legislate extraterritorially, so as to apply its criminal statutes to its citizens wherever located; and where it has not done so clearly, it may be inferred.[9] This prescriptive authority relating to when a state may reach conduct outside its territory is often summed up in five principles:[10] (1) the objective territorial principle, where a state has jurisdiction to prescribe law with respect to conduct "that has or is intended to have substantial effect within its territory;"[11] (2) the protective principle, with respect to "certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests;"[12] (3) the nationality principle, with respect to "the activities, interests, status, or relations of its nationals outside as well as within its territory;"[13] (4) the passive personality principle, where "a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the *victim* of the act was its national;"[14] and finally, (5) the universality principle, which, as the Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") provides, where "[a] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism," regardless of the locus of the occurrence.[15]

The above principles of extraterritorial jurisdiction are not uniformly accepted or applied, but merely, and often, restated. For example, in *U.S. v. Vasquez-Velasco,* the U.S. Court of Appeals for the Ninth Circuit stated that extraterritorial jurisdiction over a foreign murder suspect of an American tourist while in the foreign state may not be justified.[16]

> Thus, extraterritoriality would be based solely on the passive personality principle, under which jurisdiction is asserted based on the nationality of the victim. In general, this principle has not been accepted as a sufficient basis for extraterritorial jurisdiction for ordinary torts and crimes. *See* Restatement § 402 cmt. g; *see also* Restatement (Second) of Foreign Relations Law of the United States § 30(2) (1965) (stating that "[a] state does not have jurisdiction to prescribe a rule of law attaching legal consequences to conduct of an alien outside its territory merely on the ground that the conduct affects one of its nationals"). More recently, the passive personality principle has become increasingly accepted as an appropriate basis for extraterritoriality when applied to terrorist activities and organized attacks on a state's nationals because of the victim's nationality. Restatement § 402, cmt. g.[17]

Following a long history of debate and dissent among the American Law Institute participants preparing the Restatement, the body agreed upon the notion that an exercise of jurisdiction on one of above bases may violate international principles if it is "unreasonable." Accordingly, they settled upon certain limits or restraints on the exercise of extraterritorial jurisdiction:

> … (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
>
> (a) the link of the activity to the territory of the regulating state, *i.e.,* the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
>
> (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
>
> (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.[18]

As is evident, regardless which principle of extraterritorial jurisdiction is relied upon by the state, an argument against its application will arise not only as to the intent of the underlying criminal legislation's extraterritorial reach, but also to the "reasonableness" of any application extraterritorially. Arguably each of the reasonableness factors looks to some nexus or connection with the sovereign interests of the legislating state, less perhaps factors (e) and (f). Reliance upon those factors alone to assert the propriety of a well-articulated universal jurisdiction statute may indeed be questionable, and certainly is not fully accepted in the international community.

Germany, and undoubtedly Belgium and Spain, have wrestled with the question of whether a pure application of universal jurisdiction would stand without some nexus to the state, either in the form of the perpetrator's residence or connection with the state, or the victim's residence or connection with the state, or the existence of some other significant effect on or within the state.[19] Enacted on June 26, 2002, concomitant with the enactment of CCAIL, Germany amended its Criminal Procedure Code, adding a new section 153f. The section provides that the public prosecution office "may" dispense with prosecuting an offense punishable pursuant to section 6 through 14 of the CCAIL if the accused is not present in Germany and such presence is not to be anticipated ("ein solcher Aufenhalt auch nicht zu erwarten ist").[20] Additionally the public prosecutor "can" dispense with prosecuting an offense punishable under section 6 through 14 of the CCAIL if:

(1) there is no suspicion of a German having committed such offense;

(2) such offense was not committed against a German;

(3) no suspect in respect to such offense is present in Germany and such presence is not to be anticipated; and

(4) the offense is being prosecuted by an international court or by a state on whose territory the offense was committed, whose national is suspected of its commission or whose national was harmed by the offense.[21]

The fourth factor in the Criminal Procedure Code is similar to the complementarity principle in Article 17 of the Statute of the International Criminal Court (ICC), allowing for the deferral of prosecutorial action when another state's court prosecutes the offense.[22] In any case, as sections 6 through 14 of the CCAIL define and make punishable the specific crimes against humanity and war crimes, the amended Criminal Procedure Code mitigates, if not qualifies, the statement in the CCAIL that it applies even when the offense bears no relation to Germany ("keinen Bezug zum Inland aufweist").[23]

The complaint dismissed by the Federal Public Prosecutor in Karlsruhe on April 27, 2007, was filed November 30, 2004, dismissed by the prosecutor, appealed, dismissed again and supplemented in 2006. It named Lieutenant General Ricardo Sanchez, Major General Walter Wojdakowski, Brigadier General Janis L. Karpinski, Lieutenant Colonel Jerry L. Phillabaum, Colonel Thomas Pappas, Lieutenant Colonel Stephen L. Jordan, George Tenet, Major General Geoffrey Miller, Dr. Stephen Cambone, and then Secretary of Defense Donald Rumsfeld.[24] It alleged that persons detained at the facility at Abu Ghraib during the course of conflict in Iraq were treated cruelly and inhumanely in systematic torture, four of whom were beaten and sexually abused, deprived of sleep and food, subjected to sensory deprivation, and exposed to extreme temperatures and other mistreatment. The complaint charged then-Secretary Rumsfeld and the others as responsible both as sole perpetrators and as indirect perpetrators, by dint of their organizational command position, referring to the elements of crimes of persons in authority in the CCAIL, §§4, 13 and 14.[25] Section 4, for example, provides that a military or civilian commander who fails to prevent a subordinate from committing an offense under the CCAIL shall be punished in the same manner as the perpetrator; section 13 similarly provides that a civilian or military commander who intentionally or negligently omits or fails to supervise a subordinate shall be punished for violation of the duty of supervision if the subordinate commits a violation of the CCAIL, particularly if it was discernible to the superior and he or she could have prevented it. The complaint alleged that Secretary Rumsfeld is directly responsible for the war crimes, and that he ordered in April 2003 specific acts of torture against prisoners and further ordered others to violate human rights in order to gain critical intelligence.[26] Thus, the complaint charges him with responsibility for directly violating the CCAIL as well as violating the CCAIL under the doctrine of superior responsibility and the duty of supervision.

While torture is not defined in the CCAIL, it is argued that an internationally accepted definition is contained in Article 1 of the 1984 U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which refers to when "severe pain or suffering, whether physical or mental, is inflicted on a person."[27] The purpose of this paper is not to discuss the merits of the allegations, but it should be noted that the complaint incorporates principles derived from international humanitarian law and customary international law to justify the prosecutor's initiating an investigation under Germany's universal jurisdiction in the CCAIL.[28]

German legal scholar Professor Andreas Fischer-Lescano at the J. W. Goethe-Universität makes the argument that the CCAIL is an independent regulatory corpus, independent of the ICC and the German Criminal Code, and that because it provides for the application of universal jurisdiction, "it is always incumbent on the Prosecutor General to prosecute all crimes against international law stipulated in the CCAIL…"[29] He quotes the Federal Minister of Justice from the time of the enactment of the CCAIL, Herta Däubler-Gmelin:[30]

> Even perpetrators, who are neither German themselves nor commit their crimes against humanity in Germany or against Germans, can be made responsible here. This makes sense simply in order to underline the global significance of the proscription and prosecution of the most serious crimes.[31]

And therein again lies the core issue: the proponents of the German universal jurisdiction law do not rest it upon settled principles of extraterritorial reach, where a connection to the prosecuting state exists, but upon the need to "underline the global significance" of various serious crimes.

On February 10, 2005, German Federal Prosecutor General Kay Nehm dismissed the complaint. He looked to the Criminal Procedure Code section 153f, and relied upon virtually all the elements in the provision allowing the exercise of his discretion not to commence an investigation. He specifically noted that the primary jurisdiction for criminal prosecution was the United States, the home country of the defendants, and that there was no indication that the United States had refused to take action on the circumstances described in the complaint; that the acts were committed outside of Germany; and that no German was involved as a perpetrator or a victim of the described acts.

Critics immediately seized upon the prosecutor's decision as an abuse of discretion, arguing that the prosecutor incorrectly viewed the circumstances of the offenses as a single complex of criminal acts ("Gesamtkomplex"), thereby allowing the principle of complementarity to trigger dismissal of the complaint as the United States was about to initiate an investigation relating to the complex of criminal acts, rather than to the individual discrete offenses alleged against the named defendants. The decision was viewed by the proponents of the complaint as political and as a means to "protect the [German] federal government from further transatlantic disturbances."[32] Professor Fischer-Lescano further suggests the prosecutor had a duty to investigate whether there was in fact a court proceeding in the United States, and that a higher standard, derived from Article 129 of the Third Geneva Convention, should have required the superior officers to have been the subject of a U.S. prosecution before the activation of the complementarity principle in paragraph 4 of subsection 2 of Criminal Procedure Code 153f. [33] Nonetheless, the German higher regional court rejected the claim of prosecutorial abuse of discretion, supported the reasoning of the prosecutor and denied the request to force the prosecutor to commence the criminal investigation.[34]

Following a supplementation of the complaint in 2006, the complaint was again sent to the new Federal Prosecutor General, Monika Harms. It provided additional material on Abu Ghraib, including the 2005 congressional hearings and testimony of former U.S. Army Brig. Gen. Janis Karpinski—the one-time commander of all U.S. military prisons in Iraq. It again focused on the goal of the complainants to force an investigation and to nullify what they called the continuing impunity of the "string pullers" („andauernden Straflosigkeit für die Drahtzieher"). As noted, on April 27, 2007, the prosecutor dismissed the complaint, noting that there was no domestic connection and that it was not to be expected that the suspects would be present in Germany.[35] She dismissed the idea that American troop activity or movement in or through Germany had any factual connection to the offenses; neither the grant of overflight rights nor the permitting of intermediate stays on German soil constituted legally culpable preparation for the events in Guantánamo Bay or Iraq. She also noted that there were no concrete facts that orders were given from Germany that served to violate the CCAIL.[36] She also cautioned against the kind of "forum-shopping" that occurred here, where those bringing complaints alleging matters with no connection to the state did so because of the friendly forum; the result is an overloading of the resources of the prosecutor's office. Finally, she remarked on the limits on her investigatory powers, and the likelihood of a lack of success in a German investigation of the American activity, even with the testimony of Americans in Germany, all of which in turn militated against granting the investigation. If it were to be a one-sided trial, it would be contrary to the legislative intent of the statute.[37] Ultimately, her exercise of discretion was founded in the provisions of the Criminal Procedure Code, which provided the key grounds for dismissal—the lack of a connection and presence in Germany. These factors reflect precisely the accepted standards of reasonableness in determining when any authority considers the exercise of extraterritorial jurisdiction.

Nonetheless, the prosecutor's action led the principal lawyer, Wolfgang Kaleck, to complain: "Is this law meant only to look good on the books but never to be invoked?"[38]

The April 27 dismissal of the complaint may not signify Germany's unwillingness fully to embrace the CCAIL, nor does it undercut the juridical foundation of universal jurisdiction from the perspective of the proponents and defenders. Amnesty International has provided a legal memorandum on its website that exhaustively outlines the nature of genocide, crimes against humanity and war crimes,[39] but it draws the conclusion that the exercise of universal jurisdiction is compelled by conventional and customary international law and international humanitarian law (the law of armed conflict), all of which arise from treaty obligations and universally accepted principles.[40] In fact, while most states accept the universally accepted principles and their treaty obligations, none of those norms expressly confer or require a state to exercise pure universal jurisdiction to investigate, prosecute and enforce the relevant crimes when committed by extra-nationals abroad with no legitimate link to the state.

To support its view that pure universal jurisdiction is justified, the Amnesty International memorandum quotes a statement of the Inter-American Commission on Human Rights (IACHR), Organization of American States, that suggests that states should exercise universal jurisdiction because (1) signatory states have an obligation in the American Convention on Human Rights to prevent, investigate and punish violations of the relevant rights, (2) it is vital to thwart impunity from these violations granted through asylum, and (3) the Commission previously had stated in its Recommendations on Universal Jurisdiction and the International Criminal Court (Annual Report 1998, Ch. VII) that "the evolution of the standards in public international law has consolidated the notion of universal jurisdiction."[41] This reasoning brings to mind the notion that if

something is said often enough, it must be true. Indeed, some of these "standards in public international law" appear to be simply what is repeated in the recommendations of law commissions, law professors and international human rights activists.

Clearly, all that is "consolidated" on the topic of universal jurisdiction is the legislative adoption by a small number of European countries. Germany's experience, however, shows that not only does the country have to face its various jurisdictional challenges and practical arrangements for the exercise of the universal jurisdiction, but it might also reflect on whether, because of the discretion exercised by the prosecutor using principles of reasonableness, it is ever likely that a German court will proceed with a prosecution of serious crimes against humanity committed outside of Germany with no link to Germany. Only then will Germans have to face the more serious question of whether such a step breaches the sovereignty of one or more other states and what that means to the international order.

Taking a lunge at "realpoliticians," a term presumably referring to those who dwell in *realpolitik*, Professor Fischer-Lescano posits that international law ought to "succeed in reacting to its increasing politicization by generating a movement capable of guaranteeing legal autonomy."[42] Thus, he suggests the complaint regarding the occurrences at Abu Ghraib "is part of a world struggle for the rule of law on a global scale," and dismisses the following quote from Henry Kissinger that he himself provides, calls dramatic and fails to answer.[43] Kissinger noted:

> The advocates of universal jurisdiction argue that the state is the basic cause of war and cannot be trusted to deliver justice. If the law replaced politics, peace and justice would prevail. But even a cursory examination of history shows that there is no evidence to support such a theory. The role of the statesman is to choose the best option when seeking to advance peace and justice, realizing that there is frequently a tension between the two and that any reconciliation is likely to be partial. The choice, however, is not simply between universal and national jurisdictions.[44]

It is likely that German prosecutors will continue to dismiss complaints against the senior military officers and defense officials of the United States over the conduct of armed conflicts in which the United States is engaged, using the discretion provided by the Criminal Procedure Code section 153f. It would be a reasonable thing to do.

Endnotes

1 http://www.zeit.de/2005/01/Abu_Ghraib_2fAnwalt.

2 *See* Statement of the Generalbundesanwalt beim Bundesgerichthof, (Federal Prosecutor General, sometimes Federal Public Prosecutor), *at* http://www.generalbundesanwalt.de/de/showpress.php?themenid=9&newsid=273.

3 The Völkerstrafgesetzbuch [Code of Crimes Against International Law] provides as serious crimes subject to the act: § 6, Völkermord [genocide]; § 7, Verbrechen gegen die Menschlichkeit [crimes against humanity]; and in Chapter 2, Kriegsverbrechen [war crimes]. The latter is broken into: § 8, Kriegsverbrechen gegen Personen [war crimes against persons]; § 9, Kriegsverbrechen gegen Eigentum und sonstige Rechte [war crimes against property and other rights]; § 10, Kriegsverbrechen gegen humanitäre Operationen und Embleme [war crimes against humanitarian operations and emblems]; § 11, Kriegsverbrechen des Einsatzes verbotener Methoden der Kriegsführung [war crimes in the use of prohibited methods of warfare]; § 12, Kriegsverbrechen des Einsatzes verbotener Mittel der Kriegsführung [war crimes in the use of prohibited means of warfare]; § 13, Verletzung der Aufsichtspflicht [violation of the duty of supervision]; and § 14, Unterlassen der Meldung einer Straftat [failure to report a crime]. For text, *see* http://bundesrecht.juris.de/vstgb/index.html.

4 Also called the principle of complementarity, it applies to restrain prosecution under an exercise of universal jurisdiction if the authorities of the state of nationality of the suspect or victim or a competent international tribunal investigates the case; the principle is incorporated in Article 17 of the Rome Statute of the International Criminal Court (ICC) (July 17, 1998, and as amended)(U.N. Doc. A/CONF.183/9). The ICC is a court established by treaty and exercises jurisdiction among its member states as a court "of last resort" for serious crimes of genocide, crimes against humanity and war crimes. The United States is no longer a signatory. As to complementarity, Article 17 of the Statute specifies that the ICC shall determine a case is inadmissible if, among other things, it is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is unwilling or unable genuinely to carry out the investigation or prosecution or the state has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the state genuinely to prosecute, and the court may also consider whether there has been an unjustified delay or whether proceedings are or were not conducted independently or impartially. ICC, Art. 17.

5 *See supra* note 3.

6 *See* http://web.amnesty.org/pages/jus-index-eng

7 *See* Louis Henkin et al., International Law 1046 (3d ed. 1993); *also* Restatement (Third) of Foreign Relations Law of the United States §401(a) (1987).

8 Henkin, *supra* note 7; *see also* American Banana Co. v. United Fruit Co., 213 U.S. 347, 357 (1909).

9 U.S. v. Bowman, 260 U.S. 94, 98-99 (1922); *also* United States v. Felix-Gutierrez, 940 F.2d 1200, 1204 (9th Cir. 1991), *cert. denied,* 124 L. Ed. 2d 244, 113 S.Ct. 2332 (1993).

10 U.S. v. Usama Bin Laden, 92 F. Supp. 2d 189, 195-96 (USDC SDNY 2000); Christopher L. Blakesley, International Criminal Law 50-78 (2d ed. 1999); *also* Christopher L. Blakesley, *United States Jurisdiction Over Extraterritorial Crime*, 73 J. Crim. L. & Criminology 1109, 1110 (1982).

11 *Usama Bin Laden*; Restatement (Third) of the Foreign Relations Law of the United States ("Restatement") § 402(1)(c) (1987).

12 Restatement, *supra* note 11, § 402(3).

13 *Id*. at § 402(2).

14 *Id.* at § 402, comment g (emphasis added); sometimes the principle is characterized as including both the "passive personality principle" relating to where the *victim* of the act is the national and the "active personality principle" relating to where the *suspect* of the act is the national, *see* Amnesty International, *Legal Memorandum on Universal Jurisdiction: The Duty of States to Enact and Enforce Legislation*, ch. 1, *at* http://web.amnesty.org/pages/uj-memorandum-eng.

15 *Id. at* § 404; note that in this rendition of the universality principle, the Restatement reflects certain historical roots, namely, that pirates and other outlaws were deemed to be effectively stateless or acting without the political authority of a state. It should be contrasted with the assertion of universal jurisdiction over state actors, as does the complaint in the Rumsfeld case.

16 15 F.3d 833 (1994).

17 *Id.* at 842.

18 Restatement, *supra* note 11, § 403(2).

19 Belgium adopted a law of universal jurisdiction in 1993, but its courts

were quickly deluged with accusations against not only certain Rwandans allegedly involved in genocide, but also former Israeli Prime Minister Ariel Sharon, Yasser Arafat, George H.W. Bush, Colin Powell, and Richard Cheney. Belgium then amended its law to require the accused person be Belgian or present in Belgium. Spain's Constitutional Court decreed a version of universal jurisdiction, but even in the case of former Chilean dictator Augusto Pinochet, the Spanish judge who issued an arrest order did so not on the grounds of universal jurisdiction but on the grounds that some of the victims of the abuses committed in Chile were Spanish citizens, and ultimately the judge relied on the extradition law of the European Union to gain jurisdiction. Similarly, the International Court of Justice, an organ of the United Nations, has not relied entirely on universal jurisdiction, and where confronted with similar questions, has decided certain of these cases on the basis of the immunity of key government officials.

20 Strafprozeßordnung, § 153f(1).

21 Strafprozeßordnung, § 153f(2).

22 *See supra* note 3.

23 Völkerstrafgesetzbuch, § 1.

24 29.11.2004 Strafanzeige gegen den US-Verteidigungsminister Donald Rumsfeld, den ehemaligen CIA-Direktor George Tenet, den General Ricardo Sanchez und andere Mitglieder der Regierung und der Streitkräfte der Vereinigten Staaten von Amerika wegen Kriegsverbrechen und Folter zum Nachteil irakischer Internierter im Gefängnis Abu Ghraib/Irak 2003/2004

25 *Id.* at ¶ 4.

26 *Id.* at ¶ 4.2.1.

27 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, 1465 U.N.T.S. 85.

28 *See* Andreas Fischer-Lescano, *Torture in Abu Ghraib: The Complaint Against Donald Rumsfeld*, 6 German Law Journal No. 3 (2005).

29 *Id.*

30 Minister Däubler-Gmelin resigned from her position in 2002 after making a public statement about George Bush relying on a war strategy not unlike that of Adolf Hiltler; she strongly denied she was comparing them as persons.

31 *See supra* note 28.

32 *Id.* (citing article in Die Welt, 11 Feb. 2005).

33 Article 129 of the Third Geneva Convention (Geneva Convention relative to the Treatment of Prisoners of War adopted on 12 August 1949), provides:

> The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article. [¶] Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case. [¶] Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article. [¶] In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the present Convention.

34 Decision [Beschluss] from September 13th, 2005, Higher Regional Court [Oberlandesgericht] Stuttgart, 5th Senate for Criminal Matters.

35 *Supra* note 2.

36 *Id.*

37 *Id.*

38 Center for Constitutional Rights, *German Federal Prosecutor's Office Dismisses Rumsfeld War Crimes Case: Critics Call Move Political Capitulation To U.S. Pressure, at* http://www.ccr-ny.org/v2/reports/report.asp?ObjID=XpDtcb1AiP&Content=1011.

39 *See supra* note 13.

40 Amnesty International, *supra* note 14, ch. 3, esp. nn. 1-9.

41 *Id.*

42 *See supra* nn. 28, 25.

43 *Id.*

44 *Id.*

Environmental Law & Property Rights

NEPA Scope of Analysis in the Federal Permitting Context: The Federal Tail that Risks Wagging the Non-Federal Dog

*By Deidre G. Duncan & Brent A. Fewell**

The National Environmental Policy Act (NEPA) requires federal agencies to consider the environmental impacts of "Federal actions," not state or private actions.[1] The proper scope of an agency's NEPA analysis is determined by the extent of the "federal" action in question. For example, when the federal action at issue is wholly a federal undertaking, such as a federally constructed highway, it is clear that the scope of the NEPA analysis extends to the entire federal project. Yet, when the federal action is the issuance of a federal permit for a small component of an otherwise private or non-federal project, questions often arise regarding the proper scope of the federal action and the appropriate scope of the NEPA review. This situation is often referred to as the "small federal handle" problem.

Nowhere has the small federal handle problem been more vexing than in the case of non-federal projects that must receive Clean Water Act (CWA) section 404 permits from the Army Corps of Engineers ("Corps"). Environmental activists and others have increasingly used the NEPA process in the section 404 context as a way to expand the reach of the federal government over private activities, and as a means to thwart development.[2] The practical implications of expanding NEPA jurisdiction to a non-federal project can be significant, in many cases requiring years of costly environmental impact studies and lengthy delays from third party challenges.[3]

Indeed, the issue of how broadly NEPA should apply to a federal permitting decision over a wholly private project is particularly poignant as Congress contemplates legislative action to expand federal jurisdiction over the nation's waters in the wake of last year's Supreme Court decision in *Rapanos v. United States*.[4] Any increase in federal power and subsequent federalization of private activities is a serious encroachment on matters of traditional state and local powers, not to mention a continued erosion of rights and liberties entrusted to private landowners. As James Madison once remarked on the significance of separation of powers:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce…. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.[5]

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What Constitutes Federal Action Subject to NEPA?

The Council of Environmental Quality (CEQ) regulations define federal actions to include those actions "subject to Federal control and responsibility."[6] The Corps' NEPA regulations for the section 404 program are set forth at 33 C.F.R. Part 325 Appendix B §7(b), and were promulgated in 1988. The regulations state that the Corps' NEPA review for the regulatory program will cover "the specific activity requiring a [Department of Army] permit and those portions of the entire project over which the district engineer has sufficient control and responsibility to warrant Federal review."[7] The Corps explained the rationale as necessary "to prevent the unwarranted situation where 'the Federal tail wags the non-Federal dog'."[8]

Under the regulations, the Corps is considered to have "sufficient control and responsibility" over non-federal portions of a project only where "[f]ederal involvement is sufficient to turn an essentially private action into a Federal action" and where the "cumulative Federal involvement of the Corps and other Federal agencies is sufficient to grant legal control over such additional portions of the project." Thus, federal control and responsibility can only be found where the "environmental consequences of the additional portions of the projects are essentially products of Federal financing, assistance, direction, regulation or approval."[9]

While the Corps' regulations have consistently been upheld by courts as a reasonable interpretation of NEPA's mandates,[10] the Ninth Circuit's decision in *Save Our Sonoran* has raised questions about the Corps' scope of analysis in the 404 program.[11]

In *Save Our Sonoran*, one environmental group, Save Our Sonoran (SOS), opposed the construction of a 608-acre residential community on undeveloped desert property. Approximately thirty-one acres of the property (or about 5 percent of the project) consisted of arroyos and dry washes deemed by the Corps to be jurisdictional waters of the U.S.[12] The developer sought a CWA section 404 permit from the Corps. After assessing the impacts related to the activities affecting the washes, the Corps issued an environmental assessment and finding of no significant impact, concluding that filling the washes would not significantly affect the environment. SOS filed suit, alleging violations of NEPA and CWA, and challenged the Corps' decision not to analyze the impacts of the entire project. Siding with SOS, the district court granted a temporary restraining order, holding that the Corps should have assessed the impacts from the entire project, rather than limiting its review to the jurisdictional portions of the project. The court, in reaching this conclusion, likened the washes to human capillaries running through tissue or "lines through graph paper" and concluded that the water-related portions of the project were part and parcel to and inseparable from the upland portions.[13] The Ninth Circuit Court of Appeals

upheld the district court's decision, emphasizing the fact that because of the unique configuration of the Corps' jurisdiction, "no development of the property could occur without affecting the washes."[14] In other words, no project of any kind, including the applicant's proposed project, could have been constructed on the property without receiving Corps authorization.

The Impact of *Save Our Sonoran*

Save Our Sonoran has fallen hardest on the nation's arid Southwest (Arizona, New Mexico, Nevada, and parts of California). As with many regions around the country, the Southwest is witnessing substantial population growth, increasing the demand for more housing and supporting schools, commercial and retail establishments, and roads. Consequently, large development projects or master-planned communities, some of which are hundreds of thousands of acres in size, are becoming increasingly popular. And, while many environmental benefits result from such developments, they have become the *bête noire* of many environmental groups opposed to growth.[15]

Although *Save Our Sonoran* involved unique facts and did not signal a change in the Corps' approach to scope of analysis, environmental groups and others have consistently cited it as the basis for expanding NEPA review over non-federal projects. Importantly, in *White Tanks Concerned Citizens, Inc. v. Strock* (also known as the Festival Ranch case),[16] the district court helped to put *Save Our Sonoran* into proper perspective and provided greater clarity on the Corps' regulations and general role in local land use decisions.

White Tanks involved the construction of a 10,000-acre community near Phoenix, Arizona. The project proponent sought a permit from the Corps to fill 26.6 acres (or 0.3 percent of the entire project) associated with building houses, two golf courses, retail and commercial facilities, and utility and storm water management facilities. However, EPA objected to the Corps' issuance of the permit on the grounds that the project would result in substantial and unacceptable impacts to aquatic resources of national importance.[17] In declining to expand its scope of analysis to the entire Festival Ranch project, the Corps concluded in pertinent part:

> *Land use decisions are the responsibility of the local jurisdictions, not federal government*. Moreover, the Corps' permit action does not cause projects such as Festival Ranch to be developed. Numerous other authorizations, permits, and factors completely outside of Corps control are necessary and required by a myriad of entities to construct all the components of land development projects such as Festival Ranch that may result in many of the indirect and cumulative impacts of concern to commentors…[18]

The district court upheld the Corps' decision, concluding that the Corps had properly determined its scope of analysis under NEPA. The decision is now on appeal at the Ninth Circuit Court of Appeals.

Future Implications

The issue of NEPA scope of analysis is of increasing importance, particularly as the Congress contemplates expanding the scope of federal jurisdiction over the nation's waters in response to recent Supreme Court decisions in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*[19] and *Rapanos*,[20] both of which limited federal jurisdiction. The greater the extent of federal CWA jurisdiction, the greater the Corps' control over non-federal projects and, consequently, the broader the Corps' NEPA review. Members of Congress intend to introduce legislation this year that would redefine the term "waters of the United States" by removing any reference to the term "navigable."[21] Much of the controversy has focused on the reach of federal jurisdiction over isolated wetlands and intermittent and ephemeral streams which are characteristically small with only periodic flows of rain water. Any proposal that would remove the term "navigable" will invariably expand the scope of federal jurisdiction over many waters over which the federal government currently lacks jurisdiction. If Congress is successful in redefining "water of the United States" by stripping the term "navigable" from the Clean Water Act, many more private actions will likely be federalized through the NEPA process.

Endnotes

1 42 U.S.C. § 4332(2)(C) (2000).

2 *See, e.g.,* Save Our Sonoran, Inc. v. Flowers, 227 F. Supp. 2d 1111 (D. Ariz. 2002), aff'd, 408 F.3d 1113 (9th Cir. 2005).

3 If NEPA scope of analysis is extended to entire non-federal projects, the Corps will likely be required to prepare environmental impact statements on many more projects. This is contrary to the Corps' regulations that state that section 404 permits "normally require only an EA." 33 C.F.R. § 230.7(a) (2006).

4 126 S. Ct. 2208 (2006).

5 The Federalist No. 45 (James Madison) 298 (Modern Library ed., 2000).

6 40 C.F.R. § 1508.18 (2006).

7 33 C.F.R. pt. 325 app. B ¶ 7b (2006).

8 53 Fed. Reg. 3120, 3122 (Feb. 3, 1988).

9 *Id.* at 3135.

10 *See, e.g.,* Sylvester v. United States Army Corps of Engineers, 884 F.2d 394 (9th Cir. 1989) (upholding the Corps' regulations as a reasonable interpretation of NEPA obligations).

11 *Save Our Sonoran*, 227 F. Supp. 2d at 1111.

12 Following the recent Supreme Court decision in *Rapanos*, such washes might fall outside federal jurisdiction.

13 *Save Our Sonoran*, 227 F. Supp. 2d at 1114.

14 Save Our Sonoran, Inc. v. Flowers, 408 F.3d at 1123 (quoting district court at 1113).

15 Generally, one of the central features of a master planned community is common control and/or ownership which can lead to better upfront planning and coordination and result in more environmental benefits than ad hoc, piecemeal development. Large master planned developments offer the ability to reduce urban sprawl, eliminate redundant facilities and services, avoid and minimize impacts to sensitive environmental resources, protect and preserve green space, and install more energy and water efficient services.

16 No. 06703 (D. Ariz. Feb. 21, 2007).

17 The term "ARNI" was first established in 1992 by the Corps of Engineers and EPA in a Memorandum of Agreement that governed perceived disputes between the agencies in the 404 program. The term has never been defined under the Corps' or EPA's regulations or guidance, and consequently, EPA has broad asserted discretion in designating any resource as an ARNI. Until recently, the ARNI designation had been used sparingly by EPA for truly unique and significant aquatic resources where unacceptable adverse effects would occur; however, EPA in recent years has attempted to extend the ARNI designation to resources of limited value, entire watersheds, and upland areas.

18 *White Tanks*, slip op. at 12 (quoting Corps, emphasis added).

19 531 U.S. 159 (2001) (rejected the federal government's authority to regulate isolated, nonnavigable, intrastate waters and wetlands based solely on presence of migratory birds).

20 126 S.Ct. 2208 (plurality held that the definitional term "waters of the United States" can refer to only "relatively permanent, standing or flowing bodies of water," not "occasional," "intermittent," or "ephemeral" flows).

21 Lucy Kafanov, *Wetlands: Industry Girds to Fight House Bill Restoring U.S. Regulatory Power*, Greenwire (May 22, 2007). On May 22, 2007, Representative James Oberstar, Chairman of the House Committee on Transportation and Infrastructure, introduced H.R. 2421, entitled "Clean Water Authority Restoration Act of 2007," which has 158 co-sponsors. This legislative proposal, if enacted, would have broadly regulated "all interstate and intrastate waters" and all "activities affecting those waters" "to the fullest extent" of Congress's authority under the Constitution. Chairman Oberstar is expected to reintroduce similar legislation this year. Senator Feingold is expected to introduce a companion bill in the Senate.

Save America: Throw the Raisins Away!

*By Timothy Sandefur**

Many Americans would be shocked to learn that the federal government confiscates a quarter—or even half—of the entire California raisin crop every year. But they would be even more shocked to learn the reason for this policy: federal bureaucrats seize these raisins in order to make food more expensive.

The idea dates back to the New Deal, when certain economists were first given almost free reign over the *Code of Federal Regulations*, and the goal, at its heart, was to limit the production and sale of fruits and vegetables in order to "stabilize" their prices—i.e., to insulate them from the law of supply and demand. Believing that free market competition led to "chaos" and impoverished farmers, the architects of the Agricultural Adjustment Act of 1933 thought that the solution was obvious: by restricting the supply of foodstuffs on the market, government would create artificial scarcity that would raise the prices of remaining goods. The Act, and its successor, the Agricultural Marketing Agreement Act, therefore limited the amount of fruit or vegetables that farmers could produce, and compelled them to give up a certain fraction of their product each year for the government to sell overseas, rather than to hungry Americans. By making the remaining products more expensive, the farmers' income would go up.

Henry Hazlitt pointed out in his classic *Economics in One Lesson* that this argument is a mirage. The destruction of food means the destruction of wealth, so, although farmers may get a higher price for each bushel of raisins or each bag of peanuts, society in general will be less well-off, because it will have fewer raisins or peanuts for consumers to enjoy. The farmers' increased income is really just a tax imposed on consumers and transferred to the farmer. Worse, such policies disrupt the market mechanisms that allow farmers to know how much of their crop is demanded by the public, and distract farmers from producing the goods that are really desired. A farmer who lets a field lie fallow because of a government edict is not able to grow the plums or peaches that buyers are actually willing to purchase. In a country where thousands still go hungry every day, it is rarely wise to make food more expensive.

Yet, seventy years after their "emergency" origin, agricultural adjustment schemes remain on the books, as California raisin grower Marvin Horne learned in 2004, when he violated federal law by selling his entire raisin crop. A federal agency called the "Raisin Administrative Committee," which enforces federal raisin quotas, chooses an annual percentage of raisins (called "reserve" raisins) which must be handed over to the government when farmers deliver their produce to packers. This number is generally around 25 % of a farmer's crop, and has reached as high as 53 %. The U.S. Department of Agriculture then sells these "reserve" raisins to public schools and other buyers, and uses the proceeds from these sales to subsidize American raisin exporters. Whatever money is left over is then returned to the growers who first had their raisins confiscated.

Horne complained that this policy was wasteful, and that he had the right not to participate in it. "This is America," he told reporters. "I don't owe anybody any portion of my crop. The government cannot confiscate any of my produced raisins for the benefit of their program." But the USDA fined Horne more than $1,000 per day for each violation of its orders, and when Horne and his wife were found guilty of violating the order, they were fined $275,000 for selling their raisin crop as they wished. That same year, a group of raisin growers in Fresno, California, filed a lawsuit demanding that the government compensate them for the raisins that it takes each year. The Fifth Amendment, after all, holds that when the government takes private property for public use, it must pay the owner just compensation. But in December, the Federal Court of Claims ruled against the farmers. They knew about this program when they went into the business, explained Judge Charles Lettow, and in being forced to give up a portion of their crop, they "are paying an admissions fee or a toll—admittedly a steep one—for marketing raisins." The government "does not force plaintiffs to grow raisins or to market the raisins," it is merely requiring that "if they grow and market raisins, then passing title to their 'reserve tonnage' raisins to the [government] is their admission ticket."[1]

Such a conclusion violates a basic principle of Anglo-American law: the right to sell a product is not a government privilege for which the producer can be required to pay a "toll"—it is a natural right, inherent in the very fact of ownership, and when the government takes that right, it must justly compensate the person. The right to sell the product of one's labor is one of the most—if not *the* most—important aspect of the ownership right, and has been recognized as such throughout American history. Indeed, the very term "fruits of one's labor" indicates that among individual rights, the farmer's right to sell his produce was one of the first to be recognized. As Sir William Blackstone noted in the 1760s, "Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner."

Regarding the court's statement that the farmers "chose" to enter the interstate market, in light of the Supreme Court's expansive readings of the Commerce Clause, it is virtually impossible for any person selling a commodity to *avoid* entering the interstate market. Under federal law, raisin producers cannot even sell raisins from roadside stands to passersby without being considered members of the "interstate market" and subject to the raisin-confiscation scheme.

Economists are virtually unanimous in their view that agricultural adjustment is ultimately self-defeating and wasteful. But agricultural adjustment laws include a specious element of "democratic" decision-making that gives the illusion

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of voluntarism to what is actually a coercive government program. The law authorizes any raisin producer to petition the government to adopt a "marketing order" that, if approved by a majority vote of the farmers, will be enforced on all of them, including those who vote no. Moreover, agricultural cooperatives are allowed to bloc-vote on behalf of all of their members, meaning, as one expert pointed out, that "there will not infrequently be a single cooperative corporation that dominates the production of the commodity." Cooperatives can therefore override their own members' actual preferences, and muster whatever votes are necessary to adopt or reject a proposal regardless of the desires of their constituents. Nor are courts particularly concerned with preserving even this minuscule element of free choice: in a 1993 case, when citrus growers who disagreed with a proposed cartel agreement were outvoted by the Sunkist Cooperative's bloc-vote, and sued on the grounds that this violated their constitutional rights, the Federal Court of Appeals adopted "rational basis" scrutiny, and refused to accord their voting rights the same degree of respect accorded to the right to vote in other governmental elections.[2] Individual growers, even those belonging to agricultural cooperatives, have no real voice in the process; yet, while this is generally considered good reason to adopt heightened scrutiny, judges wary of protecting economic freedom have refused to preserve the participatory rights of this particular "discrete and insular minority."

Who, then, benefits from the federal raisin cartel? Big agricultural firms, whose "territory" is secured against newcomers and innovators by these restrictions on the opportunity. As Jim Powell points out in his devastating book, *FDR's Folly: How Roosevelt And His New Deal Prolonged The Great Depression,* agricultural adjustment schemes always did benefit powerful, entrenched agricultural companies against small farmers, who could only compete through the lower prices that the law now prohibited. Subsidies to farmers who do not grow products, restrictions on the acreage a farmer may plant, and minimum price rules that bar newcomers, protect slow, inefficient—but politically well-connected—corporations against upstarts who wish only to offer the public food they need at lower prices. Such laws, Powell concludes, are "the most blatant type of interference with U.S. agricultural markets, a throwback to medieval times when guilds determined who could work in various trades, how much they could charge, and how much they could produce." Farmers are essentially prohibited from going outside of the federally-created raisin cartel, because they are subjected to regulations any time they sell raisins in "interstate commerce"—meaning any commerce at all. Yet when they seek just compensation for the property that the government takes from them, they are told that the system is essentially voluntary, that they chose to participate in it, and that they can be required to pay a "toll" for the privilege of selling the raisins they have produced through their own labor and ingenuity.

The case is now pending before the Federal Circuit Court of Appeals.[3] Meanwhile, Americans will continue to pay inflated prices, mostly unaware of the injustices committed daily against hardworking farmers—or of the federal bureaucracy's vigilance in ensuring that grocery bills remain high.

Endnotes

1 Evans v. United States, 74 Fed.Cl. 554, 563-64 (Fed.Cl. 2006)

2 Cecelia Packing Corp. v. USDA, 10 F.3d 616, 624-25 (9th Cir. 1993).

3 Evans v. United States, No. 07-5045.

Federalism and Separation of Powers

Holding Enemy Combatants in the Wake of *Hamdan*

*By Ronald D. Rotunda**

In *Hamdan v. Rumsfeld*, the Supreme Court reversed (5 to 3) a decision that John Roberts had joined when he was on the D.C. Circuit.[1] *Hamdan* held, first, that it had jurisdiction. In other words, the Detainee Treatment Act of 2005, which limited federal jurisdiction, did not apply to pending cases.[2] Second, the Court held that the Uniform Code of Military Justice did not authorize the President to set up "military commissions" (or "war crimes tribunals" in popular parlance) to try alleged war criminals.

In addition, a plurality of the justices offered their views of the Geneva Convention.[3] However, the majority opinion focused on what it saw were the limitations of the governing statute. Justices Breyer, Ginsburg, Souter, and Kennedy invited Congress to change the result by changing the statute.[4] Congress then enacted a new law limiting habeas jurisdiction and authorizing trial by military commission subject to various safeguards. Congress enacted this new law, the Military Commissions Act of 2006 ("MCA"), within months of the decision in *Hamdan*.[5] Hence, *Hamdan* is primarily case based on statutory interpretation. It merely holds that the President needs congressional authorization for the military commission, not that he cannot have military commissions at all.

Litigants promptly argued that this new statute was unconstitutional—although four members of the majority in *Hamdan* had invited such a statute and the three members of the dissent saw no problem with the existing law.[6]

The D.C. Circuit, in *Boumediene v. Bush,*[7] rejected all the challenges to the new law that the plaintiffs raised.[8] It held (2 to 1) that the MCA limits federal courts of jurisdiction to hear habeas and non-habeas claims by aliens detained as enemy combatants. To accept appellants' arguments "would be to defy the will of Congress," because "one of the primary purposes of the MCA was to overrule *Hamdan*."[9] The court held that the MCA is constitutional. "The precedent in this court and the Supreme Court holds that the Constitution does not confer rights on aliens without property or presence within the United States."[10] There is no violation of the habeas corpus suspension clause because historically, there was no habeas for an alien held "outside the territory of the sovereign."[11]

In response, defense counsel for David Hicks, charged with war crimes, responded that the President, the Secretary of Defense, and Congress "intentionally created a rigged system that guarantees convictions in order to cover up wrongdoing" and that "everyone involved is potentially guilty of war crimes greater than the charge against" Mr. Hicks.[12]

Charging the President, the Secretary of Defense, and Congress with war crimes is a most serious charge. To understand that charge, to understand *Hamdan* and its aftermath as represented by *Boumediene*, and to understand future challenges to the MCA—*Boumediene* only dealt with jurisdiction—it is necessary to take a brief romp through history, focusing on the major cases.

I. The Historical Preclude to the Detainee Cases of 2004

A trio of cases that date back to the Civil War and World War II set the stage for the Detainee Cases of 2004 and the Detainee Case of 2006.

The first is *Ex parte Milligan*.[13] This case grew out of the Civil War but the Court decided it after the war had ended. The commander of the Indiana military district ordered the arrest of Milligan, a civilian. The military tried him in a court martial, which convicted him and sentenced him to death. He applied for a writ of habeas corpus, arguing that, as a civilian and citizen of Indiana, a non-rebelling state, he was not under the jurisdiction of a court martial.

The *Milligan* Court summarized the crucial facts:

> Milligan, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana. Had this tribunal the *legal* power and authority to try and punish this man?[14]

Under those facts, the Court said no. Congress could not authorize such military commission to operate since "the late rebellion" because the federal courts were open and operating. Milligan had never been behind enemy lines fighting for the Confederacy, nor was he a Confederate soldier.

The Court decided the next major decision during World War II. That case, *Ex parte Quirin*, often called the Nazi Saboteurs case.[15] At least one of the petitioners was an American citizen working as a spy for the Germans. Unlike Mr. Milligan, the American citizen had been behind enemy lines. He returned to the United States as a spy for the Nazis. Shortly after the government captured the alleged saboteurs in this country, President Franklin D. Roosevelt created a military tribunal on July 2, 1942, to try them for violating the laws of war. The Government gave them appointed counsel and the military *tried them in secret*.

While that *Quirin* military trial was proceeding, the defendants applied for habeas relief. Supreme Court heard oral argument on July 29, 1942, issued a very short per curiam opinion, on July 31, 1942 (which denied petitioners leave to file petitions for writs of habeas corpus), and then took a summer recess. The military tribunal then found the suspects guilty; a week after the July 31st opinion, the Government executed six of them, including, Hans Haupt, who was a U.S. citizen. The

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Court returned from its recess and filed its extended opinion on October 29, 1942.

Quirin imposed swift justice, some think too swift. Detractors argue that J. Edgar Hoover wanted the trials in secret so that he could take credit and the public would not know how lucky the FBI had been in apprehending the saboteurs. True enough. But there was also a less prosaic reason for the secrecy. If the trial were public, the Nazi Government also would have learned that its spies had almost succeeded in their sabotage, and it would, therefore, be more likely to try again. In 1942, it was not clear who would win the war. Every extra division of American troops used to guard our borders was a division that would not be fighting in the European or Pacific theaters.

Quirin held that rules protecting *civilians* from courts martial while civil courts can function and are open do not insulate enemy *combatants* from military jurisdiction. Milligan was a civilian (a noncombatant), unlike Mr. Haupt, who was a combatant, i.e., a soldier for the Nazis. Hence, Haupt was not within the purview of *Milligan*'s holding.

Moreover, Haupt was more than a mere combatant or solider for Germany. He was also a spy, and hence subject to prosecution. The Government cannot prosecute enemy soldiers merely because they are soldiers, but it can prosecute spies. *Quirin* drew a distinction between "lawful" and "unlawful" combatants (or "privileged" and "unprivileged" combatants). The Court ruled that their status as "unlawful" removed them (including the American citizen) from the purview of *Milligan*'s holding:

> By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[16]

Quirin explained that Mr. Milligan was not "a part of or associated with the armed forces of the enemy" but "was a non-belligerent, not subject to the law of war…."[17] In contrast to Mr. Milligan, the detainees in *Quirin* had been in Germany and entered the United States as spies for the Third Reich.

The third decision, *Johnson v. Eisentrager*, also arose out of World War II.[18] A U.S. military commission in China tried certain German soldiers and found that they had engaged in military activity against United States in China *after the surrender of Germany* (but not after the surrender of Japan). Hence, they violated the laws of war because they fought after their country had surrendered. After their conviction, the U.S. military detained these German nationals in a U.S. prison in occupied Germany. They sued in the U.S. courts, claiming that their military trial, conviction, and imprisonment violated the Constitution, U.S. laws, and the Geneva Convention governing treatment of prisoners of war. Their jailers, stationed in Germany, were not parties to the proceeding, but the Court assumed that "the respondents named in the petition have lawful authority to effect that release."[19] The Court, in other words, had no jurisdiction over the jailers but did have jurisdiction over their superiors, such as the Louis A. Johnson, the Secretary of Defense.

Justice Jackson, speaking for the *Eisentrager* Court, phrased the issue as follows: "The ultimate question in this case is one of jurisdiction of civil courts of the United States vis-à-vis military authorities in dealing with enemy aliens overseas."[20] He found no jurisdiction.[21] Neither the Constitution nor the habeas statute gave jurisdiction to any federal court because the jailers were outside the court's jurisdiction:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. *Nothing in the text of the Constitution extends such a right*, nor does anything in our statutes.[22]

Now, with the stage set, we move on to the Detainee Cases of 2004.

II. The Three Detainee Cases of 2004

A. The Padilla Case

Rumsfeld v. Padilla, involved Jose Padilla, an American citizen arrested when he entered the United States on a flight that from Pakistan to Chicago.[23] The civilian authorities later turned him over to U.S. military custody. The Government, at that point, did not charge Padilla with a crime although it had information that he was planning acts of terror, such as blowing up buildings. Under these facts, Mr. Padilla was, like Mr. Haupt, a spy who entered the United States after having served the enemy in Afghanistan. However, unlike Mr. Haupt, the Government captured Mr. Padilla at the border.

In *Padilla*, Chief Justice Rehnquist held (5 to 4) that the immediate jailer, the commander of the naval brig in Charleston, South Carolina where the military detained Padilla, was the only proper respondent in a habeas petition, so the Southern District of New York did not have jurisdiction over the commander. The Court dismissed the petition with leave to re-file it in South Carolina.[24]

Padilla remained in U.S. custody. He filed a habeas petition in the district where he was confined, and the Government presented evidence, under seal, that he was an enemy combatant. The trial judge ruled that the Government must either charge Padilla with a crime or release him. The Fourth Circuit unanimously reversed.[25]

The Fourth Circuit held that the Authorization for Use of Military Force permitted the President to detain Padilla without charge, as an enemy combatant, until the end of hostilities in Afghanistan. The facts were not in dispute because Padilla's lawyers *stipulated* that Al Qaeda operatives recruited Jose Padilla—

> to train for jihad in Afghanistan in February 2000, while Padilla was on a religious pilgrimage to Saudi Arabia. Subsequently, Padilla met with al Qaeda operatives in Afghanistan, received explosives training in an al Qaeda-affiliated camp, and served as an armed guard at what he understood to be a Taliban outpost. When United States military operations began in Afghanistan, Padilla and other al Qaeda operatives moved from safehouse to

> safehouse to evade bombing or capture. Padilla was, on the facts with which we are presented, "armed and present in a combat zone during armed conflict between al Qaeda/Taliban forces and the armed forces of the United States."… After receiving further training, as well as cash, travel documents, and communication devices, Padilla flew to the United States in order to carry out his accepted assignment.[26]

Given those *stipulated* facts, Mr. Padilla is similar to the saboteurs in *Quirin*. In *Hamdi*, discussed below, Justice O'Connor emphasized that *Quirin* (not earlier cases that the dissent cited) is "the law today."[27] As the Fourth Circuit unanimously concluded, the President may —

> detain militarily a citizen of this country who is closely associated with al Qaeda, an entity with which the United States is at war; who took up arms on behalf of that enemy and against our country in a foreign combat zone of that war; and who thereafter traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets.[28]

The Fourth Circuit's reasoning is straightforward. It relied on *Quirin*: Mr. Padilla has no more rights than Mr. Haupt in *Quirin*. The Fourth Circuit accepted *Quirin* as controlling because the O'Connor plurality in *Hamdi* reaffirmed *Quirin*'s continuing validity. The specific issue in *Quirin* was the President's authority to subject a United States citizen who was also an enemy combatant to military trial. As the Fourth Circuit noted, "the plurality in *Hamdi* went to lengths to observe that *Haupt* [the American citizen], *who had been captured domestically*, could instead have been permissibly *detained* for the duration of hostilities."[29] If you add the four justices who joined the O'Connor plurality with Justice Thomas' vote (he would defer even more than the plurality to the power of the executive to detainee enemy combatants), one has a majority. The Fourth Circuit followed that majority.

However, the *Quirin* Court upheld a military *trial* of Haupt, while the issue in *Padilla* is the power of the military to hold (detain) Mr. Padilla without trial. But "the plurality in *Hamdi* rejected as immaterial the distinction between detention and trial (apparently regarding the former as a lesser imposition than the latter), noting that "nothing in *Quirin* suggests that [*Haupt*'s United States] citizenship would have precluded his *mere detention* for the duration of the relevant hostilities."[30]

One might respond, "but Padilla is only an *alleged* combatant." Not true. Recall that his own lawyers *stipulated* that al Qaeda trained him and he was fighting the American armed forces in Afghanistan. Then, al Qaeda told him to come to the United States and cause mayhem.

Hence, the Fourth Circuit concluded that the President has—

> the power to detain identified and committed enemies such as Padilla, who associated with al Qaeda and the Taliban regime, who took up arms against this Nation in its war against these enemies, *and* who entered the United States for the avowed purpose of further prosecuting that war by attacking American citizens and targets on our own soil—a power without which, Congress understood, the President could well be unable to protect American citizens from the very kind of savage attack that occurred four years ago almost to the day.[31]

Quirin approved of FDR's decision to try the unprivileged enemy combatants. In *Padilla*, the court approved of the President's decision to detain the unprivileged enemy combatant. Detention only lasts until the end of the war. We do not know when that the war will end, but we do know that it is not over yet. As Justice O'Connor recognized, the war in Afghanistan will last as long as American troops are still fighting there and dying there.[32]

The fact that we do not know when this war will end is hardly unusual. Whenever a war starts, no one knows when it will end. On December 8, 1941, no one knew when World War II would end or who would win. No one knew, when the "Seven Days War" started, when it would end. Historians did not name that war the "Seven Days War" on day one or day two. Similarly, when the "Seven Years War" or when the "Thirty Years War" started, no one knew when they would end.

After the *Padilla* decision, the Government successfully snatched defeat from the jaws of victory. The Government argued that the case was moot, opposed certiorari, turned Padilla over to civilian custody, charged him with various crimes and began prosecution in an Article III court—a prosecution that continues to this day. The Supreme Court denied certiorari, allowed the transfer from the military authorities, but did not decide the mootness issue.[33]

One wonders why the Government thought it could moot the issues. They are not moot, for Padilla can sue for damages for the period of his allegedly unlawful detention. Now that the Government has indicted him, we should hardly be surprised if he seeks to exclude any evidence procured against him because of his allegedly unlawful detention. That issue also serves to prevent mootness. Moreover, the Government still claims that it has the right to detain enemy combatants such as Padilla; its transfer of Padilla to the custody of an Article III court does not change the Government's claim, so the Government is free to return to its old ways. For all these reasons, it is unlikely that any court would find the issues moot.[34]

One might think that the Government should have supported certiorari, so that it would know what the rules are. Moreover, it could hardly find a better vehicle to set the stage for a favorable ruling. Recall that Padilla *stipulated* that he was an enemy spy sent to the United States to cause terror.[35]

B. The Rasul Case

Rasul v. Bush[36] involved non-Afghan nationals (2 Australians, 12 Kuwaitis) captured abroad in connection with the Afghanistan hostilities. The military held them at the Guantánamo Bay, Cuba, an American Naval Base. Their brief emphasized that "[t]hey are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States[.]"[37]

Justice Stevens, for the majority in *Rasul*, found that the federal court has jurisdiction to hear the habeas claims but did not decide what further proceedings may be necessary. The Court did not even decide that the litigants would win, only that the lower courts had jurisdiction to hear their petitions.

In *Hamdi*, decided the same day and discussed below, the O'Connor plurality articulated procedures that it required for U.S. citizens who claimed that they were not enemy combatants.

One would think that the *Rasul* aliens would be entitled to no greater protections than those afforded to U.S. citizens, so the military decided to offer the *Hamdi* procedures to *all detainees* held in Guantánamo (whether or not they were citizens of allied countries, like Australia, or countries not allies at the time of capture, like Afghanistan or Iraq). The military created what it called Combat Status Review Tribunals (called "CSRTs") to offer what *Hamdi* only required for U.S. citizens: a "meaningful opportunity to contest the factual basis for [their] detention."[38] The purpose of these tribunals is to decide if the alleged detainee really is an enemy combatant, a problem caused because the detainees do not wear uniforms.

The detainees in *Rasul* were similar to the detainees in *Johnson v. Eisentrager*. To find jurisdiction, the *Rasul* Court first had to distinguish *Eisentrager*. The Court did not overturn that case. Instead, it said that statutory changes following *Eisentrager* now gave the courts habeas jurisdiction. The court need not have jurisdiction over the detainee as long as it has jurisdiction over a custodian of the detainee.[39]

If one compares the results in *Rasul* to *Padilla*, we have an odd result: aliens held in Guantánamo have more rights that U.S. citizens held in the United States. Aliens held at Guantánamo can file a habeas petition anywhere in the United States while U.S. citizens (and aliens held in this country) must file suit in the federal district where the jailer resides. One wonders why Congress would write a statute that way. We can continue to wonder because the Court offers no explanation why it was interpreting the habeas statute in *Rasul* and *Padilla* to reach that result.

Rasul really foreshadowed the result in D.C. Circuit's opinion in *Boumediene v. Bush*.[40] Because *Rasul* was simply interpreting the habeas statute differently given the change in the statutory framework, Congress should be able to change the result by changing the statute. That is what it did after *Hamdan v. Bush*, discussed below.

One does not "suspend" habeas corpus by reverting to a statutory definition that the *Eisentrager* had previously upheld as constitutional. Recall that *Eisentrager* concluded that the statute denied habeas to the habeas petitioners and that this interpretation of the statute was constitutional. This result would change if the Court were to decide that the Guantánamo Bay Naval Base is part of the sovereign territory of the United States—a result that would surprise both the United States and Cuba.

C. The Hamdi Case

Hamdi involved a natural-born American citizen captured in Afghanistan allegedly fighting against American troops and their coalition partners.[41] Mr. Hamdi allegedly fought for al Qaeda and for the Taliban, a group that controlled Afghanistan and harbored al Qaeda. Mr. Hamdi was captured with an AK-47 in his hand, but his father claimed that his son went to Afghanistan to do "relief work," and arrived in Afghanistan less than two months before September 11, 2001.[42]

Mr. Hamdi, the detainee, told a different story. He said that he wanted to join the Saudi Army to obtain military training so he could learn to kill Israelis. When the Saudi Army rejected him, he sought military training in Afghanistan so that al Qaeda and the Taliban could teach him how to kill; then, he would go to Israel so that he could kill Israelis.[43] In that sense, one might argue that rather than embracing the Taliban cause, he simply wanted to use Americans as target practice. That would still make him a terrorist and a danger.

The O'Connor plurality concluded that the military could not detain a U.S citizen unless it first held a minimal hearing to determine that the citizen was really a combatant. One cannot tell that he is a combatant by looking at his uniform because these combatants do not wear uniforms. However, the fact that he was carrying an AK-47 and with a Taliban military unit when captured did not help his position.[44]

In this war, unlike in previous ones, it is more difficult to tell genuine enemy combatants from noncombatants because the combatants generally do not wear uniforms. The United States and its coalition partners (Afghan forces not under direct US supervision) may capture people by mistake. The fact that the United States has paid a bounty for some detainees only serves to exacerbate the problem.

After this decision, the military created what it called "Combat Status Review Tribunals," or CSRTs, to determine if a detainee was really an enemy combatant or simply captured by mistake. These CSRTs are not war crimes tribunals (called, in military parlance, "military commissions"). The job of CSRTs is neither to punish nor to try. Instead, it is much more modest: to determine if the detainee was really an enemy combatant instead of an "errant tourist, embedded journalist, or local aid worker."[45] Because of this modest burden, Justice O'Connor emphasized that the military can shift the burden of proof to the detainee, who has to prove that the military was in error.

The military drafted the CSRT rules based on O'Connor's opinion in *Hamdi*. Her opinion said that the hearing officers must not include anyone involved in the capture; that hearsay is admissible; that rebuttable presumption favors the Government; that each detainee may testify but has a right not to testify, and that the detainee may call witnesses. Commentators have criticized CSRTs because, for example, there is a rebuttable presumption that favors the Government. But one must recall that Justice O'Connor's opinion created this presumption.[46]

CSRT rules, like grand jury rules (and like Army Regulation 190–8, on which O'Connor relied), do not authorize lawyers to be present to represent the detainee. *Hamdi* only requires CSRTs for U.S. citizens, but the military offers them to all detainees held in Guantánamo Bay.

Guerrilla wars are not new. The war on terrorism is really a guerilla war where the battlefield is not limited to a particular geographic area. The enemy combatants in this guerrilla war do not normally wear uniforms. They also do not abide by the laws of law. In other words, they do not carry their guns openly; they target protected places, like mosques (which they use to keep guns and supplies); they pretend to surrender when they are not really surrendering, and so forth. Because they do not wear uniforms, it is inevitable that we or our allies might capture people whom we think are guerillas but are not.[47] The Supreme Court required the military to create CSRTs in order to sort out these mistakes, to make sure that we do not detain the "errant tourist, embedded journalist, or local aid worker."[48]

Pursuant to this new procedure, the military has released some detainees. Critics say that the CSRTs release too few detainees, but one can argue that they release too many: the military has recaptured or killed in battle about 5% to 10% of the detainees it has released.[49]

The Court decided the war crimes issue in *Hamdan v. Rumsfeld*, discussed next.

III. Hamdi and the War Crimes Tribunals

A. Introduction

One of the President's responses to the 9/11 attack was to create war crimes tribunals or "military commissions" to prosecute selected enemy combatants for alleged war crimes. By 2006, the Government had charged 13 combatants. One of these defendants was Salim Ahmed Hamdan, a Yemeni national, who filed a habeas petition in federal court. He admitted being bin Laden's chauffeur between 1996 and 2001 but denied committing war crimes.

In November 2001, during fighting in Afghanistan with the Taliban, militia forces captured Hamdan and turned him over to the U. S. military, which transferred him to the Guantánamo Bay Naval Base where the military held him as an enemy combatant and eventually charged him, among other things, with "conspiracy to commit war crimes." He conceded that a court martial constituted in accordance with the Uniform Code of Military Justice ("UCMJ") would have authority to try him, but argued, among other things, that the tribunal that was trying him was not so constituted. The trial judge agreed and used habeas to enjoin the military commission; the D.C. Circuit reversed unanimously.

In *Hamdan v. Rumsfeld,* the Supreme Court (5 to 3) reversed the D.C. Circuit.[50] Chief Justice Roberts did not participate because he had been on the panel that had ruled against Mr. Hamdan.[51] This case, in spite of all the publicity surrounding it, did not involve constitutional issues, only a statutory one. The Court held that the military commission convened to try Hamdan lacked the power to proceed because its structure and procedures violated the Uniform Code of Military Justice (UCMJ). Justice Stevens, in a portion of the opinion that was a plurality, also argued that the Government's procedures violated the Geneva Conventions, but he could not muster five votes for that proposition.[52]

Justice Stevens spoke for the Court on some issues and for the plurality on others. Five other justices wrote various concurrences and dissents in the 185-page opinion. The Court said that the military could prosecute Hamdan under the UCMJ if the tribunal had procedures akin to a court martial, *or* if Congress authorized the President to use different procedures for the defendants.

B. The Detainee Treatment Act and the AUMF

The Court held that the jurisdictional limitations of the Detainee Treatment Act of 2005 (DTA) did not apply to *pending* cases.[53] Congress enacted the DTA *after* Hamdan had applied for certiorari. It provides that "no court, justice, or judge shall have jurisdiction to hear" the habeas application of Guantánamo Bay detainees.

Then the Court agreed with Hamdan that no Act of Congress authorized the President to create these military commissions. The Court assumed that the Congressional Authorization of the Use of Military Force ("AUMF") "activated the President's war powers" (citing *Hamdi v. Rumsfeld*) and that "those powers include the authority to convene military commissions in appropriate circumstances." Moreover, "we do not question the Government's position that the war commenced with the events of September 11, 2001," but, "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization set forth in Article 21 of the UCMJ."

C. Absence of a Formal Declaration of War

The Court was, frankly, unconcerned that Congress had not "declared war" in a formal sense, because the Court recognized that we are at war. Congress had passed the AUMF and that is enough. "[W]e assume that the AUMF activated the President's war powers,"[54] and "we do not question the Government's position that the *war* commenced with the events of September 11, 2001."[55] Later, Stevens emphasizes yet again: "nothing in our analysis turns on the admitted absence of either a formal declaration of war or a declaration of martial law."[56]

That theme repeats itself in all the detainee cases.[57] Commentators often emphasize that this war is "different" because there is no declaration of war. However, Congress does not need to declare war in order for the President to make war. Indeed, most of the wars that America has fought never involved a declaration of war. For example, Congress did not declare war when we entered the Korean War, or the first Gulf War. The Civil War, our bloodiest, was never declared.

Oddly enough, one can find a formal "declaration of war" that began the present "war on terror," but the United States did not issue that declaration. The time was August 1996, and al Qaeda's leader, Osama bin Laden, actually "declared war" on the United State. In 1998, he expanded his declaration to include killing "Americans and their allies, civilians and military … in any country in which it is possible to do it."[58]

While Congress never formally "declared war" on al Qaeda, in 1998, after al Qaeda agents bombed U.S. embassies in Kenya and Tanzania, the United States responded by firing missiles at suspected al Qaeda targets in Afghanistan and Sudan. The U.S. Ambassador to the United Nations promptly reported this action to the Security Council: "In accordance with Article 51 of the United Nations Charter, I wish, on behalf of my Government, to report that the United States has exercised *its right of self-defense* in responding to a *series of armed attacks* against U.S. Embassies and U.S. nationals."[59]

D. Afghanistan Not an International Conflict

The armed conflict in Afghanistan involves many nations besides the United States. Armies of Australia, Great Britain, Germany, Canada, NATO, and other countries are all fighting to this day in Afghanistan against al Qaeda and its Taliban supporters. And those supporters come from other countries as well—from Saudi Arabia, Australia, Afghanistan, and 38 other countries.[60]

Nonetheless, Justice Stevens' opinion said that the present conflict with al Qaeda and the Taliban, while not limited to one nation, is not a conflict between nations. The Geneva Convention's Common Article III applies to an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Stevens said that this Article applies because this multi-nation conflict in Afghanistan is not a conflict "of an international character."

Stevens then argued because this conflict is not "of an international character," the President could not use military commissions (instead of courts martial, the "regularly constitute tribunals") unless he made a special determination that they are necessary. But the President has not made an "official determination that it is impracticable to apply the rules for courts-martial."[61] If he had made such an "official determination," the situation would change: "We assume that *complete deference* is owed that determination."[62]

Because the President had not made his determination to the satisfaction of Stevens, the justices then had to decide if a military commission was a "regularly constituted court" within the meaning of the Geneva Conventions. They concluded that a military commission is not a "regularly constituted court" but a court martial would be.

E. Changing the Tribunal's Rules

One reason the *Hamdan* majority concluded that the commission is not regularly constituted is because "its rules and procedures are subject to change midtrial, at the whim of the Executive."[63] The Court was right.

After the Government had started the war crimes proceedings and *after* it had won in the Court of Appeals on July 15, 2005, it announced in October 2005 that it was changing all the rules. The military's appointing authority dramatically changed the Commission rules—the rules that the D.C. Circuit had approved—and then applied those changes to pending proceedings.

Not surprisingly, the lawyers for the detainees complained. Why would the Government create this problem? The Government said it was imposing the change in order to make the process more "efficient."[64] The Supreme Court found, on June 29, 2006, that the change in the rules was one reason why the tribunals were not "regularly constituted." The Government imposed a self-inflicted wound that helped it to lose its case.

F. Pro Se Representation

The Commission's original rules, like its changed rules of October 2005, did not allow the accused to represent himself. The Commission, by fiat, assumed that no defendant was competent enough to defend himself, although the Commission thought that a defendant was competent enough to plead guilty.

However, the standard rule in this country is that a criminal defendant has a constitutional right to represent himself in a state or federal trial if he voluntarily and intelligently elects to do so.[65] The Commission rules, until Congress imposed a change by statute, forbade pro se representation.[66]

Consider the case of al Bahlul, a detainee charged with war crimes who refuses civilian or military counsel. During the August 2004 war crimes proceedings, al Bahlul asked to represent himself. Judge Brownback immediately said no. He conducted no hearing to determine if al Bahlul was competent enough to defend himself.

Later, al Bahlul then asked to make a statement and he asked not to be interrupted. He started speaking and said:

> As God is my witness, and the United States did not put any pressure on me, I am an al-Qaeda member, and the relationship between me and Sept. 11… [67]

"Stop!" yelled Judge Brownback, who interrupted him. Brownback told the tribunal members—incorrectly—that he cut off al Bahlul because the defendant's statement, which was not under oath, was inadmissible as evidence. The prosecution objected to the judge's announcement. Defense lawyers chimed in. Eventually, after the lawyers spoke, Judge Brownback turned back to al Bahlul, who had lost his train of thought and sat down! We never heard what al Bahlul had to say. His complete statement might well have been interesting.

Later, during the proceedings in January of 2006, al Bahlul again asked to appear pro se. He made clear that he rejected not only his military counsel but also his civilian counsel:

> I heard the judge say that I have appointed volunteer lawyers. I would like to tell the judge and the people present here that I never appointed any civilian lawyers, not directly, and not in writing. And I am surprised to hear that from you. This is not because—I'm not surprised that some people [the civilian lawyers] volunteered their services. Many people would like to volunteer in this case just to get some fame. *They ask for fame. They want fame for themselves* and I do not appoint anyone by writing or even by inference.[68]

Finally, Congress changed the Commission rules by statute in order to allow the basic right of a defendant to represent and speak for himself.

G. The Medoc Indians

During oral argument in the *Hamdan* case, Justice Breyer asked the Government, "And if the president can do this, well, then he can set up commissions to go to Toledo and, in Toledo, pick up an alien and not have any trial at all, except before that special commission."[69] The Government could have responded that Hamdan was not a U.S. citizen or alien picked up in Toledo but an alien captured in Afghanistan. The Government alleged that bin Laden's admitted chauffer was aiding him in his terrorist activities.

The military cannot simply prosecute aliens it finds in Toledo. But if the hypothetical alien had been walking in Toledo and the Government could prove that he was an enemy spy who had been inside enemy lines fighting against the United States, he would be like the aliens whom the Government captured in the *Quirin* case. And, recall, Justice O'Connor told us that *Quirin* is the law today.[70]

The Government's power to detain enemy aliens was quite limited. First, as the Fourth Circuit explained, the individual must take up "arms on behalf" of an enemy warring against the United States. Second, that person must have fought "against our country in a foreign combat zone of that war," and finally,

he must have "traveled to the United States for the avowed purpose of further prosecuting that war on American soil, against American citizens and targets."[71] That is a much more limited power than the power to "go to Toledo and, in Toledo, pick up an alien."

Perhaps it was hard for the Government to rely on the Fourth Circuit because it had fought mightily to make that decision moot, appearing to manipulate the jurisdiction of the federal court.[72] Instead, the Government responded: "This is much more of a call for military commissions in a real war than, certainly, the use of military commissions against the Medoc Indians or any number of other instances in which the President has availed himself of this authority in the past."[73] Justice Breyer did not appear interested in the Medoc Indians.

H. Excluding the Defendant from Part of his Own Trial

One of the major issues that upset the Court was that the commission rules authorized the tribunal to exclude the accused and his civilian counsel (but not his military counsel) from any part of the proceeding in order to protect classified information. The Court considered this provision to be a violation of one of the "most fundamental protections," the "right to be present."[74]

The provision also bothered the D.C. Circuit when it considered this case. In the course of oral argument, Judge Randolph asked the Government about this issue. Then he added, "Doesn't the Geneva Convention also contemplate secret proceedings? Article 105 says that the court may hold in camera proceedings when state secrets are at stake." It appeared that the judge was throwing a helpful comment to the Government. If so, the Government rejected it: "I wasn't aware that Article 105 said that… [w]e haven't asserted Article 105 and I'm not certain what the precise scope is…."[75]

Perhaps the Government was seeking a broad rule based on some sort of inherent executive power. If so, by asking for so much, it received very little. The Supreme Court found one of the basic flaws in the military commission procedure is that it allowed the court to exclude the detainee from part of the proceedings.

The issue of whether the accused must be present at all stages of his criminal trial—even if the Government claims that military secrets require that the defendant (but not his lawyer) be excluded for part of the trial—figured prominently in this case, even though there had not yet been a trial. That raises the obvious question: Did the military prosecutors plan to introduce any classified evidence that might call the Hamdan's exclusion? In fact, the military prosecutors had no intention of using and could not envision using any classified evidence that would require Hamdan to be excluded from any part of his trial. The prosecution simply was not relying on any classified information and could not imagine moving to exclude him.[76] But it appears this very relevant information was not brought to the attention of the trial court, the D.C. Circuit, and the U.S. Supreme Court.

The Supreme Court was concerned that Hamdan had already been, excluded from his own trial.[77] What the Supreme Court apparently did not know was that the trial transcript showed that this exclusion (for a portion of the voir dire) occurred because *Hamdan's own lawyer* asked to exclude Hamdan. The military prosecutors simply did not object.[78]

One would think the Court would have been interested to know that defense counsel excluded their own client from part of his voir dire and then successfully moved to enjoin the proceedings because they had excluded their own client from part of his voir dire. Why was the Court unaware? I do not know.

CONCLUSION

Stevens, speaking for the Court in *Hamdan*, emphasized that he assumed "the truth of the message implicit in that charge—viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address, the Government's power to detain him for the duration of active hostilities in order to prevent such harm."[79] So, Hamdan remained detained as an enemy combatant.

His lawyers (and lawyers for other detainees) continued litigation in the federal courts. The prime case was *Boumediene v. Bush*,[80] which rejected all the habeas challenges to the new law that the plaintiffs raised.[81] The D.C. Circuit held that Congress could change the habeas statute so that it did not cover aliens who are outside (and who have never been within) the sovereign territory of the United States.

However, that law raises other questions that are not yet ripe. Indeed, they may never be ripe. One section of the new law may be read to allow evidence procured by torture subject to various conditions:

> 10 U.S.C. § 948r: Compulsory self-incrimination prohibited; treatment of statements obtained by torture and other statements
>
> (a) In General.—No person shall be required to testify against himself at a proceeding of a military commission under this chapter.
>
> (b) *Exclusion Of Statements Obtained By Torture*.—A statement obtained by use of torture shall not be admissible in a military commission under this chapter, except against a person accused of torture as evidence that the statement was made.
>
> (c) *Statements Obtained Before Enactment Of Detainee Treatment Act* of 2005.— A statement obtained before December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) *in which the degree of coercion is disputed may be admitted only if* the military judge finds that—
>
> (1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and
>
> (2) the interests of justice would best be served by admission of the statement into evidence.

(d) Statements Obtained After Enactment Of Detainee Treatment Act of 2005.— A statement obtained on or after December 30, 2005 (the date of the enactment of the Defense Treatment Act of 2005) in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

(2) the interests of justice would best be served by admission of the statement into evidence; and

(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.[82]

If a trial judge allows in evidence procured by torture, it is hard to imagine that the federal court would allow that, no matter how credible the evidence is. For example, if a witness who was tortured says, "I hid the gun under the Oak tree," that statement may well be true, even if procured by torture. All one has to do is dig under the oak tree and find the gun with the witness' fingerprints on it. The statement is true, but that does not mean a court would allow that statement into evidence. The trial judge should first determine if there was torture, coercion, or "cruel, inhuman, or degrading treatment."

While the legal battles will now proceed before the military tribunals, they will eventually return to the federal courts. But when they do, the Article III courts will decide the remaining issues. Some issues, like the applicability of 10 U.S.C. § 948r, may never come up. But if they do, the federal courts will not be reluctant to decide them, given the judicial history thus far.

Endnotes

1 548 U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006).

2 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA). The DTA added subsection (e) to the habeas statute which stated that, "[e]xcept as provided in section 1005 of the [DTA], no court, justice, or judge" may exercise jurisdiction over—

"(1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or

"(2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who

"(A) is currently in military custody; or

"(B) has been determined by the United States Court of Appeals for the District of Columbia Circuit… to have been properly detained as an enemy combatant."

DTA § 1005(e)(1). Section § 1005(e)(2) & (e)(3) provide for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit.

3 Kennedy did not participate in parts V and VI-D-iv. He made explicit in his concurring opinion in *Hamdan v. Rumsfeld* that he did not join the Geneva Convention issues: "In light of the conclusion that the military commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by Justice Stevens and the dissent by Justice Thomas." 126 S.Ct. 2749, 2808-09 (2006).

4 "The Court's conclusion ultimately rests upon a single ground: Congress has not issued the Executive a 'blank check.' Indeed, Congress has denied the President the legislative authority to create military commissions of the kind at issue here. *Nothing prevents the President from returning to Congress to seek the authority he believes necessary*." Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2799 (Breyer, J., concurring, joined by Kennedy, Souter, & Ginsburg, JJ.)(emphasis added; internal citation omitted).

Kennedy went on to repeat this invitation to Congress: "here should be reluctance, furthermore, to reach unnecessarily the question whether, as the plurality seems to conclude, Article 75 of Protocol I to the Geneva Conventions is binding law notwithstanding the earlier decision by our Government not to accede to the Protocol.… In light of the conclusion that the military commissions at issue are unauthorized *Congress may choose to provide further guidance in this area. Congress, not the Court, is the branch in the better position to undertake the 'sensitive task of establishing a principle not inconsistent with the national interest or international justice*.'" *Id*. at 2749, 2809 (Kennedy, J., concurring in part) (emphasis added).

5 PL 109-366, October 17, 2006, S. 3930. It passed the Senate, 65-34 (Sept. 28, 2006), and the House, 250-170-12 (Sept. 29, 2006).

6 *See supra* note 4.

7 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 2007 WL 957363 (April 2, 2007.)

8 Foreign nationals detained at Guantanamo Naval Base filed petitions for writs of habeas corpus and alleged violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. and the Alien Tort Act. 476 F.3d at 984.

9 476 F.3d at 987.

10 476 F.3d at 991.

11 476 F.3d at 989, 990, 1001.

12 *Quoted in* Raymond Bonner, *Terror Case Prosecutor Assails Defense Lawyer*, N.Y. Times, March 5, 2007, at A10, 2007 WLNR 4161723.

13 71 U.S. (4 Wall.) 2, 18 L.Ed. 281 (1866).

14 71 U.S. 2, 118.

15 317 U.S. 1, 63 S.Ct. 1, 87 L.Ed. 3 (1942).

16 *Ex parte Quirin*, 317 U.S. 1, 30-31, 63 S.Ct. 2, 12 (1942) (footnotes omitted). The Court cited, e.g., Winthrop, Military Law, 2d Ed., at pp. 1196-1197, 1219-1221; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V. This distinction goes back a long ways. *See also, e.g.,* Hague Convention No. IV of October 18, 1907, 36 Stat. 2295. Article I of the Annex defines the persons to whom belligerent rights and duties attach.

17 317 U.S. at 45.

18 339 U.S. 763, 70 S.Ct. 936, 94 L.Ed. 1255 (1950).

19 339 U.S. 763, 767, 70 S.Ct. 936, 938.

20 339 U.S. 763, 766, 70 S.Ct. 936, 937.

21 Justices Black, Douglas, and Burton dissented.

22 Johnson v. Eisentrager, 339 U.S. 763, 768 (emphasis added).

23 542 U.S. 426, 124 S.Ct. 2711, 159 L.Ed.2d 513 (2004).

24 Kennedy, joined by O'Connor, also filed a concurring opinion. Stevens, joined by Souter, Ginsburg, & Breyer, dissented, arguing that the Court should create an exception to the habeas requirement.

25 Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005).

26 423 F.3d 386, 389–390 (footnote omitted).

27 Hamdi v. Rumsfeld, 542 U.S. 507, 523, 124 S.Ct. 2633, 2642 (2004)(O'Connor, J., for the plurality).

28 *Padilla,* 423 F.3d at 386, 389.

29 *Id*. at 394.

30 *Id*. at 395.

31 *Id*. at 397 (emphases by court).

32 "Detention is limited to the duration of the hostilities as to which the detention is authorized. Because the United States remains engaged in the conflict with al Qaeda in Afghanistan, Padilla's detention has not exceeded in duration that authorized by the AUMF." *Id*. at 392 n. 3.

33 ___ U.S. ___, 126 S.Ct. 1649, 164 L.Ed.2d 409 (2006) (Souter & Breyer, JJ., objecting to denial of certiorari; Ginsburg, J., also dissented from certiorari and filed an opinion; Kennedy, J., joined by Robert,. C.J. & Stevens, J., writing a brief opinion concurring in the denial of certiorari).

34 1 Ronald D. Rotunda & John E. Nowak, Treatise On Constitutional Law: Substance And Procedure § 2.13(c) (4th ed. 2007); Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and their Aftermath*, 57 Syracuse L. Rev. 1, 42 (2006).

35 *See supra* note 25.

36 542 U.S. 466, 124 S.Ct. 2686, 159 L.Ed.2d 548 (2004).

37 *Rasul*, 542 U.S. at 471.

38 *Hamdi*, 542 U.S. at 509.

39 *Rasul*, 542 U.S. at 478-79 (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494-95 (1973)). "*Braden* overruled the statutory predicate to *Eisentrager*'s holding." 410 U.S. at 479.

40 476 F.3d 981 (D.C. Cir. 2007).

41 *Hamdi,* 542 U.S. at 507, 510-13.

42 *Id*. at 507, 511 (O'Connor, J., plurality).

43 Ronald D. Rotunda, *The Detainee Cases of 2004 and 2006 and their Aftermath*, 57 Syracuse L. Rev. 1, 15 & n.86 (2006).

44 *Hamdi*, 542 U.S. at 513.

45 *Id.* at 534.

46 "*Hearsay*, for example, may need to be accepted as the *most reliable available evidence* from the Government in such a proceeding. Likewise, the Constitution would not be offended by *a presumption in favor of the Government's evidence*, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria." *Id*. at 507, 534 (emphasis added).

47 Ronald D. Rotunda, *Frische Datteln für die Häftlinge*, Sueddeutsche Zeitung (Germany), January 2, 2006, at p. 2 (published in German).

48 *Hamdi*, 542 U.S. at 534.

49 *Supra* note 43, at 46-47.

50 548 U.S. ___, 126 S.Ct. 2749, 165 L.Ed.2d 723 (2006).

51 *See discussion in*, Ronald D. Rotunda, *The Propriety of a Judge's Failure to Recuse When Being Considered for Another Position*, 19 Geo. J. Legal Ethics 1187 (2006).

52 *See Hamdan,* 126 S.Ct. at 2749, 2808-09 (J. Kennedy): "In light of the conclusion that the military commission here is unauthorized under the UCMJ, I see no need to consider several further issues addressed in the plurality opinion by Justice Stevens and the dissent by Justice Thomas."

53 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680 (2005) (DTA).

DTA § 1005(e)(1). Section § 1005(e)(2) & (e)(3) provide for exclusive judicial review of Combatant Status Review Tribunal determinations and military commission decisions in the D.C. Circuit.

54 *Hamdan,* 126 S.Ct. at 2775.

55 *Id*. n.31.

56 *Id*. at 2778 n.31.

57 *See, e.g., Hamdi*, 542 U.S. at 507, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (plurality opinion).

58 *Quoted in* Ronald D. Rotunda, Modern Constitutional Law 321 (8th ed. 2007)

59 Letter from Bill Richardson, U.S. Ambassador to the United Nations, to Danilo Turk, President, U.N. Security Council, Aug. 20, 1998 (emphasis added).

60 *See, e.g.*, Robert Howard, *Canada Needs NATO Partners*, Hamilton Spectator, Oct. 28, 2006, at A16.

61 *Hamdan,* 126 S.Ct. at 2791.

62 *Id*. (emphasis added).

63 *Id*. n. 65. Commission Order No. 1, § 11 provides that the Secretary of Defense may change the governing rules "from time to time."

64 The changes "to the military commission procedures made in August [2005] will create a more efficient process for trying detainees," according to the U.S. Government's press release in October 2005. http://usinfo.state.gov/dhr/Archive/2005/Oct/27-738948.html.

65 Faretta v. California, 422 U.S. 806 (1975).

66 The statute now provides, "The accused shall be permitted to represent himself, as provided for by paragraph (3)." 120 Stat 2600, 2608, 10 U.S.C.A § 949a -- § 949a (b)(1)(D).

Paragraph 3 goes on to say:

"(3)(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (1)(D) shall conform his deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

"(B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (1)(D). In such case, the detailed defense counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense."

67 USA Today, 8/26/2004; BBC News, 26 August, 2004 ; 8/27/04 Ft. Worth Star-Telegram A12, 2004 WLNR 1920964; 8/27/04 Int'l Herald Tribune 3, 2004 WLNR 5224120.

68 http://www.defenselink.mil/news/May2006/d20060512RoT_alBahlul_v1.pdf, at pp. 50-51 (11Jan. 2006)

69 Westlaw, 3/29/06 Fed. News Service (MIDDLE EAST) 07:55:00.

70 *Hamdi,* 542 U.S. at 507, 523, 124 S.Ct. 2633, 2642 (O'Connor, J., for the plurality).

71 *Padilla,* 423 F.3d at 386, 389.

72 ___ U.S. ___, 126 S.Ct. 1649, 164 L.Ed.2d 409 (2006) (Souter & Breyer, JJ., objecting to denial of certiorari; Ginsburg, J., also dissented from certiorari and filed an opinion; Kennedy, J., joined by Robert,. C.J. & Stevens, J., writing a brief opinion concurring in the denial of certiorari).

73 Westlaw, 2006 WL 846264 (U.S.) at p. *67; *supra* note 63.

74 *Hamdan*, 126 S.Ct. at 2788, citing Commission Order No. 1

75 Transcript, Salim Ahmed Hamdan v. Donald H. Rumsfeld, No. 04-5393, April 7, 2005, at 16, lines 10-15, 20-21.

76 Rotunda, *supra* note 34, *at* 59.

77 *Hamdan*, 126 S.Ct. at 2788.

78 United States v. Hamdan, U.S. Military Comm., at 81-82, Nov. 8.2004, *available at* http:// www.defenselink.mil/news/Nov2005/d20051110Hamdan vol6.pdf.

79 *Hamdan,* 126 S.Ct. at 2798.

80 476 F.3d 981 (D.C. Cir. 2007), *cert. denied*, 2007 WL 957363 (April 2, 2007).

81 Foreign nationals detained at Guantanamo Naval Base filed petitions for writs of habeas corpus and alleged violations of the Constitution, treaties, statutes, regulations, the common law, and the law of nations. and the Alien Tort Act. 476 F.3d at 984.

82 120 Stat 2600, 2607 (emphasis added).

Financial Services and E-Commerce

A Comment on the Proposed Statement on Subprime Mortgage Lending

*By Todd Zywicki & Joseph Adamson**

In 2006, foreclosure rates on subprime mortgages more than doubled over the previous year, and a number of firms that specialize in such loans—primarily in the mortgage market—either closed or filed for bankruptcy.[1] The rise in default rates indicated that many borrowers had obtained mortgages with terms that they could not meet. The majority of subprime loans are adjustable-rate mortgages, and some policymakers are concerned that borrowers may not fully understand the risks associated with adjustable rate loan products at the time of purchase.

In response to increasing concerns about the health of this market, and its effect on the overall housing market and the economy, five agencies—the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration—proposed a statement on subprime mortgage lending. The statement discusses criteria and factors that a lender should assess in determining a borrower's ability to repay; consumer protection issues and practices; and the need for policies, procedures, and systems to assure that subprime mortgage lending is conducted in a safe and sound manner.

The statement itself does not issue new rules and regulations. It serves as guidance to lenders about existing rules that may affect the subprime industry and discusses whether further regulation of this market is necessary. Substantial evidence shows that the subprime market meets the needs of borrowers effectively, and the recent tightening of the subprime market reflects a correction. The expansion of subprime mortgage lending has had an extremely positive impact on the housing market, allowing both prime and subprime borrowers to secure more affordable mortgages. Regulatory action in this market must be carefully considered so that it does not result in product rationing or further confusion among lenders and borrowers.

I. Analysis

A discussion of subprime lending requires a definition of subprime lending. Subprime borrowers have a weak credit repayment history or credit characteristics that indicate reduced repayment capacity, such as high debt-to-income ratios.[2] Another significant category of subprime borrowers, such as self-employed individuals, have the credit characteristics of prime borrowers but cannot provide full documentation of their incomes and assets. Loans to these borrowers use higher interest rates, higher costs, and other mechanisms to mitigate the increased risk that they present.

Regulatory actions of the subprime industry fundamentally have three main facets.

(1) Does subprime lending by its nature create an unacceptable level of risk for lenders, borrowers, and those in secondary markets who purchase mortgage-based securities?

(2) Is "predatory" lending more prevalent in subprime markets and a result of the nature of subprime markets?[3]

(3) What regulatory systems can be created to alleviate market failures while maintaining the benefits that subprime borrowers receive from the expanded subprime market?

Evidence suggests that subprime lending has enhanced the mortgage market, by making credit available to a large set of homeowners whose credit histories have left the prime mortgage market unavailable. Although these borrowers have weaker financial credentials, most subprime borrowers have shown a willingness and ability to repay their loans on a timely basis. Overall, innovations in the mortgage market over the past few decades, including the expansion of subprime loans, have homeowners better able to buy homes based on their future income expectations, allowing more borrowers to become homeowners.[4]

Predatory lending may be more prevalent in the subprime mortgage market, but that is not necessarily a result of the nature of the market. The subprime market is the fastest-growing segment of the mortgage market, and it has much wider variation among rates and terms than the prime market. Substantial heterogeneity in lending terms is natural given the variety of needs and preferences of subprime borrowers, but this also makes it easier for unscrupulous lenders to take advantage of a wide set of increased fees, penalties, and disclosures/nondisclosures that cause borrowers to accept predatory loans.

Finally, regulation of the mortgage market, and all credit markets in general, must be carefully considered in order to achieve intended and to avoid unintended consequences. Restricting the types of terms that can be offered can lead to a substitution of fees or interest rates for other fees or rates. Regulations that are too strict can lead to lenders exiting the market or rationing credit. Disclosure requirements can be effective, but they can also overload borrowers with information or require irrelevant and extraneous disclosures, which do not benefit consumers.

The Proposed Statement asks for comment on four questions.

1. The proposed qualification standards are likely to result in fewer borrowers qualifying for the type of subprime loans addressed in this Statement, with no guarantee that such borrowers will qualify for alternative loans in the same amount. Do such loans always present inappropriate risks to lenders or borrowers that should be discouraged, or alternatively, when and under what circumstances are they appropriate?

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The subprime mortgage market emerged as a widespread industry in the mid 1990s.[5] Prior to then, many subprime borrowers had been excluded from the mortgage market. Rationing occurred when lenders could not charge higher rates on mortgages to riskier customers due to interest-rate caps, so they did not offer any mortgages to these customers. The expansion of the subprime market is a direct result of lenders' increased use of risk-based pricing in response to deregulated lending markets, technological changes in underwriting, and financial innovations in securities markets.[6] To compensate for the increased risk of lending to subprime borrowers, lenders use a number of instruments, including higher interest rates, higher origination fees, prepayment penalties, and down payment requirements.[7]

Prior to the 1990s, when subprime lending became widespread, the mortgage market suffered from a number of inefficiencies. Not only were subprime borrowers excluded from the market, but, without risk-based pricing, the market rate was artificially high, because of the presence of "lemon" borrowers. These high-risk borrowers still were able to take out loans, due to lenders mistakenly assessing their credit risk. These borrowers increased the overall risk of the loan pool, raising rates for all borrowers. The net effect was that high-risk loans were underpriced and low-risk loans were overpriced, pushing out some less-risky borrowers.[8]

Subprime lending has had a dramatic effect on the United States housing market. Originations in the subprime market grew from $65 billion in 1995 to $332 billion in 2003.[9] This increase mirrors a dramatic increase in the US homeownership rate. From 1965 until 1995, the homeownership rate varied between 63 percent and 66 percent. Beginning in 1995, there has been a steady increase, peaking at 69.2 percent in the fourth quarter of 2004, and holding at 68.9 percent at the end of 2006.[10] In 2006, the difference between the 65.4 percent homeownership rate from ten years prior and the actual 68.9 percent rate is the equivalent of 3.8 million households that own their homes rather than rent them.

We have not found econometric studies to control for other factors, such as the business cycle or aging populations, that may affect homeownership rates. But economists at the Federal Reserve Bank of San Francisco have found that increases in homeownership rates have held across age levels, and they suggest that some of the explanation stems from financial innovations in the mortgage market.[11]

Lenders sort borrowers into different groups based on their credit histories. Prime borrowers are also known as "A" borrowers. Subprime borrowers at the "A-minus" level have typically missed only one mortgage payment or two credit card payments in the last two years. Risk increases down to "D" borrowers, who are emerging from bankruptcy. There is also a class of "Alt-A" borrowers, who have similar credit histories as prime borrowers, but have less documentation of income or assets, or have unusual collateral characteristics.[12] Seventy percent of subprime mortgages are given to Alt-A or A-minus borrowers.[13] These borrowers are the least risky for lenders, and presumably have the greatest ability and willingness to repay among subprime borrowers.

Subprime mortgage pricing follows a schedule based on FICO credit score, loan-to-value ratio, and other loan terms. A borrower with a 560 FICO score must pay a 2.7 percent premium over a borrower with a 680 score to secure an identical mortgage. Lenders also substitute collateral risk for credit risk—customers with the lowest FICO scores cannot secure loans with more than a 90 percent loan-to-value ratio.[14]

Evidence shows that the higher cost of subprime borrowing is justified as these borrowers have a higher delinquency and default rate. In the first quarter of 2006, prime fixed-rate and adjustable-rate mortgages had delinquency rates of 2.0 percent and 2.3 percent respectively; subprime fixed-rate mortgage and adjustable-rate mortgage products had delinquency rates of 9.6 percent and 12.02 percent respectively. Foreclosure rates share a similar story. Prime mortgages foreclose at a 0.4 percent rate, while 3.5 percent of subprime mortgages entered foreclosure.[15]

Though the delinquency and foreclosure rates are much higher than for the prime market and may reveal overly risky behavior by some lenders and borrowers, they still show that over 85 percent of subprime borrowers are able to make each of their monthly payments, and more than 95 percent avoid foreclosure proceedings. Thus, the vast majority of these loans are, by definition, appropriately risky for both lenders and borrowers. The expansion of mortgage products has allowed the market to more adequately price risk and thus allows previously underserved households to obtain mortgages.

In addition, lenders have tended to adequately sort subprime borrowers into different risk classes, and have tended to lend to the least risky. Of the four subprime risk classes (A-, B, C, and D), the vast majority of originations have been to borrowers in the least risky "A-" class, while the riskiest "D" class has obtained very few mortgages.[16]

The high rate of delinquency in the subprime market may not be a prelude to foreclosure, as it often is in the prime market, but instead indicates that borrowers use delinquency as a short-term line of credit.[17] Cutts and Van Order find that in the prime market, the share of mortgages which are delinquent declines between 30-day delinquency (1.73%), 60-day delinquency (0.31%), and 90-day delinquency (0.28%). In the subprime market, the rates are highest for 30-day delinquency (7.35%), decline for 60-day delinquency (2.02%), then rise again for 90-day delinquency (4.04%). The authors explain that:

> Ninety-day delinquency rates can exceed 60-day delinquency rates only if borrowers who fall behind in their mortgage payments miss two, then three, payments, and then begin to pay again without making up all of the missed payments immediately, thus remaining 90-days late for an extended period. Since each period some 60-days delinquent loans will become 90 days late, the total number of loans 90-days late will exceed that of loans 60-days late under this scenario. Apparently, subprime borrowers tend to exercise the option to take out short-to medium-term loans from their mortgage lenders in amounts equal to a month or two month's worth of mortgage payments while prime borrowers do not.[18]

Compared to other lines of credit or personal finance loans, the interest rates of the subprime loan plus penalties are attractive enough to many subprime borrowers that they will use their mortgages as a source of short-term credit. So the higher rates of delinquency do not always indicate a path to foreclosure, but rather short-term repayment trouble.

In addition to timely repayment of their loan, delinquency is one option that mortgage borrowers face. Even after accounting for late fees and the financing of the loan, the borrower may view this as the best possible line of credit that he can acquire given relatively limited realistic available options. A borrower may also choose to default on his or her loan, exchanging the house to the lender for the remaining loan; or he can prepay the loan when interest rates fall or his credit score rises and he can acquire better terms for a new mortgage.[19] Studies of the prime mortgage industry indicate that borrowers "ruthlessly" exercise their option to prepay and refinance at better rates if the market allows it or will exercise their option to default if home values drop significantly.[20]

Due to the higher interest rates charged in the subprime market, borrowers face a strong incentive to prepay their mortgages and refinance when it is possible to secure a prime mortgage. To counter the increased risk of prepayment, subprime lenders commonly insert prepayment penalties into their contracts—three times as often as prime lenders (41 percent of subprime loans as opposed to 12 percent of prime loans in 2001).[21] The prepayment period helps ensure lenders that they will reclaim the origination costs, which borrowers in the subprime market often roll into the loan itself.

The failures of a number of subprime lenders indicate that some lenders and borrowers misjudged borrowers' ability to repay, causing the deep losses that led to some lenders going bankrupt. However, the various pricing schemes used by subprime lenders reflect the techniques that lenders use to judge and, in most cases, accurately mitigate risks by charging different interest rates and introducing prepayment penalties and other terms to extend credit to groups who do not qualify for the prime market. In response to the recent increase in default and foreclosure, lenders have corrected their practices by tightening lending requirements.

Subprime mortgages have also been widespread in poorer urban neighborhoods with disproportionately minority populations. African-American borrowers have historically been less able to acquire a prime mortgage than white borrowers.[22] But over the past decade, homeownership has increased fastest for minority groups. While this statement does not address inequalities in the mortgage market, a reduction in subprime lending due to tighter requirements for borrowers is likely to disproportionately reduce credit for minority borrowers. Homeownership is the primary method of wealth accumulation for low and middle-income people—a group that is a large part of the subprime mortgage market.[23]

Subprime loans often carry high rates that seem unreasonable to borrowers who qualify for prime loans. But the high rates and additional terms such as prepayment penalties do not signify that subprime loans are unreasonable. In most cases, the loans are reasonable and have helped expand the mortgage market to borrowers who do not meet prime standards but have almost all shown an ability and willingness to repay their mortgages. In some cases, lenders have originated complicated loans that borrowers don't fully understand, or borrowers have inflated their incomes in order to secure a loan. In these and similar cases, subprime loans are not appropriate. Many inappropriate loans can be characterized as predatory lending or fraudulent and deceptive practices, which can often be remedied by existing rules and legislation.

2. Will the proposed Statement unduly restrict the ability of existing subprime borrowers to refinance their loans and avoid payment shock? The Agencies also are specifically interested in the availability of mortgage products that would not present the risk of payment shock.

The proposed statement specifically notes the agencies' concerns with terms of adjustable-rate products including: low introductory rates that expire and jump to a much higher variable rate; loans with little income documentation; loans without rate caps; loans with terms that are likely to induce repeated re-financing; substantial prepayment penalties or prepayment penalties with long time horizons; and providing borrowers with inadequate information about loan terms or product features.

As noted above, a number of these features are typical of the subprime market and are evidence of mortgage providers' use of risk-based pricing in their loans. Restricting the use of certain products can impair the ability of lenders to match borrowers with appropriate loan products and may lead to a return to the rationing of mortgage loans which existed prior to the 1990s.

Regulating a market such as the subprime mortgage market raises a number of questions. The first is whether to pursue substantive regulation or whether an alternative regulatory system is preferable. The agencies' statement includes both substantive implications and options for alternative systems.

The substantive portion of the statement refers to certain features of loans with variable rates, loans to borrowers with little or no documentation, prepayment penalties, and loans that don't account for borrowers' ability to repay. Substantive regulation of credit markets is difficult because of the likely consequences of regulation, both intended and unintended. The intended consequences will likely include reduced use of the practices noted above. The unintended consequences are more difficult to forecast, but will likely fall into a number of categories, including term substitution or repricing, product substitution, and rationing.

Term substitution might occur if lenders are held to an interest rate ceiling or other terms that restrict them from certain risk-based pricing practices. Lenders can then use other, less-precise terms to mitigate their risks. This could include increased origination or application fees, greater down-payment requirements, stricter default and foreclosure rules, prepayment penalties, or other terms.

Product substitution—replacing one source of credit with another, such as using credit cards instead of personal finance loans—may be less likely in the mortgage market than

in other types of credit markets, such as credit cards, since there are fewer sources willing or able to lend the thousands of dollars required for purchasing a home. The more likely result of stricter mortgage origination rules is a return to rationing, which could result in a reduction in overall homeownership since some of the recent increase in homeownership was due to the ability of subprime borrowers to access credit.[24]

Empirical studies have found that city-wide or state-wide attempts to regulate predatory lending may result in rationing of credit. Beginning with North Carolina in 1999, a number of states and cities have passed legislation intended to curb predatory and abusive lending. The laws have various degrees of strictness and use various means to protect citizens against predatory lending. Some laws expand the coverage of the federal Home Ownership and Equity Protection Act (HOEPA) to a wider range of loans. Other laws restrict or require certain practices by lenders on loans covered by the legislation. Many laws combine these two paradigms. Loans that are covered by HOEPA cannot "provide short-term balloon notes, impose prepayment penalties greater than five years, refinance loans into another HOEPA loan in the first 12 months, or impose higher interest rate[s] upon default." Creditors must also account for borrowers' abilities to repay when originating loans.[25]

Studies have found mixed results from these laws. In North Carolina, Elliehausen and Staten found that the number of subprime mortgage originations dropped by 14 percent. The decline in originations was almost entirely among lower-income borrowers in North Carolina.[26] Harvey and Nigro also found that subprime applications and originations dropped significantly though most of the drop was due to fewer applications and not a significant change in rejection rates.[27]

Pennington-Cross and Ho, in a wider study of state and local anti-predatory lending laws, find that the various state and local laws that they studied did not significantly impact the rate of originations. They do, however, reduce the rate of application, and applicants are more likely to be accepted. The authors speculate that this may be due to lenders marketing less aggressively for subprime products because of strengthened predatory lending legislation; the change in rejection may also have been due to increased pre-screening by lenders, increased borrower self-selection, or a shift to lenders and loan products unregulated by the new law.[28] Harvey and Nigro reach a similar conclusion to explain the reduction in mortgage originations in North Carolina after the passage of the predatory lending law, but do not mention the possibilities of increased pre-screening by lenders or borrowers.[29] Overall, the economic studies show that restrictions on lenders tend to tighten the subprime market, reduce the number of applicants for subprime loans, and, depending on the strength of the law, reduce the number of loan originations.[30]

Alternate regulatory systems include increased disclosure requirements, increased efforts at consumer education, and a reliance on competition to correct or regulate the industry in the absence of a true market failure.

The statement includes sections on increased disclosure requirements. Incomplete or misleading disclosure may be a major cause behind predatory lending. Predatory loans can include mortgages where the terms were fraudulently or deceptively described or where the key terms were not disclosed or were falsely disclosed. Increased disclosure requirements can clarify to lenders exactly what information should be conveyed to the borrowers and can inform borrowers of the minimum amount of information that they should expect from lenders. Alternately, disclosure rules can require increased documentation from borrowers and can preclude lenders from making the most irresponsible no-documentation loans.

This approach allows the market to continue judging risk, but with more information on both sides to accurately assess the risk that the lenders face from borrowers and the responsibilities that borrowers assume when applying for the mortgage. Disclosure requirements can also standardize the information that borrowers receive from numerous lenders, allowing them to compare many offers more efficiently.[31]

But creating disclosure rules can be difficult since there are potentially dozens of terms that can be disclosed and not all terms are relevant to all borrowers or lenders. Requiring too many disclosures can overload borrowers or lenders with too much information and cause the relevant information to be lost among the noise. Crafting disclosure rules thus requires a delicate balance if the rules are to achieve their intended results.

Before creating new disclosure obligations, the agencies should consider whether there is an information market failure in the subprime mortgage industry and what the nature of that failure is. If new disclosure requirements should be made, then the agencies should note the existing disclosure requirements, the benefits that those disclosures create, and whether additional disclosures will lessen the impact of those already existing because of information overload.

It is also possible that the recent troubles in the subprime mortgage industry have been due to a market bubble followed by a correction, rather than systematic predatory fraud or a true market failure. The mortgage bubble may have expanded due to the low interest rates, a strong housing market, and the strong economy that existed for the past decade. But once all three of those factors changed—rising interest rates, an uncertain economy, and falling house values—the subprime market struggled,[32] possibly due to subprime borrowers' increased exposure to cyclical economic changes or trigger events.[33] Since the subprime market is relatively new, as is the securitization of subprime loans in bond markets, lenders and investors may have been irrationally optimistic about these products and extended financing to too many risky borrowers. Presumably, those lenders and investors now better understand the limits of the subprime market.

The market has already begun to correct the bubble by reducing originations of the riskiest loans, with no documentation, no down payment, or payment option mortgages, where the borrower decides how much to pay each month.[34] Lenders facing losses have quickly acted to change their lending models to reduce their risk.

Consumer education may be a remedy for borrowers who make mistakes when evaluating the benefits of certain

mortgage products. Although these circumstances may be particular to the subprime market, due to the financial histories of subprime borrowers and their likely lower levels of financial literacy, the vast majority are still making payments on time and continuing on a path to homeownership. And as noted above, some borrowers who are delinquent are not in danger of foreclosure, but are using the mortgage and its late penalties as a more affordable line of credit than other commercial loans.

Restrictions on subprime lenders' abilities to accurately price their products to reflect the risk of a wide variety of borrowers will likely prevent some prospective borrowers from securing subprime loans or refinancing existing loans. Substantive and disclosure regulations both have limitations. Well-designed, substantive regulation can eliminate certain practices, but lenders may be able to shift costs to other terms of the loans that they offer. Disclosure regulations should be careful to require the most relevant information, without overwhelming borrowers. Regulations that prevent lenders from mitigating the increased risk of subprime lending will likely cause some lenders to abandon the subprime market.

3. Should the principles of this proposed Statement be applied beyond the subprime ARM market?

Lenders and borrowers who are in the subprime market in good faith have obvious incentives to originate or obtain loans that are affordable and reasonable. Originating unaffordable mortgages will usually result in the lender, the borrower, or both parties losing money. Many of the losses in the subprime market, then, are a result either of faulty models and expectations—which lenders and borrowers have begun correcting by tightening the market—or due to predatory lenders and fraudulent borrowers. The principles of this statement, then, should be targeted to predatory lending within the subprime market, a subset of the subprime mortgage market.

Predatory lending is not well defined, but the definition used by Engel and McCoy generally includes loans that meet one or more of the following conditions:[35]

- Loans designed to result in disproportionate net harm to borrowers
- Loans designed to earn unusually high profits
- Fraudulent or deceptive loans
- Other misleading disclosures (or nondisclosures) that do not constitute fraud
- Loans that require the borrower to waive meaningful legal redress

Subprime mortgages, which have higher than normal interest rates or other terms that make them more costly than prime mortgages, are not necessarily predatory loans. Subprime loans are designed to compensate lenders for the increased risk of subprime lenders, while predatory loans go beyond risk-based pricing and set terms above what is required to offset the increased risk of the borrower. Predatory loans are considered a subset of the subprime market.[36]

Predatory lending laws can restrict the types of loans that lenders can originate, mandate required lending practices, or require specific disclosures.[37] Laws meant to restrict predatory lending can have the unintended consequence of making legitimate subprime lending more difficult or expensive, leading lenders to ration mortgage loans and causing some responsible subprime borrowers to lose homeownership opportunities.

Many predatory lending practices are currently restricted by existing laws and regulations. Other than creating new regulations or restrictions on lenders, stricter enforcement against lenders who practice fraud and deception or other predatory practices may be effective in enhancing consumer welfare.

Practices that are legal but may be predatory in nature, are included in the category of "other forms of lack of transparency in loans that are not actionable as fraud." Laws that require certain disclosures have loopholes that do not require some finance charges to be included, and good-faith estimates that lenders provide may be far from the actual cost since lenders aren't liable for errors in their estimates.[38] Clearer disclosure standards may be an effective way to curb predatory lenders' misleading practices.

4. We seek comment on the practice of institutions that limit prepayment penalties to the initial fixed rate period. Additionally, we seek comment on how this practice, if adopted, would assist consumers and impact institutions, by providing borrowers with a timely opportunity to determine appropriate actions relating to their mortgages. We also seek comment on whether an institution's limiting of the expiration of prepayment penalties such that they occur within the final 90 days of the fixed rate period is a practice that would help meet borrower needs.

As noted above, prepayment risk is much higher in the subprime market than it is in the prime market. While prime borrowers only have an incentive to prepay their mortgage and seek new terms when interest rates drop significantly, subprime borrowers can also choose to prepay and refinance when their credit rating improves enough to secure a better subprime loan or a prime loan.

Prepayment penalties allow lenders to mitigate the risk of prepayment by subprime borrowers. In subprime loans without prepayment penalties, lenders typically increase interest rates, to compensate for the increased risk of prepayment.[39] These prepayment-penalty periods can last from 2-5 years, which is not necessarily the same amount of time as the fixed-rate introductory period.[40] It is likely, based on evidence from various types of subprime loans, that restricting the expiration of prepayment penalties to within the final 90 days of the fixed rate period will cause some lenders to charge higher interest rates or other fees in order to shift the risk from prepayment to other terms.

In turn, by increasing the cost of the loan, raising interest rates to offset increased prepayment risk may have the unintended consequence of exacerbating the risk of default and foreclosure or could increase the incentives to prepay, thereby further exacerbating the lender's risk of prepayment. In the end,

this could potentially result in the unraveling of any option for borrowers to finance costs through the loan itself. Borrowers would then need to increase down payments or pay fees up front, resulting in higher costs to borrowers that cannot be easily financed.

CONCLUSION

Subprime mortgages have extended the home mortgage market to a large segment of borrowers who were previously unable to purchase homes. Despite high-profile failures of some subprime lenders, over 85 percent of subprime borrowers make all of their payments on time, and fewer than five percent of subprime mortgages have foreclosed.[41] The higher interest rates, down-payment requirements, prepayment penalties, and other higher fees and costs associated with subprime mortgages are a result of the higher risk of subprime borrowers. Lenders use the higher rates and fees to reduce the risk of lending in this market.

Restricting allowable interest rates or prepayment penalties of subprime lenders may result in lenders charging higher fees or costs in other mortgage terms or reducing their presence in the subprime market, which will result in some borrowers losing access to homeownership opportunities. Requiring certain disclosures may better inform borrowers of the costs and obligations associated with these loans, but too many required disclosures might overwhelm borrowers and leave them worse off. Disclosure requirements must strike a delicate balance.

Predatory lending is a concern. It is likely concentrated within the subprime mortgage market and not a major issue in the prime market. But this might be a consequence of the wider variety of subprime products and the relative novelty of this market. The subprime market at large is beneficial to borrowers and affords many low and middle income borrowers chances for homeownership. Legislative or regulatory measures targeted at predatory lending should be careful not to harm the wider, legitimate, subprime mortgage market.

Endnotes

1 *Hot Topic: The Subprime Market's Rough Road*, Wall St. J., February 17, 2007, A7.

2 The Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision, *Expanded Guidance for Subprime Lending Programs*, 2-3.

3 Predatory lending can refer to a number of practices. For this comment, we are using the definition from Kathleen C. Engel & Patricia D. McCoy, *A Tale of Three Markets: The Law and Economics of Remedies for Predatory Lending*, 80 Tex. L. Rev. 6, 1260 (2002). We are accepting this definition as a working definition, without necessarily independently endorsing it.

4 Kristopher Gerardi, et al., *Do Households Benefit from Financial Deregulation and Innovation? The Case of the Mortgage Market*, Public Policy Discussion Papers No. 06-6 (Boston: Federal Reserve Bank of Boston, 2007): 35.

5 *Id*. at 8.

6 Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, Fed. Res. Bank St. Louis Rev. 32 (January/February 2006).

7 *Id*. at 32.

8 Michael Collins et al., *Exploring the Welfare Effects of Risk-Based Pricing in the Subprime Mortgage Market, in* Building Assets, Building Credit 04-8 (Boston: Joint Center for Housing Studies, Harvard University, April 2004): 6.

9 *Supra* note 6, at 37.

10 Census Bureau, *Homeownership Rates for the U.S.*, *at* http://www.census.gov/hhes/www/housing/hvs/qtr406/q406tab5.html

11 Mark Doms & Meryl Motika, *The Rise in Homeownership*, Fed. Res. Bank San Francisco Econ. Letter 2006-30 (November 3, 2006), *at* http://www.frbsf.org/publications/economics/letter/2006/el2006-30.html.

12 *Supra* note 8, at 3.

13 Amy Crews Cutts & Robert A. Van Order, *On the Economics of Subprime Lending*, 30 J. Real Estate Fin. & Econ. 2, tbl. 1.

14 *Supra* note 8, at 3.

15 Press Release, Mortgage Bankers Association, "Residential Mortgage Foreclosures and Delinquencies Decrease Since Last Quarter, According to MBA National Delinquency Survey," June 19, 2006.

16 *Supra* note 6, at 43.

17 *Supra* note 13, at 172.

18 *Id*. at 173.

19 *Supra* note 13, at 169. The default option can be thought of as a "put" option while prepayment is analogous to a "call" option.

20 *Id*. at 169.

21 *Id*. at175.

22 William C. Apgar & Allegra Calder, "The Dual Mortgage Market: The Persistence of Discrimination in Mortgage Lending" (working paper, Harvard University: Joint Center for Housing Studies W05-11, December 2005): 10-11.

23 Thomas P. Boehm & Alan Schlottmann, *Wealth Accumulation and Homeownership: Evidence for Low-Income Households* (Washington, D.C.: Office of Policy Development & Research, HUD, December 2004), *at* http://www.huduser.org/Publications/pdf/WealthAccumulationAndHomeownership.pdf.

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25 Giang Ho & Anthony Pennington-Cross, *The Impact of Local Predatory Lending Laws on the Flow of Subprime Credit*, 60 J. Urban Econ. 2, 214 (2006).

26 Gregory Elliehausen & Michael Staten, Regulation of Subprime Mortgage Products: An Analysis of North Carolina's Predatory Lending Law, Credit Research Center Working Paper #66 (November 2002): 15.

27 Keith D. Harvey & Peter J. Nigro, *Do Predatory Lending Laws Influence Mortgage Lending? An Analysis of the North Carolina Predatory Lending Law,* 29 J. Real Estate Fin. & Econ. 4, 453-454 (2004).

28 *Supra* note 25, at 222-223.

29 *Supra* note 27, at 453.

30 North Carolina's law was one of the most restrictive in the Ho and Pennington-Cross study, which found that stricter laws have a stronger effect on the market, reducing both applications and originations.

31 *See* Thomas A. Durkin & Gregory Ellihausen, *Disclosure as a Consumer Protection*, *in* The Impact of Public Policy on Consumer Credit 109-143 (Thomas A. Durkin & Michael E. Staten eds., 2002).

32 Wharton School of Business, "Subprime Meltdown: Who's to Blame and How Should We Fix It?" Knowledge@Wharton, March 21, 2007.

33 *Supra* note 13, at 169.

34 *See supra* note 32.

35 *Supra* note 3, at 1260.

36 *Id.*, at 437.

37 *Supra* note 25, at 212.

38 *Supra* note 3, at 1269.

39 *Supra* note 13, at 175.

40 *Id.*

41 *Supra* note 15.

The WTO as a Supranational Competition Authority

*By Keith R. Fisher**

There has been a significant wave of transnational mergers and acquisitions this past decade, a wave as significant in its frequency (i.e., sheer numbers of transactions)[1] as in its amplitude (the size of those transactions).[2] Reductions in trade barriers have enabled increased foreign investment, and many multinational enterprises (MNEs) have found it most expedient to expand overseas operations by acquisition of existing businesses rather than *de novo*. By the 1990's, this trend toward increased transnational M&A activity had greatly accelerated, with business characterized by ever-more-rapidly evolving technology, and timeliness of entry or expansion in a given market becomingly increasingly crucial.[3] Total dollar amounts of global M&A activity[4] rose dramatically during 1995-1999,[5] with approximately eighty percent of those transactions involving American and European firms.[6] In response, there has been a veritable explosion of national competition laws, resulting in a massive increase in review of individual transactions by the competition authorities of multifarious jurisdictions.[7]

Thus, transnational mergers, while affording large corporations significant business opportunities, also present challenges because of the occasionally daunting task of compliance with a multiplicity of competition law regimes.[8] These merger review schemes either prohibit or assert governmental controls over transactions, from the incorrigibly anticompetitive to the competitively neutral or benign, with important way stations in-between for transactions that, while anticompetitive, confer economic advantages upon the reviewing nation (such as job creation or preservation, investment in infrastructure, etc.) deemed to outweigh the anticompetitive effects.[9] Along this spectrum, not only are the applicable legal standards somewhat different, with the two most prominent[10] being "dominance" (as used in the EU) and "substantial lessening of competition" (as used in the United States),[11] but the substantive legal content accorded those standards, as well as the remedies prescribed, can be widely divergent in countries purporting to apply the identical standard.[12] Such disparities can result from changes in personnel or changes in antitrust enforcement profiles attributable to the winds of political change.[13]

Globalization has created challenges for a variety of legal regimes, and competition law is certainly one of them. Regulators will, with considerable justification, assert authority to subject to antitrust[14] scrutiny merger transactions that arguably may have an anti-competitive effect on the territory subject to their jurisdiction, regardless of whether the legal situs or "center of gravity" of any party to the transaction falls within that jurisdiction. By the same token, a blanket assertion of authority to scrutinize transactions with little or no actual or even potential effect within that territory not only is incompatible with recognized principles of international law but often results in political conflicts.[15] In connection with the merger of Boeing and McDonnell Douglas, for example, U.S. politicians expressed outrage at the prospect that the European Commission[16] would block a quintessentially American merger and threatened to file a complaint with the WTO or impose unilateral trade sanctions in retaliation.[17] Though the Commission ultimately cleared that transaction, the subsequent blocking of the GE/Honeywell merger led to additional rancor from U.S. politicians and officials.[18]

That same year, competition policy was placed on the World Trade Organization agenda for the Ministerial Round in Doha, Qatar.[19] In anticipation of the next GATT/WTO negotiating agenda, the Doha Ministerial Declaration mandates clarification of world competition rules on "core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels."[20] The question whether to vouchsafe antitrust law, which concerns itself with *private* restraints of trade, to the tender care of an international body that concerns itself with *public* restraints of trade[21] has been the subject of academic discussion and debate pro[22] and contra.[23] Complicating the issue further is the optimal degree of WTO involvement, if any.

Proposals For World Trade Organization Involvement

Divergences in antitrust analysis between the different legal systems, exemplified as between the U.S. and the EU by the GE/Honeywell and Boeing/McDonnell Douglas imbroglios, are by no means a newly discovered problem.[24] Since the days of the Havana Charter in the late 1940's, there have been sporadic efforts to achieve some form of multinational competition law framework.[25] Examples of such efforts include the draft restrictive business practices codes of the United Nations Conference on Trade and Development (UNCTAD)[26] and the OECD[27] and the Munich Draft International Antitrust Code.[28]

At the urging of the European Union, among others, a decision was made to put the propriety of negotiation of a multilateral competition policy under the auspices of the WTO on the agenda for the next trade negotiations "round."[29] The likelihood of any consensus on the issue emerging is remote, however, because of significant differences between developed economies, most of which now have their own competition laws, and developing economies, most of which do not.[30]

Indeed, such a lack of consensus is all too familiar in—indeed, almost emblematic of—international law and internationalist tendencies generally. Even if internationalization of a particular matter is a desideratum, it is far from an inevitability. One need think only of the movement for world governance after World War I that gave rise to the pitifully inadequate League of Nations, or the push for a kind of world federalism after World War II. These movements were fated to be dashed against the rocks of long-standing—and possibly innate—sociological, political, historical, and cultural

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differences among nations and peoples. The same sorts of socio-political and historico-cultural differences doomed an attempt at an international language (Esperanto),[31] and have even scotched the effort to ratify a Constitution for the European Union.[32]

Even among developed economies with established competition law regimes, a variety of countervailing policy interests can often dilute a given state's commitment to competition law. Examples of these sorts of interests are plentiful and well-known: granting of monopoly power associated with certain rights in intellectual property; government subsidies for, or regulatory policies applicable to, certain sectors; protectionist trade policies aimed at limiting competition from foreign imports or investment by foreign multinational corporations; trade initiatives creating preferences for export cartels.[33] Indeed, the Commission's approaches in the Boeing/McDonnell-Douglas and GE/Honeywell merger applications demonstrate beyond cavil that parochial national (or, in this instance, regional, as a proxy for national) interests can often diverge and that significant disparities in merger policies can serve—and, in fact, are normally intended to serve—those interests.

Several commentators have advocated, to a greater or lesser degree, reasonably comprehensive roles for the WTO in harmonization of competition law, potentially a uniform international antitrust code for pre-merger review with the WTO as either a supranational enforcement agency[34] or a super-clearinghouse with authority to dictate which national competition regimes have sufficient nexus to a particular transaction so as to justify pre-merger notification filings.[35] Neither suggestion appears workable, however, both for institutional WTO reasons and for pragmatic reasons relating to sovereignty and national competition regimes.

Axiomatic to the trade law orientation of the WTO are principles of non-discrimination, typically formulated as "most favored nation" treatment ("MFN"),[36] national treatment[37] or some combination thereof.[38] It is therefore to be expected that extending those principles to competition law would be advocated for WTO consideration (along with the principle of transparency) by some antitrust scholars[39] and by some members of that organization.[40]

Uncritical transference of these international trade principles of non-discrimination, forged as a result of multilateral negotiations intended to affect the *sovereign* behavior of nation states, to competition law, which is targeted at *private* (i.e., non-sovereign) conduct and is, moreover, very much a *sui generis* concept as one moves from one nation's competition law to another's, raises a host of difficulties.[41] Among these are problems of asymmetry. MFN obligations, for example, are well-known in the international trade literature as being susceptible to the free-rider syndrome. When a nation state with MFN status knows that it can secure for itself any benefit extended to another nation state, the incentive to bargain is considerably reduced, if not entirely eliminated. At the same time, one country may be discouraged from offering a concession to another if that same concession must be extended equally to all states partaking of MFN status.[42] Similar problems may attend according national treatment. Suppose that it would be beneficial, as a matter of competition policy, for a particular nation to lower the threshold for pre-merger notification. A national treatment regime could dissuade the government from taking that action where the administrative onus of doing so—having to review a burdensome number of pre-merger filings from foreign enterprises—would threaten to overwhelm the resources at the competition authority's disposal. Similarly, local industry might be deterred from seeking legal reforms the benefits of which would also have to be extended—again, often asymmetrically—to foreign enterprises.

Other asymmetries arise out of the disparate levels of regulatory strength and the accompanying disparities in regulatory incentives that are characteristic of different types of national economies. Encouragement of exports, protectionism for indigenous industries, and promotion of local employment are all typical, if parochial, non-antitrust goals that can cause governments to skew the results of competition-based assessments of transnational transactions.[43] Although this danger lurks behind any nation's competition policy, it is particularly acute for larger, more developed economies (e.g., the U.S. and the EU), which have sufficient market "clout" to be able unilaterally to assert extraterritorial jurisdiction in a meaningful way. At the same time, while smaller economies can rarely expect to make a plausible threat to prohibit *altogether* conduct by a large MNE that might have negative welfare effects within their borders,[44] they can band together and create a regional competition authority—a mini-EU, in effect—that will enjoy enough resources from member countries to portend a credible, joint prohibition or other regulatory response.[45]

Another problem with a WTO-based attempt at harmonization of competition law is that, in stark contrast to the bulk of the trade regime with which the WTO has experience, competition law predominantly addresses private, as opposed to sovereign, conduct.[46] Principles on which universal agreement can be anticipated are few and at a level of generality that does not further the analysis (such as the notion that anticompetitive mergers and acquisitions should be prohibited and that enforcement action against cartels should be vigorous). Even these principles, however, are subject to exceptions, such as for anticompetitive transactions that promote certain non-competition-related interests that are deemed to outweigh their anticompetitive effects, and for the frequently tolerated export cartels.

Furthermore, applying "core" non-discrimination principles to competition law is rather like attempting to force a square peg into a round hole. While national antitrust laws are, on occasion, relatively indifferent to anticompetitive effects that are *wholly* external,[47] fundamentally they make no distinctions based on the nationality of the actor.[48] Unlike tariffs, subsidies, and the like, there is little basis in competition law for the application of concepts such as MFN or national treatment.

The trade law principles animating the WTO approach raise yet another problem. Whatever consensus on competition principles has emerged internationally has largely been the result of *bilateral* agreements on antitrust matters.[49] For example, the United States has entered into several of these bilateral cooperative antitrust agreements,[50] which may be regarded as a supplemental to, or perhaps a subset of, the network of

bilateral treaties, known as Mutual Legal Assistance Treaties (MLATs),[51] that have proliferated in recent years in an effort to promote effective transnational law enforcement.[52] Likewise, the European Union has entered into several such bilateral antitrust agreements.[53] In theory, such agreements endeavor to effect a mutual allocation of prosecutorial resources in order to maximize enforcement and minimize duplication. In practice, however, this is not always possible, particularly in cases affecting significant national (or communitarian, as the case may be) interests, be they competitive or extra-competitive.[54]

The characteristic WTO non-discrimination principles are fundamentally incompatible with the effectiveness of these sorts of bilateral antitrust agreements. If the parties to such a bilateral regime were simultaneously subject to such WTO obligations, they would find themselves in the awkward position of being compelled to accord the positive comity[55] benefits of their bilateral cooperative arrangement to *all* WTO members, e.g., providing them notification of competition enforcement actions that might affect their interests (assuming those could be known in each case), expending resources to provide them with antitrust assistance with no reciprocal obligation having been entered into by the majority of the recipients, and, worst of all, being forced to take into account, as a matter of traditional (or "negative") comity, the interests of these multifarious third-party nations in assessing whether to take enforcement action that might affect nationals of such nations (and, if so, the extent to which such enforcement would be compatible with those third-party interests).

The glib solution likely to be offered by the WTO's Working Group on the Interaction of Trade and Competition[56] (the "WTO Working Group") would be to exempt such bilateral agreements from non-discrimination principles. That, indeed, is the position advocated by the European Union[57] and is likewise the *preliminary* conclusion drawn by the WTO Working Group.[58] Such an exemption would seem to vitiate the efficacy of any WTO centralization effort on global competition norms and would call into question the wisdom of considering that particular international forum in the first place.[59]

Finally, there is the potentially messy and uncertain area of sectoral exceptions. Many countries, including the United States, commit to the discretion of authorities other than competition authorities the power to approve or deny mergers in certain regulated industries (e.g., telecommunications, energy, banking). One is hard-pressed to imagine how an organization like the WTO could obtain sufficient consensus to approve the infringement on sovereignty necessary to eliminate what will, of necessity, be a patchwork quilt of national laws containing myriad sectoral exceptions, exemptions, and special rules. Governmental motivations underlying these exemptions are, of course, varied; most are likely non-discriminatory, but perhaps not all. The WTO Working Group has acknowledged this problem but, in order to avoid dealing with it, has blithely asserted that non-discrimination in antitrust "would not preclude the enactment of sectoral exceptions, exemptions and exclusions from national competition regimes."[60] That evident reluctance to come to grips with so fundamental an issue to competition policy, particularly where the potential detriment to maintaining these special regimes includes not only the inefficiency that lack of competition in such sectors brings but also the rather obvious risk of kindling protectionist international trade responses in some cases, confirms the inadequacy of the WTO forum.

The proposal to use the WTO as a clearinghouse is also flawed. Undoubtedly it would be more convenient for an MNE to be able to make one preliminary filing with a supranational competition regulator, which would then make a binding determination as to which member countries would, and would not, be entitled to premerger notification and to exercise jurisdiction over the proposed transaction.[61] Apart from the fact that the WTO lacks both the particular institutional expertise and the resources to staff such an operation, there is no principled basis on which such determinations could be made. To do so, the WTO would, in effect, be substituting its judgment for someone else's—either (1) the considered judgment of individual sovereign nations about their own competition policy and about what sorts of transactions raise competitive (or even extra-competitive) concerns sufficient to trigger a reporting requirement, or (2) the judgment of competition authorities, charged with interpreting (and with expertise in interpreting) their own country's antitrust laws, that a particular transaction should be notified because it raises the sorts of policy concerns at which those laws were directed. The entire notion, while perhaps superficially attractive, is too rife with practical difficulties to be workable, even if nation states were willing to cede so much of their sovereignty to an international organization—a dubious proposition at best.

André Fiebig's proposal, while offering some palliatives, suffers from these same infirmities. He suggests that exemptive rulings[62] by the WTO[63] would be binding on member nations, which would have to amend their national competition laws accordingly, subject to the right of a member nation to overrule the WTO upon a showing of compelling reasons.[64] That any nation would cede authority to determine whether its own competition experts could even review the transaction is patently politically unrealistic, even if there were (1) a meaningful quantitative standard that could be applied to reach such a conclusion and (2) a qualitative set of criteria for ascertaining market share upon which all countries either would or should agree.

Last but not least, even some proponents of a broad role, in principle, for the WTO in competition law and policy concede that, notwithstanding the proliferation of merger control regimes, recourse to a regime such as the WTO is in part premature and in part uncalled for. As Professor Mitsuo Matsushita has observed:

> Mergers and acquisitions in the scope of the WTO should be put off for future consideration until such time comes when national markets will have been so globalised that they are integrated into one world market and the distinction between domestic policy and international trade policy will have been blurred so much that convergence of merger policy is essential to maintain the integrated world market…. [I]tems such as the convergence of filing requirement in mergers and acquisitions is a very important issue. This should be dealt with in the appropriate forum.

However, taking into account the objective of the WTO, one may say that this is outside its scope.[65]

A More Circumscribed Role for the WTO

The preceding discussion has identified certain immanent flaws that render the WTO unsuitable for the supranational competition authority role advocated by several scholars and commentators. Nevertheless, there do seem to be a number of more modest functions that organization could usefully perform.

At the outset, however, it should be acknowledged that concerns about proliferation of merger control regimes have a tendency to be overblown. To listen to complaints from multinational corporate behemoths or their sophisticated M&A counsel about the number of filings they have to make is likely to evoke about as much sympathy as an obese child whining for a candy bar. If one is large enough to be conducting business on a manifold multinational basis, surely it should come as no surprise, either *a priori* or *a posteriori*, that compliance with the laws of each jurisdiction in which one does business will be required. These include not just competition laws but tax laws, corporate laws, securities laws, licensing laws, and potentially a host of others.[66] Such compliance is merely a recognized cost of doing business for all enterprises, large and small, domestic or multinational.

Nor is there any question about the legitimacy, at least in principle, of substantive competition concerns even among nation states that are remote from a transaction's so-called "center of gravity." The transaction's effect on local economies may well justify not only review but a remedy—though clearly, under the well-established territoriality principle of public international law, that remedy should be tailored to address anticompetitive effects within the local economy only and, mindful of those bounds, should not unduly trammel extraterritorially the parties' ability to effect the transaction.[67]

Acknowledging that potential for exaggeration and the legitimacy of substantive competition concerns does not, however, eliminate the possibility that there are useful, efficiency-enhancing, and harmonizing functions of a *procedural* nature that could be performed for international M&A transactions on a centralized basis. Foremost among such procedural approaches would be the implementation of an internationally enforceable requirement of transparency in merger review. Under such a regime, each country would be required, before applying its competition law to any M&A transaction involving a foreign party, to have published reasonably detailed merger guidelines. To be satisfactory, these guidelines would—(a) identify the national agency or agencies with jurisdiction over the transaction; (b) articulate the basis on which such jurisdiction will be exercised;[68] (c) elucidate each such agency's enforcement policies in a manner adequate to facilitate strategic planning, provide guidance on each such agency's approach to market definition; (d) detail which defenses or mitigating factors (if any) will be taken into account by each such agency when reviewing a reportable transaction;[69] and (e) delineate any non-competition factors that will be taken into account in the merger review process.[70]

Apart from considerations of transparency, there are other harmonizing procedural suggestions that might tentatively be offered. The goals animating these suggestions are, wherever possible, to streamline transaction costs, expedite pro-competitive or competitively neutral international M&A transactions, and dilute the potential (which, admittedly, can never entirely be erased) for conflict between and among merger review jurisdictions.

To be sure, there neither is, nor can there be, any requirement that WTO members enact their own competition laws. For those that do, however, and specifically for that further subset that include merger control and pre-merger notification within their competition law regimes, certain modest but meaningful reforms could be practicably implemented and enforced under the aegis of the WTO.

First, requiring filings on transactions unlikely to cause any appreciable detrimental effect on competition within the member's territory should be prohibited and sanctionable as violative of customary principles of international law.[71]

Second, procedures should be implemented by each member nation for advance advisory opinions (a kind of *pre*-premerger notification) on whether a filing will be required. Such advisory opinions would perforce be based on and subject to accurate submissions by the parties, including information about (a) their businesses, (b) business conducted within the member nation's territory, (c) revenues from the member's territory, and (d) the extent (if any) to which the parties actually compete within the member's territory (and, if so, whether their combined market share is too low to occasion competitive concern).[72]

Third, filings should not be required unless one of the parties to the transaction either carries on significant operating business in the jurisdiction or has more than *de minimis* sales revenues there. Mere ownership of assets in a country, without any indicia of impact on consumers or the economy, should not be a sufficient nexus. Nor should either reliance on worldwide sales figures (i.e., those outside the jurisdiction) or vaguely articulated *potential* effects on the local economy be sufficient bases for the exercise of jurisdiction.

Fourth, notification thresholds should be specified with precision. In particular, the imprecision and subjectivity inherent in market share tests should, if at all possible, be avoided.[73]

Fifth, guidance should be provided (i.e., transparency) on the timing for providing notifications. That will avoid uncertainty and the potential levying of substantial fines.[74]

Finally, there should be additional guidance in the form of regulations or published policy statements and interpretations (transparency again!). This guidance will enable counsel, including especially local counsel, intelligently to advise their clients about a variety of matters, including, in particular, whether pre-merger notification will, in fact, be required for a particular transaction.

CONCLUSION

With the proliferation of national competition laws, a number of proposals have been put forward for a supranational competition authority to be housed within the World Trade Organization. To be sure, even within well-developed competition law regimes, such as those of the United States and

the European Union, substantial disparities in market definition and in the methodology of assessing market power can and do arise, notwithstanding convergence and nominal use by both systems of the same or similar yardsticks and principles. The GE/Honeywell fracas established that beyond cavil.

To the extent that the aforementioned supranational competition authority proposals envisage a substantive role for the WTO, they fail to take adequately into consideration not merely the political un-palatability of such an arrangement but, more significantly, the institutional unsuitability of the WTO for the task. This article suggests an alternative, and considerably more modest, role as an enforcer of purely procedural reforms designed to abate the potential for inter-jurisdictional conflicts, diminish transaction costs, expedite pro-competitive or competitively neutral M&A transactions, and, most important of all, promote transparency in transnational merger review.

Endnotes

1 *See* U.S. Department of Justice, Final Report of the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust [*hereinafter* ICPAC Report] 43-46 (2000) (discussing merger wave of the 1990's), *available at* http:// www.usdoj.gov/atr/icpac/finalreport.htm (last visited October 30, 2004).

2 *See, e.g.,* Frederic L. Pryor, *Dimensions in the Worldwide Merger Boom,* 35 J. Econ. Issues 825 (2001). *See also* note 5, *infra*.

3 An interesting contrast was offered by former FTC Chairman Robert Pitofsky, who noted, in connection with a speech (though not as part of his prepared remarks) to the Antitrust Section of the A.B.A. at that organizations's 1998 annual meeting, that during the Carter Administration (late 1970's), the FTC reviewed only one transaction with an international dimension. *See Mergers and Acquisitions: ABA Section Examines Consequences of Proliferation of Premerger Notification*, 75 Antitrust & Trade Reg. Rep. (BNA) 163 (1998) (reporting Pitofsky's remarks). The text of Pitofsky's prepared remarks (which do not contain the preceding observation) is available on the FTC's website. *See* Merger and Competition—The Way Ahead, Prepared Remarks of Robert Pitofsky, Chairman, U.S. Federal Trade Commission, Before the American Bar Association Annual Meeting, Toronto, Canada (August 4, 1998), *available at* http://www.ftc.gov/speeches/pitofsky/canada.sp2.htm (last visited October 28, 2004).

4 If the theory of potential competition has any validity, then global M&A activity, with its propensity to produce transnational behemoths, has a tendency to eliminate whatever restraining effect such potential competition might have. The theory arises, after all, "as a negative implication from the perception that, in a market that would otherwise permit monopoly pricing, the existence of potential competition dampens the ability to price in that manner, just as the existence of substitute competition increases the elasticity of the monopolist's demand curve and thereby reduces the level and the social costs of monopoly." Keith R. Fisher, Mergers and Acquisitions of Banks and Savings Institutions § 3.10.2 (1993). Marked diminution in the number of competitors who *could* enter the market *de novo* would tend to vitiate any vestigial market discipline the theory of potential competition might contribute. This tendency would, as a theoretical matter, only be exacerbated by high barriers to entry occasioned by technology and technology licensing or by high levels of industry-specific sunk costs.

5 One estimate of this increase was from $199 billion to $498 billion. *See* Simon J. Evenett et al., "Antitrust Policy in an Evolving Global Marketplace," *in* Antitrust Goes Global: What Future for Transatlantic Cooperation? 1, 4 (Simon J. Evenett *et al.* eds. 2001) (furnishing statistics). That appears relatively modest compared with other estimates. *Cf.* Judy Radler Cohen, *Blockbusters, Nonstop! Global M&A Hits $3.4 Trillion as Europe Takes Off and Telecom Soars,* Investment Dealer's Digest, Jan. 17, 2000 (citing data from Thomson Financial Securities and asserting an increase in global merger activity from $2.5 trillion in 1998 to $3.4 trillion in 1999). These numbers seem at first blush to be inordinately large, but then one must remember the types and magnitudes of transactions announced during those years (*e.g.,* in 1998, Travelers-Citicorp, WorldCom/MCI, NationsBank/BankAmerica, SBC/Ameritech, Norwest/Wells Fargo, and in 1999, Vodafone/Mannesmann, Sprint/MCI WorldCom, Olivetti/Telecom Italia). *See* ICPAC Report, *supra* note 1, at 45 n.9. The impact of rapidly evolving technology can be seen in the industries witnessing the most consolidation: telecommunications and financial services.

6 The aggregate amount of European M&A transactions in 1999 was more than double that of the preceding year. *Id.* at 45.

7 *See* ICPAC Report, *supra* note 1, at 33 (noting that by 2000, approximately sixty nations had adopted antitrust laws, mostly in the early 1990s, and that twenty more were in the process of drafting laws). According to more recent estimates, over 100 countries had competition laws as of the summer of 2004, and nearly 70 had pre-merger notification laws. *See* R. Hewitt Pate, *Securing the Benefits of Global Competition*, Address At the Tokyo American Center, Tokyo Japan (Sept. 10, 2004), *available at* http://www.usdoj.gov/atr/public/speeches/205389.htm (last visited October 30, 2004). For some late 1990's perspectives on this phenomenon, *see* William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies*, 66 U. Cin. L. Rev. 1075 (1998).

8 For example, according to one commentator, when MCI merged with WorldCom even back in 1997, over 30 agencies reviewed the transaction. Adam Frederickson, *A Strategic Approach to Multi-jurisdictional Filings,* 4 Eur. Counsel 23 (Dec. 1999/Jan. 2000). *See also* Notification and Procedures Subgroup, Int'l Competition Network, Report on the Costs and Burdens of Multijurisdictional Merger Review 10-12 (2002), *available at* http://www.internationalcompetitionnetwork.org/costburd.pdf (last visited February 12, 2004). *See also* Ariel Ezrachi, *The Role of Voluntary Frameworks in Multinational Cooperation over Merger Control,* 36 Geo. Wash. Int'l L. Rev. 433, 435 n.5 (2004) (asserting that the Exxon/Mobil merger was subject to review in "roughly forty jurisdictions").

9 The variations on this theme are as many and multiform as there are individualistic national customs or priorities that animate competition policy. Some competition laws, for example, concern themselves in particular with the impact of a transaction on local small- to medium-sized business. *E.g.,* South Africa, Competition Act of 1998, ch.3, § 16(3).

10 A third, oft-cited, is the nebulous "public interest" standard, which used to be the test under the U.K.'s competition law. Recognizing that this standard facilitates the substitution of non-antitrust goals for rigorous analysis of the effects of a particular transaction on competition, the U.K. has replaced its overtly politicized public interest approach with an explicitly competition-oriented standard. *See generally* U.K. Department of Trade and Industry, Productivity and Enterprise: A World Class Competition Regime 23-24 (2001), *available at* http://www.dti.gov.uk/ccp/topics2/pdf2/compwp.pdf (last visited October 28, 2004); Enterprise Act 2002, Ch. 40, § 35 (adopting as basic framework "substantial lessening of competition" test), *available at* http://www.legislation.hmso.gov.uk/acts/acts2002/20040-d.htm#36 (last visited Oct. 28, 2004).

11 Antitrust regulators in both the United States and the European Union provide training programs and other assistance for those in charge of establishing and enforcing competition laws in other countries. *See* Fed. Trade Comm'n, *A Positive Agenda for Consumers: The FTC Year in Review* (2003), *available at* http:// www.ftc.gov/reports/aba/gpra2003.pdf (last visited October 16, 2004) (describing FTC program); Kathleen E. McDermott, *Antitrust Outreach: U.S. Agencies Provide Competition Counseling to Eastern Europe,* Antitrust, 4-7 (Fall/Winter 1991) (describing Antitrust Division's initiative in Eastern Europe); Juan Antonio Rivière Martí, *Competition Policy in Latin America: A New Area of Interest for the European Union,* EC Competition Pol'y Newsl. (Spring 1997), *available at* http://europa.eu.int/comm/competition/speeches/text/sp1997_014_ en.html (last visited Oct. 16, 2004) (describing EU initiative in Latin America).

12 *See* Evenett, *supra* note 5, at 16.

13 This is a familiar phenomenon in the United States. Contrast the profile of antitrust enforcement under the Carter Administration with that under the Reagan Administration; a similar comparison can be made with the Administrations of Bill Clinton and George W. Bush (as Microsoft can readily attest).

14 At least where there are no differences in nuance, the terms "antitrust" and "competition" (in the sense of regulation of competition or competition policy) will be used interchangeably herein. *Cf.* Wolfgang Pape, *Socio-Cultural Differences and International Competition Law,* 5 Eur. L.J. 438, 444 (1999) (noting that in bilateral discussions between the United States and the European Community, European negotiators agreed that "competition" should be interpreted as meaning "antitrust" in the American sense).

15 Competition law jurisdiction is generally based upon the territoriality principle. *See, e.g.,* Cases 89, 104, 114, 116-7, 125-9/85, Ahlström v. Commission, 1988 E.C.R. 5193 ¶ 18.

16 To avoid confusion, in this article the abbreviation "Commission" will be used to refer to the European Commission but not the U.S. Federal Trade Commission, which shall only be abbreviated by its acronym, "FTC."

17 *See generally* Alison Mitchell, *Clinton Warns Europeans of Trade Complaint on Boeing Deal*, N.Y. Times, July 18, 1997, at D2; William E. Kovacic, *Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy*, 68 Antitrust L.J. 805, 826 (2001). A common view in the United States was that the position taken by the European Commission in the Boeing/McDonnell Douglas matter was pure and simple protectionism of its aerospace industry in general and of Airbus in particular. *See* Interview with Thomas L. Broeder and Benjamin S. Sharp, Attorneys for Boeing, 12 Antitrust 4, 5 (1997); Catherine Yang, *When Protectionism Wears Camouflage,* Business Week, June 2, 1997, at 60. Predictably enough, the Commission's position was that its concerns were exclusively of a legal nature and absolutely legitimate under applicable EC competition laws. *See, e.g.,* European Commission, Press Release IP/97/400 (May 13, 1997) (quoting former EC Competition Commissioner Karel Van Miert: "Our analysis of this case is strictly conducted along the lines and criteria which have been spelled out in the legal framework of the European Merger Regulation, and nothing else.").

18 Democratic Senators John D. Rockefeller, IV and Ernest F. Hollings warned of possible retaliatory action by Congress. *See* William Drozdiak, *European Union Kills GE Deal*, Wash. Post, Jul. 4, 2001, at A1 ("U.S. Senators… warned that thwarting the merger would… compel retaliatory action by Washington."). U.S. Treasury Secretary Paul H. O'Neill derided the Commission's decision as "off the wall" and said that something needed to be done to bring the EU back in line. Brian M. Carney, *Loggerheads: Mario Monti, Central Planner,* Wall St. J. Eur., Jul. 6, 2001, at 6. *See also* Brandon Mitchener & Philip Shiskin, *The Honeywell Deal: Who Asked Monti, Anyway?,* Wall St. J., June 19, 2001, at A14.

19 Ministerial Declaration, WT/MIN(01)/DEC/1, ¶¶ 23-25 (Nov. 14, 2001), *available at* http://www.wto.org/english/thewto_e/minist_ e/min01_ e/mindecl_e.htm (last visited August 8, 2004) (*hereinafter* "Doha Ministerial Declaration"). This Declaration announced a "work programme" rather than a "round" of negotiations, a somewhat murky distinction but one that was doubtless significant for those countries, such as India, that are skeptical of antitrust negotiations in this forum. *See* Press Release, Government of India Press Information Bureau, Major Gains for India at Doha Ministerial Conference (Nov. 15, 2001), *available at* http://commin.nic.in/doc/nov01_ release.htm (last visited August 8, 2004) ("India has also succeeded in warding off any commitments for negotiations in the important areas of Investment, Competition Policy and Transparency in Government Procurement. This has been made possible through extremely hard bargaining on India's part during the Doha Ministerial Conference.").

20 Doha Ministerial Declaration, *supra* note 19, ¶ 25.

21 Though there are many proponents of this view, it was actually Sir Leon Brittan, one of the principal contemporary architects of the European Union, who first suggested that a trade dispute mechanism (then under GATT auspices) might be used in transnational M&A situations. *See, e.g., EC Commissioner Recommends Larger Role for GATT in Developing Competition Policy,* BNA Antitrust & Trade Regulation Daily (Feb. 10, 1992).

22 *E.g.,* Eleanor M. Fox, *Toward World Antitrust and Market Access,* 91 Am. J. Int'l L. 1, 13 (1997); Eleanor M. Fox, *Competition Law and the Millennium Round*, 2 J. Int'l Econ. L. 665, 670- 72 (1999); Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 Nw. J. Int'l L.& Bus. 233, 247-251 (2000).

23 *E.g.,* ICPAC Report, *supra* note 1, at 279; Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy,* 94 Am. J. Int'l L. 478, 487-94 (2000).

24 *See, e.g.,* Stefan Schmitz, *The European Commission's Decision in GE/Honeywell and the Question of the Goals of Antitrust Law,* 23 U. Pa. J. Int'l. Econ. L. 539, 567-68 (2002); Keith R. Fisher, *Transparency in Global Merger Review: A Limited Role for the WTO?,* 11 Stanford J. Law, Bus. & Fin. 327, 359-372 (2006).

25 In 1948, the UN Conference on Trade and Employment resulted in what became known as the Havana Charter or the International Trade Organization (ITO). Some 53 nations signed the Havana Charter and pledged therein to promote both domestic and international actions for the purpose, *inter alia*, of eliminating restrictive business practices on the part of public or private commercial enterprises, including business practices that might limit access to markets or foster monopolization. *See* Havana Charter for an International Trade Organization, United States Conference on Trade and Employment, held at Havana, Cuba, 21 November 1947 to 24 March 1948, Final Act and Related Documents, U.N. Doc. ICITO/1/4 (March 1948), at Chapter V, Restrictive Business Practices, Art. 46, *available at* www.worldtradelaw.net/misc/havana.pdf (last visited Dec. 1, 2004). *See generally* Clair Wilcox, A Charter for World Trade 153-60, 227 (1949); Frederick M. Abbott, "Public Policy and Global Technological Integration: An Introduction," *in* Public Policy and Global Technological Integration 3 (Frederick M. Abbott & David J. Gerber, eds., 1997). Congress, however, objected to the Havana Charter, and the creation of the ITO was aborted, although the trading system was preserved under the General Agreement on Tariffs and Trade. For more background information, *see* Robert R. Wilson, *Proposed ITO Charter*, 41 Am. J. Int'l L. 879 (1947); George Bronz, *The International Trade Organisation Charter*, 62 Harv. L. Rev. 1089 (1949).

26 *See* UNCTAD, The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, U.N. Doc. TD/RBP/CONF/10, *reprinted in* 19 I.L.M. 813 (1980). For the more recently revised version, *see* U.N. Doc. TD/RBP/CONF/10/Rev.2 (2000), *available at* http://www.unctad.org/en/docs/tdrbpconf10r2en.pdf (last visited Dec. 1, 2004).

27 *See, e.g.,* OECD, Council Recommendation Concerning Cooperation between Member Countries on Restrictive Business Practices Affecting International Trade (Oct. 5, 1967), *reprinted in* 8 I.L.M. 1309 (1969); OECD, Council Recommendation Concerning a Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade C (73) 99 (Final) (July 3, 1973), *reprinted in* 19 Antitrust Bull. 283 (1974); Revised Recommendation of the OECD Council Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting Trade, OECD Doc. No. C (86) 44 (Final) (May 21, 1986), revised by OECD Doc. C(95)130/final (July 27-28, 1995), *reprinted in* 35 I.L.M. 1314 (1996).

28 *See* International Antitrust Code Working Group, Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (July 10, 1993), *reprinted in* 65 Antitrust & Trade Reg. Rep. (BNA) S-1, Issue No. 1628 (Aug. 19, 1993) (Special Supp.). This proposal went nowhere fast—even faster, indeed, than its predecessors. For discussion, *see generally* Daniel J. Gifford, *The Draft International Antitrust Code Proposed At Munich: Good Intentions Gone Awry*, 6 Minn. J. Global Trade 1 (1997).

29 Doha Ministerial Declaration, *supra* note 19, ¶ 23 (declaring agreement that "negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations").

30 Among those that do not there is also apparently a widespread mistrust about the value of such regimes to the developing world. *See, e.g.,* Working Group on the Interaction Between Trade and Competition Policy, Report on the Meeting of 26- 27 September 2002, WT/WGTCP/M/19, P 17 (Nov. 15, 2002), *available at* http:// www.wto.org (last visited October 30, 2004) (reporting submissions by India on the non-discrimination principles). *Cf.* Michal S. Gall, *Size Does Matter: The Effects of Market Size on Optimal Competition Policy*, 74 S. Cal. L. Rev. 1437, 1439 (2001) ("the size of a jurisdiction's market significantly affects the competition policy that it should adopt"); A.E. Rodriguez & Malcolm B. Coate, *Limits to Antitrust for Reforming Economies*, 18 Hous. J. Int'l L. 311, 312 (1996) (suggesting that "antitrust policies adopted in reforming economies should be strictly limited in scope").

31 Esperanto, an invented language not springing from any particular people or geographic region, was developed in the late 19th century in the belief that a common language, allowing people with different native tongues to communicate more effectively, would be useful in resolving human problems that historically had led to strife. Esperanto is not officially supported by any sovereign government. *See generally* Esperanto—An Overview, *available at* http://www.webcom.com/~donh/efaq.html (last visited April 15, 2005).

32 *See, e.g.,* World Briefing Europe: *European Union Chief Gives Up on Constitution*, N.Y. Times, Sept. 22, 2005, at A10; Elaine Sciolino, *European Charter Architect Faults Chirac for Its Rejection*, N.Y. Times, June 15, 2005, at A3; Alan Cowell, *Britain Suspends Referendum on European Constitution*, N.Y. Times, June 7, 2005, at A10; Marlise Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. Times, June 2, 2005, at A10; Elaine Sciolino, *French Voters Soundly Reject European Pact*, N.Y. Times, May 30, 2005, at A1.

33 *See, e.g.,* Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. Rev. 343, 374 (1997) (noting that such countervailing interests will determine the rate and nature of future progress and giving as examples governmental and subgovernmental pressures, business pressures, institutional pressures, private interest groups, transnational coalitions, and international organizations).

34 *See* Eleanor M. Fox, *Toward World Antitrust and Market Access,* 91 Am. J. Int'l L. 1, 13 (1997).

35 *See* Fiebig, *supra* note 22, at 247-251.

36 MFN status typically arises from clauses in international trade arrangements pursuant to which parties to a treaty are bound to extend trading benefits equal to those extended to any third party state.

37 National treatment is the commitment of a country to accord to foreign investors and to foreign-controlled enterprises in its territory treatment no less favorable than that accorded in like situations to domestic investors and enterprises.

38 *See, e.g.,* John H. Jackson, *The WTO "Constitution" and Proposed Reforms: Seven "Mantras" Revisited,* 4 J. Int'l Econ. L. 67, 72-73 (2001) (listing MFN as one of seven "mantras" central to the WTO); Debra P. Steger, *Afterword: The "Trade and…" Conundrum—A Commentary,* 96 Am. J. Int' L. 135, 137, 139 (2002) (suggesting that non-discrimination and affiliated legal principles now predominate over market access and reciprocity norms).

39 *See, e.g.,* Eleanor M. Fox, *Global Markets, National Law, and the Regulation of Business: A View From the Top,* 75 St. John's L. Rev. 383, 396 (2001) (advocating transparency and non-discrimination based on nationality); Donald I. Baker et al., *The Harmonization of International Competition Law Enforcement*, *in* Competition Policy in the Global Economy 439, 441-47 (Leonard Waverman et al. eds., 1997) (including national treatment and transparency as fundamental principles for harmonized international antitrust).

40 *See, e.g.,* Communication from the EC Communication from the European Community and its Member States, WT/WGTCP/W/222, ¶ 11 (Nov. 19, 2002), *available at* http://www.wto.org (last visited October 16, 2004) (stressing prevalence of non-discrimination principles in trade law and national antitrust laws as argument for incorporating them as part of WTO antitrust regime).

41 Commentators have differentiated international trade law from international competition law on this sovereign-private distinction. *See, e.g.,* P.J. Lloyd, *The Architecture of the WTO*, 17 Eur. J. Pol. Econ. 327, 348 (2001); Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy,* 94 Am. J. Int'l L. 478, 489 (2000).

42 *See, e.g.,* Henrik Horn & Petro C. Mavroidis, *Economic and Legal Aspects of the Most-Favored Nation Clause,* 17 Eur. J. Pol. Econ. 233, 253 (2001) (discussing the free-rider phenomenon and concessions).

43 ICPAC Report, *supra* note 1, at 50 & n. 30 (citing James B. Kobak, Jr. & Anthony M. D'Iorio, *The High Costs of Cross-Border Merger Reviews*, *in* The Global Economy at the Turn of the Century, Vol. III: International Trade, at 717, 721 (Gulser Meric & Susan E. W. Nicholds eds., 1998)).

44 The MNE will simply "vote with its feet" and abandon doing business in such a country, at least where the loss of revenues from such an exit (or the increase in costs from remaining) would be smaller than the anticipated increase in revenues from the merger or other transaction.

45 *E.g.,* the Caribbean Community (CARICOM) Single Market and Economy (CSME), Protocol VIII on Competition Policy, Consumer Protection, Dumping and Subsidies (Protocol Amending the Treaty Establishing the Caribbean Community) art. 30, *available at* http://www.caricom.org (last visited October 30, 2004).

46 For simplicity, this discussion will ignore the analytical complications engendered by the odd state-conferred monopoly, by state-owned enterprises, and by barriers to entry effected as a matter of extrinsic regulatory policy.

47 In the United States, for example, the Sherman Act, as amended by the Foreign Trade Antitrust Improvements Act (FTAIA), is simply inapplicable to trade or commerce with foreign nations except where "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic trade or commerce. 15 U.S.C. § 6a. *See, e.g.,* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796-97 n.23 (1993) (FTAIA "was intended to exempt from the Sherman Act export transactions that did not injure the United States economy"). Indeed, export cartels are a well-known exception to the ukase against cartels. *See* Waller, *supra* note 33, at 397 (noting the disparity of treatment). Another example is the Webb-Pomerene Act, 15 U.S.C. § 61 *et seq.* (exempting from the Sherman Act associations engaged exclusively in export trade). *See also* Diane P. Wood, *The U.S. Antitrust Laws in a Global Context,* 2004 Colum. Bus. L. Rev. 265, 267-68 ("Another persistent sore spot in the cartel area is the existence of legally tolerated export cartels. Some (though not necessarily all) Webb-Pomerene associations and export trading companies might fit that description. To the extent that an export arrangement among competitors is legitimately described as a cartel rather than a joint venture—that is, it exists solely because it will be more profitable to reduce output and increase prices and no efficiencies from joint operations are likely—it is a raw way of harming foreign consumers, whose injuries are not likely to bother a domestic political constituency."); Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy,* 1 Wash. U. Global Stud. L. Rev. 462, 471 & n.16 (2002) (citing Japanese export cartel law, *Yushutsunyu torihiki ho* [Export and Import Transactions Law], Law No. 299 of 1952, as amended). *Cf.* U.S. Department of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.122 (1995) (authorizing invocation of the Sherman Act to open foreign markets closed by anticompetitive restraints such as an import cartel or monopolistic exclusive dealing), *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm (last visited October 30, 2004).

48 Assuming, that is, in the case of a MNE, that corporate domicile—"nationality"—continues to have any significance at all. *See, e.g.,* Peter T. Muchlinski, Multinational Enterprises and the Law (1995); *The Discreet Charm of the Multicultural Multinational*, Economist, July 30, 1994, at 58; U.S. Int'l Trade Comm'n, *The Effect of Greater Economic Integration Within the European Community in the United States* (USITC Pub. No. 2204) (July 1989).

49 *See, e.g.,* Antitrust Cooperation Agreements, *available at* http:// www.usdoj.gov/atr/public/international/int_arrangements.htm (last visited October 30, 2004).

50 These bilateral antitrust agreements have been entered into pursuant to express authority granted by Congress under the International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. § 6201 *et seq.* The Act requires that the treaty partner have comparable ability to that of the United States enforcement apparatus to provide assistance and that it maintain the confidentiality of information disclosed.

51 MLATs create frameworks for mutual (usually bilateral) cooperation in the investigation and prosecution of transnational crime. *See* Keith R. Fisher, *In Rem Alternatives to Extradition for Money Laundering,* 25 Loyola of L.A. Int'l & Comp. L. Rev. 409, 436 (2003). As antitrust violations are criminal offenses under the laws of many jurisdictions, bilateral competition agreements are conceptually similar.

52 Typically MLATs deal with obtaining and preserving evidence and providing assistance to facilitate confiscation of criminal proceeds and instrumentalities. *Id.* (citing Jimmy Gurulé, *The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances—A Ten Year Perspective: Is International Cooperation Merely Illusory?*, 22 Fordham Int'l L.J. 74, 90-91 & n.55 (1998) (listing MLATs entered into by the United States with Colombia, Mexico, the Cayman Islands, Thailand, Panama, Switzerland, and other nations)).

53 Indeed, one of the key agreements is the Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, *available at* http://www.usdoj.gov/atr/public/international/docs/1781.htm (last visited February 12, 2004).

54 The contretemps over Boeing/McDonnell Douglas and GE/Honeywell are cases in point.

55 The notion of comity in international law refers traditionally to respect for the interests of another nation state. This is sometimes referred to as "negative comity." "Positive comity" is the obverse: a request by Country A that Country B initiate (completely voluntarily, and in whatever form it deems appropriate) some form of enforcement proceeding to remedy anticompetitive conduct taking place within Country B's borders that is substantially and adversely affecting the interests of Country A. "[I]f a signatory [*e.g.*, to a bilateral antitrust agreement] believes that anticompetitive practices carried out in the territory of another signatory are adversely affecting its own important interests, it may notify the other signatory and request its competition authorities to initiate appropriate enforcement procedures. However, in order to preserve control over limited enforcement resources, the requested signatory would retain the right not to act on the request." Joanna R. Shelton, Deputy Secretary-General, OECD, Competition Policy: What Chance for International Rules?, at 5, *available at* http://www.oecd.org/dataoecd/34/39/1919969.pdf (last visited November 1, 2004). *See also* OECD Committee on Competition Law and Policy, CLP Report on Positive Comity, OECD Doc. DAFFE/CLP(99)19, at 46-49 (June 14, 1999); Seung Wha Chang, *Interaction Between Trade and Competition: Why a Multilateral Approach for the United States?,* 14 Duke J. Comp. & Int'l. L. 1, 11 & n.42 (2004).

56 This working group was established in 1996 after the Singapore Ministerial Conference.

57 *See* Communication from the European Community and its Member States, WT/WGTCP/W/222, at 8 (Nov. 19, 2002), *available at* http://www.wto.org (last visited October 30, 2004).

58 Working Group on the Interaction Between Trade and Competition Policy, Report (2001) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, WT/WGTCP/5, at 28 (Oct. 8, 2001), *available at* http://www.wto.org (last visited Oct. 30, 2004).

59 Granting regulatory forbearance or providing assistance to some WTO members but not to others would appear antithetical to the core principles of non-discrimination and transparency invoked by the Doha Ministerial Declaration. Analogous exemptions for customs unions and free trade areas under the GATT and other agreements have been quite controversial. *See, e.g.,* John H. Jackson, The World Trading System 165-73 (2d ed. 1997).

60 Working Group on the Interaction between Trade and Competition Policy, Core Principles, Including Transparency, Non-Discrimination and Procedural Fairness: Background Note by the Secretariat, WT/WGTCP/W/209, ¶ 36 (Sept. 19, 2002), *available at* http://www.wto.org (last visited October 16, 2004).

61 The downside is that for transactions that present anticompetitive profiles in particular jurisdictions, one is merely adding an additional layer of regulatory scrutiny.

62 These would be rulings by Fiebig's suggested WTO Premerger Office that particular transactions pose no threat to competition within particular countries. Fiebig, *supra* note 22, at 249.

63 To his credit, Fiebig acknowledges that one has difficulty offering a cogent standard for identifying transactions that are competitively innocuous. *Id.* at 252.

64 He posits, however, that this possibility of overruling the WTO would be available only where the country could establish that within its borders the parties to the transaction would have more than 10% of the market share. *Id.* at 251. One wonders at the arbitrariness of this or any other percentage that might be selected, short of one that was truly and irrefutably *de minimis* (*e.g.,* less than 5%). That any sovereign nation would accede to such a suggestion seems implausible.

65 Mitsuo Matsushita, *Reflections on Competition Policy/Law in the Framework of the WTO*, *in* Fordham Corp. L. Inst. 31, 34-38 (Barry E. Hawk ed., 1998).

66 It is especially incongruous, even embarrassing, to hear such complaints about foreign competition laws from large, U.S. corporations, which, because of their long experience in doing business on a multi-state basis domestically, have every reason to expect compliance costs arising from a multiplicity of legal regimes and requirements.

67 *See supra* note 15, and accompanying text.

68 This would entail, at a minimum, defining with some precision the types of transactions subsumed within the regulatory scheme, the threshold below which such transactions need not be reported or will have no competitive concern, and the manner in which such threshold is calculated.

69 *E.g.,* failing firm defenses, efficiencies, etc.

70 For example, those countries that require, or permit, policies designed to promote "national champions" should not endeavor to conceal such policies but should put other countries and foreign businesses on notice.

71 *See supra* note 15, and accompanying text.

72 Canada, for example, has a procedure under which the parties may apply for an Advance Ruling Certificate, the granting of which is discretionary with the Bureau of Competition Policy but which, if granted, absolves the parties from premerger notification.

73 According to the ABA Antitrust Section, a significant number of jurisdictions use this approach for ascertaining whether a proposed transaction is reportable, including Brazil, Bulgaria, the Czech Republic, Estonia, Greece, Israel, Portugal, Slovenia, Slovakia, Spain, Taiwan, Tunisia, and Turkey.

74 *See, e.g.,* ICPAC Report, *supra* note 1, at 111, n.49 (noting reports of "recent problems that parties meet under the Brazilian system, including threats to retroactively apply changes in the law so as to impose fines on parties for 'late' notification.").

Free Speech and Election Law

Public Employees and Governmental Expression

*By Randy J. Kozel**

My argument is that the modern jurisprudence of public employee speech neglects an important factor: the government's interest in expressing itself.

The existing doctrine for defining the First Amendment rights of public employees is predicated upon balancing two competing sets of considerations. On the one hand, there is the employee's interest in speaking (and, correspondingly, society's interest in listening). On the other hand, there is the government's interest in providing public services efficiently (and, correspondingly, society's interest in reaping the benefits). These considerations are undoubtedly significant. Yet the doctrine has not taken proper account of the fact that government agencies are concerned with more than just operational efficiency; they are also concerned with conveying messages and values of their own. And though the First Amendment restricts the government's ability to prohibit disfavored viewpoints when it acts as a sovereign regulating the conduct of its citizens, the government should not necessarily face similar restrictions when it acts in the distinct role of employer. There is something to be said for allowing government agencies to prohibit certain employee speech simply because the speech contradicts the agencies' values.

I. The Doctrine

Over the last five decades, the Supreme Court has decided numerous cases involving the First Amendment rights of government employees. Two of those cases stand out as particularly significant.

The first is *Pickering v. Board of Education*, in which a teacher was fired because of a letter he submitted for publication in a local newspaper. The letter asserted, among other things, that the teacher's school board had mishandled "past proposals to raise new revenue for the schools."[1] The Supreme Court held the firing to be unconstitutional.[2] It rejected the notion that "teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."[3] The Court then articulated a balancing test for evaluating First Amendment claims asserted by government employees: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[4]

The other foundational case came fifteen years later. In *Connick v. Myers*, an assistant district attorney was fired for circulating a questionnaire to her coworkers that addressed issues including "the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[5] The Supreme Court began by considering whether the employee had expressed herself as a citizen on a matter of public concern. It explained that this is a critical threshold inquiry, for "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[6] Finding that one of the items on the questionnaire did indeed bear on a matter of public concern, the Court proceeded to apply the *Pickering* balancing test, which it struck in favor of the employer. The "limited First Amendment interest involved" in the case did not require the speaker's supervisor to "tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[7]

Putting together *Pickering* and *Connick*, a government employer generally cannot discipline an employee based on his speech if (1) the employee spoke as a citizen on a matter of public concern, and (2) the balance of interests described in *Pickering* weighs in the employee's favor. There are nuances and exceptions to this overarching framework (for example, affording greater discretion over the removal of high-ranking officials),[8] but it is the framework that is most important for present purposes.

II. The Problem

The modern doctrine does an admirable job of recognizing that although government employees do not relinquish all of their free speech rights by reason of their employment their employers nevertheless need the flexibility to make routine operational decisions. What the doctrine fails to acknowledge is that it is not just *employees* whose expressive interests are at stake. Governments have expressive interests, too.

There are at least three immediate objections to this point. The first is that the problem is illusory, because the modern doctrine protects the government's expressive interests by recognizing its need to "promot[e] the efficiency of the public services it performs through its employees."[9] The second is that the government has no legitimate expressive interests to protect, even when it acts in its role as employer. And the third is that if the government wishes to indicate its disapproval of statements made by its employees, it should be required to rely on counterspeech.

A. First Objection: The Modern Doctrine Already Protects the Government's Expressive Interests

When the leading Supreme Court cases describe the governmental interests that are relevant to disputes over employee speech, they do so predominantly in terms of operational efficiency. To be sure, the Court has broadly stated that "[t]he *Pickering* balance requires full consideration of the

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government's interest in the effective and efficient fulfillment of its responsibilities to the public."[10] But this has been taken to mean something much narrower—essentially, that an employer may "remove employees whose conduct hinders efficient operation."[11]

For an illustration, consider the 1987 case of *Rankin v. McPherson*.[12] That case arose from statements made by a clerical employee in a county constable's office. Upon learning that there had been an assassination attempt against President Reagan, the employee told a coworker, "If they go for him again, I hope they get him."[13] News of the statement made its way to the constable, who subsequently fired the employee.[14] The Supreme Court held that the firing violated the employee's constitutional rights. The Court noted that "there is no evidence that [the employee's statement] interfered with the efficient functioning of the office."[15] To the contrary, the firing was "based on the *content* of [the employee's] speech."[16] The Court explained that this justification is impermissible, at least when applied to employees who serve "no confidential, policymaking, or public contact role."[17]

Justice Scalia dissented, agreeing with counsel's statement at oral argument that "no law enforcement agency is required by the First Amendment to permit one of its employees to 'ride with the cops and cheer for the robbers.'"[18] He also criticized the majority's narrow conception of the implicated governmental interests, reasoning that "the Constable obviously has a strong interest in preventing statements by any of his employees approving, or expressing a desire for, serious, violent crimes—regardless of whether the statements actually interfere with office operations at the time they are made or demonstrate character traits that make the speaker unsuitable for law enforcement work."[19] But the majority was not persuaded. It left no doubt about which governmental interests it viewed as relevant to the constitutional inquiry: "[T]he state interest element of the [*Pickering* balancing] test focuses on the effective functioning of the public employer's enterprise."[20] And it made clear that "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."[21]

Whatever one makes of *Rankin*'s outcome, the case highlights the distinction between governmental *efficiency* interests, which play some role in the modern First Amendment calculus, and governmental *expressive* interests, which play no role at all. Indeed, the *Rankin* Court was unmistakable in its disapproval of employment decisions that are based on the employer's "disagree[ment] with the content of employees' speech." The takeaway is this: It is incorrect to assume that *Pickering*'s concern for operational efficiency will indirectly protect the expressive interests of government agencies. If governments really do possess legitimate expressive interests when they act in their roles as employers, then the existing doctrine needs to change to reflect that fact.

B. Second Objection: The Government's Expressive Interests Do Not Implicate the First Amendment

When a government acts in its ordinary role as a sovereign, the First Amendment places significant limits on its ability to express itself by restricting the speech of private citizens. While the government may enact criminal prohibitions against certain speech, it generally cannot do so based purely on the judgment that the speech is misguided, or even offensive. There must be other considerations in play—for example, the speech in question must be so worthless (like "false statements of fact") as to warrant no First Amendment protection at all,[22] or the government's interest must be heightened by factors such as the probable repercussions of the speech (like "fighting" words).[23] Nor does the government have a free hand to compel its citizens to disseminate a given message. As the Supreme Court remarked last Term, "Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say."[24]

This does not mean that government agencies may never express themselves. We expect our public institutions to convey all sorts of messages and values. "It is the very business of government," Justice Scalia has noted, "to favor and disfavor points of view on (in modern times, at least) innumerable subjects—which is the main reason we have decided to elect those who run the government, rather than save money by making their posts hereditary."[25] Indeed, governments may even require taxpayers to fund programs that "involve, or entirely consist of, advocating a position."[26] Some values prized by government agencies can be generalized across institutions—for instance, a belief in fairness and equality. Other values are most obviously associated with certain types of agencies, such as the Environmental Protection Agency's promotion of land conservation. These values are important because they are, in a very real sense, *our* values.[27] And they remain important even when they run counter to speech made by a government employee. This does not make the employee's speech any less significant. It simply means there is another interest at stake.

Recall the example of *Rankin v. McPherson*, where the constable encountered an employee who announced her hope for a presidential assassination. The constable had an interest in expressing views that were inconsistent with those of the employee—views such as belief in law and order, desire to prevent violent crime, and respect for elected officials. He promoted those views by firing an employee who announced that she did not share them, at least not fully. But in deciding whether that dismissal violated the Constitution, the Supreme Court did not ascribe any significance to the constable's interest in expressing and preserving his office's values. To the contrary, the Court noted that "the state interest element of the [*Pickering* balancing] test focuses on the effective functioning of the public employer's enterprise."[28]

I would like to suggest that this approach is incomplete. Government employees may not, as a condition of their employment, be forced to relinquish the entirety of their First Amendment protections.[29] This rule reflects the underlying notion that although the creation of an employment relationship brings about certain changes to the parties' legitimate expectations and rights, it does not erase all of the expectations and rights that previously existed. Why, then, should the government's interests be treated so differently?

If the government has an important interest in expressing itself through the actions and statements of its agencies, why should that interest cease to matter in any dispute between a government agency and one of its employees?

Of course, the fact that a given interest is important does not mean the interest has any relevance to the Constitution. That is, even if one acknowledges both that government employers have significant interests in expressing their values and that those interests do not disappear in disputes between government employers and their employees, it does not follow that the interests have any *constitutional* dimension. The response, I think, is this: The modern doctrine is founded on the idea that a citizen who accepts a government job retains his right to free speech, but only to a point. Identifying that point requires weighing the employee's interest in free speech against the agency's interest in fulfilling its obligations to the public. And while the existing doctrine limits the relevant governmental interest to the pursuit of operational efficiency, there does not seem to be any constitutional basis for distinguishing between a government agency's interest in efficiency and its interest in promoting the values that lie at the core of its organizational mission.

Here is what I am getting at: If the Constitution permits the restriction of a government employee's speech when the speech interferes with his employer's efficient operations, then it is difficult to see why the Constitution does not also permit the restriction of speech that contradicts the employer's fundamental values.

C. Third Objection: The Government May Protect Its Expressive Interests Through Counterspeech

Belief in the power of counterspeech is a critical component of our First Amendment jurisprudence. As noted above, when a private citizen expresses herself in a way that is controversial or offensive, the government ordinarily may not criminalize the citizen's speech. To the contrary, the First Amendment generally requires the government to rely on counterspeech, either from other citizens or from the government itself.[30] If counterspeech is the government's remedy for dealing with private citizens, then why should the same not be true when the government deals with its employees?

The difference, I think, is that counterspeech from a government agency's top policymakers is not likely to be an effective response to undesirable employee speech. A government agency has a legitimate interest in demonstrating both to the public and to its own employees that the agency, *as an entity*, does not accept the views of an employee who contradicts its values. It is therefore reasonable for the agency's policymakers to conclude that it would be insufficient simply to disagree with the employee by issuing an internal or external statement, and then to go on holding out the employee as the agency's representative. To do so would be to accept that while certain values may be embraced by the agency's policymakers, those values are not necessarily shared—and, indeed, may be explicitly rejected—by the other employees who make up the agency. This is particularly problematic given that it will often be non-policymaking employees who have the closest contact with the public and the greatest likelihood of affecting the way in which a given agency is perceived externally. If an agency's employees were free to contradict the values established by its policymakers, the result would be to subvert the agency's ability to communicate its values—as integral components of its organizational mission.

III. Some Possible Solutions

Let us assume—(perhaps charitably)—that at least some of what I have said so far makes sense. The next question is how to put it into practice. Accepting that the existing doctrine reflects an incomplete method of applying the First Amendment to disputes between government employers and their employees, what adjustments could be made to afford proper significance to the government's interest in expressing itself?

The initial step would be to recognize the government's expressive interests as an additional component of the *Pickering* balancing test. That only gets us so far, though, because we still need an idea of how much weight this factor should be given. The following sections offer preliminary discussions of three possible approaches, all of which assume that the existing doctrine's basic framework remains intact.

A. First Option: Excessive Deference to Employers

One possibility is that the government's expressive interests should receive a great deal of weight, meaning that a government employer generally will be prohibited from restricting employee speech only when the values asserted by the employer are exceptionally weak. For example, the constable in *Rankin* would be permitted to fire an employee that wished for a presidential assassination, because the firing would be in furtherance of core values such as order and lawfulness. But where a public employee was disciplined for being an outspoken fan of the Chicago Bears, the employer probably could not justify its decision based on a claimed expressive interest in cheering for the Green Bay Packers.

The most serious problem with this approach is that it unduly privileges employer values over employee speech. It is one thing to say that employers' values deserve some consideration in the First Amendment calculus; it is quite another thing to say that those values should carry the day in all but the exceptional cases. Accordingly, it may be more appropriate to focus on cases in which the government's expressive interests are likely to be particularly resonant. That leads us to a second possible solution.

B. Second Option: Widely-Shared Values

A second approach would be to treat the government's expressive interests as dispositive only where the governmental values in question are widely shared among Americans. The idea would be to ascribe heightened significance to the government's values when they are clearly in accord with the values of its citizens—which is to say, in those situations where we can be most confident that a given agency is speaking on the country's behalf. This approach essentially would permit government agencies to restrict or punish employee speech that is so extreme or outrageous as to contradict our widely shared beliefs. To illustrate, recall the facts of *Pickering*, in which a

teacher published a letter criticizing his school board for the way it handled revenue-raising proposals.[31] Under this second approach, the teacher could not be punished for his speech solely in light of the school board's expressive interests. The reason is that there is no widely-shared belief that school boards should be immune from criticism based on their handling of such proposals. But if the facts were changed so the teacher's letter urged that the board members' homes be vandalized, his firing would be permitted; our society shares a widely held belief that we should not promote illegal activity.

One might respond that there is danger in making judges responsible for determining which types of speech are inconsistent with our widely shared beliefs. But the existing First Amendment doctrine already requires judges to evaluate an employee's interest in the speech in question.[32] It also requires judges to determine whether the speech bears on a matter of public concern—an inquiry that controls whether the employee's claim even makes it to the balancing stage.[33] Reasonable minds may differ as to whether these types of content-based determinations should be featured so prominently in our public employee speech jurisprudence. But if we are serious about respecting public employers' interests in promoting their organizational values, then permitting some content-based determinations makes sense, for the simple reason that certain types of content are the most likely to implicate those values.

Moving to the methodological question of how judges would determine what constitutes a widely shared value, it is instructive to note that judges already undertake comparable tasks when, for example, they interpret the Eighth Amendment in light of "evolving standards of decency," or the Fourth Amendment in light of a citizen's "reasonable expectation of privacy." I suppose it might sometimes be more difficult to gauge our widely shared beliefs outside of discrete contexts such as these. Nevertheless, it seems to me that this is not an impracticable or inappropriate task for judges. In many cases—*Pickering* and *Rankin* come to mind—it appears to be fairly straightforward.

There is a related concern that is best illustrated through an example. Return to the facts of *Pickering*, and imagine that the school board sought to fire the teacher based on its asserted belief that public dissent by teachers is improper. Would the board's action be permissible? I think the answer is no. Once again, there is no widely held belief that teachers should not (for any reason) criticize school boards, or that public employees should not (for any reason) criticize their employers. Of course, such public dissent might create a severe disruption of employer operations and thereby justify the employer's restriction of the speech under the existing *Pickering* balancing test. And if the employee's speech was problematic for some additional reason, such as its dissemination of confidential information, there might be another independent basis for allowing the employer to prohibit or punish the speech. But viewed purely in terms of the government's expressive interests, an overarching governmental policy disfavoring any public criticism would not be sufficient.

As for the requisite parade of horribles, it is fairly unremarkable. Public employers could, without offending the Constitution, discipline or dismiss employees whose outrageous (which is to say, inconsistent with values that are widely shared among Americans) speech was out-of-step with the employer's views. Ah, but what is hidden behind the words "public employers"? Employment decisions are not made by governments. They are made by people who work for governments. This doctrinal revision thus would place significant power not into the hands of some abstract institution that dutifully represents the citizenry, but rather into the hands of ordinary people who have their own thoughts, feelings, and biases.

This is certainly a point worth noting. Still, we entrust the people who lead our public institutions with a host of responsibilities relating to the provision of public services. And we base our trust in significant part on the understanding that government officials are kept in check by superior ones, who in turn are kept in check by us at the polls. Governmental accountability is obviously not perfect. But if we are willing to accept our current system as adequate to handle countless critical functions, it seems reasonable to accept the system's ability to reign in those supervisors who would make employment decisions based on their personal values rather than the organizational values of the institutions they represent.

Finally, what about situations in which the purportedly "outrageous" speaker actually has it right, because the widely shared beliefs of the democratic majority are somehow flawed? This is a danger that should not be ignored. But as discussed above, if the government really does deserve respect for its expressive interests when it operates in its role as employer, then there is a strong case for providing government employers with the authority to prohibit their employees from contradicting those values.[34]

C. Third Option: Context-Based Approach

A third option would be to give significant deference to the government's expressive interests, but only where the employee's speech is closely related to his employment. The theory behind such a distinction is that a government institution has legitimate expressive interests in topics related to its functions, but not in topics that are remote.[35] To illustrate, imagine a teacher who devotes his spare time to writing and publishing poetry that has nothing to do with his teaching. Under this approach, the teacher could not be fired because of the views expressed in his poems, even if those views were antithetical to the values of his employer.

This option has a certain amount of intuitive appeal: there is, it seems to me, a plausible argument that an employee's First Amendment interests are strongest when he speaks outside the workplace and on topics unrelated to his employment.[36] But it does not follow that his employer's expressive interests are correspondingly weak in those situations. A government employee who publicly contradicts his employer's values causes the employer harm. And the employer's interest in remedying that harm is no less legitimate because the employee addressed an issue unrelated to the subject matter of his employment.

Viewed purely in terms of the employer's expressive interests, the question of whether there is adequate justification for allowing the employer to discipline the employee should not be contingent on the topic of the employee's speech.

CONCLUSION

I should note in closing that the line of argument I have tried to develop—based on recognizing that employers can sometimes possess legitimate expressive interests in restricting or punishing employee speech—may appear to have ramifications not just for public employers, but also for private ones. *Pickering* presents a major obstacle to that analogy. By its very nature, the *Pickering* doctrine creates the need to recognize a government agency's interests in restricting employee speech. *Pickering*, however, has no application to the private-employer context. That means there is no built-in mechanism for assessing the employer's interests as part of the constitutional calculus. This is not necessarily to imply that private employers never have First Amendment interests in their personnel decisions. But if they do have any such interests, the source is something other than the balancing test that drives the *Pickering* doctrine.[37]

Returning to the context of public employers, here is one conclusion in which I am confident: there is a good argument for modifying the modern doctrine to take into account the expressive interests of our public agencies. Beyond that, things get more complicated. I have offered preliminary discussions of a few different options for revising the doctrine to recognize this set of interests. Deciding whether any of those options is a suitable starting point for revising the doctrine would require a more complete assessment. For now, the most important point is a basic one: the government's expressive interests deserve to play *some* role in the constitutional analysis.

Endnotes

1 391 U.S. 563, 564 (1968).

2 *Id*. at 565.

3 *Id*. at 568.

4 *Id*.

5 461 U.S. 138, 141 (1983).

6 *Id*. at 146.

7 *Id*. at 154.

8 *See* Rutan v. Republican Party of Illinois, 497 U.S. 62, 74 (1990).

9 *Pickering*, 391 U.S. at 568.

10 *Connick*, 461 U.S. at 150.

11 *Id*. at 151 (quoting Arnett v. Kennedy, 416 U.S. 134, 168 (1974) (Powell, J., concurring) (internal quotation marks omitted)).

12 483 U.S. 378 (1987).

13 *Id*. at 379–82.

14 *Id*. at 382.

15 *Id*. at 389.

16 *Id*. at 390.

17 *Id*. at 390-1.

18 *Id*. at 394 (Scalia, J., dissenting).

19 *Id*. at 399.

20 *Id*. at 388 (opinion of the Court).

21 *Id*. at 384.

22 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

23 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

24 Rumsfeld v. Forum for Academic & Inst'l Rights, Inc., 126 S. Ct. 1297, 1308 (2006).

25 Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment).

26 Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 559 (2005).

27 *See Finley*, 524 U.S. at 598 (Scalia, J., concurring in the judgment) ("And it makes not a bit of difference, insofar as either common sense or the Constitution is concerned, whether these officials further their (*and, in a democracy, our*) favored point of view by achieving it directly… or by advocating it officially… or by giving money to others who achieve or advocate it.") (emphasis added).

28 *Rankin*, 483 U.S. at 388.

29 *See Pickering*, 391 U.S. at 568.

30 *See, e.g.,* Texas v. Johnson, 491 U.S. 397, 419 (1989) ("The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.").

31 391 U.S. at 566.

32 *See id.,* at 568.

33 *See Connick,* 461 U.S. at 146.

34 *Cf.* Waters v. Churchill, 511 U.S. 661, 672 (1994) (plurality op.) ("[E]ven many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees.").

35 *Cf.* United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 465–66 (1995).

36 In a previous article, I discussed an alternative model of employee speech that would (more or less and with some significant exceptions) protect an employee from discipline based on statements he made outside the workplace on matters unrelated to his employment, but not statements he made within the workplace or on work-related topics. *See Reconceptualizing Public Employee Speech*, 99 Nw. U. L. Rev. 1007 (2005). Alas, though I found the alternative model useful as a foil to expose some problems with the existing doctrine, it nevertheless struck me as flawed in important respects of its own.

37 For one approach to this issue, *see generally* Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 Minn. L. Rev. 1669 (2001).

A Glimpse of the Future?
Campaign Finance Laws and Government Regulation of the Press

*By William Maurer**

In April 2007, the Washington Supreme Court issued an important decision for the First Amendment rights of freedom of speech and of the press in the face of burdensome campaign finance regulations. In a unanimous decision, the court used the "media exemption" in Washington's campaign finance laws to strike down an effort by four Washington municipalities to force an initiative campaign to disclose on-air commentary by two talk-radio hosts as "in-kind" contributions by their radio station.[1] The court held that the media exemption protects the press's unique role of providing information and editorial commentary to the public.

The court noted the clear link between the exemption and free speech, free press, and free association protections, but it also recognized that the exemption is legislatively created. That is, the Legislature could remove it if it chose.

The facts of this case prove, however, that whatever temptation exists for removing the media exemption, a free society requires that, at the least, it remain in place. Removing the press exemption will not result in a more egalitarian marketplace of ideas, as some proponents of campaign finance regulations argue, but will simply provide the government with a powerful tool to silence and harass media messages and speakers with which it disagrees. If a media exemption is "unfair" because it excludes some, but not all, corporations (media enterprises) from campaign finance regulations, the solution is to permit all Americans to communicate without government restriction, not to restrict the First Amendment so that everyone's speech is equally suppressed.

Facts of the Case

The case began in 2005, when the Washington Legislature passed a gas tax increase.[2] Outraged by the increase, two talk-radio hosts at 570 KVI in Seattle, Kirby Wilbur and John Carlson, began strongly criticizing the measure. A political committee named No New Gas Tax (NNGT) formed to collect signatures to qualify an initiative to repeal the increase, Initiative 912 (I-912), for the ballot. Wilbur and Carlson began devoting a substantial portion of their respective radio shows to helping NNGT obtain enough signatures to qualify I-912 for the ballot. They encouraged listeners to contribute funds to NNGT, obtain petitions, and circulate them to gather signatures.[3]

This activity did not go unnoticed by supporters of the gas tax increase. In particular, a Seattle law firm, Foster Pepper PLLC ("Foster"), had a special interest in the survival of the gas tax. Foster serves as bond counsel for the state of Washington, meaning that it stood to gain fees when the state issued bonds based on the tax. Indeed, Foster contributed significantly to the political committee opposing I-912.[4]

On June 22, 2005, the prosecuting authorities of San Juan County and the cities of Seattle, Kent, and Auburn, represented by Foster, filed a complaint in Washington's superior court, alleging that NNGT had failed to disclose the receipt of "'valuable radio announcer professional services and valuable commercial radio airtime'" that constituted "in-kind" contributions to the campaign from the owner of KVI, Fisher Communications ("Fisher").[5]

About two weeks prior to the deadline for qualifying the initiative, the municipalities sought a preliminary injunction to prevent NNGT from accepting any additional in-kind contributions—that is, the commentary of the radio hosts—from Fisher Communications until it disclosed the value of the on-air commentary NNGT had purportedly already received. The motion for a preliminary injunction alleged that "'the constant exposure on the radio is more than simply reporting the news and constitutes advertising'" for NNGT, the value of which is required to be reported under Washington law.[6]

Washington's Fair Campaign Practices Act (FCPA) defines "contribution" and "political advertising" extremely broadly and would, absent some specific exemption, require campaigns that received anything of value—including media coverage—to report such coverage as a campaign contribution. In order to keep campaign regulations from reaching media commentary, however, Washington law (like federal law) also contains a media exemption, which excludes from the definition of "contribution" "[a] news item, feature, commentary, or editorial in a regularly scheduled news medium that is of primary interest to the general public, that is in a news medium controlled by a person whose business is that news medium, and that is not controlled by a candidate or a political committee."[7]

The media exemption did not deter the municipalities, however. Rather than argue that the media exemption was unconstitutional because it treated media corporations differently than other corporations (as some have done in the past), the municipalities instead proffered a convoluted and textually dubious argument as to why the exemption did not apply in this case.[8] Specifically, the municipalities argued that because Wilbur and Carlson had had "too much" contact (in the eyes of the prosecutors) with the campaign, they were "'officers and agents'" of NNGT. Therefore, Fisher had improperly allowed their facilities to be "controlled by a… political committee."[9]

Incredibly, the trial court agreed and granted the motion for a preliminary injunction, forcing NNGT to place dollar values on the hosts' commentary and "disclose" these amounts to the state. This was no mere reporting requirement, however, because Washington law states that in-kind campaign contributions in excess of $5,000, within twenty-one days of the general election, violate the FCPA.[10] This threatened to shut off discussion of the initiative by Wilbur and Carlson in the crucial three weeks before the election.

* *William Maurer is an attorney with the Institute for Justice, which represented No New Gas Tax in the case discussed. On May 16, 2007, the municipalities filed a motion for consideration with the Washington Supreme Court. At date of press, the court had yet to rule on the motion.*

NNGT then filed a constitutional challenge to the municipalities' actions, arguing that the municipalities' case and the preliminary injunction violated numerous provisions of the state and federal constitutions; most notably, the First Amendment rights of the campaign to speak and associate freely with the media. The trial court dismissed NNGT's lawsuit for having failed to state a claim and permitted the municipalities to dismiss their own complaint against NNGT after they claimed to have achieved their goals with the issuance of the preliminary injunction order.[11]

NNGT sought direct review in the Washington Supreme Court. The court granted direct review and, in April 2007, reversed the trial court.

The Court's Decision

The Washington Supreme Court unanimously reversed the trial court's order and remanded the case for consideration of NNGT's constitutional claims. In the main decision, Justice Barbara Madsen meticulously and thoroughly rebuked the municipalities' arguments for limiting the media exemption.

The court began by noting that the drafters of Washington's FCPA patterned that act after the Federal Election Campaign Act of 1971 (FECA) and that the court could therefore look to federal authorities for guidance in interpreting the FCPA.[12] The court quoted the U.S. Supreme Court's holding in *Austin v. Michigan Chamber of Commerce* that the federal media exemption "legitimately protects the press's unique role in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'"[13] The court also quoted the legislative history of the federal exemption, noting Congress's intent to not "limit or burden in any way the first amendment freedoms of the press and of association. Thus, the exclusion assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns."[14]

The court rejected the municipalities' argument that Wilbur and Carlson's broadcasts fell outside the media exemption because the broadcasts constituted "political advertising" rather than "commentary":

> When considering complaints relating to media entities, the initial inquiry is whether the media exemption applies to the communication at issue. Only if the court concludes that the media exemption does not apply, is it appropriate to consider whether the communication fits within the otherwise broad definition of "contribution." This approach accords with the statute's focus on whether a media entity is controlled by a candidate or political committee, and with the purpose of the media exemption, which is to avoid burdening the First Amendment rights of the press.[15]

The court also rejected the argument that Wilbur and Carlson's interaction with the campaign had any relevance to whether their commentary constituted a political contribution. "[T]he applicability of the media exemption does not turn on Wilbur and [Carlson's] relationship to the campaign. The question is whether the news medium—here, the radio station—is controlled by a political committee, not whether a political committee authored the content of a particular communication. As with the federal media exemption, 'control' does not change from hour to hour, depending on who may be hosting a particular radio program."[16]

The court made clear that, under the media exemption, governmental consideration of the content of a media communication was inappropriate.

> Although the term "commentary" is not defined, we believe that it plainly encompasses advocacy for or against an issue, candidate or campaign, whether that involves the solicitation of votes, money, or "other support." Indeed, such activities are a core aspect of the media's traditional role.
>
> In deciding whether the media exemption applies, it is inappropriate to draw distinctions between "commentary" and "political advertising" based on the content of the publication, or the speaker's motivations, intent, sources of information, or connection with a campaign. Indeed, the content of a news story, editorial, or commentary is largely irrelevant in deciding whether a media entity is exercising its valid press functions.[17]

The court concluded that, "for the media exemption to apply, the publication need not be fair, balanced, or avoid express advocacy or solicitations."[18]

In rejecting the municipalities' interpretation of the media exemption, the court noted the court's job is not to examine the content of the media's message:

> At oral argument, the prosecutors argued that without the limiting construction imposed by the PDC[,] media… corporations could become "king makers," providing their favored candidates and ballot measure advocates with unlimited access to the airwaves. But this is an argument more appropriately directed to the legislature. The media exemption represents a policy choice to accord full protection to the first amendment rights of the press even at the expense of countervailing societal interests that may be served by campaign finance regulations. We note that nothing in our decision today forecloses the legislature, or the people via the initiative process, from limiting the statutory media exemption. Whether, and to what extent, a media exemption is constitutionally required is beyond the scope of this opinion.[19]

The court thus rejected the municipalities' case against the campaign, reinstated NNGT's constitutional claims, and ordered the trial court to hear its case on the merits.[20]

Justice Johnson's Concurrence

Justice James M. Johnson concurred, but in a strongly-worded opinion laid bare the threat to the First Amendment from the municipalities' case: "Today we are confronted with an example of abusive prosecution by several local governments. San Juan County and the cities of Seattle, Auburn, and Kent… determined to file a legal action ostensibly for disclosure of radio time spent discussing a proposed initiative. This litigation was actually for the purpose of restricting or silencing political opponents…."[21] He characterized the municipalities' efforts as "a transparent attempt to block filing of an initiative, which is also a constitutional right in Washington."[22] Further, he suggested that the state auditor and attorney general investigate the municipalities and set out guidelines for the trial court in its consideration of NNGT's constitutional claims and its entitlement to attorney's fees on remand. Justice Johnson concluded that the "lawsuit was not justified under the law

(the majority so holds) and was offensive to the notion of free and open debate."[23]

A Glimpse Into the Future?

This case is the latest battle in a continuing war over the ability of government to regulate political discourse, and particularly media commentary, in this country. For proponents of campaign finance reform, the existence of the media exemption has always presented a significant problem. If, as the proponents claim, the purpose of campaign finance regulations is to prevent "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas,"[24] then the government would appear to have a greater interest in regulating a media corporation than it would, say, a medium-sized corporation that markets computer software.[25]

Proponents of using campaign finance regulations to achieve political equality have therefore urged Congress to do away with the media exemption. They argue that in order to achieve "political equality" and thus ensure that "each individual have roughly equal political capital," Congress should remove the media exemption and permit media corporations to engage in political advocacy only under the same restrictions and regulations that apply to other corporations.[26] Without such restrictions, proponents argue, the media exemption "undermines equality indirectly by sending an important symbolic message that the media are entitled to a special position in society as candidate-makers."[27] This language, of course, mirrors the municipalities' arguments that the Washington court should have limited the media exemption to prevent radio stations from becoming "kingmakers."

The Washington case demonstrates why legislatively repealing the media exemption would be a dangerous and ill-considered step towards creating a system of governmental regulation of the press. That step, if taken, will simply result in political censorship of dissenting views. The municipalities' actions highlight a significant flaw in the argument for using campaign finance restrictions to achieve some amorphous concept of "political equality,"[28] "participatory self-government,"[29] eliminating "undue influence,"[30] or whatever phrase reformers use to push for the creation of government censors. That flaw is that these reformers assume that the power to censor will be wielded by objective regulators committed, like the reformers themselves, to highly refined notions of "participatory self-government" or "active liberty." This case shows that giving the government the power to censor means it can restrict speech that threatens the political or financial interests of those in power. When those in power can decide when media voices have accrued "undue influence" in elections, we should not be surprised when that decision has the result of suppressing speech the political establishment would rather not have you hear.

The Washington municipalities have demonstrated, with a significant degree of success, that under a system of government regulation of the media, prosecutors with political and financial motivations will not hesitate to use the ability to censor to try to shut down speech with which they disagree. Prosecutors are, after all, human—as Justice Johnson found, the municipalities here were motivated by a desire for tax money. In the hands of unscrupulous government officials, the ability to drag a campaign or media figure into court because they have crossed the line from "reporting the news" to providing a "contribution" to a campaign will be a powerful tool for the establishment to harass or threaten voices with which they disagree. This ability to use campaign finance laws to shut down dissenting voices is only intensified by laws that permit private parties to file complaints or even prosecute those complaints themselves.

As part of their case against NNGT, government agents monitored radio broadcasts they suspected of going too far. They wrote down the words and phrases they did not like and marched into court to have the force of government dictate that such commentary be broadcast only subject to the government's restrictions and regulations. Although they justified their intrusion into fundamental First Amendment rights with such noble sounding theories as "disclosure" and preventing "kingmakers," in the end the case was little more than crass political bullying.

Having the government directly regulate the content of a media communication is inconsistent with the First Amendment's protections of a free press, free association between the press and campaigns, and the free speech rights of campaigns to access media sources that may help disseminate their political message. Doing away with the media exemption would create, in short order, governmental agencies whose purpose is to ensure that messages upon which the government frowns are quarantined and silenced. San Juan County and the cities of Seattle, Auburn and Kent have given us a glimpse into the future urged by the reformers. They have shown that, absent the media exemption, government suppression of the media will have more to do with bureaucratic greed than abstract notions of political equality.

While the concern for consistency may be a persuasive argument for some to do away with the media exemption, creating a governmental monitoring board for newspapers, the Internet, radio, and television seems like a steep price to pay for even-handed regulation. If the concern is consistency, our Constitution, history, and traditions dictate that instead of shutting down the speech of all equally the government should simply stay out of the business of regulating political discourse altogether. Even-handed freedom is better than even-handed oppression.

Endnotes

1 San Juan County v. No New Gas Tax, __ P.3d __, 2007 WL 1218207 (Wash. Apr. 26, 2007).

2 *Id.* at *2.

3 *Id.*

4 *Id.,* at *2, *11 n.2 (Johnson, J.M., J., concurring).

5 *Id.* at *2.

6 *Id.*

7 Wash. Rev. Code § 42.17.020(15)(b)(iv).

8 *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 667, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990) (business group challenged Michigan's campaign finance laws as violating the Equal Protection Clause because such laws exempted media corporations from restrictions otherwise applicable to corporate entities); Brief of Appellant National Rifle Association at 44-50, Nat'l Rifle Assoc. v. FEC, No. 02-1675 (U.S. July 8, 2003), 2003 WL 21649660 (claiming that § 201 of the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of 2, 28, and 47 U.S.C.) violated Equal Protection Clause by treating media corporations and non-profits differently).

9 *San Juan County,* 2007 WL 1218207 at *2; Wash. Rev. Code § 42.17.020(15)(b)(iv).

10 Wash. Rev. Code § 42.17.105(8).

11 *San Juan County,* 2007 WL 1218207 at *3-4. The initiative qualified for the ballot, but was rejected by the people in the November 2005 election.

12 *Id.* at *5.

13 *Id.* at *6 (quoting *Austin,* 494 U.S. at 667).

14 H.R. Rep. No. 93-1239, at 4 (1974).

15 *San Juan County,* 2007 WL 1218207 at *7.

16 *Id.*

17 *Id.* at *8 (citations omitted).

18 *Id.* at *9.

19 *Id.* at *8 n.10.

20 *Id.* at *11.

21 *Id.* at 11 (Johnson, J.M., J., concurring).

22 *Id.*

23 *Id.* at *15.

24 *Austin,* 494 U.S. at 660.

25 Opponents of campaign finance restrictions make this argument as well, as a means of pointing out the inconsistency and futility of the government's attempts to ration the speech of those whose voice may become "unduly" influential. *See Austin,* 494 U.S. at 691 (Scalia, J., dissenting).

26 Richard Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem,* 77 Tex. L. Rev. 1627, 1646-47 (1999) (arguing that the government should make it illegal for media corporations to endorse candidates unless such corporations set up separate segregated funds to pay for advertisements containing endorsements). For other articles discussing proposals to limit or eliminate the media exemption, *see* Joshua L. Shapiro, *Corporate Media Power, Corruption, and the Media Exemption,* 55 Emory L.J. 161 (2006); Victoria S. Shabo, *Money, Like Water…": Revisiting Equality in Campaign Finance Regulation after the 2004 "Summer of 527s,"* 84 N.C. L. Rev. 221, 270-71 (2005); Arthur N. Eisenberg, *Buckley, Rupert Murdoch, and the Pursuit of Equality in the Conduct of Elections,* 1996 Ann. Surv. Am. L. 451.

27 Hasen, *supra* note 26, at 1646.

28 145 Cong. Rec. S12,575, S12,606 (Oct. 14, 1999) (Statement of Sen. Wellstone) ("The last criterion is political equality. Everybody ought to have an equal opportunity to participate in the process…. One person, one vote; no more, no less; one person, same influence. Each person counts as one, no more than one.").

29 Stephen Breyer, Active Liberty 46 (2005) ("To understand the First Amendment as seeking in significant part to protect active liberty, 'participatory self-government,' is to understand it as protecting more than the individual's modern freedom.").

30 McConnell v. FEC, 540 U.S. 93, 143-44, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) (extending the anti-corruption rationale to preventing "undue influence").

Intellectual Property

The Seagate Conundrum: Risks and Rewards of Raising the Defense of "Advice of Counsel" to a Charge of Willful Patent Infringement

*By David L. Applegate & Paul J. Ripp**

Imagine that your company manufactures or sells a product in the United States, in competition with other companies that have patents on some or all of their products. Aware that your competitors have patent portfolios, your company retains outside counsel to investigate and advise whether the new product is likely to infringe any of the competitors' patents in the relevant field of art. Assume your counsel investigates diligently, then gives you a competent written legal opinion, stating that your company's product does not infringe upon the competitors' patents; or, alternatively, that those patents are invalid. Your counsel opines that at least one of the patents is unenforceable, based on the competitor having intentionally concealed known prior art from the patent office. Your company then introduces its product in the United States—and, of course, is promptly sued. In addition to asserting infringement, the competitor alleges that your company's infringement is willful and consequently asks for treble damages. Should your company produce in discovery and disclose to the jury at trial the opinions of its counsel to show that it reasonably believed either that the product did not infringe or that the patent was invalid or unenforceable? The answer may well depend on the Federal Circuit's resolution of what the authors have come to think of as "the Seagate Conundrum."[1]

Seagate Technology, Inc. is a defendant in *Convolve, Inc. v. Compaq Computer Corp.*, a patent infringement suit currently pending in the United States District Court for the Southern District of New York.[2] In *Convolve,* Seagate is accused of willfully infringing two of three patents related to computer disk drive technology owned by Convolve, Inc. and the Massachusetts Institute of Technology.[3]

Seagate's Outside Opinion Counsel

Two months before being sued, Seagate had retained an outside lawyer as "opinion counsel" to advise it concerning the first two patents and, eleven days after being sued, received a preliminary written opinion dated July 24, 2000, that Seagate did not infringe those patents or that the patents were invalid. Opinion counsel also offered preliminary observations on a then-pending application for a third patent. Five months later, Seagate received a final written opinion confirming the preliminary conclusions concerning the first two patents and opining that the second patent (since dropped from the suit) may be unenforceable for inequitable conduct. In March 2002, Seagate requested a formal opinion on the third patent, which by then had issued and been added to the suit, and on February 21, 2003 Seagate received a formal, written opinion of the third patent's non-infringement and invalidity as well.

Seagate's Outside Trial Counsel

Once sued, Seagate retained separate outside counsel to represent it in the *Convolve* litigation. Seagate's trial and opinion counsel purportedly operated independently and did not communicate with each other concerning their respective advice to Seagate. Seagate also reportedly sought and received opinions regarding infringement, validity, or enforceability of the patents in suit solely from its opinion counsel, and did not ask its trial counsel to opine on the merits of its opinion counsel's advice.[4]

Seagate's trial counsel then informed Convolve and MIT that Seagate intended to rely, in defense of the willful infringement claims, on its opinion counsel's three written opinions. Seagate therefore disclosed those opinions in discovery, made its outside opinion counsel available for deposition, produced all related correspondence and work product from its outside opinion counsel's files, and produced from its own files copies of communications with its outside opinion counsel.

Discovery Sought From Trial Counsel and Subsequent Proceedings

In addition, plaintiffs sought discovery of all internal Seagate communications with attorneys, and attorney work product, on the same subjects as those formal opinions, together with all documents forming the basis of those opinions and documents reflecting when Seagate and its counsel communicated orally on those subjects. Claiming attorney-client privilege and work product protection, Seagate refused to produce the requested information, and plaintiffs moved to compel its production.

Following oral argument, the assigned magistrate judge found that, by producing its outside opinion counsels' three written opinions, Seagate had waived the otherwise applicable attorney-client privilege with respect to all communications between Seagate and its trial counsel concerning the general subject matter of opinions Seagate had obtained from its opinion counsel.[5] The court further found that Seagate's privilege waiver "continues to such time as Seagate's alleged infringement ends;" in other words, until the case is resolved.[6] Recognizing that trial counsel might address trial strategy "in ways that do not implicate the advice-of-counsel defense," the magistrate judge provided for in camera submission of documents relating to trial strategy or planning advice regarding validity, infringement, and enforceability.[7] Nonetheless, the magistrate judge ordered that trial counsel's *advice* on these three subjects be disclosed even if communicated in the context of trial preparation.[8]

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Seagate objected to the magistrate judge's orders under Fed. R. Civ. P. 72(a), requested a stay of both orders pending possible mandamus review by the Federal Circuit, and applied to the district judge for an emergency stay of the magistrate judge's orders—all without success. Seagate then asked the district court, also unsuccessfully, to certify the rulings for interlocutory appeal under 28 U.S.C. § 1292(b). When the magistrate judge subsequently ordered Seagate to comply with the court's orders within five business days, Seagate petitioned for a writ of mandamus.

The Seagate Conundrum

Seagate currently finds itself between the proverbial rock and hard place. On the one hand, Seagate has a duty under long-standing Federal Circuit law to exercise due care to avoid infringement by, for example, obtaining competent opinion of counsel that the patents involved are invalid, unenforceable, or not infringed. But under a recent Federal Circuit en banc decision, the trier of fact could not make an adverse inference if Seagate had failed to obtain or disclose an opinion of counsel concerning infringement, validity or enforceability. Because Seagate has obtained and disclosed opinions of counsel that the patents in suit are invalid, unenforceable or not infringed, however, under another recent Federal Circuit case Seagate may have lost its ability to communicate confidentially with its trial counsel on these issues.

Background of Willful Patent Infringement

Section 284 of the patent statute provides in part that, "[w]hen the damages are not found by a jury, the court shall assess them," and that "[i]n either event the court may increase the damages up to three times the amount found or assessed."[9] In addition, in "exceptional cases," the court may award reasonable attorney fees to the prevailing party.[10] Many patent plaintiffs therefore allege willful infringement in hope of receiving up to treble damages at trial.[11] In practice, however, willfulness is found in barely half the cases in which it is pleaded,[12] and the court's decision to award enhanced damages—even if willfulness is found—is discretionary, subject to reversal only for abuse of that discretion.[13] Among all cases considered in a recent study in which willfulness was ultimately resolved (including cases in which no willfulness was found), enhanced damages were ultimately awarded only about a third of the time.[14] In addition, unless willfulness is bifurcated from liability, defendants have an opportunity to present evidence of due care before the jury decides liability for infringement.[15] A persuasive opinion of counsel, coupled with the testimony of a credible and persuasive attorney, may help a defendant avoid both a finding of willfulness and a finding of liability altogether. By asserting a willfulness claim, therefore, a plaintiff may actually weaken its liability case. On the other hand, the Seagate conundrum demonstrates that pleading willful infringement presents great difficulties for defendants as well.

Underwater Devices Inc. v. Morrison-Knudsen Co.

In *Underwater Devices Inc. v. Morrison-Knudsen Co.*, 717 F.2d 1380 (Fed. Cir. 1983), the Federal Circuit announced that potential infringers with actual notice of another's patent have an affirmative obligation to obtain a competent opinion of counsel:

> [W]here, as here, a potential infringer has actual notice of another's patent rights, he has an affirmative duty to exercise due care to determine whether or not he is infringing. Such an affirmative duty includes, *inter alia*, the duty to seek and obtain competent legal advice from counsel *before* the initiation of any possible infringing activity.[16]

Underwater Devices then upheld a finding of willfulness—and an award of treble damages—based on defendant's failure to obtain *competent* legal advice, finding that the opinions offered as a defense in that case "clearly demonstrated… willful disregard for the patents [in suit]."[17]

Three years later, in *Kloster Speedsteel AB v. Crucible Inc.*, the Federal Circuit cautioned that "not every failure to seek an opinion of competent counsel will mandate an ultimate finding of willfulness."[18] But *Kloster* found that the lower court's failure to find willful infringement was clearly erroneous, in part by drawing an adverse inference because the defendant had remained silent regarding advice of counsel based upon "alleged reliance on the attorney client privilege."[19] And because the Federal Circuit remanded *Kloster* to the lower court to address enhanced damages, as of 1986, accused defendants aware of plaintiff's patents who did not seek competent advice of counsel remained clearly at risk. Ten years later, in *Stryker Corp. v. Intermedics Orthopedics, Inc.*, the Federal Circuit reiterated that in considering willfulness, a court should consider "whether the infringer, when it knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed."[20]

In light of *Underwater Devices* and its progeny, therefore, the most obvious way for an accused infringer to demonstrate that it investigated the scope of the patent and formed the required good faith belief is to obtain and to disclose a competent opinion of counsel. But what happens if the accused infringer does not obtain such an opinion, or obtains such an opinion but chooses not to disclose it? Until 2004, the Federal Circuit continued to permit an adverse inference based on the failure to produce an opinion.

Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.

In *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, however, the Federal Circuit affirmed a patent defendant's right to rely on opinions of counsel as a defense to willfulness, but overruled "precedent authorizing an adverse inference" where an infringer:[21]

(1) asserts attorney-client or work produce privilege to justify a failure to produce an exculpatory opinion; or

(2) never obtained legal advice regarding infringement.

In part, *Knorr-Bremse* stated that it was attempting to remove "inappropriate burdens on the attorney-client relationship" and thereby allow more flexibility in a patent defendant's ability to rely on its legal advice.[22] At the same time, *Knorr-Bremse* reaffirmed that defendants have "'an affirmative

duty of due care to avoid the infringement of the known patent rights of others'"[23] and that determining willfulness may include several factors to be "weighed by the trier of fact."[24] In keeping with its broad-based "totality of the circumstances" test, *Knorr-Bremse* also held that even having a "substantial" defense to infringement will not necessarily avoid a finding of willful infringement.[25] But, independent of an adverse inference instruction, *Knorr-Bremse* expressly declined to consider whether a jury can or should be told whether a defendant has consulted with counsel.[26]

By removing an adverse inference of willfulness, *Knorr-Bremse* eliminated a powerful incentive to obtain opinion letters. But how can one square *Knorr-Bremse* with *Underwater Devices,* or even with itself? If an accused infringer has an affirmative duty to seek a "competent" opinion of counsel, then why should a jury not be instructed whether a defendant has complied with that duty?

Cases after *Knorr-Bremse* suggest the analytical difficulty in ignoring an infringer's failure to seek competent advice, and offering an incompetent opinion may leave defendants more vulnerable than having no opinion at all.[27] Indeed, on remand in *Knorr-Bremse* itself the district court found that the defendants had willfully infringed.[28] Another district court emphasized that *Knorr-Bremse* "did not say that it was improper for a jury to infer from an infringer's failure to consult counsel that the infringer… had not acted properly in other respects."[29] And, in an unpublished decision, the Federal Circuit recently permitted instructing a jury to consider whether counsel had been consulted; the jury then found willfulness.[30]

Because *Knorr-Bremse* recognized the relevance of attorney-client communications and noted that "[a] defendant may of course choose to waive the privilege," it may be that the Federal Circuit simply thought that a freer choice, not burdened by an adverse inference, would limit defendants' use to *bona fide* opinions.[31] In its recent *Echostar* decision, the Federal Circuit may have eliminated the use of "window dressing" opinions by reducing the incentive to use opinion letters at all.

In Re Echostar Commc'n Corp.

In *In Re Echostar Communications Corp.*, the Federal Circuit decided that relying on the defense of advice of counsel to a charge of willful infringement waives the attorney-client privilege regarding all attorney-client communications concerning the same "subject matter."[32] District courts have been wrestling with the precise implications of the ruling ever since, with sometimes inconsistent and unsatisfying results. What constitutes the "same subject matter"? Need an attorney explicitly address validity or unenforceability in order for the waiver to encompass those topics? (After all, an invalid or unenforceable patent cannot be successfully asserted against an alleged infringer.) Does the waiver extend to trial counsel as well? If so, then does it encompass litigation work product as well?

1. "Same Subject Matter"

As to what constitutes the same "subject matter," *Echostar* stated broadly that an accused infringer's assertion of advice of counsel as a defense to a charge of willful infringement waives the attorney-client privilege for all communications with the accused infringer's counsel that discuss the infringement, validity, and/or enforceability of the patent in suit:

> [W]hen an alleged infringer asserts its advice-of-counsel defense regarding willful infringement of a particular patent, it waives its immunity for any document or opinion that embodies or discusses a communication to or from it concerning whether that patent is valid, enforceable, and infringed by the accused.[33]

Because issues of infringement, validity, and unenforceability are fundamentally intertwined with both a court's claim construction (a question of law subject to change on appeal) and the understanding of one of ordinary skill in the art (a question of fact subject to change as discovery proceeds), the reasonableness of a continuing infringer's reliance on an opinion of counsel is also subject to change. In addition, any differences between a "reliance opinion" and a claim construction, the scope of prior art considered, or the understanding of one of ordinary skill in the art can implicate the defenses of validity and unenforceability, even if the "reliance opinion" is limited to the issue of infringement. In keeping with *Echostar*'s principles, many courts have found that all three issues—infringement, validity, and enforceability—are necessarily of a piece when it comes to examining the infringer's state of mind, and all are encompassed by the waiver.[34]

2. Waiver of Trial Counsel Communications

As *Echostar* explains, the focus in deciding willful infringement is the accused infringer's state of mind.[35] Where the alleged infringement continues after suit is filed, one can reasonably expect the infringer's state of mind to be based on both oral and written communications with trial counsel throughout the litigation.[36] As a matter of fairness, then, an accused infringer should not be permitted to defend itself with a favorable opinion obtained from opinion counsel, but then hide from view less favorable or inconsistent opinions or advice it receives from its trial counsel as the litigation proceeds.

Suppose, for example, that opinion counsel in good faith provides a competent pre-litigation opinion that the accused device does not infringe any claims of the patent. That opinion, however, assumes a favorable *Markman* claims construction, and the trial court subsequently construes disputed claims unfavorably. Already in litigation, the accused infringer does not seek supplemental advice from outside opinion counsel but relies instead upon its trial counsel. Assume further that trial counsel reports that the unfavorable claims construction makes a finding of infringement likely but strengthens the invalidity defense, and the accused infringer therefore decides to press on. Why is the advice on which the defendant decides to continue not relevant to whether infringement, if found, is willful, at least from the court's claim construction forward?

Echostar generally supports this view: "once a party asserts the defense of advice of counsel, this opens to inspection the advice received during the entire course of alleged infringement."[37] Thus, where the "course of the alleged infringement" is ongoing, as claimed in *Convolve*, many district courts have applied the waiver to communications with trial counsel as well.[38]

Disclosure of trial counsel's advice presents a significant and related practical problem: calling trial counsel as a witness at trial. Such testimony is disfavored because it can prejudice opposing parties and create conflicts with clients.[39] Thus, disclosing trial counsel's advice may raise additional difficult questions regarding its use at trial, depending on what it reveals and which party seeks to use it. Plaintiffs can reasonably argue that even if not appropriate at trial, such evidence is likely to lead to the discovery of admissible evidence, particularly testimony, from defendants. Defendants might well respond that if trial counsel advice is referenced in any manner at trial, then trial counsel should be permitted to testify notwithstanding the traditional concerns regarding the propriety of such testimony.

3. Work Product Inclusion

Finally, by including documents or opinions that "embod[y] or discuss a communication" between attorney and client, *Echostar* extended the waiver to work product as well. Specifically, *Echostar* found that a party that waives the attorney-client privilege by relying on the defense of advice of counsel to a charge of willful infringement must produce all applicable work product documents (1) that embody a communication between the attorney and client concerning the subject matter of the case, such as a traditional opinion letter and (3) documents that discuss a communication between attorney and client concerning the subject matter of the case but are not themselves communications to or from the client, but not (2) documents analyzing the law, facts, trial strategy, and so forth that reflect the attorney's mental impressions but were not given to the client.[40]

Convolve, Inc. v. Compaq Computer Corp.

In light of *Underwater Devices, Knorr-Bremse* and *Echostar*, the Federal Circuit on January 26, 2007, invited the parties to *Convolve* to address three questions on Seagate's petition for writ of mandamus:

> (1) Should a party's assertion of the advice of counsel defense to willful infringement extend waiver of the attorney-client privilege to communications with that party's trial counsel?[41]
>
> (2) What is the effect of any such waiver on work-product immunity?
>
> (3) Given the impact of the statutory duty of care standard announced in *Underwater Devices, Inc. v. Morrison-Knudsen Co.*,[42] on the issue of waiver of attorney-client privilege, should this court reconsider the decision in *Underwater Devices* and the duty of care standard itself?

Seagate Question (1):
Should Waiver Extend to Trial Counsel?

In response to the Federal Circuit's first question, Seagate of course insists that the answer is no. In its March 12, 2007, en banc brief, Seagate argues that some district courts have "misread" *Echostar* as establishing a new "general" rule in patent cases that extends the scope of the attorney-client privilege waiver to all communications on the same subject as the opinion of counsel, including trial counsel. Seagate further asks that the Federal Circuit "affirmatively hold" that the scope of waiver does not extend to communications with trial counsel "where opinion counsel and trial counsel are separate and independent."

After observing that the attorney-client privilege is at the "very heart" of the American adversarial system of justice and that the scope of privilege waiver is generally limited by fairness concerns, Seagate first argues that the "general rule" is that waiver covers only communications with the same attorney(s) concerning the same subject matter discussed in the waived communications. Seagate argues next that extending the *Echostar* waiver to independent trial counsel contravenes the Federal Circuit's attempt in *Knorr-Bremse* to remove "inappropriate burdens on the attorney-client relationship."[43] Third, Seagate in effect says that drawing a bright line at communications with trial counsel would provide a simple and clear standard.

Seagate's first argument is one of fairness. Privilege waiver is driven by its purpose, Seagate argues: the prevention of abuse resulting from selectively disclosing favorable advice while refusing to disclose unfavorable advice. If a defendant has kept its opinion and trial counsel separate and has asked for opinions on only certain subjects, in fairness to the defendant the waiver should not extend beyond those communications with that counsel on those subjects. Seagate's proposed distinction, however, does not guard against the defendant whose opinion counsel gives it a clean bill of health but whose trial counsel, especially post-*Markman* or post-design around, does not. Fairness to both parties does not argue for protecting attorney-client communications with trial counsel in all cases on its face, and *Echostar* makes no reference to the status of counsel giving the advice: "Under the analysis in *Echostar* it is immaterial whether [a defendant's] opinion counsel and trial counsel are from the same firm, different firms or are even the same person."[44]

Seagate's second argument is harder to refute. In refusing to draw an adverse inference from failure to obtain or produce an opinion of counsel, *Knorr-Bremse* did express concern with "special rules" for patent litigants that unduly burden the attorney-client privilege and distort the attorney-client relationship.[45] Requiring a patent defendant to share with opposing counsel throughout the litigation its communications with its own counsel concerning infringement, validity, and enforceability surely is a "special rule" that "unduly burden[s] the attorney-client privilege" and "distort[s] the attorney-client relationship." Yet *Knorr-Bremse* addressed waiver simply by stating that "[a] defendant may of course choose to waive the privilege…," suggesting that removing the adverse inference solved defendants' problem.[46] Taken together with *Echostar, Knorr-Bremse* discourages patent defendants from seeking advice, because either it is not needed to avoid an adverse influence or it proves too perilous to use.[47]

Finally, as a practical matter, Seagate's third argument has merit. In this area, as in others, both plaintiffs and defendants need clarity, although the bright line test that Seagate suggests—that waiver not extend to counsel who are separate

and independent from opinion counsel—is less simple to enforce than to state. Litigation counsel would, of course, need to see the opinions of counsel to produce them in discovery, and would need to read and understand them in order to represent litigation clients properly. Although litigation counsel could obtain the opinions from the client directly, would litigation counsel then need to refrain from talking to opinion counsel—or the client—regarding these opinions in order to remain "separate and independent"? If so, then who would represent opinion counsel at their depositions—yet another set of counsel? How would the additional counsel communicate with the client or with litigation counsel? And if litigation counsel agree with opinion counsel, then does that make them less "separate and independent"? If the Federal Circuit goes this route, then it has much clarification to do.

Seagate's position would finesse these problems by effectively redefining the standard from a subjective to an objective one: rather than asking whether defendants acted reasonably in light of *all* advice actually received, the question would become whether defendants received *any* advice on which a reasonable defendant could rely.[48] Thus, Seagate's proposed separation of trial and opinion counsel would not eliminate all "sword and shield" concerns, but would merely ignore some.[49]

Seagate Question (2):
What is the Effect of Waiver on Work Product?

Seagate gives the second question short shrift, simply asserting that, "[a]s there should be no waiver of the attorney-client privilege to communications with separate and independent trial counsel, there likewise should be no waiver of the work-product immunity for trial counsel." But indeed work product protection should rise or fall with attorney-client communications, and if the Federal Circuit in *Seagate* "clarifies" that the waiver extends to communications with trial counsel, then *Echostar* has it right: the waiver should also extend to work product that embodies or reflects the communication; i.e., *Echostar* categories (1) and (3).

Once again, however, Seagate's solution begs the question: what constitutes "separate and independent" trial counsel? Suppose that trial counsel communicates to the client as part of a litigation risk analysis a work-product memorandum concluding that opinion counsel's pre-litigation advice is flawed? Or, suppose litigation counsel uses opinion counsel's opinion as the basis for its litigation strategy? Is the work product memorandum now producible on the grounds that it is not "separate and independent"? The practicalities of litigation again present practical difficulties.

Seagate Question (3):
Should the Federal Circuit Reconsider the Duty of Care?

The answer to this question is self-evidently yes. What is less clear is what the resulting standard should be. Seagate argues that *Underwater Devices* turns upside-down both the patentee's burden to prove willful infringement by clear and convincing evidence,[50] and the Supreme Court's admonition in other areas that punitive damages be awarded only for reprehensible conduct.[51] If, as Seagate asserts, Judge Dyk is correct in *Knorr-Bremse* that "mere failure to engage in due care is not itself reprehensible conduct," then enhanced patent litigation damages—if they are considered punitive—should never be awarded for "mere failure to engage in due care."[52]

On the other hand, what can "willful" infringement mean but a deliberate disregard of the patentee's rights after learning of the patent? Perhaps *Underwater Devices*, by creating an affirmative duty, tips the scales too much. But if patents are to mean anything, should we really encourage defendants to stick their heads in the sand and not investigate the possibility of their infringement? Perhaps. The situation is akin to that of the patent applicant's obligation to disclose to the Patent Office known prior art, but not to undertake a search for possibly applicable prior art about which it does not know. Failure to disclose the former can constitute inequitable conduct, but failure to do the latter does not. Even so, many applicants search for prior art before applying for patents, in order to minimize the risk of later invalidity. Even in the absence of the prospect of willful infringement, potential infringers have an incentive to learn of others' patents and to design around them, both to improve their products and to avoid potential liability for infringement.

CONCLUSION

At bottom, Seagate's petition presents policy questions, perhaps better left to Congress than the courts. The Federal Circuit certainly has its work cut out for it, but the recent history of *Knorr-Bremse* and *Echostar* suggests that the Court is not likely to resolve many of the issues leading to current criticism.

Endnotes

1 Although we have entitled this article "The *Seagate* Conundrum," the issues raised are not new. In 1991, the Federal Circuit recognized the dilemma defendants face when choosing whether to assert an advice of counsel defense or to maintain attorney-client privilege, and encouraged trial courts to consider the potential impact on attorney-client privilege when deciding whether to bifurcate willfulness from infringement; trial courts have since characterized this situation as the "*Quantum* Dilemma." Quantum Corp. v. Tandon Corp., 940 F.2d 642, 643-644 (Fed. Cir. 1991). *See, e.g.,* Kos Pharmaceuticals, Inc. v. Barr Labs., Inc., 218 F.R.D. 387, 393 (S.D.N.Y. 2003) (noting dilemma but refusing to bifurcate). More recently, district courts have suggested that *Knorr-Bremse,* discussed below in the text, diminishes the *Quantum* Dilemma. *See, e.g.,* Trading Technologies Int'l, Inc. v. Espeed, Inc., 431 F. Supp. 2d 834, 837-839 (N.D. Ill. 2006).

2 No. 1:00-cv-05141-GBD-JCF ("*Convolve*").

3 On July 13, 2000, Convolve, Inc. and MIT sued Seagate and Compaq Computer Corporation for allegedly infringing two patents, U.S. Patent Nos. 4,916,635 ("the '635 Patent") and 5,638,267 ("the '267 Patent"). Both plaintiffs later dropped the '267 Patent from the suit. On January 25, 2002, plaintiffs added a new patent, U.S. Patent No. 6,314,473 ("the '473 Patent"), which issued to Convolve, Inc. in November 2001. The amended complaint alleges willful patent infringement and seeks treble damages under 35 U.S.C. § 284.

4 Seagate asserts that it never received any advice from its trial counsel on the merits of opinion counsel's advice, but Seagate cannot reasonably claim it does not rely on trial counsel's independent advice because Seagate

seeks mandamus relief precisely to protect its ability to receive such advice confidentially. (*See* Seagate Petition at 16.)

5 Convolve, Inc. v. Compaq Computer Corp., 224 F.R.D. 98, 104-105 (S.D.N.Y. 2004).

6 *Id*. at 105.

7 *Id.*

8 *Id.*

9 35 U.S.C. § 284, ¶2.

10 35 U.S.C. § 285.

11 *See, e.g.,* Ira V. Heffan, *Willful Patent Infringement*, 7 Fed. Cir. B.J. 115, 154 (1997); Kimberly A. Moore, *Empirical Statistics on Willful Patent Infringement*, 14 Fed. Cir. B.J. 227, 230-231 (2004) (willful infringement alleged in 92.3% of original complaints, involving 92.8% of patents in suit, in 1721 patent infringement complaints studied from 1999-2000).

12 In some recent empirical studies, willfulness was found in just 60.4% of the bench trials and in 56.0% of the jury trials in which it had been pleaded. Kimberly A. Moore, *Empirical Statistics on Willful Patent Infringement,* 14 Fed. Cir. B.J. 227, 236 (2004).

13 Juicy Whip, Inc. v. Orange Bang, Inc., 382 F.3d 1367, 1370, 1373 (Fed. Cir. 2004). The Federal Circuit considers the following (non-exclusive) factors when addressing a claim of willfulness and whether increased damages are warranted: (1) whether the infringer deliberately copied the ideas or design of another; (2) whether the infringer, when he knew of the other's patent protection, investigated the scope of the patent and formed a good-faith belief that it was invalid or that it was not infringed; (3) the infringer's behavior as a party to the litigation. (4) Defendant's size and financial condition. (5) Closeness of the case. (6) Duration of defendant's misconduct. (7) Remedial action by the defendant (8) Defendant's motivation for harm (9) Whether defendant attempted to conceal its misconduct. Read Corp. v. Portec, Inc., 970 F.2d 816, 826-827 (Fed. Cir. 1992) (internal citations omitted). The relevance of each factor depends on a very fact specific "totality of the circumstances" test. *Id.*

14 Judges in the 1721 cases examined in the Moore study awarded enhanced damages in just 55.7% of all cases in which willfulness was found and in only 36.8% of jury cases; because willfulness is not found in all cases, the resulting percentage of cases in which enhanced damages were awarded was just 32.0%. Kimberly A. Moore*, Empirical Statistics on Willful Patent Infringement*, 14 Fed. Cir. B.J. 227, 236 (2004); *see also, e.g.*, John Skenyon, et al., Patent Damages Law & Practice, Appendix B (1999); Kimberly A. Moore, *Judges, Juries, and Patent Cases—An Empirical Peek Inside the Black Box*, 99 Mich. L. Rev. 365 (2000); Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*?, 79 N.C. L. Rev. 889 (2001).

15 *Cf.* Real v. Bunn-O-Matic Corp., 195 F.R.D. 618, 625 (N.D. Ill. 2000) (denying defendant's request to bifurcate issues of willfulness and infringement).

16 717 F.2d at 1389-1390 (emphasis in original) (citations omitted).

17 *Id.* at 1390.

18 793 F.2d 1565, 1579 (Fed. Cir. 1986).

19 *Id.* at 1580.

20 96 F.3d 1409, 1414 (Fed. Cir. 1996).

21 383 F.3d 1337, 1343-1344 (Fed. Cir. 2004) (*en banc*).

22 *Id.* at 1343.

23 383 F.3d at 1345 (citation omitted).

24 *Id*. at 1342-1343.

25 *Id.* at 1347.

26 *Id.* at 1346-1347.

27 Liquid Dynamics Corp. v. Vaughn Co., Inc., 449 F.3d 1209, 1226 (Fed. Cir. 2006) (jury may discount opinion based on incomplete information); nCube Corp. v. Seachange Int'l, Inc., 436 F.3d 1317, 1324 (Fed. Cir. 2006)(same); Golden Blount, Inc. v. Robert H. Peterson Co., 438 F.3d 1354, 1368-1369 (Fed. Cir. 2006) (improper to infer that a competent opinion would have been unfavorable, but not improper to consider incompetent opinions to support finding of willfulness); *see also,* Applied Medical Resources Corp. v. United States Surgical Corp., 435 F.3d 1356, 1365 (Fed. Cir. 2006) (evidence that defendant did not rely on opinion letter supports willfulness finding); Imonex Services, Inc. v. W.H. Munzprufer Dietmar Trenner GmbH, 408 F.3d 1374, 1377-1378 (Fed. Cir. 2005) (early receipt of opinion of counsel would have strengthened willfulness defense; though delay did not permit adverse inference, jury had substantial evidence supporting willfulness); IMX, Inc. v. Lendingtree, LLC, 469 F. Supp. 2d 203, 220-221 (D. Del. 2007) (delay in seeking infringement opinion supported finding of willfulness).

28 Knorr-Bremse Systeme Fuer Nutzfahrzeuge GMBH v. Dana Corp., 372 F. Supp. 2d 833, 846-847 (E.D. Va. 2005).

29 Third Wave Technologies, Inc. v. Stratagene Corp., 405 F. Supp. 2d 991, 1016-1017 (W.D. Wis. 2005).

30 Engineered Products Co. v. Donaldson Co., Inc., 147 Fed. Appx. 979, 991 (Fed. Cir. 2005).

31 383 F.3d at 1345. *Cf. Knorr-Bremse,* 383 F.3d at 1351 (Dyk, J.) (dissenting in part) (duty of care standard has led to "a cottage industry of window-dressing legal opinions by third party counsel designed to protect the real decision making process….").

32 448 F.3d 1294 (Fed. Cir. 2006).

33 *Echostar,* 448 F.3d at 1304.

34 In *Computer Associates Int'l, Inc. v. Simple.com, Inc.*, the court granted the patent holder's motion to compel in its entirety, notwithstanding that the subject matter of the opinion at issue was limited to validity, No. 02 C 2748, 2006 WL 3050883 at *1 (Slip copy) (E.D.N.Y. Oct. 23, 2006); *see also*, Affinion Net Patents, Inc. v. Maritz, Inc., 440 F. Supp. 2d 354, 356 (D. Del. 2006) (advice of counsel waiver extends to any defense to infringement); Intex Recreation Corp. v. Team Worldwide Corp., 439 F. Supp. 2d 46, 51 (D.D.C. 2006) (subject matter waiver scope includes infringement, waiver, and enforceability). *But see* Autobytel, Inc. v. Dealix Corp., 455 F. Supp. 2d 569, 574-575 (E.D. Tex. 2006) (waiver by an accused infringer limited to documents relating to infringement).

35 448 F.3d at 1299, 1303.

36 *C.f., e.g.,* Genentech, Inc. v. Insmed Incorp., 442 F. Supp. 2d 838, 843 n. 4 (N.D. Cal. 2006) ("Had trial counsel claimed that it never provided any comments on the likelihood of success, the Court would be hard pressed to find such testimony credible.")

37 448 F.3d at 1302-03, n.4.

38 *See, e.g.,* Beck Sys., Inc. v. Managesoft Corp., No. 05 C 2036, 2006 WL 2037356, at *5, n.1 (N.D. Ill. July 14, 2006) ("*EchoStar*… indicates that the Federal Circuit would extend this waiver to all attorneys other than those who provided the advice on which the defendant relies, irrespective of whether the other attorneys are trial counsel"); Affinion Net Patents, Inc. v. Maritz, Inc., 440 F. Supp. 2d 354, 356 (D. Del. 2006); Informatica Corp. v. Business Objects Data Integration, 454 F. Supp. 2d 957, 964-965 (N.D. Cal. 2006).

39 Culebras Enterprises Corp. v. Rivera-Rios, 846 F.2d 94, 99 (1st Cir. 1988).

40 *Echostar*, 448 F.3d at 1302-03 (category numbering as in original).

41 *See In Re Echostar Commc'n Corp*., 448 F.3d 1294 (Fed. Cir. 2006).

42 717 F.2d 1380 (Fed. Cir. 1983),

43 383 F.3d at 1343.

44 Informatica Corp. v. Business Objects Data Integration, 454 F. Supp. 2d 957, 965 (N.D. Cal. 2006).

45 383 F.3d at 1343.

46 *Id.* at 1345.

47 Seagate argues that the magistrate judge's production orders could require disclosure up until and through trial, but unless a case is appealed and remanded for a new trial while infringement continues unabated, the relevance of such communications diminishes as trial approaches. A possible solution is to bifurcate willfulness and compel disclosure only after establishing infringement, but this would of necessity require two trials. Counsel may also protest that this does not diminish the potential chilling of attorney-client communications, but trial counsel communications are subject to discovery in other areas of the law where placed at issue in subsequent litigation.

48 Arguably, the willfulness test in practice, if not in form, is already primarily objective. *See* Hall and WBX Partners v. Aqua Queen Mfg., Inc., 93 F.3d 1548, 1555 (Fed. Cir. 1996) (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" and finding no willfulness based in part on "industry-wide belief in the invalidity of the [asserted] patent (based on widely circulated opinion letters or opinion letter summaries)" (citation omitted)).

49 This approach may give continuing infringers a tool to avoid treble damages, but plaintiffs might still attack a defendant's failure to update an opinion in light of court rulings or newly disclosed facts.

50 *See, e.g.,* Crystal Semiconductor Corp. v. Tritech Microelects. Int'l, Inc., 246 F.3d 1336, 1346 (Fed. Cir. 2001),

51 *See* State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003).

52 *Knorr-Bremse*, 383 F.3d at 1349 (Dyk, J., concurring in part and dissenting in part).

Patents and Public Health at the World Health Organization

*By Mark Schultz & Christopher Frericks**

Are patents bad for public health? Despite the vast number of fundamental public health challenges facing the world,[1] the effect of the patent system on public health has emerged as a key focus of policy discussions at the international level.[2] A coalition of NGOs and developing nations has raised objections to strong intellectual property protection in a number of international organizations.[3] The issue of patents and access to essential medicines—particularly anti-retroviral drugs needed to combat the HIV virus—has been particularly contentious, spurring urgent calls for action to help the developing world. This article summarizes recent developments at the World Health Organization (WHO), which is currently examining the effect of patents on public health.

WHO and the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property

Developing nations and NGOs skeptical of intellectual property have recently shifted the focus of their efforts to restrict intellectual property rights in the name of public health to the World Health Organization ("WHO"). In many respects, this new focus appears to be an example of what Prof. Laurence Helfer describes as "regime shifting," an attempt by policy proponents to move debate from one international forum to another, more sympathetic one.[4] Responding to criticism of IP's effect on public health, in 2004 WHO convened the Commission on Intellectual Property Rights, Innovation and Public Health (CIPIH), which was charged with analyzing the relationships between IPRs, innovation and public health in the developing world. The CIPH finished its work and issued a lengthy, detailed report in April, 2006.[5] While not wholly skeptical of the benefits of IPRs, the CIPIH Report contended that there were serious deficiencies in the patent-driven model of public health research; it listed sixty recommendations.

Among the recommendations of the CIPIH there are several that are of particular interest to proponents of IPRs. The most notable of these include: pharmaceutical companies should use differential pricing[6] and implement patenting and patent enforcement policies which benefit developing countries;[7] WHO and WIPO, among others, should promote patent pooling;[8] WHO and WIPO should establish a patent database;[9] governments should legislate compulsory licensing in accordance with TRIPS to both improve access to,[10] and promote research into, medications;[11] governments should motivate researchers to contribute to "open source" methods of innovation;[12] governments should impose patentability criteria that avoid barriers to "legitimate competition";[13] governments and the WTO should encourage transfers of technologies to developing countries;[14] governments of developed countries should restrict parallel imports;[15] and governments of developed countries should not seek TRIPS-plus trade agreements that may reduce access to medicines.[16]

A number of the CIPIH recommendations were controversial. Some of the members of the Commission appended partially dissenting statements. Critics of the CIPIH report are concerned that WHO is working from the wrong premises in an area outside of its expertise. Looking at drug patents in isolation from other factors that drive innovation (IPRs more generally, free markets, access to capital) and other factors that more directly affect public health (infrastructure, access to health care, worldwide shortfalls in trained doctors and nurses, public sanitation, availability of all medicines) could badly misconstrue the issues and lead to great mischief. Moreover, WHO brings considerable moral and actual authority to bear, despite its lack of a mandate with respect to intellectual property.

As recommended by the CIPIH Report,[17] WHO established an intergovernmental working group (the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property ("IGWG")) to consider implementing the recommendations of the CIPIH report, as well as a secretariat to support its activities.[18] The IGWG is charged with drawing up a "global strategy… to provide a medium-term framework based on the recommendations of the Commission."[19] This framework is intended to provide "enhanced and sustainable" incentives for need-based research and development into diseases which disproportionately affect the developing world.[20] IGWG is currently working within a two-year time frame and is scheduled to report on its progress to the 60th World Health Assembly in spring 2007. A final strategy must be prepared a year later for the 2008 meeting of the 61st World Health Assembly.[21]

IGWG Activities Thus Far

One of the IGWG's first actions was to hold web-based "public hearings" between 1 and 15 November.[22] In total, thirty-one groups or individuals contributed to the public hearing, representing a wide range of viewpoints, including: the International Federation of Pharmaceutical Manufacturers and Associations ("IFPMA"), the International Policy Network ("IPN"), Doctors Without Borders, Consumer Project on Technology ("CPTech"), as well as and several individual health care professionals and academics.[23] IFPMA observed that research and development of new medicines is both expensive and risky under current regulatory schemes, making the need for strong intellectual property protections a near necessity before initiating the process of innovation.[24] The Doctors Without Borders submission announced their general agreement with the CIPIH report, but focused primarily on those recommendations concerning the delivery of medicines and medical treatment to those in need rather than the alleged defects of an intellectual property-funded research and development scheme.[25] CPTech's submission focused on encouraging research and development into diseases that disproportionately affect the developing world through the use of a prize fund.[26] Other notable

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recommendations included separating the various functions of the pharmaceutical industry (such as research, marketing and manufacturing) and paying for each separately via government agencies,[27] increased use of public/private partnerships (PPPs),[28] and a universal acceptance of every recommendation made in the CIPIH report, perhaps embodied in an international R&D treaty.[29]

Before the IGWG held its first official meetings in December, the United States government reportedly sent a demarche to several developing nations with which it has trade agreements, explaining that much of what is being proposed at the IGWG may not be in the long term best interest of developing countries.[30] The demarche observed that WHO had likely overstepped its expertise by attempting to influence international trade and intellectual property related agreements with the pending IGWG plan of action.[31] Moreover, the demarche noted that other intergovernmental organizations, specifically the WTO and WIPO, have been established to deal with the subject matter of the IGWG and those issues should and would be taken up by those organizations.[32]

In early December, the IGWG met to produce a plan for its work over the next two years.[33] The initial proposal was to organize work around the subjects addressed by the CIPIH report, including prioritizing health research and development needs; promoting drug research and development; building innovation capacity; improving delivery of and access to drugs; ensuring sustainable financing mechanisms for drug development, and establishing monitoring and reporting systems.[34]

The main controversy at the meeting was whether the IGWG should also address the issues of intellectual property rights management and transfer of technology to developing nations. These issues had long been seen as the province of WIPO, and are currently being discussed as part of WIPO's Development Agenda discussions.[35] Representatives from WIPO, the IFPMA and several developed nations indicated that the IGWG was overstepping its area of technical expertise.[36] With regard to technology transfers, most countries agreed that such activity is helpful to both the transferor and transferee and should be encouraged.[37] However, the United States representative explained that transfers of technology could not be *forced* without undermining IPRs.[38] With regard to IPR management, most delegates of developed nations agreed that patent pooling might be an option, but several reserved final judgment on the idea until it could be shown practically viable, again without undermining IPR protections.[39]

The final product of the IGWG's first meeting consisted of a progress report to the WHO executive board consisting of three annexes.[40] The first, the "final" draft of the "Elements of a Plan of Action," closely tracked the CIPIH Report. The IGWG intends to use these elements, now grouped into eight categories and including the two contentious IP-related topics, as a focus for continued discussions in various meetings throughout 2007. The second, "Elements of a Global Strategy," explains the mission of the IGWG and includes several strategies that the IGWG would like to implement in its plan of action. The third annex includes notes on the first two documents from individual countries and groups of countries involved in the IGWG.

Some criticized the first meting of the IGWG as unproductive, especially considering that it cost WHO a reported $600,000.[41] In most ways, however, it was typical of the beginning of such processes: The IGWG affirmed that it attempted to work toward its mandate to formulate a plan of action and strategy to improve research and development into diseases which disproportionately affect the developing world based on the recommendations of the CIPIH. It also reflected the fissures that have appeared at other recent intellectual property related meetings.[42] Developed countries largely sought to defend the intellectual property system from fundamental change. Lesser developed countries with the greatest need, particularly the African Group, sought to obtain whatever technical assistance and technology transfer they could get. "Middle income" developing countries like Brazil and Thailand continue to demand radical changes that would benefit their domestic generic drug industries, alleviate public health budget strains, and provide them with leverage in trade talks at the WTO.

WHO Executive Board Meetings

The WHO Executive Board met the week of January 22 and took up issues regarding the work of the IGWG Wednesday, January 24.[43] During the discussion, some countries, including Switzerland, Brazil, Kenya and Thailand, expressed their disappointment that the December meeting of the IGWG fell short of expectations.[44] Switzerland and Kenya proposed a resolution which would begin implementing some concepts discussed by the Working Group and possibly provide focus and muscle to the work of the IGWG.[45]

The proposed resolution requested that the Director-General "promote, with other relevant organizations, patent pools of upstream technologies that may be useful to foster innovation which addresses diseases that affect developing countries."[46] Amendments proposed by Thailand (which had just broken certain Merck anti-retroviral patents) included requests "to promote competition of generic medicines and health products which would bring down prices and improve access;" "to continue to provide incentives to enterprises and institutions in their territories in accordance with Article 66.2 of the TRIPS Agreement," which concerns technology transfers; and "to strengthen, as appropriate, institutional and human capacity in the management of health-related intellectual property."[47]

A number of countries, including the United States, expressed concerns regarding the proposed resolution.[48] The U.S. delegation was prepared to submit its own amendments which called for promoting research into diseases that disproportionately affect the developing world through incentives for their development, which would included "effective intellectual property protection" and "respecting international obligations."[49] The U.S. amendment was not submitted as support for the proposed resolution did not materialize.[50] When asked by Switzerland whether "there [were] delegations that would have a serious problem if there were no resolution," no country answered affirmatively.[51] In

the end, Kenya requested to postpone the proposal because it became clear that discussion of the topic was, at that point, premature.[52]

In February, member nations submitted comments on a report intended to guide the future progress of the IGWG.[53] The comments will be included in a working document which is slated to be released in July, 2007. The current version of the document states that the WHO director general and IGWG will "identify a pool of experts and concerned entities, ensuring a balanced representation between regions, developing and developed countries, and female and male experts."[54] The document also stated that IGWG officers would "meet as necessary to consider other possible intersessional work and detailed arrangements for the second session."[55] The second session of the IGWG is scheduled for October, 2007.[56] Two proposals were made to prepare for the October meeting: regional meetings, possibly with the aforementioned experts and another Internet-based public hearing.[57]

The comments submitted displayed the now-familiar divisions in this debate. The United States advocated working to remove fundamental barriers to essential health care, like poor infrastructure. Other nations focused once again on patents as a barrier to access to health, advocating greater use of the so-called flexibilities in TRIPS to engage in compulsory licensing. As this article goes to press in spring 2007, the outcome of such debates remains unclear. The next steps to be taken at the upcoming World Health Assembly and further IGWG meetings remain to be seen.

What Will and Should Result from WHO's Examination of Intellectual Property Rights?

The IGWG's final proposal will almost certainly not be radical. After all, the work product of international organizations is typically shaped by compromise. The developed world will not likely abandon the intellectual property system that has done so much to fuel innovation. Nor is it likely to abandon wholly the hard-won concessions of the last two decades tying trade liberalization to more effective enforcement of IPRS by trading partners. Alternative means of encouraging research into health issues that disproportionately affect developing countries will have to be compatible with current IPR practices to be accepted by the developed members of WHO.

Although radical change to the patent-driven system of innovation is unlikely (and arguably undesirable), there appears to be a consensus that something ought to be done about diseases that disproportionately affect developing countries. The IGWG process thus will inevitably produce some sort of substantive proposals. The question is what will and should be the nature of those proposals? Some of the diseases that afflict the developing world would indeed be greatly alleviated by new drugs, but also could be prevented by low-cost interventions. For example, a malaria vaccine is a long-sought dream, but in the meantime, mosquito netting, pest eradication, and other low-cost interventions would greatly alleviate the problem. Toward that end, countries should adhere to existing obligations like the Abuja Declaration on Roll Back Malaria, which calls for measures like malaria prevention education and reducing taxes and tariffs on insecticides and repellents.[58] In addition, a large portion of the world's people lack clean water. Although providing clean water may seem less promising than high-profile R&D into silver bullet drugs, it is one of the world's most important public health priorities, as developing countries lose over three million lives each year to diarrheal diseases. The world has a long, long way to go before such low-cost interventions are exhausted. They ought to be a priority, as they could save millions of lives a year.

Nevertheless, new drug development could also do some good. There are some markets that are just too poor to attract research dollars for diseases uniquely associated with such markets, and some sort of public incentives might help. Toward that end, the IGWG might propose model legislation to facilitate development of drugs for "neglected" diseases—perhaps orphan drug legislation, tax incentives, or tradable patent extensions. Since problems are diverse and the potential solutions manifold, such programs ought to remain decentralized to allow for experimentation with respect to both problems and solutions. Encouraging new private/public partnerships between charities, NGOs, and governments would also be helpful, as such efforts tend to produce many flexible approaches. In the end, however, the IGWG would do well to avoid creating new supranational or transnational organizations; such efforts have proven to be fraught with politics and waste.[59]

In addition, one ought to bear in mind that the very problems that make such markets unattractive to drug companies may interfere with the ability to deliver drugs to the people who need them most. Poverty, war, corruption, lack of infrastructure, health professional shortages, and other issues deter market solutions, but they are also great obstacles to successful charitable and aid efforts.[60] Such challenges do not mean that the developed world should not bother to try to help, but they should shape a more realistic response. Cutting-edge drug developing is important, but the developing world will benefit greatly in the long term with help on less glamorous tasks like fighting poverty, improving sanitation, and preventing disease. In the end, the developing world needs most of the institutions that have fostered prosperity in the developed world: private property rights, the rule of law, and free markets.

CONCLUSION

Health and development related issues will likely continue to dominate the activities of all intergovernmental organizations with a stake in public health and intellectual property. WIPO, which has done little but discuss a potential "development agenda" over the last few years, will continue to do so, taking into consideration the CIPIH report and the IGWG's activities. IP skeptics will certainly continue to raise issues at the WTO, the UN Human Rights Council, UNESCO, and any other organization that will entertain them.

Perhaps the most important immediate consequences of the IGWG's work will be continued distractions from the primary causes of misery in the developing world. Blaming IPRs for failing to engender development ignores the vast institutional failures that prevent IPRs and other market institutions from working in the developing world: The lack of clear property rights and enforceable contracts, confiscatory

taxes, stifling regulation, corruption, poorly functioning or non-existent capital markets, and the lack of physical security all greatly impede economic development. War, disorder, instability, predatory governments, and a lack of essential infrastructure and institutions also keep the developing world impoverished and thus keep IPRs from being an effective incentive for R&D into diseases that disproportionately affect impoverished countries.[61] These same conditions, along with a fundamental failure in the public health systems of most developing countries, also cause great misery. Rather than spending time in Geneva arguing about the effect of IPRs, intergovernmental organizations and the nations of the world might better focus on fulfilling fundamental human needs and building secure, effective market institutions that empower people to lift themselves from poverty.

Endnotes

1 Challenges include world-wide shortages of trained health professionals, inability to obtain access to any health care or medicines (not just patented drugs), infrastructure problems impeding delivery of health care, lack of clean water, lack of obstetric and neo-natal care, corruption causing diversion of health funding, and other fundamental issues. *See generally* Laurie Garrett, *The Challenge of Global Health,* Foreign Affairs (Jan/Feb 2007). Garrett notes that recent years have seen an extraordinary rise in public and private donations directed to alleviate public health problems in the developing world. Such donations have included patented drugs provided at reduced costs or for free. Unfortunately, the fundamental problems detailed by Garrett continue to impede progress. *See id.*

2 Brazil, Argentina, Kenya, and a number of countries have raised the issue of public health and patents at the World Trade Organization ("WTO"), the World Intellectual Property Organization ("WIPO"), and several other organizations. In particular, activity at WIPO the past two years has focused on the "Development Agenda," which proposes to shift WIPO's mandate from one that promotes intellectual property to one that promotes a more skeptical view of intellectual property rights in order to benefit developing nations. *See* Mark Schultz & David Walker, *How Intellectual Property Became Controversial: NGOs and the New International IP Agenda,* 6 Engage 8.2 (2005) (available at http://www.fed-soc.org/Publications/Engage/Oct%2005.pdf). Thus far, the Development Agenda has met with limited success at WIPO, as it has engendered much talk but little action. *See* Mark Schultz, *Daily Reports from the 2006 Development Agenda Meetings*, http://www.ngowatch.org/articles.php?id=320 (2006).

3 *See* Schultz & Walker, *supra* note 2.

4 *See* Laurence R. Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking,* 29 Yale J. Int'l L. 1 23-47 (2004).

5 Report of the Commission on Intellectual Property, Innovation and Public Health, World Health Organization (Apr. 2006) *available at* http://www.who.int/intellectualproperty/report/en/index.html (last visited Jan. 16, 2007) ("CIPIH Report").

6 *CIPIH Report*, *supra* note 5, at 115. "Differential pricing" is "[t]he practice of setting different prices for different markets, typically higher prices in richer markets and lower prices in poorer markets." *Id.* at 192.

7 *Id.* at 122.

8 *Id.* at 53. "Patent pools" are defined as "[a]n agreement between two or more patent owners to license one or more of their patents to one another or third parties." *Id.* at 194.

9 *Id.* at 122.

10 *Id.* at 120.

11 *Id.* at 55.

12 *Id.* at 91. "Open source" methods would be analogous to "computer program[s] in which the source code is available to the general public for use, and/or modification from its original design. Open source code is typically created as a collaborative effort in which programmers improve upon the code and share the changes within the community. *Id.* at 194.

13 *Id.* at 134.

14 *Id.* at 123, 153.

15 *Id.* at 124. "Parallel imports" are patented goods purchased "from a lawful source in an exporting country" and "import[ed] without seeking the consent of the 'parallel' patent holder in the importing country." *Id.* at 194.

16 *Id.* at 126, 130.

17 *Id.* at 187-188.

18 Public Health, Innovation, Essential Health Research and Intellectual Property Rights: Toward a Global Strategy and Plan of Action, WHA Res. 59/24 (May 27, 2006) *available at* http://www.who.int/gb/ebwha/pdf_files/WHA59/A59_R24-en.pdf (last visited Jan. 16 2007).

19 *Id.*

20 *Id.* The IGWG is open to economic integration organizations to which WHO Member States have transferred the capacity to enter international legally binding regulations relevant to the subject matter of the resolution. Other organizations and individuals, including non-Member States and nongovernmental organizations with relations to WHO are allowed to observe meetings.

21 *Id.*

22 World Health Organization, *WHO to Hold Public Hearings on Public Health, Innovation and Intellectual Property*, Oct. 27, 2006, http://www.who.int/mediacentre/news/notes/2006/np30/en/index.html.

23 World Health Organization, *Contributions to Date*, http://www.who.int/public_hearing_phi/summary/en/index.html (visited Jan. 16 2007).

24 Eric Noehrenburg, *The R&D process for pharmaceutical products, diagnostics and vaccines*, http://www.who.int/public_hearing_phi/summary/14Nov06EricNoehrenberg.pdf (Nov. 15, 2006).

25 Ellen F. M. t' Hoen, *Towards a health needs driven framework for R&D and access to medicines*, http://www.who.int/public_hearing_phi/summary/15Nov06EllentHoenMSF.pdf (Nov. 15, 2006).

26 James Love, *Submission of CPTech to IGWG*, http://www.who.int/public_hearing_phi/summary/15Nov2006CPTech15nov06.pdf (Nov. 15, 2006).

27 Peter Mansfield, *Submission from Health Skepticism Inc.*, http://www.who.int/public_hearing_phi/summary/15Nov06MansfieldPeter.pdf (Nov. 15, 2006).

28 Trevor M. Jones, *WHO—Hearings on R&D into Drugs for Developing Countries*, http://www.who.int/public_hearing_phi/summary/13Nov06TrevorMJonesCBE.pdf (Nov. 13, 2006).

29 Health Action International Europe, *Submission to the World Health Organization Public Hearing on Public Health, Innovation and Intellectual Property*, http://www.who.int/public_hearing_phi/summary/14Nov06CoolleenDanielsHAI.pdf (Nov. 14, 2006).

30 Tove Iren S. Gerhardsen, *US Advises Developing Country FTA Partners Not To Follow WHO IP Plan*, http://www.ip-watch.org/weblog/index.php?p=485&res=1024&print=0 (Dec. 11, 2006).

31 *Id.*

32 *Id.*

33 Tove Iren S. Gerhardsen, *Cautious Start For WHO IP Working Group As Members Feel Their Way*, http://www.ip-watch.org/weblog/index.php?p=478&res=1024&print=0 (Dec. 5, 2006).

34 *Id.*

35 *See supra* note 2, and sources cited therein.

36 *See id.*

37 *Id.*

38 *Id.*

39 *Id.*

40 Intergovernmental Working Group on Public Health, Innovation and Intellectual Property, *Elements of a global strategy and plan of action*, http://www.who.int/gb/phi/PDF/phi_igwg1_5-en.pdf (Dec. 8, 2006).

41 Tove Iren S. Gerhardsen, *WHO Group Lays Foundation For Global Neglected Diseases R&D Plan*, *at* http://www.ip-watch.org/weblog/index.php?p=484&res=1024&print=0 (Dec. 11, 2006).

42 *See supra* note 2, and sources cited therein.

43 E-mail from Leonard Leo, Executive Vice President, Federalist Society, World Health Organization Daily Report, (Jan. 24, 2007) (on file with author).

44 *Id.*

45 Tove Iren S. Gerhardsen, *Immediate Action For Global Health Plan Called For At WHO Meeting*, *at* http://www.ip-watch.org/weblog/index.php?p=512&res=1024&print=0 (Jan. 23, 2007).

46 E-mail from Leonard Leo, Executive Vice President, Federalist Society, World Health Organization Daily Report, (Jan. 24, 2007) (on file with author); *see also* Tove Iren S. Gerhardsen, *Immediate Action For Global Health Plan Called For At WHO Meeting*, http://www.ip-watch.org/weblog/index.php?p=512&res=1024&print=0 (Jan. 23, 2007).

47 E-mail from Leonard Leo, Executive Vice President, Federalist Society, World Health Organization Daily Report, (Jan. 24, 2007) (on file with author).

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*

52 Tove Iren S. Gerhardsen, *WHO Members Agree On Need to Improve IP and Public Health Process*, http://www.ip-watch.org/weblog/index.php?p=517&res=1024&print=0 (Jan. 30, 2007).

53 Member States' Submissions to the IGWG Outcome Document, A/PHI/IGWG/1/5, http://www.who.int/phi/submissions/memberstates/en/index.html.

54 Intergovernmental Working Group on Public Health, Innovation and Intellectual Property [IGWG], Follow-up to the first session of the Intergovernmental Working Group: Report by the Secretariat, ¶ 3, WHO Doc. EB120/INF.DOC./5 (Jan. 27, 2007), *available at* http://www.who.int/gb/ebwha/pdf_files/EB120/B120_ID5-en.pdf (last visited Feb. 1, 2007).

55 *Id.* at ¶ 4.

56 *Id.* at ¶ 5.

57 Tove Iren S. Gerhardsen, *WHO Members Agree On Need to Improve IP and Public Health Process*, http://www.ip-watch.org/weblog/index.php?p=517&res=1024&print=0 (Jan. 30, 2007).

58 Abuja Declaration, *available at* http://www.rbm.who.int/docs/abuja_declaration.pdf (last visited Feb. 18, 2007).

59 Recently, Dr. Richard Feachem, the executive director of the Global Fund to Fight AIDS, Tuberculosis and Malaria has been criticized for lavish misuse of Global Fund money, spending "hundreds of thousands of dollars on limousines, expensive meals, a boat cruise for Global Fund staff members and other expenses, according to an internal investigation" and other smaller personal expenses, including renting a wedding tuxedo. John Donnelly, *Director of Global AIDS Charity Used Funds for Private Purposes,* The Boston Globe, February 6, 2007, *available at* http://www.iht.com/articles/2007/02/06/news/global.php. Although it would be unfair to use one such incident to criticize all such efforts, stories of waste and fraud in international bureaucracies are legion. At best, large sums of money are spent honestly but wastefully on administrators, consultants, and other overhead expenses. *See* Garrett, *supra* note 1. Better then to focus on leaner, more direct efforts to help.

60 *See id.*

61 *See* Report of the Commission on Intellectual Property, Innovation and Public Health, World Health Organization,, Commentaries, 202 (Apr. 2006) *available at* http://www.who.int/intellectual property/report/en/index.html (last visited Jan. 16, 2007).

International Law & National Security

Stripping Habeas Corpus Jurisdiction over Non-Citizens Detained Outside the United States: *Boumediene v. Bush* & The Suspension Clause

*By Scott Keller**

In the ongoing saga over the detainees held at Guantanamo Bay, the D.C. Circuit recently upheld provisions of the Military Commissions Act of 2006 (MCA) that stripped jurisdiction over habeas corpus claims. In *Boumediene v. Bush*, Judges Randolph and Sentelle concluded that detainees could not challenge their statuses as enemy combatants through habeas corpus.[1] Judge Rogers dissented, posing multiple questions that the majority did not have to address.[2] While the U.S. Supreme Court was one vote short of granting certiorari, the issues in *Boumediene* will likely be reviewed by the Court at some point as Justices Stevens and Kennedy voted to deny certiorari simply because the detainees had not exhausted all available remedies.[3]

This article summarizes and expands on the many federal jurisdiction issues implicated by *Boumediene*. Specifically, it responds to the arguments advanced by Judge Rogers's dissent, and structures the Suspension Clause questions in a different manner that tracks the text of the Constitution and narrows the focus of each individual question.

Boumediene v. Bush is hardly the first case addressing the difficult questions surrounding federal courts and the war on terror—nor will it be the last. *Boumediene* specifically addresses whether the MCA constitutionally prevents noncitizens detained outside the United States from challenging their statuses as enemy combatants by resort to the writ of habeas corpus.[4] Thus, it is important to recognize what *Boumediene* does not address. Unlike *Hamdan v. Rumsfeld*, *Boumediene* does not address the military commissions that will try the detainees.[5] Likewise, *Boumediene* does not implicate the habeas rights of U.S. *citizens*[6] or non-citizens held *within* the United States.[7]

This article proceeds in three parts. Part I examines the background leading up to passage of the MCA. Part II briefly addresses the argument that the MCA did not strip habeas jurisdiction. Part III examines the core question of *Boumediene*: whether the Suspension Clause renders the MCA unconstitutional. This part structures the various Suspension Clause questions in a different manner than did Judge Rogers and holds that the Suspension Clause does not invalidate the MCA.

I. Background: From *Rasul v. Bush* To the Military Commissions Act of 2006

The Court has traversed a winding path in addressing Congress's attempts to strip habeas jurisdiction over noncitizens detained outside the United States. In *Rasul v. Bush*, the Court construed the federal habeas corpus statute as extending habeas to non-citizen detainees. Congress reacted by passing the Detainee Treatment Act of 2005 (DTA), which among other things, attempted to strip courts of the jurisdiction to hear habeas challenges of non-citizen detainees. But in *Hamdan v. Rumsfeld*, the Court held that the DTA did not strip courts of jurisdiction over habeas cases pending when the DTA was enacted. Congress responded by passing the MCA, which among other things, attempted to strip courts of jurisdiction over pending habeas cases.

A. Rasul v. Bush

In *Rasul v. Bush*,[8] the Supreme Court opened the door for non-citizen detainees to use the writ of habeas corpus to challenge executive detention.[9] The Court held that non-citizen detainees could obtain writs of habeas corpus under the federal habeas corpus statute, 28 U.S.C. § 2241.[10] Section 2241(a) provides that, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*"[11] Instead of interpreting the phrase "within their respective jurisdictions" to require that a *detainee* be within the territory of the court issuing the writ of habeas corpus, the Court only required that the *custodian* be within the territory of the court.[12]

To reach this result, though, the Court had to distinguish the 1950 case *Johnson v. Eisentrager*.[13] In *Eisentrager*, the Court held that a federal district court lacked jurisdiction to issue writs of habeas corpus to twenty-one German citizens captured in China and held in Germany.[14] According to the five Justices in the *Rasul* majority, the 1948 case *Ahrens v. Clark* foreclosed the federal habeas statute from applying in *Eisentrager*.[15] *Ahrens* had interpreted § 2241's "within their respective jurisdictions" to require the *detainee* to be within the district court's territorial jurisdiction.[16] But the subsequent 1973 case *Braden v. 30th Judicial Circuit Court of Kentucky* "held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not 'an invariable prerequisite' to the exercise of district court jurisdiction under the federal habeas statute"—rather, the presence of the custodian was sufficient.[17] Thus, according to the *Rasul* Court, while the federal habeas statute did not apply in *Eisentrager* because of *Ahrens*'s interpretation of § 2241, the federal habeas statute did apply in *Rasul* because of *Braden*'s reinterpretation of § 2241. Of course, this required the *Rasul* majority to expel the presumption against giving statutes extraterritorial effect.[18]

Four Justices disagreed with this reasoning. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented. Justice Scalia first noted that *Ahrens* did not address the question of whether writs of habeas corpus could be issued for persons "confined in an area not subject to the jurisdiction of any district court."[19] Rather, *Eisentrager* resolved that question by holding that noncitizens detained outside the jurisdiction of any district court could not obtain a writ of habeas corpus.[20] Justice Scalia then emphasized that *Braden* distinguished *Ahrens*—it did not overrule *Ahrens*.[21] *Braden* involved a prisoner

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who was in the custody of *multiple* jurisdictions within the United States; Braden was confined within Alabama, but Alabama was merely an agent for Kentucky (the jurisdiction that actually issued the detainer).[22] Thus, where a detainee is not subject to the jurisdiction of any district court, *Eisentrager* "unquestionably controls."[23]

Justice Kennedy, concurring in the judgment, agreed that *Eisentrager* framework applied and that Justice Scalia's dissent "expose[d] the weakness in the Court's conclusion that *Braden*… 'overruled the statutory predicate to *Eisentrager*'s holding.'"[24] However, Justice Kennedy extended habeas to the Guantanamo detainees by distinguishing the facts of *Eisentrager* on two grounds. First, unlike *Eisentrager* where the detention was in Germany, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities."[25] Second, as of 2004, "the detainees at Guantanamo Bay [were] being held indefinitely, and without benefit of any legal proceeding to determine their status."[26] But *Eisentrager* rejected the claim that the *Constitution* extended habeas to the German detainees.[27] Thus, simply distinguishing *Rasul* as presenting more favorable facts than *Eisentrager*, as Justice Kennedy did, would not necessarily extend habeas to the Guantanamo detainees through § 2241—unless Justice Kennedy implicitly made a constitutional decision instead of a statutory decision.

Even though *Rasul v. Bush* would have permitted non-citizen detainees to use habeas corpus to challenge their detentions, much has changed in the three years since *Rasul* was decided. First, Congress subsequently stripped courts of the jurisdiction to issue writs of habeas corpus for non-citizen detainees in the MCA.[28] *Rasul* established a statutory right to habeas corpus—not a constitutional right—which can be overridden by a subsequent congressional act.[29] Thus, a congressional amendment to § 2241 that strips habeas jurisdiction would override *Rasul*. Second, it is unclear how the current Court would have decided *Rasul v. Bush*. Justice O'Connor, who was the fifth vote for the *Rasul* majority, has been replaced by Justice Alito. Plus, contrary to the observation in Justice Kennedy's *Rasul* concurrence, detainees are no longer "being held indefinitely, and without benefit of any legal proceeding to determine their status."[30] After *Hamdi v. Rumsfeld*, the government began using Combatant Status Review Tribunals ("CSRT") to determine whether each detainee is an enemy combatant, and the government is attempting to initiate military commission proceedings against enemy combatants.[31] Therefore, it is unclear whether the Court today would interpret § 2241 in the same manner. But if § 2241 would no longer provide habeas corpus for non-citizen detainees, then there would be no Suspension Clause argument as there would be no habeas to suspend—unless *Rasul* was a constitutional holding. Regardless, *Rasul* is far from the last word on whether non-citizen detainees can use habeas corpus to challenge their detentions.

B. The Detainee Treatment Act of 2005 And Its Subsequent Limitation by Hamdan v. Rumsfeld

In response to *Rasul v. Bush*, Congress enacted the Detainee Treatment Act of 2005.[32] Subsection (e)(1) of the DTA amended 28 U.S.C. § 2241, the federal habeas statute, by adding § 2241(e):

> except as provided in section 1005 of the [DTA], no court, justice, or judge shall have
> jurisdiction to hear or consider—
>
> (1) an application for a writ of habeas corpus filed by or on behalf of an alien detained by the Department of Defense at Guantanamo Bay, Cuba; or
>
> (2) any other action against the United States or its agents relating to any aspect of the detention by the Department of Defense of an alien at Guantanamo Bay, Cuba, who—
>
> (A) is currently in military custody; or
>
> (B) has been determined by the United States Court of Appeals for the District of Columbia Circuit… to have been properly detained as an enemy combatant.[33]

The "except as provided for in section 1005 of the [DTA]" refers to "subsections (e)(2) and (e)(3) of DTA § 1005, which provided for exclusive judicial review of CSRT determinations and military commission decisions in the D.C. Circuit."[34] Thus, among other things, the DTA attempted to do three things: (1) strip courts of habeas jurisdiction over non-citizen detainees; (2) strip courts of direct review over the detention of non-citizens; and (3) create an exclusive forum for reviewing CSRTs and military commissions in the D.C. Circuit.

However, *Hamdan v. Rumsfeld* held,[35] over a vigorous dissent by Justice Scalia,[36] that the DTA did not strip courts of jurisdiction over habeas cases that were pending when the DTA was enacted because of an internal statutory distinction in the DTA.[37] According to DTA § 1005(h), subsections (e)(2) and (e)(3)—providing for D.C. Circuit review of CSRT and military commission decisions—"shall apply with respect to any claim… that is pending on or after the date of the enactment of this Act."[38] In contrast, subsection (e)(1)—the jurisdiction stripping—was silent as to whether it applied to cases *pending* when the DTA was enacted. Thus, because Congress explicitly provided that the D.C. Circuit review provisions applied to pending cases but was silent regarding the jurisdiction strip, the Court concluded that the DTA did not strip jurisdiction over non-citizen detainees.[39] However, *Hamdan* only postponed the constitutional questions relating to stripping habeas jurisdiction over non-citizens detainees.

C. The Military Commissions Act of 2006

Congress responded to *Hamdan* by passing the Military Commissions Act of 2006.[40] As Judge Randolph noted in *Boumediene*, "one of the primary purposes of the MCA was to overrule *Hamdan*."[41] In § 7(a) of the MCA, Congress again amended 28 U.S.C. § 2241(e) to strip courts of habeas and direct review jurisdiction over non-citizen detainees, while maintaining the DTA's D.C. Circuit review of CSRTs and military commissions.[42] But, in § 7(b) of the MCA, Congress specifically stated that § 7(a)'s amendment would apply to pending cases:

> The amendment made by subsection (a) shall take effect on the date of the enactment of this Act, and shall apply to *all cases, without exception, pending on or after the date of the enactment* of this Act which relate to any aspect of the detention, transfer, treatment, trial, or conditions of detention of an alien detained by the United States since September 11, 2001.[43]

As a result, *Boumediene v. Bush* deals with the application of the MCA's habeas jurisdiction stripping, which explicitly applies to pending cases.

II. Does the MCA Strip Habeas Jurisdiction Over Noncitizen Detainees?

All three judges on the *Boumediene* D.C. Circuit panel held that the MCA did in fact strip jurisdiction over pending non-citizen habeas cases.[44] While MCA § 7(a)(1) is clear that Congress intended to strip all courts of habeas jurisdiction over non-citizen detainees,[45] the detainees argued that the MCA was not clear enough and therefore did not succeed in stripping habeas jurisdiction.[46] The detainees relied on *INS v. St. Cyr*, where a five Justice majority (which included Justice Kennedy) required a congressional clear statement to strip habeas jurisdiction[47]—at least in the absence of "another judicial forum" where "the question of law could be answered."[48] Justice Scalia criticized *St. Cyr* as "fabricat[ing] a superclear statement, 'magic words' requirement… unjustified in law and unparalleled in any other area of our jurisprudence."[49]

Indeed, the detainees appeared to be asking for such a "superclear statement" as they argued that MCA § 7(b) should have specifically referenced habeas cases instead of merely cross-referencing MCA § 7(a), which stripped both habeas and direct review jurisdiction.[50] Specifically, the detainees pointed out that MCA § 7(b)—which explicitly stripped jurisdiction over pending cases—referred to "detention, transfer, treatment, trial, or conditions." The jurisdiction stripping relating to direct review, MCA § 7(a)(2), referred to this same list. However, the habeas jurisdiction stripping, MCA § 7(a)(1), referred only to writs of habeas corpus. Therefore, the detainees argued, MCA § 7(b) only meant to apply MCA § 7(a)(2) retroactively—not MCA § 7(a)(1); in other words, habeas jurisdiction was not stripped for pending cases.

Both the *Boumediene* majority and the dissent quickly disposed of this argument. Calling this argument "nonsense," Judge Randolph's majority opinion concluded that the "*St. Cyr* rule of interpretation… demands clarity, not redundancy."[51] Likewise, Judge Rogers's dissent agreed that "by the plain text of section 7, it is clear that the detainees suggest ambiguity where there is none."[52] Such holdings cleared the way for the D.C Circuit to address the constitutional issues over the MCA's habeas jurisdiction stripping.

III. Is the MCA Unconstitutional Under the Suspension Clause?

Even if the MCA strips habeas jurisdiction over non-citizen detainees held outside the United States, the Suspension Clause could render this unconstitutional. The Suspension Clause provides that

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.[53]

This seemingly straight-forward clause raises many questions. First, what does "The Privilege of the Writ of Habeas Corpus" protect? Second, when is habeas corpus "suspended?" Third, what qualifies as "Rebellion," "Invasion," or the "public Safety," and are these nonjusticiable political questions?

A. What Does "The Privilege of the Writ of Habeas Corpus" Protect?

The Supreme Court has not yet defined what the Suspension Clause's phrase "The Privilege of the Writ of Habeas Corpus" protects,[54] but there are essentially two possibilities: (1) the writ "as it existed in 1789,"[55] or (2) subsequent expansions of habeas corpus. *St. Cyr* held that "*at the absolute minimum*, the Suspension Clause protects the writ 'as it existed in 1789.'"[56] However, the Court has left open whether subsequent expansions of habeas corpus are protected by the Suspension Clause.[57]

In *Boumediene*, the D.C. Circuit quarreled over what was protected by the writ of habeas corpus as it existed in 1789. The *Boumediene* majority accepted the first possible definition (implicitly rejecting the second): "the Suspension Clause protects the writ 'as it existed in 1789.'"[58] After distinguishing three historical cases that the detainees relied on, the majority concluded that "given the history of the writ in England prior to the founding, habeas corpus would not have been available in 1789 to aliens without presence or property within the United States."[59] Furthermore, the majority rejected the detainee's reliance on *Rasul*.[60] In dicta, *Rasul* stated that granting habeas to non-citizens detained outside the United States "is consistent with the historical reach of the writ of habeas corpus."[61] The *Rasul* Court based this statement on historical cases that alternatively held (1) that habeas was available for *citizens* detained outside the sovereign's territory or (2) that habeas was available for non-citizens detained *within* the sovereign's territory. But as Justice Scalia's dissent in *Rasul* noted, the majority did not cite "a single case holding that aliens held outside the territory of the sovereign were within reach of the writ."[62]

Instead, the *Boumediene* majority found that *Eisentrager* controlled, and *Eisentrager* denied habeas to non-citizens detained outside the United States:

> We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.[63]

The majority then noted that because the United States did not have sovereignty over Guantanamo Bay, Cuba, habeas corpus would not have been available to non-citizens detained by the United States in Guantanamo Bay in 1789.[64] Therefore, the Suspension Clause did not prevent the MCA from stripping habeas jurisdiction over the *Boumediene* detainees.

Judge Rogers, in dissent, argued that habeas corpus would have been available in 1789 to non-citizens detained outside the United States.[65] She recognized that while there may be no case before 1789 where a court exercised habeas jurisdiction over a non-citizen detained outside the sovereign's territory, there was also no case denying such habeas jurisdiction.[66] Rather, relying on cases that extended habeas to *citizens* detained outside the sovereign's territory and cases that extended habeas to non-citizens detained *within* the sovereign's territory,[67] Judge Rogers would have "piec[ed] together the considerable circumstantial evidence" to determine that habeas in 1789 would have been extended to non-citizens detained outside the sovereign's territory.[68] Finally, Judge Rogers distinguished *Eisentrager*. The detainees in *Eisentrager* claimed they were "entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*."[69] However, the *Boumediene* detainees were not arguing that the "Constitution accords them a positive right to the writ but rather that the Suspension Clause restricts Congress's power to eliminate a preexisting statutory right."[70]

However, both of Judge Rogers's arguments overlook crucial responses. First, it does not follow that the writ in 1789 extended to *non-citizens* detained *outside* the sovereign's territory simply because habeas was issued historically (1) to *citizens* detained outside the sovereign's territory and (2) to non-citizens held *within* the sovereign's territory. This overlooks a meaningful distinction that could explain the absence of any case extending habeas to non-citizens detained outside the sovereign's territory: the power to issue the writ of habeas corpus requires some personal, territorial connection to the sovereign.[71] Cases involving citizens *or* detention within the sovereign's territory both have such a connection—either citizenship or physical presence. But cases involving *neither* citizens *nor* detention within the sovereign's territory (like *Boumediene*) lack this territorial connection.

Second, Judge Rogers's attempt to distinguish *Eisentrager* proves too much. If the writ of habeas corpus would have been available in 1789, "when the first Judiciary Act created the federal courts and granted jurisdiction to issue writs of habeas corpus," then it should have been available in 1950 for *Eisentrager*—unless, sometime after 1789, Congress eliminated the ability of non-citizens detained outside the United States to obtain writs of habeas corpus.[72] But nothing between 1789 and 1950 purported to take away the ability of non-citizens detained outside the United States to obtain writs of habeas corpus. Thus, when *Eisentrager* held that the German detainees had neither a statutory nor a constitutional right to habeas corpus, it was also holding that the writ was not available in 1789.[73] The fact that the *Eisentrager* detainees claimed a constitutional right to habeas and the *Boumediene* detainees claimed the Suspension Clause restricted Congress's power to eliminate a preexisting statutory right is a distinction without a difference.

Of course, even if habeas would not have been extended to non-citizens detained outside the United States in 1789, the Supreme Court could hold—contrary to the *Boumediene* majority—that "The Privilege of the Writ of Habeas Corpus" protects some subsequent expansion of habeas corpus. The Court could hold that the Suspension Clause protects any congressional expansion of habeas from subsequent elimination. Under this view, because *Rasul* (or *Braden*) extended the federal habeas statute to non-citizens detained outside the United States, the Suspension Clause would protect against the MCA's habeas jurisdiction stripping.

Then again, the Court could take a more moderate approach. For instance, the Court could focus on the facts and circumstances of the armed conflict. Thus, the Court could hold that when "military exigencies" exist, the Suspension Clause does not protect the elimination of habeas.[74] Alternatively, the Court could focus on the facts and circumstances relating to the territory of detention. As Professor J. Andrew Kent has argued, the Court could hold that the Suspension Clause only protects the elimination of habeas in "territor[ies] over which the United States exercises such pervasive and persistent sovereignty that a hostile military incursion could be fairly described as an 'invasion' vis-à-vis the United States, or an armed insurrection could fairly be described as a 'rebellion' vis-à-vis the United States."[75] Regardless, *Boumediene v. Bush* is hardly the final word on what the Suspension Clause's phrase "The Privilege of the Writ of Habeas Corpus" protects.

B. What Qualifies as "suspended"?

The *Boumediene* majority did not address any of the remaining questions because the first question was dispositive. However, the Supreme Court could reach further questions by either disagreeing with the *Boumediene* majority's historical analysis of the writ or by extending the Suspension Clause's protection beyond the writ as it existed in 1789. The next question would be whether habeas corpus has been "suspended" under the Suspension Clause. There are essentially two separate questions: (1) Has the operative definition of "suspended" been met?; (2) Even if this definition has been met, did Congress provide an "adequate and effective" alternative remedy "to test the legality of a person's detention," so that the stripping of habeas jurisdiction "does not constitute a suspension of the writ of habeas corpus?"[76]

1. Definition of "suspended"

Without addressing this question explicitly, the *St. Cyr* majority defined "suspended" as merely "withdraw[ing]" the "power to issue the writ of habeas corpus."[77] Presumably, stripping habeas jurisdiction *where it previously existed* would amount to such a withdrawal. *Rasul* construed the federal habeas statute as permitting habeas jurisdiction over non-citizen detainees, so the MCA probably meets the *St. Cyr* definition of "suspended."[78] Judge Rogers's *Boumediene* dissent implicitly adopted this position.[79]

In contrast, Justice Scalia's dissent in *St. Cyr* determined that "suspended" only means that Congress has "temporarily withheld operation of the writ," as opposed to "permanently alter[ing] its content."[80] Examining the history of the writ, Justice Scalia found that the temporary elimination of the writ "was a distinct abuse of majority power… that had manifested itself often in the Framers' experience."[81] These suspension acts would "temporarily but entirely eliminat[e] the 'Privilege of the Writ' for a certain geographic area or areas, or for a certain class or classes of individuals."[82] Justice Scalia fully recognized that

a permanent alteration of the writ was subject to majoritarian abuse, but he also noted "that is not the majoritarian abuse against which the Suspension Clause was directed."[83]

Nonetheless, the implicit definition of "suspended" used by the *St. Cyr* majority probably controls. Under this view, the MCA probably "suspended" habeas corpus; the MCA withdraws the power of judges to issue writs of habeas corpus to non-citizen detainees—a power previously established under the federal habeas statute by *Rasul*.[84]

2. Adequate and Effective Alternative Remedy

Even if the operative definition of "suspended" is met, *Swain v. Pressley* held that "the substitution of a collateral remedy which is neither inadequate nor ineffective to test the legality of a person's detention does not constitute a suspension of the writ of habeas corpus."[85] In other words, if habeas is replaced by an alternative adequate and effective remedy, the Court will deem that habeas is not "suspended" for purposes of the Suspension Clause. The MCA specifically preserved the alternative remedy established by the DTA (D.C. Circuit and possible Supreme Court review over CSRTs and military commissions),[86] which begs the question of whether the DTA's alternative remedy is "adequate and effective" under *Swain*.[87]

Judge Rogers determined that the DTA was not an adequate and effective remedy. In establishing her baseline for comparison, she quoted the 1969 case *Harris v. Nelson* for the proposition that the detainees should be "'entitled to careful consideration and plenary processing of their claims including full opportunity for the presentation of the relevant facts.'"[88] She found that the "CSRTs fall far short of this mark" because CSRT practices implemented by the MCA "impede[] the process of determining the true facts underlying the lawfulness of the challenged detention."[89]

But Judge Rogers's baseline for evaluating the DTA's D.C. Circuit review was incorrect. The baseline here should be the degree of *executive detention* habeas review over *military tribunals*.[90] However, Judge Rogers's quoted baseline dealt with *collateral attack* habeas review over *typical criminal convictions* completely removed from the military context.[91] Furthermore, the *Harris v. Nelson* standard has become an anachronism; in decades following *Harris v. Nelson*, the Court cut down on the degree of habeas review afforded.[92]

In actuality, the degree of executive detention habeas review over military tribunals is quite limited. The Court gives extremely broad deference to military commissions even under habeas review,[93] and the same deference would be accorded to the CSRTs.[94] During habeas review of executive detentions, "other than the question whether there was some evidence to support the order, the courts generally did not review the factual determinations made by the Executive."[95] In fact, compared to executive detention habeas review over military tribunals, the DTA affords detainees *more* review.[96] Granted, the D.C. Circuit review of CSRTs is limited to determining (1) whether the CSRT determination is "consistent with the standards and procedures" established for CSRTs[97] and (2) whether these procedures are "consistent with the Constitution and laws of the United States."[98] But even with these limitations, this judicial review is an adequate and effective alternative remedy. First, the DTA permits the D.C. Circuit to review constitutional challenges such as due process claims.[99] Second, because the D.C. Circuit can inquire whether the CSRT determination is consistent with the CSRT's standards, it can evaluate whether the correct evidentiary standard was used.[100] Thus, under the DTA, the D.C. Circuit would be able to review the evidence by examining the evidentiary standard[101]—which is certainly more review than only asking if "there was some evidence" to support the CSRTs determination.[102]

Simply, the DTA's D.C. Circuit review provides more review than executive detention habeas review over military tribunals. Therefore, the DTA provides an alternative adequate and effective remedy under *Swain*. Thus, the MCA's habeas jurisdiction stripping has not "suspended" habeas for purposes of the Suspension Clause.

C. What Qualifies as "Rebellion," "Invasion," or the "public Safety"? And Are These Non-justiciable Political Questions?

Even if "The Privilege of the Writ of Habeas Corpus" is "suspended," this is constitutionally permissible "in Cases of Rebellion or Invasion" when "the public Safety may require it."[103] Unfortunately, the Court has provided little guidance on what constitutes "Cases of Rebellion or Invasion" or when "the public Safety may require" suspension of habeas. Without addressing the substantive content of these provisions, Judge Rogers's *Boumediene* dissent would have found that these predicates were not satisfied because Congress did not provide a clear statement that at least one of these predicates existed.[104] Judge Rogers explained that "[o]n only four occasions has Congress seen fit to suspend the writ," and "[e]ach suspension has made specific reference to a state of 'Rebellion' or 'Invasion' and each suspension was limited to the duration of that necessity."[105] However, the MCA contained "neither of these hallmarks of suspension" and "there was "no indication that Congress sought to avail itself of the exception in the Suspension Clause."[106] Judge Rogers's view, though, is quite remarkable because it stands in stark contrast to a major argument that she did not address.

Multiple Justices have posited that questions relating to the Suspension Clause's "Rebellion," "Invasion," or "public Safety" predicates are non-justiciable political questions.[107] In *Hamdi*, Justice Scalia (joined by Justice Stevens) and Justice Thomas put forth this view.[108] Similarly, Chief Justice Marshall,[109] Justice Story,[110] and Chief Justice Taney[111] suggested that questions about the Suspension Clause's predicates are non-justiciable. According to this view, the very fact that Congress suspended habeas corpus means that Congress determined that "Rebellion" or "Invasion" existed such that the "public Safety" required suspension.

In contrast, Professor Amanda Tyler argues that whether "Rebellion" or "Invasion" exists is a justiciable question[112]—but she suggests that consideration of the "public Safety" predicate may be nonjusticiable.[113] She questions the views presented by multiple Justices on the grounds that "there is no settled authority on the justiciability of suspension, and the handful of jurists who have expressed an opinion on the question have done

so cursorily, offering little more than an institutional hunch as a basis for their conclusions."[114] Then, she essentially makes two arguments in favor of the justiciability of the suspension predicates.[115] First, she presents various textual arguments. She begins with the contextual argument that the "Suspension Clause abuts the Ex Post Facto and Bill of Attainder Clauses," both of which "are routinely enforced by the courts."[116] Additionally, the existence of "Rebellion or Invasion" represents the "kind of bright-line limitation on political authority that seems to invite judicial enforcement."[117] Finally, she uses counterfactual redrafting to explain that the Framers would have specifically mentioned Congress in the Suspension Clause if they wanted to make suspension non-justiciable.[118]

These textual arguments are far from conclusive. The Constitution invites many other "bright line limitation[s]," yet the Court hardly finds them dispositive. For example, the phrases "commerce… among the several states"[119] and "All legislative powers"[120] invite a formalistic view of the Commerce Clause and an acceptance of the non-delegation doctrine, respectively. But the Court has eschewed these formalistic limits[121] largely on the grounds that it is not competent to stand in the way of Congress.[122] Concerns of institutional competency are only heightened in the suspension context when the elected representatives of the people deem it necessary to suspend habeas corpus and the President acts under this authorization. This institutional competency argument also undermines the other textual arguments made by Tyler. The Ex Post Facto and Bill of Attainder Clauses do not implicate war powers or emergency questions. And the fact that the Framers rejected a proposal unrelated to habeas that gave Congress the authority to strike down unconstitutional state laws bears no relevance to the institutional competency of courts to judge whether a "Rebellion or Invasion" exists.[123]

Second, and analogously, Tyler points out that the Court has in fact "performed similar analyses in war powers cases since the time of Chief Justice Marshall."[124] She proceeds to list various precedents where the Court invalidated *executive* action during times of armed conflict.[125] However, suspension is completely different because it involves *congressional* action. Indeed, in each of the cases Tyler cites,[126] the President was *not* acting "pursuant to an express or implied authorization of Congress."[127] Thus, in these cases, the Court was not faced with the deferential first category of Justice Jackson's famous *Youngstown* separation of powers framework, which requires the "widest latitude of judicial interpretation."[128] But suspension cases will always involve an "express… authorization of Congress"[129] under the consensus view that only Congress can "suspend[ ]" habeas corpus.[130]

D. Synthesizing the Suspension Clause Arguments

As this Part shows, it would require five separate holdings for the Suspension Clause to render the MCA's suspension provisions unconstitutional. First, "The Privilege of the Writ of Habeas Corpus" in the Suspension Clause would need to cover more than the writ "as it existed in 1789."[131] Indeed, it would have to cover *Rasul*'s expansion of habeas in 2004,[132] even though Congress tried twice to counteract *Rasul v. Bush*.[133] Second, "suspended" in the Suspension Clause would need to apply to permanent withdrawals of habeas.[134] Third, the DTA's alternative remedy of D.C. Circuit review would need to be considered ineffective or inadequate, even though it provides more review than habeas.[135] Fourth, questions regarding the Suspension Clause's predicates must be justiciable, and, fifth, a "Rebellion or Invasion" implicating the "public Safety" must not exist.[136] Only after making those five holdings could a court invoke the Suspension Clause to invalidate the MCA's provisions stripping habeas jurisdiction over the CSRT determinations.

CONCLUSION

Regardless of how the *Boumediene* habeas jurisdiction stripping issue is resolved, there will be many more questions regarding the war on terror detainees held at Guantanamo Bay. At a minimum, there will be challenges regarding due process and the CSRTs and military commissions, habeas jurisdiction over the military commissions, and direct review in the D.C. Circuit. But as to the habeas jurisdictions stripping over CSRT determinations, the D.C. Circuit's holding in *Boumediene v. Bush* is correct: the MCA validly strips jurisdiction for issuing writs of habeas corpus to non-citizens detained outside the United States for purposes of challenging CSRT determinations.

Endnotes

1 Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007).

2 *Id.* (Rogers, J., dissenting).

3 Boumediene v. Bush, No. 06-1195, 2007 WL 957363, at *1 (U.S. Apr. 2, 2007) (Stevens & Kennedy, JJ, respecting the denial of certiorari).

4 There are two distinct uses of habeas corpus: (1) to challenge executive detention when there is no judicial conviction, and (2) to collaterally attack criminal convictions. *See* Erwin Chemerinsky, Federal Jurisdiction § 15.1, at 867 (4th ed. 2003) ("[A]lthough this chapter deals primarily with habeas corpus review of criminal convictions, which is by far the most frequent use of habeas corpus, it should be noted that habeas corpus is available whenever a person is in government custody."); Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and the Federal System 1179, 1285 (5th ed. 2003) ("The writ remains important, however, outside the postconviction context, as a mechanism for constitutional attack upon official claims of power to detain."). *Boumediene* implicates the former. *Boumediene*, 476 F.3d at 994.

5 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2769 (2006).

6 The MCA does not attempt to strip habeas jurisdiction for U.S. Citizens. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600 (2006).

7 *Cf.* Al-Marri v. Wright, 443 F. Supp. 2d 774, 776–77 (D.S.C. 2006) (involving a petition for a writ of habeas corpus by a noncitizen detained within the United States, who had been designated as an enemy combatant).

8 542 U.S. 466 (2004).

9 Justice Stevens wrote the majority opinion and was joined by Justices O'Connor, Souter, Ginsburg, and Breyer. *Id.* at 468. Justice Kennedy concurred in the judgment. *Id.* Justice Scalia dissented and was joined by Chief Justice Rehnquist and Justice Thomas. *Id.*

10 *See id.* at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

11 28 U.S.C. § 2241(a) (emphasis added).

12 *See Rasul*, 542 U.S. at 478–79 ("Rather, because 'the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody,' a district court acts 'within [its] respective jurisdiction" within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 494–95 (1973)).

13 339 U.S. 763 (1950).

14 *Id.* at 766.

15 *Rasul*, 542 U.S. at 476–77 (citing Ahrens v. Clark, 335 U.S. 188 (1948)).

16 *Id.*

17 *Id.* at 478 (quoting Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 495 (1973)).

18 *See id.* at 480–81; *id.* at 500–02 (Scalia, J., dissenting) (criticizing the majority for ignoring this presumption); *see also* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (quoting Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285 (1949))).

19 *Rasul*, 542 U.S. at 490 (Scalia, J., dissenting) (quoting Ahrens v. Clark, 335 U.S. 188, 192 n.4 (1948)).

20 *Id.* at 491.

21 *Id.* at 494.

22 *Id.* at 494–95 (citing Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484, 498–500 (1973)).

23 *Id.* at 495.

24 *Id.* at 485 (Kennedy, J., concurring in the judgment) (quoting *Rasul*, 542 U.S. at 479 (majority opinion)).

25 *Id.* at 487. *But see* Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) (noting that noncitizens detained outside the United States could not invoke habeas because the noncitizens "at no relevant time were within any territory over which the United States is *sovereign*" (emphasis added)).

26 *Rasul*, 542 U.S at 487–88.

27 *See* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950)) ("We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. *Nothing in the text of the Constitution extends such a right.*…" (emphasis added)).

28 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600 (2006) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination."); *see also Detainee* Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1), 119 Stat. 2739 (2005).

29 *See Rasul*, 542 U.S. at 484 ("We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.").

30 *Id.* at 487–88 (Kennedy, J., concurring in the judgment).

31 *Hamdi* held that a U.S. citizen has a due process right to some procedures for challenging the factual basis for being classified as an enemy combatant. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion) ("We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker.").

32 Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005).

33 *Id.* § 1005(e)(1) (internal quotation marks omitted).

34 Boumediene v. Bush, 476 F.3d 981, 985 (D.C. Cir. 2007).

35 Chief Justice Roberts did not participate in the decision as he was on the D.C. Circuit panel that decided the case below. Hamdan v. Rumsfeld, 415 F.3d 33 (2005), *rev'd*, 126 S. Ct. 2749 (2006).

36 *See id.* at 2810 (Scalia, J., dissenting) ("An ancient and unbroken line of authority attests that statutes ousting jurisdiction unambiguously apply to cases pending at their effective date."). Justice Scalia was joined by Justice Thomas and Justice Alito. *Id.*

Justice Thomas, joined by Justice Scalia in full and Justice Alito in part, wrote an equally vigorous dissent on the merits. *Id.* at 2823 (Thomas, J., dissenting).

37 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2769 (2006).

38 Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(h), 119 Stat. 2739 (2005).

39 *Hamdan*, 126 S. Ct. at 2769 (2006).

40 Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

41 Boumediene v. Bush, 476 F.3d 981, 986 (D.C. Cir. 2007).

42 Section 7(a) of the MCA reads:

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600 (2006) (internal quotation marks omitted).

43 *Id.* § 7(b) (emphasis added).

44 *Boumediene*, 476 F.3d at 986–88; *see id.* at 999 (Rogers, J., dissenting) ("As for the MCA, I concur in the court's conclusion that, notwithstanding the requirements that Congress speak clearly when it intends its action to apply retroactively and when withdrawing habeas jurisdiction from the courts, Congress sought in the MCA to revoke all federal jurisdiction retroactively as to the habeas petitions of detainees held at Guantanamo Bay." (citations omitted)).

45 *See* Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a)(1), 120 Stat. 2600 (2006) ("No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.").

46 *See Boumediene*, 476 F.3d at 987 (stating that detainees argued that the MCA does not meet the *St. Cyr* clear statement rule for repealing habeas corpus jurisdiction).

47 *See* INS v. St. Cyr, 533 U.S. 289, 299 (2001) ("Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal [of habeas jurisdiction].").

48 *Id.* at 314.

49 *Id.* at 327 (Scalia, J., dissenting).

50 *Boumediene*, 476 F.3d at 987.

51 *Id.*

52 *Id.* at 999.

53 U.S. Const. art. I, § 9, cl. 2.

54 As Justice Scalia has noted, the Suspension Clause itself does not guarantee a constitutional right to habeas corpus. *See* INS v. St. Cyr, 533 U.S. 289, 337 (2001) (Scalia, J., dissenting) ("A straightforward reading of this text discloses that it does not guarantee any content to (or even the existence of) the writ of habeas corpus, but merely provides that the writ shall not (except in case of rebellion or invasion) be suspended. Indeed, that was precisely the objection expressed by four of the state ratifying conventions—that the Constitution failed affirmatively to guarantee a right to habeas corpus." (citations omitted)).

55 *Id.* at 301 (majority opinion); *see also* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 47 U. Chi. L. Rev. 142, 170 (1970) ("It can scarcely be doubted that the writ protected by the suspension clause is the writ as known to the framers, not as Congress may have chosen to expand it or, more pertinently, as the Supreme Court has interpreted what Congress did."), *cited in* Boumediene v. Bush, 476 F.3d 981, 988 (D.C. Cir. 2007).

56 *St. Cyr*, 533 U.S. at 301 (quoting Felker v. Turpin, 518 U.S. 651, 663–64 (1996)).

57 *Id.* at 300–01; Swain v. Pressley, 430 U.S. 372, 380 n.13 (1977).

58 *Boumediene*, 476 F.3d at 988 (quoting *St. Cyr*, 533 U.S. at 301).

59 *Id.* at 990.

60 *Id.*

61 Rasul v. Bush, 542 U.S. 466, 481 (2004).

62 *Id.* at 505 n.5 (Scalia, J., dissenting).

63 *Boumediene*, 476 F.3d at 990 (quoting Johnson v. Eisentrager, 339 U.S. 763, 768 (1950)).

64 *Id.* at 992.

65 *Id.* at 1000–04 (Rogers, J., dissenting).

Thus, she would not have reached the question of whether the Suspension Clause only protects the writ as it existed in 1789" or if it protects subsequent expansion of habeas corpus. *Id.* at 1000 n.5.

66 *Id.* at 1000.

67 *See id.* at 1001–04.

68 *Id.* at 1001.

69 *Id.* at 1004 (quoting Johnson v. Eisentrager, 339 U.S. 763, 777 (1950)).

70 *Id.*

71 *Cf.* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."); United States v. Verdugo-Urquidez, 494 U.S. 259, 273 (1990) (reaffirming *Eisentrager*'s holding that noncitizens detained outside the United States do not have a constitutional right to habeas corpus by noting that "the result of accepting [the noncitizen's] claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries").

72 *Boumediene*, 476 F.3d at 988; *see also* Felker v. Turpin, 518 U.S. 651, 663, 664 (1996) (recognizing that in 1789 "the first Congress made the writ of habeas corpus available").

73 *See* Johnson v. Eisentrager, 339 U.S. 763, 768 (1950) ("Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.").

74 *Cf.* Rasul v. Bush, 542 U.S. 466, 488 (2004) (Kennedy, J., concurring in the judgment) ("[A]s the period of detention stretches from months to years, the case for continued detention to meet *military exigencies* becomes weaker." (emphasis added)).

75 J. Andrew Kent, *A Textual and Historical Case Against a Global Constitution*, 95 Geo. L.J. 463, 523 (2007), *cited in* Boumediene v. Bush, 476 F.3d 981, 992 n.11 (D.C. Cir. 2007).

76 Swain v. Pressley, 430 U.S. 372, 381 (1977).

77 INS v. St. Cyr, 533 U.S. 289, 305 (2001); *see id.* at 304–05 ("In sum, even assuming that the Suspension Clause protects only the writ as it existed in 1789, there is substantial evidence to support the proposition that pure questions of law like the one raised by the respondent in this case could have been answered in 1789 by a common-law judge *with power to issue the writ of habeas corpus*. It necessarily follows that a serious Suspension Clause issue would be presented if we were to accept the INS' submission that the 1996 statutes have *withdrawn that power* from federal judges and provided no adequate substitute for its exercise." (emphasis added)).

78 *See supra* Part I.A.

79 *See* Boumediene v. Bush, 476 F.3d 981, 1004 (D.C. Cir. 2007) (Rogers, J., dissenting) ("[T]he Suspension Clause restricts Congress's power to *eliminate a preexisting statutory right*." (emphasis added)).

80 *St. Cyr*, 533 U.S. at 338 (Scalia, J., dissenting).

81 *Id.* at 337.

82 *Id.* at 337–38.

83 *Id.* at 338.

For the opposite argument that a limitation on suspending habeas implies a prohibition on permanently eliminating habeas, *see* Laurence Claus, *The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 Geo. L.J. (forthcoming 2007) (manuscript at 74, *available at* http://ssrn.com/abstract=935368) ("But the Constitution seems to assume that the jurisdiction to determine legality of federal detentions cannot be removed—that such jurisdiction can at most be suspended.").

84 This raises an intriguing hypothetical. Assume that instead of explicitly stripping jurisdiction, as the MCA does, Congress simply amended or qualified the federal habeas statute phrase at issue in *Rasul* ("within their respective jurisdictions" in 28 U.S.C. § 2241(a)) to only apply to the jurisdiction where the detainee is located.

Under the St. Cyr definition of "withdrawal," it would appear that even this suspends habeas because after *Rasul*, the power to issue the writ would have existed. But this means that if Congress thought the *Rasul* Court simply misinterpreted § 2241 and wanted to clarify it, the Suspension Clause could stand in its way.

85 Swain v. Pressley, 430 U.S. 372, 381 (1977).

86 *See supra* Part I.C.

87 The Court has provided little guidance on what constitutes an "adequate and effective" alternate remedy. *Swain* itself did not require an "exact equivalent or the pre-existing habeas corpus remedy." *Cf. Swain*, 430 U.S. at 381. Although, the only difference between the alternate remedy and habeas in *Swain* was that Article III judges did not administer the alternate remedial scheme. *Id.* at 382.

88 Boumediene v. Bush, 476 F.3d 981, 1005 (D.C. Cir. 2007) (Rogers, J., dissenting) (quoting Harris v. Nelson, 394 U.S. 286, 298 (1969)).

89 *Id.* at 1006.

90 Unlike *Hamdan*, the *Boumediene* detainees were only seeking habeas review over CSRT determinations that the detainees were enemy combatants—not the validity of the military commissions. *Boumediene*, 476 F.3d at 994.

91 Harris v. Nelson, 394 U.S. 286, 288–89 (1969).

92 *See generally* Chemerinsky, *supra* note 4, § 15.2, at 871–72 (explaining that the Burger and Rehnquist Courts narrowed the scope of federal habeas corpus availability).

93 *See* Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) ("It is not for us to say whether these prisoners were or were not guilty of a war crime, or whether if we were to retry the case we would agree to the findings of fact or the application of the laws of war made by the Military Commission."); Yamashita v. Styer, 327 U.S. 1, 8 (1946) ("If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions."); *id.* at 17 ("We do not here appraise the evidence on which petitioner was convicted."); *Ex parte* Quirin, 317 U.S. 1, 25 (1942) ("We are not here concerned with any question of the guilt or innocence of petitioners.").

94 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.'" (quoting *Quirin*, 317 U.S. at 28)); *id.* at 535 ("[T]he full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.").

95 INS v. St. Cyr, 533 U.S. 289, 305–06 (2001).

96 Indeed, the DTA review provisions afford more process than is constitutionally due for *U.S. citizens held within the United States* who are challenging their statuses as enemy combatants. And there is no plausible argument for constitutionally requiring more process for noncitizens detainees.

Hamdi held that a citizen detained as an enemy combatant "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." Hamdi v. Rumsfeld, 542 U.S. 507, 533 (2004) (plurality opinion). But *Hamdi* also approved of hearsay evidence, a "presumption in favor of the Government's evidence," and the exclusive focus on a "combatant's acts." *Id.* at 533–34. The CSRTs meet all the requirements of *Hamdi*, and in some instances, provide greater protection than Article 5 of the Geneva Convention. *See generally* Brief for the Federal Government Appellees at 30–33, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007), 2005 WL 1387147.

97 Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(2)(C)(i), 119 Stat. 2739, 2742 (2005).

98 *Id.* § 1005(e)(2)(C)(ii).

99 *Id.*

100 *See id.* § 1005(e)(2)(C)(i) (stating that review of the "standards and procedures" specifically includes review of "the requirement that the conclusion of the Tribunal be supported by a preponderance of the evidence and allowing a rebuttable presumption in favor of the Government's evidence").

101 *Id.*

102 INS v. St. Cyr, 533 U.S. 289, 305 (2001); *see also supra* text accompanying note 95.

103 U.S. Const. art. I, § 9, cl. 2.

104 Boumediene v. Bush, 476 F.3d 981, 1007 (D.C. Cir. 2007) (Rogers, J., dissenting).

Professor Amanda Tyler also argued for a clear statement establishing these predicates when due process concerns are implicated. *See* Amanda L. Tyler, *Is Suspension a Political Question?*, 59 Stan. L. Rev. 333, 390 (2006), *cited in* Boumediene v. Bush, 476 F.3d 981, 993–94 (D.C. Cir. 2007) ("Before honoring a suspension as displacing the habeas remedy in these circumstances, the judiciary should require, at a minimum, a clear statement from Congress setting forth the justification for the suspension and its reach. Indeed, given that the fundamental right to individual liberty is at stake, a clear statement rule is entirely appropriate."). However, even she stipulated that deference to Congress is warranted if suspension is justiciable: "deference in the suspension context would recognize that in exercising this authority, the political branches must be given considerable latitude to define those situations warranting suspension of the writ." Tyler, *supra*, at 410.

105 *Boumediene*, 476 F.3d at 1007 (Rogers, J., dissenting).

106 *Id.*

107 *See generally* Tyler, *supra* note 104, at 335.

108 *See* Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004) (Scalia, J., joined by Stevens, J., dissenting) ("To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an 'invasion,' and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court."); *id.* at 594 n.4 (Thomas, J., dissenting) ("I agree with Justice Scalia that this Court could not review Congress' decision to suspend the writ.").

109 *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.").

110 *See* 3 Joseph Story, Commentaries on the Constitution of the United States § 1336, at 208–09 (Boston, Hilliard, Gray & Co. 1833), *cited in* Hamdi v. Rumsfeld, 542 U.S. 507, 578 (2004) (Scalia, J., dissenting).

111 *See Ex parte* Merryman, 17 F. Cas. 144, 151–52 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (quoting *Bollman*, 8 U.S. at 101; 3 Story, *supra* note 110, § 1336).

112 *See* Tyler, *supra* note 104, at 339 ("In the end, I contend that suspension does not present a political question, at least insofar as that assertion would be advanced to shield the constitutionality of an exercise of the suspension authority entirely from judicial review.").

113 *Id.* at 367 ("[T]here remains the additional, separate determination whether the public safety "may" require suspension. This latter determination may be a true political question, as it is phrased expressly in discretionary terms and therefore arguably delegated to the legislature for final resolution.").

114 *Id.* at 335–36. Additionally, she cites Chief Justice Marshall as supporting her position because in *Ex parte Bollman*, Marshall only referred to the "public Safety" predicate as being nonjusticiable. *Id.* at 367; *see Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 101 (1807) ("If at any time the *public safety* should require the suspension of the powers vested by this act in the courts of the United States, it is for the legislature to say so. That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws." (emphasis added)).

115 Tyler also argues that due process concerns could render a suspension invalid. Tyler, *supra* note 104, at 382–99. But Tyler is not directly addressing a Fifth Amendment Due Process claim; rather, she is addressing the question of whether suspension in all forms is nonjusticiable.

However, due process concerns would be better conceptualized by disaggregating this independent constitutional bar claim from the justiciability of the Suspension Clause's predicates. After all, one could argue that even if the Suspension Clause's predicates ("Rebellion," "Invasion," and "public Safety") are nonjusticiable political questions, an independent constitutional bar could render a suspension invalid (and thus obviously justiciable). Indeed, while discussing the justiciability of suspension, Tyler made such an argument: "one could easily imagine scenarios in which claims sounding in the Bill of Rights should remain viable *even in the face of a suspension*." Tyler, *supra* note 104, at 387 (emphasis added).

Thus, even if the Suspension Clause would not render the MCA's suspension unconstitutional, some could argue that the Due Process Clause would (assuming that citizens detained outside the United States have Fifth

Amendment rights). Under this argument, if a jurisdiction stripping (or suspension) measure forecloses the opportunity to vindicate constitutional rights, then it is unconstitutional. *See* Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948) (holding that Congress's jurisdiction stripping powers were subject to the Fifth Amendment's Due Process Clause and Takings Clause).

Regardless of whether this is a valid argument, the DTA does not foreclose the opportunity to vindicate due process rights because it provides for direct review in the D.C. Circuit. *See supra* note 99 and accompanying text. In fact, the DTA probably provides more process than would be due. *See supra* note 96.

116 Tyler, *supra* note 104, at 366–67.

117 *Id.* at 367.

118 *See id.* at 368 ("A Suspension Clause so designed would have read: 'The National Legislature should have authority to judge that the existence of a Rebellion or Invasion and the needs of public safety require suspension of the privilege of the writ of habeas corpus.' Of course, the Framers did not so draft the Suspension Clause. Rather, the text of the Clause suggests that the predicate conditions are judicially enforceable and that at best only the public safety determination falls exclusively to the legislature.").

119 U.S. Const. art. I, § 8, cl. 3.

120 U.S. Const. art. I, § 1, cl. 1.

121 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring) ("The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause."); *see also* Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) ("[W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts.").

122 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 574 (Kennedy, J., concurring) ("That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system."); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928) (holding that "common sense" requires that Congress have the power to delegate what it could not practicably do itself).

123 Tyler, *supra* note 104, at 368.

124 *Id.* at 402.

125 *Id.* at 403.

126 *See* N.Y. Times Co. v. United States, 403 U.S. 713, 720 (1971) (Douglas, J., concurring, joined by Black, J.) ("There is, moreover, no statute barring the publication by the press of the material which the Times and the Post seek to use."); *id.* at 730 (Brennan, J., concurring) ("But in the cases before us we are asked neither to construe specific regulations nor to apply specific laws."); *id.* at 732 (White, J., concurring, joined by Stewart, J.) ("At least in the absence of legislation by Congress, based on its own investigations and findings, I am quite unable to agree that the inherent powers of the Executive and the courts reach so far as to authorize remedies having such sweeping potential for inhibiting publications by the press."); *id.* at 742 (Marshall, J., concurring) ("It would, however, be utterly inconsistent with the concept of separation of powers for this Court to use its power of contempt to prevent behavior that Congress has specifically declined to prohibit."); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (invalidating President Truman's seizure of steel mills in part because Congress had not provided "statutory authorization"); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 122 (1866) (rejecting the President's use of military commissions that were "not ordained and established by Congress"); The Prize Cases, 67 U.S. (2 Black) 635, 671 (1863) (upholding President Lincoln's blockade of the Confederacy even though Congress had not declared war); Little v. Barreme, 6 U.S. (2 Cranch) 170, 177–79 (1804) (invalidating the seizure of a foreign ship on the grounds that the President exceeded the authorization granted by Congress).

127 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

128 *Id.* at 637.

129 *Id.* at 635.

130 *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507, 554 (2004) (Scalia, J., dissenting) ("[T]he Constitution's Suspension Clause, Art. I, § 9, cl. 2., allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge."); *Ex parte* Merryman, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9487) (Taney, C.J.) (holding that the President could not suspend habeas because the Suspension Clause is in Article I, which is "devoted to the legislative department of the United States, and has not the slightest reference to the executive department"); *see also* Tyler, *supra* note 104, at 342 ("Although the Supreme Court has never spoken as a full Court to the issue, it is widely thought that only Congress can suspend the writ.").

131 INS v. St. Cyr, 533 U.S. 289, 301 (2001); *see supra* Part III.A.

132 *See supra* Part I.A.

133 *See supra* Parts I.B & I.C.

134 *See supra* Part III.B.1.

135 *See supra* Part III.B.2.

136 *See supra* Part III.C.

Democratic Evolution and the Church of the United Nations

*By James P. Kelly, III**

Competition among the diverse values systems developed over time to create and maintain social order results in what the author terms "democratic evolution." Since the early part of the nineteenth century, social scientists have developed different ethical systems for promoting social order at the level of the nation-state. However, recent advancements in technology and communications have made it easier to develop and disseminate ideas and to organize activities on a global basis. These developments have prompted the United Nations, international human rights treaty bodies, and non-governmental organizations to construct and promote a human rights-based "Religion of Humanity."

This article describes this notion of democratic evolution; highlights the philosophical foundations of this Religion of Humanity; explains how the "Church of the United Nations" promotes various humanist values systems; describes its ecclesiastical features; explains the nature and drawbacks of normative imperialism; and describes the threat that these developments pose to democratic evolution at the national level.

Democratic Evolution

Democratic evolution is marked by the articulation of philosophical views about the ideal social order that, over time, are embraced by political leaders, government officials, and the general public. As these philosophical ideas are debated among citizens in private and, ultimately, in the political process, they coalesce into identifiable values-systems that, because of their relation to the human person and society, have become known as "humanist." Ultimately, courts are called upon to determine the propriety or limits of each new humanist values-system. These court battles establish a legal framework for further social evolution.

Although there are different varieties of humanism, in general, each of the humanist movements embodies "the perennial need of human beings to find significance in their lives, to integrate their personalities around some clear, consistent and compelling view of existence, and to seek definite and reliable methods in the solution of their problems."[1] The Democratic Evolution Paradigm that follows is an attempt by the author to stimulate thought, speculation, and debate regarding the unfolding of different humanist movements throughout the modern democratic experiences of Western civilization.

The author has identified and classified the appearance of different humanist movements based on their defining value and goals; *to wit*:

Deistic Humanism. The idea that there is one God responsible for creating a human person vested with certain inalienable rights that, when properly exercised consistent with the motives written by the Creator on the human heart, further the cause of social order. To stimulate citizen remembrances of the divine source of their rights, government officials promote "ceremonial" deism in the form of the placement of copies of the Ten Commandments in schools, courthouses, and other public meeting places.

Civic Humanism. The idea that social order is rooted in love of country and that the state should stimulate allegiance to the nation among citizens who, if necessary, are prepared to sacrifice themselves for their fellow citizens and country. Federal, state, and local government officials implement oaths, pledges, and school exercises that are designed to build allegiance to the State. Government officials limit or ban political speech that, in their opinion, threatens the public order.

Social Humanism. The idea that improvement in the lives of the lowest and most numerous class of citizens depends on the abilities, educational training, and work of an elite intellectual and creative class of individuals who should be supported by the State. In an effort to improve the lives of citizens in lower and middle-income classes, the government creates programs for the delivery of information and services.

Scientific Humanism. The idea that social order depends on the application of evidence-based scientific principles to the problems of human development and social life. The highest-profile battle over the implementation of the scientific humanist approach in education has arisen in connection with the teaching of evolution in public schools.

Secular Humanism. The idea that traditional theistic religious beliefs, sacraments, and practices are false and that the state should actively expunge such traditions from the public square for the betterment of mankind through rational thought and proven practices. In their attempt to achieve a "naked" public square, secular humanists seek to eliminate prayer and other religious expression from public schools and other public meeting places.

Ethical Humanism. The idea that humans require a non-theistic moral and ethical values system upon which they can rely in order to bring justice and peace to the world. Ethical humanists believe that individuals can, and should, develop a moral or ethical self without relying on a personal relationship with God or a reference to Christianity or other theistic religions.

Democratic Humanism. The idea that positive human development can only be achieved through the availability and exercise of civil and political rights which, in turn, advance the economic, social, and cultural rights of citizens in a way that secures social order and brings about prosperity. In an attempt to promote the inclusion of diverse, often minority, viewpoints in the democratic process, government officials use public funds to sponsor political discourse.

Evolutionary Humanism. The idea that a person's pursuit of global peace is a natural outgrowth of his or her biological hardwiring and inclinations, and that humans, through rational

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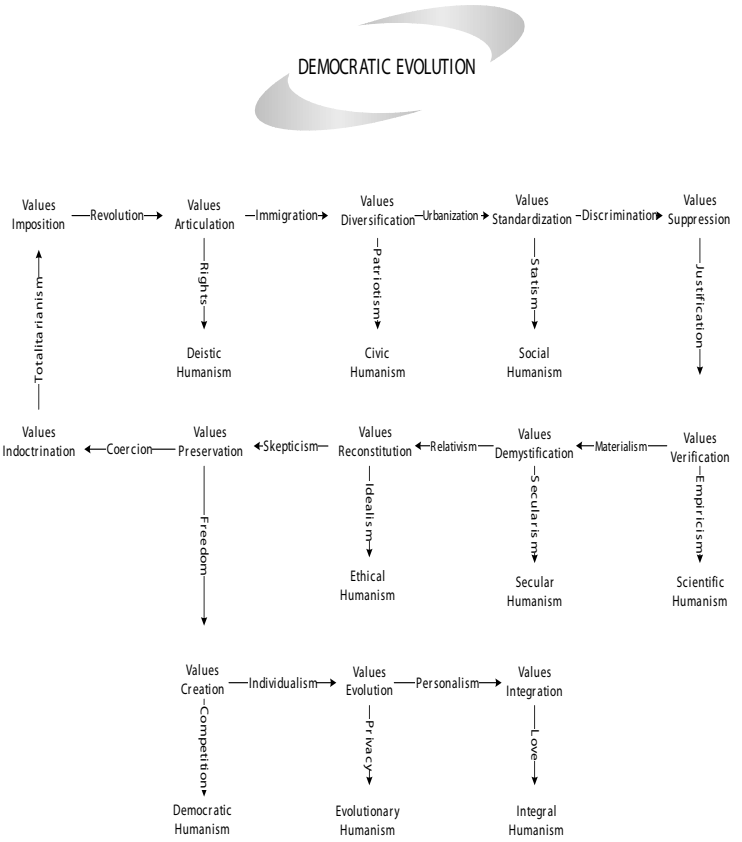
thought and scientific practical and moral principles, are entirely responsible for their fate. Privacy rights are foundational to evolutionary humanism.

Integral Humanism. The idea that the human person consists of both supernatural and temporal elements, and that a person's faith is an integral part of all aspects of his or her daily life. Integral humanists, including, but not limited to, Christian humanists, believe that the state should adopt policies that, at a minimum, do not discriminate against the theistic world view, and, at best, neutrally support the voluntary engagement by citizens in private and public religious activities that promote justice and peace.

Democratic evolution consists of the development of, and movement to and through, these various forms of humanism. It originates in a revolution against the imposition of authoritative values. This revolution results in the articulation of values reflecting the rights inherent in each person. Over time, immigrants introduce their values-systems to the existing social order. Government authorities use the state's educational system to indoctrinate the new citizens in the "accepted" civil religion. As the rate of urbanization increases, the government finds it necessary to become even more deeply involved in securing social order by prescribing educational, health, marriage, childrearing, psychological, environmental, and moral practices and remedies. These prescriptions lead to discrimination that suppresses the traditional religious values, expression, and practices of the lower and middle classes. As a means of justifying such discrimination, government authorities and social scientists explain that the only acceptable remedial practices are those based in experimentation and science. An exclusive focus on scientific reason, rather than a balanced approach based in faith and reason, leads to materialism. Soon, citizens unbridled by the limits of traditional religion adopt a secularist, relativist approach to life. In the face of a decline in civic values and civility, government officials use the state educational system to introduce a non-theistic ethical religion (i.e., character education or human rights education) to replace traditional religious values. Now skeptical about the intentions and educational practices of the government, traditionally religious citizens reject government attempts to indoctrinate their children in a "politically correct" moral and ethical code. Instead, to protect the free expression of their religious and other viewpoints, these citizens demand equal access to the public square and to the public treasury. All citizens, secular and religious, become free to develop themselves in accordance with the dictates of their consciences. The battle ground then shifts from a "statist" attempt to establish social order to a competitive "culture war" between those who desire to maximize individual autonomy and happiness through the promotion and protection of privacy rights and those who desire to maximize social solidarity by using the democratic process to peacefully persuade their fellow citizens to embrace a message of faith in God and love for others.



Although most people would hope otherwise, the possibility exists that citizens or nations can regress along the path of democratic evolution. There is always the temptation to adopt authoritarian policies and laws that are viewed as a necessary solution to social unrest, or to even mere social discord.

At its core, democratic evolution is a religious process touching on what one theologian referred to as one's "ultimate concern," a definition of religion subsequently acknowledged by the United States Supreme Court.[2] Under such an interpretation, because democracy is a process through which citizens pursue their ultimate concerns, democracy is a religious undertaking.

In essence, democratic evolution is the outcome of each citizen, alone or together with like-minded citizens, attempting to persuade others to share his or her ultimate concern or concerns. This reality raises two important issues. First, it is critical to realize those instances where one has left the realm of persuasive speech or association and moved into the realm of coercive, anti-democratic speech or association. Second, if the government decides to limit coercive religious or political expression, one must determine whether such restrictions

are legal. For example, in Europe, any restriction on the association rights of individuals or groups must be "necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."[3]

The investigation as to whether a citizen or group of citizens is using coercive, rather than persuasive, means to realize his, her, or its ultimate concerns is a factual one. It involves a thorough examination of the expressed philosophies, policies, and practices of individuals and their religious or political associations.

Philosophical Foundations of the UN's Religion of Humanity

The Church of the United Nations practices a Religion of Humanity that is inspired by the Religion of Humanity of early French social scientists who sought a means to replace the moderating influence on society that was lost by the rejection of traditional Christianity. The French social scientist Count Claude Henri de Rouvroy de Saint-Simon was the first person to attempt the synthesis of religion and social science. Late in his career, Saint-Simon realized that, absent a religious instinct on the part of the masses, a purely scientific approach to restoring social order in early nineteenth-century France was doomed to failure. Convinced that historic Christianity had run its course and would be unable to adapt itself to the needs of the new society, Saint-Simon proposed his New Christianity to remind men "of the interests common to all members of society, of the common interests of the human race."[4]

The key features of Saint-Simon's New Christianity included:

1. New Christianity is to direct humanity toward the rapid betterment of the condition of the poorest and most numerous class of society;

2. Worship should be regarded only as a means of reminding men of philanthropic feelings and ideas; and dogma should consist only as a collection of commentaries aimed at the general application of these feelings and ideas to political developments, or encouraging the faithful to apply moral principles in their daily relationships;

3. Nations must abandon their own interests and adhere to principles of a universal morality which promotes the good of the whole human race;

4. Scientists, artists, and industrialists should be made the managing directors of the human race; and

5. Any theology that tries to teach men that there is any other way of obtaining eternal life except that of working for the improvement of the conditions of human life should be condemned.

In 1825, Saint-Simon died before fully articulating his vision for New Christianity. Nevertheless, his followers, the Saint-Simonians, spent the seven years following Saint-Simon's death advancing his vision for a scientifically-planned society the members of which would be inspired by New Christianity. On June 1, 1825, a group of young French technocrats formed the Saint-Simonian Society and began to publish a weekly journal, *Le Producteur*, the focus of which was to apply the scientific knowledge of competent experts to the solution of social problems. After suspension of the *Producteur* in October, 1826, the members of the Saint-Simonian Society engaged in a more precise formulation of Saint-Simonian theory which was expounded in a series of public lectures held biweekly after December 17, 1828. These lectures became known as the *Doctrine of Saint-Simon: An Exposition. First Year, 1828-29*.

The *Doctrine* critically examined the structure of contemporary European society and proposed a program for total social reorganization. The later lectures contained in the *Doctrine* tended to subordinate the earlier scientific and industrial interests to religious and political interests. As the Saint-Simonians expressed in the Tenth Session (May 6, 1829):

> Without those sympathies that unite man with his fellow-men and that make him suffer their sorrows, enjoy their joys, and live their lives, it would be impossible to see in societies anything but aggregations of individuals without bonds, having no motive for their actions but the impulses of egoism.[5]

By 1829, Saint-Simon's followers had established a hierarchically organized Saint-Simonian church for the practice of a religion of humanity.

But it was the social scientist Auguste Comte, a former assistant and silent collaborator of Saint-Simon, who developed what came to be known as the Religion of Humanity. After Saint-Simon's death, Comte briefly contributed to the work of the Saint-Simonian movement; however, he quickly separated himself from the movement as it took on a religious nature. During 1830 to 1842, Comte produced his six volume *Cours de philosophie positive*. The *Cours* attempted to synthesize the studies of individual scientists by identifying the essence of each branch of science and arranging it into a hierarchy of complexity. The hierarchy was designed to prove that each branch of science had progressed from a theological state into a metaphysical and, then, into a positive state. Religion and sentiment were banished from Comte's new body of positive knowledge. During this stage of his career, Comte was recognized as the ultimate fulfillment of the eighteenth-century ideal of materialism.[6]

Ultimately, however, Comte followed the pattern of other social scientists, who, when frustrated by the apathy shown by the general population toward their secular theories for the material improvement of humanity, resort to coercive religious values systems and values to inspire the social sentiments of mankind. In his *Système de politique positive* produced from 1851 through 1854, Comte proclaimed love as the motive force of mankind. He developed a special calendar for his Religion of Humanity complete with earthly saints and ritual observances in celebration of human progress. In his view, sentiments and the imagination moved mankind to action; and religious faith was the force that would bring intellectual and moral unity to humanity. In 1852, he produced his *Catéchisme positiviste* that reduced his system of positive religion into principles of faith that could be referred to by the masses.

The Church of the United Nations

Similar in spirit and purpose to the attempts of Saint-Simon, the Saint-Simonians, and Comte, the Church of the United Nations seeks to secure human security for all people. According to the Commission on Human Security, which laid the foundation for the United Nations human security agenda:

> Human security means protecting fundamental freedoms that are the essence of life. It means protecting people from critical (severe) and pervasive (widespread) threats and situations. It means using processes that build on people's strengths and aspirations. It means creating political, social, environmental, economic, military and cultural systems that together give people the building blocks of survival, livelihood and dignity.[7]

Human security encompasses all human rights, including civil and political rights, which protect people, and economic, social and cultural rights, which empower people. Protection strategies attempt to shield people from menace. Empowerment strategies attempt to enable people to develop their resilience to difficult conditions. According to the Commission, both strategies are required in nearly all situations of human insecurity, though their form and balance will vary tremendously.

In the Commission's opinion, although the state remains the primary source of security, it often fails to fulfill its security obligations and, at times, has even become a source of threat to its own people. In the Commission's view, human security complements state security by enhancing human rights and strengthening human development. By enhancing human rights, human security seeks to protect people against a broad range of threats to individuals and communities. By strengthening human development, human security seeks to empower them to act on their own behalf.[8]

In May 2004, the United Nations established the Human Security Unit ("HSU") within the UN's Office for the Coordination of Humanitarian Affairs. The overall objective of the HSU is to place human security in the mainstream of UN activities.

At its core, the Church of the United Nations and its Religion of Humanity consist of the confluence and pursuit of the following humanist ideas:

> 1. The *social humanist* idea that improvement in the lives of the lowest and most numerous class of citizens depends on the abilities, educational training, and work of an elite intellectual and creative class of individuals who should be supported by the state. In spreading its Religion of Humanity, the Church of the United Nations relies on a global network of official experts from the United Nations Educational, Scientific and Cultural Organization ("UNESCO"); the Office of the United Nations High Commissioner for Human Rights and the international human rights treaty bodies that it supports; the United Nations Development Programme; and the United Nations Economic and Social Council and the non-governmental organizations that have consultative status with it. This elite intellectual and creative class of individuals seeks to improve the lives of the lowest and most numerous class of citizens through the pursuit of its human rights, development, and "social transformations" agenda.

2. The *scientific humanist* idea that social order depends on the application of evidence-based scientific principles to the problems of human development and social life. This idea is promoted by the World Commission on the Ethics of Scientific Knowledge and Technology ("COMEST") which UNESCO established i) to advise UNESCO on its programming concerning the ethics of scientific knowledge and technology; ii) to be an intellectual forum for the exchange of ideas and experience; iii) to detect on that basis the early signs of risk situations; iv) to perform the role of adviser to decision-makers in this respect and; v) to promote dialogue between scientific communities, decision-makers and the public at large.[9] COMEST promotes an "ethics of science and technology" agenda that includes bioethics, environmental ethics, the ethics of nanotechnology, and the ethics of outer space.

3. The *ethical humanist* idea that humans require a non-theistic moral and ethical values system upon which they can rely in order to bring justice and peace to the world. The Church of the United Nations uses the World Programme on Human Rights Education (the "World Programme on HRE") to indoctrinate school children in its Religion of Humanity. A United Nations inter-agency coordinating committee is responsible for working with UN country teams or international agencies to support the HRE implementation strategy at the national level. In reviewing the human rights activities of national governments, UN-supported human rights treaty bodies are to emphasize the obligation of countries to implement human rights in their school systems. At the end of the first phase (2005-2007) of the World Programme on HRE, countries are required to provide a final national evaluation report to the UN.

4. The *evolutionary humanist* idea that a person's pursuit of global peace is a natural outgrowth of his or her biological hardwiring and inclinations and that humans, through rational thought and scientific practical and moral principles, are entirely responsible for their fate. Pierre Teilhard de Chardin (1881-1955), a French Jesuit Catholic priest, paleontologist, biologist, and philosopher, is the person most responsible for articulating the philosophical/religious/scientific underpinnings and inevitability of the Religion of Humanity promoted by the Church of the United Nations. Writing in 1949 about his impressions on a questionnaire that was sent to influential philosophers who would be responsible for the articulating the vision for UNESCO, Chardin observed that:

> Of all the structural tendencies inherent in the human mass the most fundamental (indeed, the one from which all others are derived) is undoubtedly that which has led Mankind, under the twofold influence of planetary compression and psychic interpenetration, to enter upon an irresistible process of unification and organization upon itself.[10]

Ecclesiastical Features

The Church of the United Nations rejects the natural law theory that persons are born with inalienable rights. Instead, it subscribes to the theory that its gospel, the 1948 Universal Declaration of Human Rights, declared a host of civil, political, economic, social, and cultural rights and that it is the job of the United Nations to define, promote, and secure these human rights for all persons.

The Catechism of the Church of the United Nations consists of the interpretative comments on human rights generated by international human rights treaty bodies. The holy days of obligation within the Church of the United Nations consist of the plethora of its official days, years, decades, and observances designed to promote awareness of a global society with shared concerns that dwarf national identities and concerns.[11] The national bishops conferences of the Church of the United Nations consist of the global network of national human rights institutions with which it is in communion.

The Church of the United Nations encourages national governments and transnational businesses to examine their consciences by conducting human rights impact assessments in relation to any proposed legislation, programs, or projects to determine and address the manner in which their actions might negatively impact human rights. For transnational businesses, penance consists of participating in the corporate social responsibility movement and sharing the benefits of commercial research and intellectual property.

In light of the growing global religious influence of the Church of the United Nations, it is ironic that, in 1963, the Roman Catholic Church foresaw and gave its blessing to such a role for the United Nations. It explained that the 1948 Universal Declaration of Human Rights should be considered a step in the right direction toward establishing "a juridical and political ordering of the world community," and expressed its wish that the United Nations be able "progressively to adapt its structure and methods of operation to the magnitude and nobility of its tasks."[12] Likely, this was one of the developments that, in 1966, led the French-Catholic philosopher Jacques Maritain to lament that the great concern and the only thing that matters for many Christians, both clergy and laity, "is the temporal vocation of the human race, with its march, embattled but victorious, to justice, peace, and happiness."[13] In his opinion, making these earthly goals the true supreme end for humanity ignores the presence of evil in the world. By encouraging the United Nations to assume responsibility for the earthly realization of human security, the Catholic Church may have failed to appreciate the totalitarian impulses associated with imposing a Religion of Humanity that refuses to acknowledge, or attempts to correct for, human imperfection.

Normative Imperialism

In promoting its Religion of Humanity, the Church of the United Nations is engaging in normative imperialism. Normative imperialism is the imposition of civil, political, economic, and social norms by international multilateral institutions, nongovernmental organizations, and human rights idealogues in a manner that prevents or interferes with authentic democratic evolution. In its unbridled pursuit of the amorphous and utopian concept of human security, normative imperialism rejects the importance of national sovereignty, the rule of law, democratic discourse, and political action.

Ultimately, normative imperialism has at least three significant negative effects on democratic evolution.

First, normative imperialism deprives citizens of their right to participate in the democratic process. The removal of human rights discourse from the domestic public square through international action threatens personal, political, social, and cultural development.

Second, normative imperialism forces transnational corporations to spend a significant amount of their human and financial resources defending themselves in the marketplace against a nebulous socialist dogma the scope and endpoint of which cannot be definitively measured. These unwarranted expenditures divert the attention of business leaders from reasonable consideration of their legitimate social responsibilities and from the design and implementation of business innovation and growth strategies that could benefit millions of people throughout the world.

Third, some domestic courts facilitate normative imperialism by referring to or relying upon human rights interpretations, rulings or decisions by international institutions or tribunals. In doing so, these courts ignore constitutional or statutory realities in a way that undermines respect for the judiciary by lending credence to claims of judicial activism.

Implications on Democratic Evolution

John Stuart Mill's insights on utilitarianism provide a roadmap for determining the implications of the Church of the United Nations and its Religion of Humanity on democratic evolution. In Mill's view, according to the utilitarian opinion, the ultimate end of human action (whether we are considering our own human good or that of other people) "is an existence exempt as far as possible from pain, and as rich in possible enjoyments, both in point of quantity and quality."[14] As is the case with the Church of the United Nations, for Mill, security is the essential element upon which an individual's right to happiness is based. Without security, "nothing but the gratification of the instant could be of any worth to us, if we could be deprived of anything the next instant by whoever was momentarily stronger than ourselves."[15] As a result, the need for security is inextricably intertwined with the notion of justice.[16]

For Mill, "justice is a name for certain classes of moral rules, which concern the essentials of human well-being."[17] In his view, justice consists of the moral rules that forbid mankind to hurt one another, which include rules forbidding the wrongful interference with each other's freedom. It is clear that Mill's notion of justice respects the need to protect the civil and political rights of individuals. But what does justice dictate in the way of protecting economic and social rights, especially in the face of societal upheavals? As it turns out, for Mill, the function of the State naturally widens with the advance of civilization:

> It must, then, be granted that new legislation is often necessitated, by the progress of society, to protect from injury either individuals or the public, not only through the rising-up of new economical and social phenomenon; but also because the more enlarged scale on which operations are carried on, involves evils and dangers which on a smaller scale it was allowable to overlook.[18]

In this regard, Mill and the Church of the United Nations agree that justice requires that steps be taken to protect the human security of individuals in the face of "new economical and social phenomenon." Yet, though there is agreement regarding the end, as far as the means are concerned, Mill and the United Nations differ. In the case of globalization, unlike the top-down approach advocated and employed by the Church of the United Nations, the approach that Mill advocates for achieving human security respects the dictates of democratic evolution.

Mill rejects the argument of some that "the opinions of mankind should really be formed for them by an exceedingly small number of minds of the highest class, trained to the task by the most thorough and laborious mental preparation."[19] Instead, Mill's idea of justice and human security contemplates the consideration and adoption of new legislation through the democratic process, where the propriety of new measures is examined in the context of local conditions and debate. This approach is the essence of democratic evolution.

For Mill, the mischief begins when, instead of calling forth the activity and power of individuals and bodies, the State substitutes its own activity for theirs; "when instead of informing, advising, and, upon occasion, denouncing, it makes them work in fetters, or bids them stand-aside and does their work instead of them."[20] In his opinion:

> a State which dwarfs its men, in order that they may be more docile instruments in its hands even for beneficial purposes—will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.[21]

Unlike the Church of the United Nations, Mill acknowledges and accepts the fact that the removal of the sources of human suffering—the realization of human security for all—is a grievously slow process during which "a long succession of generations will perish in the breach before the conquest is completed." Yet, each sufficiently intelligent and generous participant in this endeavor "will draw a noble enjoyment from the contest itself, which he would not for any bribe in the form of selfish indulgence consent to be without."[22]

CONCLUSION

John Stuart Mill and the Church of the United Nations share a utilitarian view of human security and the notion of justice that support its pursuit. Nevertheless, in pursuing human security, Mill would have the State invoke and draw forth the agency of individuals and their voluntary organizations consistent "not only with the wants of every country and age, and the capabilities of every people, but with the special requirements of every kind of work to be done."[23] He would have the State guide and assist the process by removing obstacles and by providing facilities, direction, and financial aid.[24] To the contrary, the Church of the United Nations is seeking to impose a Religion of Humanity that controls individual and group action, thereby stifling human development. Mill's approach respects democratic evolution; the approach of the United Nations interrupts it at great risk to human liberty and happiness.

Endnotes

1 Corliss Lamont, The Philosophy of Humanism 3 (1971).

2 Paul Tillich, The Shaking of the Foundations 57 (1948); United States v. Seeger, 380 U.S. 163, 187 (1965).

3 Article 11(2), European Convention for the Protection of Human Rights and Fundamental Freedoms (1950).

4 Henri de Saint-Simon, Science of Man and Other Writings 81-116 (F. Markham, ed. & trans., 1964) (1825).

5 Georg G. Iggers, The Doctrine of Saint-Simon: An Exposition. First Year, 1828-1829 (1958).

6 Frank E. Manuel, The Prophets of Paris (1962).

7 *Human Security Now: Protecting and Empowering People*, Commission on Human Security, at 4, May 1, 2003.

8 *Id.* at 2.

9 http://portal.unesco.org/shs/en/ev.php-URL_ID=6193&URL_DO=DO_TOPIC&URL_SECTION=201.html

10 Pierre Teilhard de Chardin, "The Essence of the Democratic Idea: A Biological Approach," *in* The Future of Man 239 (1964).

11 "Conferences and Events," United Nations, February 28, 2007, *at* http://www.un.org/events/index.html.

12 Encyclical Letter, John XXIII, *Pacem in Terris: On Establishing Universal Peace in Truth, Justice, Charity, and Liberty*, ¶144-145 (1963).

13 Jacques Maritain, The Peasant of the Garonne 56 (1968).

14 John S. Mill, Utilitarianism 11 (1910).

15 *Id.* at 50.

16 *Id.* at 51.

17 *Id.* at 55.

18 John S. Mill, *Centralisation*, 115 Edinburgh Rev. 323, 346-347 (1862).

19 John S. Mill, Auguste Comte and Positivism 75 (1961).

20 John S. Mill, On Liberty 115 (1989).

21 *Id.*

22 *Supra* note 14, at 14.

23 *Supra* note 18, at 355.

24 John S. Mill, Principles of Political Economy V: 970-971 (1965).

Labor and Employment Law

Premature Recognition: Isn't There a Better Way?

*By John S. Irving**

I. The Problem: When Is Union Recognition "Premature" and Unlawful?

How many times do labor lawyers see this? Company A is interested in purchasing Company B or a portion of it. The prospective buyer may be seeking to expand its business, its product lines, its capacity, or to acquire strategic customers. It has the cash or financing to do so. Target Company B seeks to exit a business or a portion of it, discontinue production of a product, or raise cash. It, too, may be motivated by a variety of strategic or financial reasons. Often there is financial distress or some other urgency. The seller may be in Chapter 11 bankruptcy reorganization, perhaps contemplating an auction sale supervised by the bankruptcy court under Section 363 of the Bankruptcy Code. The employees of the seller for many years have been represented by a particular union. The seller may have been suffering losses, its market may have contracted, capital investment may be needed, and/or it may be suffering financially from restrictive and costly labor agreements and pension liabilities.

The purchaser sees a business opportunity but is not stupid. Before it commits its capital, it analyzes its risks and opportunities for business success. Seller's labor contract does not expire for three years and contains a "successors" clause purporting to require the seller to bind any purchaser to the agreement, with potential seller liability to the union and union represented employees if it fails to do so.

The union is not stupid either. It recognizes its strategic and legal leverage and considers itself a player in any sale transaction. It seeks to protect jobs and benefits, often including defined benefit pension plans and retiree insurance benefits. The union is realistic and open minded, however, and prefers a constructive relationship with a prospective buyer that will permit the business to succeed, but without alienating its members and retirees.

The prospective is not ideologically "anti-union." A substantial portion of its own workforce is union-represented by a different union. The buyer does not mind becoming a "*Burns*" successor by hiring a majority of the seller's union-represented employees and recognizing and bargaining with their union.[1] However, the purchaser does not wish to assume a burdensome agreement or working conditions that may have undermined the seller's competitive position. On the other hand, the buyer understands, as a practical matter, that it may not be free as a *Burns* successor to set its own initial terms because the seller is insisting on assumption of its labor contact in order to insulate itself from successorship liability potentially imposed by its labor contract. Neither does the buyer wish to face the prospect of a strike once it takes over.

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The buyer would like to meet with the union, discuss its operational plans and, ideally, negotiate a new, binding labor agreement. Its operational plans may include downsizing, consolidation, relocation of work, subcontracting or other cost cutting measures—any of which is likely to raise union concerns and may even be barred by the seller's labor contract. Timing is important.

The practical desires of all parties are understandable and reasonable. Negotiation of a new labor agreement between the union and the prospective buyer makes sense. From the purchaser's standpoint it would lessen its risks, add predictability to the transaction, and promote its business objectives and profitability. The union sees opportunities for capital infusion, revitalization and job preservation. Can the buyer and the union just sit down together and negotiate a new labor agreement? Does the National Labor Relations Act permit them to do so? Some would say yes. Some would say no. Some would say maybe. The answer is no one knows for sure.

II. Convergence of Legal Principles

A number of statutory and labor case concepts appear to converge one way or another on this practical problem.

(1) The seller has no collective bargaining relationship with the union and no employment relationship yet with the seller's employees.

(2) The Supreme Court has held that an agreement between a labor organization and an employer that is outside of a collective bargaining relationship may not fall within federal labor antitrust exemptions.[2]

(3) Except in the construction industry, employers may not negotiate "pre-hire" agreements with unions.[3] To do so constitutes unlawful assistance to the union violative of Section 8(a)(2).[4]

(4) Section 8(a)(2) is violated if an employer extends recognition to a union prematurely, before it represents a majority of the employer's employees in an appropriate unit, and such a violation is not excused even though the union later attains majority status.[5]

(5) "[I]t is well settled that an employer can recognize a union by virtue of bargaining with it."[6]

(6) Even if a union represents an employee majority, recognition can be premature and violate 8(a)(2) if the employer has not employed a "representative employee complement" and is not engaged in "normal business operations."[7]

(7) Section 301 provides for enforcement of agreements between employers and unions, but those agreements must be lawful, and the purchaser must have a lawful bargained agreement with the seller's unions. 29 U.S.C. § 185(a).

(8) The Board held that recognition and signing of an agreement was premature and violative of 8(a)(2) even though signing was conditioned upon the union achieving majority status.[8]

(9) However, a collective bargaining agreement provision that extends coverage to employees at "additional stores" is not unlawful because implicit in the understanding is that the union will establish its majority status.[9]

(10) The Supreme Court's decision in *Burns* has been applied to assets purchases and establishes a purchaser's obligation to bargain with a seller's union once a majority of a purchaser's workforce is comprised of former employees of the seller, or once a prospective purchaser indicates an intention to hire all or a majority of the seller's employees.[10]

So what is this prospective purchaser, Company A, to do? It has hired none of the seller's employees. Bargaining with a union alone may constitute recognition. Premature recognition can be unlawful 8(a)(2) employer assistance and a union violation of 8(b)(1)(A). Recognition and bargaining that violates 8(a)(2) taints an agreement that is the product of that unlawful assistance. An agreement that is the product of an unlawful relationship would not be enforceable under Section 301 and in some circumstances might even subject parties to antitrust scrutiny. On the other hand, *Burns* seems to say that a bargaining obligation may attach even before an assets sale is concluded, when it is "perfectly clear" that an assets purchaser intends to hire all or a majority of the seller's employees. However, this prospective purchaser is trying to decide whether or not to purchase the assets at all, and to risk its investment, and therefore may not be in a position to express unqualifiedly its intention to take all or a majority of the seller's employees as contemplated by *Burns*.

III. Pragmatic Solutions: What's a Buyer to Do?

A number of approaches are used to deal with these recognitional problems and uncertainties. A stock purchase, in which the business entity survives, normally circumvents the problem because a stock transfer passes union representation and the collective bargaining agreement to a new set of stock owners.[11]

In an assets sale, a purchaser and the seller's union typically meet and discuss the prospective transaction with the express understanding that such discussions are "preliminary" and do not constitute "recognition" or "bargaining." Instead, discussions are "exploratory." The purchaser may be afraid to indicate its intention to hire all or a majority of the seller's employees for fear of prematurely triggering recognition and a bargaining obligation, after which it might not be free to unilaterally set its own initial terms. To protect its options in the absence of an enforceable agreement, the purchaser is likely to reserve its "*Spruce Up*" right to set initial terms.[12] Some general "understanding" may be reached but may not be enforceable under Section 301, hardly a "deal," if not binding on the union and perhaps even unlawful, that encourages a purchaser to risk its capital and which certainly does not reduce labor cost contingencies that may make the acquisition less unattractive.

Some asset purchasers, on the other hand, simply announce their intention early to take all or a majority of seller's employees and then proceed to an agreement in reliance on the, hopefully, saving language of *Burns*; that is, relying on the attachment of a pre-sale bargaining obligation once it has "clearly" expressed its hiring intentions.

Another course is for the seller, which has the bargaining relationship with the union, to negotiate amendments to its own agreement, in effect negotiating on the purchaser's behalf for terms acceptable to the purchaser and which will facilitate the sale. A resulting amended agreement is one to which the purchaser may then "succeed," a lawfully-bargained agreement enforceable under § 301. However, sellers and purchasers may not wish to risk potential "joint employer" involvement in each other's labor affairs and negotiations, even though it may be in their interest to do so.

Sometimes, especially in bankruptcy Chapter 11 and 363 sales, purchasers may condition their bidding upon union acceptance of contract modifications or removal under Bankruptcy Code of objectionable contract provisions such as successorship requirements.[13] Of course, a purchaser without an agreement also is without contractual no-strike protections when the sale takes effect.

Often, as a practical matter, buyers and unions simply ignore all of the legalese and NLRA niceties altogether and sit down and hammer out new mutually acceptable terms. In the absence of clear guidance from the NLRB, should those "pragmatic" parties be concerned? Looking back over the relevant converging background principles, perhaps not, but clear guidance is lacking.

IV. Balancing Concerns

Certain elements of the union/purchaser dealings posed must be kept in mind. There is no question that the union is the exclusive representative of the seller's bargaining unit employees. There is no pending decertification or rumor that employees are seeking to displace their union. In fact, most of the seller's employees may be dues paying union members anyway. There is no rival union on the scene. There is no question about employee "representative complement" or whether the facility is engaged in "normal business operations." A collective bargaining agreement with the seller is in effect. If there is a successors clause, it is likely that the seller would insist that the existing contract and union representation pass to the assets purchaser in any event.[14] It is unlikely that the seller would expose itself to liability for failing to require contractually mandated succession.[15]

How can it be said that purchaser recognition is premature when the union already represents the seller's employees? There is no waiting period needed to see if the union can establish its majority. This is not a "pre-hire" agreement in an 8(f) sense where there is no defined bargaining unit or bargaining unit employees. To be sure, the prospective asset purchaser, like the stock purchaser is new to the scene, but no one argues that prospective stock purchasers cannot negotiate with the union

for an agreement that will bind the corporate entity that the stock purchaser will own.

What does the language of *Burns* mean? Does it not mean that a bargaining *obligation* can arise even before a sale is complete, when a purchaser indicates that it intends to take all or a majority of the seller's bargaining unit employees? In this context *Connell Construction* should not be a concern either. The union there was attempting to force a bargaining relationship upon an unwilling construction manager that had no employees and intended to hire none. There was no bargaining unit already represented by the union. Who is to say that a contract hammered out by the asset purchaser and a labor organization which already represents them is not a Section 301 enforceable agreement? No such case has been found. The legitimacy of such an agreement would seem even clearer where an agreement between the purchaser and a seller's union is conditioned upon completion of the sale, i.e., a "condition subsequent." *Kroger* establishment of majority status should not be a problem either. *Kroger* was not a sale situation and applied to new stores where, unlike here, the union had to first establish its majority status.

Much is made of *Majestic Weaving*, *supra*, which some say encumbers pre-sale negotiations between a union and a prospective assets purchaser. *Majestic Weaving*, however, was not a sale of business assets in which employees already were represented by a union. Rather the union organized employees with Majestic's unlawful 8(a)(2) assistance. The contract was invalid *ab initio*, and "the fact that [the employer] conditioned the actual signing of a contract with [the union] on the latter achieving a majority at the 'conclusion' of negotiations is immaterial."[16] *Majestic Weaving* followed the Supreme Court's 1961 *Bernhard-Altmann* decision. There, as in *Majestic Weaving*, the employer recognized, bargained and signed a contract with a union which, as it turned out, did not represent an employee majority at that time. The key in *Bernhard-Altmann* was to avoid invasion of the guaranteed right of employees to choose their own representative. It did not matter that recognition was in good faith or that the union later attained majority status.

Majestic Weaving and *Bernhard-Altmann* have no bearing on the union/purchaser situation discussed here, in which there is no question concerning the union's status as the exclusive representative of the seller's employees in an appropriate bargaining unit, and where logically it cannot be said that there is unlawful purchaser assistance to the incumbent union in attaining its majority status. *Majestic Weaving* and *Bernhard-Altmann* are simply not impediments to pre-sale discussions between a prospective purchaser and an incumbent union, and where there is no invasion of employee self-determination rights.

V. Recent Board Guidance?

The Board recently decided a case that provides some insights into its thinking but, despite a correct result, fails to take the issue of voluntary purchaser/union negotiations head-on and thus does as much to perpetuate confusion as to dispel it. The case is *Road & Rail Servs., Inc.*, and was decided by Chairman Batista, Members Schaumber and Walsh, with the Chairman dissenting in part.[17]

Road & Rail was awarded rail car cleaning contracts and concluded an agreement with the union representing a previous contractor's employees before any of those employees were hired and before commencing contract performance. The Board panel majority dismissed 8(a)(2) and (3) allegations because *Road & Rail*, had made it "perfectly clear" that it intended to hire the predecessor employer's unionized workforce before recognizing the union and concluding an agreement. The majority affirmed the ALJ's determination that *Road & Rail* "was a 'perfectly clear' successor within the meaning of *NLRB v. Burns Int'l Sec. Servs.*, and subsequent Board precedent."[18] The result was strongly influenced because *Road & Rail* "gave no indication that it planned to unilaterally set new terms and conditions of employment" and instead "acknowledged an obligation to recognize the Union and emphasized its desire to quickly reach a mutually acceptable agreement on terms and conditions of employment."

In partial dissent, Chairman Battista concluded that *Road & Rail* was not a "perfectly clear" successor because, before hiring employees, it had indicated a desire to negotiate a new collective bargaining agreement, which the Chairman equated with a "*Spruce Up*" intention to set its own initial terms, thus leaving in doubt whether an employee majority would be hired. All of the Members accepted the proposition that, consistent with *Burns* recognition, bargaining may occur before employees are hired. Where they differed was over whether the employer's expressed intention to negotiate a new agreement equated with a desire to set its own initial terms, foreclosing a "perfectly clear" successorship because recognition was granted while composition of the new workforce was still in doubt. In other words, the focus of all three Members was on a literal reading of *Burns* and the particular moment in time when an incumbent union and a putative successor are privileged to consummate a bargaining relationship and an agreement.

Quite arguably, it might have been better if the Board had been focused on a broader more constructive analysis of the parties' good faith practical problem, without such narrow emphasis on satisfaction of the "perfectly clear" language of *Burns*. It would have been more helpful for the Board to do what it may do some day and that is reexamine the fundamental purposes of 8(a)(2). It is difficult to imagine how this willing employer, *Road & Rail*, could be said to have accorded unlawful assistance to the incumbent union that already was a party to a collective bargaining agreement covering the very same employees on whose behalf it was speaking to the purchaser. With the employer and the union willing to negotiate in such circumstances and where jobs are likely to be saved, why should the Board get tangled up in a chicken-and-egg analysis of whether recognition and an agreement are foreclosed because the employer might have been harboring some desire to set initial employment terms. The focus instead could have been on how the voluntary conclusion of such an agreement was likely to ensure hiring of the union-represented employees, thus contributing to the

certainty of union majority status. It is hard for me to see how this would undermine the Act's policies.

VI. Isn't There a Better Way?

What is needed is better guidance. What is needed is for the full Board to take this transaction-related recognition problem head on. The Supreme Court has cautioned against encumbering business transfers. *Burns* stressed that holding a new employer bound by the substantive terms of the pre-existing collective-bargaining agreement might inhibit the free-transfer of capital, and that new employers must be free to make substantial changes in the operations of the enterprise. *Burns* emphasized that a potential employer may be willing to take over a moribund business only if it can make changes in corporate structure, composition of the labor force and nature of supervision.[19]

Burns, however, dealt with the *obligation* of a transferee to bargain with a transferor's union. *Burns* did not deal with the *rights* of a willing prospective purchaser and willing incumbent union representing a seller's employees to negotiate a new agreement that is good for the represented employees and the union, good for the purchaser, good for the seller, and good for the economy because it promotes stability, continuity and labor peace. This is a quite different setting from *Burns*, and there is no requirement that in this context the analysis must turn on whether and precisely when a prospective purchaser indicates a "clear intention" to hire all or a majority of a seller's employees. Instead, the focus in this setting should be on the legislative purposes behind Section 8(a)(2) and an analysis of when *mutual* assistance that benefits all concerned is not *unlawful* assistance.

Such clarification by the Board would be welcome and would help to facilitate important business transfers that can benefit the parties and the public. This would be a logical extension of *Burns* and would assist parties to sale transactions to focus on preservation, often survival, of the business, and on direct and timely mutual dealings and understandings rather than on tedious mating dances in which cautious parties must engage today.

There is room, too, for the General Counsel to do his part. Just as in the past, the General Counsel should consider providing his own guidance. Everyone knows that General Counsels look for cases to present to the Board. For all I know, *Road & Rail* may have been such a test case. If it was, however, counsel for the General Counsel could have made broader policy based arguments, or even presented arguments in the alternative, rather than simply arguing for a violation, in order that the Board might have had the benefit of the General Counsel's thinking. The General Counsel, too, wears a policy hat and, as in the past, is free to argue for constructive changes in Board policy.

In the meantime, the General Counsel could consider publishing a guidance memorandum, without waiting for the perfect case. Guidance memoranda have been issued by General Counsels in the past and have been helpful—guidance on important factors to be investigated, when complaints will or will not be issued, how cases such as *Road & Rail* should be read, and so forth. Such guidance would be welcome and would help to eliminate many of the uncertainties and risks that transactional parties face today. This developing labor law subject deserves attention as one of the most important subjects since *Burns*, which itself was the single most significant and consequential labor case in my years at the Board and in practice.

Endnotes

1 In *NLRB v. Burns Int'l Sec. Servs., Inc.*, the Supreme Court determined that in some business transfers, a transferee whose workforce majority is comprised of union-represented employees of the transferor has an obligation to recognize and bargain with the union but is not bound to assume the transferor's labor agreement. 406 U.S. 272 (1972),

2 Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616 (1975).

3 "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement…." 29 U.S.C. § 158(f).

4 "It shall be an unfair labor practice for an employer—to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it…." 29 U.S.C. § 158(a)(2).

5 Int'l Ladies' Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB, 366 U.S. 731 (1961).

6 Div. of Advice Memorandum, Secure Trans LLC, March 17, 2005; *see* Int'l Union of Operating Eng'rs Local 150 v. NLRB, 361 F.3d 395, 400 (7th Cir. 2004), *enforcing,* 339 N.L.R.B. 221 (2003) (citing Lyon & Ryan Ford, 246 N.L.R.B. 1, 4 (1979), *enforced*, 647 F2d 745 (7th Cir. 1981)).

7 *Crown Cork & Seal Co.*, 182 N.L.R.B. 657 (1970); *Herman Bros., Inc.,* 264 N.L.R.B. 439 (1982); *Grocery Haulers, Inc.*, 315 N.L.R.B. 1312 (1995); *Gen. Extrusion Co.,* 121 N.L.R.B. 1165 (1958) (establishing that a contract will bar an election only if at least 30 percent of the complement was employed at the time the contract was executed *and* 50 percent of the job classifications were in existence at the time the contract was executed).

8 *Majestic Weaving Co.,* 147 N.L.R.B. 859 (1964).

9 *Houston Div. of the Kroger Co.,* 219 N.L.R.B. 388 (1975)*, on remand from,* 510 F.2d 802 (D.C. Cir. 1975).

10 In *Burns*, the Supreme Court stated that although a successor "is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." 406 U.S. at 294-95.

11 *See Children's Hosp. of San Francisco*, 312 N.L.R.B. 920, 927 (1993), *aff'd*, 87 F.3d 304 (9th Cir. 1996).

12 As further explicated by the Board, the "perfectly clear" caveat, while restrictive, should apply "to circumstances in which the new employer has either actively or, by tacit inference, misled employees into believing they would all be retained without change in their wages, hours, or conditions of employment, or at least to circumstances where the new employer… *has failed*

to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974), *enforced*, 529 F.2d 516 (4th Cir. 1975) (emphasis added).

13 Section 1113 of the Bankruptcy Code provides for rejection of bargaining agreements and Section (e) of that Section provides for emergency modification. 11 U.S.C. § 1113(e).

14 The Board has no problem with a union and an employer imposing union representation prospectively upon purchasers. That subject was dealt with in *Lone Star Steel* where the Board concluded, with court approval, that successorship language constitutes a mandatory subject of bargaining as a sale "vitally affects" unionized employees. *United Mine Workers*, 231 N.L.R.B. 573 (1977), *aff'd in relevant part sub nom., Lone Star Steel Co. v. NLRB*, 639 F.2d 545 (10th Cir. 1980). To be sure, a prospective *Lone Star* purchaser and the prospective purchaser, like Company A, are strangers to the seller's union. However, in both cases there is no question concerning union representation with respect to the seller's employees. And, with or without contractual successorship language, certainly a sale of assets "vitally affects" bargaining unit employees.

15 *See* Howard Johnson Co. v. Detroit Local Joint Executive Bd., Hotel & Rest. Employees & Bartenders Int'l Union, 417 U.S. 249 (1974).

16 147 N.L.R.B. at 860.

17 348 N.L.R.B. No. 77 (Nov. 30, 2006).

18 406 U.S. 272 (1972).

19 406 U.S. at 287-288.

Litigation

Judicial Restraint And The Supreme Court: *Phillip Morris USA v. Williams*

*By Raymond J. Tittmann**

Judicial pragmatists have implicitly ceded the moral high ground to more restrained approaches to constitutional interpretation.[1] People for the American Way (PFAW), for example, did not oppose Judge Alito for rejecting judicial activism. They rather opposed him for allegedly embracing judicial activism: "Judge Alito… has a record of *ideological activism* against privacy rights, civil rights, workers' rights, and more…. far-right *judicial activists* like Samuel Alito… would threaten hundreds of Supreme Court decisions…."[2] Judicial restraint has evidently prevailed, at least in theory.

Reality, however, is a different matter altogether. Many judges now extol the virtue of judicial restraint, but do they practice it? Even the greatest advocates of judicial restraint, such as Justice Alito, are accused of becoming judicial activists clothed deceptively in the rhetoric of judicial restraint. This is a serious accusation. Advocates of judicial restraint ought to examine their own consciences: do they truly follow their own principles of judicial restraint, or is that simply cover for "ideological activism," as PFAW contends?

Philip Morris USA v. Williams: A Litmus Test of Judicial Activism

The U.S. Supreme Court's recent decision on punitive damages, *Philip Morris USA v. Williams,* provides an interesting case study because it pits political ideology against judicial philosophy.[3] While political conservatives generally share the Supreme Court's "concern about punitive damages [ ] 'run wild'," advocates of judicial restraint are hard-pressed to find a constitutional basis to overturn state court jury awards.[4] Conservative political ideology appears to be directly at odds with principles of judicial restraint.

Philip Morris therefore provides an early glimpse into the judicial temperament of Justices Alito and John Roberts. By joining the majority opinion in *Philip Morris*, overturning the punitive damage award based on the Due Process Clause, Justices Alito and Roberts compromised judicial restraint, at least in the strict sense advocated by dissenting Justices Clarence Thomas and Antonin Scalia. Justice Scalia had previously criticized judicial limits on punitive damages for resting on an imaginary "excessive damages clause of the bill of rights."[5]

The Facts and Holding of *Philip Morris*

In *Philip Morris,* an Oregon jury found that plaintiff Jesse Williams' death was caused by smoking and that Philip Morris knowingly and falsely led Williams to believe smoking was safe. The jury awarded $821,000 in compensatory damages and $79.5 million in punitive damages, a ratio of nearly 100:1.[6] The jury had considered evidence of damages to other non-party smokers to justify the high ratio of punitive damages. The trial court reduced the punitive award, which was later restored by the Oregon Court of Appeals. The Oregon Supreme Court rejected Philip Morris' arguments (1) that the trial court should have accepted a proposed jury instruction directing the jury that it could not punish Philip Morris for the injuries of non-parties and (2) that the 100:1 ratio of punitive to compensatory damages was excessive.

The Supreme Court granted certiorari on the second issue, excessive damages, but reversed the decision of the Oregon Supreme Court on the first issue, punishment based on damages to nonparties. A five-member majority held that:

> [T]he Constitution's Due Process Clause [does not] permit[ ] a jury to base that award in part upon its desire to *punish* the defendant for harming persons who are not before the court (e.g., victims whom the parties do not represent). We hold that such an award would amount to a taking of "property" from the defendant without due process.[7]

The Supreme Court therefore reversed the punitive damage award.

The majority opinion and the dissents reveal differing degrees of adherence to or rejection of judicial restraint. The four Supreme Court Justices that PFAW probably classifies as "far-right judicial activists" along with Justice Alito split their four votes. Justices Roberts and Alito interpreted the Due Process Clause to prohibit consideration of injury to non-parties, and therefore joined the majority opinion overturning the jury award. Justices Scalia and Thomas dissented, finding the Due Process Clause inapplicable.

Dissenting Opinions of Justices Scalia and Thomas Reveal Strict Adherence to Judicial Restraint

The dissents by Justices Scalia, Thomas and Ruth Bader Ginsburg show judicial restraint with various degrees of consistency, clarity, and force. The dissent by Justice Stevens dismisses judicial restraint altogether by uncritically endorsing substantive due process without recognizing that this is a current field of debate.

Justice Thomas demonstrated the most forceful commitment to judicial restraint in this case. He interpreted the Due Process Clause narrowly to establish *procedural* rights only, not *substantive* rights: "the Constitution does not constrain the size of punitive damage awards."[8] Justice Thomas therefore rejected substantive due process, however pragmatic or just the substantive right might appear.[9]

Justices Ginsburg's dissent, joined by Justices Scalia and Thomas, reached the same conclusion in less absolute terms. Her dissent "accord[s] more respectful treatment to the proceedings and dispositions of state courts," without rejecting the entire line of punitive damage cases outright or stating at what point—if any—she would stop respecting state court dispositions.

Prior decisions, however, shed more light on Justice Scalia and Justice Ginsburg's construction of the Due Process Clause.

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Justice Scalia had previously rejected this line of punitive damage cases because the Due Process Clause did not impose such limitations.[10] Presumably, Justice Scalia still rejects judicially mandated substantive due process limits on punitive damages, though he did not reiterate that position in *Philip Morris*. Therefore, Justices Thomas and Scalia both consistently adhered to principles of judicial restraint, even though the result—and excessive punitive damage award—was contrary to their presumed political preferences, or at least contrary to common sense and good governance.

Justice Ginsburg's history of jurisprudence reveals a broad view of the Due Process Clause, and she specifically relied on substantive due process to overturn state limits on abortion.[11] Her decision to endorse substantive due process in the case of abortion and reject it in the case of punitive damages suggests classic judicial activism—altering a judicial philosophy as it supports the desired result.

Justice Stevens likewise dissented to approve the high punitive damage award, but not based on a narrow interpretation of the Due Process Clause. Indeed, he expressly rejected a narrow interpretation:

> It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power.[12]

Justice Stevens therefore dismisses the debate over substantive due process, not on any principle of judicial construction, but because it was evidently "too late in the day." In fact, the Due Process Clause's silence on substantive limits presented the critical issue in *Philip Morris* for the other dissenting Justices as well as those in the majority.

Majority Opinion Joined by Justices Roberts and Alito Compromises Judicial Restraint

The majority opinion in *Philip Morris* reflects a compromise between judicial pragmatism and judicial restraint. Prior Supreme Court decisions on punitive damages impose substantive limits on "excessive" or "unreasonable" punitive damages, even prohibiting punitive-to-compensatory damage ratios greater than single digits.[13] Had the Justices in the majority here held the same point of view as the majority in prior decisions, they likely would have overturned the 100:1 ratio in *Philip Morris*. Yet the majority in *Philip Morris* did not even address the ratio or the "reasonableness" of the award. Instead the majority in *Philip Morris* focused only on alleged procedural defects:

> Because we shall not decide whether the award here at issue is "grossly excessive," we need now only consider the Constitution's procedural limitations.[14]

In other words, the majority opinion in *Philip Morris* interprets the Due Process Clause to impose certain *procedural* limitations with regard to a punitive damage award without expressly imposing substantive limitations. In so doing, the *Philip Morris* majority strives to have its cake and eat it too, i.e., exercise judicial restraint and rein in punitive damages in the same bite.

The history of Supreme Court punitive damage decisions suggests that the new Justices Roberts and/or Alito played a significant role in this compromise. The other members of the *Philip Morris* majority demonstrated no difficulty applying the doctrine of substantive due process to impose a single-digit ratio in *State Farm v. Campbell.*[15] And yet the *Philip Morris* decision is strangely silent on the single digit rule. The new justices apparently refused to adopt such a rule, presumably because such a substantive limitation is not found in the Due Process Clause. If that is correct, Justices Roberts and/or Alito probably insisted on some judicial restraint as a condition to joining the majority. They deserve credit.

But how much credit? On the one hand, the majority opinion in *Philip Morris* is fairly grounded on a true due process right. *Philip Morris* is based on a recognized procedural right to "present every available defense."[16] Due process prohibits using evidence of non-party injuries where the defendant is unable to conduct discovery as to the nonparties. As the majority opinion explained,

> [A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary.[17]

Consequently, the holding can be supported by the Due Process Clause.

On the other hand, this "procedural" limitation potentially opens a backdoor to challenge jury awards substantively by characterizing the challenge as "procedural." Creative counsel will search for ways to express every substantive argument can be expressed in procedural terms. Moreover, the majority opinion in *Philip Morris* is ripe with inspiration for such creativity:

- "We have emphasized the need to avoid arbitrary determinations of an award's amount. Unless a State insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of fair notice… of the severity of the penalty that a State may impose."[18]
- "And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified."[19]
- "We have said that it may be appropriate to consider the reasonableness of a punitive damages award in light of the potential harm the defendant's conduct could have caused."[20]
- "Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible…"[20]

Justice Thomas's dissent is therefore well-taken:

> It matters not that the Court styles today's holding as "procedural" because the "procedural" rule is simply a confusing implementation of the substantive due process regime this Court has created for punitive damages.[22]

He has a point.

Endnotes

1 In general, "judicial restraint" in this article refers to methods of constitutional interpretation focused on the meaning of the words in the Constitution, thus narrowly interpreting clauses even at the risk of allowing politically undesirable results. "Judicial pragmatism" and "judicial activism" are used synonymously, and refer to methods of interpretation focused on reaching politically desirable results. These definitions paint regretfully broad strokes attempting to cover complex judicial philosophies. More subtle distinctions are beyond the scope of this article.

2 People for the American Way Press Release, "Bush Puts Demands Of Far-Right Above Interests Of Americans With High Court Nomination Of Right-Wing Activist Alito," October 31, 2005.

3 127 S. Ct. 1057 (2007).

4 Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18 (1991).

5 *See* TXO Production Corp. v. Alliance Resources, 509 U.S. 443 (1993) (Scalia, J., concurring); BMW v. Gore, 517 U.S. 559 (1996) (Scalia, dissenting).

6 The Supreme Court originally granted certiori to consider the 100:1 punitive-to-compensatory damage ratio in light of the prior Supreme Court's analysis in *State Farm Mut. Ins. v. Campbell*, 538 U.S. 408 (2003). This ratio had been of great interest to litigants because defendants interpret *State Farm* to prohibit double-digit ratios or higher, while plaintiffs interpret *State Farm* more broadly.

7 *Philip Morris*, 127 S. Ct. at 1060.

8 *Id*. at 1067-68 (Thomas, J., dissenting).

9 Justice Thomas previously joined Justice Scalia's dissent rejecting the Court's contention that the Due Process Clause granted "substantive due process" rights against "excessive" punitive damages, because the Clause refers only to due *process. See, e.g.,* BMW of North America v. Gore, 116 S. Ct. 1589, 1611 (1996) (J. Scalia, joined by J. Thomas, dissenting). Justice Thomas cited this dissent from *Gore* again in *Philip Morris*.

10 *See supra* note 8.

11 Justice Ginsburg, before her nomination to the Supreme Court, stated that abortion rights were not appropriately founded in the Fourteenth Amendment's Due Process Clause. *See* Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C.L.Rev. 375 (1985). As Supreme Court Justice, she nevertheless relied on substantive due process to enforce abortion rights. Stenberg v. Carhart, 530 U.S. 914 (2000) (Ginsburg, J., concurring) (citing Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 877 (1992) ("Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. It declares that no State shall 'deprive any person of life, liberty, or property, without due process of law.'").

12 *Philip Morris*, at 1067 (Stevens, J., dissenting).

13 The single digit rule was established in *State Farm*.

14 *Philip Morris*, 127 S. Ct. at 1063.

15 *538* U.S. *408 (2003).*

16 *Id*. at 1063 (citing Lindsey v. Normet, *92* S.Ct. 862 (1972)).

17 *Id*. at 1063.

18 *Id*. at 1062.

19 *Id*. at *1063.*

20 *Id*.

21 *Id*. at 1064.

22 *Id*. at 1067 (Thomas, J., dissenting).

The Judge & State Law: MTBE Multi-District Litigation

*By Michael I. Krauss**

Imagine a product that, when used properly, is safe, valuable and environmentally sound, but when used improperly is dangerous to the environment. Many such products exist. Drano is safe and useful—except when stored in the pantry salt shaker. Firearms save many lives—but not when used by criminals.[1] Automobiles get us where we need to go—but in the hands of bank robbers and drunks they can be lethal weapons. And the gasoline from our automobiles can either get us rolling, burn our house down, or leak through rusty gas tanks into the ground.

In every one of these cases the product itself is not deemed defective or unreasonably dangerous. The product is considered fine if it is correctly manufactured and accompanied by adequate instructions for proper use. If harm occurs, we assign legal blame for the *misuse* of the product, for its negligent storage or for the underlying crime.

Keep this in mind as we discuss the Methyl Tertiary Butyl Ether (MTBE) multi-district litigation. For MTBE, when used properly, is inoffensive to the environment. Indeed, MTBE *helps* the environment according to the Environmental Protection Agency, since it is an oxygenate that allows gasoline to burn more efficiently. And oxygenates are required by law (as will be discussed below).

I. *In re: Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig*[2]

A. The Plaintiffs' Claims: The Procedural Posture

Plaintiffs—(four Boards of Education or School Districts; one Church; one Company; fifteen Utility Companies or Water Districts; twenty-Six Towns, Cities, Municipalities or Fire Districts; three Home Owners Associations (HOAs) or Villages; and two individuals from fifteen different states)—sought relief in multi-district litigation assigned to the Southern District of New York, for defendants' contamination or potential contamination of groundwater by MTBE. The defendants—five petroleum companies that supply some form of petroleum and own and operate various gas stations—invoked rule 12(b)(6) of the Federal Rules of Civil Procedure to demur to all of the complaints, which had originally been filed in fifteen states but removed to federal court for reasons of diversity of citizenship. In essence, the defendants' demurrers point out that MTBE is not intrinsically harmful, and that in any case plaintiffs cannot identify the origin of any product which in fact harmed any one of them, as the chemical is fungible. If the plaintiffs cannot identify a product's manufacturer, they must rely on some theory of collective liability, which defendants claim that all fifteen states reject.

Other courts have consistently ruled that the Reformulated Gasoline (RFG) requirements of the Clean Air Act do not free petroleum companies from liability for damages caused by their oxygenate as a matter of law, for the Act only requires the defendants to use *an* oxygenate, and they *chose* to use MTBE.[3] This is true. But the lack of immunity under the Clean Air Act does not mean, of course, that the defendants should not succeed on demurrer if there is no proof they produced a defective and unreasonably dangerous product that proximately caused harm to an identifiable individual.

B. The Science

In an effort to significantly reduce summertime smog pollution and year-round air toxic emissions, Congress required the use of RFG beginning in 1995 in the nation's most polluted cities. As part of these "clean gasoline" specifications, Congress required that every gallon of RFG contain cleaner-burning fuel additives called oxygenates.

The two most commonly used oxygenates were Methyl Tertiary-Butyl Ether (MTBE) (used in approximately 85 percent of RFG), and ethanol (used in approximately 10–15 percent of RFG). According to both the Congressional Research Service and the federal Department of Energy, ethanol is the more difficult and expensive way to meet the new RFG specifications than MTBE. This is true for two main reasons:

i. Pipeline Transportation: Ethanol's high affinity for water does not allow it to be blended with gasoline at the refinery, nor transported through the existing nation-wide gasoline pipeline infrastructure. Ethanol must be stored in segregated tanks, can only be transported by rail or truck to its final destination and must be blended into gasoline at the terminal or even the retail gas station. As a result, the cost of blending ethanol into gasoline is significantly higher than the cost of gasoline without ethanol.

ii. Blending Characteristics: RFG's clean fuel specifications call for limits on gasoline's ability to evaporate quickly in the summertime. Because ethanol blends evaporate more readily than MTBE blends, ethanol-using refiners are forced to spend additional resources and capital to produce a gasoline blendstock with ultra-low evaporative properties. This is a very expensive process that adds significantly to the cost of producing summertime gasoline ready for ethanol.

MTBE has none of these disadvantages. It is derived principally from natural gas, which is in abundant supply in the US. It can be safely and efficiently blended into gasoline *at the refinery* and efficiently shipped via the interstate gasoline pipeline system, already mixed with gasoline.

The differences in the efficiency and convenience between MTBE and ethanol are apparent, as witnessed by gasoline prices before more recent federal regulations mandated increased ethanol use. The primary ethanol/RFG market was the Chicago/Milwaukee area, where gas prices were *over 40 cents per gallon higher* than elsewhere; over 85 percent of the nation's gasoline providers used MTBE, their oxygenate of choice. In sum, defendants and many other companies chose to use MTBE for sound economic reasons. The cost efficiency

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of MTBE as opposed to ethanol is of course a good thing, unless one is an ethanol producer.

MTBE is highly soluble; once it enters a water source it is not readily biodegradable. When properly stored and used, MTBE *never* enters any water source. But beginning in late 1996, MTBE was discovered at low levels in groundwater sources in California, notably in Santa Monica and Lake Tahoe. Since then, MTBE has been detected at low concentrations in other parts of the country. Invariably, the presence of MTBE in groundwater was linked to underground storage tanks (USTs) that had been leaking gasoline for an extended period of time—several years, in many instances. These leaks are typically due to inadequate or non-existent UST inspection and/or maintenance practices. MTBE received an inordinate amount of attention from public officials because it is more water-soluble than other gasoline components and thus can be transported faster and farther in soil and water. As a result, MTBE is the canary in the proverbial coal mine: it is often discovered at the front edge of any gasoline plume traveling through the soil. An MTBE leak signifies that other, much more harmful, gasoline components, such as benzene, are in fact present as well. MTBE can persist for decades in water supplies and if foul-smelling a small quantity can make the water supply unfit for human consumption. Of course, this also applies to many other products, including non-oxygenated gasoline. To repeat, MTBE was never meant to get into water supplies in the first place and will *not* get into a water supply if stored in proper gasoline holding tanks.

As of March 2001, the California Department of Health Services reported that MTBE had been detected in 0.8 percent of all water sources sampled, with only 0.2 percent of those samples exceeding California's primary health standard for MTBE. In addition, a report by the engineering consulting firm, Exponent, Inc., concluded that, "Despite the negative publicity surrounding MTBE and potential aesthetic issues, MTBE in drinking water should not pose a significant public health hazard in California…" MTBE has become a political scapegoat, one very attractive to the ethanol-producing lobby, blamed for failure to enforce federal storage tank regulations. This has occurred despite the fact that it is far more cost-effective to ensure that UST systems are properly preventing leaks than it is to ban the use of MTBE. When UST systems work well, *all* leaks, not just MTBE leaks, are prevented. According to the EPA, compliance with the 1998 minimum UST installation/upgrade requirements and the 1993 UST leak detection requirements is a national priority. Data suggests that UST systems in compliance with applicable regulatory requirements are not experiencing problems with leaking gasoline or gasoline additives, including MTBE. The dramatic impact that UST upgrades have had on groundwater protection is evident in recent contamination data from the California Department of Health Services. This data indicates that as USTs are upgraded the concentration level and frequency of MTBE detections is leveling off and beginning to decline. However, as of 2000 more than 40 percent (304,000 USTs) of all USTs were still not in compliance with 1993 leak detection regulations. More than 15 percent (150,000 USTs) remain out-of-compliance with 1998 regulations for the upgrade of spill, overfill and corrosion protection requirements. By law, all non-compliant USTs must be closed; however, many remain operational. Clearly, those operating non-compliant USTs should fear the wrath of tort law.

Upon repeated oral exposure of very substantial amounts of MTBE, female rats demonstrated an increase in the combined tumor types, lymphoma and leukemia. Male rats developed an increase in testicular tumors. Results from each of the two long-term inhalation studies in laboratory rats and mice, respectively, showed an increased occurrence of kidney and testicular tumors in male rats and liver tumors in mice of both sexes. The relevance of these findings to humans, at concentrations of MTBE found in the environment, is questionable. Extremely high doses were administered to the animals, and it is not known how MTBE causes tumors in these animals. Nevertheless, several agencies have concluded that it is carcinogenic in animals. Plaintiffs claim that it may also be carcinogenic in humans, but no one has yet determined that.[4] The EPA reviewed available health effects information on MTBE in its 1997 Drinking Water Advisory guidance and decided that there was insufficient information available to allow the EPA to establish quantitative estimates for health risks—and as such would not set health advisory limits. The drinking water advisory document indicates that there is little likelihood that MTBE in drinking water will cause "adverse health effects" at concentrations between 20 and 40 ppb or below. Those "adverse health effects" are essentially unpleasant odor and taste, but the vast majority of MTBE detections have been at non-sensory concentrations, under five parts per billion (ppb)—well below the EPA Consumer Advisory level.

The plaintiffs claim that the defendants were aware of dangerous contamination qualities of MTBE, and that the defendants are therefore each jointly responsible for contaminating their water, no matter whose MTBE actually caused the damage. Note that this reasoning could apply equally well to Drano, to gasoline itself, to firearms, and to automobiles. Ford and GM "know" that some of its cars will be misused by drunkards and criminals—but only the latter remain liable for the misuse of cars.

C. Collective Liability Theories

There are four recognized theories of collective liability: concert of action, alternative liability, enterprise liability, and market share liability. Each theory is often altered to fit a particular state's preferences, but they all have a basic definition from which the states begin their analysis.

CONCERT OF ACTION is described by the Restatement (Second) of Torts § 876 (1979) as a vicarious liability, where one party is responsible for the acts of another if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result where his own conduct, separately considered, constitutes a breach of duty to the third person. For example, if you and I rob a bank

together, I am liable for the entire amount of booty stolen, and injuries to the teller whom you struck.

ALTERNATIVE LIABILITY, which was first adopted in the controversial *Summers v. Tice,* occurs "where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it."[5] In these cases, "the burden is upon each such actor to prove that he has not caused the harm."[6] Both of us misbehaved, one of us harmed the plaintiff, and the other did not, but the plaintiff cannot make his case against either of us, so the court deliberately chooses to hold both of us liable. This derogation from the normal plaintiff's burden of care is not upheld in all states, and where it is upheld it is done only in extreme cases (e.g., where misbehavior was virtually concerted).

Under ENTERPRISE LIABILITY plaintiffs must demonstrate defendants' joint awareness of the risks at issue and their joint capacity to reduce or affect those risks. As it were, each company in an industry gives cover to the others as they misbehave, much as a rampaging mob gives anonymity to each rampaging citizen.[7] Enterprise liability is only applicable to industries composed of a small number of units, for "what would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers," who could hardly concert.[8]

MARKET SHARE LIABILITY allows the plaintiffs to shift the burden of proof to the defendants when identification of the product manufacturer is problematic or impossible.[9] "The plaintiff must join as defendant manufacturers representing a substantial share of the particular market and each defendant is liable for the proportion of the judgment represented by its share of the market unless it demonstrates that it could not have made the product that caused the plaintiff's injury."[10] *Four* states accepted market share liability for DES (the generic, synthetic female hormone, still used for many purposes but once incorrectly used to prevent miscarriage, causing ovarian cancer to female offspring). Most states squarely reject market share liability.

To these four established federal approaches to the issue, Judge Scheindlin added a fifth, dangerous legal innovation.

D. Judge's Scheindlin's Addition

Judge Scheindlin's COMMINGLED PRODUCT SHARE MARKET LIABILITY theory is an expanded version of market share liability.[11] This theory was held by Judge Scheindlin to be applicable when "a plaintiff can prove that certain gaseous or liquid products (e.g., gasoline, liquid propane, alcohol) of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, [if] the commingled product caused a single indivisible injury, [so that] each of the products should be deemed to have caused the harm."[12] Under this theory damages should be apportioned by proof of the defendants' share of the market. Plaintiffs only need to identify those defendants they believe to have contributed to the 'commingled' product which caused their injury; they must conduct some form of an investigation so that they can make a good faith effort to identify the defendants whom they believe caused their injury.[13]

Again, note that unless the defendant manufacturers *knew* that their MTBE would be placed in a particular leaky tank, they are similarly situated to Ford, who "knows" statistically that some of its drivers will use their cars as a deadly weapon, but also that this is *not* the case for any particular driver. Unless such knowledge is proven, it is very hard to see how this new theory could plausibly apply without implying a revolution in products liability.

II. Federal Judges Predicting State Law

When a case is in federal court due to diversity and the substantive law of a forum state is uncertain or ambiguous, the federal court may certify the question to the highest state court.[14] Even when certification is not available under state law, a federal court "not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn."[15] Of course, the federal court *may* also attempt to predict how the highest court of the forum state would rule.[16] To make these predictions the federal judge must look to the state constitutions, statutes, judicial decisions, the Restatements, as well as law from other states.[17]

A. Judge Scheindlin on How to Predict State Law

While many federal judges take a cautious and conservative view when making predictions about the evolution of a state's laws, Judge Scheindlin states that a more liberal view is in order. For while "a court may not adopt innovative theories without the support of state law, or distort existing state law, when a case is removed to federal court, the plaintiff is entitled to the same treatment it would receive in state court."[18] Judge Scheindlin's theory is that the fears about possibly distorting established law or wrongly speculating about trends in state law are only appropriate where the plaintiffs brought the action in federal court, for then their motive may be to "obtain a broader interpretation of state law."[19] In this case the plaintiffs have not brought the case to the federal court, rather the plaintiffs objected to its removal there by the defendants.[20] Judge Scheindlin argues that in this situation, a liberal construction of state law is in order, for it protects principles of dual sovereignty "by protecting a party who sought to obtain a resolution of state law claims from state courts."[21] If a more restrictive view was adopted, this would lead to forum shopping—a main concern of the Erie Doctrine.[22]

Under this reasoning, if a corporate defendant properly removes (for diversity reasons) a state law case to federal court, for fear that as an out-of-state corporation it would be discriminated against (i.e., would not have state law correctly applied to it) by the elected judge and local jury, the federal court is now free to hold the corporation liable anyway. This is a significant new illustration of "darned if you do, darned if you don't."

Judge Scheindlin takes a very broad view of predicting state laws; this view is evident in her ruling.

B. An Opposing View of Predicting State Law

Many take the opposing view of federal prediction from Judge Scheindlin and implement a certification process or simply adhere to a conservative view of the state law and thus refrain from making innovative predictions when the state law is not easily discernable.

Certification occurs when a federal court, sitting for diversity purposes, is faced with an unclear question of state law, and asks the forum state's highest court for resolution.[23] Proponents of certification argue that the process is beneficial and promotes comity and federalism and avoids prognostication by federal courts.[24] Certification may "save time, energy, and resources and helps build a cooperative judicial federalism."[25] The Supreme Court has held that for a "matter of state law [federal judges are] 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."[26] In *Lehman Bros.*, the Court does not assert that certification is obligatory merely because state law is in doubt.[27] The Court does say, however, that certification would seem "particularly appropriate" because of the novelty of the question posed and because the state law to be applied (in the instance, that of Florida) is in considerable distance from the federal court (New York).[28]

IV. "Erie Guesses"

A. Indiana

Among fifteen states, Judge Scheindlin predicts that Indiana will apply her commingled theory of market share liability.[29] She cites two cases toward that end.

In *City of Gary v. Smith & Wesson Corp.*, the courts chose to reject market share liability theory, but stated that even if they chose to adopt it, it would not be applicable in their case, for guns are not fungible and there was a great remoteness problem between the defendants and the crimes that their products later caused.[30] The "[market share] approach to allocation of liability has not been adopted in Indiana… Whatever the merits of 'market share' in other contexts, we do not believe it is properly applied in this situation involving such a wide mix of lawful and unlawful conditions as well as many potentially intervening acts by non-parties."[31] Judge Scheindlin's theory is that this case is not determinative of what Indiana would do in the case of MTBE, for the two cases are too dissimilar, with the key being the fact that guns are not fungible, while MTBE is fungible.[32] But of course MTBE only affects water supplies when it escapes through leaky tanks that are not the responsibility of MTBE producers—and leaky tanks are not interchangeable with non-leaky tanks, are they?

Judge Scheindlin relies heavily on *E.Z. Gas, Inc. v. Hydrocarbon Transp., Inc.* to reach her conclusion of commingled market share liability.[33] In *E.Z. Gas,* a gas explosion caused injury to plaintiff when he lit the pilot of his gas heater, because of its lack of gaseous odor.[34] Various gas manufacturers' non-odor-added products had been commingled and thus the plaintiff could not identify whose product caused his injury.[35] Indiana allowed burden shifting because there was a product identification problem.[36] Judge Scheindlin also relied on Indiana's Comparative Fault Act,[37] which adopted Indiana's Products Liability Act,[38] and requires that parties' level of liability must be apportioned. Joint responsibility is rejected in Indiana. But this is enterprise liability, and maybe even concert of action, not some version of market share.

Strangely, in a footnote, Judge Scheindlin reserves the use of market share liability, musing that Indiana may one day adopt ordinary market share liability based on the Restatement (Third) factors of market share liability (§15).[39] However, there is no evidence that Indiana has adopted this section of the Restatement (Third). While Indiana courts have used the Restatement (Third) in products liability cases, they have yet to specifically refer to §15.[40] In addition they continue to rely on portions of the Restatement (Second) of Torts.[41] But mere musing is not sufficient to preserve the practice of dual federalism.

B. Kansas

The judge also claims that Kansas will leap to apply her theory of market share liability. *MTBE Prods. Liab. Litig.*[42] However, Kansas is silent on whether or when they would adopt *any* collective liability theory.[43] Even more important is that Kansas' legislature has made it clear that policy-based alterations to well established tort law doctrines should be left to the legislature. Thus it would be inappropriate for federal courts to venture into realms of Kansas public policy.[44]

Despite this, the judge comes to her conclusion by analyzing *McAlister v. Atlantic Richfield Co.*, where a plaintiff sued various oil companies for polluting his fresh water well.[45] She concludes from this case that collective liability is allowed where all defendants acted tortiously towards the plaintiff.[46] In *McAlister* it is "not a prerequisite to recovery that it be shown that the [defendants] were the sole cause of the pollution."[47] Rather, there simply must be enough facts from which the defendants could reasonably be inferred to be the source; once this is determined the issue may then go to the jury.[48] Again, this is concert of action or enterprise liability—it has nothing to do with Judge Scheindlin's case.

In addition, Judge Scheindlin relied on the Restatement (Second) of Torts § 433B(2) and Kansas' comparative fault statute in determining that Kansas will likely apportion the damages among the defendants.[49] But apportionment of comparative fault still requires causation and individualized damages, facts the judge seemed not to address. *McAlister* appears to be saying that plaintiffs may name any one defendant as long as they can prove that the defendant is wrongfully responsible for *their* injuries; they do not have to list every possible defendant.[50] Judge Scheindlin also relies on the "common law notion that oil companies should be liable for storing hazardous substances on their land and permitting those substances to damage the plaintiff's property" to argue that the defendants have breached a duty to the plaintiffs.[51] However, there is no proof *whose* oil damaged the plaintiffs' property, i.e., which tanks were leaky, and this fundamentally undermines the judge's analogy.

Respecting federalism would require a conclusion that Kansas would insist that plaintiffs first prove that each defendant violated a duty against them or that each defendant was

reasonably responsible for their injuries before going forward with their case.[52] The fact that the plaintiffs cannot prove this, and that the Kansas courts have not addressed the theories of collective liability would lead one to conclude that the Kansas plaintiffs' causes of action may not survive the defendants' 12(b)(6) motion.[53]

C. Vermont, Virginia and West Virginia

Vermont, Virginia and West Virginia have not had a chance to rule on the viability of collective liability in a products liability case, and Judge Scheindlin stated that she was not able to discover a "basis for inferring whether [those states] would accept or reject collective liability in MTBE cases."[54] What this means, of course, is that potential plaintiffs (there were "DES daughters" in all 50 states) did not even dare sue in these states, knowing as they did that their suits would be dismissed on demurrer for failure to state a legally cognizable grounds for liability. However, despite this, Judge Scheindlin concluded that the states would adopt the theory of market share liability.[55]

Judge Scheindlin reached her conclusion by citing two cases where the states expanded on the common law "to meet the changing needs of their society" and allowed recovery where, in the past, tort victims were unable to recover.[56] This is, however, in utter contention with our system of federalism; it is the states' right to expand upon the common law, not the federal court system. In brief, because these states' common law has not remained an un-moveable concrete block, Judge Scheindlin is authorized to treat it as moist clay moldable to her liking.

D. New Jersey

Judge Scheindlin predicts that New Jersey will adopt a market share liability theory, despite the fact that New Jersey has explicitly rejected market share, enterprise, alternative and concert of action theories in the context of products liability actions.[57] Judge Scheindlin bases this prediction on the idea that *Shakil v. Lenderle Labs* left the door slightly ajar, for the use of a market share theory of liability in a different context.[58] But *Shakil* made clear that its ruling was confined solely to the context of vaccines.[59]

Judge Scheindlin theorized that this MTBE case would nonetheless fall under the 'rule' of *Shakil*, which was never the rule and addressed only vaccines.[60] She came to this conclusion by comparing *Shakil* and this MTBE case. First, the two cases have a mutual interest in public safety.[61] Second, vaccines are required to save lives,[62] and gasoline, while needed, is not required to protect lives.[63] Placing liability on the defendants will not harm the public.[64] Third, liability exposure would have hurt companies willing to make the vaccine—for only two existed—while with MTBE there are over fifty petroleum companies. This effort at legal reasoning turns on its head earlier New Jersey law. Now, the less likely it is that you caused individualized damage the more likely it is that you will be held liable.

There is solid reason to think that New Jersey will decline the wide-spread adoption of market share liability.[65]

E. Louisiana

Louisiana plaintiffs asserted seven causes of action: unreasonably dangerous design in violation of the Louisiana Products Liability Act (LPLA), inadequate warning in violation of the LPLA, negligence, public nuisance, private nuisance, trespass and civil conspiracy.[66] Judge Scheindlin dismissed the Louisiana plaintiffs' five non-LPLA claims, for they were precluded by the statute.[67] Her analysis was thus based on whether the two LPLA claims may survive on a theory of collective liability.

Judge Scheindlin claims that Louisiana has been silent on the adoption of collective liability. Again, what this reveals is that "market share" plaintiffs ("DES daughters") did not even dare sue in Louisiana. Indeed, the defendants claimed that other federal courts, when called on to apply Louisiana law, had consistently refused to recognize any theory of collective liability.[68] However, according to Judge Scheindlin, such decisions are irrelevant. She concludes the Louisiana courts will adopt the market share theory of liability.[69]

Judge Scheindlin relies heavily on *Gould v. Hous. Auth. of New Orleans* to reach her conclusion.[70] She argued that in this case the courts allowed the plaintiffs to move forward with their claim, despite the fact that they could not identify the exact manufacturers of the lead based paint, which caused the tenants' lead poisoning.[71] *Gould* relied on Louisiana's statute, which allows for pleading in the alternative.[72] The statute specifically states that "a petition may set forth two or more causes of action in the alternative, even though the legal or factual bases thereof may be inconsistent or mutually exclusive."[73] *Gould* refrained from making any decisions on market share or collective liability, for the appeal was from the dismissal of the claims and based on Louisiana Civil Procedure; the issue of market share or collective liability did not need to be decided upon at that point in the proceedings.[74]

Judge Scheindlin is correct that the plaintiffs may move forward with their causes of action at this time due to Louisiana's alternative pleading rules. However, one questions why Judge Scheindlin would then take the extra step of invading the Pelican State's sovereignty to decide such a controversial issue as the adoption of collective liability: precisely what was reserved in *Gould*. What is more puzzling is that she stakes this claim on the idea that Louisiana has or would adopt the Restatement (Third) of Torts §15.[75] There is no evidence that the judge cites that Louisiana would adopt the Restatement (Third) or Torts. Rather, the Restatement (Third) of Torts § 15 cmt. c specifically discusses how Louisiana has rejected market share liability. Section 15 cmt c, cites the Louisiana case *Jefferson v. Lead Indus.*, which rejects market share liability.[76]

There are numerous Louisiana cases which reject the theory of market share liability.[77] Judge Scheindlin, while correct in her ruling that the plaintiffs' cause of action may move forward at this time, had no need to make a prediction about Louisiana's adoption of the market share liability theory.

F. Connecticut

Connecticut has not considered the theories of collective liability—but again, Judge Scheindlin concludes that they will adopt her novel theory.[78]

She relies on two cases: *Sharp v. Wyatt*[79] and *Champagne v. Raybestos-Manhattan Inc.*[80] In *Champagne—Sharp* relied on

Champagne—the court held that a "defendant may be liable when its defective product contributes to a condition giving rise to an injury or death. That other sellers supplied similar products that also may have contributed to the" plaintiff's injury does not matter.[81] I poison your air, and so does Joe. You die from poisoned air—Connecticut says you may sue either one of the wrongdoers. This is classic common law. Somehow Judge Scheindlin concludes that this relaxation of listing all the possible tortfeasors would lead Connecticut to adopt her commingled theory of market share liability, which of course involves liability to a plaintiff by a defendant who placed no poison in the air the plaintiff breathed.[82]

Judge Scheindlin also cited 52-572h(c) of the Connecticut General Statutes, (Conn. Gen. Stat. §52-572h(c) (1999)), which requires that the damages be apportioned among defendants—abolishing joint and several liability—to reach her conclusion.[83] But this statute did not abolish the causation requirement in Connecticut.

G. Pennsylvania

Judge Scheindlin writes that Pennsylvania plaintiffs may rely on either a market share or an alternative liability theory.[84] She reaches this conclusion by relying on Pennsylvania's case law, which discusses the two theories—but rejects them.

Scheindlin relies heavily on *Skipworth v. Lead Indus. Ass'n.*, which is a products liability case brought by the parents of a young child who was poisoned by the lead paint on the walls of their home in Philadelphia.[85] *Skipworth* rejected market share liability theory because the lead based paint products were not fungible and defendants, who did not constitute the sum total of possible defendants from a hundred year period, would have been forced to pay for others' actions.[86] They also rejected alternative liability for factual reasons—the paint manufacturers did not act simultaneously and the plaintiffs had not listed all of the possible tortfeasors.[87] However, the court did "realize that there may arise a situation which would compel [them] to depart from [their] time-tested general rule" of proximate causation.[88] Judge Scheindlin also cited to previous Pennsylvania cases which reached the same conclusion as *Skipworth*—rejecting market share liablity.[89]

In *Erlich v. Abbott Labs.*, the court approved the use of alternative liability, holding that there are four main elements, which justify the plaintiff not listing all of the possible tortfeasors:[90] (1) when the plaintiffs cannot identify exactly which defendant caused their injury, to no fault of their own; (2) they have joined substantially all possible tortfeasors who created substantially all the defective product; (3) all defendants are tortfeasors in that they all engaged in wrongful conduct—i.e., manufactured or marketed the defective product; and (4) the product is fungible.[91] Judge Scheindlin used this approval of alternative liability to conclude that Pennsylvania has adopted the theory of alternative liability.[92] However, she also used this case to conclude that Pennsylvania would adopt market share liability.[93] "That although [*Erlich*] purported to adopt a modified form of alternative liability, its analysis was more akin to that under market share."[94] In an attempt to further back up her theory of market share liability, Judge Scheindlin again cites the Restatement (Third) of Torts §15. Again, there is no clear evidence that Pennsylvania has adopted this section of the Restatement.

Judge Scheindlin's analysis is flawed. She is correct in that Pennsylvania has observed a theory of alternative liability and thus the defendants' motion to dismiss based on this theory should be denied. However, the courts have not openly adopted the theory of market share liability.[95] Rather, the courts have left open the possibility that when faced with a certain fact pattern they might consider adopting the theory.[96] When this fact pattern is present it should be left up to the Pennsylvania state courts. The role of the federal court in a diversity case is "to apply the current law of the appropriate jurisdiction, and leave it undisturbed."[97] "Federal courts may not engage in judicial activism."[98] Judge Scheindlin should not have made the decision to adopt market share liability for Pennsylvania.

H. Massachusetts

Judge Sheindlin relies heavily on two Massachusetts cases to conclude that the plaintiffs may move forward with their claims on a market share theory of liability.[99]

In *Payton v. Abbott Labs.,* the court received a certification request from the federal courts and held that they were not closing the door to the theory of market share liability and *may* "on an adequate record… recognize some relaxation of the traditional identification requirement," and hold the negligent defendant liable for their portion of the market.[100] The case was then sent back to the federal court, which held in *McCormack v. Abbott Labs*, that the plaintiffs may seek damages on a market share theory of liability as long as (a) the injuring product is present, (b) the product caused the damages, (c) defendant(s) produced or marketed the product, (d) the defendant(s) acted negligently in producing or marketing the product, and (e) that the defendants may exculpate themselves by proving that they did not produce or market the product which caused the injury.[101] It was also held that damages must be apportioned among the defendants.[102] The *McCormack* court held that these requirements quashed the *Payton* court's worries that defendants would be unable to prove their innocence and that damages would not be apportioned; and thus the theory was a viable form of recovery for plaintiffs.[103]

Judge Scheindlin has support for her argument, but there is also a strong alternative argument, which she dangerously ignores. The highest court of Massachusetts has never ruled on the issue of market share liability. The *Payton* court left open the door for the adoption of the theory, but the only courts which have adopted the theory are the Superior Court of Massachusetts and the United States District Court of Massachusetts. Other federal courts have refrained from allowing market share liability as a basis for plaintiff's recovery. In *Mills v. Allegiance Healthcare Corp.*, the court held that "although the Supreme Judicial Court of Massachusetts has never categorically rejected the theory, neither has it clearly sanctioned its validity."[104]

I. Iowa

In *Mulcahy v. Eli Lilly & Co.*, the Iowa Supreme Court addressed the issue of collective liability.[105] The court rejected the theory of market share liability on broad public policy reasons,[106] and rejected the use of enterprise liability

and alternative liability theories due to factual reasons.[107] Judge Scheindlin acknowledged that the facts of this case do not meet the standards of Iowa's enterprise liability[108] and alternative liability theories.[109] Plaintiffs have joined too many or too few defendants. Defendants did not delegate control or responsibility for safety functions to a trade association. And all possible tortfeasors are not before the court.[110] However, *Mulcahy* "reserved for later consideration the case which involves actual concert of action by the defendants."[111] Judge Scheindlin relied on this statement to reject the defendants' motion to dismiss.[112]

Iowa has indeed left the door ajar to the theory of concert of action. However, there is no evidence there was a concert of action to pour MTBE through leaky storage pipes into the ground water. *Mulcahy* worried that there would be injustice allowing manufacturers to pay for injuries they did not cause.[113] "If the MTBE defendants acted in concert… the court's concern would be inapplicable because they would be joint tortfeasors—*each* defendant would be responsible for the harm caused to the Iowa Plaintiffs."[114] There is no evidence which points to this scenario and thus it would be improper for a federal judge to apply this theory.

J. New Hampshire

New Hampshire has ruled only once on the issue of collective liability, rejecting it.[115] Judge Scheindlin nonetheless relies on New Hampshire's products liability law to conclude that the state would be receptive to all of the theories of collective liability, especially market share liability.[116]

Judge Scheindlin relied on New Hampshire's liability for defective design.[117] How this supports her is unclear. Similarly, *Bagley v. Controlled Envt. Corp.* held that liability for defective and unreasonably dangerous products did not require proof of negligence.[118] Many other cases are cited to this effect. None of them allow waiving causation requirements, nor the requirement that defendant (as opposed to someone else) produced a defective and unreasonably dangerous product that proximately caused harm to plaintiff.

Judge Scheindlin predicted that New Hampshire would be inclined to apply the market share liability theory based on its product liability law, and on her assessment of the Restatement (Third) of Torts § 15. However, there is no evidence that they would adopt this section of the Restatement and none that they have adopted it. Indeed, the groundless basis of Judge Scheindlin's illogical product liability extension argument is based on the Restatement (Second) of Torts § 402A.[119]

K. Florida, New York and Illinois

Judge Scheindlin had previously ruled on the use of collective liability in Florida, New York and Illinois in an earlier MTBE case.[120]

i. Florida

Scheindlin concludes that the plaintiffs' negligence claims survive on the theory of market share liability and the rest of their claims on the theory of concert of action.[121]

In *Conley v. Boyle Drug Co.*, Florida approved the use of market share liability only for "actions sounding in negligence."[122] The district court, on certification, discarded the theory of concert of action due to the factual situation of the case,[123] and when the case was returned to the Supreme Court the court agreed and did not reject the theory as a whole.[124] If X negligently uses ten leaky storage tanks that pollute *your* well with MTBE, and negligently uses five leaky storage tanks that pollute *your* well with MTBE, then and only then does Florida allow for market share liability.

ii. New York

Judge Scheindlin predicts that New York plaintiffs' claims may survive on theories of market share liability and concert of action.[125] *Hymowitz* also acknowledged the use of concerted action "in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible."[126] The opinion does not make clear how the defendants concerted to pour MTBE through leaky storage pipes into plaintiffs' wells, however.

iii. Illinois

Judge Scheindlin concludes that Illinois rejects the theories of market share, alternative and enterprise liabilities, but the plaintiffs may nonetheless rely on theories of concert of action and civil conspiracy.[127]

What is interesting is that in *MTBE I,* Judge Scheindlin had allowed plaintiffs to move forward on theories of concert of action and civil conspiracy, despite the fact that an Illinois case, *Smith v. Eli Lilly & Co.*, had held that concert of action had rarely been "utilized to help plaintiffs overcome the identification burden in product liability cases."[128] Judge Scheindlin failed to cite any Illinois cases which allowed plaintiffs to bypass this identification requirement. However, subsequent to her decision in *MTBE I*, Illinois, in *Lewis v. Lead Indus. Ass'n*, held that the identification burden may be relaxed if the plaintiffs prove that: (a) the distribution/manufacturing of the product causing the injury is tortious itself; (b) the defendants were sole suppliers/promoters of the product; and (c) that each was a party to the conspiratorial agreement.[129] Clearly the fundamental element, (a), has not been proven here. MTBE is safe and effective when used properly, as the introduction to this analysis has shown.

CONCLUSION

When a federal judge in a diversity action makes "innovative" rulings about what a state would do or what theories of law they would adopt the judge has intruded upon the Constitution's integrity. It is true that often the *lex loci* is unclear or in need of interpretation. But in such cases it is prudent for the judge to either certify the case to the highest court in the state or to make the most conservative prediction about how far the state would choose to modify existing jurisprudence. The lack of moderation in this case is almost breathtaking.

Endnotes

1 *See* Michael I. Krauss, Fire and Smoke: Government Lawsuits and the Rule of Law (2001).

2 379 F. Supp. 2d 348, 348-49 (S.D.N.Y. 2005).

3 *MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d at 624; Oxygenated Fuels Ass'n Inc. v. Davis, 331 F.3d 665, 673 (9th Cir. 2003).

4 379 F. Supp. 2d 348, at 365.

5 199 P.2d 1 (Cal. 1948).

6 Restatement (Second) of Torts §433B(3) (1965).

7 Hall v. E.I Du Pont De Nemours & Co., Inc., 345 F. Supp. 353, 378 (E.D.N.Y. 1972).

8 *Id.*

9 63 Am. Jur. 2d Prod. Liab. §179.

10 Am. L. Prod. Liab. 3d § 89:21 (2006).

11 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 377.

12 *Id.* at 377-78.

13 *Id.* at 378.

14 Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974).

15 *Id.* at 390.

16 *Id.* at 390-91.

17 Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994).

18 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 364.

19 *Id.* at 363-64.

20 *Id.*

21 *Id.* at 364.

22 *Id.* "The principle that a federal court exercising diversity jurisdiction over a case that does not involve a federal question must apply the substantive law of the state where the court sits. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938)." Black's Law Dictionary (8th ed. 2004).

23 Jessica Smith, *Avoiding Prognostication And Promoting Federalism: The Need For An Inter-Jurisdictional Certification Procedure In North Carolina,* 77 N.C. L. Rev. 2123, 2125 (1999); *See also* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification And Choice Of Law,* 41 Vand. L. Rev. 411, 414-15 (1988) (certification is a byproduct of the Erie Doctrine).

24 Smith, *supra* note 23, at 2133; Corr, *supra* note 23, at 417-18.

25 *Lehman Bros.*, 416 U.S. at 390-91.

26 *Id.* at 391.

27 *Id.*

28 *Id.*

29 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 396.

30 801 N.E.2d 1222 (Ind. 2003).

31 *Id.* at 1245.

32 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 394-5.

33 471 N.E.2d 316 (Ind.Ct.App.1984).

34 *Id.* at 317-18.

35 *Id.* at 318.

36 *Id.* at 321.

37 Ind. Code Ann. §34-20-7-1 (West 1999).

38 Ind. Code Ann. §34-20-2-2 (West 1999).

39 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 397 n.233. Restatement (Third) of Torts: Products Liability § 15 (1998): In deciding when to adopt a rule of [market share] liability, courts have considered the following factors: (1) the generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's products caused the plaintiff harm, even after exhaustive discovery; (4) the clarity of the causal connection between the defective product and harm suffered by plaintiffs; (5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and (6) the availability of sufficient market share data to support a reasonable apportionment of liability.

40 Progressive Ins. Co. v. General Motors Corp., 749 N.E.2d 484, 489 (Ind. 2001).

41 Vaughn v. Daniels Co. (W.Va), Inc., 841 N.E.2d 1133, 1140-41 (Ind. 2006).

42 379 F. Supp. 2d at 405.

43 *Id.* at 403.

44 *In Re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, Defendant's Motion to Dismiss, Master File C.A. No. 1:00-1898 (SAS) MDL 1358, Kansas cases, 8, S.D.N.Y.

45 662 P.2d 1203 (Kan. 1983).

46 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 404.

47 *McAlister*, 662 P.2d at 1209.

48 *Id.*

49 Kan. Stat. Ann. § 60-258a (2005).

50 662 P.2d at 1209; *see also* Atkinson v. Herington Cattle Co., 436 P.2d 816, 820 (Kan. 1968) ("where two or more persons by their concurrent action pollute or contaminate a stream to the injury of another through whose land the stream flows, they are jointly and severally liable for the wrongdoing, and the injured party may, at his option, institute an action and recover against one or all of those contributing to his injury").

51 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 404.

52 *See* Lyons v. Garlock, 12 F. Supp. 2d 1226 (D. Kan. 1998) (must prove that the tortfeasor is a substantial cause of the injury).

53 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 362.

54 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 439.

55 *Id.* at 440.

56 *Id.* at 439; *see* Hay v. Med. Ctr. Hosp. of Vt., 496 A.2d 939, 945 (Vt. 1985) (holding that Vermont "often met changing times and new social demands by expanding outmoded common law concepts."); Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200, 202 (1971) (" 'There is not a rule of common law in force today that has not evolved from some earlier rule of common law … leaving the common law of today when compared with the common law of centuries ago as different as day is from night.' ") (quoting State v. Culver, 23 N.J. 495, 505, 129 A.2d 715 (1957)); McDavid v. United States, 213 W.Va. 592, 584 S.E.2d 226, 230 n. 4 (2003) (maintaining that their "courts retain the power to change the common law"); R. & E. Builders, Inc. v. Chandler, 144 Vt. 302, 304, 476 A.2d 540 (1984) (rejecting common law rule that wife's legal existence merged with that of her husband); Hilder v. St. Peter, 144 Vt. 150, 159-60, 478 A.2d 202 (1984) (finding an implied warranty of habitability for residential premises); Morris v. American Motors Corp., 142 Vt. 566, 575, 459 A.2d 968 (1982) (holding that assembler-manufacturer of cars can be vicariously liable for negligence of manufacturer of defective component part); Menard v. Newhall, 135 Vt. 53, 54-55, 373 A.2d 505 (1977) (creating rebuttable presumption of causation in failure to warn cases); Zaleskie v. Joyce, 133 Vt. 150, 155, 333 A.2d 110 (1975) (adopting strict products liability); Richard v. Richard, 131 Vt. 98, 106, 300 A.2d 637 (1973) (abrogating rule of interspousal tort immunity); O'Brien v. Comstock Foods, Inc., 125 Vt. 158, 161, 212 A.2d 69 (1965) (rejecting privity as a defense for injuries to consumer); Foster v. Roman Catholic Diocese, 116 Vt. 124, 133-34, 70 A.2d 230 (1950) (rejecting rule that charitable institutions are immune from tort liability); Smith v. Kauffman, 212 Va. 181, 186, 183 S.E.2d 190 (1971) (abolishing parental immunity in automobile accident cases); Weishaupt v. Commonwealth, 227 Va. 389, 405, 315 S.E.2d 847 (1984) (abolishing husband's immunity from prosecution for rape of wife that

occurred when husband and wife were separated but not yet divorced); Midkiff v. Midkiff, 201 Va. 829, 833, 113 S.E.2d 875 (1960) (abolishing immunity in automobile accident case between two unemancipated brothers); Worrell v. Worrell, 174 Va. 11, 12, 4 S.E.2d 343 (1939) (eliminating interspousal tort immunity in personal injury case because "[a] maxim of the common law (and of the ages for that matter) is when the reason for a rule ceases the rule itself ceases"); Teller v. McCoy, 162 W.Va. 367, 384, 253 S.E.2d 114 (1978) (affording residential tenant implied warranty of habitability); Lee v. Comer, 159 W.Va. 585, 593, 224 S.E.2d 721 (1976) (establishing right of unemancipated minor to maintain action against parents for personal injuries received in automobile accident); Adkins v. St. Francis Hosp. of Charleston, 149 W.Va. 705, 718, 143 S.E.2d 154 (1965) (abolishing doctrine of charitable immunity in tort cases against hospitals); Snyder v. Wheeling Elec. Co., 43 W.Va. 661, 661, 28 S.E. 733 (1897) (adopting res ipsa loquitur doctrine). These cases and citations were taken directly from Judge Scheindlin's opinion. *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 439 nn. 516-17.

57 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 420.

58 561 A.2d 511 (N.J. 1989).

59 *Id.* at 529.

60 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 421.

61 *Id.* at 422.

62 But do defective vaccines not *harm* life?

63 But does non-defective gasoline not allow the ambulance to get the patient to the hospital?

64 *Id.*

65 *See* James v. Bessemer Processing Co. 714 A.2d 898 (N.J. 1998) (held that, in a failure to warn of toxicity of chemicals at the workplace, New Jersey would rely on the asbestos rulings in *Sholtis*, which stated that the "'frequency, regularity and proximity' [of exposure] test appears to… be well-reasoned, properly focusing upon the cumulative effects of the exposure. It is a fair balance between the needs of plaintiffs (recognizing the difficulty of proving contact) and defendants (protecting against liability predicated on guesswork). [The] [i]ndustry should not be saddled with such open-ended exposure based upon "'a casual or minimum contact.'" 568 A.2d at 1207); *see also* Provini v. Asbestospray Corp. 822 A.2d 627, 629 (N.J. Super. Ct. 2003) (follows *Sholtis*).

66 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 405.

67 *Id.* at 408.

68 *Id* at 405.

69 *Id.* at 407-08.

70 595 So.2d 1238 (La.Ct.App. 1992).

71 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 407.

72 La. Code Civ. Proc. Ann. Art 892 (1960).

73 La. Code Civ. Proc. Ann. Art 892 (1960).

74 *Gould*, 595 So.2d at 1242.

75 *Id.*

76 106 F.3d 1245 (5th Cir. 1997).

77 *See* George v. Hous. Auth. of New Orleans, 906 So.2d 1282, 1287 (4th Cir. 2005) (held that, "while market share liability is recognized by some jurisdictions, [there is] no Louisiana case law adopting it."); *Jefferson* 106 F.3d 1245 (5th Cir.1997); Bateman v. Johns-Manville Sales Corp. 781 F.2d 1132,1133 (5th Cir. 1986) (held that they "are bound by the *Thompson* holding that it is for the state of Louisiana to decide for itself whether to make the major policy change of adopting the market share theory."); Thompson v. Johns-Manville Sales Corp. 714 F.2d 581 (5th Cir. 1983) (held that departing from the Louisiana courts is not for them to do.); Case v. Merck & Co., 2002 WL 31478219 (Nov. 5, 2002, E.D.LA) (held that Louisiana has never adopted market share.); Hannon v. Waterman S.S. Corp., 567 F. Supp. 90 (E.D.L.A.1983) (held that market share liability is not proper in asbestos cases).

78 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 379.

79 627 A.2d 1347 (Conn. App. Ct. 1993).

80 562 A.2d 1100 (Conn. 1989).

81 *Sharp*, 627 A.2d at 1357.

82 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 381-82.

83 *Id.* at 382.

84 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 437. Concert of action and enterprise theory of liability are recognized in Pennsylvania, however, the theories as stated in Pennsylvania do not "provide a basis for relaxing [the] plaintiffs' obligation to prove causation." *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 433-34.

85 690 A.2d 169 (Pa. 1997).

86 *Id.* at 173.

87 *Id.* at 174.

88 *Id.* at 172.

89 *See* Pennfield Corp. v. Meadow Valley Elec., 604 A.2d 1082 (Pa. Super. Ct. 1992) (rejected market share liability because not all defendants acted negligently and rejected alternative liability because defendants' actions were not all tortious.); Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963 (Pa. Super. Ct. 1985) (did not adopt market share liability because the factual situation did not condone it.); Burnside v. Abbott Labs., 505 A.2d 973 (Pa. Super. Ct. 1985) (rejected market share liability because at that time the state had not yet adopted the theory and even if they had the facts did not fit the theory—the defendants in question had already proven themselves out of the equation.).

90 1981 WL 207361, 268 (Pa.Com.Pl. 1981).

91 *Id.* at 265-69.

92 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 437.

93 *Id.* at 436-37.

94 *Id.*

95 *Skipworth*, 690 A.2d at 172.

96 *Id.*

97 City of Phila. v. Lead Indus. Ass'n., 994 F.2d 112 (3d Cir. 1993).

98 *Id.*

99 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 411.

100 437 N.E.2d 171, 190 (Mass. 1982).

101 617 F.Supp.1521, 1526 (D. Mass. 1985).

102 *Id.* at 1527.

103 *Id. See also* Russo v. Material Handling Specialties, 1995 WL 1146853 (Mass. Supp. 1995) (adopted and followed *McCormack*'s theory of market share liability.); Mahar v. Hanover House Industries Inc., 1995 WL 1146188 (Mass. Supp. 1995) (adopted market share theory).

104 178 F.Supp.2d 1, 8 (D.Mass. 2001); *see also* Gurski v. Wyeth-Ayerst Div. of Am. Home Prods. Corp., 953 F. Supp. 412 (D.Mass. 1997) (held that Mass. not recognize market share liability.); Santiago v. Sherwin Williams Co., 3 F.3d 546 (1st. Cir. 1993) (holding that Massachusetts has never explicitly endorsed the theory of market share liability).

105 386 N.W.2d 67, 72 (Iowa 1986).

106 *Id.* at 75.

107 *Id* at 71, 73.

108 Enterprise liability requires that (1) the injury-causing product was manufactured by one of a small number of defendants in any industry; (2) the defendants had joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce those risks; and (3) each of them failed to take steps to reduce the risk but, rather, delegated this responsibility to a trade association. *Mulcahy*, 386 N.W.2d at 71 (citing *Burnside*, 505 A.2d at 984).

109 Alternative liability requires that the plaintiffs bring forth all of the parties which may have caused the injury and that these parties acted tortiously and that the plaintiffs, through no fault of their own, cannot identify which party caused their injury. *Mulcahy*, 386 N.W.2d at 74.

110 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 399.

111 386 N.E.2d at 76.

112 *Id.* at 400.

113 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 400. This worry of injustice was the worry with the theories of enterprise, alternative and market share liability. *Mulcahy*, 386 N.W.2d at 71, 73, 76.

114 *Id.*

115 Univ. Sys. Of N.H. v. U.S. Gypsum Co., 756 F. Supp. 640 (D.N.H. 1991), was an asbestos case and the theories were rejected due to the non-fungibilty of the asbestos products.

116 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 413, 416.

117 *See* Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969) (held that use of strict liability and burden shifting is allowed where defect details are beyond plaintiff's knowledge, so long as plaintiff proves there was a defect at the time of purchase and the defect caused the plaintiff's damage.).

118 503 A.2d 823 (N.H. 1986).

119 *See Buttrick*, 260 A.2d at 113.

120 *In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 175 F.Supp.2d 593 (S.D.N.Y. 2001) (hereafter, MTBE I).

121 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 388-89.

122 570 So.2d 275, 286 (Fla. 1990).

123 Conley v. Boyle Drug Co., 477 So.2d 600 (Fla. Dist. Ct. App. 1985).

124 *Conley*, 570 So.2d at 280; *see* Symmes v. Prairie Pebble Phosphate Co., 63 So. 1 (Fla. 1913) (held that there must be a common design for the theory of concert of action to be viable); Standard Phosphate Co. v. Lunn, 63 So. 429 (Fla. 1913) (followed *Symmes* recognition of the theory of concert of action).

125 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 425. New York has adopted the theory of market share liability in DES cases. Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989); *see also* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y.Ct.App. 2001) (held that market share liability did not apply because guns are not fungible products; their origin is identifiable).

126 539 N.E.2d at 1073.

127 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 391. The theories of concert of action and civil conspiracy are treated as one in Illinois. Lewis v. Lead Indus. Ass'n., 793 N.E.2d 869, 878-79 (Ill. App. Ct. 2003).

128 527 N.E.2d 333, 350 (Ill. App. Ct. 1988).

129 793 N.E.2d 869, 879 (Ill. App. Ct. 2003).

Professional Responsibility & Legal Education

Evaluating Judicial Nominees: Will A Nominee Respect and Protect The Amendment Process and the Right of the People to Participate?

*By Charles W. Pickering**

Article II, Section 2, of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint… judges." What is the appropriate role of the Senate in discharging its constitutional responsibility of "Advice and Consent" to the President's nominations to the Judiciary? How should the United States Senate evaluate nominees to the federal bench? In today's extremely partisan political atmosphere, that is a hotly debated question. For an appropriate answer, it is necessary to review history, analyze why confirmation of judges is now such a mean-spirited fight, how we reached this point, and carefully consider how we should proceed in the future.

The framers of our Constitution saw the Senate's role of "Advice and Consent" as limited to the prevention of "the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."[1] As Madison wrote in *Federalist* 51, "The primary consideration [for the confirmation of judges] ought to be qualifications."[2] The limited role of the Senate in the confirmation process was noted by historian Joseph Harris, who wrote, "the debates of the Convention indicate that 'advice and consent' was regarded simply as a vote of approval or rejection. The phrase was used as synonymous with 'approbation,' 'concurrence,' and 'approval,' and the power of the Senate was spoken of as a negative on the appointment by the President."[3]

The Democratic leadership today sees "Advice and Consent" as a much broader power of the Senate, as legislative license at the expense of the executive branch to increase its power over judicial nominees. In August 2001, as the unprecedented and unconstitutional obstruction of Bush appellate nominees was taking shape, Joseph Califano wrote a guest opinion column for the *Washington Post* titled "Yes, Litmus-Test Judges." He argued:

> In considering presidential nominees for district and appellate judgeships, professional qualification alone should no longer be considered a ticket to a seat on the bench. For years partisan gridlock and political pandering for campaign dollars have led to failures of the Congress and the White House, whether Democratic or Republican, to legislate and execute laws on a variety of matters of urgent concern to our citizens. As a result, the federal courts have become increasingly powerful architects of public policy, and those who seek such power must be judged in the spotlight of that reality.… What's new is the growing role of federal courts in crafting national policies once considered the exclusive preserve of the legislature and executive… concerned citizens have gone to court with petitions they once would have taken to legislators and executive appointees. As the federal courts have moved to fill the public policy vacuum, conservatives, liberals and a host of special interests have developed a sharp eye for those nominated to sit on the bench. So should the Senate.… Environmentalists, prison reformers and consumer advocates have learned that what can't be won in the legislature or executive may be achievable in a federal district court where a sympathetic judge sits.… Who sits in federal district and appellate courts is more important than the struggle over the budget, the level of defense spending, second guessing the tax bill and whose fingers are poised to dip into the Social Security and Medicare cookie jars.…
>
> Both sides know that many of the individuals who fill these seats will have more power over tobacco policy, prison reform, control of HMOs, the death penalty, abortion, environmental issues, the constitutionality of redistricting for House elections, gun control and the rights of women and minorities than the president or congressional leaders, and for a longer period of time.… That's why professional qualifications should be only the threshold step in the climb of judicial nominees to Senate confirmation.… the Senate must take enough time to give these men and women the kind of searching review their sweeping power to make national policies deserves.[4]

Califano's guest editorial is a clear acknowledgment that the Court is now making policy decisions which the Constitution delegates to either the legislative or executive branches. His main concern seems to be that since the Reagan years liberal ideology has not been winning at the ballot box. Reacting to Califano's article, Roger Pilon with the Cato Institute wrote that for many Democrats the Supreme Court is now "something akin to another legislative branch." He points out that the Democrats are looking not for a "judge applying the law, but a 'sympathetic judge.' That's politics, not law." I agree with Pilon that we need justices who know "the difference between politics and law—and respect it."[5]

If the practice of litigants scourging the countryside, researching the record of individual judges (to find where a judge sits who is sympathetic to the theory of their case) becomes the norm, we will have lost something basic and fundamental about our system of justice. We will not have equal rights under our Constitution. The law will be different in New York, as compared with Oklahoma, or Virginia, or Ohio, because the result will depend on whether a case is heard by a "sympathetic judge." As Justice Curtis wrote in his dissent in the *Dred Scott* case:

> When a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power

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> to declare what the Constitution is according to their own views of what it ought to mean.[6]

Justice Curtis, distressed at the outcome of the case and the activism of the majority, resigned from the Supreme Court on principle, the only person ever to do so for that reason. During the last fifty to sixty years, Curtis' pronouncement that "when a strict interpretation of the Constitution… is abandoned… we have no longer a Constitution; we are under the government of individual men," has unfortunately become a reality in far too many areas of the law.

How did we reach the point where the Judiciary has become politicized as acknowledged by Califano? Consistent with the desire of certain liberals that judges make political policy decisions and create new rights, there has evolved over the years a theory of interpreting the Constitution as a document that changes meaning over time, referred to by those who support or utilize this theory as a "living Constitution." They reject the notion that we are a government of laws, not of men; they reject the notion that the Constitution means what it says and says what it means; and they reject the notion that our Constitution is a contract between the government and its people. What they have created is a "mystery Constitution," the meaning of which is unknown to average citizens and can only be revealed by a majority of the Supreme Court. Interpreting the Constitution as an evolving document to be changed and altered by a majority of the Supreme Court has transferred the fight over hot button social issues from the election of state legislators, congressmen, and senators to the confirmation of federal judges.

Judges who interpret the Constitution as a changing, evolving, "living," "mystery" document exercise their "independent judgment" to determine the "sense of decency" of a modern evolving society. Unable to justify their decisions with the text or original understanding of the Constitution as ratified, they look to whatever trend in state law—or foreign law—currently comports with the "in vogue" political view. These judges look to Sweden or to France or Zimbabwe and interpret our laws according to foreign decisions. Most Americans do not want to be governed by the laws of Europe or any other continent; they want to be governed by the rule of law as established by duly elected representatives in America. That was the foundational reason for the American Revolution: to be governed by the rule of law as established by "We the People" and not laws from across the ocean.

Judges are individuals just like others—they make mistakes and face the problems of every day life. Frequently, individuals get off on the wrong track. I saw it often as a trial judge. When this happens, it can be disastrous for that individual and for that individual's family. But when that individual happens to be a judge, the impact is greater and the consequences far-reaching, a real danger when a judge does not recognize that his power is limited by something outside of himself.

Nations also frequently get off on the wrong track. When nations get off on the wrong track, it can have even more devastating effect, it can be disastrous for millions of people. Consider two nations that experienced revolution and got off on the wrong track. Though near in time, the French Revolution diverged far from our American experience. The "essential difference between the American Revolution and the French Revolution is that the American Revolution… was a religious event, whereas the French Revolution was an antireligious event."[7] The French Revolutionists submitted to no faith outside of themselves. They possessed no moral constraints to curb their vengeance, and blood ran like a river through the streets of Paris with Napoleon Bonaparte emerging to devastate Europe. The French Revolutionists established no rule of law, no checks and balances. Their failure bred a disaster.

Likewise, in 1917, the Communists—the Bolsheviks—revolted in Russia. Their philosophy espoused materialism and atheism. They rejected the rights of individuals and derided the importance of the human spirit. They instituted a totalitarian regime, murdering millions of Soviet citizens. Like the French, the Soviets created no checks and balances for their leaders and thus established no rule of law. Their imprudence spawned a catastrophe.These examples illustrate the importance of moral constraints woven into a system of government, the necessity of a clearly established rule of law, and the wisdom of checks and balances among the three branches of government. We Americans are fortunate indeed that our Founders got us off on the right track. Unlike the leaders of England or ancient Rome, our Founding Fathers gave us a written Constitution so we would not be compelled to rely on the sense of justice, or the sense of decency of a particular judge, or even five judges, for our life, liberty, or property. Instead, we could rely on our Constitution as written and ratified by the people through their duly elected representatives.

It was wrong when judges on the Right ignored the text of the Constitution in cases such as *Dred Scott*[8] and *Plessy v. Ferguson*.[9] It is wrong today when far-left secularist groups seek to win in a court of law that which they cannot win in the court of public opinion, at the ballot box. They seek new rights never contemplated by our Founders and not sanctioned by the Amendment Process. The Framers of our Constitution gave us a government deeply committed to the "rule of law." The "rule of law" requires first that the law be clearly understood and second that those bound by the law know in advance what the law requires.[10] The reason for these two requirements is quite simple: those who are bound by the law need to know in advance what is expected. The concept of an evolving Constitution violates both of these fundamental principles. One cannot "clearly understand" that which is still undetermined. One cannot know "in advance" what has yet to be articulated. A "living," "mystery" constitution does not conform to the rule of law and provides little assurance of consistency—no more than that of a king or a dictator.

Our Founders formed our government based on two premises: the worth of each individual person—"all Men are created equal"—and the imperfection of man, even kings. The tyranny of King George III taught them what Lord Acton would verbalize years later: "Power tends to corrupt and absolute power corrupts absolutely."[11] They recognized the necessity of checks and balances to prevent the three independent and co-equal branches of our government from engaging in excesses.

The Founders carefully limited the powers of each branch. To allow the judicial branch to cross over into the jurisdiction of the legislative and executive branches increases the power of judges, but violating the separation of powers over time will erode confidence in the courts and thus ultimately weaken the Judiciary—indeed it will undermine the power of all branches of our government. A violation by any branch of this carefully crafted system of checks and balances threatens the stability and vitality of the system.

The structure of governance given to us by our Founders is more important than the Bill of Rights. Without the structure, without the safeguards, the Bill of Rights is an illusion, not a reality. When the Court exceeds the structure given the Judiciary, and goes beyond the Constitution, it threatens the Bill of Rights—and all our rights. The constitution of the now-defunct Soviet Union promised grandiose rights, but they did not exist because they had no carefully crafted system of checks and balances, no "rule of law."

About the time I graduated from law school, I heard the story of a Supreme Court justice who was hearing arguments in a case. A young lawyer was arguing strenuously that the Court had to rule in his favor based on stare decisis. The justice leaned forward and asked the young lawyer, "But is it right?" There was a time when I might have thought this a great question: a judge concerned about what is right rather than the niceties of the law. But who will we give—for the rest of their life and regardless of how they might decide—the power to determine what is right or wrong for America? Will it be a Democrat or a Republican? A conservative or a liberal? Will it be a Christian, someone of the Jewish faith, someone of another belief, or an atheist? Will it be someone from the Christian Coalition, or will it be a member of the ACLU or People for the American Way? These rhetorical questions answer themselves. We should fight to uphold the principle that we have: "A government of laws, and not of men."

Allowing courts to make political decisions is extremely bad policy. Courts are ill-equipped to make such decisions. Their debate is private, not public. Judges cannot develop a consensus, cannot compromise, and have no way to receive public input and analyze data. Judges simply have no process to formulate public policy as do legislative bodies. Courts are not an appropriate branch of government to make political decisions. When judges start exercising their "independent judgment" to determine the meaning of the Constitution, rather than following the text and precedent, they cease being judges and move into the arena of policy. They are making political decisions. They are creating law rather than interpreting law. They have politicized the Judiciary.

The legislative resolution of controversial political issues usually creates unity, while judicial resolution of controversial political issues only increases division. For example, Congress passed the Civil Rights Act of 1964, extremely controversial at the time, but did so only after compromise, broad consensus, and the working of the democratic political process. Within three decades of its passage, we lived in a different America where the vast majority of Americans view the denial of equal rights to anyone based on race as wrong and intolerable. The Civil Rights Act today has almost universal acceptance. Many Americans, likewise, opposed abortion when the Supreme Court in 1973 decided *Roe v. Wade*.[12] Judges reached the decision in secret through private debates with no public input or participation. Now, more than three decades later, abortion divides our nation even more than in 1973. What is the difference between the acceptance of the Civil Rights Act of 1964 and *Roe v. Wade*? The Civil Rights Act was adopted by the correct political process by the appropriate branch of government. Conversely, *Roe v. Wade* was decided and handed down by judicial decree, by an inappropriate branch of government, inappropriately deciding a political issue.

Because the federal judiciary has entered the political arena, thus inappropriately becoming a political branch of government, confirmation of a federal judge can become election to one of the most important offices in the land, insofar as hot button social issues are concerned. Americans care deeply about these issues, and they deeply divide our nation. The elections to these important positions take place in the United States Senate and hold civility, comity, and collegiality in that body hostage, thus impairing the ability of the Senate to discharge its constitutional responsibilities. Politicizing the Judiciary weakens both the Judiciary and the Senate. When one views the Judiciary as do Joseph Califano and some other liberals, as a political branch of government, it is understandable that they want to litmus-test nominees to determine their position on hot-button social issues. I respectfully suggest there is a better way to evaluate judicial nominees.

Certainly, the place to begin in evaluating judicial nominees is qualifications: is a nominee qualified by education and experience to be a judge; does a nominee have legal ability and an understanding of the law; and most importantly, does a nominee have integrity? If a nominee is otherwise qualified, a nominee should then be evaluated to determine if the nominee will respect and protect the Amendment Process and the right of the people to participate when the Constitution is to be changed.

Our Constitution is going to change over time, as it should. The only question is who will bring about the change. Will it be the people acting through their duly elected representatives (through the amendment process), or will it be five judges reacting to their own biases, predilections, and preferences trying to determine what they perceive to be the sense of decency of our nation and the entire world. Judge Robert Bork pointedly said, "the truth is that the judge who looks outside the Constitution always looks inside himself and nowhere else."[13] Although we must not have a "dead Constitution," neither should we have a cancerous "living Constitution" that grows unwanted and invades and intrudes into every niche and cranny, into every part and organ of the body politic. A "living Constitution," conceived only in the minds of five judges, leaves the American people disillusioned and dismayed that their fundamental, basic law, the Constitution, has been altered and changed, not by their act and will, but by the limited vision of five determined judges who seek to change and mold the Constitution into what they perceive it should be.

Protecting the amendment process and allowing the people to participate in changing the Constitution to meet the needs and understandings of an advancing and more compassionate civilization will assure a healthy Constitution, one that is strong, robust and vibrant. Protecting the amendment process will provide a Constitution that is healthy because the people participate; a Constitution that is strong because it binds all three branches of government; a Constitution that is robust because the people are involved in changing it as they, and they alone, determine it should be changed; and a Constitution that is vibrant because it is respected by the American people as the permanent and paramount law of the land.

From 1789 until 1971, the amendment process was honored. The Constitution was amended twenty-six times for an average of one amendment every seven years (seven times from 1933 to 1971, for an average of once every five years). These amendments dealt with hot-button social issues. These amendments abolished slavery; guaranteed the privileges and immunities of citizenship, due process, and equal protection of the law to the citizens of all states; provided for the direct election of senators; brought about prohibition and the abolition of prohibition; established the right of women to vote; provided term limits for the President; granted suffrage to the citizens of D. C. in presidential elections; abolished poll taxes; and extended the right to vote to eighteen year olds. During this time, our Constitution was healthy, strong, robust, and vibrant. It was the expression of the people's will, remaining so until changed by the people and the people alone.

Liberals rely on *Marbury v Madison*[14] as the seminal case that established the doctrine of judicial supremacy for interpreting the Constitution, that is that the Courts will determine what is and what is not constitutional.[15] But liberal judges who seize upon *Marbury's* holding of judicial supremacy to interpret the Constitution as the basis for changing the meaning of the Constitution completely ignore the other pronouncements of *Marbury*. If judges today will follow all of the *Marbury* holdings, then we will once again have a healthy and strong Constitution.

While the *Marbury* Court held "[i]t is emphatically the province and duty of the judicial department to say what the law is," the *Marbury* Court did not find that the Judiciary had the power to change the Constitution or the power to create law. To the contrary, the Court ruled that the judicial branch—just as the legislative and executive branches—was bound by the Constitution. Judges who apply *Marbury* as precedent for the principle of judicial supremacy to interpret the Constitution should also follow the rest of the *Marbury* decision. In *Marbury*, the Supreme Court exercised considerable judicial restraint not to exercise power it did not have. The Court had before it an act of Congress that gave the Supreme Court original jurisdiction in instances not specifically mentioned in the Constitution. Since the Constitution gave the Supreme Court original jurisdiction as to certain cases, did that negate original jurisdiction for the Supreme Court in all other situations, including the ones then authorized by Congress?

The Court reasoned, "it cannot be presumed that any clause in the constitution is intended to be without effect.…" The Court concluded, "affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all." The Court then held that Congress overstepped its authority and violated the Constitution in granting the Supreme Court original jurisdiction over areas not designated by the Constitution. The Court declined to exercise that jurisdiction, and expressed great respect, deference, and appreciation for the Constitution. Writing for the Court, Chief Justice John Marshall recognized as a "well established" principle "the people have an original right to establish for their future government, such principles as, in their opinion, shall most conduce to their own happiness" and that this was "the basis on which the whole American fabric has been erected. The exercise of this original right [adopting the Constitution] is a very great exertion;… The principles, therefore, so established, are deemed fundamental." These principals were derived from the supreme authority—the people—"they are designed to be permanent." Likewise, Marshall found, the Constitution was meant to be permanent, not an evolving document. He extolled the Constitution as "superior, paramount law, unchangeable by ordinary means," saying that if the Constitution "is alterable when the legislature shall please to alter it… then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation" and it is "to be considered by this court" as such.

Those "who controvert the principle that the constitution is to be considered, in court, as a paramount law," Marshall continued, "would subvert the very foundation of all written constitutions" and reduce "to nothing what we have deemed the greatest improvement on political institutions—a written constitution."

> [I]t is apparent that the framers of the constitution contemplated that instrument, as a rule for the government of *courts* as well as of the legislature. Why otherwise does it direct the Judges to take an oath to support it?… How immoral to impose it on them, if they were to be used as the instruments… for violating what they swear to support?… Why does a Judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rules for his government?… *courts*, as well as other departments, are bound by that instrument [the Constitution]." (emphasis original)

Marshall clearly recognized the Supreme Court is bound by the Constitution, as a "permanent" and "paramount" document, not one that evolves and morphs, depending on who is on the Court.

Marshall respected the separation of powers principle, stating that his Court would not consider questions "which are, by the constitution and laws, submitted to the executive." "Questions," he wrote, "in their nature political… can never be made in this Court." The Supreme Court should not, and could not, address political issues or enter the political arena. Yet, that is exactly what some members of the Court are doing today, making political decisions in determining the "sense of decency" not only of the United States, but also of the world,

and imposing those views on all Americans. In such cases, a majority of the Court seizes upon the *Marbury* pronouncement of judicial supremacy to interpret the Constitution, while ignoring its declaration that the Constitution is a permanent written document, side-stepping its pronouncement that the Court is not to enter the realm of politics, failing to heed its unequivocal recognition that the Judiciary is bound by our written Constitution, disregarding its proclamation of the separation of powers doctrine, and leaving in shambles the system of checks and balances carefully crafted by our Founders. When the Court travels outside its judicial role, it voyages into spheres of responsibility given by the Constitution to the legislative and executive branches. It legislates by changing the Constitution, adjudicates on the change the Court itself has made, and then requires obedience to its fiat. Our Founders never intended one branch of government to exercise judicial, executive, and legislative powers.

Over the years judicial supremacy to interpret the Constitution has been widely accepted. But only during the last half century has the Court openly, plainly, and on a wide-scale basis declared that it also has the power to change, add to, or alter the Constitution, when a majority of its members exercise their "independent judgment" to determine that the Constitution no longer comports with their determination of the "sense of decency" of an evolving world. Under this power, five judges now claim for themselves the right to do something even the American people themselves cannot do by majority vote, or by super majority vote. Congress alone cannot change our written Constitution, not by majority vote, not by super majority vote, or even by unanimous consent. No president—not George Washington, Abraham Lincoln, Franklin Roosevelt, John Kennedy, or Ronald Reagan—could alter the Constitution. Nevertheless, some judges now assume for themselves this awesome power. James Madison argued in Federalist No. 51,

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[16]

Madison recognized that requiring the government to exercise restraint, "to control itself," was "a great difficulty." He was right. Some members of the Supreme Court do not now feel obliged to "control" the power of the court consistent with Madison's view, nor, to exercise restraint as did the *Marbury* Court.

In *Marbury*, Chief Justice Marshall declared that the grant by the Constitution of original jurisdiction to the Supreme Court in certain instances negated the power of Congress to delegate or the Court to exercise original jurisdiction in other areas, as already noted. Marshall's reasoning is likewise applicable to changing or amending the Constitution. The Constitution explicitly provides the Constitution may be changed by amendment. This explicit process for changing or altering the Constitution negates any other method for altering or changing the Constitution.

If our Founders intended that five judges should be able to change the paramount and permanent law of the land embodied in our Constitution, they were perfectly capable of inserting such language, and would have done so. If they had, without question, our Constitution would not have been ratified. The founding generation, skeptical to the core of excessive power, would never have granted such unlimited power to any of the three branches of government. And such unbridled unlimited power should not be exercised today, not by any branch of government. Article V of the Constitution provides a perfectly logical and reasonable method by which to change or alter our Constitution—the amendment process. The Constitution provides no other, and the people have agreed to none. However, some judges have ignored the implicit requirement of the Constitution that the only way to change the Constitution is through the amendment process. Consequently, in *A Price Too High: The Judiciary in Jeopardy*, I propose and develop the case for a constitutional amendment to specifically mandate that the only way the Constitution can be changed is through the amendment process, that in the future judges will interpret the Constitution according to the common understanding of the relevant provision at the time such provision was adopted.

How then should nominees to the federal judiciary be evaluated? They should be evaluated on their legal ability and whether they have integrity. Beyond that, they should be evaluated as to whether they will respect and protect the Amendment Process and the right of the people to participate when the Constitution needs to be changed. Nominees should be evaluated as to whether they will follow all the pronouncement of *Marbury v Madison*, not just the doctrine of judicial supremacy to interpret the Constitution. Will they respect our written Constitution as the "paramount" and "permanent" law of the land, "unchangeable by ordinary means," changeable only by the method set out in the Constitution? Will the nominee honor the "separation of powers" and not intrude into matters delegated by the Constitution to the executive or legislative branches? Will a nominee do as did the *Marbury* Court, exercise judicial restraint and not exercise power not given by the Constitution to the courts? Does a nominee know the difference between politics and the law, and respect it? Will a nominee, as did Chief Justice John Marshall follow the pronouncement that "questions, in their nature political… can never be made in this Court"? Will a nominee recognize as was recognized in *Marbury* that the judiciary is bound by our written Constitution just as are the other two branches? If a nominee agrees to follow all of the *Marbury* precedents, there will be no need to "litmus-test" such a nominee on all the hot button social issues.

If judicial nominees are evaluated and confirmed on the basis of following all of the *Marbury* teachings, and in the future if judges will apply all of *Marbury*, then the judiciary will be depoliticized, the battles over hot-button social issues will be returned to the political branches of government where they belong, and confirmation of judges will once again become a process that is respectful and civil. A nominee who will respect and protect the amendment process and the right of the people

to participate in changing the Constitution when it is to be changed should be confirmed.

Endnotes

1 The Federalist No. 76 (Alexander Hamilton) 386 (1982).

2 *Id*. at 262.

3 Joseph P. Harrison, The Advice and Consent of the Senate 376 (1968).

4 Joseph A. Califano, Jr., *Yes, Litmus-Test Judges*, Wash. Post, August 31, 2001.

5 "Senate Battle Over Justices Begins Monday," Fox News, 10 November, 2003.

6 60 U.S. 393, at 621 (1856).

7 Paul Johnson, A History of the American People 117 (1998).

8 60 U.S. 393 (1856).

9 163 U.S. at 555, 556, 16 U.S. Court cp. 1138 (1896).

10 David F. Forte, *The Rule of Law and the Rules of Law*, 38 Cleveland State L. Rev. 97 (1990).

11 John Emerich Edward Dalberg Acton ("Lord Acton"), Later Professor of Modern History at Cambridge, to Bishop Mandell Creigton, 5 April 1887.

12 410 U.S. 113 (1973).

13 Speech by Edwin Meese, III before the D.C. Chapter of the Federalist Society Lawyer's Division, November 15, 1985, *printed in The Great Debate: Interpreting Our Written Constitution*, The Federalist Society (reprinted 2005) (citing Robert H. Bork, Traditions and Morality in Constitutional Law (1984)).

14 1 Cranch 137, 5 U.S. 137 (1803).

15 The Constitution itself does not give the third branch of government this power. The Constitution is silent on the issue of which of the three co-equal branches of government gets to make this call, or whether all three get to make this decision in their separate spheres of responsibility. The declaration by the *Marbury* Court of judicial supremacy to interpret the Constitution is viewed by some as an act of judicial activism. Others contend that the Federalist papers make it clear that construing the Constitution was to be the prerogative of the Judiciary (Federalist No. 78).

Regardless, the holding of *Marbury v. Madison* that the Judiciary is the final arbiter of what the Constitution means has been precedent since 1803 and not challenged in any meaningful way since the Civil War. It is extremely unlikely that the theory of judicial supremacy in resolving Constitutional issues will be displaced.

16 The Federalist No. 51 (James Madison) 261-2 (1982).

Religious Liberties

Nondiscrimination Rules and Religious Associational Freedom

*By Gregory S. Baylor & Timothy J. Tracey**

Governments are applying rules banning "discrimination" on the basis of religion and "sexual orientation" to religious groups with increasing frequency. As interpreted by the courts, the extent to which the Constitution protects the freedom of religious groups to associate around shared religious commitments is not entirely settled. We believe, however, that a proper regard for religious liberty should move government to exempt religious organizations from such nondiscrimination rules. When government subordinates religious freedom to other public policy objectives, courts should—and must—find violations of the Constitution.

Introduction

Religious groups seek to preserve their collective embrace of particular commitments over time through various means. One of those means is to articulate a creed. In many cases, this creed may still be questioned and challenged, both from within and from without, and, in response to those challenges, religious groups often change, clarify, or reconfirm their beliefs. Many religious groups, particularly those in the Christian tradition, adopt or revise creeds or confessions of faith in the course of and as a consequence of working through these challenges. With varying degrees of rigor, however, religious groups assess the extent to which a particular individual shares its religious commitments before admitting him or her to formal membership in community groups that share such beliefs. More scrutiny is applied to those considered for positions of leadership. A member or leader's subsequent rejection or transgression of the group's commitments may warrant discipline or even expulsion. The freedom to live out this process is what is under attack. One might plausibly ask why the conflict between nondiscrimination rules and religious associational freedom has heated up so much in recent years. We are able to identify at least two reasons; one is rather obvious, the other less so.

The first and more obvious reason is the success of the homosexual rights movement. A growing number of legislative and administrative bodies have added "sexual orientation" to lists of protected characteristics in various nondiscrimination rules. As of this writing, eighteen states and the District of Columbia forbid covered nongovernmental employers from discriminating on the basis of sexual orientation in hiring, promotion, and other employment actions.[1] Before 1989, only two had such a prohibition. In addition, scores of cities and counties now forbid sexual orientation discrimination in employment. Many states and localities forbid sexual orientation discrimination in housing, public accommodations, and business establishments.

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Police power rules are not the only means by which governments punish and deter discrimination; they also condition eligibility for public benefits upon compliance with nondiscrimination rules. Public educational institutions routinely condition recognition of student groups upon compliance with nondiscrimination rules. They also condition use of their career services offices to employers willing to pledge compliance with a nondiscrimination rule. Organizations seeking government contracts and grants generally must pledge not to discriminate on the basis of protected characteristics. Many states impose a nondiscrimination rule upon charities seeking to participate in their state employee charitable campaigns. Rules of judicial ethics forbid judges from joining or maintaining their membership in discriminatory organizations.[2]

Given that many religious belief systems deem homosexual conduct immoral, the addition of "sexual orientation" to many government nondiscrimination policies in recent years is partially responsible for the increase in the number of conflicts between these rules and religious associational freedom. But there is another, less obvious, reason why the conflict between religious associational freedom and nondiscrimination rules has intensified: the paradigm shift in Establishment Clause jurisprudence away from "strict separationism" towards "benevolent neutrality."

Our starting point is something self-evident: that a "culture war" is being waged in the United States.[3] Church-state law is at once a battlefield, an offensive weapon, and a defensive shield in the culture war. A key dispute in church-state law concerns the extent to which the Establishment Clause and analogous state constitutional provisions restrain the power of government to include religious entities in public benefit programs. Strict separationists argue that these constitutional provisions generally forbid government from providing benefits to seriously religious entities, including schools and social service providers. Others argue that these constitutional provisions allow government to include religious organizations (even seriously religious ones) in such programs on a neutral basis.

Although there are a number of important exceptions, progressives tend to embrace strict separationism and the orthodox tend to favor neutrality theory. It may be no coincidence that strict separationism, as applied by the Supreme Court, forbids government funding of seriously religious entities (which tend to be "orthodox") but allows funding of merely "religiously affiliated" institutions (which tend to be more "progressive"). Thus, one might understand strict separationism as a weapon progressives use to penalize their cultural opponents. Unsurprisingly, then, many in the orthodox camp decry strict separationism and urge the Court to reject it.

Adherents of both strict separation and neutrality point to *Everson v. Board of Education*, a 1947 decision commonly considered to be the first "modern" Establishment Clause case.[4]

The rhetoric of *Everson* is strict separationist, the outcome consistent with neutrality theory. Both paradigms have been present in subsequent Establishment Clause jurisprudence. However, in the four decades following *Everson*, strict separationism was the dominant paradigm, particularly in the 1970s and 1980s. During this period, the Court repeatedly held that government violated the Establishment Clause by including religious schools in education funding programs.[5] By the early part of this decade, neutrality had become the dominant paradigm in funding cases.[6] Foreshadowing the paradigm shift in funding cases, the Court repeatedly rejected the argument that the Establishment Clause required or justified government discrimination against non-governmental religious speech.[7]

We believe that the paradigm shift in Establishment Clause funding cases has likely contributed to the recent uptick in conflicts between religious associational freedom and nondiscrimination rules in two ways. First, the Court's changed Establishment Clause jurisprudence diminished the power of a once-potent weapon used by progressives to penalize their cultural opponents. The reduced power of this weapon hardly convinced progressives to give up the fight; instead, they relied in greater measure upon a different weapon: nondiscrimination rules. This shift in rhetoric was particularly obvious during the early debates over President George W. Bush's Faith-Based and Community Initiative. Progressive opponents of the initiative initially tended to invoke standard strict separationist arguments, such as protecting taxpayers from supporting organizations whose religious views they reject. When these arguments failed to gain much traction, attacks on "funding bigotry" took center stage.

Second, the Establishment Clause paradigm shift enabled and caused more intentionally religious organizations to seek participation in government programs, thereby creating conflicts with nondiscrimination rules. Rules barring religious discrimination in employment may have governed the programs for years, but strict separationism generally limited participation to those groups that had no trouble complying with such rules. When seriously religious groups became eligible, conflicts arose.

I. A Brief Survey of Selected Nondiscrimination Rules

Government rules barring discrimination on the basis of religion and sexual orientation might usefully be divided into two categories: police power rules, which governments apply to persons by virtue of their presence in or connection with a particular jurisdiction; and conditions on access to government benefits. What follows is a sampling of such nondiscrimination rules, designed primarily to illustrate the many contexts in which such rules are applied.

A. Police Power Rules

1. Employment

The federal and almost every state government generally forbids employers from taking into account an employee's or applicant's religious beliefs in their personnel decisions. However, virtually all police power laws banning religious discrimination in employment exempt religious employers. Title VII of the federal Civil Rights Act of 1964[8] forbids religious discrimination[9] by covered employers[10] but expressly exempts, in separate statutory sections, religious schools[11] and all religious employers[12] with respect to their treatment of employees and applicants for employment.

Religious exemptions in state laws vary. Some mirror Title VII, explicitly exempting religious employers from their bans on religious discrimination. Others categorically exempt religious employers from *all* the prohibitions of the nondiscrimination law, including ones pertaining to race, sex, and national origin. Still others exempt religious employers only with respect to certain positions.

With regard to sexual orientation, Title VII does not forbid employers from making employment decisions on this basis.[13] Seventeen of the eighteen jurisdictions prohibiting sexual orientation discrimination in employment fairly clearly exempt religious organizations from the prohibition, at least with respect to some job positions.[14]

2. Public Accommodations and Business Establishments

Title II of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, or national origin in public accommodations.[15] In part because of the relatively narrow definition of "public accommodation" in the federal statute, conflicts between the ban on religious discrimination and genuine religious associational freedom are virtually nonexistent.[16]

Many states also ban discrimination in the operation of public accommodations or business establishments. Such bans often cover discrimination on the basis of religion and sexual orientation. Because such state bans often have a broader definition of "public accommodation" (or simply cover the broader category of "business establishments"), conflicts between such laws and religious freedom are more common.

For example, California courts have construed the state's Unruh Civil Rights Act to ban discrimination on the basis of sexual orientation in business establishments.[17] In *Benitez v. North Coast Women's Care Medical Group*, a lesbian sued her doctor after she declined to perform a particular infertility treatment upon her.[18] The doctor contends that, for religious reasons, she will not provide certain infertility treatments to unmarried women, including homosexual women. The plaintiff in *Benitez* is arguing that the doctor's action violates the Unruh Act's ban on sexual orientation discrimination in business establishments. The doctor asserted a religious freedom defense, and the California Supreme Court is currently considering the viability of that defense.[19] In *Doe v. California Lutheran High School Association*, a Christian high school expelled two students for engaging in homosexual conduct. The students sued, claiming that the school discriminated against them and thus violated the Unruh Act.[20]

Numerous other states forbid sexual orientation discrimination in public accommodations or business establishments. These include Connecticut,[21] the District of Columbia,[22] Hawai'i,[23] Illinois,[24] Maine,[25] Maryland,[26] Massachusetts,[27] Minnesota,[28] New Hampshire,[29] New Jersey,[30] New Mexico,[31] New York,[32] Oregon,[33] Rhode Island,[34] Vermont,[35] Washington,[36] and Wisconsin.[37]

3. Education

Some jurisdictions prohibit religious and/or sexual orientation discrimination by private educational institutions. These include the District of Columbia,[38] Maine,[39] Minnesota,[40] New York,[41] and Vermont.[42] Such bans routinely exempt religious schools.[43]

B. Conditions on Access to Benefits

Police power rules are not the sole means by which governments pressure private organizations to ignore religion and "sexual orientation" in their personnel policies. Eligibility for numerous government benefits is conditioned upon compliance with a nondiscrimination rule. Generally speaking, nondiscrimination conditions on access to benefits currently present a greater threat to religious associational freedom than do police power rules, because they are less likely to exempt religious organizations from their bans on religious and sexual orientation discrimination.

1. Government Contractors and Grant Recipients

Beyond their obligation to comply with Title VII, organizations that receive federal financial assistance are subject to four additional civil rights statutes.[44] None of these statutes forbids discrimination on the basis of religion or sexual orientation, and thus do not substantially implicate religious associational freedom. However, certain program-specific federal statutes forbid recipients of federal funds from discrimination on the basis of religion in employment. These include the Workforce Investment Act of 1998,[45] the Omnibus Crime Control and Safe Streets Act of 1968,[46] the statute governing the Community Development Block Grant program,[47] and the statute governing the Head Start program.[48] In addition to rules governing federal financial assistance, some states require their contractors and grantees—including religious ones—to ignore religion in their staffing decisions.[49]

2. *Access to State Employee Charitable Campaigns*

Through state employee charitable campaigns, many states facilitate donations by their employees to qualified charities. To participate in a campaign, a charity typically must satisfy certain rules laid down by the state. Some states condition eligibility upon compliance with a nondiscrimination rule. For example, Connecticut requires charities to affirm that they "do not discriminate or permit discrimination against any person or group of persons except in the case of bona fide occupational qualification on the grounds of… religious creed… marital status… [or] sexual orientation."[50] Michigan requires charities "to provide equal membership/employment/service opportunities to all eligible persons without regard to… religion."[51]

3. Speech Fora

As discussed below, many public universities have withheld recognition and attendant benefits to student religious groups that "discriminate" on the basis of religion or sexual orientation. Some secondary schools have also applied such rules to student religious groups.[52]

II. The Magnitude of the Threat Posed by Religion and Sexual Orientation Nondiscrimination Rules to Religious Associational Freedom

It is difficult to overstate the threat to religious freedom posed by religion and sexual orientation nondiscrimination rules. A key to understanding the magnitude of the threat is realizing that many homosexual rights advocates equate sexual orientation with race. More specifically, they contend that those that take homosexual conduct into account in personnel decisions are as morally repugnant as those who practice invidious discrimination against African-Americans. If they persuade law-makers and judges to embrace this view, the law would treat theologically conservative religious organizations the same way it treats racists. Racist organizations are utterly marginalized by the law: they are subject to liability under police power rules and they are ineligible for a host of valuable government benefits (properly so). Given the involvement of government in virtually every area of life, there are numerous points of contact between private groups and government. Each of these points of a contact is a context in which a nondiscrimination rule might be applied. It is reasonable to believe that at least some homosexual rights supporters desire to create a similar situation for theologically conservative religious organizations that consider a person's homosexual conduct in making decisions about that person.

There are numerous ways in which we might get closer to such an unwelcome state of affairs. First, more jurisdictions could adopt police power nondiscrimination rules without adequate religious exemptions. Second, government might condition access to more and more benefits upon compliance with religion and sexual orientation nondiscrimination rules. Third, governments might step up enforcement of existing nondiscrimination rules.

One might reasonably speculate that future proposals for police power bans on sexual orientation discrimination will not include adequate religious exemptions. The evolution of the religious exemption in the proposed federal Employment Non-Discrimination Act (ENDA) tends to support this speculation. When it was first introduced in 1994, ENDA categorically exempted non-profit religious employers.[53] Subsequent versions did likewise.[54] The version in the current Congress, however, appears to be somewhat more limited. It categorically exempts only those employers that "ha[ve] as [their] primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief."[55] With respect to religious employers that do not fall within this categorical exemption, the ban on sexual orientation discrimination:

> shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship.[56]

There is an additional, somewhat unclear provision that allows religious employers to require employees in "similar positions" to conform to those religious tenets the employer

declares to be significant.[57] Whatever ambiguities exist in this language, it is undeniable that the religious exemption is narrower than in all the previous versions of ENDA.

In addition, the current version of ENDA appears to restrict the power of employers to consider the extramarital sexual activity of their employees—even if they do not single out homosexual behavior for especially adverse treatment. ENDA generally does not impose liability on employers who take actions that have a disparate impact on homosexuals.[58] However, the bill appears to forbid employers in states that do not allow same-sex marriage from adopting and enforcing policies or rules whose application turns on whether employee or applicant is married.[59]

Recent developments in Illinois also contribute to the concern that newer police power bans on sexual orientation discrimination will not include adequate religious exemptions. As footnoted above, it appears as though the recently amended Illinois Human Rights Act does *not* exempt religious employers from its ban on sexual orientation discrimination.

There are other contexts in which religious associational freedom is at risk. For one, theologically conservative institutions of higher education may face challenges to their accredited status. The American Psychological Association (APA), for example, accredits doctoral graduate programs in psychology.[60] In deciding whether to accredit an institution's program, the APA examines whether "the program avoids any actions that would restrict program access on grounds that are irrelevant to success in graduate training."[61] This language is commonly understood to require accredited graduate psychology programs to ignore the sexual orientation of students and faculty. A footnote to this language reads as follows:

This requirement does not exclude programs from having a religious affiliation or purpose and adopting and applying admission and employment policies that directly relate to this affiliation or purpose so long as: (1) Public notice of these policies has been made to applicants, students, faculty, or staff before their application or affiliation with the program; and (2) the policies do not contravene the intent of other relevant portions of this document or the concept of academic freedom. These policies may provide a preference for persons adhering to the religious purpose or affiliation of the program, but they shall not be used to preclude the admission, hiring, or retention of individuals because of the personal and demographic characteristics described in Domain A, Section 5 of this document (and referred to as cultural and individual diversity). This footnote is intended to permit religious policies as to admission, retention, and employment only to the extent that they are protected by the United States Constitution. It will be administered as if the United States Constitution governed its application.

Some students and psychologists urged the APA to drop the footnote, complaining that some religious schools created an "atmosphere of exclusion" by drawing their faculty and students from among those who agreed with their statements of faith and codes of conduct. After extensive review, the APA elected not to eliminate the footnote. The U.S. Department of Education's role may well have been decisive. The Department suggested that if the APA removed the footnote, it would consider revoking APA's status as an accrediting body.[62] The APA explicitly identified the Department's exertion of pressure as an important reason why it chose not to eliminate the footnote.[63] It is hardly inconceivable that the APA might try once again to change its stance towards conservative religious schools, and that a more accommodating Secretary of Education might allow that to happen.

Although not a present concern, it is not inconceivable that the tax-exempt status of theologically conservative religious groups might one day be in jeopardy. Those defending the application of sexual orientation nondiscrimination rules to religious groups routinely cite *Bob Jones University v. United States*, the case in which the Supreme Court upheld an Internal Revenue Service decision to revoke the university's tax-exempt status because of its racially discriminatory admissions standards.[64] Some academic commentators have suggested similar treatment for organizations that deem homosexual conduct immoral and adopt personnel policies consistent with that belief.[65]

III. Constitutional Limits on the Application of Religion and Sexual Orientation Nondiscrimination Rules to Religious Organizations

A. Right of Expressive Association

The Supreme Court has recognized that implicit in the First Amendment freedoms of speech, assembly, and petition is the freedom to gather to express ideas—what the Court terms a "right of expressive association."[66] Expressive association is protected because "[i]f the government were free to restrict individuals' ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect."[67] The Supreme Court has already held that in some circumstances the right of expressive association trumps governmental nondiscrimination policies. The Court in *Boy Scouts of America v. Dale,*[68] for example, held that New Jersey violated the Boy Scouts' expressive association rights by applying the New Jersey Law Against Discrimination to force the Scouts to retain an active homosexual as a scoutmaster.[69] The Court determined that the Scouts were an expressive association because they seek to instill values in young people through activities like camping and fishing.[70] Among these is that "homosexual conduct is not morally straight."[71] Forcing the Scouts to include a gay scoutmaster, the Court said, "would… surely interfere with the Boy Scouts' choice not to propound a point of view contrary to its beliefs."[72]

Likewise, the Court held in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*[73] that Massachusetts could not use its public accommodations law to force the private organizers of a St. Patrick's Day parade to include a contingent of self-identified homosexual persons.[74] The Court found that the parade is "a form of expression," the parade marchers "are making some sort of collective point, not just to each other but to bystanders along the way."[75] The parade organizers were not espousing any views about human sexuality.[76] Forcing the parade organizers to include the homosexual persons, according to the Court, would "violate[] the fundamental rule of protection under the

First Amendment, that a speaker has the autonomy to choose the content of his own message."[77]

When the government forbids a religious organization from discriminating on the basis of religious belief, whether directly through a police power rule or indirectly as a condition on access to a benefit, the government's actions run contrary to *Dale* and *Hurley.* Religious organizations, such as churches, student groups, private religious schools, or religious charities, are expressive associations.[78] Like the Scouts in *Dale*, they seek to instill certain values in their members, employees, and/or patrons.[79] They operate to foster Christian belief, educate young people, or perform social services. These are the exact activities that Justice O'Connor listed in *Roberts v. United States Jaycees* as examples of expressive association.[80] "[P]rotected expression may… take the form of quiet persuasion, inculcation of traditional values, instruction of the young, and community service."[81] For this reason, there is generally little debate concerning whether a religious organization is an expressive association.[82]

For government to use a nondiscrimination policy to force religious organizations to accept members or hire employees who disagree with their religious beliefs impermissibly burdens the right of expressive association. A church stays true to its doctrine by hiring only pastors and other employees that adhere to church doctrine. A private religious school ensures that its faculty teaches consistent with the school's beliefs by hiring only teachers that share its beliefs. A religious student group maintains its religious mission and identity by restricting those that lead the group to hold the same beliefs. Like the Scouts in *Dale*, telling these groups to abandon their religious criteria for employees or members forces them to "propound a point of view contrary to [their] beliefs."[83]

For example, in *Christian Legal Society v. Walker*, Southern Illinois University (SIU) denied a Christian Legal Society (CLS) chapter the status and benefits of official university recognition because of the group's religious criteria for officers and members.[84] The Seventh Circuit Court of Appeals held that SIU's application of its antidiscrimination policy to CLS violated the group's right of expressive association.[85] "SIU's enforcement of its antidiscrimination policy upon penalty of derecognition can only be understood as intended to induce CLS to alter its membership standards… in order to maintain recognition."[86] Application of the antidiscrimination policy in this way, according to the Seventh Circuit, "burdens CLS's ability to express it ideas."[87]

Governments typically argue that conditioning access to a benefit on agreement to a nondiscrimination policy is distinguishable from the direct application of a nondiscrimination policy at issue in cases like *Dale* and *Hurley*.[88] *Dale* and *Hurley,* according to the government, are "forced inclusion" cases; the government was directly forcing an association to accept persons that alter its expression. The denial of a government benefit to a religious group is different, since the government is not forcing the religious group to do anything. The religious group is free to associate and speak all it wants; it simply cannot have access to the funding, university recognition, government contract, or other benefit the government happens to be administering. The government thus concludes that *Dale* and *Hurley* should not apply.

This argument is an overly narrow construction of the right of expressive association. The Supreme Court has explained that interference with the right of expressive association may "take many forms."[89] Even where government is not directly regulating or restraining a group's ability to associate, the government may nonetheless be impermissibly interfering with the right of expressive association. In *NAACP v. Alabama ex rel. Patterson,*[90] for example, the Court held that for Alabama to require the NAACP to disclose its membership lists was an unconstitutional burden on association even though the state had "taken no direct action… to restrict the right of members to associate freely."[91] Likewise, in *Healy v. James*,[92] the Court held that the denial of official college recognition violated Students for a Democratic Society's associational rights even though the "administration ha[d] taken no direct action to restrict the rights of petitioners to associate freely."[93]

The Supreme Court recently considered *Patterson* and *Healy* in deciding *Rumsfeld v. FAIR.*[94] It explained that although the laws at issue in those cases "did not directly interfere with an organization's composition, they made group membership less attractive, raising the same First Amendment concerns about affecting the group's ability to express its message."[95] That the "same First Amendment concerns" are raised whether the interference with the right of expressive association is direct or indirect suggests that any distinctions between the two are constitutionally insignificant.

Reinforcing this assertion is the fact that the Supreme Court has specifically held that to impose penalties or withhold benefits from individuals because of their exercise of associational rights violates the right of expressive association.[96] In *Keyishian v. Board of Regents,*[97] for example, the Court held that a public university could not deny persons the benefit of employment because of their association with "'subversive' organizations."[98] It expressly rejected the premise "that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action."[99]

At least three federal circuit courts have specifically held that it violates the right of expressive association for government to condition access to a benefit on accepting persons inimical to an association's purpose. The Seventh Circuit in *Walker*, as noted above, held that conditioning official university recognition on agreement to a religion and sexual orientation nondiscrimination policy violated the local CLS chapter's expressive association rights even though Southern Illinois University "was not forcing CLS to do anything at all."[100] The Eighth Circuit in *Cuffley v. Mickes*[101] held that requiring the Ku Klux Klan to accept "non-Aryans" as a condition of participating in Missouri's Adopt-a-Highway program violated the Klan's right of association though the Klan had "no right to adopt a highway."[102] The Second Circuit in *Hsu v. Roslyn Union Free School District No. 3*[103] held that it violated the statutory right of equal access for a school district to condition recognition of a religious student group on the group's pledge not to discriminate on the basis of religion.[104]

More generally, the doctrine of unconstitutional conditions mandates that the government cannot attach a string to a benefit so as to "produce a result which it could not command directly."[105] In *Rumsfeld v. FAIR,* for example, the issue before the Court was whether the federal government could use the Solomon Amendment to condition government funding on granting military recruiters equal access to university campuses.[106] The Court explained that "the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students."[107] *Dale* and *Hurley* establish that the government cannot directly force religious organizations to accept members or hire employees that disagree with their religious beliefs. The doctrine of unconstitutional conditions means the government should not be able to accomplish the same result simply by conditioning a benefit on agreement to a religion nondiscrimination policy.

The primary case relied on by government defendants for their argument that conditioning access to a benefit can be distinguished from *Dale* is *Boy Scouts of America v. Wyman*.[108] In *Wyman*, the Scouts were denied participation in Connecticut's state employee charitable campaign. Connecticut denied the Scouts' application to be an approved charity because they bar homosexual persons from membership.[109] The Scouts sued arguing that the exclusion from the charitable campaign violated their expressive association rights under *Dale*.[110] The Second Circuit held that the Scouts' expressive association rights had not been violated, distinguishing *Dale* as an attempt to directly force the Scouts to accept a member that would compromise its message.[111]

Wyman's reasoning is suspect on a number of grounds. First and foremost, the underlying premise of *Wyman*—that an indirect burden on associational rights is permissible—runs contrary to the well-established Supreme Court precedent explained above.[112] Second, *Wyman* improperly conflates forum analysis and expressive association.[113] The Second Circuit deemed Connecticut's charitable campaign a nonpublic forum, and thus found reasonableness the applicable standard of review for the Scouts' expressive association claim.[114] The right of expressive association, however, is not contingent on the nature of the forum.[115] If a group otherwise has a right to be in a speech forum, whether public or not, the question is can that right of access be conditioned on accepting persons inimical to the group's purpose? The constitutional analysis of that condition is divorced from the nature of the forum involved.[116] Third, *Wyman* rests on the dubious proposition that Connecticut's charitable campaign involves a government subsidy.[117] The only money involved in the campaign, however, comes from state employees giving their own money to private charities of their choice.[118] Because this is private money, not government money, the charitable campaign should not have been analyzed as a government subsidy.[119] Moreover, access to the campaign forum itself is not properly considered a government subsidy.[120] If forum access were a subsidy, then the government in *Good News Club v. Milford Central School,*[121] *Lamb's Chapel v. Center Moriches Union Free School District,*[122] and *Rosenberger v. Rector of the University of Virginia*[123] should have been able to deny the religious groups access to its forum simply by contending that it had chosen not to subsidize religion. Instead the Supreme Court held in each case that excluding the religious group from the government's forum ran afoul of the First Amendment.[124] Access to a forum is thus treated as a right and not a benefit.

Perhaps it is obvious, but the argument that *Dale* is distinguishable as a forced inclusion case is not applicable in the context of police power rules. *Dale* itself dealt with a police power rule—the New Jersey Law Against Discrimination.[125] The law applied to the Scouts directly and regardless of whether the Scouts were seeking any sort of government benefit.

B. Free Speech Clause

Application of a nondiscrimination policy to a religious group may also be viewpoint discriminatory under the First Amendment. It is frequently the case that when government forbids religious organizations from selecting members or hiring employees who share their religious beliefs, it allows other organizations to hire employees or select members that share their organizations' beliefs, whether those beliefs are political, economic, or social.[126] For example, public universities often forbid groups formed around religious ideas but allow groups formed around other ideas. The environmental group may require members to support conservation or recycling. The chess club may require that officers and members share an interest in playing chess. The Republican club may require officers and members to support Republican political ideas. Yet the universities forbid religious groups from requiring that officers and members share the groups' religious beliefs. This difference in treatment is religious viewpoint discrimination.[127]

Government typically claims that this sort of treatment of religious organizations is neutral because *all* organizations must pledge not to select members or hire employees on the basis of religious belief to have access to a particular benefit.[128] This is of course an easy promise for nonreligious organizations. But to claim that such a condition is neutral when applied to a religious organization is formalism that turns a blind eye to reality and ignores established Supreme Court precedent.[129]

In *Widmar*, the university conditioned use of school facilities on student groups refraining from "religious worship or religious teaching."[130] Non-religious student groups could easily comply with this condition and use university facilities; however, the religious group could not. The university, therefore, withdrew the religious group's previously granted access to meeting space.[131] Even though the condition applied to all university groups, the Supreme Court ruled that it was not content-neutral and applied strict scrutiny in holding that the condition violated the religious group's right of expressive association and freedom of speech.[132]

Similarly, in *Rosenberger*, the university argued its policy was viewpoint-neutral because it was not denying funding to a particular religious perspective but denying all student organizations funding for religious content.[133] The Supreme Court disagreed:

It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint. The dissent's declaration that debate is not skewed so long

as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.[134]

Finally, in *Lamb's Chapel*, school officials argued that they were not discriminating against a church that sought access to show a religious film because all community groups were banned from speaking on religious subject matter.[135] The Supreme Court again dismissed the argument that this was neutral:

> That all religions and all uses for religious purposes are treated alike… however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.[136]

Like the government's treatment of religious organizations in *Widmar, Rosenberger*, and *Lamb's Chapel*, when government conditions access to a benefit on agreement to a religion nondiscrimination policy, government applies to all groups a condition that matters only to religious groups. While the nondiscrimination requirement applies to all organizations, it prevents only the religious organizations from accessing the particular government benefit in question, because only religious organizations need to apply religious qualifications for membership or employment to protect their expressive purpose.[137]

C. Free Exercise Clause

The government also violates the Free Exercise rights of religious organizations when it forbids them from selecting members or hiring employees on the basis of religious belief.[138] Government typically argues that its nondiscrimination policy is neutral and generally applicable and therefore not subject to strict scrutiny under *Employment Division v. Smith*.[139] Regulations "impos[ing] special disabilities on the basis of religious views or religious status," however, remain presumptively unconstitutional, even under *Smith*.[140] The Supreme Court in *Church of the Lukumi Babalu Aye v. City of Hialeah*[141] struck down an ordinance that prohibited slaughtering animals for religious purposes, but not for commercial purposes or sport.[142] The Court held that the law was "substantially underinclusive" and, therefore, impermissibly targeted religion.[143]

When government applies a rule of no religious discrimination to a religious organization it similarly targets religion. For example, the government's nondiscrimination policy prohibits a Quaker organization from requiring its employees or members to adhere to pacifist religious beliefs, but permits an antiwar organization to tell employees or members they must oppose war. It prohibits an Orthodox Jewish organization from requiring members and officers to adhere to a kosher diet for religious reasons, but permits a vegetarian organization to tell its members and officers that they must not eat meat. In each instance, the government's objective of forbidding discrimination is pursued with respect to religious organizations, but not with respect to analogous non-religious organizations. Such a policy is fatally under-inclusive and unconstitutional under the Free Exercise Clause.[144]

It is also often the case that the government, at least in practice, is granting other organizations exemptions from its nondiscrimination policy.[145] For example, a public university's nondiscrimination policy may forbid gender discrimination but fraternities and sororities are granted exemptions to select members on the basis of gender.[146] Any such exemptions render the government's nondiscrimination requirement not generally applicable and, therefore, subject to strict scrutiny.[147]

While the so-called "hybrid-rights doctrine" has received a mixed reception by the federal courts, the Supreme Court in *Smith* expressly preserved the application of strict scrutiny for "a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns."[148] Using the "cf." signal, the Court invoked *Roberts v. Jaycees*, a case involving both freedom of association and a nondiscrimination rule, and quoted the following: "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed."[149] If there were ever a case warranting application of the hybrid rights doctrine, the government's decision to prohibit religious organizations from selecting members or hiring employees on the basis of religion is it.

D. Church Autonomy Doctrine

The Supreme Court has found that the religion clauses of the First Amendment provide religious organizations with the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[150] This so-called "church autonomy doctrine" has been applied in a line of cases protecting religious organizations against employment laws that would otherwise interfere with their internal management. For example, in *Alicea-Hernandez v. Catholic Bishop of Chicago*,[151] the Seventh Circuit held that a religious organization could not be held liable under Title VII for gender and race discrimination claims brought by a former press secretary, since it "would result in an encroachment by the state into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment."[152] Likewise, in *NLRB v. Catholic Bishop of Chicago,*[153] the Supreme Court held that the National Labor Relations Act could not be applied to lay teachers employed by Catholic schools, since it "would implicate the guarantees of the Religion Clauses."[154]

The protections of the church autonomy doctrine are not limited to actual churches; rather, they have been extended to various religiously-affiliated institutions, including schools, hospitals, and charities.[155] The Sixth Circuit in *Hollins v. Methodist Healthcare*[156] in fact specifically held that to invoke these protections "an employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization."[157]

When government applies a religion nondiscrimination law to a religious organization, either directly or indirectly, it intrudes into the internal affairs of a religious organization. It rips away from the organization the ability to define itself as religious. The organization must hire employees or accept members that disagree with its core religious beliefs.

This interferes with the internal management of religious organizations and therefore runs afoul of the First Amendment religion clauses.[158]

CONCLUSION

The increased application of sexual orientation and religion nondiscrimination rules to religious organizations poses a serious threat to the constitutionally protected freedom of such organizations. Theologically conservative religious organizations are particularly threatened by this trend, as they are more likely to draw members of their communities from among those who share their faith commitments, both doctrinal and behavioral. Such organizations are also far more likely to resist the societal trend towards affirmation of homosexual activity.

One need not agree with their theological and moral positions to be concerned about the attack on their core freedoms. Religious organizations should be allowed to maintain their distinctly religious character, free from undue government pressure. Such freedom, properly understood, does not merely restrain the government's power to regulate their practices through police power rules. It also limits the state's authority to pressure religious groups to abandon sincere religious beliefs and practices by withholding valuable benefits or full participation in public life. Fortunately, the Supreme Court has already laid a solid foundation for the full constitutional protection of these important exercises of freedom, and we are cautiously optimistic that the courts will protect liberty in the event legislatures and other rule making bodies give insufficient weight to the Constitution's guarantees.

Endnotes

1 D.C. Code § 2-1402.11(a) (2007); Cal. Gov't Code § 12940(a) (West 2007); Conn. Gen. Stat. § 46a-81c (2007); Haw. Rev. Stat. § 378-2(1)(a) (2006); 775 Ill. Comp. Stat. Ann. § 5/1-103(Q) (2007); Me. Rev. Stat. Ann. tit. 5, § 4553(10)(G) (2006); Md. Ann. Code Ann. art. 49B, § 16(a)(1) (2007); Mass. Gen. Laws. Ann. ch. 151B, § 4(1) (West 2007); Minn. Stat. Ann. § 363A.08(2) (West 2007); Nev. Rev. Stat. 613.330(1) (2006); N.H. Rev. Stat. Ann. § 354-A:2(I) (2006); N.J. Rev. Stat. Ann. § 10:5-12(a) (West 2006); N.M. Stat. Ann. § 28-1-7(A) (2007); N.Y. Exec. Law § 296(1)(a) (McKinney 2007); S.B. 2, 74th Legis. Assem., 2007 Reg. Sess. (Or. 2007) (enacted) (Oregon Equality Act, signed May 9, 2007); R.I. Gen. Laws § 28-5-7(1) (2006); Vt. Stat. Ann. tit. 21, § 495(a)(1) (2006); Wis. Stat. Ann. § 111.36(1)(d) (West 2007). As of this writing, bills banning sexual orientation employment discrimination in two states (Colorado and Iowa), are on their governors' desks. S.B. 07-025, 66th Gen. Assem., 1st Reg. Sess., (Colo. 2007) (as passed by Senate, May 3, 2007); S. File 427, 82d Gen. Assem., 1st Reg. Sess. (Iowa 2007) (as passed by Senate Apr. 25, 2007).

2 See, e.g., Vermont Code of Judicial Conduct, Admin. Order No. 10 (2000).

3 James Davison Hunter, Culture Wars: The Struggle to Define America (1991).

4 330 U.S. 1 (1947).

5 Ball v. United States, 140 U.S. 131 (1891); Aguilar v. Felton, 473 U.S. 402 (1985); Meek v. Pittenger,

421 U.S. 349 (1975) (plurality in part); Lemon v. Kurtzman, 403 U.S. 602 (1971); Comm. for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Essex v. Wolman, 409 U.S. 808 (1972) (summarily aff'd).

6 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995); Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

7 Widmar v. Vincent, 454 U.S. 263 (1981); Westside Bd. of Educ. v. Mergens, 496 U.S. 226 (1990)

(plurality in part); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Capitol Square Review & Advisory Bd. v. Pinette,

515 U.S. 753 (1995) (plurality in part); Rosenberger, 515 U.S. 819; Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

8 Title VII, § 701, July 2, 1964, Pub. L. 88-352, 78 Stat. 253 (codified as amended at 42 U.S.C. § 2000e (2007)).

9 42 U.S.C. § 2000e-2(a) (2007). Title VII also forbids discrimination on the basis of race, color, sex, or national origin. *Id.*

10 *Id.* § 2000e(b) (defining "employer").

11 *Id.* § 2000e-2(e) ("[n]otwithstanding any other provision of this subchapter… it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion").

12 *Id.* § 2000e-1(a) ("[t]his subchapter shall not apply to… a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities").

13 The proposed Employment Non-Discrimination Act of 2007 would impose civil liability upon employers who discriminate on the basis of "sexual orientation" and "gender identity." H.R. 2015, 110th Cong. § 1 (2007). Notably, it does not categorically exempt religious employers. *Id.* § 6. Previous versions did tend to categorically exempt religious employers. *See, e.g.,* H.R. 3285, 108th Cong. § 9 ("This Act shall not apply to a religious organization.").

14 It is unclear, however, whether Illinois' ban on sexual orientation discrimination covers religious employers. The Illinois Human Rights Act declares that a religious organization is not an "employer" subject to liability for religious discrimination "with respect to the employment of individuals of a particular religion." 775 ILCS 5/2-101(B)(2). In other words, a religious employer may "discriminate" on the basis of religion. It is far from self-evident that this language permits a religious employer to take a person's homosexual orientation or conduct into account in personnel decisions.

15 42 U.S.C. §§ 2000a-2000a-6 (2007). Title II does not ban discrimination on the basis of sexual orientation.

16 *Id.* § 2000a(b).

17 Cal. Civ. Code § 51 (West 2007).

18 No. GIC 770165, 2004 WL 5047112, at *1 (Cal. Super. Ct. Oct. 28, 2004), *vacated*, N. Coast Women's Care Med. Group v. Super. Ct., 37 Cal. Rptr. 3d 20, (Cal. Ct. App. 2005), *vacated*, 40 Cal.Rptr.3d 636 (Cal. Ct. App. 2006), *review granted and superseded*, 139 P.3d 1 (Cal. Jun. 14, 2006) (No. S142892).

19 N. Coast Women's Care Med. Group, 139 P.3d 1.

20 No. RIC 441819 (Cal. Super. Ct. filed Dec. 15, 2005). *See also* Butler v. Adoption Media, LLC, No. C 04-0135, 2007 WL 963159, at *1 (N.D. Cal. Mar. 30, 2007) (Unruh Act sexual orientation discrimination claim against adoption websites).

21 Conn. Gen. Stat. § 46a – 81d (2007).

22 D.C. Code § 2-1402.31.

23 Hawai'i Stat. § 489-1 *et seq*.

24 775 ILCS 5/1-102 *et seq.*

25 Me. Rev. Stat. § 4591-94F.

26 Md. Ann. Code art. 49B § 5.

27 Mass. Gen. Laws Ann. ch. 272, §§ 92A, and 98.

28 Minn. Stat. §363A.01 *et seq.*

29 N.H. Rev. Stat. § 354-A:1 *et seq.*

30 N.J. Stat. Ann. § 10:5-1 *et seq.*

31 N.M. Stat. Ann. § 28-1-1 *et seq.*

32 N.Y. Exec. Law § 296(2).

33 Oregon Equality Act, S.B. 2, signed into law on May 9, 2007.

34 R.I. Gen. Law. § 11-24-2.

35 9 V.S.A. § 4502.

36 West's RCWA § 49.60.215.

37 W.S.A. § 106.52.

38 D.C. Code § 2-1402.41

39 Me. Rev. Stat. Ann. §§ 4601 and 4602 (prohibiting discrimination on the basis of sexual orientation but not on the basis of religion).

40 Minn. Stat. Ann. § 363A.13.

41 N.Y. Educ. Law § 313 (prohibiting discrimination on the basis of religion and sexual orientation).

42 Vt. Stat. Ann. tit. 9, § 4502 (prohibiting discrimination on the basis of creed and sexual orientation)

43 D.C. Code § 2-1401.03(b) (permits religious schools to give preference in admissions to "persons of the same religion"); Me. Rev. Stat. Ann. § 4602 ("The provisions in this subsection relating to sexual orientation do not apply to any education facility owned, controlled or operated by a bona fide religious corporation, association or society."); Minn. Stat. Ann. § 363A.23(1) ("It is not an unfair discriminatory practice for a religious or denominational institution to limit admission or give preference to applicants of the same religion."); *id*. at § 363A.26 (religious exemption from ban on sexual orientation discrimination); N.Y. Educ. Law § 313(1)(a) (permitting religious schools to "discriminate" on the basis of sexual orientation); *id*. at § 313(3)(a) (permitting a religious school "to make such selection of its students as is calculated by such institution to promote the religious principles for which it is established or maintained").

44 Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.; Age Discrimination Act of 1975, 42 U.S.C. §§ 6101-07; Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794; and Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-88

45 29 U.S.C. § 2938(a)(2).

46 42 U.S.C. § 3789d(c)(1).

47 42 U.S.C. § 5309.

48 42 U.S.C. § 9849(a).

49 *See* Paul Taylor, *The Costs of Denying Religious Organizations the Right to Staff on a Religious Basis When They Join Federal Social Service Efforts*, 12 Geo. Mason U. Civ. Rts. L.J 159, 196 n. 128 (2002) (listing eleven states).

50 Connecticut State Employee Campaign Committee 2005 application materials (on file with the authors).

51 Michigan State Employees Combined Campaign Steering Committee 2005 application materials (on file with the authors).

52 Hsu v. Roslyn Union Free Sch. Dist. No. 3, 85 F.3d 839 (2nd Cir. 1996).

53 S. 2238, 103rd Cong. § 7 (1994); H.R. 4636, 103rd Cong. § 6 (1994).

54 H.R. 1863, 104th Cong. § 6 (1995); S. 869, 105th Cong. § 9 (1997); H.R. 1858, 105th Cong. § 9 (1997); S. 1276, 106th Cong. § 9 (1999); H.R. 2355, 106th Cong. § 9 (1999); S. 1284, 107th Cong. § 9 (2001); H.R. 2692, 107th Cong. § 9 (2001); S. 19, 107th Cong. § 509 (2001); S. 1705, 108th Cong. § 9 (2003); H.R. 3285, 108th Cong. § 9 (2003); S. 16, 108th Cong. § 709 (2003).

55 Employment Non-Discrimination Act of 2007, H.R. 2015, § 6(a).

56 *Id*. § 6(b).

57 *Id*. § 6(c).

58 H.R. 2015, 110th Cong. § 4(g).

59 *Id*. § 8(a)(5).

60 http://www.apa.org/ed/accreditation/accrfaq.html (last visited May 5, 2007).

61 Guidelines and Principles for Accreditation of Programs in Professional Psychology, *at* http://www.apa.org/ed/accreditation/G&P0522.pdf (last visited May 5, 2007).

62 33 Monitor on Psychology 1, *Accreditation Committee Decides to Keep Religious Exemption* (January 2002). http://www.apa.org/monitor/jan02/exemption.html.

63 *See id.*

64 461 U.S. 574 (1983).

65 Russell J. Upton, Comment, *Bob Jonesing Baden-Powell: Fighting the Boy Scouts of America's Discriminatory Practices by Revoking Its State-Level Tax-Exempt Status*, 50 Am. U. L. Rev. 793 (2001); David A. Brennen, *Tax Expenditures, Social Justice, and Civil Rights: Expanding the Scope of Civil Rights Laws to Apply to Tax-Exempt Charities*, 2001 B.Y.U. L. Rev. 167 (2001); David B. Cruz, Note, *Piety and Prejudice: Free Exercise Exemption From Laws Prohibiting Sexual Orientation Discrimination*, 69 N.Y.U. L. Rev. 1176 (1994).

66 Rumsfeld v. FAIR, 547 U.S. 47, 126 S. Ct. 1297, 1311-12 (2006); Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

67 FAIR, 126 S. Ct. at 1312.

68 530 U.S. 640 (2000).

69 *Id*. at 654.

70 *Id*. at 649-50.

71 *Id*. at 651.

72 *Id*. at 654.

73 515 U.S. 557 (1995).

74 *Id*. at 574-75.

75 *Id*. at 568.

76 *Id*. at 572; *see also Dale*, 530 U.S. at 655 ("purpose of the St. Patrick's Day parade in Hurley was not to espouse any views about sexual orientation").

77 *Hurley*, 515 U.S. at 573.

78 *See* Christian Legal Soc'y v. Walker, 453 F.3d 853, 862 (7th Cir. 2006) (holding that religious student group is an expressive association); Christian Legal Soc'y v. Kane, 2006 WL 997217, at *20 (N.D. Cal. May 19, 2006) (holding that religious student group is an expressive association); Circle Sch. v. Pappert, 381 F.3d 172, 182 (3d Cir. 2004) ("[b]y nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated to students"); *Roberts,* 468 U.S. at 636 (O'Connor, J., concurring) (citing to Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925), a case about private schools, as an example of an expressive association). *Cf. FAIR,*

126 S. Ct. at 1311-13 (analyzing expressive association claim of private law schools).

79 It is legally insignificant that some cases may involve the right to choose employees as opposed to the right to choose members, as was at issue in Dale and Walker. The Supreme Court has held that the important distinction is between expressive activity and commercial activity, not employees and members. *See Roberts,* 468 U.S. at 633-34 (O'Connor, J., concurring); *see also FAIR*, 126 S. Ct. at 1312 ("the freedom of expressive association protects more than just a group's membership decisions"). For example, lawyering to advance social goals is protected speech, *see* NAACP v. Button, 371 U.S. 415, 429-30 (1963), but ordinary commercial law practice is not. *See* Hishon v. King & Spalding, 467 U.S. 69, 78 (1984). While governmental regulation of the "commercial recruitment of new members" may be permissible, Roberts, 468 U.S. at 635 (emphasis added), governmental regulation of member recruitment by noncommercial groups, such as the Scouts or the Christian Legal Society, violates the First Amendment. *See Dale,* 530 U.S. at 659; *Walker,* 453 F.3d at 862-64. In most cases, the religious groups at issue in these cases are nonprofit, 501(c)(3) organizations. They are specifically prohibited from operating for "commercial purposes." Airlie Foundation v. IRS, 283 F. Supp. 2d 58, 63 (D.D.C. 2003) (denying 501(c)(3) status to organization for engaging in excessive commercial activity); see also 26 U.S.C. § 501(c)(3) (2007). Accordingly, these organizations generally fall on the noncommercial, expressive side of the line.

80 468 U.S. 609.

81 *Id*. at 636 (O'Connor, J., concurring).

82 *Walker*, 453 F.3d at 862 ("It would be hard to argue—and no one does—that CLS is not an expressive association."); Kane, 2006 WL 997217, at *20 ("Hastings does not dispute that CLS engages in expressive association.").

83 *Dale*, 530 U.S. at 654.

84 *Walker*, 453 F.3d at 857-59.

85 *Id*. at 864.

86 *Id*. at 863.

87 *Id*.

88 Boy Scouts of America v. Wyman, 335 F.3d 80, 91 (2d Cir. 2003) ("The effect of Connecticut's removal of the BSA from the Campaign is neither direct nor immediate, since its conditioned exclusion does not rise to the level of compulsion. Consequently, Dale does not, by itself, mandate a result in the current case."); Walker, 453 F.3d at 864 ("SIU objects that this is not a "forced inclusion" case like Dale or Hurley because it is not forcing CLS to do anything at all, but is only withdrawing its student organization status."); Kane, 2006 WL 997217, at *16 ("Hastings is not directly ordering CLS to admit certain students. Rather, Hastings has merely placed conditions on using aspects of its campus as a forum and providing subsidies to organizations."); Evans v. City of Berkeley, 38 Cal. 4th 1, 13 (2006) ("the city did not purport to prohibit the scouts from operating in a discriminatory manner; it simply refused to fund such activities out of the public fisc") (internal quotations and citations omitted); Ass'n of Faith-Based Organizations v. Bablitch, 454 F. Supp. 2d 812, 816 (W.D.Wis. 2006) ("Nothing suggests that any member would be compelled to abandon its rights to expressive association in exchange for this limited benefit.").

89 *Dale*, 530 U.S. at 640; see also Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) ("Government actions that may unconstitutionally infringe upon this freedom can take a number of forms.").

90 357 U.S. 449 (1958).

91 *Id*. at 461; *see also* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 101-02 (1982).

92 408 U.S. 169 (1972).

93 *Id*. at 183; *see also* Lyng v. Int'l Union, 485 U.S. 360, 367 n.5 (1988) ("It is clear from previous decisions that associational rights are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference, and that these rights can be abridged even by government actions that do not directly restrict individuals' ability to associate freely.") (internal citations and quotations omitted).

94 126 S. Ct. 1297.

95 *Id*. at 1312.

96 *Roberts*, 468 U.S. at 622; *see also* Clingman v. Beaver, 544 U.S. 581, 586-87 (2005) (observing that it "impose[s] severe burdens on associational rights… to disqualify the [Libertarian Party] from public benefits or privileges"); *FAIR*, 126 S. Ct. at 1312 (observing that the "freedom of expressive association protects" against laws that "impose penalties or withhold benefits based on membership in a disfavored group").

97 385 U.S. 589 (1967).

98 *Id*. at 595.

99 *Id*. at 605. *See also* United States v. American Library Ass'n, 539 U.S. 194, 210 (2003) ("the government may not deny a benefit to a person on a basis that infringes his constitutionally protected… freedom of speech even if he has no entitlement to that benefit") (internal citations and quotations omitted).

100 *Walker*, 453 F.3d at 864.

101 208 F.3d 702 (8th Cir. 2000).

102 *Id*. at 705 n.2, 708-09; see also Knights of the Ku Klux Klan v. East Baton Rouge Parish Sch. Bd., 578 F.2d 1122 (5th Cir. 1978) (holding that school district could not condition use of gymnasium on Ku Klux Klan abandoning its discriminatory membership practices violated First Amendment).

103 85 F.3d 839 (2d Cir. 1996).

104 *Id*. at 872-73. *See also* Boy Scouts of America v. Till, 136 F. Supp. 2d 1295 (S.D. Fla. 2001) (conditioning after-school use of school facilities on agreement to nondiscrimination policy violated First Amendment); Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City Univ., 443 F. Supp. 2d 374 (E.D.N.Y. 2006) (conditioning recognition of Jewish fraternity on agreement to university nondiscrimination policy violated associational rights); 922 F. Supp. 56 (N.D. Ohio 1995) (conditioning use of Convention Center on agreement with a nondiscrimination policy subject to strict scrutiny); Roman Catholic Foundation v. Walsh, 2007 WL 1056772 (W.D. Wis. Apr. 4, 2007) (conditioning university recognition and funding of religious student group on agreement to religion nondiscrimination policy violated group's right of expressive association); 97 Ga. Op. Att'y Gen. 32 (1997) (conditioning university recognition of a religious student organization on agreement to a religion nondiscrimination policy violated the organization's right of association).

105 Perry v. Sindermann, 408 U.S. 593, 597 (1972).

106 *Id*. at 1207.

107 *Id*.

108 335 F.3d 80.

109 *Id*. at 85.

110 *Id*. at 88.

111 *Id*. at 91.

112 *See* discussion *supra* notes 24-43.

113 *Wyman*, 335 F.3d at 91-92.

114 *Id*. at 92.

115 *Walker*, 453 F.3d at 861-64.

116 *Id*.; *see also* Michael S. Paulsen, *A Funny Thing Happened on the Way to the Limited Public Forum: Unconstitutional Conditions on "Equal Access" for Religious Speakers and Groups*, 29 U.C. Davis L. Rev. 653, 666-67 & n.32 (Spring 1996) (explaining that "[t]he condition or limitation should be severed from the forum").

117 *Wyman*, 335 F.3d at 91-92 (relying on Regan v. Taxation with Representation, 461 U.S 540 (1983), to frame its analysis).

118 *Id*. at 84 (noting that "employees make voluntary contributions to charities selected from a list of participating organizations set forth in a booklet that is distributed at the workplace" and that "[g]ifts are made by payroll deduction").

119 The Supreme Court has explained that the government subsidy cases, such as *Regan*, 461 U.S. 540, and *Rust v. Sullivan,* 500 U.S. 173 (1991), only apply "in instances in which the government is itself the speaker, or instances… in which the government used private speakers to transmit specific information pertaining to its own program." Legal Services Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (internal citations and quotations omitted); see also Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (observing that government subsidy cases apply only where "funds raised by the government will be spent for speech and other expression to advocate and defend its own policies"); Rosenberger v. Rector of the Univ. of Va., 515 U.S. 819, 834 (1995) (rejecting application of government subsidy cases because "the University does not itself speak or subsidize transmittal of a message it favors" through a student activity fee). The State of Connecticut neither speaks through its charitable campaign nor pays participating charities through its campaign to transmit its message. Cf. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 805 (1985) ("The Government did not create the [Combined Federal Campaign] for purposes of providing a forum for expressive activity."). Rather, the charitable campaign was created to provide opportunities for state employees to give their money to charity. Thus, the Second Circuit erred in analyzing the charitable campaign under the government subsidy cases. *See Velazquez*, 531 U.S. at 542 (rejecting application of government subsidy cases because legal services program does "not [ ] promote a governmental message").

120 *Cf.* Eugene Volokh, *Freedom of Expressive Association and Government Subsidies*, 58 Stan. L. Rev. 1919, 1920 n.1 (April 2006) (classifying without explanation "access to government property" as a form of government subsidy and citing to Rosenberger, 515 U.S. 819).

121 533 U.S. 98 (2001).

122 508 U.S. 384 (1993).

123 515 U.S. 819.

124 *See Good News Club,* 533 U.S. at 109; *Lamb's Chapel,* 508 U.S. at 394; *Rosenberger,* 515 U.S. at 831-32.

125 *See Dale*, 530 U.S. at 645.

126 *See, e.g., Hsu*, 85 F.3d at 860-61 (listing school groups that require officers and/or members to agree with their purpose and mission); *Bablitch*, 454 F. Supp. 2d at 814 (listing other charities participating in the Wisconsin State Employees Combined Campaign that in some way restrict hiring or selection of board members).

127 *See Good News Club,* 533 U.S. at 109 (excluding Good News Club from school facilities because it "seeks to address… the teaching of morals and character from a religious standpoint" was unconstitutional viewpoint discrimination); *Lamb's Chapel,* 508 U.S. at 394 (denying religious group access to school facilities to show film series on child-rearing "because the series dealt with the subject from a religious standpoint" was unconstitutional viewpoint discrimination); *Rosenberger,* 515 U.S. at 826, 831-32 (denying student activity funds to student newspaper because of the "religious editorial viewpoints" taken by the paper on subjects including "stories about homosexuality" was unconstitutional viewpoint discrimination).

The government's decision to treat similarly situated organizations differently also violates the Equal Protection Clause of Fourteenth Amendment. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985) ("Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."). For example, in Alpha Iota Omega Christian Fraternity v. Moeser, No. 04-765 (M.D.N.C. Mar. 2, 2005) (order granting preliminary injunction), the district court held that for the University of North Carolina to condition recognition of a religious student organization on agreement to a religion nondiscrimination policy violated the Equal Protection Clause, since it "imposed conditions on [a Christian student group] which are inapplicable to other student groups seeking university recognition," and entered a preliminary injunction that "would place the Plaintiffs on the same footing as non-religious organizations which select their members on the basis of commitment."

128 *Kane*, 2006 WL 997217, at *11; *see also* Christian Legal Society v. Kane, 2005 WL 850864, at *8 (N.D. Cal. Apr. 12, 2005) ("Hastings' policy would… bar an atheist group from excluding those who are religious," just as it would a religious group).

129 *See Widmar*, 454 U.S. 263; *Rosenberger*, 515 U.S. 819; *Lamb's Chapel*, 508 U.S. 384.

130 *Widmar*, 454 U.S. at 265.

131 *Id*. at 265.

132 *Id*. at 269-70.

133 *Rosenberger,* 515 U.S. at 830-31.

134 *Id*. at 831-32.

135 *Lamb's Chapel*, 508 U.S. at 393.

136 *Id*.

137 Unlike other organizations, religious organizations define themselves by their shared religious beliefs. "Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself." Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) (emphasis added).

138 *See* Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871) (affirming "[t]he right to organize voluntary religious associations to assist in the expression and dissemination of… religious doctrine").

139 494 U.S. 872, 878-80 (1990); *see also* Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) ("our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice").

140 *Smith*, 484 U.S. at 877.

141 508 U.S. 520.

142 *Id*. at 543-46.

143 *Id.*

144 *Id*. at 546.

145 *See, e.g., Bablitch,* 454 F. Supp. 2d at 814 (noting that "Defendants have permitted several other charitable organizations… to participate notwithstanding that these organizations have similar requirements of faith affirmation for its board members"); *Walker*, 453 F.3d at 866-67 ("SIU has applied its antidiscrimination policy to CLS alone, even though other student groups discriminate in their membership requirements on grounds that are prohibited by the policy.").

Even if the exemptions are provided only in practice and not evident from the face of the nondiscrimination policy, they still trigger strict scrutiny under Smith, 494 U.S. 872. See Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 167 (3d Cir. 2002) (because "the Borough ha[d] tacitly or expressly granted exemptions from [sign] ordinance's unyielding language for various secular and religious… purposes," the ordinance was not generally applicable).

146 A university's exemption for fraternities and sororities from its nondiscrimination policy cannot be excused as necessary for compliance with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2007). The Title IX exemption only exempts universities from liability under Title IX for recognizing fraternities and sororities. *See id.* at § 1681(a)(6)(A). It does not bar universities from otherwise prohibiting fraternities and sororities from discriminating on the basis of gender. Thus, any exemption given from the university's own nondiscrimination requirement is purely voluntary.

147 *Smith*, 494 U.S. at 884 ("where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason"); *see also* Rader v. Johnston, 924 F. Supp. 1540, 1551-53 (D. Neb. 1996) (university's granting of exceptions from on-campus residency rule rendered rule not generally

applicable); Blackhawk v. Pennsylvania, 381 F.3d 202, 209-10 (3d Cir. 2004) (exemptions from fee requirement caused Game Code to "fail[ ] the general applicability requirement").

148 *Smith,* 494 U.S. at 882.

149 *Id*., citing *Roberts*, 468 U.S. at 622.

150 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952). *See also* Serbian E. Orthodox Dioceses v. Milivojevich, 426 U.S. 696, 714 (1976) ("courts are bound to accept the decisions… of a religious organization… on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law"); Hutchison v. Thomas, 789 F.2d 392, 394 (6th Cir. 1986) ("First and Fourteenth Amendments permit… religious organizations to establish their own rules and regulations for internal discipline and government").

151 320 F.3d 698 (7th Cir. 2003).

152 *Id*. at 702-04; *see also* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 790-91 (9th Cir. 2005); Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1577-78 (1st Cir. 1989); Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006); Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1168-69 (4th Cir. 1985); McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972); Hutchison v. Thomas, 789 F.2d 392, 393 (6th Cir. 1986); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360, 363 (8th Cir. 1991); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299, 1302-04 (11th Cir. 2000); Minker v. Baltimore Annual Conf. of United Methodist Church, 894 F.2d 1354, 1358 (D.C. Cir. 1990).

153 440 U.S. 490 (1979).

154 *Id*. at 507.

155 *See, e.g.,* EEOC v. Catholic Univ., 83 F.3d 455 (D.C. Cir. 1996) (university); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991) (hospital); Shaliehsabou v. Hebrew Home of Greater Wash., 363 F.3d 299 (4th Cir. 2004) (religious charity); Feldstein v. Christian Sci. Monitor, 555 F. Supp. 974 (D. Mass. 1983) (religious corporation).

156 474 F.3d 223 (6th Cir. 2007).

157 *Id*. at 225.

158 For this reason, employment nondiscrimination laws, like Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2007), explicitly exempt religious employers. *See* Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 625 (6th Cir. 2000) ("The exemptions reflect a decision by Congress that religious organizations have a constitutional right to be free from government intervention.").

Government sometimes contends that the Establishment Clause of the First Amendment actually requires the application religion nondiscrimination rules to religious organizations receiving government benefits. This argument has been largely rejected by the federal courts. *See, e.g.,* Lown v. Salvation Army, 393 F. Supp. 2d 223 (S.D.N.Y. 2005); Pedreira v. Kentucky Baptist Homes for Children, 186 F. Supp. 2d 757 (W.D. Ky. 2001); but see Dodge v. Salvation Army, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).

Telecommunications & Electronic Media

Conforming Communications Policy to a Constitutional Culture

*By Randolph J. May**

With over a decade elapsed since enactment of the supposedly (but not really) deregulatory Telecommunications Act of 1996, it is time to engage in a radical rethinking of communications law and policy.

Two of 2006's most prominent communications policy topics—so-called Net Neutrality and the AT&T-BellSouth merger—nicely illustrate the main point I wish to make: Much of communications policy throughout the twentieth century rested on foundations that run against the grain of our constitutional culture. The "contra-constitutionalism" ingrained in communications policy has continued even today, even though we now have a dramatically changed, much more competitive communications marketplace, brought about by the digital revolution.

I do not mean to argue here the unconstitutionality of particular laws or policies in the sense of contending they violate outright current constitutional jurisprudence. Rather, I contend that in the current competitive and fast-changing digital communications environment, one radically different from the staid, generally monopolistic analog era in which the counter-constitutional culture was born, a heightened respect for values that inhere in the Constitution would be a good starting point for reforming communications policy.

First consider Net Neutrality. Proposed neutrality mandates would prohibit broadband Internet service providers ("ISPs") such as Verizon or Comcast from taking any action to "block, impair, or degrade" the ability of subscribers to reach any website or from "discriminating" against the content or applications of unaffiliated entities. A popular formulation prohibits broadband ISPs from preventing subscribers from "sending, posting, or receiving" any content or from charging different rates for prioritizing traffic transported over their networks.

Like pleas for "a level playing field" or "fair competition," "Net Neutrality" has a pleasing ring. But pleasing sound bites do not count as constitutional points. Government mandates requiring broadband ISPs to make available their networks for carrying or posting content they otherwise might prefer not to carry or post implicates the ISPs' free speech rights. Under traditional First Amendment jurisprudence, it is as much a free speech infringement to compel a speaker to convey messages against the speaker's wishes as it is to prevent a speaker from conveying such messages.

Those still wedded to analog era regulatory paradigms find it difficult to grasp the notion that government-imposed "neutrality" mandates might violate the First Amendment. They cling to the traditional broadcast and common carrier paradigms that dominated communications policymaking throughout the twentieth century. Under the broadcast model, on the theory that broadcasters use the electromagnetic spectrum, a claimed scarce public resource, it is deemed permissible to curtail broadcasters' free speech rights in ways the First Amendment does not tolerate for non-broadcast media. Thus, the Supreme Court sanctioned the FCC's notorious Fairness Doctrine which required broadcasters, pursuant to obligations to operate in the "public interest," to cover controversial issues and to do so in a balanced (read: neutral) way.

Under the common carrier model, on the theory that telephone companies operate in a monopolistic environment, their rates and terms of service are controlled by the FCC. As long as carriers are allowed to earn a "reasonable" rate of return on their investment, such government control is considered constitutionally permissible. But the Fifth Amendment's prohibition against the "taking" of private property for public use without just compensation stands as an outer boundary against unreasonable or confiscatory regulation.

Today's digital broadband ISPs are neither broadcasters nor common carriers under the Communications Act's regulatory classification scheme or the FCC's rules implementing the statute. They are private businesses that have invested billions of dollars building their own high-speed communications networks. The FCC has classified broadband ISPs as unregulated "information service providers" and repeatedly has determined they operate in a competitive environment. Under these circumstances, efforts to impose neutrality mandates akin to the speech restrictions that have characterized broadcast regulation and non-discrimination mandates akin to common carrier regulation become constitutionally suspect.

Now consider the AT&T-BellSouth merger. The FCC's merger review process has been criticized for many years on different counts. Among the primary criticisms, the Commission substantially duplicates the effort of the Department of Justice and the Federal Trade Commission, the government agencies which are the repository of expertise and experience assessing the competitive impacts of mergers. This duplication of effort is wasteful and causes the review process to drag on unnecessarily.

But a particular feature of the Communications Act adds to communications policy's counter-constitutional milieu with respect to merger reviews. The act delegates authority to the agency to determine whether a proposed merger is in the "public interest." This vague standard, which happens to govern much other FCC activity as well, means no more or less than whatever three of the five FCC commissioners say it means on any given day. Senator Dill, the chief sponsor of the original Communications Act of 1934, remarked that the public interest standard "covers just about everything."

Such a vacuous standard might be thought to violate constitutional separation of powers principles to the effect that Congress may only delegate lawmaking authority when a statute contains an "intelligible principle" to which the administrative agency "is directed to conform." While the Supreme Court

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continues to maintain the validity of the "intelligible principle" test, it thus far has refused to hold that the public interest standard violates the non-delegation doctrine.

Nevertheless, the problematic nature of the standard is evident in the FCC's handling of the AT&T-BellSouth merger and most major mergers that come before the agency. With such unconstrained authority in the agency's hands, merger applicants are forced to enter into unseemly—and non-transparent—negotiations with the commissioners and, in order to win approval in any sort of timely fashion, they must offer up "voluntary" concessions.

In the AT&T-BellSouth case, with one of the three Republican commissioners recused, the two Democrat commissioners refused to approve the merger unless the applicants agreed to accept a new Net Neutrality mandate that both Congress and the FCC thus far have refused to impose on an industry-wide basis. And they agreed to reduce rates for high-capacity services used by large business customers and their competitors, even though the FCC already had deregulated these rates on the basis that competition in this market segment exists. As the Republican commissioners pointed out, neither of these "voluntary" concessions constitutes sound policy. Both are likely to deter new network investment.

The applicants volunteered to abide by other conditions, such as committing to offer new retail broadband customers a $10 per month service, offering stand-alone DSL service, and repatriating 3000 currently outsourced jobs. While some of these conditions may meet some commissioners' notions of the public interest, the problem is that they have virtually nothing to do with any claimed anti-competitive impact of the AT&T-BellSouth merger. If the conditions have any merit at all, the FCC should consider imposing them on all similarly-situated industry participants in generic proceedings.

As conducted under the public interest standard, merger reviews almost always become what I have called a "bizarre bazaar," an unbecoming process featuring midnight behind-the-scenes negotiations not befitting a government committed to constitutional ideals of due process. The way the FCC conducts its merger review process now, bureaucratic discretion is unconstrained by any pre-existing known intelligible principles to guide the regulators, regulated parties, or interested members of the public.

Perhaps it is understandable, if not entirely forgivable, that in an era of limited competition, communications regulatory paradigms were adopted which at least strained certain constitutional norms. But in today's digital era characterized by information abundance, there is no reason to allow such counter-constitutional strains to persist. For anyone looking for a roadmap to reform communications policy, looking to the Constitution would be a good starting point.

Book Reviews

The Supreme Court Opinions Of Clarence Thomas, 1991-2006: A Conservative's Perspective

By Henry Mark Holzer

*Reviewed by Jonathan H. Adler**

Since his nomination to the Supreme Court to replace Justice Thurgood Marshall in 1991, Justice Clarence Thomas has been a magnet for attention. His speeches and public appearances draw crowds and controversy, his principled jurisprudential philosophy both devotion and derision. After fifteen years on the Court, he is already one of the most studied Supreme Court justices of all time. Thomas has been the subject of more profiles, biographies, and book-length treatments than all but the most prominent jurists. Among the titles currently available on Amazon are Scott Michael Gerber's *First Principles: The Jurisprudence of Justice Thomas*, Ken Fostkett's *Judging Thomas: The Life and Times of Clarence Thomas*, Andrew Peyton Thomas' *Clarence Thomas: A Biography*, and the newly released *Supreme Discomfort: The Divided Soul of Clarence Thomas* by Kevin Merida and Michael Fletcher. Several more books were written about his epic confirmation battle, and more profiles are on the way. In 2003, Harper-Collins inked Thomas to a $1.5 million book contract for *My Grandfather's Son: A Memoir*, due for release this October. This may seem a jaw-dropping sum for a Supreme Court Justice's memoir, but it was almost certainly a good investment.

A new addition to the shelf of books on and inspired by Justice Thomas is *The Supreme Court Opinions of Clarence Thomas: 1991-2006: A Conservative's Perspective* by Brooklyn Law School professor emeritus Henry Mark Holzer. Unlike other recent books, Supreme Court Opinions focuses exclusively on Thomas' work on the Court, eschewing biographical details or pop psychoanalysis of what makes the most enigmatic and admired Justice tick. Holzer provides a summary of the three-hundred-plus opinions authored by Justice Thomas during his first fifteen years on the Court (and includes a list of these opinions in an appendix), distilling Thomas' jurisprudence to its essentials.

Supreme Court Opinions provides a useful survey of Justice Thomas' judicial philosophy and its application to various issues, often through the language of Thomas' own opinions. As such, it succeeds in providing a highly sympathetic introduction to the jurisprudence of Justice Thomas. Those hoping for a rigorous academic treatment will be left disappointed, however, as the book lacks much critical analysis.

The book is organized by constitutional provisions, providing a tour of Thomas' opinions, virtually clause by clause. It is filled with extensive quotations and descriptions of Justice Thomas' opinions on various subjects. At times Holzer reproduces lengthy passages, or even whole paragraphs, "so that his words would, without need for anyone's 'interpretation,' speak for themselves." A consequence of this approach is that *Supreme Court Opinions* provides only limited explication of Justice Thomas' interpretive philosophy or its underlying rationale. For instance, Holzer notes that Thomas' dissent in *U.S. Term Limits, Inc. v. Thornton* provides the greatest insight into the Justice's "sophisticated federalism jurisprudence," but his discussion of the lengthy opinion covers less than a page.

Justice Thomas' opinions are remarkable for their philosophical and interpretive consistency. More than any other Justice on the Court—or in recent memory—Justice Thomas eschews silent acquiescence in opinions that do not track his jurisprudential views. Instead, he regularly authors short concurring opinions to qualify his support for his colleagues' interpretive conclusions. Whether or not one subscribes to Thomas' brand of originalism, his collected opinions have substantial jurisprudential force, and are worthy of searching analysis beyond the intended scope of the Holzer analysis. To probe and question Justice Thomas' opinions is to acknowledge the power and importance of his judicial philosophy and contribution to American law.

Holzer accurately describes Thomas as a "thoughtful conservative" whose "reputation among laypersons is not commensurate with his achievements." Justice Thomas has indeed distinguished himself on the Court as an able and articulate explicator of the original meaning of the Constitution. Thomas fans will not doubt enjoy Holzer's overview and summary of Thomas' unique contribution to the Court, and its hint at the further contributions that are yet to come. The substance of his distinctively conservative jurisprudence is worthy of more critical treatment and discussion. *Supreme Court Opinions* is a good reference work regarding the Justice's body of work—something like an annotated greatest hits—and should please Justice Thomas' many fans, but ultimately more work will be needed to earn more converts to his cause.

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The Future of Marriage

by David Blankenhorn

*First Review by Katherine S. Spaht**

*Second Review by Dale A. Carpenter***

David Blankenhorn's *The Future of Marriage* is an ambitious book—ambitious in its exploration of the question it takes seriously: "Will same-sex marriage strengthen or undermine the institution of marriage?" The author brings the prism of different disciplines to bear on the question, including biology, history, anthropology, sociology, and psychology. In doing so, he makes a unique contribution to the debate over "same-sex" marriage.

First, he connects the dots of big ideas inherently contained in the recognition of "same-sex" marriage, such as the elimination of the legal categories of mother and father by replacement with "legal" parent (necessarily unconnected to

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biological parenthood). Secondly, he compares the attitudes of citizens of different countries towards the institution of marriage, as reflected in surveys based on whether those countries recognize or do not recognize "same-sex" marriage. Not surprisingly, Blankenhorn finds a *correlation* between the attitudes of citizens in countries that recognize "same-sex" marriage and their general lack of support for marriage as an institution. Finally, he identifies some of the most vocal supporters of "same-sex" marriage as those interested in "de-institutionalizing" marriage, replacing this social institution with arrangements or families that result from adult choices. These arrangements vary in form from cohabitation to polygamy and polyamory. For abandonment of the fundamental core of the institution of marriage recognizable across history and across cultures—that is the union of a man and a woman—means necessarily that nothing about the institution is immutable.

Let us examine what I consider to be these unique contributions one at a time.

1. *It recognizes big ideas inherently connected to the recognition of "same-sex" marriage.*

In Chapter 6, Blankenhorn argues that, conceptually, recognition of "same-sex" marriage communicates the following ideas: (1) Marriage is not connected to sex. (2) Marriage is not connected to bridging the sexual divide between male and female. (3) Marriage is not connected to rearing children. (4) Marriage is not connected to legal and biological parenthood. (5) Children do not need a father and a mother. These ideas are nothing less than radical; but of course, Blankenhorn is right. Clearly, changing marriage to permit two people of the same sex to marry changes motherhood and fatherhood. Ask the Canadians. Mothers and fathers as legal terms of art are replaced by the asexual legal term "parent." *"Parent"* disconnected from biology, as it must be for one parent of a same-sex union (at least for now), becomes a flexible term that could conceivably extend to any third person with a psychological connection to the child. Currently, unregulated collaborative reproduction, depending upon whose gametes are used, scientifically assists the redefinition of parenthood. The result: *the child is denied the right to know and be cared for by his or her [biological] parents.* Article 7, United Nations Convention on the Rights of the Child.

For Blankenhorn, whose earliest and most influential work sounded the alarm about children reared without fathers, children will bear the brunt of one more disastrous adult experiment. In *Fatherless America* (1995), he marshaled evidence from different disciplines, much from the social sciences, to demonstrate that children suffered from the lack of father involvement across all measures of child well-being. From that vantage point, Blankenhorn recognized that marriage was the best vehicle for assuring that a father remained devoted to and invested in the rearing of his children. Marriage as a social institution united and theoretically bound the father to his children through their mother. As he phrases it, "there can be no fatherhood [a social definition] without marriage."

2. *It compares the attitudes of citizens of different countries to establish a* correlation *between recognition of "same-sex" marriage and lack of support for the institution of marriage.*

Now that there exists some foreign experience with the legal recognition of "same-sex" relationships, especially in Europe, Blankenhorn utilizes two survey documents, both conducted within the last ten years: the ISSP, which reached twenty-four countries, and the World Values Survey of citizens in thirty-five countries. What he discovered was extremely interesting: there was a *correlation* in survey interviews between the weakest support for marriage in the seven countries that recognize "same-sex" marriage (essentially accord all the rights and privileges of marriage to same-sex unions). Residents of countries that recognize "civil unions" but not "same-sex" marriage express stronger support for the institution of marriage. In the two countries where only some regions recognize "same-sex" marriage, the United States being one, support for marriage is even stronger. Finally, in the thirteen countries surveyed that fail to recognize either same-sex marriage or civil unions, support for marriage was the strongest.

In his use of the survey data, Blankenhorn carefully distinguishes what he sees as a *correlation* between attitudes toward marriage in countries that recognize "same-sex" marriage from causation. He explains correlation as the result of "things that tend naturally to cluster together." Judging from the response of critics of Blankenhorn's book, it is this information and "the correlation" that is the focus of the ire of "same-sex" marriage proponents. It obviously hit a nerve. No doubt the reason is that it is the only information that suggests empirically a connection between the relatively new phenomena of legally recognized "same-sex" marriage and generally hostile attitudes toward the institution of marriage. Unlike accusations about the work of Stanley Kurtz, Blankenhorn is very careful to suggest only a correlation, not causation, but this has failed to spare him the same incensed criticism. In fact, his cautionary approach to the information and what can be learned from it may have engendered an even stronger reaction. He sounds (and is) so reasonable and careful.

3. *It identifies the goal of some of the most vocal supporters of "same-sex" marriage as the de-institutionalization of marriage.*

Those who professionally dislike marriage almost always favor "same-sex" marriage. In fact, recognition of gay marriage, according to Blankenhorn, constitutes a brilliant strategy for transforming or, in effect, (according to marriage advocates like me) abolishing the institution of marriage. The possibility of transformation naturally assumes that marriage is a social construct and thus capable of transformation by a certain amount of manipulation. Although Blankenhorn recognizes that humans constructed this social institution sanctioned by law and custom, he opines that it has natural roots (i.e. biochemical) and deep foundations. Yet, it is also, in his words, "fragile."

Blankenhorn observes that the most vocal proponents of "same-sex" marriage define *marriage* for purposes of public debate in terms that reflect relatively superficial sentiments when

compared to the richly complex structure of the social institution of marriage. For example, consider this definition of marriage: it is an expression of love and commitment between two people. Or, marriage constitutes social approval and validation of a couple's love. Or, marriage civilizes relationships between adults, especially men. Or, marriage constitutes a means of distributing benefits for those who make a commitment. Such definitions of marriage conjured up by proponents of "same-sex" marriage reflect a relationship that is fragile indeed and surely not the historically robust social institution we have called marriage.

To his credit, David Blankenhorn does not ignore what evidence exists that challenges his own arguments and definition of marriage. For example, he carefully examines the few social groups that scholars cite as departing from the traditional definition and purpose of marriage—the Nayars (southwest India), the Nuers (southeastern Sudan and western Ethiopia), the Navajo, and certain formal "homosexual unions" in Africa and Melanesia. In each case he finds that marriage patterns may differ but not fundamentally and that the formal "homosexual unions" do not constitute the equivalent of marriage.

Although I do not agree with all statements in *The Future of Marriage*, I agree with most of them. I know David Blankenhorn and know how reluctant he has been to publicly engage this difficult topic. His struggle is obvious throughout the book. He respects the human dignity of all persons but nonetheless refuses to capitulate to demands to change marriage as a means of affording it. Opposition to "same-sex" marriage from marriage proponents like David Blankenhorn and me center on one fundamental proposition: "For every child, a mother and a father."

On March 28, I addressed part of David Blankenhorn's argument, relying on international survey data, that support for same-sex marriage ("SSM") is part of a "cluster" of "mutually reinforcing" beliefs that are hostile to traditional marriage. "These things do go together," he writes.

I responded by saying that a correlation between the recognition of SSM in a country and the views of its people on other marital and family issues (1) could not show that SSM in that country caused, or even contributed to, those other views, and (2) did not tell us anything very important about whether, on balance, SSM is a good policy idea. SSM might be a small part of a project of reinstitutionalizing marriage—despite what those who hold a cluster of non-traditional beliefs about marriage may hope for.

I do not deny that people who hold non-traditionalist views about family life and marriage also tend to be more supportive of SSM; I simply maintain that the existence of this cluster in some people is not very important in the public policy argument about SSM. By itself, it tells us nothing about what the likely or necessary *effects* of SSM will be. It would similarly not be very useful in the debate over SSM to note the existence of other correlations more friendly to the case for SSM, like the fact that countries recognizing SSM tend to be wealthier, more educated, more democratic, healthier, have lower infant mortality rates, longer life expectancy, and are more devoted to women's equality, than countries that refuse to recognize gay relationships.

The second half of Blankenhorn's argument that supporting SSM and opposing marriage "go together" boils down to this:

> [P]eople who have devoted much of their professional lives to attacking marriage as an institution almost always favor gay marriage.… Inevitably, the pattern discernible in the [international survey data] statistics is borne out in the statements of the activists. Many of those who most vigorously champion same-sex marriage say that they do so precisely in the hope of dethroning once and for all the traditional "conjugal institution."

In a move that has become common among anti-gay marriage intellectuals, Blankenhorn then quotes three academics/activists who do indeed see SSM as a way to begin dismantling traditional marriage and undermining many of the values associated with it. There are many more such quotes that could be pulled from the pages of law reviews, newspaper op-eds, dissertations, college term papers, and the like. They have been gathered with great gusto by Maggie Gallagher and especially Stanley Kurtz, who regards them as the "confessions" of the grand project to subvert American civilization. (Remember the "Beyond Marriage" manifesto that excited Kurtz so much last summer? Not many people do.)

I do not deny that there are supporters of SSM who think this way, including some very smart and prominent academics. I wince when I read some of what they write; in part because I know these ideas will be used by good writers like Blankenhorn to frighten people about gay marriage, in part because I just think they're wrong normatively and in their predictions about the likely effects of SSM on marriage. But mostly I wince because if I believed they were correct that SSM would undermine marriage as an institution, if I thought there was any credible evidence that this was a reasonable possibility, I would oppose SSM—regardless of whatever help it might give gay Americans and the estimated 1-2 million children they are raising right now in this country.

So I wince, but I am not persuaded that either correlations from international surveys or statements from marriage radicals show that "gay marriage clearly presupposes and reinforces deinstitutionalization [of marriage]."

First, as Blankenhorn well knows, it is not *necessary* to the cause of gay marriage to embrace the "cluster" of beliefs he and I would both regard as generally anti-marriage. One could, as many conservative supporters of gay marriage do, both support SSM and believe that (1) marriage is not an outdated institution, (2) divorce should be made harder to get, (3) adultery should be discouraged and perhaps penalized in some fashion, (4) it is better for children to be born within marriage than without, (5) it is better for a committed couple to get married than to stay unmarried, (6) it is better for children to be raised by two parents rather than one, and so on.

Second, a policy view is not necessarily bad because some (or many) of the people who support it also support bad things and see those other bad things as part of a grand project to do ill. Some (many?) opponents of gay marriage also oppose the use of contraceptives (even by married couples), would recriminalize sodomy, would end sex education in the schools, and would

re-subordinate wives to their husbands. And they see all of this —including their opposition to SSM—as part of a grand project to make America once and for all "One Christian Nation" where the "separation of church and state" is always accompanied by scare quotes and is debunked by selective quotes from George Washington. These are, one might say, a "cluster" of "mutually reinforcing" beliefs that "do go together." But it would be unfair to tar opponents of SSM with all of these causes, or to dismiss the case against SSM because opposing SSM might tend to advance some of them.

Third, in citing and quoting these pro-SSM marriage radicals, Blankenhorn and other anti-gay marriage writers ignore an entire segment of the large debate on the left about whether marriage is a worthwhile cause for gays. While there are many writers on the left who support SSM because they believe (erroneously, I think) that it will deinstitutionalize marriage, there are many other writers on the left who oppose (or are at least anxious about) SSM because they think it will *reinstitutionalize* it. Let me give a just a few examples that Blankenhorn, Gallagher, and Kurtz have so far missed.

Paula Ettelbrick, in a very influential and widely quoted essay written at the outset of the intra-community debate over SSM, worried that SSM would reassert the primacy of marriage, enervate the movement for alternatives to marriage, and traditionalize gay life and culture:

> By looking to our sameness and de-emphasizing our differences, we don't even place ourselves in a position of power that would allow us to transform marriage from an institution that emphasizes property and state regulation of relationships to an institution which recognizes one of many types of valid and respected relationships.… *[Pursuing the legalization of same-sex marriage] would be perpetuating the elevation of married relationships and of 'couples' in general, and further eclipsing other relationships of choice*.…
>
> Ironically, gay marriage, instead of liberating gay sex and sexuality, would further outlaw all gay and lesbian sex which is not performed in a marital context. Just as sexually active non-married women face stigma and double standards around sex and sexual activity, so too would non-married gay people. *The only legitimate gay sex would be that which is cloaked in and regulated by marriage*.… Lesbians and gay men who did not seek the state's stamp of approval would clearly face increased sexual oppression.…
>
> *If the laws change tomorrow and lesbians and gay men were allowed to marry, where would we find the incentive to continue the progressive movement we have started that is pushing for societal and legal recognition of all kinds of family relationships? To create other options and alternatives?*

Since When is Marriage a Path to Liberation?, Out/Look 8-12 (Fall 1989) (emphasis added).

Professor Michael Warner of Rutgers argues in his book *The Trouble With Normal* (1999) that SSM would augment the normative status of marriage, reinforce conservative trends toward reinstitutionalizing it, and thus be "regressive" (all of which for him would be *bad things*):

> *[T]he effect [of gay marriage] would be to reinforce the material privileges and cultural normativity of marriage*.… Buying commodities sustains the culture of commodities whether the buyers like it or not. That is the power of a system. Just so, marrying consolidates and sustains the normativity of marriage. (p. 109) (emphasis added)
>
> The conservative trend of shoring up this privilege [in marriage] is mirrored, wittingly or unwittingly, by the decision of U.S. advocates of gay marriage to *subordinate an entire bundle of entitlements to the status of marriage*. (p. 122) (emphasis added)
>
> In respect to the family, real estate, and employment, for example, the state has taken many small steps toward recognizing households and relationships that it once did not.… But *the drive for gay marriage [ ] threatens to reverse the trend* [toward progressive change], because it restores the constitutive role of state certification. Gay couples don't just want households, benefits, and recognition. They want marriage licenses. They want the stipulative language of law rewritten and then enforced. (p. 125) (emphasis added)
>
> The definition of marriage, from the state's special role in it to the culture of romantic love—already includes so many layers of history, and so many norms, that *gay marriage is not likely to alter it fundamentally, and any changes that it does bring may well be regressive*. (p. 129) (emphasis added)

As for the hopes of pro-SSM marriage radicals (like those Blankenhorn quotes) that gay marriage would somehow radicalize marriage, Warner counters that "It seems rather much to expect that gay people would transform the institution of marriage by simply marrying."

Many other activists and intellectuals have written a stream of editorials and position papers over the past two decades expressing a similar "assimilation anxiety" (William Eskridge's phrase) about SSM. Here are just a few:

> "[Same-sex] Marriage is an attempt to limit the multiplicity of relationships and the complexities of coupling in the lesbian experience." Ruthann Robson & S.E.Valentine, *Lov(hers): Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 Temp. L. Q. 511, 540 (1990).
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> "[I]n seeking to replicate marriage clause for clause and sacrament for sacrament, reformers may stall the achievement of real sexual freedom and social equality for everyone.… [M]arriage —forget the gay for a moment—is intrinsically conservative.… Assimilating another 'virtually normal' constituency, namely monogamous, long-term homosexual couples, marriage pushes the queerer queers of all sexual persuasions—drag queens, club crawlers, polyamorists, even ordinary single mothers or teenage lovers—further to the margins." Judith Levine, *Stop the Wedding!*, Village Voice, July 23-29, 2003.
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> "As an old-time gay liberationist, I find the frenzy around marriage organizing exciting, but depressing.… Securing the right to marry… will not change the world. Heck, it won't even change marriage." Michael Bronski, *Over the Rainbow*, Boston Phoenix, August 1-7, 2003.
>
> "But the simple fact remains that the fight for marriage equality is at its essence not a progressive fight, but rather a deeply conservative one that seeks to maintain the social norm of the two-partnered relationship—with or without children—as more valuable than any other relational configuration. While this may make a great deal of sense to conservatives… it is clear that this paradigm simply leaves the basic needs of many people out of the equation. In the case of same-sex marriage the fight for equality

bears little resemblance to a progressive fight for the betterment of all people." Michael Bronski, *Altar ego*, Boston Phoenix, July 16-22, 2004.

Here's another "cluster" of beliefs to add to the mix: gay marriage will enhance the primacy of marriage, take the wind out of the sails of the "families we choose" movement, cut off support for the creation of marriage alternatives (like domestic partnerships and civil unions), de-radicalize gay culture, gut the movement for sexual liberation, and reinforce recent conservative trends in family law. So say what we might roughly call the *anti-SSM marriage radicals*.

These anti-assimilationist writers (some of whom have actually opposed SSM and some of whom, to be fair, are just very uncomfortable about it) have not gotten as much attention in the press as other writers because they greatly complicate an already complex debate. And indeed it's fair to say they have kept themselves fairly quiet for fear that their concerns would be seen as undermining gay equality and thwarting gay marriage, a cause that has broad support among gays. They don't want to be seen as opposing benefits for gay people (which in fact they do not oppose).

But these anti-SSM marriage radicals comprise a significant perspective among what I would call "queer" activists, those who observe that the gay movement is pursuing traditionalist causes in traditionalist ways, who think it is endangering sexual liberation, and who fear it is making gay people just like straight people (who are, by implication, all boring, uncultured philistines who couple up, vote Republican, and live in the suburbs). And they think these are bad things.

The point is not to argue that any of these writers are correct that gay marriage will have the significant reinstitutionalizing effect they think it will have. I think both the anti-SSM marriage radicals and the pro-SSM marriage radicals Blankenhorn cites are far too taken with the transformative power of adding an additional increment of 3% or so to existing marriages in the country. So are anti-gay marriage activists generally. I think all of them—including Blankenhorn—are mistaken if they imagine that straight couples take cues from gay couples in structuring their lives and relationships, if they think straight couples may stop having children, or if they predict straight couples will be more likely to have babies outside of marriage because gay couples are now having and raising their children within it.

The point is that both support for and opposition to SSM well up from a variety of complex ideas, fears, hopes, emotions, world-views, motives, and underlying theories. The debate will not be resolved by dueling quotes from marriage radicals. SSM will have the effects it has—good or bad—regardless of what marriage radicals with one or another "cluster" of beliefs hope it will have.

The Future of Marriage is lively, engaging, subtle, interesting, happily free of jargon, and deeply wrong. It is probably the best single book yet written opposing gay marriage. Blankenhorn is a serious scholar and thinker. He has thought long and hard about the needs of heterosexuals for marriage. He has challenged the idea that family structure is irrelevant. He has said that our ethical and moral traditions require that we place the needs of children above adult needs where they're in conflict. He has been right about all of this.

But for all his integrity and sincere opposition to anti-gay bigotry, I do not think he has thought very hard about the needs of gay families. That is why, for example, he and many others opposed to gay marriage could imagine that protecting gay families in law means placing the needs of adults ahead of children—as if we do not already have many childless marriages and as if thousands of gay families do not already include children whose welfare the gay parents place before their own.

In addition to the important procreative and child-raising purpose of marriage that David Blankenhorn and others opposed to gay marriage have emphasized, marriage has other functions arising from our history, tradition, and actual practice that are served by allowing people to marry *even if they never have children*.

So what does marriage do? What is it for? Marriage does at least six important things. I put these here in block text for ease of reference:

(1) *Marriage is a legal contract.* Marriage creates formal and legal obligations and rights between spouses. Public recognition of, and protection for, this marriage contract, whether in tax or divorce law, helps married couples succeed in creating a permanent bond.

(2) *Marriage is a financial partnership.* In marriage, "my money" typically becomes "our money," and this sharing of property creates its own kind of intimacy and mutuality that is difficult to achieve outside a legal marriage. Only lovers who make this legal vow typically acquire the confidence that allows them to share their bank accounts as well as their bed.

(3) *Marriage is a sacred promise.* Even people who are not part of any organized religion usually see marriage as a sacred union, with profound spiritual implications. "Whether it is the deep metaphors of covenant as in Judaism, Islam and Reformed Protestantism; sacrament as in Roman Catholicism or Eastern Orthodoxy; the yin and yang of Confucianism; the quasi-sacramentalism of Hinduism; or the mysticism often associated with allegedly modern romantic love," Don Browning writes, "humans tend to find values in marriage that call them beyond the mundane and everyday." Religious faith helps to deepen the meaning of marriage and provides a unique fountainhead of inspiration and support when troubles arise.

(4) *Marriage is a sexual union.* Marriage elevates sexual desire into a permanent sign of love, turning two lovers into "one flesh." Marriage indicates not only a private but a public understanding that two people have withdrawn themselves from the sexual marketplace. This public vow of fidelity also makes the married partners more likely to be faithful. Research shows, for example, that cohabiting men are four times more likely to cheat than husbands, and cohabiting women are eight times more likely to cheat than spouses.

(5) *Marriage is a personal bond.* Marriage is the ultimate avowal of caring, committed, and collaborative love. Marriage incorporates our desire to know and be known by another human being; it represents our dearest hopes that love is not

a temporary condition, that we are not condemned to drift in and out of shifting relationships forever.

(6) *Marriage is a family-making bond.* Marriage takes two biological strangers and turns them into each other's next-of-kin. As a procreative bond, marriage also includes a commitment to care for any children produced by the married couple. It reinforces fathers' (and fathers' kin's) obligations to acknowledge children as part of the family system.

I suppose some people would dismiss these sentiments as the product of "adult-centered" thinking about marriage, with all the emphasis here on legal contracts, finances, sacred promises, sexual fulfillment, and private personal bonds. I suppose some would say I have missed the central importance of marriage as the place for child-rearing. After all, I've placed any procreative and child-rearing function at the very end. It doesn't even make the Top 5. I suppose others would say I've placed marriage in a largely private context and given little attention to the existence of marriage as a public institution with public purposes.

David Blankenhorn would not be among those people. He drafted these very claims about marriage as part of a "Statement of Principles" by the marriage movement in 2000, at a time when gay marriage was barely a blip on the radar. In the block text above, I have copied the statement word-for-word, except that in #4 I have substituted "the married partners" for "men and women."

Blankenhorn has also explicitly rejected the anachronistic and reductive view that the only public purpose of marriage is to encourage procreation and child-rearing. Marriage is a "multi-dimensional, multi-purpose institution," he acknowledges. "It is *not true* therefore to say that the state's *only* interest in marriage is marriage's generative role," he wrote a couple of years ago. "Instead, marriage's role as a pro-child social institution is only one, albeit the most important, of these legitimate state interests." (Emphasis original.)

Blankenhorn has been criticized for a "change of tune" — for emphasizing procreation and biological parenthood in the context of the gay-marriage debate, while he did not emphasize these things before the debate took center stage. He has defended himself on this point by saying that it is only in the context of the gay-marriage debate that some people have insisted there's no connection between marriage and family-making. I suppose he could also say that the six dimensions of marriage are valuable only because they serve the family-making purpose of marriage by cementing the bond between two biological parents. But that is not how I read the statement and I don't think it fits the idea of marriage as a "multi-purpose" institution.

Blankenhorn, who has long been concerned about fathers leaving their families, is not necessarily being hypocritical by now emphasizing the role of marriage in bringing biological parents together. Nothing in the statement he endorsed seven years ago is inconsistent with the view that the central and important purpose of marriage is to encourage procreation and child-rearing within marriage. *But that's the point: even if you erroneously thought gay marriage had nothing to do with benefiting children, and everything to do with, for example, a "personal bond" that "represents our dearest hopes that love is not a temporary condition," it would not be a threat to marriage.*

Gay marriage can very clearly meet five of the six dimensions of marriage Blankenhorn himself has endorsed: it can benefit the couple with legal advantages that help "create a permanent bond;" it can facilitate the formation of a financial interdependence that "creates its own kind of intimacy and mutuality;" it helps the couple find values, including religious ones, that go beyond the mundane and everyday and that may be "a fountainhead of inspiration and support when troubles arise;" it can "elevate sexual desire into a permanent sign of love" and be more likely than cohabitation to lead the couple to withdraw themselves from the sexual marketplace; and of course it can be a deep personal bond between two people who share the common human desire for permanence and attachment to one other person.

Gay marriage can also serve the sixth, family-making, function identified by Blankenhorn seven years ago. A gay couple can't procreate as a couple, it's true. But they can fit and benefit from all of the dimensions listed above in the same way a sterile straight couple could. Marriage can turn gay couples, unrelated biologically, into next-of-kin, as it can for opposite-sex couples. It can reinforce parents' (and parents' kin's) "obligations to acknowledge children as part of the family system," just as it can for second-marriage couples and for sterile opposite-sex couples who adopt or use some method of assisted reproduction.

Even if they never have children, married gay couples will hardly be outside the bounds of marriage as it is actually practiced and as Blankenhorn described it in 2000. By choice or by necessity, lots of marriages never result in children. We do not think less of these marriages, do not think they transform marriage into something wholly adult-centered, and do not worry that they represent a threat to "the future of marriage" by making biological parents think family structure is unimportant. There are already far many more such childless opposite-sex marriages than there will be gay marriages. We recognize that these childless marriages fit the additional dimensions of marriage that Blankenhorn beautifully articulated seven years ago and that, in doing so, they do not undermine the important family-making purpose of marriage.

Many opponents of gay marriage would deny that homosexual couples can meet even the five companionate (non-generative) dimensions of marriage. But based on his public statements about homosexuality, I think Blankenhorn would have to agree that for gay Americans marriage would be "a personal bond," the "ultimate avowal of caring, committed, and collaborative love;" that gay persons equally share the deep human yearning "to know and be known by another human being;" and that they too possess "our dearest hopes that love is not a temporary condition."

If that's good enough reason to let childless straight couples marry, to let sterile couples adopt or reach outside their sexual union to produce a child, why is it not good enough for gay couples? The answer to that question might be found in moral or religious objections to homosexuality, in a desire to

avoid placing society's imprimatur on homosexual relationships, or in ugly and unfounded stereotypes about gay people as hopelessly hyper-promiscuous or unstable. But it cannot easily be found in a world-view that affirms, as Blankenhorn recently did, "the equal dignity of homosexual love."

Perhaps, just perhaps, Blankenhorn will one day see that marriage offers gay people and their families, at no cost to heterosexuals, the best hope that they too will not be "condemned to drift in and out of shifting relationships forever."

Principles and Heresies: Frank S. Meyer and the Shaping of the American Conservative Movement

BY KEVIN J. SMANT

*Reviewed by Michael B. Brennan**

Temporary deviations from fundamental principles are always more or less dangerous. When the first pretext fails, those who become interested in prolonging the evil will rarely be at a loss for other pretexts.

James Madison

Civilized society seeks to achieve a proper balance between freedom and order. Law is often the arbiter. The tension between liberty and order is litigated ubiquitously, from criminal courts to the "war-on-terrorism" cases. While appellate courts adjudicate this balance, the debate over government imposition on individual liberties has its deep roots in a philosophical and historical exchange.

The subject of this biography—a Communist *apparatchik*, *National Review* editor, conservative philosopher, and a central figure in the development of the conservative movement in the United States—devoted his life to that debate. The epigraph above could be his credo.

Frank Meyer, born in New Jersey in 1909, joined the Communist party in 1931 while at Oxford. For ten years he served the party as an educator and organizer. When Nazi Germany attacked the Soviet Union in 1941, he and other American Communists urged American entry into World War II on the side of the Soviets. The Communist party gave Meyer permission to join the U.S. Army, but he suffered severe foot problems before completing officer's training. An instructor took pity on Meyer and gave him free time that he spent in the library. In this unlikely spot, while an active Communist training in the U.S. Army, the seeds of conversion were planted. There Meyer read *The Federalist Papers*, which engendered an appreciation for the separation of powers and limited government in the United States. He was also influenced by Friedrich von Hayek's *The Road to Serfdom* which argued that Communism requires planning which must lead to violations of individual rights, and Richard Weaver's *Ideas have Consequences* which affirmed the existence of universal truths and defended private property.

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In 1945 Meyer and his wife Elsie, whom he met through the party, broke from the Communists completely. This autodidactical conversion brought the Meyers and their growing family extreme difficulties. The Communists were known for Stalinistic assassination of their enemies. The Meyers took to sleeping with a loaded rifle next to their bed. During the early to mid-1950's Meyer testified in several prosecutions of Communists under the Smith Act, and the FBI debriefed him extensively.

Meyer also began to contact authors and journalists, hoping to become active in the conservative movement, which at the time was defined by Russell Kirk in his monograph *The Conservative Mind*. While Meyer agreed with Kirk's attacks on "collectivism," as it was called, he found they lacked a body of principles upon which to base their attacks on modern liberalism. Thus began Meyer's lifelong role of critiquing and defining American conservatism. Meyer had begun a friendship with a young William F. Buckley, Jr., who asked Meyer to join the original staff of a new magazine named *National Review*.

The bulk of Smant's book reviews Meyer's work at *National Review*. From 1956 until 1972 Meyer was a senior editor and wrote a regular column entitled "Principles and Heresies" (from which Smant's book takes its title). Throughout his tenure Meyer played a crucial role in the magazine's debates. Meyer aptly chose the title of his *National Review* column: identifying, developing, and applying first principles animated his work. Smant portrays Meyer as an intellectual and articulate teacher longing for ideological purity, and *National Review* as an outlet for Meyer's thinking. Meyer was a deep reader in classical literature and history with a habit of developing ideas through long argument and discussion. This book details his unceasing attempts to bring principle to bear on political, legal, and cultural issues of the day, through his column and five books, the most famous of which, *In Defense of Freedom: A Conservative Credo*, offered a defining statement of Meyer's beliefs.

Meyer's key philosophical contribution to the conservative movement was to address the divide between traditionalists and libertarians. Traditionalists emphasized maintaining a moral order based on transcendent virtuous principles. This strand of conservatism holds that absolute truths and an objective moral code exist, that these are knowable by man, and that a fundamental view of humanity follows from those truths: the individual person is the reference point for all politics and philosophy. He argued that traditional precepts, rather than the relativistic or materialistic premises of modern thought, were needed to undergird a regime of freedom. Meyer embraced a traditional interpretation of the Constitution understanding the Framers' intent and the importance of the separation of powers.

Libertarians hold freedom as the only absolute. Among creatures, only human beings can choose, and no ideology, government or institution should deny this right. "Truth withers when freedom dies, however righteous the authority that kills it," according to Meyer. In the 1960's libertarians constituted an increasingly vocal and sizable portion of the American conservative movement. While Meyer considered himself a "libertarian-conservative," he was wary of the extremes

of libertarians. While freedom is the highest goal of a political order, once attained, Meyer questioned how it should be used. The libertarian response was to do what they wanted. But only in civilizations have men risen above savagery. To Meyer, "[t]he first victim of the mobs let loose by the weakening of civilizational restraint will be, as it has always been, freedom—for anyone, anywhere."

Meyer's reconciliation of these two philosophies bridged a troubling gap in the burgeoning American conservative movement. As Smant describes Meyer's synthesis of principles, truth and order exist, "and freedom was the highest *political* end, it being the way for the individual legitimately to choose the truth." This synthesis came to be called "fusionism" (a label Meyer rejected; he preferred "marriage"). Meyer corrected those who emphasized one school of thought to the exclusion of the other, and preached that disagreements between them resulted from inadequate vision and ignorance of the cultural record. Rather than an organization to compel virtue, the State can facilitate the conditions for individuals to choose virtue. A politician's responsibility is to broaden liberty for those choices to occur. Accordingly, Meyer emphasized limiting the size of the state and expanding individual freedom while maintaining a moral order based on transcendent principles.

To Meyer, this "marriage" became the first premise of conservatism. From it answers to political and cultural issues could be derived: the efficacy of the free market, opposition to a centralized federal government, the proper role of the courts, and of course fierce anti-Communism, which was the defining issue for *National Review* and Meyer. He viewed the Cold War in moral terms, and saw the world in crisis brought on by continued Communist aggression. Meyer and *National Review* made unrelenting efforts to fortify public opinion against Communism. Smant writes of Meyer's sense of duty, as a former Communist, to educate the West and warn of Communism's serious dangers. A shared hatred of Communism formed the umbrella under which traditionalists and libertarians found shelter. Meyer brokered an uneasy truce between them.

While Meyer was a libertarian, in his own words "by temperament and by inclination," this aspect of his political philosophy is not fully explored by Smant, perhaps because it was a more instinctual part of Meyer's thinking. It is true that Meyer took the core concept that attracts libertarians—freedom—and explained its necessity for traditionalists. But Smant does not develop Meyer's objections to John Stuart Mill's utilitarianism, a philosophy so attractive to some libertarians. Meyer had great problems with an Enlightment philosophy in which the state has no stake on the question of virtue, and in which the term "liberty" is polymorphous to the point of uselessness. How Meyer would join issue with libertarians over Mill might explain why he retained his libertarian roots, notwithstanding difficulties inherent in that philosophy.

Developing a philosophy is one thing; seeing it applied to issues of the day is another. As Meyer and *National Review* faced the 1960's and 1970's, they confronted this continuing tension between principles and pragmatism. Meyer believed that politics should be based upon principles, and that compromise without attention to those first principles led to bad public policy. But *National Review* was neither a philosophical quarterly nor a political party publication. It was a journal of thought and opinion. Through heated editorial meetings, which the staff called "agonies," and a flurry of memoranda, Meyer attempted to impress his view of principle upon his colleagues. When Meyer argued, he placed the issue in historical and cultural context (Smant uses the same approach, to good effect), and usually let the argument flow from his first premise, described above. Buckley would occasionally refer to Meyer's home in Woodstock, New York as "ground control," guiding *National Review* on the correct path.

But Meyer did not just hole up in his mountain home in Woodstock. He helped build a conservative movement by befriending younger conservatives, lecturing across the country, and seeking contacts with conservative groups and organizations. He applied his organizing talents learned in years as a Communist to help found New York's Conservative party, as well as the American Conservative Union.

Smant methodically and thoroughly describes how this tension between principle and pragmatics played out through the events of the 1960's and 1970's: the 1964 Johnson-Goldwater election with its potentially apocalyptic result for conservatives; the expulsion of the John Birch Society from the conservative movement; the formation of New York's Conservative party; the civil rights movement; conservatives' relationship with candidate and then President Nixon; and Vietnam. Throughout, Meyer contended how conservatives should understand and act in the political circumstances of the day. Meyer's role was to hold those involved (of any political stripe) to first principles, while taking into account the practical political consequences of their positions. For Meyer, on any of these questions political parties do not have to be "paradigms of ideological purity," but must take "broadly principled position[s]." While prudential choice among "immediate practical alternatives" was proper, conservatives must know the essential nature of the tradition they wanted to conserve.

Conservatism as an American political philosophy has become a popular scholarly topic. Meyer's philosophical and political contributions have been outlined in other recent works, such as Rick Perlstein's *Before the Storm: Barry Goldwater and the Unmaking of the American Consensus* and George Nash's *The Conservative Intellectual Movement since 1945*. But not until this biography is Meyer's full story told, and told well. While the book is heavy with internal *National Review* struggles, and may understate the ex-Communist's contributions to political organizational efforts, Kevin Smant makes an erudite addition to this corpus by analyzing the difficulties of translating Meyer's views of the balance between freedom and order into practice.

Meyer's life elucidates how "conservatism" is hardly a static label. Conservatives differ greatly on many questions, legal and political, and those battles inform not just the issues of that day, but the shades of conservative judges, scholars, and politicians whom we see today. While not an Oz behind a political curtain, Smant's book details how Meyer's voice resonates in American conservatism. In his roles as ideological purist and political organizer, Meyer shepherded the conservative movement into

prominence. Meyer would not live to see the victories and defeats of his political philosophy as they played out, even in today's law and politics. He died of cancer in 1972.

While the Cold War has been replaced by the War on Terror, that battle is still seen in and fought on moral terms. For Meyer, "conservatives, irrespective of whether their emphasis is upon tradition and order or upon liberty, unite in their veneration of the ordered liberty conceived and executed by the framers of the Constitution." Meyer identified and promoted that a keen vision and cultural knowledge can provide a philosophical premise from which to address the issues of the day. His philosophical legacy can bring clarity to the historical debate over the contours of "ordered liberty."

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