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Letter from the Editor...

ENGAGE, the Journal of the Federalist Society Practice Groups, provides original scholarship on current, important legal and policy issues. It is a collaborative effort, involving the hard work and voluntary dedication of each of the organization's fifteen Practice Groups. Through its publication, these Groups aim to contribute to the marketplace of ideas in a way that is collegial, measured, and insightful—to spark a higher level of debate and discussion than is all too often found in today's legal community.

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

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Lights, Camera, Legislation: Congress Set to Adopt Hate Crimes Bill That May Put Double Jeopardy Protections in Jeopardy

*By Gail Heriot**

Americans were horrified by the brutal murders of James Byrd in Jasper, Texas and Matthew Shepard in Laramie, Wyoming a decade ago.[1] "There ought to be a law…," some people said, preferably a federal one.

Of course, even then, there *was* a law. Murder is a serious crime everywhere regardless of its motive and it has been as far back as the advent of our civilization. Indeed, all but a few states have additional, special hate crimes statutes.[2] No one is claiming that state authorities have been neglecting their duty to enforce the law. Matthew Shepard's tormentors are now serving life sentences; James Byrd's are on death row awaiting execution.[3]

Unfortunately, both tragedies quickly became an opportunity for political grandstanding. Bereaved relatives were paraded before the cameras in staged events that allowed politicians to get their faces beamed into our living rooms.[4] But the proposed federal hate crimes legislation that they touted as a response to the Jasper and Laramie murders should not have been treated merely as a photo opportunity. It is real legislation with real world consequences—and some of them are bad. Skeptics of the approach taken by the bill have managed to keep it bottled up all these years. President Obama, however, has said that this legislation will be among his civil rights priorities. A close examination of its consequences, especially its consequences for federalism and double jeopardy protections, is therefore in order.

All hate crimes statutes, even those that have been adopted at the state level, raise significant issues:

* Why should James Byrd's or Matthew Shepard's killers be treated differently from Jeffrey Dahmer or Ted Kaczynski? Hate crimes are surely horrible, but there are other crimes that are equally, if not more, horrible. Why are some lives more worthy of protection than others?

* What happens if hate crimes statutes are not enforced evenhandedly? Crime statistics show that among racially-inspired murders, black-on-white attacks are more common than white-on-black. Should all be punished as hate crimes? Or just those that fit the skinhead stereotype?

*What is gained by defining crimes in such a way that prosecutors must prove that the defendant's actions were motivated by racial or sexual animus? Is it enough to justify what is lost? When prosecutors are busy marshalling the extra evidence necessary for a hate crime prosecution, doesn't something have to give? Should not our prosecutorial resources be deployed more efficiently?

* Will hate crimes statutes really make women and minorities feel that the law takes their safety seriously? Or might it have just the opposite effect? Sooner or later, a high profile crime will occur that some citizens strongly believe ought to be prosecuted as a hate crime. Rightly or wrongly, the prosecution will decline to prosecute it as such or the jury will convict only on the underlying crime and not on the hate crime charge, and these citizens will wind up feeling cheated—when they would have felt completely vindicated had no hate crime statute ever existed.

Americans may disagree in good faith about whether such laws will in the end help or hurt harmony in the community. The proposed federal hate crimes legislation, however, has special problems of overreach with implications for federalism and double jeopardy protections. These problems should cause even those who favor state hate crime statutes to question the desirability of a federal statute.

Under current law, adopted in 1969, federal authorities may bring a prosecution for a crime because it was motivated by the victim's "race, color, religion or national origin" only to protect the victim's right to engage in certain "federally protected activities." For example, if the defendant prevented a black woman from enrolling in a public school or from travelling by common carrier because she is black, he has committed a federal offense.[5] This statutory provision does not purport to be a hate crimes statute; it was enacted to enforce the rights recognized by the courts or enacted by Congress during the Civil Rights Era.

The new proposal, currently entitled the "Local Law Enforcement Hate Crimes Prevention Act of 2007" (H.R. 1592) (LLEHCPA) would remove the requirement that the victim be engaged in a federally-protected activity and expands the list of protected categories to include actual or perceived "gender, sexual orientation, gender identity or disability" in addition to the "race, color, religion and national origin" already covered in the federal criminal code. Any crime fitting that description in which the defendant "wilfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person" may be fined and imprisoned for up to 10 ten years.[6] If death results or "the offense includes kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill," the defendant may be sentenced to life in prison.[7]

These changes will vastly expand the reach of the federal criminal code. Back in 1998, while members of Congress were posing for the cameras, Clinton Administration attorneys at the Department of Justice, eager to expand federal authority, were drafting language for the bill that will create federal jurisdiction over many cases that cannot honestly be regarded as hate crimes. The trick is that, despite the misleading use of the words "hate crime," LLEHCPA does not require that the defendant be inspired by hatred in order to convict. It is sufficient if he acts

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"because of" someone's actual or perceived race, color, religion, national origin, gender, sexual orientation, gender identity or disability.[8] This legislative sleight of hand was apparently lost upon most members of Congress, but consider:

*Rapists are seldom indifferent to the gender of their victims. They are always chosen "because of" their gender.

*A thief might well steal only from the disabled because, in general, they are less able to defend themselves. Literally, they are chosen "because of" their disability.

This was not just sloppy draftsmanship. The language was chosen deliberately. Administration officials wanted something susceptible to broad construction.[9] As a staff member of the Senate Committee on the Judiciary back in 1998, I had several conversations with DOJ representatives. They repeatedly refused to disclaim the view that all rape will be covered, and resisted efforts to correct any ambiguity by re-drafting the language. They *like* the bill's broad sweep. The last thing they wanted was to limit the scope of the statute's reach by requiring that the defendant be motivated by ill will toward the victim's group.[10]

Among other things, this creates an efficiency problem. State hate crimes laws give prosecutors an extra weapon, to be used or not used as they see fit. Federal laws, on the other hand, bring in a new cast of characters to prosecute the same crimes that are already being handled by state authorities. While efforts can be made to minimize the tension, turf battles are inevitable as ambitious prosecutors jockey for position over big cases.[11] The result is that resources are diverted away from frontline crime fighting.

What justification exists for this redundancy? Back in 1998, Administration officials argued that it was needed, because state procedures often make it difficult to obtain convictions. They cited a Texas case involving an attack on several black men by three white hoodlums. Texas law required the three defendants to be tried separately. By prosecuting them under federal law, however, they could have been tried together. As a result, admissions made by one could be introduced into evidence at the trial of all three without falling foul of the hearsay rule.

One might expect that argument to send up red flags among civil libertarian groups like the ACLU. But political correctness seems to have caused them to abandon their traditional role as advocates for the accused.[12] Still, the argument cries out: Isn't this just an end-run around state procedures designed to ensure a fair trial? The citizens of Texas evidently believe that separate trials are necessary to ensure innocent men and women are not punished. No one is claiming that Texas applies this rule only when the victim is black or gay. And surely no one is arguing that Texans are soft on crime. Why interfere with their judgment?

The double jeopardy issue stands out among the problems created by the proposed statute (as well as other proposed expansions of the federal criminal code).[13] School children are taught that the Double Jeopardy Clause of the Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb."[14] They are seldom taught, however, about the dual sovereignty rule, which holds that the Double Jeopardy Clause does not apply when separate sovereign governments prosecute the same defendant. As the Supreme Court put it in *United States v. Lanza*, a defendant who violates the laws of two sovereigns has "committed two different offenses by the same act, and [therefore] a conviction by a court [of one sovereign] of the offense that [sovereign] is not a conviction of the different offense against the [other sovereign] and so is not double jeopardy."[15] A state cannot oust the federal government from jurisdiction by prosecuting first; similarly the federal government cannot oust the state. Indeed, New Jersey cannot oust New York from jurisdiction over a crime over which they both have authority, so in theory at least a defendant may face as many of 51 prosecutions for the same incident.[16]

The doctrine is founded upon considerations that are real and understandable. If a state has the power to oust the federal government from jurisdiction by beating it to the "prosecutorial punch," it can, in effect, veto the implementation of federal policy (and vice versa). In 1922, the Court in *Lanza* put it in terms of Prohibition, which was then hotly controversial. Allowing a state to "punish the manufacture, transportation and sale of intoxicating liquor by small or nominal fines," it wrote, will lead to "a race of offenders to the courts of that State to plead guilty and secure immunity from federal prosecution."[17]

But the dual sovereignty doctrine is still at best troubling. And its most troubling aspect is that it applies even when the defendant has been acquitted of the same offense in the first court and is now being re-tried.[18] Prosecutors in effect have two bites at the apple (or in a case in which two or more states are concerned, three, four, or five bites). The potential for abuse should be of concern to all Americans.

In the past, opportunities for such double prosecutions seldom arose, since so few federal crimes were on the books. But with the explosive growth of the federal criminal code in the last couple of decades, this is no longer true.[19] The nation is facing the very real possibility that double prosecutions could become routinely available to state and federal prosecutors who wish to employ them.

The proposed LLEHCPA would add substantially to the problem in two ways. By declining to require that the defendant be motivated by hatred or even malice in order to establish a "hate crime," it would vastly expand the reach of the federal criminal code. A creative prosecutor will be able to charge defendants in a very broad range of cases—cases that ordinary users of the English language would never term "hate crimes." And it makes the most controversial cases—those that were arguably motivated by race, color, religion, national origin, gender identity, sexual orientation, or disability—front and center on the federal stage.

It should come as no surprise that re-prosecutions are common in cases that are emotionally-charged–cases like the Rodney King prosecutions and the Crown Heights murders. As Judge Guido Calabresi put it:

> Among the important examples of successive federal-state prosecution are (1) the federal prosecution of the Los Angeles police officers accused of using excessive force on motorist Rodney King after their acquittal on state charges, (2) the federal prosecution of an African-American youth accused of murdering

a Hasidic Jew in the Crown Heights section of Brooklyn, New York, after his acquittal on state charges, and (3) the Florida state prosecution–seeking the death penalty–of the anti-abortion zealot who had been convicted and sentenced to life imprisonment in federal court for killing an abortion doctor.[20]

While Judge Calabresi expressed no opinion about the merits of these cases, he noted that "there can be no doubt that all of these cases involved re-prosecutions in emotionally and politically charged contexts" and that it was "to avoid political pressures for the re-prosecution that the Double Jeopardy Clause was adopted." It "is especially troublesome," he stated, "that the dual sovereignty doctrine keeps the Double Jeopardy Clause from protecting defendants whose punishment, after an acquittal or an allegedly inadequate sentence, is the object of public attention and political concern."[21]

Hate crimes are perhaps the most emotionally-charged criminal issue in the nation today. According to CNN's Kyra Phillips, "Thousands of people converg[ed] on the U.S. Justice Department" on November 16, 2007 "demanding more federal prosecutions of hate crimes."[22] Can anyone seriously argue that political pressure of this sort will have no effect on the judgment of federal officials?

Proponents of the bill argue that the actual risk of abuse at the Department of Justice is quite minimal. DOJ has its own internal guidelines, know as the "Petite Policy," under which it limits double prosecutions to cases that meet certain standards. Unfortunately, the standards are vague. For example, they authorize double prosecutions whenever there are "substantial federal interests demonstrably unvindicated" by successful state procedures. These federal interests are undefined and undefinable. Moreover, courts have consistently held that a criminal defendant cannot invoke the Petite policy as a bar to federal prosecution.[23]

No one can deny the horror of the Jasper and Laramie murders—or of violent crimes inspired by hatred of any kind. This is something upon which all decent people can agree. But it is precisely in those situations—where all decent people agree on the need to do "something"—that some of the gravest mistakes are made. Passage of the LLEHCPA would be a giant step toward the federalization of all crime. It is a step that the 111th Congress and President Obama should think about twice before they take.

Endnotes

1 James Brooke, *Gay Man Dies from Attack, Fanning Outrage and Debate*, N.Y. Times (October 13, 1998); Carol Marie Cropper, *Black Man Fatally Dragged in Possible Racial Killing*, N.Y. Times (June 8, 1998).

2 Few would argue that these state hate crimes laws add significant additional deterrence beyond that already created by basic criminal prohibitions on murder and other violent behavior; the argument in their favor lies mainly in their symbolic value. There are exceptions: Former New York Governor George Pataki gushed at the signing ceremony for New York hate crimes statute, "It is conceivable that if this law had been in effect 100 years ago, the greatest hate crime of all, the Holocaust, could have been avoided." *See* Richard Brookhiser, *One Critic's View of the Pataki Era*, New York Observer (October 22, 2006).

3 Michael Janofsky, *Parents of Gay Obtain Mercy for His Killer*, N.Y. Times (Nov. 5, 1999). *See* Texas Department of Criminal Justice: Death Row Information, available at www.tdcj.state.tx.us/stat/deathrow.htm (giving status of Lawrence Brewer and John King). A third perpetrator, Shawn Berry, was sentenced to life in prison. *See Third Defendant Is Convicted in Dragging Death in Texas*, N.Y. Times (Nov. 19, 1999).

4 *See* Combating Hate Crimes: Promoting a Responsive and Responsible Role for the Federal Government, Hearing Before the Senate Committee on the Judiciary (May 11, 1999), available at judiciary.senate.gov/resources/106transcripts.cfm.; Hate Crimes Prevention Act of 1998, Hearing Before the Senate Committee on the Judiciary (July 8, 1999).

5 Specifically, 18 U.S.C. Section 245(b) states:

"Whoever, whether or not acting under color of law, by force or threat of force willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with–

...

(2) any person because of his race, color, religion, or national origin and because he is or has been–

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) travelling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and

(i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and;

(ii) which holds itself out as serving patrons of such establishments ... shall be fined under this title, or imprisoned not more than one year, or both ....

6 H.R. 1592 states: "Section 249. Hate crimes acts

(a) In General-

(1) OFFENSES INVOLVING ACTUAL OR PERCEIVED RACE, COLOR, RELIGION, OR NATIONAL ORIGIN- Whoever, whether or not acting under color of law, willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived race, color, religion, or national origin of any person--

(A) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(B) shall be imprisoned for any term of years or for life, fined in accordance with this title, or both, if--

(i) death results from the offense; or

(ii) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(2) OFFENSES INVOLVING ACTUAL OR PERCEIVED RELIGION, NATIONAL ORIGIN, GENDER, SEXUAL ORIENTATION, GENDER IDENTITY, OR DISABILITY-

(A) IN GENERAL- Whoever, whether or not acting under color of law, in any circumstance described in subparagraph (B), willfully causes bodily injury to any person or, through the use of fire, a firearm, or an explosive or incendiary device, attempts to cause bodily injury to any person, because of the actual or perceived religion, national origin, gender, sexual orientation, gender identity or disability of any person--

(i) shall be imprisoned not more than 10 years, fined in accordance with this title, or both; and

(ii) shall be imprisoned for any term of years or for life, fined in accordance

with this title, or both, if--

(I) death results from the offense; or

(II) the offense includes kidnaping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill.

(B) CIRCUMSTANCES DESCRIBED- For purposes of subparagraph (A), the circumstances described in this subparagraph are that--

(i) the conduct described in subparagraph (A) occurs during the course of, or as the result of, the travel of the defendant or the victim--

(I) across a State line or national border; or

(II) using a channel, facility, or instrumentality of interstate or foreign commerce;

(ii) the defendant uses a channel, facility, or instrumentality of interstate or foreign commerce in connection with the conduct described in subparagraph (A);

(iii) in connection with the conduct described in subparagraph (A), the defendant employs a firearm, explosive or incendiary device, or other weapon that has traveled in interstate or foreign commerce; or

(iv) the conduct described in subparagraph (A)--

(I) interferes with commercial or other economic activity in which the victim is engaged at the time of the conduct; or

(II) otherwise affects interstate or foreign commerce.

7 Note, for example, that this provision contains a significant element of strict liability. A defendant who slaps me in the face because I am a law professor may be guilty only of a misdemeanor even if, through some unforeseeable sequence of events, I end up dying as a result of the slap. (Perhaps I slip on a banana peel and hit my head in my effort to escape him.) On the other hand, if he slaps me because I am a woman and my death results in the same manner, he may spend the rest of his life in prison.

8 It isn't necessary that the victim be chosen on the ground of his own perceived or actual status. It is enough, for example, that the victim is chosen on account of the perceived or actual status of some third person. An ordinary street criminal who robs a man because his travelling companion is wheelchair bound (and hence the man has his hands full pushing the wheelchair) would probably be guilty of a federal crime if the LLEHCPA passes.

9 This inclusion of all rape as a "hate crime" would be in keeping with at least one previous Congressional statement. For example, Senate Report 103-138, issued in the connection with the Violence Against Women Act, stated that "[p]lacing [sexual] violence in the context of the civil rights laws recognizes it for what it is–a hate crime." *See* Kathryn Carney, *Rape: The Paradigmatic Hate Crime*, 75 St. John L. Rev. 315 (2001)(arguing that rape should be routinely prosecuted as a hate crime); Elizabeth Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, Harv. Women's L. J. 157 (1994)(arguing that rape is fundamentally gender-based and should be included in the Hate Crimes Statistics Act); Peggy Miller & Nancy Biele, Twenty Years Later: The Unfinished Revolution, in Transforming A Rape Culture 47, 52 (Emilie Buchwald et al. eds., 1993) ("Rape is a hate crime, the logical outcome of an ancient social bias against women.").

10 In response to this situation, Senator Edward Kennedy seems to have disclaimed any intention of covering all rape in the bill. *See* Edward Kennedy, *Hate Crimes: The Unfinished Business of America*, 44 Boston Bar J. 6 (Jan./Feb. 2000)("This broader jurisdiction does not mean that all rapes or sexual assaults will be federal crimes"). But his claim that "such aggravating factors as a serial rapist" will be necessary is not found in any language of the statute and is inconsistent with the refusal of Department of Justice representatives in their earlier discussions with me. It is evidently made in the faith that the Department of Justice will choose not to act except in aggravated cases.

11 *See* LLEHCPA Section 249(b), which requires "certification" by the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General before a prosecution may be undertaken. Although the purpose of this requirement appears to be to avoid turf battles between state and federal authorities, the standards for certification are extremely vague and flexible, and the certification process itself is an extra playing field upon which bureaucratic turf battles may be fought.

12 *See* ACLU Applauds Senate Introduction of Hate Crimes Legislation, *available at* www.aclu.org/lgbt/gen/29340prs20070412.html (April 12, 2007).

13 The ACLU endorses the bill without any discussion of the potential double jeopardy issues it raises. *See supra* at note12. Professor Paul Cassell reports that the ACLU was split on the federal prosecution on the police officers accused of using excessive force against Rodney King following their acquittal on state charges. Although the ACLU's Board of Directors ultimately mustered a vote of 37 to 29 to support the proposition that re-trials constitute double jeopardy, several chapters continued to demand that federal civil rights law be employed to prosecute the Rodney King defendants, notably the Southern California chapter, where the conduct took place. *See* Paul G. Cassell, *The Rodney King Trials and the Double Jeopardy Clause: Some Observations on Original Meaning and the ACLU's Schizophrenic Views of the Dual Sovereign Doctrine*, 41 UCLA L. Rev. 693, 709-15 (1994). *See* Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU,* 41 UCLA L. Rev. 609 (1994); Paul Hoffman, *Double Jeopardy Wars: The Case for a Civil Rights "Exception,"* 41 UCLA L. Rev. 649 (1994)(Legal Director of the ACLU Foundation of Southern California makes argument in favor of re-prosecutions in cases involving "civil rights").

14 U.S. Const. amend. V.

15 260 U.S. 377, 382 (1922). *See* Abbate v. United States, 359 U.S. 187 (1959)(federal prosecution upheld following state conviction); Moore v. Illinois, 55 U.S. (14 How.) 13, 19-20 (1852)(dictum); Fox v. Ohio, 46 U.S. (5 How.) 410, 424-35 (1847)(dictum).

16 At the time of *Lanza*, the Double Jeopardy Clause was thought not to apply to the states and some arguments for the dual sovereignty doctrine rely on that view. But the Supreme Court has held steadfastly to the dual sovereignty doctrine even after *Benton v. Maryland*, 395 U.S. 784 (1969), which held that the Clause had been incorporated through the Fourteenth Amendment. *See* Heath v. Alabama, 474 U.S. 82, 87-89 (1985)(case involving the dual sovereignty of Alabama and Georgia); United States v. Wheeler, 435 U.S. 313 (1978); Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. R. Rev. 1, 11-18 (1995).

17 260 U.S. at 385. *See* United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 497 (2d Cir. 1995)(expressing concern over the doctrine while noting that "[t]he danger that one sovereign may negate the ability of another adequately to punish a wrongdoer, by bringing a sham or poorly planned prosecution or by imposing a minimal sentence, is ... obvious")(separate opinion of Calabresi, J.). *See also* Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. & Soc. Change 383 (1986).

18 *See* Bartkus v. Illinois, 359 U.S. 121 (1959)(state prosecution following federal acquittal upheld); United States v. Avants, 278 F.3d 510, 516 (5th Cir.), cert. denied 536 U.S. 968 (2002)(under the "dual sovereignty doctrine," "the federal government may ... prosecute a defendant after an unsuccessful state prosecution based on the same conduct, even if the elements of the state and federal offenses are identical"); United States v. Farmer, 924 F.2d 647, 650 (7th Cir. 1991)(a "double jeopardy claim based on [a] prior state acquittal of murder is defeated by the 'dual sovereignty' principle").

19 *See generally* James A. Strazzella, The Federalization of Criminal Law, 1998 A.B.A. Sect. Crim. Just. 5-13 (discussing the growth of federal crimes). According to former Attorney General Edwin Meese, III, Chair of the American Bar Association's Task Force on Federalization of Criminal Law, there are at least 3,000 federal crimes. *See* Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 11 Fed. Sentencing Rep. 129, 129 (1998).

20 United States v. All Assets of G.P.S. Automotive Corp., 66 F.3d 483, 499 (2d Cir. 1995).

21 *Id*. at 499.

22 Thousands Protest Hate Crimes, CNN Newsroom Transcript (November 16, 2007) (available on LexisNexis). According to the report, the Department of Justice spokesman said that the Department of Justice was aggressively pursuing hate crimes. One of the reasons cited for the failure to prosecute more hate crimes was the narrowness of the applicable statutes.

23 *See, e.g.,* United States v. Howard, 590 F.2d 564, 567-58 (4th Cir.), *cert. denied,* 440 U.S. 976 (1979) (noting that the Petite policy is "a mere housekeeping provision"); United States v. Musgrove, 581 F.2d 406, 407 (4th Cir. 1978) (stating the rule that "a defendant has no right to have an otherwise valid conviction vacated because government attorneys fail to comply with [Petite] policy on dual prosecutions."); United States v. Thompson, 579 F.2d 1184, 1189 (10th Cir. 1978)("Our view that [the Petite policy] is at most a guide for the use of the Attorney General and the United States Attorneys in the field ...."); United States v. Wallace, 578 F.2d 735, 740 (8th Cir. 1978).

One Year Later: A Reflection on *Parents Involved in Community Schools v. Seattle School District* and the Pursuit of Racial Representation in Public Elementary and Secondary Public Schools

*By Sharon L. Browne**

> At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class.
>
> *Parents Involved in Community Schools v. Seattle School District*

A little more than a year has passed since the U.S. Supreme Court issued its splintered decision in *Parents Involved in Community Schools v. Seattle School District,*[1] striking down two voluntary racial integration plans used by the public school systems in Seattle and Louisville. The court's rejection of the voluntary use of race in assigning students to the nation's public elementary and secondary schools prompted a heated debate among legal scholars and educators, leaving school districts struggling to make sense of the emotionally charged, 5-4 ruling.

Both Seattle and Louisville expressly used race as the tipping factor in assigning school children to public schools.[2] The common motive for these plans was "voluntary integration" to increase racial and ethnic diversity within the public schools.[3] These plans sought to achieve the government's preferred racial and ethnic mix of students, regardless of the choices of the students themselves, or of their parents.

Although the Court's decision struck down both programs, the *Parents Involved* decision did not provide a clear set of rules and principles for school districts to follow, and created some confusion about what school districts and communities can do to promote racial balance in their schools. Much of the confusion arises because the justices in *Parents Involved* were sharply torn on the question of whether public schools should pursue both academic and civic missions. Justice Thomas's concurrence, in particular, sided with the academic-mission advocates, while the dissenting justices sided with the civic-mission advocates.[4] Writing for the plurality, Chief Justice Roberts avoided the debate, contending that the sociological or academic effect of racial diversity was not a question that the Court needed to resolve because neither the Seattle nor Louisville plans were sufficiently narrowly tailored to survive strict scrutiny.[5] Consequently, measures voluntarily undertaken by public school districts to effect racial integration are presumptively unconstitutional, whether used to advance either a civic or academic mission.[6]

The opinion by the Court by Chief Justice Roberts, joined by Justices Scalia, Thomas, Alito and in part by Kennedy, severely limits the tools school districts can use to achieve racial diversity in the classroom. The plurality decision expressed skepticism of all governmental racial and ethnic classifications and preferences, and made clear that such measures must be justified by much more than a mere desire for integration or diversity. As the Chief Justice declared, "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[7] The plurality rejected as compelling state interests eliminating racial imbalance, reducing racial isolation, racial integration, addressing racially concentrated housing patterns or remedying past societal discrimination.[8]

Justice Kennedy's concurrence provided the fifth vote to find Seattle's and Louisville's voluntary racial balancing plans unconstitutional, but took a different view, thereby creating both a legal and a policy conundrum.[9] Justice Kennedy said that school districts may have a compelling interest to avoid "racial isolation" and to achieve a "diverse student population," but made it clear that school children are not pawns to be moved about at the whim of school administrators. "What the government is not permitted to do, is to classify every student on the basis of race and to assign each of them to schools based on that classification. Crude measures of this sort threaten to reduce children to racial chits, valued and traded according to one school's supply and another's demand."[10] Justice Kennedy would endorse bringing students together through strategic site selection of new schools, drawing attendance zones with general recognition of demographics of neighborhoods, allocating resources for special programs, recruiting students and faculty in a targeted fashion, tracing enrollment, performance, and other statistics by race.[11]

Armed with Justice Kennedy's concurrence, the National School Boards Association, the NAACP, and others promptly claimed that the *Parents Involved* decision is murky enough to justify the continued use of race-conscious assignment plans when Justice Kennedy's concurring opinion is joined with the four dissenting justices.[12] School administrators and policymakers across the country are scrambling to craft and implement race-conscious measures designed to achieve racially diverse student bodies. This article questions the wisdom of such pursuits.[13]

Justice Kennedy's Concurrence Stressed the Need to Search for Race-Neutral Alternatives

The plurality opinion made (or reaffirmed) several important holdings. First, strict scrutiny applies to any voluntary integration plans that rely on individual racial classifications.[14] Second, the Court has recognized only two compelling interests for the use of race in the context of public education: remediation of past de jure segregation and, in higher education, the achievement of a broad concept of diversity where race is only one of many factors.[15] And finally, racial balancing per se is patently unconstitutional.[16] The plurality then struck down the Seattle and Louisville school assignment programs because they were not narrowly tailored, without addressing the key question of whether the plans served a compelling state interest.[17]

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While joining Justice Roberts' opinion on these points, Justice Kennedy parted company with the plurality in asserting that "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue."[18] In some limited circumstances, Kennedy opined, race "may be taken into account" to ensure that "all people have equal opportunity regardless of their race."[19] In particular, the Kennedy concurrence stressed that "[t]o the extent the plurality opinion suggests the constitution mandates that state and local school authorities must accept the status quo of racial isolation in schools, it is in my view, profoundly mistaken."[20] Nevertheless, Justice Kennedy equally forcefully distanced himself from Justice Breyer's dissent: "The dissent's reliance on this Court's precedents to justify the explicit, sweeping classwide racial classifications at issue here is a misreading of our authorities that, it appears to me, tends to undermine well-accepted principles needed to guard our freedom. And in his critique of that analysis, I am in many respects in agreement with the Chief Justice."[21]

The Kennedy concurrence provides guidelines of race-neutral measures that, in his view, school districts may legally employ to "encourage a diverse student body, one aspect of which is its racial composition."[22] These include strategic site selection of new schools, drawing attendance zones with general recognition of the demographics of neighborhoods, allocating resources for special programs, recruiting students and faculty in a targeted fashion, and tracking enrollments, performance, and other statistics by race.[23] But in implementing such measures, Kennedy warned, the districts must not assign to "each student a personal designation according to a crude system of individual racial classification."[24] These admittedly race-conscious mechanisms, in Kennedy's view, "do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible."[25]

Still, the Kennedy concurrence would not give school officials a free pass to engage in voluntary integration through facially race-neutral policies.[26] As the concurrence points out, facially neutral measures require "a more searching inquiry" before strict scrutiny applies, but they are nonetheless ultimately bound by the most exacting level of judicial review.[27] If facially race-neutral measures are being used simply as a "pretext for racial discrimination" by the state, then strict scrutiny applies with equal force.[28] Notably, in *Columbus Bd. of Education v. Penick*,[29] the Court struck down a school district's race-neutral policy of using "optional attendance zones, discontiguous attendance areas, and boundary changes; and the selection of sites for new school construction" because they were "intentionally segregative" and had the "foreseeable and anticipated effect of maintaining the racial separation of the school."[30]

Predictably, courts will need to engage in their own line-drawing in determining what race-neutral alternatives are predominately racially motivated, and which are not. Justice Kennedy's concurrence opinion plainly invites further litigation regarding the manner and extent to which school districts may implement race-conscious policies to achieve non-remedial integration in their schools.

An Abundance of Race-Neutral Mechanisms Exist to Address the Problem Associated with Racial Imbalance in Public Schools

The *Parents Involved* decision left educators across the country struggling to identify fresh approaches to student assignment plans. The Court's opinion made it clear that all racial classifications are subject to strict scrutiny review, and even under Justice Kennedy's concurrence, such classifications may be employed in pursuit of a racially diverse student body only as a last resort.[31] In casting his vote to strike down the race-conscious school assignment plans adopted in Seattle and Louisville, Kennedy noted that "the schools could have achieved their stated ends through different means."[32]

What means could they have used?

The Department of Education's Office for Civil Rights has identified many innovative, race-neutral alternatives to promote student body diversity while avoiding the sort of blatantly discriminatory policies that were rejected by *Parents Involved*.[33] Perhaps the foremost example of such a race-neutral alternative would be providing preferential assignments on the basis of socioeconomic status. Such programs seek to reduce concentrations of poverty and "set the tone that academic achievement is to be valued and that aspirations should be set high."[34] To the extent racially imbalanced schools are merely a side effect of poor student achievement, other race-neutral strategies can be brought to bear on the problem. These might include the creation of "skills development" programs—projects designed to improve educational achievement among students who attend traditionally low-performing schools. Low performing schools can also enter into partnership with universities to strengthen their students' ability to succeed in college.

On a more fundamental level, school districts can reform their procedures to give parents greater choice as to where to send their children to school. Such reforms could introduce the use of charter schools or vouchers. "Increased choice creates a competitive environment that forces schools to compete for students. Thus, increased school choice should produce new and innovative schools, including those that are particularly effective at responding to the educational needs of low-income, urban, minority students."[35] Similarly, districts can create magnet schools offering specialized programs that attract diverse groups of students. As a California appeals court has explained: "Magnet schools have the advantage of encouraging voluntary movement of students within a school district in a pattern that aids desegregation on a voluntary basis."[36] In case of excess demand to place students in high-performing schools, districts can make school assignments on the basis of a lottery system, perhaps weighted in favor of applicants from disadvantaged socioeconomic backgrounds.[37]

California's Proposition 209 Demonstrates the Potential of Race-Neutral Programs to Improve the Academic Performance of Minority Students

Are the foregoing proposals merely ideological window dressing, or do they have serious potential to overcome the problems associated with racially isolated public schools? If the goal of race-based assignment policies is to improve the

academic performance of minority children, then California has proven that the goal can be achieved through race-neutral means. For over ten years, most of California's public school districts have been providing equal educational opportunities to all students without using race-based assignment plans.[38] This is because the California Constitution prohibits the very kind of voluntary integration policies at issue in *Parents Involved*.

In 1996, California's voters overwhelmingly approved Proposition 209, adding Article I, Section 31, to the California Constitution. This measure provides that "[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[39] By banning the use of race in public education for nearly any reason whatsoever, Proposition 209 imposes more stringent restrictions on government than those of the federal Equal Protection Clause.[40]

One of the goals of Proposition 209 was to "address inequality of opportunity... by making sure that *all* California children are provided with the tools to compete in our society."[41] At the same time, the voters understood that Proposition 209 would "eliminate, or cause fundamental changes to, voluntary desegregation programs run by school districts.[42]

In the wake of Proposition 209's passage, the League of California Cities made recommendations to school districts, including the development of academic support programs and financial aid services for students from low-income backgrounds.[43] Today, for example, the UC Links program at the University of California Berkeley helps prepare K-12 students from low-income families for college.[44] UC Links is inclusive, supporting children who are struggling in school, as well as those who do well. While many educational programs serve students who are already succeeding in school, UC Links programs are open to all children and youth in the host school or community. By giving youth from low-income or language-minority communities extra support early in their school careers, UC Links enables them to overcome obstacles they face to their academic development.[45] According to… the program has resulted in "improved basic literacy, greater information literacy, improved collaborative behavior and attitudes, and increased aspirations for higher learning."[46]

The academic achievement of students in California K-12 schools has not suffered from the unavailability of race-based policies since 1996. In fact, according to data reported by Eryn Hadley, "[t]he graduation rates of California's high school students steadily increased after the passage of Proposition 209" *in every ethnic group*.[47] Hadley goes on to explain:

> [T]he California High School completion rate reached a low point of 64% during the 1994-95 year (the year before Proposition 209 was adopted), after dropping from 68.6% in 1991-92. In the following years, the high school graduation rate crept back up to 69.6% in 2001-02. A report based on data from the California Department of Education shows that the graduation rate of all minority students increased in each ethnic group between the years 1995-96 and 2001-02. The low percentage of students that graduate with a high school diploma is discouraging, but it requires providing all students with the tools they need, regardless of race or sex.[48]

Moreover, minority high school students in California have outperformed minority high schools students nationally, notwithstanding the state's constitutional ban on race-based programs to achieve student diversity. As Hadley reports:

> The graduation rates of California's minority students were above the national average in 2001. In California, 82.0% of Asian students graduated in 2001, compared to 76.8% of Asian students nationally. Fifty-seven percent of Hispanic students in California graduated in 2001, compared to 53.2% nationally. California's black students beat the national graduation rate by 5.1% in 2001, with 55.3% of California's black students graduating from high school.[49]

Race-neutral programs have worked in California and have a proven track record. It is the responsibility of elected local school boards to ensure that every child has a genuine opportunity to receive an excellent education no matter what school he or she attends, regardless of race.

Parents and Community Leaders Can Band Together to Eliminate Race-Based Assignment Programs

It is generally acknowledged that many school districts must redo their assignment plans to comply with *Parents Involved*, and some school districts have abandoned their race-based school assignment plans in the wake of the decision.[50] Much can be accomplished through the political process when parents, guardians, and community leaders apply pressure on their school boards to eliminate race-based assignment plans. For example, in Beaumont, Texas, the locally elected school board recently discontinued its race-conscious student transfer policy in favor of one based on socio-economic factors after parents and community leaders threatened legal action unless the board discontinued its program.

After operating under a desegregation order for years, the Beaumont schools were finally declared unitary in 1984.[51] Nevertheless, the school board never ceased its race-based transfer policies. When approving or disapproving a student's transfer request, race became the deciding factor. The transfer policy stated:

> Students may request a school out of their assigned zone based upon ethnic percentages at their zoned school and their school of choice. If their ethnic classification is of a lesser number on the desired campus rather than their zoned campus, and space is available, then the transfer will be approved. Transportation is provided.[52]

In November of 2007, on behalf of parents, guardian, and community leaders, the Pacific Legal Foundation sent a demand letter to the Beaumont Board of Trustees demanding that they repeal the policy.[53] Local newspapers and radio stations joined in the effort. In February 2008, the Trustees eliminated the race-based transfer policy and replaced it with one based on economic status.[54]

Other school districts have refused to comply with the Supreme Court's decision, yet parents are reluctant to come forward because of the cost of litigation and fear of retaliation. Until parents and community leaders bring pressure to bear, school districts in Jefferson County, Kentucky, Los Angeles, California, Boston, Massachusetts, Hartford, Connecticut, Milwaukee, Wisconsin and elsewhere may continue to classify

their students by race in pursuit of the chimera of "diversity."

CONCLUSION

The *Parents Involved* decision is severely fragmented, yet the plurality opinion read in conjunction with Justice Kennedy's concurrence makes three points clear: voluntary integration plans that incorporate race-based criteria are subject to strict scrutiny, school districts may not classify individual students on the basis of racially defined groups, and race-neutral alternatives must be exhausted before any race-conscious program may be employed. Public school boards and administrators should rise to the challenge of fashioning creative race-neutral programs to ensure academic achievement by all students, regardless of race. If necessary, parents and community leaders must be willing to step forward and demand that their locally elected school boards comply with the Supreme Court's mandate in *Parents Involved*.

Endnotes

1 Parents Involved in Community Schools v. Seattle School Dist. No. 1, 127 S. Ct. 2738 (2007).

2 *Id.* at 2747, 2750.

3 *Id.* at 2749.

4 *Id.* at 2820-2824. Justice Kennedy characterized the dissent's finding of compelling state interest: "The dissent finds that the school districts have identified a compelling interest in increasing diversity, including for the purpose of avoiding racial isolation." *Id.* at 2789 (Kennedy, J., concur.).

5 *Id.* at 2755 ("The parties and their amici dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity."). Justice Kennedy characterized the plurality's opinion: "The plurality, by contrast, does not acknowledge that the school districts have identified a compelling interest here. For this reason, among others, I do not join Parts III-B and IV. Diversity depending on its meaning and definition, is a compelling educational goal a school district may pursue." 127 S. Ct. at 2789 (Kennedy, J. concur.).

6 While pursuit of achieving the social, democratic and academic benefits may be laudable, they do not guarantee educational equality for all students. *See* Eboni Nelson, *Examining the Costs of Diversity*, Miami L. Rev.(forthcoming).

7 127 S. Ct. at 2768 (plurality opinion).

8 127 S. Ct. at 2758 ("The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote–racial diversity, avoidance of racial isolation, racial integration–they offer no definition of the interest that suggests it differs from racial balance.").

9 Marks v. United States, 430 U.S. 188, 193 (1977), holds that when there is a split in the Court's decision, "the position taken by those members who concurred in the judgment on the narrowest grounds" controls. Although beyond the scope of this article, it appears that Justice Kennedy's concurring opinion on what is a compelling state interest is too broad and undefined; whereas the plurality opinion directly addresses the issues before the court and should be followed.

10 *Parents Involved*, 127 S. Ct. at 2797 (Kennedy, J., concur). As demonstrated by a variety of amicus briefs filed on behalf of both sides in *Parents Involved*, the psychological, emotional, and mental harms that result when government engages in racial line-drawing are numerous. *See, e.g.*, Brief Amicus Curiae of Asian American Legal Foundation in Support of Petitioners in Parents Involved at 15 ("While mandated racial balancing in San Francisco's schools did not produce discernable benefits, it caused obvious harm.… Many Chinese American children have internalized their anger and pain, confused about why they are treated differently from their non-Chinese friends."); Brief Amicus Curiae of Various School Children from Lynn, Massachusetts, Who are Parties in *Comfort v. Lynn School Committee*, Filed in Support of the Petitioners in *Parents Involved* at 9 ("Using race-based student assignments to achieve diversity based purely on race assumes that a child will contribute in a certain way to the classroom, without any examination of the individual child.").

11 *Parents Involved*, 127 S. Ct. at 2792 (Kennedy, J., concur.).

12 National School Boards Association, *Not Black and White*, *available at* http://www.nsba.org/SecondaryMenu/CUBE/Publications?CUBERResearchReports?NotBlackandWhite.aspx (last visited October 14, 2008); NAACP Legal Defense and Educational Fund, Inc. and the Civil Rights Project/Proyecto Derechos Civiles, *Still Looking to the Future: Voluntary K-12 School Integration*; A Manual for Parents, Educators, & Advocates, available at http://www.naacpldf.org/content/pdf/voluntary/Still_Looking_to_the_Future_Voluntary_K-12_School_Integration;_A Manual for Parents,_ Educators_and_Advocates.pdf (last visited Oct. 14, 2008).

13 There were 97,000 K-12 public schools in the 2005-06 school year, which educate approximately 49.1 million students ranging from 5 to 18 years of age, at an annual cost to taxpayers of more than $487.8 billion. Nat'l Ctr. for Educ. Statistics, *Information on Public Schools and School Districts in the United States*, CCD Quick Facts, *at* http:// nces.ed.gov/ccd/quickfacts.asp (last visited Oct. 14, 2008).

14 127 S. Ct. at 2751-52.

15 *Id.* at 2752-53.

16 *Id.* at 2753-54.

17 *Id.* at 2755.

18 *Id*. at 2789 (Kennedy, J. concur.).

19 *Id.* at 2791.

20 *Id.*

21 *Id.* at 2793.

22 *Id.* at 2791.

23 *Id.* at 2792.

24 *Id.*

25 *Id.* at 2791.

26 *See, e.g.*, Leslie Yalof Garfield, *The Glass Half Full: Envisioning the Future of Race Preference Policies*, 63 N.Y.U. Ann. Surv. Am. L. 385, 419 (Justice Kennedy's "clear formulation of the appropriate instances in which courts may find that a state agency has met its burden of showing a compelling governmental interest provides future courts with the ability to uphold race-preference challenges beyond the context of higher education."); *see also* Michael J. Kaufman, *Reading, Writing, and Race: The Constitutionality of Educational Strategies Designed to Teach Racial Literacy*, 41 U. Rich. L. Rev. 707, 734-40 (identifying the race-neutral alternatives in achieving racial diversity under *Grutter*).

27 *See* 127 S.Ct. at 2792.

28 *Id.*

29 443 U.S. 449 (1979).

30 *Id.* at 461-63.

31 127 S. Ct at 2792 (Kennedy, J., concur.).

32 *Id*. at 2792-93 (Kennedy, J., concur.).

33 *See* U.S. Dep't of Educ., Office for Civil Rights, *Achieving Diversity: Race-Neutral Alternatives in American Education* (2004) *Available at* http://www.ed.gov/about/offices/list/ocr/edlite-race neutralreport2.html (last visited July 9, 2006).

34 *Id.* at 34.

35 Kevin Brown, *The Supreme Court's Role in the Growing School Choice Movement*, 67 Ohio St. L.J. 37, 41 (2006).

36 Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96, 104 (Cal. Ct. App. 2002) (internal citation and quotation marks omitted); *see also* Hernandez v. Bd. of Educ. of Stockton Unified Sch. Dist., 25 Cal. Rptr. 3d 1, 4-5 (Cal. Ct. App. 2004) (describing a school district's "race neutral" magnet program for achieving racial diversity).

37 *See Crawford*, 121 Cal. Rptr. 2d at 104 ("Another version of an 'integration plan' described is a program which would assign only a very small geographic area for a student's home school, and fill remaining places in that school's class by an unweighted random lottery."). *See also* U.S. Dep't of Educ., Office of Innovation & Improvement, *Innovations in Education: Creating Successful Magnet Schools Programs* 4 (2004).

38 Proposition 209 provides a narrow exception from the prohibition on the use of race when there is a court order or a consent decree that was "in effect" when Proposition 209 was adopted in 1996. Cal. Const. art. 1, section 31(d). When a narrow exception is not triggered, California appellate courts have struck down plans to achieve racial balancing. *See, e.g., Crawford*, 121 Cal. Rptr. 2d at 104 (striking down race-based voluntary transfer policy used to achieve racial balance).

39 Cal. Const. art. I, § 31(a). "State" includes school districts. Cal. Const. art. I, § 31(f).

40 *See* Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068, 1087 (Cal. 2000) ("Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception"). The measure does provide for narrow statutory exceptions, including race-conscious programs required to comply with existing court orders and to maintain federal funding.

41 *Id.* at 12 P.3d at 1083, 24 Cal. 4th at 561.

42 *Id.* at 584 (concurring and dissenting opinion of George, C.J.).

43 *See* Eryn Hadley, Note, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 B.Y.U. J. Pub. L. 103, 131 (2005) (citing League of California Cities report).

44 "UC Links serves students starting at the early stages of the academic pipeline. UC Links largely serves students at the elementary and middle school levels, and sets them early on a college-going path through engaging learning activities." *UC Links: A Summary*, http://www.uclinks. org/what/what_home. html (follow "summary" hyperlink).

45 *See id.*

46 UC Links, *University-Community Links: Building a Pathway to Higher Education Through Informal Learning Activities*, http://www. uclinks.org/what/ what_home.html (follow "overview" hyperlink).

47 *Supra* note 43, at 132 (citing California Department of Education statistics).

48 *Supra* note 43, at 132.

49 *Supra* note 43, at 133.

50 Charles Ogeltree, *From Little Rock to Seattle and Louisville: Is "All Deliberate Speed" Stuck in Reverse?"* 30 U. Ark. Little Rock L.Rev. 279, 290 (2008)(citing Gary Orfield & Erica Frankenberg, *The Integration Decision*, Education Week (July 18, 2007).

51 United States v. Texas Educ. Agency, No. B-6819-CA, slip. op., at 17 (E.D. Tex. July 19, 1984).

52 On file at Pacific Legal Foundation.

53 On file at Pacific Legal Foundation.

54 BISD changed its policy in response to a December 2007 cease and desist letter by the Pacific Legal Foundation. Emily Guevara, *BISD Replaces Race-Based Transfers With Policy Based On Students' Economic Status*, Beaumont Enterprise. Com (February 23, 2008), available at http://www.beaumontenterprise. com/site/news.cfm?newsid=19258589&BRD=2287&PAG=461&dept_ id=512588&rfi=6 (last visited April 15, 2008).

A New Era in Federal Preferential Contracting? *Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*

*By George R. La Noue**

On Election Day, while the country's attention was otherwise engaged, the Federal Circuit Court of Appeals unanimously stuck down the racial preferences in Section 1207 of the National Defense Authorization Act (1987), the federal defense contracting program.[1] Although racial preferences in federal contracting began in the 1977 Public Works Employment Act (PWEA)[2] and have subsequently spread to dozens of other programs and agencies,[3] the *Rothe v. Department of Defense and Department of the Air Force* decision marks the first time a facial challenge to a federal preferential contracting program has ever been successful. *Rothe's* victory came after ten years of litigation that involved losing three trial court decisions[4] and then winning reversals and remands in two Circuit Court opinions in 2001 and 2005.[5] In its third encounter with the case, precedents had so tightened the evidentiary requirements for contracting preferences that the Federal Circuit finally found the 1207 program unconstitutional on its face."[6] Because of the unique status of the Federal Circuit Court of Appeals which can have national jurisdiction over federal contracting,[7] the *Rothe* decision has far more significance than a decision by another Circuit which would be enforceable only in that Circuit. The Bush Department of Justice opted not to seek en banc reconsideration and Obama's new team decided not to petition for certiorari, so the *Rothe* rules will have to be seriously considered as the Obama administration crafts its stimulus programs with expanded federal procurement.

I. Context of the *Rothe* Litigation

During the 1977 consideration of the PWEA which was also designed to use federal procurement to respond to a downturn in that era's economy, Congressman Parren Mitchell, chair of the Black Congressional Caucus, successfully amended the bill to include a provision that 10% of all contract dollars go to minority businesses. Minorities were defined by the Small Business Administration as African-Americans, Hispanics, Asian-Americans, and Native Americans and that is still the definition used in all federal minority business programs.[8] In 1986, Congress extended the concept of minority business preferences to defense procurement in the "Contract Goal for Minorities" Act, or Section 1207 of the National Defense Authorization Act, which covered, in addition to the Department of Defense (DOD), the Coast Guard and NASA. Designated minority firms were to receive 5% of all defense contracts dollars,[9] even though most of those dollars go to large publicly held firms such as Northrop Grumman, Lockheed Martin, General Dynamics, etc. In order to meet these goals, DOD could grant a price-evaluation adjustment (or "PEA") of up to 10% to minority firms, meaning that if a non-minority bid $10,000,000 for a contract and a minority bid $10,900,000, the non-minority firm bid could be increased up to 10%, or $11,000,000, so that the contract could be could be awarded to the minority firm.[10] There are no published reports on how much more taxpayers have been billed for superfluous military expenditures under this arrangement. Minority firms were also eligible for advance payments on contracts awarded. Congress extended these substantial advantages to minority firms several times between 1986 and 2006, but Congress rarely made specific findings about why there was a compelling interest for such race-based preferences in defense procurements. Once embedded in the DOD legislation or in the dozens of similar programs the Congressional Research Service has located, the minority provisions were routinely extended without much debate.

Such debate, however, has occurred in the courts. In 1980, in a 6-3 vote the Supreme Court upheld the PWEA 10% set-aside largely because the majority thought it appropriate to defer to Congress on a spending program.[11]

In the 1989 landmark *City of Richmond v. J. A. Croson* decision, the Supreme Court not only invalidated Richmond's preferential contracting program, but it established that strict scrutiny was the test that should apply to all such state and local racial classifications. To meet the compelling interest and narrow tailoring prongs of strict scrutiny, "proper findings" had to prove the preferences were a remedy for discrimination and not just legislative racial politics. To be narrowly tailored discrimination had to be identified in each locality and industry covered by the contracting program and that discrimination had to affect each of the specific groups preferred by the program. Those findings had to be primarily statistical. Justice O'Connor provided a specific test:

> Where there is a *significant* statistical disparity between the number of *qualified* minority contractors *willing and able to perform a particular service* and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion *could arise*.[12]

This tough standard has rarely been met and, after *Croson,* dozens of state and local minority and women preference programs have been terminated, substantially modified, or turned into race-neutral operations.

Similar federal contracting programs, however, generally have been immune from attack, despite the Supreme Court's 1995 *Adarand Constructors v. Pena* decision, which required that a single standard of strict scrutiny be applied to all race-based programs, regardless of the originating level of government.[13] After *Adarand*, the Clinton administration created a two-prong defense in 1996 to protect its "mend don't end" affirmative action policy in contracting. First, it attempted to buttress the compelling interest for preferences by conducting a federal disparity study by the Department of Commerce (the Benchmark Limits study), by asking the Urban Institute to create a meta-analysis of existing state and

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local disparity studies, and by creating a Department of Justice position paper, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey." Attached to the survey was "Appendix A," a 23 page compendium listing all the congressional documents and disparity studies the Justice Deparment could find to support its argument that pervasive discrimination existed in the economy.

In the short run, these strategies were successful. The three compelling interest documents created an evidentiary basis so voluminous that it overwhelmed the resources of plaintiffs who did not have the wherewithal to acquire the three reports' underlying data and then to conduct their own analyses of that data. Thus, the plaintiff's strategy of challenging the validity of individual disparity studies that has prevailed in a number of state and local cases could not be implemented in the federal cases. So, despite the fact that substantial criticisms were leveled at these reports,[14] they proved practically unchallengeable in litigation.

Second, the Clinton Administration changed the regulations governing some of its contracting programs to create more narrow tailoring.[15] For example, the 10% national Disadvantaged Business Enterprise (DBE) quota was abandoned in favor of requiring every state and local recipient of transportation funds to set its own goals based on local market availability of DBE and non-DBE firms and estimates about the effects of local discrimination, if any. DBEs are firms whose principal owner is entitled to the presumption of being socially and economically disadvantaged. After *Adarand*, an objective, though generous definition of "economic disadvantage" was added, but "social disadvantage" was automatically presumed to adhere to any minority or women business owner.

In the late 1980s, the Department of the Air Force contracted with Rothe Development Corporation, owned by a white woman, to maintain, operate, and repair the computer systems at Columbus Air Force base in Mississippi. Rothe was regarded as a contractor "with an excellent performance record,"[16] but the Air Force decided to consolidate Rothe's contract with a larger one for communication services and to award the contract under the Section 1207 program. After the bids were opened, Rothe was low at $5.57 million, while International Communications and Telecommunications, Inc. (ICT), a Small Disadvantaged Business (SDB),[17] owned by a Korean-American was second at $5.75 million. Under the 1207 preferential price adjustment (PEA) policy, the government recalculated Rothe's bid to $6.1 million and the contract was awarded to ICT now "fictionally"[18] the lowest bidder at a cost of about $150,000 more to the taxpayers for the same service.

Deprived of a contract on which it had successfully performed and now facing laying off its own workers and training ICT to do it works, Rothe decided to seek a preliminary injunction. Its attorney was David Barton of the Gardner Law Firm in San Antonio. Barton specialized in procurement law and coincidentally was a retired Air Force Judge Advocate Lieutenant Colonel, but had not been involved previously in major civil rights litigation.

II. *Rothe* I, II, and III

Rothe's motion for a preliminary injunction filed in November 1998 was quickly denied by District Court Judge Edward Prado. Consequently, an amended complaint was filed in February 1999 claiming that Section 1207 was unconstitutiona1 on its face and, therefore, that a permanent injunction should be issued prohibiting the award of the contract to ICT and that Rothe should be awarded bid preparation costs not to exceed $10,000 under the Little Tucker Act. Two months later, Judge Prado granted summary judgment to DOD upholding the constitutionality of Section 1207 and denying any relief to the plaintiff (*Rothe* I).[19] The court held that, since Section 1207 had no illegitimate purpose nor reflected any legislative racial animus, but "was designed to address a social ill identified by Congress on the basis of extensive evidence," the federal government had a compelling interest for the program.[20]

Rothe, then, appealed to the Fifth Circuit, but DOD moved to dismiss the appeal or to transfer it to the Federal Circuit of Appeals which has exclusive appellate jurisdiction over Tucker Act claims. In October, 1999, the Fifth Circuit agreed that jurisdiction belonged to the Federal Circuit, so the case was transferred there (*Rothe* II).[21]

The Federal Circuit heard oral arguments more than a year later and on August 20, 2001 issued an opinion accepting exclusive jurisdiction and vacating the District court ruling because that court," improperly applied a deferential legal standard rather than 'strict scrutiny' and "also impermissibly relied on post-reauthorization evidence to support [Section 1207's] constitutionality as reauthorized (*Rothe* III).[22]

In *Rothe* I, the District Court found compelling a 1975 Congressional report that showed minorities were 16% percent of the population, but owned only 3% of American businesses.[23] The plaintiffs argued that even if a generalized compelling interest existed, the government needed *Croson*-like evidence that related to the specific beneficiary groups, the specific industries, and the specific geographical areas relevant to the contract involved. Judge Prado had no difficulty sweeping aside the latter argument because Congress has national legislative responsibilities. The plaintiffs also attacked SDB's inclusion of Asian-Americans as a socially and economically disadvantaged group, because on many educational and income measures they exceed white attainment. Furthery, they challenged including Korean-Americans specifically because they are the leading ethnic group in business formation.[24] In rejecting the plaintiffs' group specific argument, the court relied on no government statistics, but Judge Prado said he was aided by the post-enactment evidence in amici briefs submitted by several of the Asian American legal defense organizations, insisting that their constituents still faced discrimination.[25]

Regarding the issue of whether to limit the preferences to industries in which there was some evidence of discrimination, the benchmark limits study had to be considered, since it was post-*Adarand* federal policy that preferences could only be applied to those industries where a disparity had been shown. Rothe believed that the benchmark ratios had been incorrectly calculated and demanded that the government provide the

underlying census data on which parts of the study were based or have the study excluded because its underlying data were not available. The Department of Commerce asserted that the statutory privilege regarding raw census data precluded its release and the court decided that it would not presume that the government was hiding data and that, since neither the plaintiffs nor the defense could get the underlying data, neither side was disadvantaged. In other words, the court would accept the government's word that the statistics in the benchmark study were accurate.

While Judge Prado was certain that Section 1207 met his standards, *Rothe* I was not clear about what kind of evidence the federal government needed to have before Congress had the compelling interest to create contracting preferences. To the contrary, the judge stated that, "if Congress is to be allowed a broad vision of the nation's problems, it seems only logical that it be allowed some measure of deference in addressing those problems."[26] He specifically declined to conduct a *Croson*-like analysis of the § 1207 program, arguing that *"Croson's* mandate that a local government make specific findings regarding specific minorities in specific industries" should not be applied "without alteration to acts of Congress."[27]

In its *Rothe* III review, the Federal Circuit Court of Appeals rejected the district court's deferential approach.[28] The Circuit determined that *Adarand* required that all racial classifications, regardless of the government making them, were subject to the strictest governmental scrutiny, [29] because "it would be unthinkable that the same Constitution would impose a *lesser* duty on the Federal Government than it does on a State to afford equal protection of the laws."[30] Since the Supreme Court had concluded that the Fourteenth Amendment's equal protection precedents applied when interpreting equal protection issues under the Fifth Amendment's due process clause, it followed that the *Croson* analysis was the standard to be applied to the §1207 program and other federal racial classifications as well.[31] In a major clarification of the law, the Circuit held Congress was entitled to no deference in either the compelling interest or narrow tailoring analysis required by strict scrutiny. On remand, the Circuit Court instructed that the district court "should undertake the same type of detailed, skeptical, non-deferential analysis undertaken by the *Croson* Court."[32]

The Circuit, then, addressed the problem of how the remand should treat compelling interest evidence. First was the controversial issue of post-enactment evidence. If a legislature needed to have a compelling interest to use racial classifications, then logically that evidence should be assessed prior to enactment. But some courts have permitted defendants to make their case for racial classifications with evidence gathered after the fact, even literally at trial. Such a judicial policy sanctions legislative lassitude, since the defense evidence can always be mobilized years later, if and when the race-based program is attacked. It also greatly intimidates potential plaintiffs, since they cannot estimate what the time and cost will be of challenging evidence they have never seen. After reviewing the divided case law, the Circuit determined that, while post-enactment evidence could be used to evaluate whether a program was narrowly-tailored in its operation, it could not be used determine whether there was a compelling interest in the first place. Consequently, the Circuit found that Judge Prado had impermissibly relied on the 1996 benchmark study and the Asian-American trial amici briefs to justify a compelling interest in the 1987 and 1992 1207 reauthorizations.

Second, the Circuit held that, while Congress could legislate on a national basis, a few isolated instances of discrimination would be insufficient to uphold a nationwide program and the district court should attempt draw that line. Third, the Court ruled that while Congress did not have the obligation to make findings regarding each subgroup (i.e., Korean-Americans), it should have evidence for each of the five major racial and ethnic groups preferred by the program.[33] Fourth, it found that the district court should determine whether discriminatory effects were experienced in specific industries and that court should determine the boundaries of "relevant industries."[34]

In short, *Rothe* III created a road map for reviewing congressional compelling interest contracting evidence that blended *Croson* with other appellate decisions in a far more explicit way than had previously existed. Among other things, it created a template that did not exist when the Clinton Administration's 1996 reports were created to buttress the compelling interest case for federal contracting preferences.

III. *Rothe* IV and V

It is one thing for a Circuit Court to remand with instructions and another thing to have those instruction promptly implemented by a district court. Three years later, Judge Xavier Rodriguez, who inherited the case when Judge Prado was elevated to the Fifth Circuit bench, responded in *Rothe* IV that the Circuit Court's road map had "quickly became obsolete."[35] First, Rothe was making a claim about the contract it lost, as well as for prospective injunctive and declaratory relief against the existing program. Therefore, the district court held that because Congress had reauthorized Section 1207 again, the case should be bifurcated into the evidence Congress had before the 1992 reauthorization and the evidence Congress had before it in the 2003 reauthorization. After lamenting the fact that Congress could not have known in 1992 that it must meet the standards the Supreme Court announced in *Adarand* (1995) and *Shaw* (1996),[36] and reviewing the pre-authorization evidence Congress did have, Judge Rodriguez agreed that Congress had no statistical evidence about Asian-Americans in any specific industry in 1992. Consequently, he found that the Section 1207 program as applied to Rothe's lost 1998 contract was unconstitutional.[37]

The district court then turned to whether the 1207 program was still unconstitutional on its face after the 2003 reauthorization. The Court evaluated the three Clinton post-*Adarand* documents and found them sufficient to create a compelling interest.

On appeal in 2005 (*Rothe* V),[38] the Circuit Court again vacated the district court's summary judgment for the government. The Circuit's principal concern was that the district court had impermissibly narrowed discovery and that it had not actually analyzed whether the 1996 studies were "before" Congress in the sense that there were hearings or debates about these documents during the routine reauthorization

process. At one point, DOD appeared to argue that there were no boundaries to the information on which it could be later inferred that Congress had relied on in finding a compelling interest. Further, the Circuit specifically rejected the district court's theory of Congressional "institutional memory" that would permit a finding of compelling interest based on an assumption that Congress in passing current legislation was relying on evidence about discrimination it remembered from some time in the past. Rothe argued that evidence might now be stale and no longer descriptive of the current discrimination or its effects and the Circuit Court agreed.

In short, in *Rothe* III the Circuit limited the use of post-enactment evidence for the purpose of establishing a compelling interest and in *Rothe* V it limited the use of pre-enactment evidence to information that was actually before a legislature and that was not stale. *Rothe* III and V, therefore, established two major evidentiary principles regarding compelling interest in Equal Protection cases. But the third remand was not to bring relief to the plaintiff for three more years.

IV. *Rothe* VI and VII

Following *Rothe* V, the plaintiffs moved in district court for a preliminary injunction to bar DOD use of any race-based procurement programs. This motion clarified Rothe's Section 1207 challenge to include: the subcontracting incentive programs, awards using less than full and open competition to designated groups (including some awards under the 8(a) program of the Small Business Act), advance payment and other assistance to SDBs, and the provision of SDB status to historically black colleges and universities.[39] The district court acknowledged that the clarification was within the parameters of the original complaint and directed the parties to present to the court any [non-stale] evidence about relevant discrimination that was before Congress during the 2006 Section 1207 reauthorization. After additional discovery, both parties moved for summary judgment and the district granted summary judgment to DOD on August 10, 2007.[40]

Because of the ruling that only non-stale evidence could support the 2006 reauthorization, the court first had to reconsider the three 1996 Clinton era reports which the Department of Justice had successfully proffered to support preferential contracting programs for years. This time, however, Judge Rodriguez found that the studies' data, some dating back to the mid-1980s, were too stale to serve as evidence for racial preferences reauthorized in 2006.[41] Since DOD did not challenge this finding on appeal, the Clinton-era studies have now been laid to rest as foundations for any contemporary compelling interest finding.

The court then turned to the newer evidence DOD produced: letters from various business owners describing their perceptions of discrimination in state, local, and private contracting, various anecdotes regarding discrimination mentioned by members of Congress in floor remarks,[42] some testimony by business owners before the House Small Business Committee in 2001 and 2004, three reports from the Small Business Administration, and most significantly six state (Virginia) and local (Cincinnati, Dallas, and New York, Alameda County, Cal. and Cuyahoga County, Ohio) disparity studies. Because the Benchmark study was considered stale, there was no longer any federal disparity study to consider.

On appeal, the Federal Circuit appeared to be growing tired of the pattern of remand in which its instructions were not always followed and decided to rule on the merits. It unanimously found the DOD Section 1207 program unconstitutional on its face. The Circuit focused its review on the District Court's acceptance of the six state and local disparity studies as a basis for the 1207 program. The plaintiffs argued that much of the data in those studies were also stale, noting that the United States Commission on Civil Rights suggested a five-year rule for determining whether statistical data were relevant to analyzing the existence of discrimination in a fast changing economy. But the Circuit Court was disinclined to set such a hard-and-fast rule and suggested, instead, that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date" and left the question of data staleness to trial courts to decide.[43]

Rothe also argued that the studies were never "before" Congress and therefore could not provide a compelling interest for the 2006 reauthorization. The district court had cited the fact that Senator Ted Kennedy and Representative Cynthia McKinney had made reference to these studies in floor speeches, but the Circuit noted that the studies were not "debated or reviewed by any member of Congress or by any witnesses."[44] The Circuit, while mindful of Congress' "broad discretion to regulate its internal proceedings," said that it would not conclude that mere floor mention of a statistical study sufficiently met Congress' "obligation to amass a strong basis in evidence for race-conscious action."[45]

In confronting the six disparity studies, Rothe made a tactical decision that it had neither the time nor money to acquire the studies' underlying data nor to depose their authors or to commission its own expert report. Instead, the plaintiff attached a critique of the studies to its brief. The district court held this critique was not in the proper form and accepted the studies as the compelling interest basis for the 2006 reauthorization. The Circuit replied that this was judicial error, since that district court had been instructed to undertake its own "detailed, skeptical, non-deferential analysis undertaken by the *Croson* Court" because "Congress is entitled to no deference in determining whether Congress had a compelling interest in enacting the racial classification."[46]

The Circuit then engaged in its own *Croson*-like review of the studies and found them all deficient. The Circuit was particularly concerned that the studies failed to measure firm capacity correctly. This is an endemic problem in disparity studies which typically attribute discrimination as the cause of differences in contract award sizes between minority and non-minority owned firms, even when there is evidence that non-minority owned firms, including those owned by stockholders, are larger and older than their minority counterparts. This problem has been noted by a number of courts and government agencies, but most disparity studies persist in this error. [47] In *Rothe* VII, however, the Circuit adopted an illustration provided by DOD expert Yale Professor Ian Ayres that even laymen

could understand. Ayres pointed out that a micro brewery and Budweiser are in the same business, but it would not be expected that they would have the same sales volume. Further, the Circuit found that it was not enough to establish a threshold for being able to bid on one contract to determine availability because that measure fails to account for "the relative capacity of businesses to bid *on more than one contract at a time.*"[48] This judicial requirement to measure the relative capacity of minority and non-minority firms in order to calculate valid disparity ratios may invalidate almost all existing disparity studies.

CONCLUSION

The *Rothe* decisions suggest federal racial contracting preferences must be addressed anew. The old supports are either obsolete or invalid. As Congress and the Obama administration ponder policy choices in using federal procurement to stimulate the economy, they will have a more difficult legal terrain than before, if the choice is to treat minority businesses preferentially.

In *Rothe*, courts have found that the 1996 reports are now "stale" data and the Department of Justice has conceded that point. Therefore, those studies will no longer be available to create a compelling interest for federal preferential programs. Of course, the Obama administration could attempt to replicate the Clinton strategy by creating new reports, but there are several difficulties with that approach. First, some of the economic stimulus programs will likely be put in place before any new reports can be completed. Second, after *Rothe* and *Western States*[49] new disparity studies will surely have to take into account the capacity and qualifications of minority and non-minority firms in a way the older studies did not. But, even the flawed Benchmark study found underutilization of minority firms in only 40 of the 74 SIC codes, so there is no guarantee that a new Obama administration study would support an across-the-board preferential program. Further, both *Rothe* and *Western States,* applying the *Croson* standard that relevant discrimination had to be found for each of the principal beneficiary groups, have undermined the old concept of treating minority firms in a single SDB or DBE category. Whenever group specific disparity ratios are calculated, almost invariably the results will show disparities for some groups but not others. This sort of patchwork result can create substantial political problems in putting together a pro preference coalition.

Another alternative would eschew a future disparity study whose results would be uncertain and to rely instead on Congressional hearings, reports, and floor statements whose outcome is quite predictable. Under Republican control the strategy was to avoid such opportunities by not holding hearings or creating reports on contracting discrimination, but in the 111th Congress Democrats will have the will and the power to create such a record.[50] That will leave courts with the uncomfortable choice of going back to the *Fullilove* standard of congressional deference or of engaging in a strict scrutiny review of whatever evidence Congress purportedly relied on to reach its judgment. If, under *Rothe,* a sort of stage-managed mention of six state and local disparity studies in the Senate and the House is not enough, what about twenty such studies whose text is appended to some Congressional document? It will be impossible, however, to locate very many studies which have made accurate measures of qualifications and capacity and have found any consistent pattern of discrimination. Nor does it seem likely that anecdotal testimony will be sufficient. Courts which are accustomed to the necessity of evaluating the stories witnesses submit under oath to them have proved reluctant to accept anecdotal surveys or individual testimony as a sufficient basis for a compelling interest finding.

Much of the new economic stimulus will use the mechanism of grants for assisting states and localities with new infrastructure projects, rather than direct federal contracts. Here the current transportation DBE programs will be the model. In these programs, each recipient sets its own goals for minority- and women-owned businesses, to be fulfilled largely by subcontracting. Quotas are barred by statute and race-neutral means are to be maximized in achieving the goals.[51]

These programs have largely survived constitutional challenges, but the 1996 compelling interest reports will no longer be considered relevant in future litigation. Furthermore, *Western States* raised substantial issues about the recipient's narrow tailoring responsibility in setting race conscious goals. Since DBE goals are to be set according to local availability and findings of discrimination, the Ninth Circuit asserted in *Western States* and the U. S. Departments of Justice and Transportation agreed that a recipient had to identify transportation contracting discrimination in its own market to justify the use of race conscious goals rather relying on wholly race neutral means. USDOT has concluded that meeting that judicial mandate probably will require disparity studies to utilize multiple regression analysis. Consequently, every state in the Ninth Circuit has begun or completed a disparity study. The finished disparity studies show very different patterns of disparities and thus have forced state DOTs to reach different policy choices than previously existed. For example, Nevada and Idaho have gone wholly race neutral, while California has proposed increasing its race neutral share and excluding Hispanic and subcontinent Asian contractors from its race-conscious portion. In short, though *Western States* currently applies only to Ninth Circuit states, its logic that local findings must be made to support locally set goals is unassailable and the Ninth Circuit required disparity studies are showing quite unpredictable outcomes.

Consequently, as the Obama administration and the 111th Congress confront the issue of continuing the practice of race-preferential federal contracting, they will discover that *Rothe* and *Western States* create substantial challenges to establishing that these programs have either a compelling interest or are narrowly tailored. The Obama Administration has promised to go through the federal budget line by line to eliminate programs that "we don't need, or what doesn't work."[52] The Section 1207 program, which adds to the cost of federal procurement solely for the purpose of redistributing contract awards from low bidders to firms owned by designated minorities, may be an example of "what doesn't work."[53] Administration staff may conclude that programs creating "fictional" low bidders are not consistent with a rational economic agenda in these hard times. Race-neutral business programs will prove a better vehicle

for assisting all small businesses and expanding the economy. But perhaps President Obama may see an even greater issue than fiscal prudence. One affirmation in his famous 2004 Democratic Convention speech and repeated throughout the 2008 campaign was, "There is not a black America and a white America and Latino America and Asian America—there's the United States of America." Awarding federal contracts based on skin color is not consistent with that vision.

Endnotes

1 10 U.S.C. sect 2323 ("Section 1207").

2 42 U.S.C. sect. 6701 et.seq.

3 The comprehensive list of federal preferential business programs shows such programs exist in almost every federal agency. Charles V. Dale and Cassandra Foley, "Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-asides, or Other Preferences Based on Race, Gender or Ethnicity." Congressional Research Service, 2004.

4 Rothe Dev. Corp. v. U.S. Dep't of Defense, 49 F. Supp. 2d 937 (W. D. Tx.1999) (*Rothe* I); 324 F. Supp 840 (W.D. Tx, 2004) *(Rothe* IV), and 499 F. Supp.2nd 775 (W.D. Tx, 2007) (*Rothe* VI).

5 Rothe Dev. Corp. v. U.S. Dep't of Defense, 262 F. 3d 1306 (Fed Cir. 2001) (*Rothe* III) and 413 F.3d 1327 (Fed Cir.2005) (*Rothe* V).

6 Rothe Dev. Corp. v. U.S. Dep't of Def., 545 F.3d 1023, 1027 (2008) (*Rothe* VII).

7 The Fifth Circuit, *Rothe II* , 194 F.3d 622, 625 (5th Cir.1999) and the Federal Circuit *Rothe* III 262 F.3d 1306, 1316, agreed that the Federal Circuit has exclusive jurisdiction over federal claims raised based in part on the Little Tucker Act. 28 U.S.C.S. sect.1346 (a) (2).

8 For a history of the Small Business Administration's decisions about which racial and ethnic groups should be considered by federal agencies as presumptively socially and economically disadvantaged see, George La Noue & John Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 Journal of Policy History 4 (Fall 1994).

9 Section 1207, Subsection (e).

10 *Rothe* I at 942.

11 Fullilove v. Klutznick, 448 U.S. 448 (1980).

12 *Croson*, 488 U.S. 469, 509 (1989) (emphasis added).

13 515 U.S. 200 (1995)

14 "Disparity Studies as Evidence of Discrimination in Federal Contracting" A BRIEFING HELD BEFORE THE UNITED STATES COMMISSION OF CIVIL RIGHTS, Washington D.C. December 16, 2005. Edited with findings in May 2006. (hereafter USCCR report) For the author's critique of these three documents, see USCCR report, at 34-46.

15 "Proposed Reforms to Affirmative Action in Federal Procurement," 61 Fed.Reg. 26042-50, May 23, 1997.

16 499 F.Supp. 2d 775, 782 (W. D. Tx. 2007)

17 The presumptions and other eligibility criteria in the DBE and the SDB programs are quite similar, except that women-owned businesses are not preferred beneficiaries in the latter.

18 499 F.Supp. 2d at 782.

19 49 F. Supp. 2nd 937 (W. D. Tx., 1999).

20 *Id*. at 954.

21 194 F.3d 622 (5th Cir, 1999).

22 262 F.3d 1306, 1312 (Fed Cir. 2001).

23 49 F.Supp. at 946.

24 Robert W. Fairlie & Bruce D. Meyers, *Ethnic and Racial Self-Employment Differences and Possible Explanations*, 31 J. Hum. Resources 757 (1996).

25 49 F.Supp. at 947.

26 *Id*. at 949.

27 *Id*. at 953.

28 262 F. 3d 1306 (Fed Cir. 2001).

29 *Ibid,* 1319.

30 *Id.*

31 *Id*. At 1320.

32 *Id*. at 1321.

33 Courts have been inconsistent about the precision of group specific analysis. *Croson* singles out Richmond's lack of evidence for including Eskimos and Aleuts (at 506) for criticism, while *Western States* merely required evidence of discrimination for the six major DBE groups (at 999). For a discussion of this issue, see George R. La Noue & John Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara Law Review 1 (Winter 2000).

34 In the benchmark study, SIC 73 (business services) was closest category to the work Rothe performed, but the plaintiff argued that this SIC was overinclusive because computer maintenance was only a small fraction of the firms in SIC 73.

35 324 F.Supp. 840, 845 (W.D. Tx. 2004).

36 Shaw v. Hunt, 517 U.S. 899 (1969) (holding that evidence identifying discrimination must exist before a government uses a racial classification as a remedy).

37 424 F. Supp. at 850.

38 413 F. 3d 1327 (Fed..Cir. 2005).

39 *Rothe* VI, 499 F. Supp.2d 775, 814.

40 *Id*. at 818-25.

41 *Id.* at 875.

42 Judge Rodriguez seemed particularly impressed by a 2005 floor statement by Senator Obama, who voiced his strong support for the reauthorization of Sect.1207 program because it was designed to ensure that DOD contracting "does not support or subsidize discrimination." The Senator pointed out that in the aftermath of Hurricane Katrina minority-owned and economically disadvantaged companies have had a "near impossible time" trying to secure some of the billions of dollars of gulf coast reconstruction contracts, while some big multi-national firms were given no-bid contracts in the week immediately following the hurricane. (At 866)

43 545 F.3d at 1039. It is not clear what guidelines trial court should follow on staleness. Governments have annual data on which firms bid and receive contracts and dollar awards, so how long can a government wait to analyze that annual data before its compelling interest evidence is stale?

44 *Id*. at 1040.

45 *Id.* at 1039-40

46 *Id*., at 1040.

47 The Circuit cited *Eng'g Contractors Ass'n of South Florida v. Dade County* , 122 F.3d 895,917 ("in a perfectly non-discriminatory market, one would expect the (bigger) on average non-MWBE firms to get a disproportionately higher proportion of total construction dollars awarded than smaller MWBE firms."

48 *Id*. at 1044 (emphasis in original).

49 Western States Paving v. Washington Department of Transportation, 407 F.3d 985 (2005) holding that while the transportation DBE program was facially constitutional, recipients had the obligation to narrow tailor the use of race conscious measures if they were justified at all.)

50 Joe Davidson, *Another Obstacle for Affirmative Action, and Congress is Prepared to Fight*, Washington Post, Dec. 3, 2008, at D01.

51 For a discussion of the problems in DBE programs, see George R. La Noue,

Can the Federal Transportation DBE Program be Narrowly Tailored to Remedy Discrimination?, Engage, October 2007.

52 John Zelany & John Harwood, *Obama Promises Bid to Overhaul Retiree Spending*, N.Y. Times, Jan. 8, 2009, p. A1,A18.

53 In fy 2006, minority-owned firms won $15 billion in DOD contracts, but the portion of that amount that awarded on a race preferential or race neutral basis is unknown. Davidson, *op.cit*.

Corporations, Securities & Antitrust

Hexion v. Huntsman: Elaborating the Delaware MAC Standard

*By Robert T. Miller**

In any large corporate acquisition, there is a delay between the time the parties enter into a merger agreement and the time the agreement is consummated, i.e., the time that the purchase price is paid and ownership of the subject business changes hands. Reasons for the delay depend on the details of the transaction but typically include obtaining clearance under the federal antitrust laws and other needed government approvals and obtaining required shareholder votes approving the deal.[1] This delay between signing and closing creates the possibility that, during the interim period, the business or financial condition of one of the parties may deteriorate. When this happens to the target company in a cash deal, or to either company in a stock-for-stock deal, the counterparty may no longer want to proceed with the transaction. One contractual protection counterparties typically have in such cases is the *material adverse effect* (MAE) or *material adverse change* (MAC) clause in the business combination agreement.[2] Although the details can vary considerably depending on how the agreement is drafted, the basic idea is that it is a condition precedent to the counterparty's obligation to consummate the transaction that the party has not suffered a MAC. Hence, if between signing and closing, a party has suffered a MAC, the counterparty may costlessly cancel the deal and walk away; if the party has *not* suffered a MAC, the counterparty has to pay the full purchase price and close the transaction.

In transactions between public companies advised by sophisticated counsel, MAC clauses are heavily negotiated and very complex. Typically, they distinguish various types of risks that may affect a party's business between the signing and closing of the agreement, including some and excluding others from the definition of "Material Adverse Change." For example, adverse changes to the party's business or financial condition arising from systematic risks such as general economic changes, changes in financial markets generally, or *force majeure* events like war or terrorism are often excluded from the definition.[3] When the definition of "Material Adverse Change" includes such exceptions, the causality underlying a MAC becomes crucially important. If the risk the materialization of which has MAC'd the party is included in the definition, then the counterparty may walk away from the deal, but if the risk is excepted from the definition, the counterparty has to pay the purchase price and consummate the transaction. Significant academic attention has been devoted to the question of which kinds of risks are typically distinguished in MAC clauses, how these risks are typically allocated between the parties, and why such allocations are likely efficient.[4]

MAC clauses have probably generated more litigation than any other provision of business combination agreements between public companies, and because MAC litigations can determine the fates of whole transactions, the stakes in such suits have usually been enormous, often billions of dollars.[5] Beginning in the early summer of 2007 when the credit markets began to deteriorate, and then later as financial and economic conditions worsened, buyers in many pending acquisitions discovered that transactions to which they had agreed were becoming significantly less attractive. This led to the termination of many pending acquisitions, including in some cases because acquirers had declared that targets had been MAC'd. The most significant litigation to emerge from these disputes is *Hexion Specialty Chemicals, Inc. v. Huntsman Corp.*,[6] in which Hexion, a portfolio company of private-equity fund Apollo Global Management, LLC, sought to terminate a merger agreement pursuant to which it had agreed to acquire Huntsman for more than $10 billion in cash. Hexion argued, among other things, that Huntsman's business had so deteriorated between signing and closing that Huntsman had suffered a MAC. Vice Chancellor Lamb of the Delaware Court of Chancery disagreed and, holding that the company had not been MAC'd, awarded judgment to Huntsman.

The first part of this article reviews the state of Delaware MAC jurisprudence prior to *Hexion*, and the second part explains how *Hexion* elaborated and extended the Delaware MAC standard in some significant ways. The third part offers some concluding observations, including by drawing some analogies between the development of Delaware's MAC jurisprudence and the development of case law under Section 271 of the Delaware General Corporation Law.

I. MAC Jurisprudence in Delaware before *Hexion*: The Doctrine of *In re IBP Shareholders Litigation* and *Frontier Oil v. Holly*

Prior to *Hexion*, there were two significant MAC cases in Delaware, *In re IBP Shareholders Litigation*,[7] which is the leading case, and *Frontier Oil v. Holly*.[8]

A. In re IBP Shareholders Litigation

In re IBP Shareholders Litigation concerned the $4.7 billion acquisition of IBP, the nation's largest processor of beef and second largest processor of pork, by Tyson Foods, the nation's largest producer of poultry. After a hotly contested auction, Tyson entered into a two-step merger agreement with IBP pursuant to which it would acquire IBP for a mix of cash and stock.[9] Both the chicken business and the beef business are cyclical and suffer during severe winters, and at the time the agreement was signed both parties knew that the beef business in particular was about to enter one of its periodic troughs.[10] After the agreement was signed but before the transaction closed, the businesses of both Tyson and IBP began to deteriorate, and Tyson's founder and controlling shareholder, Don Tyson,[11] suffering from a bad case of buyer's remorse,[12] decided he wanted out of the merger agreement. Accordingly, "Tyson's legal team

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swung into action,"[13] sending a notice to IBP purporting to terminate the merger agreement and then suing IBP on a wide variety of theories, including fraud and breach of contract, but also alleging that Tyson was relieved of its obligation to close because IBP had suffered a MAC.[14]

In the merger agreement, IBP represented and warranted that, except as set forth in a schedule attached to the agreement and in the company's periodic filings with the Securities and Exchange Commission, "there has not been… any event, occurrence or development of a state of circumstances or facts which has had or reasonably could be expected to have a Material Adverse Effect" on IBP.[15] "Material Adverse Effect" was defined as "a material adverse effect on the condition (financial or otherwise), business, assets, liabilities or results of operations" of IBP and its subsidiaries taken as a whole.[16] Somewhat unusually, the definition included none of the exceptions for systematic risks typically found in MAC definitions, such as risks arising from general economic conditions or conditions affecting the whole industry in which IBP operated. Since it was a condition of Tyson's obligation to close the transaction that IBP's representation about the absence of a MAC be true, Tyson would not have to pay the purchase price and close the deal if IBP had suffered a MAC.

In arguing that IBP had indeed suffered a MAC, Tyson pointed primarily to IBP's disappointing financial performance during the quarter in which the merger agreement was signed (but for which financial statements were not yet available at signing) and the subsequent quarter during which the merger was pending.[17] There was no doubt that IBP's financial performance during these periods was disappointing and below projections that IBP had previously prepared. The issue before the court, however, was whether the adverse change IBP had suffered was in fact *material*. This is typical of MAC litigations: the primary issue in all the important cases has been whether the adverse change suffered by a party is significant enough to qualify as a *material* adverse change within the meaning of the agreement. The typical MAC definition is of virtually no help in this context, for a "Material Adverse Change" is virtually always defined as a "material adverse change," even if some such changes, when arising from specified causes, are excluded from the definition. That is, although transactional lawyers have expended tremendous energy delineating by cause various kinds of risks, assigning some risks to one party and others to the other, the key issue in litigation has been not the cause of the adverse change but its magnitude, and on this issue the text of merger agreements has been almost entirely unhelpful.

Faced with this problem and attempting to gloss the phrase *material adverse effect* or *material adverse change*, Vice Chancellor Strine produced the doctrinal language that would be quoted in virtually all subsequent MAC cases: a MAC clause, the Vice Chancellor wrote, protects the acquirer "from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner."[18] He continued, "A short-term hiccup in earnings should not suffice; rather the Material Adverse Effect should be material when viewed from the longer-term perspective of a reasonable acquiror."[19] Since modern financial theory views the value of a company as the present value of its future earnings, it is plausible to understand a MAC on the company as something that "substantially threatens the overall earnings potential of the target in a durationally-significant manner." This is an important conceptual advance over the language of "material adverse change" and naturally lends itself to a quantitative interpretation that can be directly applied to individual cases. Although he never puts it in these terms, the Vice Chancellor started down the road towards developing such a quantitative interpretation of the doctrinal language, an interpretation that requires, in effect, two things: first, an appropriate measure of the earnings capacity of the company, and, second, a determination as to what level of diminution in that measure will be required to effect a MAC. We need to know, in other words, first, *how to measure earnings capacity quantitatively*, and, second, *what percentage decrease in earnings capacity thus measured* will amount to a MAC.

As to the first of these, Vice Chancellor Strine discusses IBP's financial performance, somewhat inconsistently, in terms both of the company's earnings before interest and taxes (EBIT)[20] and its earnings per share (EPS). What Vice Chancellor Strine refers to as EBIT is designated in IBP's financial statements as "Earnings from Operations," and it does indeed exclude interest and taxes.[21] The "earnings" Vice Chancellor Strine refers to in his EPS data, however, reflect not only interest and taxes but also extraordinary charges.[22] Hence, ratios between EBIT for given periods and EPS for the same periods are not identical, even accounting for changes in the number of shares outstanding as between the periods. There is thus a certain slippage in Vice Chancellor Strine's discussion as he shifts back and forth from EBIT numbers to EPS numbers. As we shall see below, in *Hexion* Vice Chancellor Lamb will confront this issue directly and argue persuasively that the correct measure of earnings capacity is actually EBITDA (earnings before interest, taxes, depreciation and amortization).

As to the percent decrease in earnings capacity needed to trigger a MAC, Vice Chancellor Strine begins by establishing a baseline consisting of EBIT and EPS data for the five fiscal years of the company (FY1995-FY1999) prior to the fiscal year in which the merger agreement with Tyson was signed, including by computing five-year (FY1995-FY1999) and most-recent three-year (FY1997-FY1999) averages for these figures.[23] Against this historical data, he compared the available data from the time the agreement was signed to the date of the decision, i.e., data for FY2001Q1 and preliminary data from the then still-pending FY2001Q2. Most important, he notes that EBIT for FY2001Q1 was 64% below FY2000Q1,[24] and that if IBP's FY2001 EBIT were projected from the FY2001Q1 results on a straightline basis, the diminution in its "annual performance would be consequential to a reasonable acquirer and would deviate materially from the range in which IBP had performed in the recent past,"[25] i.e., would represent a MAC. Vice Chancellor Strine does not fully spell this out, but from information contained in the opinion and in IBP's financial statements, we can compute the following:[26]

IBP PROJECTED FY2001 EBIT VERSUS VARIOUS HISTORICAL MEASURES

FY2000	-40.1%
FY1999	-61.1%
FY1998	-45.0%
FY1997	-9.4%
FY1996	-36.4%
FY1995	-57.2%
AVG. FY1995-FY1999	-46.8%
AVG. FY1997-FY1999	-45.4%

That is, if we were to assume that IBP would perform as poorly from FY2001Q2 through FY2001Q4 as it had in FY2001Q1, then its EBIT would have declined approximately 45% against historical standards and, according to Vice Chancellor Strine, *this would have been a MAC*. From this we can cautiously conclude that a decrease of 45% or more in earnings capacity, as measured by EBIT against relevant historical standards, is a MAC in Delaware.[27]

Because of the demonstrably cyclical nature of IBP's business, however, and because of other evidence that IBP's EBIT was increasing in FY2001Q2, Vice Chancellor Strine concluded that IBP's FY2001 EBIT would exceed what projecting FY2001Q1 numbers on a straightline basis would imply. In particular, he took judicial notice of the industry analysts' mean earnings estimates for IBP for both FY2001 and FY2002 as reported by Morningstar and concluded that "the analyst community was predicting that IBP would return to historically healthy earnings" in FY2002.[28] Unfortunately, Vice Chancellor Strine refers to the analyst estimates in terms of EPS rather than EBIT, which makes exact comparisons with the data relied upon above somewhat difficult, and he does not always specify exactly which fiscal periods he is comparing to which. Nevertheless, based on data in the opinion and in IBP's financial statements, we can compute the following:[29]

MEAN ANALYST ESTIMATES FOR FY2001 AND FY2002 EPS VERSUS EPS FOR FY1995-FY2000

	FY2001	FY2002	AVG. FY2001-FY2002
FY2000	+20.0%	+86.4%	+53.6%
FY1999	-55.8%	-31.3%	-43.4%
FY1998	-32.1%	+5.4%	-13.1%
FY1997	+19.0%	+84.9%	+52.4%
FY1996	-28.6%	-9.9%	-8.6%
FY1995	-49.3%	-21.3%	-35.1%
AVG. FY1995-FY1999	-37.0%	-2.1%	-19.3%
AVG. FY1997-FY1999	-34.5%	+1.7%	-16.2%
AVG. FY1996-FY1998	-19.4%	+25.2%	+3.2%

Again, Vice Chancellor Strine does not explicitly compute all of these percentages, and exactly which numbers he is comparing to which is not always clear, but he seems to draw from these figures two important conclusions. First, based on the analysts' earnings estimates, "IBP would return to historically healthy earnings" in FY2002.[30] That is, estimated FY2002 EPS was only 2.1% below the five-year average for FY1995-1999 and was actually 1.7% above the three-year average for FY1997-FY1999. Second, again based on analysts' earnings estimates, "IBP's earnings for the next two years would not be out of line with its historical performance during troughs in the beef cycle."[31] Since the Vice Chancellor mentions the FY1996-FY1998 period as a trough, if we compare the company's average EPS over this period with the average estimated EPS for FY2001-FY2002, we find that average estimated EPS for FY2001-FY2002 was actually 3.2% *above* the average EBIT in the FY1996-FY1998 trough.[32]

Hence, if we put together all the lessons of *IBP*, it seems reasonable that a decrease in earnings power, as measured by EBIT, of about 45% or more is a MAC, but a decrease in such power of about 2% or less is not. Of course, rules like this cannot be applied mindlessly: it was crucial that Vice Chancellor Strine compared trough-numbers to trough-numbers for a cyclical business. Nevertheless, once the issue of which periods' earnings numbers ought be compared to which is settled, these conclusions from *IBP*, if sound, establish two important data points: a diminution in EBIT of 2% or less is not a MAC, but a diminution of 45% or more is.

B. Frontier Oil v. Holly

In *Frontier Oil v. Holly*,[33] Frontier and Holly, both mid-sized petroleum companies, entered into a merger agreement pursuant to which Frontier would acquire Holly and the Holly shareholders would receive a mix of cash and Frontier shares.[34] Even prior to entering into the merger, the parties knew that Wainoco, a subsidiary of Frontier, was likely to be sued in connection with a potentially massive toxic tort. In particular, Wainoco had in the past operated an oil rig on land adjacent to Beverly Hills High School, and it had been publicly reported that the famous plaintiffs firm associated with Erin Brockovich was planning to sue Wainoco (and other parties associated with the site) alleging that emissions from the site were responsible for a supposed cancer cluster among students, alumni and staff at the high school.[35]

In their merger agreement, Frontier and Holly dealt with this risk in various ways, most importantly by having Frontier in effect represent and warrant that the potential litigation would not have, and would not reasonably be expected to have, a material adverse effect on Frontier.[36] After the agreement was signed but before the merger closed, however, the Beverley Hills situation worsened. The plaintiffs filed suit, and eventually there were three separate litigations involving more than 400 individual plaintiffs.[37] Although the parties disagreed about the potential costs of the suit (including both liabilities to the plaintiffs and defense costs), it was clear these costs would be significant. Although Frontier and Holly tried to renegotiate the deal, eventually Frontier sued Holly, alleging that Holly had repudiated the merger agreement.[38] Holly denied this and counterclaimed, alleging, among other things, that because of the Beverly Hills litigation Frontier had suffered a MAC.[39]

Unlike the agreement in the Tyson-IBP merger but as is typical in merger agreements nowadays,[40] the definition of "Material Adverse Effect" in the Frontier-Holly agreement contained exceptions for various kinds of adverse changes, such as changes resulting from general economic conditions, conditions in financial markets, and conditions in the petroleum industry generally.[41] Obviously, none of these exceptions was relevant, and so the sole issue was whether the Beverly Hills

litigation, which was admittedly adverse to Frontier, was of sufficient magnitude to constitute a "Material Adverse Effect" under the agreement.[42] This pattern—carefully drafted exceptions for systematic risks turn out to be irrelevant while the dispute centers on whether an admittedly adverse event is sufficiently material—is common in MAC disputes. It will recur in *Hexion*.

In determining whether the Beverly Hills litigation was sufficiently material, Vice Chancellor Noble began by quoting Vice Chancellor Strine's doctrinal glosses in *IBP* of the phrase "material adverse effect."[43] An inquiry into impairment of earnings capacity, however, is not immediately adaptable to a looming extraordinary liability like the Beverly Hills litigation. Clearly, the litigation had not yet had any significant impact on Frontier's earnings, no matter how earnings may be measured. In fact, the litigation might *never* have affected the capacity of Frontier's operations to generate EBITDA. For, if Frontier lost or settled the suit, it would presumably incur a large one-time cost, but depending on the vagaries of generally accepted accounting principles, this cost might be extraordinary and so would not affect the company's EBITDA at all. The costs of defending the suit might be treated similarly. Hence it was unclear how, or even whether, to use changes in the company's capacity to produce EBITDA in determining whether Frontier had suffered a MAC.

Vice Chancellor Noble approached the problem by attempting to determine the expected cost to Frontier of the Beverly Hills lawsuits, considering evidence regarding the likelihood of their success and the likely dollar value of the judgments or settlements if successful, plus estimated defense costs. Concluding that Holly had failed to adduce sufficient evidence to show that the plaintiffs were likely to prevail, the Vice Chancellor limited his consideration to defense costs only.[44] Recognizing that these costs would not be borne by Frontier in a single fiscal period but would likely be stretched out over several years as the litigation played out, he compared the expected defense costs (about $15 to $20 million, according to expert testimony)[45] to the enterprise value of the firm (about $338 million, according to expert testimony).[46] Enterprise value, of course, is commonly estimated as a multiple of current or expected EBITDA or as the present value of future EBITDA, and so it seems likely that in referring to enterprise value, Vice Chancellor Noble was implicitly accepting the idea that the proper measure of earnings capacity in the MAC context is EBIT or EBITDA.[47] Although Vice Chancellor Noble does not perform the calculation expressly, the ratio of his estimate of the expected cost of the litigation to the enterprise value of Frontier is between 4% and 6%. On this basis, he concludes that Holly had not proved that the Beverly Hills litigation would have a material adverse effect on Frontier. The teaching of *Frontier Oil* seems to be, therefore, that a diminution in earnings capacity of about 5% is not a MAC in Delaware.

II. *Hexion v. Huntsman*: Elaborating the Delaware MAC Standard

In June 2007, just before the credit markets began to unravel, Hexion, a portfolio company of private-equity giant Apollo Global Management, won an intense bidding contest to acquire fellow specialty chemical manufacturer Huntsman.[48] One effect of the competitive bidding for the company was that the Hexion-Huntsman merger agreement was generally quite favorable to Huntsman. In particular, even though Hexion intended to finance the entire $10 billion purchase price, its obligation to close the transaction was not conditioned on the availability of financing.[49] Immediately prior to entering into the merger agreement with Huntsman, Hexion had received commitment letters from Credit Suisse and Deutsche Bank to provide the needed financing, but the obligations of the banks under these letters was contingent in various ways that Hexion's obligation to complete the merger was not.[50] Hence, if the time came to close the deal and Hexion had not obtained the necessary financing under the bank commitment letters or otherwise, Hexion would still be obligated to pay the purchase price and consummate the merger, and it would be in breach if it did not do so.

Under the terms of the merger agreement, however, the effect of such a breach would depend on whether or not Hexion had committed a knowing and intentional breach of the agreement.[51] That is, if, as required by the agreement, Hexion had used its reasonable best efforts to take all actions and do all things necessary, proper and advisable to obtain the financing but had nevertheless failed to do so, then Hexion's liability to Huntsman for failing to close the deal would be capped at $325 million in liquidated damages.[52] If, on the other hand, Hexion had committed a knowing and intentional breach of the agreement (by, for example, intentionally sabotaging its own financing—which is what the court concluded ultimately happened), then its liability to Huntsman would not be contractually capped and Huntsman would be entitled to full expectancy damages—i.e., the purchase price in the agreement minus the fair market value of the company at the time of closing.

In the event, with the credit markets deteriorating, the transaction became significantly less profitable for Hexion, and so Hexion began to look for a way out of the agreement. One attractive strategy for Hexion was to declare that Huntsman had suffered a MAC. For, as favorable as the merger agreement was to Huntsman, it was a condition precedent to Hexion's obligation to close the transaction that Huntsman not have suffered a MAC. Hence, if Huntsman *had* suffered a MAC, Hexion could have walked away from the deal and would not have been required to pay even the $325 million in liquidated damages. As part of a larger strategy to exit the transaction, Hexion sued Huntsman, alleging, among other things, that Huntsman had suffered a MAC.[53]

The definition of "Material Adverse Effect" in the Hexion-Huntsman merger agreement contained exceptions for various kinds of systematic risks, including changes resulting from general economic or financial market conditions and changes in the chemical industry generally.[54] Moreover, just as happened in *Frontier Oil,* the carefully-crafted exceptions from the definition turned out to be irrelevant; all that mattered was how adverse a change had to be to count as a MAC. There is a good reason that MAC cases follow this pattern. For, given the structure of the typical MAC definition (e.g., "A 'Material Adverse Change' means a material adverse change on the business, financial

condition or results of operations of the company, except for changes arising from…"),[55] the first issue for the court to decide is whether the company has indeed suffered a MAC, and only if that issue is resolved affirmatively do the exceptions from the MAC definition related to the cause of the adverse change come into play. As Vice Chancellor Lamb put it in *Hexion*, "The plain meaning of the carve-outs… is to prevent certain occurrences which would *otherwise* be MAE's being found to be so."[56] The proper order of analysis, therefore, requires that the court determine *first* whether a MAC has occurred, and *second*, if a MAC has occurred, whether it is nevertheless excluded from the definition by one of the exceptions. Thus, while the MAC definitions in Tyson-IBP, Frontier-Holly, and Hexion-Huntsman were in significant ways different, the key issue before the court was the same in all three cases: was the adverse change undeniably suffered by the company between signing and closing sufficiently adverse to count as a MAC?

Vice Chancellor Lamb begins with the doctrinal language of Vice Chancellor Strine in *IBP*. Paraphrasing *IBP*, he writes, "The important consideration is whether there has been an adverse change in the target's business that is consequential to the company's long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months."[57] This language is presumably synonymous with the key sentence from *IBP*, which Vice Chancellor Lamb goes on to quote: the MAC clause "protect[s] the acquirer from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner."[58]

Whereas Vice Chancellor Strine vacillated in his *IBP* opinion between using EBIT or EPS to measure the earnings capacity of the company, Vice Chancellor Lamb confronts head-on the question of which metric should be employed. "The issue then becomes," he says, "what benchmark to use in examining changes in the business operations post-signing of the merger agreement—EBITDA or earnings per share."[59] In coming down in favor of EBITDA over EPS, he argues that EPS "is very much a function of the capital structure of a company, reflecting the effects of leverage."[60] In other words, a company can tinker with its capital structure in various ways that can have dramatic effects on EPS. Since "[w]hat matters is the results of operation of the business," and since "EBITDA is independent of capital structure," EBITDA "is a better measure of the operational results of the business."[61]

This is all true, of course, but it actually understates the case for using EBITDA instead of EPS. For, the earnings numbers used in calculating EPS reflect not just interest expense but also the company's tax liabilities, which can be artificially managed in any number of ways and which may change as the tax laws change, as well as depreciation and amortization charges, which are also manipulatable and are not even cash items. Moreover, EPS will also reflect extraordinary, non-recurring items, many of which are also not cash items.[62] As the Vice Chancellor observed, this is why in the Hexion-Huntsman transaction (as indeed in most business combination transactions), EBITDA was the measure most heavily relied upon by the parties and their bankers in valuing the deal.[63]

Having established EBITDA as the measure, Vice Chancellor Lamb next needed to determine which periods' EBITDA should be compared with which. He noted that the terms "business," "financial condition" and "results of operations" typically used in MAC definitions and used in the Hexion-Huntsman agreement "are terms of art, to be understood with reference to their meaning in Reg. S-X and Item 7, the 'Management's Discussion and Analysis of Financial Condition and Results of Operations' section of the financial statements public companies are required to file with the SEC."[64] Appealing to the practice of financial analysts using such filings, the Vice Chancellor stated that "these results are analyzed by comparing the results in each period with the results in the same period for the prior year," e.g., FY2007 to FY2006, FY2008Q1 to FY2007Q1, etc. This procedure seems obviously right, because many businesses experience recurring quarterly variations in their financial results, and comparing Q1 of one year to Q4 of the immediately preceding year could be badly misleading.

Vice Chancellor Lamb's point here, however, cannot be applied mindlessly: some businesses are cyclical but on a cycle longer than one year. Recall, for example, how Vice Chancellor Strine compared trough-year EPS numbers for IBP to other trough-year numbers.[65] Had he compared peak-year numbers to trough-year numbers, even if the former immediately succeeded the latter, the result would have been deceptive. Similarly, in television and radio broadcasting, election years (especially the years of presidential elections) almost always produce financial results greatly superior to those of non-election years because of added revenues from political advertising. In determining which periods' EBITDA to compare to which, the cyclicality of the business, if there is such a thing, should be expressly determined.

Vice Chancellor Lamb then went on to compare Huntsman's EBITDA for FY2007 to its EBIDTA for FY2006, noting only a 3% decline, and Huntsman's trailing twelve-month EBITDA for FY2008Q2 (the most recently completed quarter for which numbers were available) to its trailing twelve-month EBITDA for FY2007Q2, noting only a 6% decline.[66] The Vice Chancellor then compared various projections for Huntsman's FY2008 EBITDA to its actual FY2007 EBITDA, and these comparisons revealed either a 7% decline using Huntsman's projections for FY2008 or an 11% decline using Hexion's projections for FY2008.[67] Finally, Vice Chancellor Lamb compared "current analyst estimates"[68] of Huntsman's FY2009 EBITDA to Huntsman's EBITDA for FY2006 and FY2007, noting declines of 3.6% relative to FY2006 and "a result essentially flat" relative to FY2007.[69] Interpreting this numbers about as much they will bear, the lesson seems to be that a diminution in earnings capacity of up to 10%, as measured by EBITDA across relevant fiscal periods, is not a MAC in Delaware.[70]

III. Evolution of a Standard and Analogy to DGCL 271 Cases

Reviewing the essential legal developments in these cases, we see that the Delaware courts first glossed the phrase "material adverse change" or "material adverse effect" to mean a change

or event that substantially threatens the subject company's long-term earnings capacity and then set out to explicate this gloss in a financially sophisticated and essentially quantitative way. As the cases progress, the phrase *earnings capacity* comes to mean power to produce EBITDA, thus incorporating into the legal standard all the generally accepted accounting principles needed to compute EBITDA as well as the generally accepted practices of finance professionals who routinely rely on EBITDA in valuing companies and their securities. Next, the conventions of Regulation S-X under the federal securities laws and related practices of financial analysts are used to determine the fiscal periods for which EBITDA figures should be compared. Finally, judicial commonsense is used, on a case-by-case basis, to establish how much of a decline in EBITDA thus measured will count as a MAC. In this perspective, the individual MAC litigations should be seen as plotting out data points: in *IBP*, we learn that a diminution in earnings capacity from relevant fiscal period to relevant fiscal period of 45% or more is likely a MAC, but a diminution of up to about 2% is not. In *Frontier Oil*, a diminution of about 5% is not a MAC, and in *Hexion* a diminution of even 10% is not a MAC. Although it would be fatuous to expect the Delaware courts to draw a bright line between MACs and non-MACs at some specified percentage, presumably further cases will plot out additional points between 10% and 45%, holding that some are MACs and others are not.

Such an evolution is typical of the common law. Consider by way of analogy the development of the case law under Section 271 of the Delaware General Corporation Law. That section provides that, if a corporation is to sell "all or substantially all" of its assets, the sale must be approved by a majority of the shares entitled to vote.[71] The phrase "substantially all" is a standard almost as vague as "material adverse change," and the development of Delaware law interpreting Section 271 clearly foreshadows the Delaware MAC cases. First, in *Gimbel v. Signal Cos., Inc.*,[72] the Delaware courts glossed the "substantially all" language of the statute by holding that a transfer relates to "substantially all" of a corporation's assets if, among other things, the transfer involves a quantum of assets that are "quantitatively vital to the operation of the corporation."[73] In explaining this language, the Delaware courts have considered both (a) the measure to be applied in valuing assets, referring at times to book value and fair market value as well as power to produce revenues, earnings and EBITDA,[74] and (b) the percentage of assets, however measured, that will constitute "substantially all" of the corporation's assets.[75] These issues exactly parallel those that the Delaware courts have faced in the MAC cases—determining the relevant measure and determining the percentage threshold once the measure is determined.

Finally, despite the evident analogies between Delaware's Section 271 jurisprudence and the Delaware MAC cases, there is one striking disanalogy: while the Section 271 cases began from a standard embodied in a *statute*, the MAC cases begin from language used in a *contract* between private parties. Although the meaning of the statute is the same for everyone, the meaning of a phrase in a contract depends on the particularized intentions of the parties to the agreement. Thus, at least in determining what percentage declines in earnings capacity would constitute a MAC, the Delaware courts have sometimes referred to the particular intentions and beliefs of the parties at the time they were contracting. For example, in *IBP*, Vice Chancellor Strine noted that Tyson's own investment banker had advised Tyson prior to its entering into the merger agreement that the transaction would be fair to Tyson from a financial point of view even if IBP's EBIT levels declined to levels comparable to those that IBP was in fact generating at the time of the suit.[76] The court's reliance on the particular intentions of the parties means that data points established by the cases regarding which percentage declines in EBITDA will MAC a company should be approached with caution. If, for instance, a party could prove that, at the time of contracting, the parties had understood that a decline of 10% in earnings capacity would be a MAC, then such a decline ought to be held to be a MAC.

This fact, together with the elaboration of the Delaware MAC standard in *Hexion*, suggests a possible evolution in deal technology. The MAC cases nowadays provide so much of a gloss to the phrase "material adverse change" or "material adverse effect" that future MAC disputes will very likely reduce to the questions of (a) which fiscal periods' EBITDA should be compared to which, and (b) how much of a percent reduction in EBITDA will count as a MAC. If this is indeed an efficient way to allocate risks associated with the target's business between signing and closing, then parties to merger agreements can reduce their transaction costs, including the costs uncertainty, by specifying in their agreements answers to the questions they can foresee Delaware courts will ask in determining whether a MAC has occurred. Alternatively, if the Delaware courts have got this matter significantly wrong—if, that is, the Delaware approach is not more-or-less efficiently allocating risk between the parties—then the MAC language will disappear from public company agreements, and some wholly new language allocating risk efficiently will develop. Contracts will be efficient, whether courts like it or not.

Endnotes

1 E.g., Lou R. Kling & Eileen T. Nugent, Negotiated Acquisitions of Companies, Subsidiaries and Divisions, § 1.04[1][i] (federal securities laws) (2006); James C. Freund, Anatomy of a Merger 151 (1975) (explaining how corporate law and federal securities law combine to necessitate non-simultaneous signing and closing in sale of public company); Lou R. Kling et al, *Summary of Acquisition Agreements*, 51 U. Miami L. Rev. 779 (1997) (same).

2 Although the phrase "material adverse effect" is more commonly used in merger agreements nowadays, "material adverse effect" (MAE) and "material adverse change" (MAC) are generally understood to be synonymous. I shall use "MAC" throughout. *See, e.g.,* Ronald J. Gilson and Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. Econ. & Org. 330 (2005) (treating MAC and MAE as equivalent and using MAC throughout); Rod J. Howard, Deal Risk, Announcement Risk and Interim Changes—Allocating Risk in Recent Technology M&A Agreements, Corporate Law and Practice Course Handbook Series (PLI No. B0-00OB, December 2000) at *244 (stating that "[o]ften the difference [between MAC and MAE] is merely a choice of shorthand terminology, and the definitions are identical or indistinguishable," but noting that clever litigators may attempt to find, *ex post*, a difference in meaning).

3 In my *The Economics of Deal Risk: Allocating Risk Through MAC Clauses in Business Combination Agreements,* 50 William & Mary L. Rev. ___ (forthcoming, 2009) [hereinafter Miller, *The Economics of Deal Risk*], I present

the results of a large empirical study of MAC clauses in business combination agreements and explain why the typical allocation of various kinds of deal risk as revealed in the empirical study is efficient.

4 *Cf.* Miller, *The Economics of Deal Risk*, supra note 2, with Ronald J. Gilson and Alan Schwartz, *Understanding MACs: Moral Hazard in Acquisitions*, 21 J.L. Econ. & Org. 330 (2005).

5 E.g., in the $25 billion leveraged buyout of Sallie Mae by J.C. Flowers, Flowers declared a MAC, and Sallie Mae sued to enforce the deal, later settling the litigation on terms favorable to Flowers. Andrew Ross Sorkin & Michael de la Merced, *Sallie Mae Settles Suit Over Buy Out That Fizzled*, N.Y. Times (Jan. 28, 2008) at C1. In the $27 billion acquisition of Guidant by Johnson & Johnson, after Johnson & Johnson declared a MAC, the parties settled litigation ahead of trial and agreed upon a reduced purchase price (though Boston Scientific later made a topping offer for Guidant). Scott Hensley & Thomas M. Burton, *J&J, Guidant Skip Courtroom, Set Deal*, Wall St. J. (Nov. 16, 2005) at A3.

6 Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 2008 WL 4457544 (Del. Ch. 2008).

7 *In re IBP Shareholders Litigation*, 789 A.2d 14 (Del. Ch. 2001).

8 Frontier Oil Corp. v. Holly Corp., 2005 WL 1039027 (Del. Ch. 2005).

9 The whole case is helpfully reviewed by knowledgeable practitioners in Herbert Henryson, *'IBP v. Tyson' Teaches Valuable Lessons*, 226 N.Y. Law J. 1 No. 18 (July 26, 2001) and in Joseph R. Allerhand & Seth Goodchild, *Court of Chancery Orders Tyson-IBP Merger*, Bus. & Sec. Litig. (August 2001). For academic commentary, see Gilson and Schwartz at 355-357; Sherri L. Toub, *"Buyer's Regret" No Longer: Drafting Effective MAC Clauses in a Post-IBP Environment*, 24 Cardozo L. Rev. 849, 871-882 (2003); Jeffrey Thomas Cicarella, *Wake of Death: How the Current MAC Standard Circumvents the Purpose of the MAC Clause*, 57 Case W. Res. L. Rev. 423, 432-436 (2007); Alana A. Zerbe, *The Material Adverse Effect Provision: Multiple Interpretations and Surprising Remedies*, 22 J.L. & Com. 17, 20-26 (2002).

10 *In re IBP Shareholders Litigation*, 789 A.2d 14, 22 (Del. Ch. 2001). *See also id.* at 26 (explaining that cattle supplies go through cycles that can be tracked with some general precision using information from the United States Department of Agriculture).

11 *Id*. at 49.

12 *Id*. at 22.

13 *Id*. at 50.

14 The characterization of the behavior of Tyson and its managers given in the text is harsh, but not more so than that in Vice Chancellor Strine's findings of fact in the case. See Id. at 47-51(detailing delicts by Tyson managers).

15 Section 5.10 of the Tyson-IBP merger agreement, described in id. at 65.

16 Section 5.01 of the Tyson-IBP merger agreement, described in id. at 65.

17 *In re IBP Shareholders Litigation*, 789 A.2d 14, 65 (Del. Ch. 2001).

18 *Id*. at 68.

19 *Id*.

20 It is a good question why Vice Chancellor Strine used EBIT rather than EBITDA (earnings before interest, taxes, depreciation and amortization). As we will see, Vice Chancellor Lamb in *Hexion* will use EBITDA, never even mentioning EBIT. The change is no doubt an improvement, for depreciation and amortization are, like interest and taxes, subject to manipulation in various ways, and, unlike interest and taxes, are not even cash items. See the discussion below in Part II. As to why Vice Chancellor Stine used EBIT rather than EBITDA, the reason, I suspect, is simply that IBP's financial statements did not break out depreciation and amortization in a way that made it feasible to compute EBITDA. *See, e.g.,* IBP's Annual Report on Form 10-K of IBP, Inc. for Fiscal Year ended December 30, 2000 (on file with SEC).

21 See Annual Report on Form 10-K of IBP, Inc. for Fiscal Year ended December 30, 2000 (on file with SEC) and Annual Report on Form 10-K of IBP, Inc. for Fiscal Year ended December 25, 1999 (on file with SEC). It seems, however, that "Earnings from Operations" *includes* depreciation and amortization; that is, it is truly EBIT and not EBITDA.

22 *See id.*

23 Tyson and IBP entered into the merger agreement on January 1, 2001, which is actually two days after IBP's FY 2000 ended on December 30, 2000. Naturally, audited financial statements for this fiscal year would not have been available yet on January 1, 2001, but IBP had prepared and filed its Forms 10-Q for 2000, and so the unaudited financial information included in them for FY2000Q1 through FY2000Q3 should perhaps have been included in the baseline Vice Chancellor Strine established. Despite this omission, however, Vice Chancellor Strine does refer at times to EBIT numbers for Q1 to Q3 for FY2000.

24 *In re IBP Shareholders Litigation*, 789 A.2d 14, 69 (Del. Ch. 2001).

25 *Id*.

26 The percentages presented in the table are based on the following EBIT numbers (with all numbers in thousands). For FY2001Q1 (on file with SEC), $205,504, projected on a straightline basis from EBIT of $51,376, as reported in IBP's Form 10-Q for FY2001Q1 (i.e., Earnings from Operations of $58,273, adjusted to disregard an extraordinary gain of $6,897). For FY2000, EBIT of $346,822 as reported in IBP's Form 10-K for FY2000 (on file with SEC). For FY1999 through FY1995, EBIT of $528,473 (FY1999), $373,735 (FY1998), $226,716 (FY1997), $322,908 (FY1996), and $480,096 (FY1995), as set forth in *In re IBP Shareholders Litigation*, 789 A.2d 14, 66 (Del. Ch. 2001).

27 *See* Raskin v. Birmingham Steel Corp., 1990 WL 193326 (Del. Ch. 1990) at *5, where Chancellor Allen, on a motion to approve a shareholder class action settlement, in considering the probable merits of a claim that a party to a merger agreement had suffered a MAC, says, "While it is possible that on a full record and placed in a larger context one might conclude that a reported 50% decline in earnings over two consecutive quarters might not be held to constitute a material adverse development, it is, I believe unlikely… that that might happen."

28 *In re IBP Shareholders Litigation*, 789 A.2d 14, 70 (Del. Ch. 2001).

29 The percentages presented in the table are based on the following EPS numbers: (a) for FY2001, $1.50, and for FY2002 $2.33, as set forth in id. at 71 (taking, as Vice Chancellor Strine says, the lower end of the consensus ranges (i.e., $1.50 from the $1.50 to $1.74 range for FY2001, and $2.33 from the $2.33 to $2.42 range for FY 2002)); (b) for FY2000, EPS of $1.25 as reported in IBP's Form 10-K for FY2000 (on file with SEC); (c) for FY1999 through FY1995, EPS of $3.39 (FY1999), $2.21 (FY1998), $1.26 (FY1997), $2.10 (FY1996), and $2.96 (FY1995), as set forth in *In re IBP Shareholders Litigation*, 789 A.2d 14, 66 (Del. Ch. 2001).

30 *Id*. at 71.

31 *Id*.

32 Again, I use the figures referred to above to compute these percentages. Vice Chancellor Strine does not explain why he implicitly compares a three year average (FY1996-FY1998) to a two-year average (FY2001-FY2002), but if troughs in the beef cycle vary in length so that some extend for two seasons but others for three, such a comparison would seem unobjectionable.

33 Frontier Oil Corp. v. Holly Corp., 2005 WL 1039027 (Del. Ch. 2005). After *IBP*, *Frontier Oil* was generally recognized as the most important of the reported MAC cases before *Hexion*. E.g., William R. Kucera, *MAE Clauses Might Not Avert a Bad Deal*, National Law Journal (November 7, 2005) at S1 (noting that states other than Delaware look to *IBP* and *Frontier Oil* as persuasive authority in MAC cases); see also Memorandum and Order, No. 07-2137-II(III) (Tenn. Chan. Ct.) (December 27, 2007) in *Genesco, Inc. v. The Finish Line, Inc*. (citing *IBP* in MAC case decided under Tennessee law). *See also* Jeffrey Thomas Cicarella, *Wake of Death: How the Current MAC Standard Circumvents the Purpose of the MAC Clause*, 57 Case W. Res. L. Rev. 423, 433-435 (2007) (discussing *Frontier Oil* case).

34 Frontier Oil Corp. v. Holly Corp., 2005 WL 1039027 at *2 (Del. Ch.). Each Holly share would also receive a contingent value right representing the potential value of a litigation claim Holly was then pursuing. *Id.*

35 *Id*.

36 *Id*. at *33.

37 *Id*. at *21.

38 *Id*. at *24.

39 *Id*. at *25. More precisely, Holly claimed that Frontier's representation that there was no litigation pending or threatened against it except for such litigations as would not have (or would not reasonably be expected to have) a material adverse effect on Frontier, was false. That is, Holly claimed that Frontier's litigation representation, which was qualified to a MAC, had been breached. *Id*. at *35. Since the closing condition in favor of Holly conditioned Holly's obligation to close on all of Frontier's representations qualified to MACs (or to materiality) being true, *id*. at *8, the net effect was that Holly's obligation to close would be discharged if the Beverly Hills litigation caused a MAC on Frontier.

40 *See* Miller, *The Economics of Deal Risk*, *supra* note 2.

41 *Id*. at *33.

42 *Id*. at *35.

43 *Id*. at *34.

44 *Id*. at *36.

45 *Id*.

46 *Id*.

47 Even if the figure for the enterprise value of Frontier on which Vice Chancellor Noble relied was computed in some method that does not rely on EBITDA, nevertheless enterprise value is routinely interpreted as described in the text, and so the connection between enterprise value and EBITDA is inescapable.

48 Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 2008 WL 4457544 at *4 (Del. Ch. 2008).

49 *Id*.

50 *Id*.

51 *Id*.

52 *Id*. at *2, *21.

53 *Id*. at *14.

54 *Id*. As mentioned above, such exceptions are common in contemporary MAC definitions. *See* Miller, *The Economics of Deal Risk*, *supra* note 2.

55 *See id.*

56 *Hexion*, 2008 WL 4457544 at *15.

57 *Id*.

58 *Id*. (quoting *In re IBP Shareholders Litigation*, 789 A.2d 14, 67 (Del. Ch. 2001)).

59 *Hexion*, 2008 WL 4457544 at *16. Note the change from IBP, where Vice Chancellor Strine used EBIT rather than EBITDA. *See supra* note 19.

60 *Hexion*, 2008 WL 4457544 at *16.

61 *Id*.

62 Exactly this was the case with an impairment charge that IBP was forced to recognize and to which Tyson pointed in arguing that IBP had been MAC'd. *See In re IBP Shareholders Litigation*, 789 A.2d 14, 70 (Del.Ch. 2001).

63 *Hexion*, 2008 WL 4457544 at *16. Of course, depending on the nature of the business and the accounting principles it employs, other measures such as EBITDAR (earnings before interest, taxes, depreciation, amortization and rent) or EBITDARM (earnings before interest, taxes, depreciation, amortization, rent and management fees) may be more appropriate.

64 *Id.* at *18.

65 See discussion in Part I.A above.

66 *Hexion*, 2008 WL 4457544 at *18.

67 *Id.*, *but see also id.* at *18 FN 76, where Vice Chancellor Lamb says that, based on Hexion's projections for Huntsman's FY2008, EBITDA would decline 12% (rather than 11%) relative to FY2007. Presumably the discrepancy is due to inconsistent rounding between Vice Chancellor Lamb's text and his footnotes.

68 *Id*. at *19. Presumably, the Vice Chancellor was referring to mean analyst estimates like those used by Vice Chancellor Strine in *IBP*, but the opinion does not make this entirely clear.

69 *Id*.

70 In arguing that Huntsman had suffered a MAC, Hexion also referred to factors other than a decline in Huntsman's actual or expected EBITDA, including increased debt levels relative to the time the merger agreement was signed, *id.* at *19, and alleged poor performance at certain of Huntsman's business segments, *id*. at *20. Vice Chancellor Lamb dismissed the first argument because in valuing the deal, Apollo, the parent of Hexion, had assumed Hexion would have debt levels consistent with those Huntsman actually eventually had. *Id*. at *19. As to the second argument, Vice Chancellor Lamb concluded that, if the earnings capacity of Huntsman as a whole had not been impaired (which it had not, based on the EBITDA analysis described in the text), then any adverse changes limited to particular business segments *a fortiori* could not amount to a MAC on the whole company. *Id*. at *20.

71 Del. Code Ann. tit. 8 § 271 (2001).

72 316 A.2d 599 (Del. Ch. 1974), *aff'd on other grounds*, 316 A.2d 619 (Del. 1974).

73 *Id*. at 606.

74 E.g., in *Gimbel*, the court considered book value, net worth, revenue producing power and pre-tax earnings producing power. Id at 607. In *Bacine v. Scharffenberger*, 1984 Del. Ch. LEXIS 501 at *7-8 (1984) the court considered book value and power to produce revenues and operating income. In *Katz v. Bregman*, 431 A.2d 1274, 1275-1276 (Del.Ch. 1981) the court looked at book value, revenues, pretax operating income. In *Hollinger v. Hollinger International*, 858 A.2d 342 (Del. Ch. 2004), the subject corporation had recently attempted to auction its various business segments, and Vice Chancellor Strine relied on, among other things, bids from that process to establish the fair market value of the various segments.

75 The cases produce less definite answers on this issue. Reading all the cases together, perhaps the best that can currently be said is that, for purpose of Section 271, (a) a quantum of assets generally should not be deemed to constitute substantially all of a corporation's assets if the assets aggregate less than 50% of the corporation's assets as measured by each of their book value, their fair market value, their revenue producing power, and their income producing power, and (b) a quantum of assets that aggregates more than 75% of the corporation's assets as measured by any of these metrics may be deemed to constitute substantially all of a corporation's assets if the percentage is significantly more than 50% or if the assets constitute more than 75% of the corporation's assets as measured by more than one metric, particularly if one of the metrics is the assets' income producing power.

76 *In re IBP, Inc. Shareholders Litigation*, 789 A.2d 14, 70 (Del.Ch. 2001).

A Primer on Credit Default Swaps

*By Kristin L. Schmid**

The recent financial crisis and resulting government bailouts have led many people to search for someone, or something, to blame. Some people have even decided to cast as villain credit default swaps—a kind of derivative financial instrument of which virtually no one outside Wall Street had heard this time last year. But are credit default swaps really "financial weapons of mass destruction," as Warren Buffet alleges? Or are they efficient contracts that in fact reduce risk and contribute to the stability and flexibility of the American economy, as Alan Greenspan argued when he was Chairman of the Federal Reserve?[1]

I. Credit Default Swaps: What They Are and What They Do

Imagine that a person owning a bond issued by IBM with a face amount of $1 million is worried that IBM will default and not pay the interest or the principal on the bond as these become due. To guard against this risk, the bondholder can enter into an agreement, usually with a bank, to, in effect, buy protection against this risk. In such an agreement, the bondholder (the *buyer*) agrees to pay the counterparty (the *seller*) a specified percentage, say 2%, of the $1 million face amount of the bond. The seller on the contract agrees that, if IBM fails to pay interest or principal when due, the seller will make a one-time payment to the buyer, either by buying the bond from the buyer at face value (this is known as *physical settlement*) or by making a cash payment to the buyer for the difference between the face value of the bond and its then current market value (this is known as *cash settlement*). Either way, the buyer of the contract has been made whole for his loss on the bond.

This kind of contract is a credit default swap (CDS). The underlying debt obligation—in our example, the bond issued by IBM—is known as the *reference obligation*, and the obligor on that obligation is known as the *reference entity*. The amount of the reference obligation for which credit protection is purchased is known as the *notional amount*, and the price of the CDS—the percentage of notional amount that the buyer pays the seller—is known as the *spread*. Obviously enough, the better the credit of the reference entity, the lower the spread; the worse, the higher. CDSs thus transfer the credit risk associated with the reference obligation from the buyer to the seller, the seller receiving a fee in exchange for accepting the risk. The CDS is thus something like an insurance policy—insurance against a default on the underlying security.

CDSs can be used for many purposes. The most obvious of these, as in our example above, is hedging. Such hedging is not limited to corporate bonds, however. For virtually any debt obligation of any entity, it is possible to buy a CDS on that obligation. For example, suppose that a commercial bank makes a five-year loan for $5 million at 8% to an industrial company. The bank may then buy a $5 million CDS from a third party in order to hedge the bank's credit risk. In return for this credit protection, the bank will pay the third party a percentage of the notional value of the CDS, say 2% of the $5 million ($100,000), per annum in quarterly payments. This, of course, reduces the bank's return on the loan from 8% to 6%. But, if the company defaults on the loan after three years, the bank will lose money on the loan but make money on the CDS because the seller of the CDS will pay the bank $5 million, thus returning the bank's principal on the loan. The buyer would then assume the loan from the bank, recovering what it may. In effect, the bank will have made a $5 million loan for three years at 6% and have been repaid in full. Conversely, if the reference entity does not default on the loan, the bank will pay the seller the agreed upon amount for the five year term ($500,000), thereby reducing the bank's profit on the loan but eliminating the bank's risk of loss due to default.

Although CDSs initially were designed and used for hedging against defaults, the buyer need not actually hold the reference obligation, but can instead enter into a CDS to speculate, or bet, on whether a *credit event*, such as a change in a reference entity's credit quality, will occur. Since CDS spreads generally decrease as credit quality increases and increase as credit quality decreases, an investor may use this spread information to purchase a CDS on a company the investor speculates will soon default. For example, suppose that a hedge fund believes that the industrial company in our example above will soon default on the five-year loan. The hedge fund can purchase a $5 million CDS from a bank, with the industrial company as the reference entity. Like the commercial bank above, the hedge fund will also pay the bank that issued the CDS a percentage of the notional value of the CDS, again say 2% of the $5 million ($100,000) for a CDS term of, say, two years. If the industrial company defaults after one year, the hedge fund will have paid the bank $100,000, but will receive the CDS contract's notional amount ($5 million) less the remaining value of the loan, thereby making a large profit. Conversely, if the industrial company does not default, the hedge fund will pay the full amount on the CDS contract ($200,000), will receive nothing in return, and so suffer a loss. The hedge fund, however, can mitigate its potential losses. If after the first year, the industrial company's CDS spread has decreased, meaning that the company is less likely to default, the hedge fund can sell the bank a one-year $5 million CDS at this lower spread, say, 1%. Thus, if the industrial company does not default, the hedge fund will pay the bank the full two-year CDS contract ($200,000) and receive a payment for the one-year CDS contract from the bank ($50,000). In effect, the hedge fund has reduced its losses from $200,000 to $150,000. These *naked* credit default swaps do not mitigate risk or even transfer risk. Instead, the contract allows the buyer in effect to bet on, and profit from, a downturn in the financial condition of the reference entities, e.g., issuer of the underlying securities.[2] A buyer that has purchased naked credit default swaps thus has an incentive to use its position affirmatively to destroy value and ensure default.[3] (Of course, market participants can make the opposite bets—that is, bet on and profit from an improvement in the financial condition

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of the reference entity—by *selling* CDS contracts, and market participants who do so have opposite incentives, i.e., incentives to see the reference entity avoid defaults.) On the other hand, naked CDSs are not necessarily bad. Like short-selling of a company's stock, buying CDSs sends a signal to the market about the state of the issuer of the underlying obligation, and that information may be valuable information that helps the market more accurately price the issuer's securities.

CDSs are also used to engage in a strategy known as capital structure arbitrage. Such arbitraging begins from the assumption that a company's stock price and its CDS spread are negatively correlated. For instance, when the company's stock price increases, the CDS spread decreases, resulting in the company's credit quality increasing since the company is less likely to default. Sometimes, a capital structure arbitrageur can exploit the spread between a company's CDS spread (debt) and stock price (equity) in an effort to capitalize on market inefficiencies that misprice these different parts of the same company's capital structure. For example, if a company's stock price has decreased but its CDS spread remains unchanged, the arbitrageur will assume that the CDS spread will subsequently increase. In this situation, the arbitrageur would buy a CDS contract with the company as the reference entity, while simultaneously buying the company's stock. Taking a long position on the CDS, the arbitrageur is short on the company's debt, but has hedged this position by being long on the company's stock. If, as expected, the CDS spread widens relative to the equity price, the arbitrageur will profit. For instance, if the stock price remains the same but the CDS spread increases, then the arbitrageur will sell an offsetting CDS at a higher spread, eliminating all this risk on the original CDS, and then sell the stock too, closing out the whole position at a profit equal to the difference in the spreads on the CDS contracts.

Through its various uses, a CDS allows the holder of a risky asset to shift the potential credit risk to someone else willing to bear it for a fee the CDS buyer is willing to pay. Now, contractual risk-shifting is generally efficient. That is, for various reasons, some parties are more efficient risk bearers than others—e.g., because they have superior information and know the expected cost of the risk to be low, because they can diversify in ways other people cannot, because they can pool risks and in effect self-insure them.[4] Moreover, CDSs allow parties to shift risk without having to sell the reference obligation—e.g., selling the bond, syndicating the loan, etc. CDSs thus increase the buyer's liquidation. With their risks from lending reduced, banks using CDSs are more willing to lend more money to more businesses, thus reducing the costs of credit for everyone.

Nevertheless, if the buyer of a CDS owns the reference obligation, the risk that the value of the reference obligation will decrease due to market forces (i.e. market risk) stays with the CDS buyer. For example, if the reference obligation is a bond paying 6%, the value of the bond will drop if interest rates increase. This is not a credit event, and so nothing at all happens under the CDS. The CDS provides insurance against *credit risk*, not market risk or other forms of risk.

While CDSs and similar instruments have been around for decades, it was only in the mid-1990s that JP Morgan built a "swaps" desk to create an active market in CDSs.[5] Within a few years, the CDS became the safest way to parse out credit risk while maintaining a steady return, and the CDS market thus experienced massive growth. CDSs were written on virtually every kind of debt instruments available—corporate bonds, municipal bonds, asset-backed securities, structured investment vehicles, and even U.S. Treasury securities.[6] Credit default swaps were used to encourage investment in emerging markets by insuring the debt of developing countries. During the housing boom, when mortgages were pooled together and sliced into mortgage-backed securities, many financial institutions purchased CDSs to protect against default in these securities too.[7] By the end of 2000, the notional value of the CDS market totaled approximately $900 billion.[8]

By the early 2000s, the CDS market had changed in three substantive ways. First, numerous new parties became active in the CDS market through the development of a secondary market, where these speculative investors would buy and sell CDSs from the sidelines without having any direct relationship with the reference entity. Second, CDSs were increasingly issued for asset-backed securities (ABSs) and mortgaged-backed securities (MBSs), as well as the obligations of structured investment vehicles that often owned ABSs and MBSs. Third, naked CDSs became extremely common. Eventually, the CDS market had a notional value of more than $45 trillion.[9] The notional value of CDSs written on corporate bonds, municipal bonds and structured investment vehicles totaled approximately $25 trillion, while the notional value of naked CDSs, speculating on numerous reference obligations, totaled approximately $20 trillion.[10] The estimated notional value of these credit default swaps was thus almost four times the United State's Gross Domestic Product[11] and approximately five times the national debt.[12]

In interpreting the significance of these numbers, however, it is crucial to keep in mind that they refer to the aggregate *notional value* of all the existing CDS contracts in a given moment. Since only a small percentage of reference obligations will ever go into default, the vast majority of the CDS contacts by dollar value will be settled without the seller having to pay the buyer a penny. The cash flow on such agreements, therefore, will always be vastly less than the aggregate notional amount. Recall that the CDS is something like an insurance policy. If one buys a $100,000 insurance policy, it is not actually worth $100,000. The true value of the insurance policy is probably closer to zero—probably a little less than the premiums paid on the policy. Comparing the amount insured by CDSs (notional value) to the actual value (i.e. what someone would pay for it) of the stock market or the real value of any other real asset is thus misleading; it is to compare two quite different things.

The notional value of the CDS market is further increased because in many cases the same investor both buys and sells CDSs on the same reference obligation. The reason for this should be obvious. Sometimes, the investor is hedging, and having assumed some credit risk on the reference obligation, the investor then protects against that risk by buying protection in the form of another CDS. Compare how insurers reinsure risk: by reinsuring risks they have insured, insurers can both spread risks out over a large group of insurers and allow each such insurer to obtain a more diversified portfolio of risks. No

one would think, however, that reinsurance was bad because it increases the notional value of insurance policies. For example, if there is an office building in Manhattan worth $100 million, and the owner insures it for the full value, and the insurer then reinsures $90 million of the risk, and the reinsurer reinsures $80 million of that $90 million, and so on down the line, the total amount of "insurance" sold will total $550 million. But it would be ridiculous to think that there was something amiss here because the $550 million number so greatly exceeds the value of the building. The notional value of all the insurance and reinsurance policies has no relationship to the real value of the insured property—and this is just as it should be. Or again, in other cases, the notional value of CDS contracts is inflated because investors are engaged in capital structure arbitrage, and as market conditions change, they will attempt to profit sometimes by buying CDSs and sometimes by selling them, all with respect to the same reference obligation or reference entity. It is impossible to know how much of the CDS market represents such hedging or arbitraging, but the amount is certainly very significant, and the result is that the actual value of the CDS market is surely only a small fraction of that of the stock market.

The CDS market has remained essentially unregulated. One might think that CDSs would be regulated under the federal securities laws, especially the Securities Act of 1933 because Section 2 thereof defines "security" to include any "security future" or "investment contract," which could reasonably be thought to include CDSs.[13] This is not the case. Instead, Section 2A of the Securities Act provides that "swap agreements," as defined by the Gramm-Leach-Bliley Act of 1999, which includes credit default swaps, are exempt from the Securities Act. The Gramm-Leach-Bliley Act, also known as the Financial Modernization Act of 1999, amended not only the Securities Act, but also repealed parts of the Glass-Steagall Act of 1933.[14] Following the motivation of the Gramm-Leach-Bliley Act, in 2000 Congress passed the Commodity Futures Modernization Act (CFMA), which specifically removed CDSs and other derivative instruments from the scope of the Securities Acts. The CFMA does provide that CDSs are subject to the anti-fraud and anti-manipulation provisions of the Securities Acts as "security-based swap agreements," but prohibits the SEC from taking preventative measures against fraud or manipulation with respect to security-based swaps.

Through the CFMA, credit default swaps are also excluded from the jurisdiction of the Commodity Futures Trading Commission (CFTC), which regulates certain other kinds of derivatives. Under the Commodity Exchange Act, CDSs are excluded because they are either (a) made between eligible contract participants, are subject to individual negotiation by the parties, and are executed over-the-counter, or (b) involve credit risk, credit measure, or an occurrence out of the parties' control that is associated with a financial consequence.[15] CDSs are generally excluded from CFTC regulation because they are not considered "futures" under the Commodity Exchange Act, which requires that, unless a statutory exclusion applies, all futures contracts must be traded on a CFTC regulated exchange.[16] With the steady conversion of exchange-traded and over-the-counter (OTC) derivative instruments, and the increasing volume of OTC derivative transactions, fear that these OTC instruments would not be enforceable, and ultimately illegal, created pressure for enacting regulatory exemption of OTC instruments.[17] Since these OTC derivative transactions were between sophisticated investors in directly negotiated transactions, it was argued that contract law provided adequate protection against fraud and additional regulatory oversight by the CFTC was unnecessary.[18]

Thus, since CDSs are neither "securities" under the Securities Act nor "futures" under the Commodity Exchange Act, they are essentially unregulated. Perhaps the most importance consequence of this absence of regulation is that the market for credit default swaps is opaque. There is no easy way for anyone to know the total value of the CDSs written on any particular reference obligation or who holds long and short positions on any such obligation. In addition, since virtually anyone can buy or sell a CDS, each market participant has to make its own decision regarding counterparty risk—i.e., the risk that the counterparty to a CDS will be unable to perform its obligations thereunder as they come due.

II. CDSs and the Current Financial Crisis

The current financial crisis was the product of policy mistakes by various government entities, including the Federal Reserve, as well as complex market failures and market forces, and to provide a full description of all the causes and effects of the financial crisis is well beyond this article.[19] This article will attempt, however, to explain the very minor role that CDSs have played in the crisis.

The interconnectedness of large financial institutions creates one kind of systematic risk. That is, because of the numerous and complex transactions between major financial institutions, there is a risk of a wide spread breakdown in the financial system (e.g., one financial institution after another becoming insolvent) resulting from a series of correlated defaults among financial institutions over a short period of time, perhaps being triggered by a single major event.[20] The theory is that, because of the web of obligations among large financial obligations, if one financial institution experiences a significant loss, the losses could spread to other financial institutions and ultimately undermine the stability of the entire financial system. Obviously, CDS contracts are one kind of obligation linking financial institutions together.

On one common interpretation, one cause of the current financial crisis was the materialization of such a systematic risk. Banks and mortgage companies issued subprime mortgages, which required little or no downpayment and were often issued to households with low incomes, few or no assets, and troubled credit histories.[21] Once sold to secondary buyers such as investment banks, these subprime mortgages were pooled and sliced to create MBSs.[22] Rating agencies, paid by the issuers, rated these securities, often declaring them to be extremely safe.[23] Sometimes the securities were securitized again—a second level of securitization. All these securities were either sold to final buyers or held on the balance sheets of the banks and brokerages.[24] In some cases, people created instruments derivative on the MBSs. Finally, many people wrote CDSs on these MBSs and securities derivative on them or on the

securities of entities (such as structured investment vehicles) that held such securities.

Now, CDSs written on these securities were generally a good thing, both for the parties that entered into these agreements and for the economy as whole. CDSs spread, and often even reduced, the risk associated with these instruments. This is a very important point. CDSs allow not just the transfer of risk but its actual reduction or even elimination. That is, when someone comes to an investment bank and asks the bank to write a CDS and the bank agrees, usually the bank has gone out out and hedged the risk it just took on. Meaning, sometimes the bank acts as intermediary between two other market participants who have opposite positions on the reference obligation. The person wanting the CDS is long on the security; someone else is short. By writing the CDS the bank took a long position on the security, and then hedged it out by taking, in a transaction with the other person, a short position. The bank makes its money on the fees from doing this, not by actually taking an investment position on the underlying securities. That bank is, as it were, a middleman in the hedging market.

So the CDSs written on the MBSs and instruments derivative from them in part reduced the risk of such instruments and in part spread it out among a wider class of market participants. This is a wholly good thing because, by eliminating and spreading risk, it reduces the cost of capital. So far, so good.

But, if a market panic should start on the underlying mortgages, the panic—i.e., the irrational under pricing by the market—can spread through the financial structure, from the mortgages to the MBSs backed by them, to derivative securities based on the MBSs, and finally to the CDSs written on the MBSs and other securities. This is exactly what happened.

When housing prices started unexpectedly to decline in 2006-2007, mortgage delinquencies soared, and the securities backed by these subprime mortgages lost some of their value. As mortgage defaults rose, the likelihood that the parties who issued CDSs related to MBSs would have to pay their counterparties increased. Sellers of CDSs thus faced potential losses if the reference obligations on which they sold CDSs went into default and the sellers had to pay out on the CDS contracts. The value of the CDSs held on their books thus declined.

Now, under FAS 157, adopted by the Securities and Exchange Commission and Financial Accounting Standards Board, companies must determine the "market price" of certain types of assets, including at least some CDSs[25] and record such values on their books on a quarterly basis,[26] even if the company has no intention of selling the assets. Thus, if a bank makes a loan or buys a security and in the next quarter, that loan or security is only worth 50 cents on the dollar as revealed in market transactions, then the bank has to write down the value of the loan on its balance and recognize a loss on its income statement equal to half the value of the loan. Adopted in response to the Savings and Loans crisis and expanded after the Enron scandal, this "mark-to-market" system was intended to keep the financial system healthy and honest. But, in the context of a market panic, when market participants start pricing assets irrationally low, mark-to-market only exacerbates the panic. In a distressed market, where assets cannot be readily sold, companies are forced to declare values at fire-sale prices, even though they have suffered no real losses, intend to hold the obligations to maturity, and will very likely be paid in full in accordance with the terms of the security.

This is exactly what happened to companies holding CDSs. Despite the fact that most of the reference obligations on the CDSs were not in default and were not likely to go into default, mark-to-market accounting rules required the CDS sellers to book accounting losses since the reference obligations were being traded at steep discounts or not traded at all. Many large financial institutions were forced to value assets at unrealistically low levels and take charges against their earnings accordingly. This has important ripple effects: if, for mark-to-market reasons, a financial institution has to recognize losses, then its own financial position appears to deteriorate, which will cause the value of its own debt obligations to decrease, which will cause CDSs written on those obligations to decrease in value, which will cause other market participants to have to recognize losses under mark-to-market rules—and so a vicious cycle can begin.

III. What Happened to AIG

AIG is a global financial services holding company doing business in 130 countries.[27] It owns 71 U.S. based insurance companies and 176 other financial services companies.[28] State insurance departments regulate only AIG's U.S. insurance subsidiaries. AIG owns the largest commercial and industrial insurance company in the U.S. and the world's largest life insurance company.[29]

Through its non-insurance operations, especially a unit of AIG known as AIG Financial Products (AIGFP), AIG sold hundreds of billions of dollars of credit derivatives, particularly CDSs, on obligations ultimately backed by home mortgages.[30] AIG's policy was for AIGFP to conduct business on a "hedged" basis—that is, whatever risk AIGFP took on by selling a CDS, it would offset by a hedging transaction on the market, thus making its net exposure zero. Its profit would stem from the difference between the fees earned from selling the CDS and the cost of offsetting or hedging the risk in the market.

Approximately $70 billion of AIGFP's CDSs were on "multi-sector" bonds, that is, bonds backed by student loans, credit card receivables, and residential mortgages.[31] Additionally, AIGFP wrote CDSs only on what AIG referred to as "super senior" bonds, which were viewed as extremely safe and better than AAA rated bonds.[32] These CDSs were listed on AIG's books at "par value" meaning that after analyzing them, AIG did not expect any losses.

When the financial crisis began, the reference obligations of the CDSs that AIG had sold plunged in value. As with other financial services companies, AIG was forced to mark-to-market the CDSs on its books, writing down their value not because of actual defaults on subprime mortgages or securities backed by them, but because of default fears and a dried up market, resulting in very depressed market prices for these reference obligations, especially collateralized debt obligations (CDOs)—derivative instruments based on MBSs on which AIGFP had written CDSs. In effect, AIG was forced to mark CDS positions at fire-sale prices as if AIG owned the reference securities, even

though a majority—probably a very large supermajority—of the reference securities did not default and probably never would default, meaning that AIG's swap positions had value, even their full value, if held to maturity.

As AIG's reported losses rose, there was a domino-like series of repercussions. AIG's stock price fell dramatically. As the value of the reference obligations declined, the CDS contracts gave the buyers of the swaps the right to demand that AIG post collateral for its obligations under the swap should the reference obligation ever actually default. Typically, this collateral was cash or highly-rated securities such as treasury securities or municipal bonds. Further, as AIG recognized more and more mark-to-market losses, the credit rating agencies decided to downgrade AIG, and under the CDS contracts, AIG then had to post even more collateral in favor of the CDS counterparties. As CDS values continued to deteriorate, AIG was obliged to take more write-downs, requiring AIG to post more and more collateral each day. AIG's counterparties on other, non-CDS transactions (such as counterparties in its securities lending program) also demanded that AIG post additional collateral or return investments. As a result, counterparties eventually demanded AIG post approximately $35 billion in collateral.[33] While AIG easily had assets of the required value, including its insurance companies, the assets were not liquid, which meant that AIG could not immediately convert those assets to cash or cash-equivalents in order to satisfy the collateral calls. AIG was not short of capital, but it was short of cash because it could not turn most of its assets into cash quickly enough.

Recognizing AIG's peril, New York Governor David Paterson worked with AIG to develop a proposal to stabilize the company while protecting policyholders. The plan would have allowed AIG to temporarily access about $20 billion in excess surplus assets currently in its insurance companies by effectively selling some of the life insurance companies stock to AIG's property insurance companies for certain liquid assets, especially certain municipal bonds.[34] AIG would have used the municipal bonds to provide the needed collateral. This exchange would give AIG access to the high quality assets needed to meet the collateral calls. The plan further provided that the amount of securities remaining in the companies be sufficient to pay all claims, meet statutory risk-based capital requirements, and still leave surplus capital. This is important because insurance companies are required to keep reserves to pay future claims, which depends on the type of insurance.

Eventually, when it became clear that AIG needed even more money than Governor Paterson's plan could provide, the Federal Reserve and the Treasury Department attempted to identify private-sector approaches to raise the necessary funds. With no commercial private sector rescue to be found in time, and worried that an AIG default would trigger subsequent defaults leading to a global financial system meltdown, the Federal Reserve, with the support of the Treasury, provided an emergency credit line to AIG to allow it to meet its obligations. The Federal Reserve initially proposed an $85 billion facility. The two-year loan would have an interest rate of LIBOR plus 8.5% and effectively grants the U.S. government a 79.9% equity stake in AIG in the form of warrants called equity participation notes.[35] The loan would facilitate a process under which AIG could sell certain subsidiaries in an orderly way, not at fire sale prices, meet all its obligations, and minimize disruption to the financial and insurance markets.

In taking this extraordinary action, the Federal Reserve determined that an AIG collapse could add to already significant levels of financial market fragility and lead to substantially higher borrowing costs, reduced household wealth, and materially weaker economic performance. The purpose of the bailout was to assist AIG in meeting its obligations and facilitate a process under which AIG can sell certain subsidiaries, with the least possible disruption to the overall economy. But because they were concerned that the bailout would exacerbate moral hazard and encourage inappropriate future risk taking by other financial institutions, the Federal Reserve and the Treasury Department imposed on AIG certain onerous terms in addition to the merely financial ones noted above. The loan from the Federal Reserve is secured by all of the assets of AIG and of its primary non-regulated subsidiaries, giving the Federal Reserve some protection even if markets continue to collapse. Furthermore, the Federal Reserve has certain control rights, including the right to veto any dividend payments to common and preferred shareholders. And, of course, the shareholders of AIG were massively diluted by the 79.9% equity stake given to the government.

Unfortunately, even the initial $85 billion bailout failed to stabilize AIG because the company's financial condition continued to deteriorate as the credit crisis continued. AIG was burning through cash and was saddled with difficult-to-value, mortgage-related securities that had fallen sharply in value and continued to deteriorate. The federal government thus decided to restructure the bailout to provide additional relief. While AIG will retain the initial $85 billion emergency line of credit, under the new plan AIG will receive supplement help from the New York Federal Reserve Bank in the form of two new lending facilities, each focusing on a particular portfolio of mortgage-related securities—residential mortgage-backed securities and multi-sector CDOs. In one facility, the New York Federal Reserve Bank will lend up to $22.5 billion to a newly formed limited liability company to finance the purchase of residential MBSs held by an AIG subsidiary, AIG Securities Lending Corp., under AIG's U.S. securities lending program. AIG will make a $1 billion subordinated loan to the LLC and bear the risk for the first $1 billion of any losses on the portfolio. The loans will be repaid from the cash flows produced by these assets, as well as proceeds from any sales of these assets. The New York Federal Reserve Bank and AIG will share any residual cash flows after the loans are repaid. In the second new facility, the New York Federal Reserve Bank and AIG will provide $30 billion and $5 billion, respectively, to fund the purchase of multi-sector CDOs on which AIGFP had written CDS contracts.[36] AIG will bear the risk for the first $5 billion of losses among the securities purchased. The CDS counterparties will retain the collateral received from AIG and will sell the CDO reference securities to the new company at market prices averaging 50 cents on the dollar.[37] Any counterparty that does not participate will bear the risk that AIG will not be able to meet its obligations under the CDS. This buy-back proposal will allow AIG to unwind the CDSs it previously wrote and prevent any additional collateral

calls on those swaps. Any increase in the CDOs' value or pay off over time will be apportioned between the Federal Reserve and AIG, with most going to the Federal Reserve.

IV. Should Credit Default Swaps Be Regulated?

Developing a stronger, more resilient financial system requires extensive analysis and not mere quick regulation. Indeed, in some cases, it is clear that government regulation—such as FAS 157's mark-to-market rules—*exacerbated* the financial crisis, and even played a significant role in causing it. To their credit, the SEC and Congress have recognized the unintended consequences of FAS 157 and are further examining mark-to-market accounting to prevent accounting-based failures of financial institutions when markets freeze or otherwise go into panics.[38] Thus, while the impulse of Congress may be to regulate, the lesson to be drawn from the financial crisis, at least with respect to CDSs, is far from clear. Congress must be cautious of quick *panic* regulation, which ignores the benefits of market flexibility and, therefore, impedes future market innovation.[39]

In light of the recent financial crisis, many are pressuring Congress to repeal the swaps exclusion included in the Commodity Futures Modernization Act of 2000 and regulate CDSs in order, it is said, to protect investors and prevent de-stabilization of the financial markets. Still others, a minority, argue against CDS regulation. These people say that the real financial crisis issue was not CDSs, but over-leveraged balance sheets, poor management decisions, and flawed business plans. While CDSs neither caused nor, in any important way, exacerbated the financial crisis, it seems that CDS regulation is inevitable. Still, the *right kind* of CDS regulation would likely do little harm and much good.

The magnitude and importance of the CDS market have led to proposals for a formalized CDS exchange with standardized contracts. An open and transparent market for CDSs could reduce confusion regarding valuation. Standardizing the terms of CDS contracts would reduce their opaque nature and reduce systemic risk because the nature of the obligation and amount of the obligation would be better known. Additionally, it is argued that exchange trading of credit default swaps would eliminate the counter party risk, as the solvent exchange-clearing corporation would be the responsible party.[40] The exchange would also be able to better monitor the risks undertaken.

On the other hand, this system could itself introduce new risks. For, in the exchange-clearing house proposals, all exchange participants guarantee the clearing house, and so each becomes potentially liable for the failure of the weakest members, and the weakness of the credit of such members may be unknown. Nevertheless, the CDS market is already moving toward centralized clearing and settlement. In recent months, Citadel and the CME Group have partnered to build a clearinghouse for credit default swaps.[41]

Believing that the unregulated use of CDSs contributed to the Wall Street meltdown, New York Governor David Paterson declared that New York would regulate certain aspects of the CDS market beginning January 1, 2009. As proposed, the New York regulation would have only regulated about a fifth of the sprawling CDS market, i.e., only CDSs within the jurisdiction of New York State.[42] Under the plan, the state's insurance department would regulate CDSs as insurance products in situations where the buyer of the swap also owns the reference security. Only licensed insurers would be able to issue a CDS. New guidelines would also increase financial institutions' minimum capital requirements and reserves. The regulation was aimed at preventing financial institutions from engaging in exorbitant amounts of CDSs and at guaranteeing that the CDS issuer was solvent. The New York state regulation was delayed "indefinitely," however, due to the progress made by federal regulators in creating a regulated, central clearinghouse.

State-by-state regulation, as suggested by New York, would be impractical. Financial markets work best when they are competitive, fair, transparent, and stable. Even if financial crises are unavoidable due to the unfettered ability to innovate, compete, and evolve, their disruptive effects can be significantly reduced through greater transparency. For the most part, Alan Greenspan was right: CDSs are efficient contracts that reduce risk; however, opaque naked CDSs can be somewhat problematic, and they can exacerbate other problems in a financial panic. Although these speculative naked CDSs serve a purpose and should not be outright prohibited, requiring institutions to disclose their CDS positions if they reach certain values, e.g. more than 5% of the value of the class of securities, would expose the magnitude of risks parties are assuming and, by putting more information in the market, would allow other parties to price securities and obligations more efficiently. Particularly since these CDSs are sold and resold among financial institutions, an original buyer may not know that a new, potentially weaker entity has taken over the obligation to pay a claim. Regulating these CDSs by requiring verification that parties to the CDS can meet its obligations will create greater transparency and help prevent systemic risk.

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Criminal Law and Procedure

The Unfinished *Daubert* Revolution

*By David E. Bernstein**

The American judiciary traditionally had a laissez-faire approach toward the admissibility of most categories of expert testimony.[1] This approach ended in federal courts when the U.S. Supreme Court adopted a reliability test for the admissibility of expert testimony in a series of three decisions: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, *General Electric Co. v. Joiner*, and *Kumho Tire Co., Ltd., v. Carmichael.*[2] An amendment to Federal Rule of Evidence 702 in 2000 then codified a stringent interpretation of the "*Daubert* trilogy." Many states also have adopted some version of the *Daubert* reliability test.[3] Given that expert testimony is crucial to modern civil and criminal litigation, the emergence of the *Daubert*–702 reliability test for expert testimony is probably the most radical, sudden, and consequential change in the modern history of the law of evidence.

Contrary to many early predictions, the consequences of *Daubert* and its progeny have been quite positive. The *Daubert* trilogy has had a particularly dramatic effect on toxic tort litigation in which plaintiffs rely on speculative theories of causation. Amended Rule 702 resolves the controversy over the admissibility of such evidence by stating that expert testimony is admissible only if "the testimony is the product of reliable principles and method" and "the witness has applied the principles and methods reliably to the facts of the case." Because speculation is by definition unreliable, this standard suggests that speculative testimony by plaintiffs' experts is not admissible under Rule 702.

As a result, toxic tort litigation based on dubious scientific theories has started to wither. Such legal atrocities as the Bendectin[4] and breast implant litigation[5] could not have emerged under the current Rule 702 regime. Moreover, *Daubert* considerations have been critical in uncovering massive fraud in the silicosis litigation, and may yet result in a reining in of the out-of-control asbestos madness.[6]

More generally, courts nationwide are taking seriously their obligation to serve as gatekeepers who filter unsound expert witness testimony in a wide range of areas. Testimony that was routinely admitted before *Daubert*—such as expert testimony by engineers in products liability litigation—is now met with great skepticism in *Daubert* jurisdictions, unless the expert can point to objective support for his claims. Indeed, contrary to pre-*Daubert* practice, all expert testimony, ranging from economics to forensic techniques to psychological testimony, is now scrutinized for reliability before admitted into court. The result has been a significant decline in the presentation of "quackspertise" in the courts.

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Nevertheless, *Daubert* has several significant limitations. First, many state courts have declined to adopt it, and have instead retained more liberal rules of admissibility, some of which amount to a "let-it-all-in" philosophy. Second, some federal judges simply refuse to acknowledge the sea change that has occurred in the law of expert testimony, and continue to rely on older, more inclusionary precedents. Third, *Daubert* has been ineffective in limiting the use of junk science by prosecutors in criminal cases. Finally, *Daubert* is a poor match for certain kinds of expert testimony. Specifically, Rule 702 and the *Daubert* trilogy are ill-equipped to deal with "connoisseur" testimony that arises from a legitimate field of expertise, but whose reliability is ultimately dependent on the personal credibility of the testifying expert. Each of these limitations will be addressed in turn.

I. State Courts' Failure to Adopt *Daubert*/Rule 702

Plaintiff attorneys, often allied with prosecutors, have fought every effort to adopt the *Daubert* trilogy and amended Rule 702 at the state level. *Daubert* opponents have inertia on their side, and *Daubert's* reception has been particularly unfriendly in some of the most populous and influential states, such as California, Florida, Illinois, New York, New Jersey, and Pennsylvania.

The result is a hodgepodge. At one extreme, some states such as Wisconsin apply a qualifications-only test, meaning that any marginally qualified expert can testify to just about anything without meaningful judicial oversight.[7] Most other non-*Daubert* states apply the older *Frye* "general acceptance" test, which requires that expert testimony be generally accepted in the relevant scientific community. Unfortunately, in most jurisdictions *Frye* is not a significant barrier to the admissibility of junk science.

Some courts limit the application of the *Frye* rule to "novel" forms of expertise. Courts in other states have held that Frye only applies to "scientific" expertise, and then define such expertise extremely narrowly.

The Kansas Supreme Court[8] even held that a physician's testimony—claiming that ingestion of the drug Parlodel caused a woman's death—was exempt from Frye because it was not based on scientific evidence but was instead his "pure opinion." This peculiar outcome seems to suggest that the less objective the basis for an expert's scientific opinion, the less judicial scrutiny it should receive!

Even when courts do apply *Frye*, experts can usually evade the rule by claiming reliance on a "generally accepted" scientific methodology (such as high-dose animal studies to find suspected carcinogens) and then using it in a generally unaccepted way (extrapolating from the results of such a study to proving cancer causation in a human exposed to a much lower dose). In contrast, under Rule 702, federal judges are required to ensure that the expert "has applied the principles and methods reliably to the facts of the case."

As a result of state courts' failure to embrace *Daubert*, plaintiff attorneys with dubious claims are engaging in heroic efforts to avoid diversity jurisdiction and bring their claims in state rather than federal court. If state courts want to avoid becoming the dumping ground for junk science and quackspertise, they need to either enforce a stricter version of the *Frye* test, or, better yet, adopt amended Rule 702. It is particularly unfortunate that prosecutors have been the leading opponents of adoption of Rule 702. For reasons discussed below in Part III, prosecutors are probably exaggerating how much practical effect Rule 702 would have on prosecutions. But, to the extent Rule 702 would exclude bad expert testimony in criminal cases, prosecutors should be supportive of that goal. Relying on junk science may occasionally help prosecutors secure a conviction, but securing convictions based on quackspertise is hardly the way to promote justice.

II. Federal Judges' Refusal to Follow Rule 702

Some federal judges, whether out of ignorance, poor briefing by the parties, or willful defiance, refuse to apply, or fail to apply, amended Rule 702 to contested expert evidence. Consider, just as an example,[9] one recent Federal Circuit opinion, *Liquid Dynamics Corp. v. Vaughan Co., Inc*.[10]

The *Liquid Dynamics Corp.* court cited the 1993 *Daubert* opinion as the last word on the admissibility of expert testimony. Meanwhile, the Court ignored the text of amended Rule 702, and ignored the later cases in the *Daubert* trilogy. As a result, the court concluded that the objection that an expert "used the wrong equations to run his… analysis of the engine's aerodynamic properties" goes to weight, not admissibility. Yet Rule 702, as amended, specifically states that expert testimony is only admissible if "the witness has applied the principles and methods *reliably* to the facts of the case."

Relatedly, *Liquid Dynamics Corp.* cited *Daubert* for the proposition that "the focus of a court's inquiry into the relevance and reliability of scientific evidence 'must be solely on principles and methodology, not on the conclusions that they generate.'" The court failed to recognize however, that amended Rule 702 requires that judges scrutinize an expert's reasoning process. Moreover, the 1997 *Joiner* case stated that "conclusions and methodology are not entirely distinct from one another," and that courts could reject testimony even when based on what, in general, may be a reliable methodology, if it was misused in a particular case.

Liquid Dynamics Corp. also relied on a 1986 Eighth Circuit opinion for the proposition that as a general matter inadequacies in expert testimony, especially if they can be vigorously contested at trial, are a matter of weight, not admissibility. In terms of the evolution of federal expert evidence law, 1986, seven years before *Daubert*, might as well be 1800.

A similar scenario arose in a federal district court in *Riley v. Target Corp*.[11] in 2006. In *Riley*, the defendant challenged the admissibility of the plaintiffs' physician's "differential diagnosis"[12] under Rule 702. The court found that the methodology of differential diagnosis is a generally reliable one. It then added that any weaknesses in how the expert extrapolated from the differential diagnosis go to the weight of his testimony, not its admissibility.

The court's holding directly contradicts the language of amended Rule 702, as well as the Supreme Court's *Joiner* opinion. To justify its ruling, *Riley* cited a pre-*Joiner* 1995 circuit court case for the proposition that "[f]aults in an expert's use of differential etiology as a methodology or lack of textual authority for his opinion go to the weight, not the admissibility, of his testimony." Even worse, the court, directly contradicting *Daubert*, much less amended Rule 702, contended that "[o]nly if an expert's opinion is 'so fundamentally unsupported that it can offer no assistance to the jury' must such testimony be excluded.'" The supporting precedent quoted by the court originated in a pre-*Daubert* case from 1988.

To the extent that courts such as the two discussed above are failing to apply modern rules for the admissibility of expert evidence out of ignorance, it behooves attorneys arguing before them to do a better job of informing them about Rule 702. Various judicial education projects could also, apparently, be doing a better job at disseminating information about *Daubert* and its progeny. To the extent this judicial misfeasance is willful, an obvious solution is for higher courts and colleagues to police judges who refuse to follow the law. Legal scholars and commentators should also criticize such judges, constructively.

III. The Impotence of Rule 702 With Regard to Forensic Science

Forensic science is important evidence in a very large fraction of criminal law cases. Unfortunately, as various scandals suggest and various studies conclude, too often forensic scientists present unreliable or biased testimony.[13]

One problem is that many frequently used forensic techniques have not been proven reliable and have high rates of error when tested. And even when forensic experts use reliable techniques, testimony based on these techniques is often flawed. A recent article neatly summarizes several reasons forensic testimony is so problematic: [14]

- Each jurisdiction typically has just one forensic laboratory; the absence of competition reduces the incentive to perform well.[15]
- Forensic labs are usually attached to police departments and therefore depend on the police department for their budgets, which naturally leads to a desire to please the police, even at the cost of honesty and thoroughness.[16]
- Quality control is weak at most forensic labs.[17]
- Forensic scientists often know what result they are "supposed" to reach, which can lead to an unconscious bias in interpretations of test results, or even conscious fraud.[18]
- The scientist who performs a particular test typically also interprets the results of the test, reducing the odds that anomalies will be discovered.[19]

In short, even when forensic scientists are using reliable techniques, forensic science testimony is subject to significant unconscious bias by experts seeking to help their bosses, the prosecutors. Moreover, the structure of the forensic science system means that such bias, or even outright fraud, is likely to go undiscovered.

Rule 702 and the *Daubert* trilogy's solution to these problems is to provide a reliability test for all expert testimony, including forensic testimony. Enforced strictly and universally, this test would dramatically improve the quality of expert forensic testimony. In practice, however, defense attorneys are rarely successful at challenging the admissibility of prosecution forensic science. The problem is not simply that courts are too inclined to admit prosecution testimony (though perhaps they are). Rather, defense attorneys often fail to challenge the admissibility of questionable testimony to begin with.

The effectiveness of Rule 702 depends on enforcement by competent attorneys willing and able to expend sufficient time and resources to challenge unreliable testimony. Unfortunately, defense attorneys rarely meet this ideal. Public defenders, for example, are frequently "inexperienced, overworked, and underpaid."[20] These attorneys often do not have the resources to investigate, much less challenge, forensic testimony proffered by the prosecution. Court-appointed defense attorneys also operate under severe resource constraints if they seek to challenge the prosecution's expert testimony.

To make matters even more unbalanced, most forensic scientists are affiliated with crime labs controlled by the prosecution and are prohibited from assisting defendants.[21] As Peter Neufield concludes, "If no one challenges the speculative science or scientist, there is nothing for a gatekeeper to tend to. Thus, the principal failing of *Daubert* is its misplaced reliance [in the context of forensic science] on a robust adversarial system to expose bad science."[22]

Unfortunately, there are no easy fixes to the problem of quackspertise in forensic science testimony—the entire system needs an overhaul. (For those interested in the possibilities for reform, two good sources for proposals are Paul C. Giannelli's article "Wrongful Convictions and Forensic Science" in the *North Carolina Law Review* (2007), and Roger Koppl's "How to Improve Forensic Science" in the *European Journal of Law & Economics* (2005). The latter article relies on sound economic reasoning in its reform proposals.)

IV. *Daubert* and "Connoisseur" Testimony

A great deal of expert testimony in American courts is based solely on an expert's experience and training, what I call connoisseur testimony. The most significant feature of connoisseur testimony is that it has no *objective* basis, and, given selection bias (i.e., that parties only hire expert witnesses whom they know agree with their position in the case), the underlying reliability of connoisseur testimony in any given case is completely opaque. Unless a connoisseur expert is intentionally lying, cross-examination is unlikely to reveal any flaws in the expert's testimony.

Enforcement of Rule 702's reliability requirement for connoisseur testimony involves three steps. The first is to determine whether *anyone* can do what the expert purports to be able to do.[23] Second, just because the field of expertise is legitimate does not mean that the expert in question is competent. There are at least three ways a court can ensure that an expert can reliably do what she claims to be able to do.[24] First, the court can require the expert to prove her ability. Second, if a private company hires someone to perform the task at issue, that should create at least a presumption that the expert is competent. Finally, the expert can present the results of reliable proficiency tests she has completed.

The third and most problematic issue faced by courts charged with enforcing Rule 702 is the requirement that an expert relies on "sufficient facts or data" and "appl[ies] the principles and methods reliably to the facts of the case."[25] Given that connoisseur experts inherently rely on their training and experience, they are incapable of presenting any "facts or data" to the court or showing the court how they reliably applied any principle or method to the facts of the case. To illustrate, Professor David Crump suggests a hypothetical dialogue with a perfume-sniffing expert based on the Rule 702 standard:

> Q: Mr. Perfume Sniffer, the Supreme Court says that I must first ask you whether (1) your testimony identifying perfumes by the nasal method is based upon "sufficient facts or data."
>
> A: Well, I sniffed the perfume. Is that "sufficient facts or data?"
>
> Q: And (2) I have to ask you whether your testimony is the product of "reliable principles and methods."
>
> A: Look. I smelled Chanel No. 5. I know I smelled Chanel No. 5.
>
> Q: And did you "apply the principles and methods reliably to the facts of the case?"
>
> A: I used my nose. That's all I can do.[26]

As this example illustrates, contrary to the requirements of Rule 702, most connoisseurs cannot explain how their "experience is reliably applied to the facts" in any given case; instead, they implicitly need the presiding judge to simply take their word for it. Rule 702, however, forbids a judge to do so.

Not surprisingly, many courts have not fully assimilated Rule 702's requirements into their assessment of the admissibility of connoisseur testimony. The Rule requires an extremely dramatic shift from the previous practice of routinely allowing qualified connoisseurs to testify to essentially banning all testimony by adversarial connoisseur experts. Eventually, however, the text of the rule will prevail over courts' inertia, and courts will increasingly exclude connoisseur testimony.

Yet to the extent that connoisseurs can provide reliable, useful information to the jury, completely banning their testimony is almost as foolish as simply allowing a battle of the experts with no objective way for the trier of fact to determine who is correct. Rather, connoisseur testimony is a perfect arena for judges to use their power under Federal Rule of Evidence 706 (and state equivalents) to appoint nonpartisan experts. If five nonpartisan expert perfume-sniffers agree that the scent at issue is Chanel No. 5, that information would be extremely useful to the jury.

CONCLUSION

The "*Daubert* Revolution" has dramatically cut down on the use of junk science in federal court, especially in toxic torts and products liability cases. Unfortunately, however, the *Daubert* trilogy and Rule 702 are still the minority rule in the states, some federal judges ignore the reliability requirements *Daubert* imposes on them, *Daubert* has not done much to alleviate the problem of forensic science quackspertise, and *Daubert* is ill-suited to dealing with problems attendant to

"connoisseur experts." These problems demand resolution before one can conclude that the *Daubert* revolution is complete.

Endnotes

1 *See* David H. Kaye et al., The New Wigmore: Expert Evidence § 1.1, at 2 (2004) (describing the pre-*Daubert* rules for the admissibility of expert testimony).

2 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).

3 David E. Bernstein & Jeffrey D. Jackson, *The* Daubert *Trilogy in the States*, 44 Jurimetrics J. 351, 357–61 (2004).

4 *See* David E. Bernstein, *Learning the Wrong Lessons from an American Tragedy*, 104 *Mich. L. Rev*. 1961 (2006).

5 *See* David E. Bernstein, *The Breast Implant Fiasco*, 87 Calif. L. Rev. 457 (1999).

6 *See* David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 Pepp. L. Rev. 11 (2003); Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 Cardozo L. Rev. 513 (2007).

7 Conley Publ'g Group Ltd. v. Journal Communications Inc., 665 N.W.2d 879, 892 (Wis. 2003).

8 Kuhn v. Sandoz Pharms. Corp., 14 P.3d 1170 (Kan. 2000).

9 To take another example, A federal district court recently wrote, "Rule 702 of the Federal Rules of Evidence, as discussed and interpreted by the Supreme Court in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)." It would have been pretty difficult for the Supreme to have discussed and interpreted current Rule 702 in these cases, because they were all decided before current Rule 702 existed.

10 Liquid Dynamics Corp. v. Vaughan Co., Inc., 449 F.3d 1209 (Fed. Cir. 2006).

11 2006 WL 1028773, slip op. (E.D. Ark. Apr. 13, 2006).

12 Really, differential etiology.

13 *See generally* Craig M. Cooley, *Reforming the Forensic Science Community to Avert the Ultimate Injustice*, 15 Stan. L. & Pol'y Rev. 381 (2004); Paul C. Giannelli, *The Abuse of Scientific Evidence in Criminal Cases: The Need for Independent Crime Laboratories*, 4 Va. J. Soc. Pol'y & L. 439 (1997); Paul C. Giannelli, *Fabricated Reports*, 16 Crim. Just. 49 (2002); Randolph N. Jonakait, *Forensic Science: The Need for Regulation*, 4 Harv. J.L. & Tech. 109 (1991); Jennifer L. Mnookin, *Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability*, 87 Va. L. Rev. 1723, 1725 (2001); Barry C. Scheck, *New Hope for Forensic Science Quality*, Champion, March 2005, at 4.

14 Roger Koppl, *How to Improve Forensic Science*, 20 Eur. J.L. & Econ. 255 (2005).

15 *Id.*

16 *Id.* 260–62.

17 *Id.* at 266–71.

18 *Id.* at 257.

19 *Id.* at 257, 262–64.

20 Samuel R. Gross & Jennifer L. Mnookin, *Expert Information and Expert Evidence: A Preliminary Taxonomy*, 34 Seton Hall L. Rev. 141, 157 (2003)

21 Henry Lee, *Forensic Science and the Law*, 25 Conn. L. Rev. 1117, 1124 (1993).

22 Peter J. Neufield, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 Am. J. Pub. Health S107, S110 (2005).

23 *See* David L. Faigman, *Embracing the Darkness:* Logerquist v. McVey *and the Doctrine of Ignorance of Science Is an Excuse*, 33 Ariz. St. L.J. 87, 91 (2001).

24 *See* United States v. Santiago, 199 F. Supp. 2d 101, 112 (S.D.N.Y. 2002) (stating that before the court would admit evidence by a proffered expert about a match between a bullet and a gun, it needed to know how often the expert's "identifications have been wrong in the past").

25 Fed. R. Evid. 702.

26 David Crump, *The Trouble with Daubert-Kumho: Reconsidering the Supreme Court's Philosophy of Science*, 68 Mo. L. Rev. 1, 16 (2003).

Environmental Law & Property Rights

Testing *Rapanos*: *United States v. Robinson* and the Future of "Navigable Waters"

*By Thomas L. Casey III**

An apocryphal tale concerning Justice Story relates that "if a bucket of water were brought into his court with a corn cob floating in it, he would at once extend the admiralty jurisdiction of the United States over it."[1] Something similar certainly could be said of both the U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers ("Corps") in their efforts to administer and enforce the Clean Water Act (CWA). Since the advent of the modern CWA in 1972, the EPA and the Corps have expanded their jurisdiction under the Act over "navigable waters" to include nonnavigable streams and wetlands remote from any genuinely "navigable" waterways, as that concept was understood historically. The U.S. Supreme Court often acquiesced in this effort, affirming unanimously in *United States v. Riverside Bayview Homes* that the Corps could exercise its CWA jurisdiction over wetlands adjacent to other waters covered under the Act, including tributaries of traditionally navigable waterways.[2]

Beginning with the Court's decision in *Solid Waste Agency of Northern Cook County v. Corps of Engineers*,[3] however, and continuing most recently with the Court's 2006 decision in *United States v. Rapanos*,[4] the Supreme Court has started recognizing important limitations on the scope of the federal government's authority under the Clean Water Act. Unfortunately, the Court's fractured 4-1-4 *Rapanos* decision has left the lower courts, federal and state agencies, and the public uncertain as to the present extent of the Act's jurisdiction.

The official position of the EPA and the Corps is that their jurisdiction under the CWA covers all waters that would satisfy *either* the test set forth in Justice Scalia's *Rapanos* plurality opinion *or* Justice Kennedy's concurrence.[5] Nonetheless, the Seventh, Ninth, and Eleventh Circuits have identified Justice Kennedy's "narrow" test as providing the controlling standard.[6] Under Justice Kennedy's test, the CWA extends to all waters or wetlands that bear a "significant nexus" to traditionally navigable waterways.[7] In contrast, the plurality would extend the Act's jurisdiction only to "relatively permanent, standing or flowing bodies of water" and wetlands "with a continuous surface connection to bodies that are 'waters of the United States' in their own right."[8]

Some have noted, however, that Justice Kennedy's test could potentially exclude from coverage some waters and wetlands that would otherwise be covered by the plurality's test.[9] This quirk in the fractured *Rapanos* opinion arguably was dispositive in the Eleventh Circuit's recent decision in *United States v. Robinson*.[10] In that case, the court overturned the conviction of certain employees of McWane, Inc. in Birmingham, Alabama on the grounds that the government had failed to prove a "significant nexus" between the non-navigable Avondale Creek (into which McWane's employees had made unauthorized discharges) and the Black Warrior River (a traditionally navigable waterway miles downstream).[11] Arguably, Avondale Creek would have been covered under the *Rapanos* plurality's test due to the creek's permanent, flowing nature. The *Robinson* case is significant in that it recognizes limitations on the jurisdiction of both the Corps and the EPA under the CWA and provides a strong argument that the *Rapanos* opinion does create meaningful limitation on the federal government's authority under the Act, even when applying what might be considered Justice Kennedy's looser test.

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I. Regulation of "Navigable Waters" under the Clean Water Act from 1972 to Riverside Bayview Homes

In 1972, Congress undertook comprehensive reform of the nation's existing water pollution control laws.[12] The result was the overhaul of the existing Federal Water Pollution Control Act (FWPCA). Congress's 1972 amendments to the FWPCA, which became commonly known as the Clean Water Act after further amendments in 1977, restructured federal authority over water pollution control, consolidating most regulatory authority over discharges to the nation's waters with the EPA, but leaving the Corps with jurisdiction over dredge and fill activity.[13]

Section 301(a) of the CWA broadly prohibits "the discharge of any pollutant by any person" into "navigable waters" unless authorized under the Act.[14] Compliance with Section 301(a) is generally satisfied through one of two permitting programs. Section 402 of the Clean Water Act establishes the National Pollutant Discharge Elimination System (NPDES) program, which regulates the discharge of pollutants from a "point source" into "navigable waters."[15] Section 404 of the Act governs the discharge of "dredged or fill material" into "navigable waters."[16] Section 402 is administered by the EPA, while Section 404 is administered by the Corps.[17] To distinguish between the two programs in laymen's terms, Section 402 would cover discharges of wastewater from a pipe into a creek, stream, or river, for example, while Section 404 would cover the disposal of riverbed material dredged as part of river channel navigation maintenance activities or the placement of fill material in a creek, stream, or river as part of a pier construction project.

Sections 402 and 404, although administered by different agencies, share a common statutory definition of the term "navigable waters." "Navigable waters" is defined broadly by the CWA as "the waters of the United States."[18] The Act provides no further definition of "waters of the United States," although the meaning of the phrase is critical to the jurisdictional scope of the Act.

In 1974, the Corps adopted regulations defining the term "navigable waters" consistent with the Corps' definition of the same phrase as used under the much older 1899 Rivers and Harbors Act, which authorized the Corps to maintain the navigability of the nation's interstate waterways.[19] Specifically, the Corps defined "navigable waters," as used under the Clean Water Act, as "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce."[20] The Corps thus tied its definition to traditional concepts of navigability.

The Corps' 1974 definition of "navigable waters" was rejected in *Natural Resources Defense Council v. Callaway*, where the court held that the term "navigable waters" was "not limited to the traditional tests of navigability."[21] In response, in July of 1975, the Corps published "interim final regulations" selecting a broader approach to the regulation of tributaries under the Clean Water Act.[22] Under this rule, "navigable waters" were defined to include "[a]ll tributaries of navigable waters of the United States," interstate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce.[23]

What proved to be the most controversial aspect of the Corps' 1975 regulations was the Corps' revision of its definition of "navigable waters" to include all "freshwater wetlands" adjacent to other covered waters.[24] The term "wetlands" was itself subsequently defined broadly to include "those areas that are inundated or saturated by surface or ground water at a frequency and duration to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions"—i.e., swamps, marshes, and bogs.[25] The inclusion of all freshwater wetlands adjacent to other covered waters meant that inland development of marshland—perhaps miles from any traditionally navigable waterway—became subject to the often costly and onerous regulatory burdens of the Corps' Section 404 permitting program.

In *Riverside Bayview Homes*, the Supreme Court unanimously upheld the Corps' inclusion of "adjacent wetlands" in its definition of "navigable waters."[26] Relying largely on legislative history, the Court concluded that the term "navigable," as used in the Act, was of "limited import."[27] In adopting a broad definition of "navigable waters" as "waters of the United Stated," the Court reasoned, "Congress intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate at least some waters that would not be deemed 'navigable' under the classical understanding of that term."[28]

II. Limiting the Scope of "Navigable Waters" from *SWANCC* to *Rapanos*

In 1986, the Corps attempted to further expand its regulatory authority under the Clean Water Act by adopting what became known as the Migratory Bird Rule.[29] Under this rule, the Corps extended the jurisdictional scope of its Section 404 permitting authority to, *inter alia*, intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties."[30] The Corps thus intended to extend its permitting authority under the Clean Water Act to wholly isolated water bodies completely disassociated from waters that were navigable-in-fact. Under the Migratory bird rule, for example, discharge of dredge or fill material to a farmer's cattle pond could be regulated as "waters under the United States" pursuant to the Clean Water Act so long as the pond could be used as habitat for migratory birds.

SWANCC

In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("SWANCC"),[31] in a 5-4 opinion, the Supreme Court struck down the Migratory Bird Rule. In the *SWANCC* case, the Corps had extended its Clean Water Act jurisdiction over an abandoned sand and gravel pit that provided habitat for migratory birds pursuant to the Migratory Bird Rule.[32] In its opinion, the Court provided a significant corrective to its earlier *Riverside* opinion. The Court distinguished *Riverside* as a case involving wetlands that bore a "significant nexus" to traditionally navigable waters.[33] The Court, moreover, explicitly recognized that traditional concepts of navigability still had some relevance under the Clean Water Act—contra *Riverside*—even though Congress may have intended the Clean Water Act to reach some waters "that would not be deemed 'navigable' under the classical understanding of the term."[34]

United States v. Rapanos and Carabell v. United States

While the *SWANCC* decision made it clear that the Corps could not regulate wholly isolated waters as "navigable water" under the Clean Water Act, many issues concerning the scope of the Corps' jurisdiction remained. Among other things, the Corps' regulations did not provide a clear explanation of the "adjacency" concept. It also remained unclear what sort of channels qualified as "tributaries" under the Act. Do occasional swales, ditches or gullies, inundated only during heavy rainfall, constitute the sort of "tributaries" within the Corps' regulatory jurisdiction under the Clean Water Act? These issues eventually came to a head in the Supreme Court's recent opinion in *United States v. Rapanos*.

The *Rapanos* opinion involved two consolidated cases concerning the Corps' jurisdiction over wetlands under Section 404 of the Clean Water Act: *Rapanos v. United States*, (Petition 04-1034) and *Carabell v. United States Army Corps of Engineers*, (Petition 04-1384).[35] Petitioners in No. 04-1034, the Rapanoses and their affiliated businesses, deposited fill material without a Section 404 permit into wetlands on three separate sites near Midland, Michigan, which each had only a remote connection to traditionally navigable waterways.[36] The United States brought civil enforcement proceedings against the Rapanos petitioners, and the District Court found that the three described wetlands were "within federal jurisdiction" because they were each "adjacent to other waters of the United States."[37] On appeal, the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because "there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters."[38]

Petitioners in No. 04-1384, the Carabells, were denied a Section 404 permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St.

Clair.[39] A man-made drainage ditch ran along one side of the wetland, separated from it by a four-foot-wide man-made berm.[40] The berm was largely or entirely impermeable to water and blocks drainage from the wetland, though it may have permitted occasional overflow to the ditch.[41] The ditch emptied into another ditch, which connected to Auvase Creek, which in turn emptied into Lake St. Clair.[42] After exhausting their administrative appeals, the Carabell petitioners filed suit in the U.S. District Court, challenging the exercise of federal regulatory jurisdiction over the site at issue.[43] The District Court ruled that there was federal jurisdiction over the site because the wetland was "adjacent to neighboring tributaries of navigable waters and ha[d] a significant nexus to 'waters of the United States.'"[44] Again, the Sixth Circuit affirmed, holding that the Carabell wetland was "adjacent" to navigable waters and covered under the Act.[45]

In a plurality opinion joined by Chief Justice Roberts, Justice Alito, and Justice Thomas, Justice Scalia recommended vacatur of the judgments of the Sixth Circuit in both Petition 04-1034 and Petition 04-1384, concluding that the Sixth Circuit had applied the wrong standard to determine if the wetlands in both cases are jurisdictionally-covered "navigable waters."[46] Due to the paucity of the record in both of these cases, the plurality concluded that on remand the lower courts should determine "whether the ditches or drains near each wetland are 'waters' in the ordinary sense of containing a relatively permanent flow," and if so, "whether the wetlands in question are 'adjacent' to these 'waters' in the sense of possessing a continuous surface connection that creates [a] boundary-drawing problem."[47] Justice Scalia reasoned that the term "navigable waters," defined as "the waters of the United States," could only refer to "relatively permanent, standing or flowing bodies of water," such as streams, oceans, rivers, lakes, and other bodies of water "forming geographical features."[48] Additionally, Justice Scalia concluded that only those wetlands "with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[49]

In a separate concurrence (joined by no other Justice), Justice Kennedy agreed that remand was appropriate in both cases, but disagreed with the two central conclusions of Justice Scalia's plurality opinion.[50] Unlike Justice Scalia, Justice Kennedy believed that intermittent, seasonal channels and swales could be included within the Act's definition of "navigable waters."[51] Justice Kennedy pointed out that many rivers in the western United States, like the Los Angeles River, ordinarily carry only a trickle of water, and often are completely dry for long periods of the year.[52] At other times, however, these rivers can carry tremendous, and often destructive, volumes of water, requiring concrete and steel channel regularization.[53] However, under the plurality's opinion, "The merest trickle, if continuous, would count as a 'water' subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not."[54] Justice Kennedy also disagreed with the plurality's exclusion of wetlands lacking a continuous surface water connection to other jurisdictional waters.[55] In Justice Kennedy's opinion, the relevant connection between the jurisdictional water and the wetland sufficient for jurisdiction can permissibly be based on a broader set of considerations, including subsurface connections and ecological factors.[56]

Despite his differences with the plurality opinion, Justice Kennedy agreed that the judgments of the Sixth Circuit in the consolidated cases before the Court should be vacated and remanded.[57] Focusing on language in the Court's *SWANCC* opinion, Justice Kennedy concluded that the lower courts, on remand, should consider "whether the specific wetlands at issue possess a significant nexus with navigable waters."[58] In his opinion,

> [W]etlands possess the requisite nexus, and thus come within the statutory phrase "navigable waters," if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as "navigable." When, in contrast, wetlands' effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term "navigable waters."[59]

Importantly, this test takes into consideration the relationship between the relevant adjacent tributary and traditional navigable water.[60] "When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries."[61]

III. The Circuits Respond to *Rapanos*

The fractured *Rapanos* decision has led to significant confusion among the courts, relevant federal and state agencies, and the regulated community concerning the current scope of the Clean Water Act. Federal Agencies and the courts have taken divergent views on the meaning of the *Rapanos* decision, and have struggled to articulate the new governing standard. At least five federal circuits have now weighed in on the meaning of the *Rapanos* decision—the Ninth,[62] Seventh,[63] First,[64] Fifth,[65] and Eleventh Circuits.[66]

In a short per curiam opinion in *United States v. Gerke Excavating, Inc.*,[67] a panel of the Seventh Circuit—including Judges Posner and Easterbrook—determined that Justice Kennedy's concurrence provided the controlling jurisdictional test under Section 404 of the Clean Water Act. The Court reasoned that the Kennedy concurrence was the narrower of the two majority opinions, and should control under the test set forth in *Marks v. United States*.[68] That case provides that when a majority of the Supreme Court agrees only on the outcome of a case and not on the ground for that outcome, lower-court judges are to follow the narrowest ground to which a majority of the Justices would have assented if forced to choose.[69] The Seventh Circuit recognized, however, that in some cases Justice Kennedy's test might prohibit federal jurisdiction otherwise permitted by the plurality, i.e., in those cases where there is only a slight surface water connection between wetlands and a nonnavigable tributary.[70]

The Ninth Circuit followed the Seventh Circuit's lead in *Northern California River v. City of Healdsburg*,[71] adopting Kennedy's concurrence as the jurisdictional test under Section

402 of the Act. The First Circuit rejected the Seventh Circuit's rationale, holding in *United States v. Johnson*[72] that federal jurisdiction existed under Section 404 whenever the test set forth in the plurality opinion *or* Justice Kennedy's opinion is met—the same approach recommended by EPA and the Corps in their June 5, 2007 Joint Guidance.[73] The Fifth Circuit, in *United States v. Lucas*, having determined that the facts under review satisfied both tests, refrained from determining whether Justice Kennedy's concurrence provided the exclusive test for determining jurisdictional questions under the Clean Water Act. [74]

IV. *United States v. Robinson*

The Eleventh Circuit, in *United States v. Robinson*, adopted the same approach recommended by the Seventh and Ninth Circuits, namely that Justice Kennedy's *Rapanos* concurrence provides the exclusive test for determining the scope of federal jurisdiction under the Clean Water Act.[75] The *Robinson* case, however, is unique because it involves a set of circumstances in which Justice Kennedy's concurrence—the "narrower" of the two opinions—prohibits an exercise of federal jurisdiction that would likely have been permissible under Justice Scalia's plurality opinion.

In *Robinson*, the Eleventh Circuit reversed the convictions of four employees of McWane, Inc., for criminal violations of the Clean Water Act.[76] Among other things, the defendants had been charged with knowingly discharging pollutants into the waters of the United States in violation of McWane's Section 402 permit.[77] The specific violations at issue involved discharge of pollutants into Avondale Creek, which is adjacent to McWane's plant.[78] Avondale Creek flows into another creek called Village Creek.[79] In turn, Village Creek flows approximately twenty-eight miles into and through Bayview Lake, which was created by damming Village Creek.[80] On the other side of Bayview Lake, Village Creek becomes Locust Fork, and Locust Fork flows approximately twenty miles out of Bayview Lake before it flows into the Black Warrior River.[81]

At trial, the government presented testimony from an EPA investigator (Fritz Wagoner) that Avondale Creek is a perennial stream with a "continuous uninterrupted flow" into Village Creek.[82] Wagoner testified that there is a "continuous uninterrupted flow" not only from Avondale Creek into Village Creek, but also from Village Creek through Bayview Lake and into Locust Fork, and ultimately into the Black Warrior River.[83] Wagoner admitted that he had not conducted a tracer test to check the flow of Avondale Creek into the Black Warrior River, nor did Wagoner conduct tests to measure the volume of water discharged from Avondale Creek or between the bodies of water that connect Avondale Creek and the Black Warrior River.[84] The district court itself observed that there was no evidence of any actual harm or injury to the Black Warrior River.[85]

At trial, the parties agreed that the proper definition of "navigable waters" under the Clean Water Act was a key element of the government's case.[86] The district court charged the jury that "navigable waters" include "any stream which may eventually flow into a navigable stream or river," and that such stream may be man-made and flow "only intermittently."[87] The sufficiency of the trial court's charge—as well as the case presented by the government—turned on whether the government's evidence of a continuous flow between Avondale Creek (a relatively permanent, fixed body of water) and the Black Warrior River (a navigable-in-fact water) was sufficient to establish Clean Water Act jurisdiction over the defendant's discharge into Avondale Creek.[88]

On appeal, the parties disagreed as to the proper interpretation of the Supreme Court's *Rapanos* opinion, which had been handed down after the trial court conviction. The defendants argued that the *Rapanos* decision undermined the sufficiency of the district court's jury instruction and the government's case-in-chief.[89] For its part, the government contended that even if the jury charge was inconsistent with *Rapanos*, any error was harmless and did not warrant reversal.[90]

The Eleventh Circuit reviewed the *Rapanos* case, describing the plurality opinion and Justice Kennedy's concurrence consistently with the description of each provided above. The relevant question for the court was determining the controlling rule in light of the fractured opinion.[91] In light of the *Marks* standard, the Eleventh Circuit determined that it must choose between the plurality's test and Justice Kennedy's concurrence as the governing standard, rejecting the government's argument that Clean Water Act jurisdiction existed where either test was satisfied.[92] The court ultimately concluded that Justice Kennedy's test was the narrower of the two and should control, despite the fact that Justice Kennedy's test might prohibit Clean Water Act jurisdiction in some cases that would otherwise qualify under the plurality's test.[93] Consequently, a "water can be considered 'navigable' under the CWA only if it possesses a 'significant nexus' to waters that 'are or were navigable in fact or that could reasonably be so made.' Moreover, a 'mere hydrologic connection' will not necessarily be enough to satisfy the 'significant nexus' test."[94]

Based on Justice Kennedy's "significant nexus" test, the Eleventh Circuit concluded that the government had failed to meet its burden.[95] Although the government's witness testified that there is a continuous uninterrupted flow between Avondale Creek and the Black Warrior River, he did not testify as to any "significant nexus" between Avondale Creek and the Black Warrior River.[96] The government did not present any evidence, through Wagoner or otherwise, concerning the possible chemical, physical or biological effect that Avondale Creek may have on the Black Warrior River, and there was also no evidence presented of any actual harm suffered by the Black Warrior River.[97] Thus, the trial court's jury instruction was not "harmless," and the defendants' convictions were due to be vacated and remanded to the trial court for a new trial.[98] The court did not express any opinion as to whether Avondale Creek does or does not actually satisfy Justice Kennedy's test, but only that the government had not presented sufficient evidence to establish the "significant nexus" between Avondale Creek and the Black Warrior River.[99]

On June 13, 2008, the United States filed a petition for writ of certiorari with the U.S. Supreme Court, asking the Court to reverse the Eleventh Circuit's decision.[100] On December 1, 2008, the Supreme Court denied the government's petition.

V. The Future of "Navigable Waters"

On its face, the *Robinson* case limits the scope of the Act to wetlands and non-navigable tributaries that can be shown to have a hydrologically significant connection to traditionally navigable waterways. The same should be true in other circuits—such as the Seventh and Ninth Circuit[101]—that have adopted Justice Kennedy's concurring opinion in *Rapanos* as providing the exclusive controlling test for Clean Water Act jurisdiction. Importantly, this test, as illustrated in the *Robinson* case, could exempt from federal regulation wetlands and non-navigable waterways that might otherwise have been covered by Justice Scalia's plurality opinion.

However, it remains to be seen how far the Corps and EPA can expand the scope of "navigable waters" post-*Rapanos* through agency rulemaking. Justice Kennedy suggests that a case-by-case application of his test is only appropriate in the absence of "more specific regulations."[102] This was not lost on the *Rapanos* plurality, which noted that Justice Kennedy's concurring opinion "tips a wink at the agency, inviting it to try its same expansive reading again."[103]

The fracturing of the circuit courts over *Rapanos*'s meaning may also invite the Supreme Court to once again attempt to resolve the issue. And, the Supreme Court's perennial role in expanding or narrowing the scope of the Act again illustrates the continuing importance of appointments to the U.S. Supreme Court. Justices appointed during the Obama administration are, more likely than not, going to take a broader reading of the scope of the Clean Water Act's jurisdiction. However, unless and until one of the five justices in the *Rapanos* majority retire—Chief Justice Roberts, Justices Scalia, Alito, Thomas and Kennedy—the Court will most likely continue to recognize some limitations on the scope of the Clean Water Act.

Legislation seeking to undermine the import of the *Rapanos* decision is also on the horizon. A bill introduced by Congressman Oberstar in May of 2007, H.R. 2421, proposed adoption of the "Clean Water Restoration Act," which would expand the definition of "waters of the United States" to include:

> [A]ll waters subject to the ebb and flow of the tide, the territorial seas, and all interstate and intrastate waters and their tributaries, including lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, natural ponds, and all impoundments of the foregoing, to the fullest extent that these waters, or activities affecting these waters, are subject to the legislative power of Congress under the Constitution.[104]

If reintroduced in the future and enacted into law, the Oberstar bill would push the scope of the Clean Water Act's jurisdiction to the full extent of Congress's Commerce Clause power. In doing so, the bill would undermine much of *Rapanos*'s import, and would force the Supreme Court, ultimately, to determine the extent of the federal government's authority to regulate the nation's waters under Article I, Section 8 of the U.S. Constitution, an issue the Court has avoided to this point. The Supreme Court did note in *SWANCC* that an overly broad exercise of federal authority over isolated waters would raise "significant constitutional questions."[105] If Congress enacts the Clean Water Restoration Act, the Court eventually may be presented with an opportunity to address those significant questions.

Undoubtedly, the *Rapanos* decision has created a significant amount of confusion and uncertainty among the lower courts as to the current jurisdictional scope of the Clean Water Act. The only thing certain at this point, however, is that we have not yet heard the last word on the scope of the Act's jurisdiction. It remains to be seen whether the other circuits adopting Justice Kennedy's "significant nexus" test will apply it as earnestly as the Eleventh Circuit. And, even were this to occur, regulatory and legislative efforts may ultimately scale back *Rapanos*'s significance.

Endnotes

1 Note, 37 Am. L. Rev. 911, 916 (1903).

2 474 U.S. 121 (1985).

3 531 U.S. 159 (2001).

4 547 U.S. 715 (2006).

5 *See* U.S. Environmental Protection Agency & U.S. Army Corps of Engineers, Memorandum, *Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in* Rapanos v. United States & Carabell v. United States (June 5, 2007), *available at* http://www.epa.gov/owow/wetlands/pdf/RapanosGuidance6507.pdf.

6 *See* Northern California River v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007); Robinson v. United States, 505 F.3d 1208 (11th Cir. 2007); United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006).

7 *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

8 *Id*. at 732, 742.

9 *See, e.g.*, *Gerke Excavating*, 464 F.3d at 725.

10 505 F.3d 1208 (11th Cir. 2007).

11 *Id*. at 1222.

12 *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 898 (Oct. 18, 1972).

13 *See generally*, U.S. Environmental Protection Agency, The Challenge of the Environment: A Primer on EPA's Statutory Authority (Dec. 1972) (discussing legislative history and purpose of the 1972 Federal Water Pollution Control Act Amendments).

14 33 U.S.C. § 1311(a).

15 *Id*. § 1342.

16 *Id*. § 1344(a).

17 *See id*. §§ 1342(a), 1344(a).

18 *Id*. § 1362(7).

19 39 Fed. Reg. 12,115 (1974).

20 *Id*. at 12,119.

21 392 F. Supp. 685, 686 (D.D.C. 1975).

22 40 Fed. Reg. 31,320 (1975).

23 *Id*. at 31,320-21.

24 *Id*. at 31,321.

25 33 C.F.R. 323.2(c) (1978).

26 474 U.S. 121 (1985).

27 *Id*. at 133.

28 *Id*.

29 51 Fed. Reg. 41,206 (1986).

30 *Id*. at 41,217.

31 531 U.S. 159 (2001).

32 *Id*. at 162.

33 *Id*. at 167.

34 *Id*. at 159.

35 *See Rapanos*, 547 U.S. at 729-30.

36 *Id*.

37 *Id*.

38 *Id*. at 729-30.

39 *Id*. at 730.

40 *Id*.

41 *Id*.

42 *Id*.

43 *Id*.

44 *Id*.

45 *Id*.

46 *Id*. at 757.

47 *Id*.

48 *Id*. at 732-33.

49 *Id*. at 742.

50 *See id*. at 759 (Kennedy, J., concurring).

51 *See id*. at 769.

52 *Id*.

53 *Id*.

54 *Id*.

55 *Id*. at 772.

56 *Id*. at 772-73.

57 *Id*. at 787.

58 *Id*.

59 *Id*. at 780.

60 *Id*. at 781.

61 *Id*. at 782.

62 Northern California River v. City of Healdsburg, 496 F.3d 993 (9th Cir. 2007).

63 United States v. Gerke Excavating, Inc., 464 F.3d 723 (7th Cir. 2006).

64 United States v. Johnson, 467 F.3d 56 (1st Cir. 2006).

65 United States v. Lucas, 516 F.3d 316 (5th Cir. 2008).

66 United States v. Robinson, 505 F.3d 1208 (11th Cir. 2007).

67 464 F.3d 723 (7th Cir. 2006).

68 *Id*. at 724 (citing Marks v. United States, 430 U.S. 188, 193 (1977)).

69 Marks v. United States, 430 U.S. 188, 193 (1977).

70 *Gerke Excavating*, 464 F.3d at 725.

71 496 F.3d 993 (9th Cir. 2007).

72 467 F.3d 56 (1st Cir. 2006).

73 *See* Joint Guidance, *supra*, note 5.

74 516 F.3d 316 (5th Cir. 2008).

75 505 F.3d 1208 (11th Cir. 2007).

76 *Id*. at 1229.

77 *Id*. at 1213.

78 *Id*. at 1211.

79 *Id*.

80 *Id*.

81 *Id*.

82 *Id*.

83 *Id*. at 1211-12.

84 *Id*.

85 *Id*. at 1212.

86 *Id*. at 1215.

87 *Id*.

88 *See id*. 1222-24.

89 *Id*. at 1215.

90 *Id*. at 1216.

91 *Id*. at 1219.

92 *See id*. at 1221.

93 *Id*. at 1222.

94 *Id*. (citations omitted).

95 *Id*. at 1223.

96 *Id*.

97 *Id*.

98 *Id*. at 1224.

99 *See id*. at 1224 n.21.

100 United States v. McWane, Inc., Petition No. 08-223 (June 13, 2008).

101 *See Northern California River*, 496 F.3d 993; *Gerke Excavating*, 464 F.3d 723.

102 *Rapanos*, 547 U.S. at 718 (Kennedy, J., concurring).

103 *Id*. at 756 n.15.

104 *Available at* http://thomas.loc.gov/home/gpoxmlc110/h2421_ih.xml.

105 *See SWANCC*, 531 U.S. at 683-84.

Navigating EPA's Vessel Discharge Program

*By Jeffrey H. Wood & Brent A. Fewell**

Two-thousand-and-eight was, relatively speaking, not a blockbuster year for any major federal environmental initiatives. The Supreme Court issued a ruling in just one significant environmental case[1] and efforts to enact legislation on key environmental priorities failed. Indeed, the U.S. Environmental Protection Agency (EPA), while busy, promulgated just a few regulations which caught national attention.

This is not to say, however, that the reach of federal environmental law went unchanged. As sure as the Mississippi River flows south, every year seems to bring an expansion of federal environmental regulation to previously excluded, exempted, or otherwise overlooked activities or industries. 2008 was no exception, as large commercial vessels—already heavily regulated in their own right—became subject to an extensive EPA water discharge permitting scheme. This happened soon after the U.S. Court of Appeals for the Ninth Circuit affirmed the vacatur of a longstanding exemption for discharges incidental to the normal operation of a vessel from EPA's National Pollutant Discharge Elimination System (NPDES)—the federal permitting program created by the Clean Water Act of 1972 (CWA).

The nation's commercial and recreational vessel fleet, while subject to a wide range of other federal regulations, had operated free from NPDES requirements for over 30 years. As a result of the Ninth Circuit's ruling, literally millions of commercial and recreational vessels would have been required to obtain coverage under an NPDES permit by September 30, 2008. In fact, absent last minute action by Congress, over 18 million recreational boats and small fishing vessels would have been required to obtain permit coverage.

Still, since Congress chose not to provide relief to the commercial boating industry, over 60,000 commercial vessels including cruise ships, towboats, barges, and other vessels are now subject to a comprehensive NPDES permit program, which includes many burdensome requirements, but without providing much environmental benefit. To be fair, it was not EPA's idea (or desire) to bring vessels within the purview of the NPDES permit program, as it was clear to the agency for over 30 years that the NPDES program was neither intended to regulate vessel discharges nor particularly well-designed to do so. Nonetheless, due to the diligent efforts of some in the environmental community, the realm of federal NPDES regulation expanded in 2008 to encompass the commercial waterway transportation industry.

This article discusses the vessel discharge exclusion adopted by EPA in 1973 and the recent vacatur of that de minimis exclusion by a federal district court in California, a decision which the Ninth Circuit affirmed. After discussing legislative efforts to deal with this issue, this article describes EPA's new Vessel General Permit for large commercial vessels. The article concludes by discussing the need for additional congressional action to exempt all vessel discharges from the NPDES program in favor of a separate set of nationwide standards crafted specifically for these kinds of sources.

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The 1973 Vessel Discharge Exclusion

Environmental enactments of the 1970s were, for the most part, broad in scope and application. Perhaps the most sweeping environmental legislation of the 1970s were the 1972 amendments to the Clean Water Act, wherein Congress aimed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and to eliminate all pollutant discharges by 1985.[2] To do so, Congress established a federal NPDES permitting program, which was designed to minimize or reduce the effects of billions of gallons of untreated sewage and industrial wastewaters that were severely impacting the quality of America's waters.[3]

Under the CWA, no person can discharge any pollutant from any point source into the navigable waters of the United States unless authorized to do so by an NPDES permit.[4] Congress defined the key jurisdictional terms broadly. "Navigable waters," for example, was defined as "waters of the United States, including the territorial seas."[5] (For an interesting discussion of the significant federalism questions raised by this jurisdictional term, please see Thomas Casey's article in this edition of *Engage*.) "Pollutant" was defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water."[6] "Point source" was defined as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."[7] And "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source..."[8]

Although Congress granted the EPA administrator a certain level of discretion in giving functional meaning to these terms, Congress's choice of definitions left little room for exclusions. Where it did intend for exclusions to exist, Congress usually spoke directly. For example, Congress excluded from NPDES coverage "sewage from vessels" and any "discharge incidental to the normal operation of a vessel of the Armed Forces."[9]

This left a variety of de minimis discharges potentially subject to NPDES permitting which, absent some reasonable regulatory exclusion, would have resulted in an overload of the permitting system. For that reason, when EPA originally promulgated its NPDES permitting regulations in 1973, it presumed a certain level of regulatory discretion to exclude de minimis discharges and adopted 40 C.F.R. § 122.3, which stated:

The following discharges do not require NPDES permits:

(a) Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or *any other discharge incidental to the normal operation of a vessel*. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard; nor to other discharges when the vessel is operating in a capacity other than as a means of transportation such as when used as an energy or mining facility, a storage facility or a seafood processing facility, or when secured to a storage facility or a seafood processing facility, or when secured to the bed of the ocean, contiguous zone or waters of the United States for the purpose of mineral or oil exploration or development.[10]

EPA's regulation exempting vessel discharges, which went essentially unquestioned for 30 years, was based on a relatively simple proposition. EPA explained in 1973: "Most discharges from vessels to inland waters are now clearly excluded from the [NPDES] permit requirements. *This type of discharge generally causes little pollution and exclusion of vessel wastes from the permit requirements will reduce administrative costs drastically*."[11] And when an unwieldy, administrative permitting requirement vastly outweighs the environmental benefits, courts historically have not been unsympathetic to both the agency and the regulated community.[12]

However, an agency's authority to adopt regulatory exclusions is substantially curtailed, if not completely extinguished, when Congress has spoken clearly that the particular regulatory program should be broadly applied. So, it should have come as little surprise that, when presented with an ultra vires challenge to the vessel discharge exclusion, a federal district court in California and, on appeal, the Ninth Circuit would opt for vacatur of the exclusion, particularly in light of perceived environmental problems associated with ballast water and other vessel discharges. Prior to this litigation, a number of courts had commented on agency discretion to adopt de minimis exclusions from broad statutory programs.[13] It was this debate that was front-and-center in the legal battle over the validity of the vessel discharge exclusion.

Vacatur of the Vessel Discharge Exclusion

Ballast water was the real focus of environmental concerns about vessel discharges. The last decade has witnessed an increase in the spread of certain non-indigenous invasive aquatic species, such as the Eurasian water milfoil and zebra mussel, which have infested the Great Lakes and elsewhere. Many such species are picked up in ballast drawn from foreign waters and, like aquatic hitch-hikers, are relocated and deposited in other waters when ballast is discharged and exchanged. These species in some cases have out-competed and adversely impacted other native aquatic populations.

Prompted mainly out of concern over the spread of these invasive species, environmental groups petitioned the EPA in 1999 to repeal the vessel discharge exclusion and to regulate ballast water under the NPDES permit program. EPA had long been sympathetic to this concern, but the agency believed that the CWA was a poor vehicle for regulating ballast water and instead pointed to other statutory authorities, such as the Non-Indigenous Aquatic Nuisance Prevention and Control Act of 1990, which required the Coast Guard to develop ballast water regulations. After EPA denied the petition in 2003, environmental groups filed suit.

In defending the vessel discharge exclusion, EPA advanced a number of arguments, including the fact that Congress had acquiesced to the exclusion more than 30 years prior and had never sought to overturn the exclusion. The district court, however, rejected this argument on the basis that the exclusion was clearly in conflict with Congress' "clear intent" that no pollutant could be discharged without a NPDES permit.[14] Accordingly, the district court concluded that the exclusion exceeded EPA's authority under the CWA and ordered its vacatur.[15] Looking to the text of the statute, the court noted that the CWA prohibits the "discharge of any pollutant" except as authorized by an NPDES permit.[16] The court, pointing to this as the clear intent of Congress, declined to extend any deference to the agency's de minimis concept, even if it was reasonable.[17] The Ninth Circuit affirmed in July of 2008, agreeing with all essential aspects of the lower court's ruling.[18]

The district court ultimately ordered that EPA's vessel discharge exclusion would be vacated as of September 31, 2008, a deadline which was subsequently extended to December 19, 2008, and then again to February 6, 2009. In place of the vessel discharge exclusion, EPA was compelled to adopt and implement an NPDES permit for vessel discharges. Otherwise, all vessels operating in the nation's waters would, upon vacatur of the exclusion, be deemed in violation of the Clean Water Act, creating a very real threat of substantial civil and criminal penalties, or citizen suits, even for doing little more than allowing rainwater to flow off the deck of a boat. Accordingly, time was of the essence—to either convince Congress to codify a vessel discharge exclusion or put a permit in place authorizing those discharges to continue.

From the perspective of a Federalist, the district court's decision, which was upheld by the Ninth Circuit, is a mixed bag. On the one hand, the court construed and applied the statute in a manner which was faithful to the language used by Congress. The CWA is, after all, a broad statute with very few exemptions, making it difficult to criticize a court for rendering a decision much like any other strict constructionist would have done.[19] However, the district court failed to properly take into account the significant burdens on EPA and the regulated community which would result from a speedy vacatur of the vessel discharge exclusion. In that regard, the court exercised a level of discretion which, while perhaps not abusive, was not necessarily in keeping with concepts of good governance.

Congressional Response

Since the district court ruled, Congress has debated the passage of legislation to resolve this matter, including the applicable technology and standards that should apply. Despite efforts to pass the Ballast Water Management Act, a comprehensive bill sponsored by Senator Inouye (D-HI) that would have required national uniform ballast water treatment standards and exempted industry from NPDES permitting, very little progress on federal legislation has been made.

Industry has long argued that an exemption from NPDES permitting for its vessel discharges—even just a temporary exemption—was necessary and reasonable in light of the other federal priorities which the industry is currently implementing.[20] Industry also argued as a general matter that EPA was not equipped to deal with a vessel discharge program, since EPA had no real experience with the industry and no vessels of its own to monitor compliance and enforce such a program. Moreover, the regulation of aquatic species as a "pollutant" under the Clean Water Act is legally suspect.[21] Therefore, industry supported a standards-based program implemented by the Coast Guard, outside of the Clean Water Act permitting program. Disagreements between industry and environmental groups on how such a program should be implemented delayed progress in bringing about a comprehensive legislative solution.

A number of states, such as Michigan, Washington and Oregon, concerned about the impact of invasive aquatic species on their state waters, grew weary waiting for a federal legislative solution to the problem and began adopting state laws subjecting vessels to state permits and effluent limits. Industry, which was highly concerned about an unwieldy patchwork of state laws, supported the notion of federal preemption of state laws that, absent preemption, would make compliance by vessels engaged in interstate movement virtually impossible. However, Senator Boxer (D-CA)—backed by a number of environmental groups—opposed any relief that would preempt more stringent state requirements.

Finally, in late 2008, Congress passed two pieces of legislation that provide temporary relief for most recreational and fishing vessels. The first, the Clean Boating Act of 2008, Pub. L. 110-188, provides a temporary two-year exemption from NPDES permitting for recreational vessels and small fishing boats, in order to allow time to study whether it is necessary to require NPDES permits for those vessels. In that regard, the voices of millions of recreational boat owners (which translates to millions of voters) were heard. The other bill, Pub. L. 110-299, provides a two-year moratorium on the requirement that all vessels smaller than 79 feet in length obtain coverage under the NPDES permit program. Notwithstanding significant lobbying efforts by the commercial towing and cruise ship industries, large non-recreational vessels (including cruise ships, towboats, and barges) were not granted relief by Congress in 2008.

EPA's Vessel Discharge Permit Program

In June 2007, EPA published a notice of intent to begin the process of creating a vessel discharge permit program.[22] One year later, in June 2008, EPA published its "Draft National Pollutant Discharge Elimination System General Permit for Discharges Incidental to the Normal Operation of a Vessel."[23] A public notice and comment period ensued, and on December 18, 2008, a day before the NPDES vessel discharge exemption was to be vacated, EPA posted on its website a 163-page final Vessel General Permit ("VGP").[24] A note on the website explained that the permit would be effective the next day. Industry scrambled for another last minute extension from the courts. Fortunately, within a matter of hours, the federal district court with jurisdiction over the issue extended by 48 days its vacatur deadline, effectively pushing the compliance date for the VGP to February 6, 2009. In the interim, a notice regarding the availability of the final VGP was published in the Federal Register on December 28, 2008.[25]

The final VGP is applicable to most large non-recreational vessels, including commercial towboats, barges, cruise ships, ferries, oil tankers, research vessels, and fire/police boats.[26] The permit authorizes "discharges incidental to the normal operation of a vessel,"[27] a term which EPA defined with reference to a list of virtually all conceivable kinds of vessel discharge streams—26 in total, ranging from deck runoff, bilge water and ballast water to chain locker effluent, firemain system water and graywater.[28] For each of the 26 discharges, EPA has created a set of best management standards and requirements designed to minimize any potentially adverse environmental impacts. EPA also included within the VGP additional requirements specifically applicable to the various kinds of covered vessels.[29] Authorization to operate under the permit is available immediately to all covered vessels. By September 19, 2009, all larger commercial vessels must have filed a "notice of intent" with EPA to be covered by the VGP.[30]

The VGP is, like the district court's decision before it, a mixed bag from industry's point of view. On one hand, the regulated community has reasons to appreciate EPA's efforts. First, EPA deserves credit for crafting the VGP under the significant time constraints imposed by the courts. Certainly, from the regulated community's perspective, the draconian enforcement provisions in the CWA made operating without an NPDES permit in place untenable, as doing little more than washing a vessel could have resulted in civil or even criminal penalties, and citizen suits.

Moreover, EPA deserves credit for working hard to try to ensure that, while compliant with the requirements of the CWA, the permit is not unnecessarily burdensome. Whether EPA succeeded in that regard is subject to debate, but EPA did at least wisely opt for a general, as opposed to an individual, permitting regime where one standardized permit is applied across an industry instead of requiring each individual owner or operator of a commercial vessel to seek permit coverage separately. As the Ninth Circuit had noted, "[o]btaining a permit under the CWA need not be an onerous process."[31]

EPA is not, however, free from all criticism. Some within industry were disappointed by EPA's decision to apply the Ninth Circuit's precedent nationwide when, at least arguably, doing so was not mandatory. For example, in 1998, after the Fourth Circuit vacated a wetlands regulation found at 33 C.F.R. Section 328.3(a)(3), the Clinton Administration's EPA and the U.S. Army Corps of Engineers issued guidance explaining that it would not consider the rule vacated nationwide, choosing instead to simply deem the rule vacated "within the states constituting the Fourth Circuit."[32] This time around, the Bush Administration's EPA, under direction of the U.S. Department of Justice, opted against that approach.

Other aspects of the VGP might be criticized as unnecessarily complex (e.g., the VGP spans 163 pages when other general permits are often half as voluminous), overly bureaucratic (e.g., the permit requires vessel owners and operators to submit separate regulatory documentation for

each individual vessel, as opposed to allowing a simpler, fleet-wide submittal),[33] or even pedantic (e.g., the permit provides that new vessels delivered after September 19, 2009 are not authorized to discharge, and as a result, are not authorized to operate, until 30 days after a complete notice of intent is received by EPA).[34]

In addition to these (and other) criticisms regarding the VGP, the very nature of the NPDES program itself presents its own set of significant challenges when applied to commercial navigation. Importantly, under Section 401 of the CWA, states are authorized to impose their own conditions and requirements on top of the VGP if a state deems it necessary to ensure that the permitted discharges do not violate the state's water quality standards.[35] In response to the VGP, more than 20 states exercised their Section 401 certification authority and imposed additional standards and requirements to the VGP, thereby creating a patchwork of additional state-imposed standards and requirements. Indeed, 40 pages of the VGP cover these state-imposed terms.

Some of these state conditions were particularly onerous, such as Illinois's original decision to prohibit all graywater discharges in Illinois waters.[36] Since the vast majority of vessels operating on the nation's 27,000 miles of inland waterways do not have graywater storage systems, Illinois's seemingly innocuous condition meant that crews living aboard a towboat travelling in Illinois waters (such as the Illinois River, parts of the Mississippi and Ohio Rivers, etc.) could not shower, use the sinks, or wash their clothes or dishes. While EPA ultimately removed this condition from the VGP, one day before the prohibition would have gone into effect, this example illustrates a larger point: a vessel traveling the nation's inland waterway system could be subjected to a dozen or more different state vessel discharge requirements along a single voyage.

A Roadmap for Congressional Action

As EPA has itself conceded, the federal NPDES permitting program is ill-equipped to address the problem of vessel discharges.[37] As well, certain members of Congress have questioned the wisdom of the courts' decision and expressed reservation regarding the application of NPDES permits to vessels.[38]

In addition, commercial vessels are already subject to extensive, overlapping regulatory requirements designed to protect human health and the environment. For example, part 1321 of the CWA prohibits the discharge of oil or hazardous substances into the navigable waters of the United States in harmful quantities.[39] The Refuse Act prohibits the discharge or depositing of any refuse matter or any material of any kind into the navigable waters in a manner that could impede navigation.[40] The Ocean Dumping Act prohibits the dumping of any material from a vessel of the United States without a permit.[41] The Act to Prevent Pollution from Ships implements the provisions of the International Convention for the Prevention of Pollution from Ships generally prohibits the disposal of plastics and other garbage into the sea.[42] Likewise, the Oil Pollution Act prohibits the discharge of oil into navigable waters, requires reporting of spills, and imposes significant restrictions on the types of vessels that can carry petroleum.[43] The Comprehensive Environmental Response, Compensation and Liability Act makes owners or operators of vessels used to transport hazardous substances potentially liable for releases of those substances to the environment.[44] U.S. Coast Guard regulations mandate that all sewage generated aboard a vessel must be processed and treated in approved marine sanitation device sewage treatment systems aboard the vessel.[45] A variety of other international, federal, and state restrictions apply as well, as do various other practices adopted voluntarily by industry.

An unduly burdensome and complicated NPDES permitting regime risks redirecting attention away from safety and security issues which are paramount for people working aboard moving vessels. Consequently, Congress should adopt comprehensive legislation to re-exempt vessel discharges from the NPDES permit program, and in its place, establish a limited set of nationwide standards for vessel discharges. This suggested legislation (perhaps to be titled, "the Clean Commercial Boating & Barging Act of 2009") would need to include several key components; namely, (1) provide the U.S. Coast Guard with sole authority for regulating ballast water discharges and all other discharges incidental to the normal operation of a vessel; (2) authorize the Coast Guard to promulgate national uniform standards and management practices for such discharges; and (3) provide for increased federal funding for the development of cost-effective ballast treatment technologies and funding for states to monitor and control the spread of harmful aquatic non-indigenous invasive species. Congress could also provide a role for EPA and the States in developing and establishing these standards and management practices.

With the swearing-in of a new Democratic President and Democrat-controlled Congress, 2009 is primed to be a hallmark year, much like 1972, for expanded federal environmental regulation. It will undoubtedly surpass 2008 in that regard. As Congress pushes through its environmental reform agenda, however, it should also give due consideration to ideas, even if they come from the Right, on refining and recalibrating existing federal environmental laws to ensure that good governance prevails. Federal regulation of discharges from vessels might be a good place to start.

Endnotes

1 Winter v. NRDC, 129 S. Ct. 365 (2008) (vacating injunction against Navy's use of mid-frequency active sonar in waters off Southern California in light of concerns about impacts to marine mammals).

2 33 U.S.C. § 1251(a).

3 *Id.* § 1342.

4 *Id.* § 1311(a).

5 *Id.* § 1362(7).

6 *Id.* § 1362(6).

7 *Id.* § 1362(14).

8 *Id.* § 1362(12) (including also "any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft").

9 *Id.* § 1362(6). The definitions above are provided as they currently exist in federal statute. Note, however, that some of the original 1972 definitions differed in some respects. Of particular relevance to this article, in 1996,

Congress substituted "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" for "sewage from vessels." Pub. L. 104-106, § 325(c)(3).

10 40 C.F.R. § 122.3(a) (emphasis added).

11 38 Fed. Reg. 13,528 (May 22, 1973) (emphasis added).

12 *See, e.g.,* NRDC v. Costle, 568 F.2d 1369, 1380-81 (D.C. Cir. 1977) ("We are and must be sensitive to EPA's concern of an intolerable permit load.").

13 *See*, *e.g.*, Monsanto Co. v. Kennedy, 613 F.2d 947, 955 (D.C. Cir. 1979) (recognizing FDA's authority to rely on a "de minimis" exemption principle); Alabama Power Co. v. Costle, 636 F.2d 323, 360 (D.C. Cir. 1979) (recognizing at least some agency authority to adopt de minimis exemptions from statutory regimes, and explaining: "Categorical exemptions may also be permissible as an exercise of agency power, inherent in most statutory schemes, to overlook circumstances that in context may fairly be considered de minimis. It is commonplace, of course, that the law does not concern itself with trifling matters, and this principle has often found application in the administrative context. Courts should be reluctant to apply the literal terms of a statute to mandate pointless expenditures of effort." [internal citations omitted]); NRDC v. EPA, 966 F.2d 1292, 1306 (9th Cir. 1992) (rejecting EPA's reliance on inherent authority to adopt "de minimis" exemptions from the Clean Water Act and stating that "once Congress has delineated an area that requires permits, EPA is not free to create exemptions… The de minimis exemption is only available where a regulation would yield a gain of trivial or no value" [internal citations omitted]).

14 *See* Northwest Envtl. Advocates v. EPA, 2005 WL 756614, at *9 (N.D. Cal. 2005) (granting summary judgment to the plaintiffs on the basis that 40 C.F.R. § 122.3(a) was ultra vires, and ordering EPA to repeal the exclusion); Northwest Envtl. Advocates v. EPA, 2006 WL 2669042, at *14 (N.D. Cal. 2006) (vacating the challenged portions of 40 C.F.R. § 122.3(a) effective September 30, 2008).

15 2005 WL 756614, at *13.

16 *Id.* at *8-9.

17 *Id.* at *8-9 (ending the analysis at *Chevron* step one).

18 537 F.3d 1006 (9th Cir. 2008). No party sought review by the U.S. Supreme Court.

19 This says nothing, of course, about the merits of the other non-statutory grounds advanced by EPA in the litigation.

20 For example, industry is currently implementing the U.S. Coast Guard's new Transportation Worker Identification Credential ("TWIC") requirements, which were mandated by Congress after 9/11 as part of the Maritime Transportation Security Act of 2002. As part of that effort, the industry is currently working to ensure that its associates obtain "TWIC" cards (i.e., the biometric security credential required for unescorted access to inland ports and other areas important to homeland security) by the 2009 deadline. Similarly, industry is preparing for compliance with EPA's new marine diesel engine emissions standards (*see* 73 Fed. Reg. 25,098) and various other initiatives of the U.S. Coast Guard such as implementation of new guidance related to "Crew Endurance Management Systems" and the anticipated new Subchapter M requirements.

21 Although the term "pollutant" includes "biological materials," 33 U.S.C. § 1362(6), the extension of that definition to all aquatic species would produce illogical results. Since the passage of the CWA, the definition of pollutant has generally been construed in the context of waste-like materials, not biological organisms generally. Applying that term broadly to all biological organisms could result in the regulation of all non-indigenous aquatic species, including the Asian carp, which has been introduced into certain U.S. waters and can grow over 100 pounds, as a pollutant. Such a broad construction not only has implications for the NPDES permitting program, but for the establishment of water quality criteria and standards, the listing of impaired waters, and the development of total maximum daily loadings for such species. Congress clearly did not intend the NPDES program to be implemented in this manner.

22 *See* 72 Fed. Reg. 34,241 (June 21, 2007).

23 *See* 73 Fed. Reg. 34,296 (June 17, 2008).

24 EPA has established a website with information about the VGP at http://cfpub.epa.gov/npdes/home.cfm?program_id=350.

25 73 Fed. Reg. 79,473.

26 "Recreational vessels" are not covered by the VGP but those vessels are subject to regulation under Section 312(o) of the Clean Water Act. Non-recreational vessels (less than 79 feet in length) and all commercial fishing vessels are not subject to the VGP. Likewise, vessels of the Armed Forces are not covered.

27 *See* Final VGP at 2.

28 Final VGP at Part 1.2.2. "Graywater" is created on board a vessel usually through the operation of kitchen sinks, showers, and washing machines.

29 Final VGP at Part 5.

30 73 Fed. Reg. at 79,477. A notice of intent ("NOI") must be filed for vessels which are either 300 or more gross tons or have the capacity to hold or discharge more than 2113 gallons of ballast water. Until September 19, 2009, vessels required to submit a NOI are automatically authorized to discharge in accordance with the VGP's requirements, and companies may begin filing NOIs as early as June 19, 2009.

31 537 F.3d at 1010. Several lawsuits have been filed challenging the VGP, including at least one lawsuit filed by business interests (*Lake Carriers Ass'n v. EPA*, pending in the D.C. Circuit) and two lawsuits by environmental groups (*NRDC v. EPA*, pending in the Second Circuit; and *Northwest Envtl. Advocates v. EPA*, pending in the Ninth Circuit).

32 *See* Guidance for Corps and EPA Field Offices in Light of United States v. Wilson (May 29, 1998), available at http://www.usace.army.mil/cw/cecwo/reg/wilson.pdf.

33 *See* Final VGP at Part 1.5.

34 *See id.*

35 33 U.S.C. § 1341(a).

36 On February 3, 2009, just three days before the Illinois graywater prohibition would have gone into effect, a state circuit court in Springfield, Illinois granted a preliminary injunction to prevent the graywater prohibition from going into effect. Soon thereafter, Illinois EPA asked USEPA to remove the prohibition from the state's Section 401 certification, which USEPA did just one day before the VGP went into effect.

37 In June 2008, James Hanlon, the director of EPA's Office of Wastewater Management, told the House Transportation and Infrastructure Committee's Subcommittee on Water Resources and Environment that "the NPDES program does not currently provide an appropriate framework for managing ballast water and other discharges incidental to the normal operation of vessels, which are highly mobile and routinely move from port to port, state to state, and country to country." BNA, Daily Environment, at A-2 (June 13, 2008). Mr. Hanlon continued: "[D]ischarges from such highly mobile sources would be more effectively and efficiently managed through the development of national, environmentally sound, uniform discharge standards." *Id.*

38 Rep. John Boozman (R-Ark.), for example, who was the ranking member on the House subcommittee, said the court had "overreached" in a way that would lead to a "regulatory morass" for commercial vessel owners and operators. *Id.*

39 33 U.S.C. § 1251 et seq.,

40 33 U.S.C. § 407.

41 33 U.S.C. § 1401 *et seq.*

42 33 U.S.C. § 1901 *et seq.*

43 33 U.S.C. § 2701 *et seq.*

44 42 U.S.C. § 9601 *et seq.*

45 *See* 33 C.F.R. § 159.7.

Federalism and Separation of Powers

Federalism and the International Criminal Court

*By Ronald J. Rychlak & John M. Czarnetzky**

At a luncheon at the University of Mississippi, the European Union's former ambassador to the United States, Guenter Burghardt, expressed great disappointment that the United States has not embraced the International Criminal Court (ICC). Ambassador Burghardt felt that terms had been defined and issues had been set with sufficient certainty to justify American ratification of the agreement calling for its establishment.[1]

The obvious concern, which has been expressed by many American politicians and commentators, is that American troops travel all over the globe, including areas where Americans are not popular. We do not want to see our men and women put on trial before an international tribunal every time they offend a local group. Most efforts by ICC officials to appease American concerns have addressed this issue.

There is, however, another basic concern about the ICC that is too often overlooked. Part of the American resistance to the ICC stems from the judicially-mandated growth in the size and authority of the U.S. federal government that has come at the expense of state autonomy. The American experience reveals that an active federal judiciary leads to a larger central government. If we now imagine an active *world* court, it is easy to envision a centralization of global power that is unprecedented in history. To many Americans, that is not a welcome development. In short, American opposition to the ICC is based in significant part on courts' failure to adhere to the doctrine of federalism.[2]

I. The International Criminal Court

The idea behind the ICC is not new. At the end of the Second World War, the Allies conducted Nuremberg and the Tokyo Tribunals.[3] More recently, *ad hoc* tribunals were established to deal with abuses in the former Yugoslavia[4] and Rwanda.[5] These tribunals led to the doctrines that shape international criminal law today.

In the summer of 1998, the United Nations (UN) convened the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome, Italy. The charge to the conference was to negotiate an agreement relating to a new international court. Despite numerous unresolved issues, the delegates at that conference adopted a draft statute, the "Rome Statute."[6]

This conference did not represent an exercise in multilateral treaty-making of a contractual nature. Rather, the delegates engaged in what was a quasi-legislative effort. More than a treaty, the Rome Statute was designed to modify customary international law and apply even to non-signatories.[7]

As set forth in the Rome Statute, the ICC has the authority to prosecute and sentence individuals, and to impose obligations of cooperation upon states, regardless of whether they are parties to relevant treaties or have accepted the Court's jurisdiction with respect to the crimes in question. The Rome Statute asserts jurisdiction for the ICC over defendants so long as either the "State on the territory of which" a crime was committed or "the State of which the person accused of the crime is a national" has ratified the statute. The result is a serious blow to the concept of national sovereignty.

An international court with the express authorization to modify customary international law has extraordinary power. Consider the Constitution of the United States. Judges have used that document to create new rights that do not appear in the text of that document. What is to stop ICC judges from inventing new crimes, new rights, or otherwise trampling on national sovereignty?

With 18 judges (balanced in terms of gender, geography, and legal systems) and a potentially slow docket, there is every reason to think that ICC judges will be pressured to add new crimes. Following the attack of September 11, 2001 representatives from the nation of Turkey proposed adding the crime of terrorism to the ICC's jurisdiction. There have also been proposals to add international drug transactions to the list of ICC crimes. Suppose ICC judges conclude that denial of the right to euthanasia constitutes a violation of human rights? Or what if they find that a society must recognize the right to same-sex marriage or outlaw the death penalty? Regardless of how members of a society feel about such issues, does anyone really want international judges to decide these issues for all nations?

Officially, the ICC has jurisdiction over only four crimes: Genocide, War Crimes, Crimes against Humanity, and the yet undefined crime of Aggression. This oft-cited list of four crimes is a bit deceptive. Each of these crimes is further defined so that the ICC also has jurisdiction over crimes such as: serious injury to mental health, outrages upon personal dignity, and forced pregnancy. Article 31 of the Rome Statute also codifies grounds for excluding criminal responsibility, including mental disease, intoxication, defensive force (self-defense), and duress or necessity. Article 32 codifies mistake of fact and mistake of law, and Article 33 codifies a limited defense of superior orders. These defenses suggest that the ICC may ultimately be used to prosecute a broad spectrum of crimes.[8]

If the ICC were to create an international right to universal health care or limit certain forms of pollution, it would likely trample on the sovereignty of many nations. Such judicial over-reaching would be bad enough, but without co-equal branches of government (the ICC is a stand-alone court) how would those nations voice their objections? Of course, even without an expansion of jurisdiction, the ICC will have a dramatic impact on domestic laws.

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II. Complimentarity

The typical answer to concerns about an overly-aggressive ICC is that the new court's jurisdiction is "complementary" to national criminal jurisdiction.[9] In other words, national courts have the first right and obligation to prosecute perpetrators of international crimes, and ICC jurisdiction can only be invoked if the national court is unwilling or unable to prosecute.[10] This language appears to protect national sovereignty and is invoked by proponents of the Court to calm concerns that the Court might seriously intrude upon state authority. The complementarity doctrine, however, may instead operate like an international Supremacy Clause.

ICC judges will not simply accept the nation's assurance that it can handle the case. They will have to consider whether the nation is acting in good faith. They are required to examine whether, despite the nation's assertion to the contrary, it can successfully carry out the proceedings. The ICC does not have a mechanism to defer to national policy determinations that might confer amnesty to wrongdoers, and that is a very serious problem. The principle of complementarity cannot avoid this problem, despite assurances to the contrary.[11]

There are cases where punishment of even a clearly guilty person might not promote societal cohesion. At these times, prosecutorial discretion, executive clemency, amnesty, and even jury nullification can do more to serve the common good than would punishment of the guilty. Even statutes of limitation are based on putting other considerations above retributive justice.

At the end of the Civil War, to give one example, President Lincoln forgave many crimes that might legitimately have been prosecuted. He did this in order to preserve social cohesion. In a different example, Sammie "Athe Bull" Gravano was freed (briefly, as it turns out) after a light sentence, despite admitting to participation in numerous murders. Convicting (the late) John Gotti was so important that the government made a deal with a multiple murderer. In cases like this, law-abiding members of society are willing to trade the utilitarian "benefit" that they might receive from punishment in exchange for a larger benefit to the common good.

Consider the example of Chile under Augusto Pinochet. The Pinochet regime regularly violated human rights. When a free vote revealed a high level of hostility toward that regime, Pinochet agreed to leave office, but only after securing a lifetime appointment and the promise of amnesty from prosecution. As it turned out, he was later stripped of much of his immunity, but while it was in place, could it be said that Chile was unwilling or unable to prosecute Pinochet? If the ICC had been in existence, its judges may well have so determined. Of course, if that threat were known to Pinochet, he might never have left office. Would that have been better for the people of Chile?

As with the situation in Chile, South Africa's transition from apartheid to democracy was accomplished through negotiation. The Truth and Reconciliation Commission (ATRC) process must receive credit for South Africa's bloodless transition, even though *it certainly permitted notorious wrongdoers to escape criminal punishment.* Archbishop Desmond Tutu has often spoken of the need to forgo retributive justice in order to balance truth, justice, and reconciliation. Sometimes those values compete with one another:

> [R]etributive justice B in which an impersonal state hands down punishment with little consideration for victims and hardly any for the perpetrator B is not the only form of justice. I contend that there is another kind of justice, restorative justice, which was characteristic of traditional African jurisprudence. Here the central concern is not retribution or punishment but, in the spirit of *ubuntu*, the healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured.[12]

Unfortunately, the ICC structure elevates retributive justice over other concerns, such as restoraive justice.

Consider the current situation in Uganda. Jan Egeland, the UN Under-Secretary-General for Humanitarian Affairs, has described Northern Uganda as "the world's terrorism epicenter." One of the main terror groups, The Lord's Resistance Army (LRA), has killed more people than Al Qaeda, Hamas, and Hezbollah combined. In July, 2006, however, the prospects for peace brightened when LRA leader Joseph Kony accepted an amnesty offer from the Ugandan government. That offer required the LRA to commit to peace talks and to renounce violence.

Unfortunately, Kony had already been indicted by the ICC, and the ICC will not accept Uganda's promise of amnesty. According to a news account from Africa, "Athe government and the ICC are knocking heads over the amnesty matter. The ICC, which has indicted and issued arrest warrants for the LRA leadership, says Kony and his men should be arrested, not granted amnesty. The Ugandan government thinks otherwise, for the sake of peace."[13] In other words, hostility to political compromise (which, of course, is central to the ICC's *raison d'être*) means that people have continued to die.

While there is obviously a place for criminal prosecutions in meting out justice to tyrants who violate international criminal law, trials are only one tool among several in the search for justice. The problem with the ICC is that it favors criminal prosecution in *every* situation. At Nuremberg, this model made sense. When the bad guys have been defeated by an outside force, there is no threat of civil war, and the defendants have already been captured, trials are very logical. In other cases, however, they may only prolong the suffering.

Tyrants know what fate awaits them if they are overthrown. History extending back at least to the French Revolution shows them that they will be called to justice if they fall out of favor. The ICC adds nothing to that threat. *Those who proceed to violate human rights simply do not expect to be overthrown*.[14] In fact, it is entirely possible that the ICC will have the opposite of its intended impact when it comes to deterrence.

Students of social science explain that deterrence is a matter of certainty, or likelihood, of punishment and severity of punishment. Certainty of punishment is hard to establish, particularly when the wrongdoer is a national leader supported by military power. By offering a form of due process and legal counsel to the defendant, however, the ICC may well decrease even the likelihood of punishment. In addition, since judges

of the ICC do not have authority to impose the death penalty, tyrants need not fear the fate that befell Mussolini and others. As such, the ICC probably *decreases* both the certainty *and* the severity of punishment.

III. Federalism's Role in Shaping American Attitudes

Americans have seen a federal court system of supposed limited jurisdiction grow dramatically over the past forty years. There is every reason to think that the ICC will receive similar pressure to expand. Already several scholars have advocated expanding the ICC's jurisdiction to cover international gun running and drug trafficking. In fact, one of the reasons cited by the US for its initial refusal to sign the Rome Statute was its potential to conflict with policing matters. In particular the US was concerned that the ICC might conflict with existing American efforts to combat terrorism and drug crimes.[15]

The ICC will almost certainly force nations to change their domestic substantive criminal laws.[16] A manual for the ratification and implementation of the Rome Statute explains that "the ICC is no ordinary international regulatory or institutional body."[17] In order to comply with the dictates of "complementarity," the manual asserts that "modifications" must be made to a state's "code of criminal law… and human rights legislation."[18] These changes are needed if national law diverges in any important detail from the law established by the ICC. As the manual states, "should there be a conflict between the ICC legislation and existing legislation," international law established under the ICC "takes precedence."[19] Accordingly, the manual declares that "[i]t would be prudent" for states "to incorporate all acts defined as crimes" into their own "national laws."[20]

A booklet issued by *The Women's Caucus for Gender Justice* asserts that "ratification of the treaty creating the Court will necessitate in many cases that national laws be in conformity with the ICC Statute."[21] The booklet states that implementation of the ICC Statute will provide an opportunity for groups "[a]ll over the world to initiate and consolidate law reforms...."[22] Indeed, the caucus asserts that "[i]t is this aspect of the Court- the possibility of national law reform- which may present the most far-reaching potential" for change in the long run.[23] According to the caucus, "State parties will be required to review their domestic criminal laws and fill in the gaps to ensure that the crimes enumerated in the ICC Statute are also prohibited domestically."[24]

At the time that the Rome Statute was being negotiated, the Lawyers Committee for Human Rights predicted that rules established by the ICC "will have a significant impact on domestic criminal procedure... because it will be legally and politically difficult to justify a two-tiered system of rights, one for the ICC and another for purely domestic purposes."[25] According to ICC supporters, nations may need to introduce new criminal laws, proscribing genocide, crimes against humanity, and war crimes, if they do not have such laws already. The simplest approach would be to adopt the definitions of the crimes within the jurisdiction of the ICC. Nations may, however, wish to go beyond these definitions and give their courts jurisdiction over other international crimes as well.[26] Moreover, as the ICC decides these cases and begins to develop a common law of what constitutes effective and acceptable national trials, nations will be forced to follow those precedents or risk having their defendants re-tried before the ICC.

Perhaps the greatest threat to national sovereignty does not relate to potential changes in substantive law, but to changes that might be necessary to a nation's procedural laws. Article 88 of the Rome Statute requires that State Parties "ensure that there are procedures available under their national laws for all of the forms of cooperation that are specified [elsewhere in the statute]."[27] This may require adoption of certain procedures, and may also require deletion of certain features of a nation's procedural laws, particularly constitutional protections for criminal defendants.

Presumably no state, regardless of the Rome Statute, tries to provide undesirable loopholes for criminal defendants. The question becomes whether a nation's "Bill of Rights" might be viewed by the ICC as a loophole.[28] As it is currently structured, the ICC conflicts with many American constitutional rights, including the right to be tried by a jury of peers, the prohibition against double jeopardy, the right to a speedy trial, the Supremacy Clause, the presidential pardon power, the right to be free from unreasonable searches and seizures, and more.[29] If the United States is to participate fully in the ICC, it would seem that constitutional amendments will be required. Of course, at the end of the day the Constitution might be deemed more important than the ICC.[30]

CONCLUSION

If the United States were to join the ICC, it would have significant ramifications on domestic criminal laws and procedures. Concerns about national sovereignty, Constitutional amendments, and other modifications to domestic criminal laws that will be necessary in order to come into conformity with an international standard are quite legitimate. In reality, these concerns are mere extensions of traditional federalist concerns. Efforts to appease them by writing in limits on the court's authority are not successful because Americans have seen courts ignore limits, stretch their authority, and grow in power beyond all expectation.

Supporters of the ICC may see value in the idea of uniformity of national laws. Some may even see value in a "one-world" government.[31] It is good to remember, however, the words of Jacques Maritain:

> The quest of… a Superstate capping the nations is nothing else, in fact, than the quest of the old utopia of a universal Empire. This utopia was pursued in past ages in the form of the Empire of one single nation over all others. The pursuit, in the modern age, of an absolute World Superstate would be the pursuit of a democratic multinational Empire, which would be no better than the others.[32]

The threat of such a quest being imposed by the ICC is particularly worrisome, because there is no legislative or executive branch to hold the court in line.

No one wants to see wrongdoers escape justice, particularly those tyrants who commit crimes like those that fall under the jurisdiction of the ICC. Americans, however, are correct to be cautious about the ICC. Unless and until we see our own courts once again respect federalism, there is little reason to think that a world court, like the ICC, would do so.

A comprehensive strategy to combat serious violations of international criminal law would incorporate amnesties (including a UN Security Council pardon power, not just the ability to temporarily delay prosecution),[33] truth commissions, exile for entrenched leaders, lustration for mid-level officials, and civil compensation. It would prioritize domestic processes—and have the courage not to insist on trials in countries that are not ready. It would also recognize that "[t]he energy expended on tribunals might be better invested in building consensus on robust, timely intervention when crimes are being committed rather than seeking punishment afterward."[34] Some military actions are just.[35]

Defining the crimes of genocide, aggression, war crimes, and crimes against humanity will certainly help overcome future objections based on the claim of "victor's justice." It is also wise to develop basic standard procedures that will help assure that future trials run smoothly. The idea of a standing court, with incentive to grow and a "one size fits all" approach to diverse international problems, however, is extraordinarily unwise.

Endnotes

1 President Clinton signed the agreement in question (the Rome Statute) on December 31, 2000, but he noted serious flaws and said: "I will not, and do not recommend that my successor submit the treaty to the Senate for advice and consent until our fundamental concerns are satisfied." John. B. Bellinger, *The United States and the International Criminal Court: Where We've Been and Where We're Going*, Remarks to the DePaul University College of Law, April 25, 2008 <<http://www.state.gov/s/l/rls/104053.htm >>. In 2002 President Bush announced that he was "un-signing" the Rome Statute. *Id.* See Michael Knigge, *Don't Expect Obama Or McCain To Reverse Washington's Stance Toward The International Criminal Court*, dw-world.de, Oct. 14, 2008 << http://blogs.dw-world.de/acrossthepond/michael/1.7227.html>>.

2 *See* Brian Darling, *U.S. Shouldn't Be Supporting ICC,* Human Events, Oct. 20, 2008 <<http://www.humanevents.com/article.php?id=29091&page=1>>.

3 *See, e.g.,* Quincy Wright, *The Law of the Nuremberg Trial*, 41 Am. J. Int. L. 38 (1947), *reprinted in* 2 International Criminal Law (Gerhard O.W. Mueller & Edward M. Wise, eds., 1965). Even before World War II had ended, people started talking about putting war criminals, like Adolf Hitler and his close associates, on trial for war crimes. *See* Michael Young, The Trial of Adolf Hitler (1944).

4 The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY"), S.C. Res. 808, U.N. SCOR, 48th Sess., 3175 mtg., U.N. Doc. S/RES/808 (1993).

5 The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Rwanda ("ICTR"), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., U.N. Doc. S/RES/955 (1994).

6 *Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, U.N. Doc. A/CONF. 183/9 (1998).

7 *See generally* Timothy L. Dickinson, *Joint Report with Recommendations to the House of Delegates: Establishment of an International Criminal Court*, 1998 A.B.A. Sec. Int'l. L. & Prac. 118B (tracing procedural history of the International Criminal Court).

8 The ICC is supposed to exercise its jurisdiction only in cases involving "the most serious crimes of concern to the international community as a whole." Rome Statute, art.5(1).

9 The Tenth Preambular Paragraph of the Rome Statute proclaims that "the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions." Rome Statute, pmbl.

10 Johan D. van der Vyver, *Personal and Territorial Jurisdiction of the International Criminal Court,* 14 Emory Int'l L. Rev. 1, 67-68 (2000). The International Criminal Tribunals for both the Former Yugoslavia and Rwanda proceeded on the contrary assumption, namely that their jurisdiction enjoys precedence over that of national courts. Statute of the Tribunal for the Former Yugoslavia, art. 9(2), 32 I.L.M.1192, 1194 (1993); Statute of the Tribunal for Rwanda, art. 8(2), 33 I.L.M. 1602, 1605 (1994). Of course, in as much as these tribunals were specially established and not standing courts, that only makes sense.

11 "The principle of complementarity says that if a nation is worried about having its people called before the International Criminal Court, it need only investigate them conscientiously itself and if appropriate, prosecute them. That is an absolute defense to any prosecution by the ICC." 14 Emory Int'l L. Rev. at 171 (comments of Kenneth Roth, Executive Director of Human Rights Watch).

12 Desmond Tutu, No Future Without Forgiveness 52 (1999).

13 Emma Mutaizibwa, *Govt Happy Kony is for Amnesty*, The Monitor (Kampala), July 9, 2006. A similar issue arose in 2003 when Liberian leader Charles Taylor refused to leave office until he was granted exile in Nigeria.

14 Every year, *Parade* magazine ranks the world's worst dictators. A recent check showed that five of the twelve worst had signed the Rome Statute.

15 These concerns were outlined before the Senate Foreign Relations Committee by David Scheffer, the head of the U.S. delegation to the Rome Conference. Kristafer Ailslieger, *Why the United States Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999). *See also* Darling, *supra* note 2.

16 Hans-Peter Kaul of the German Foreign Ministry and head of the German delegation to the Preparatory Commission noted that the ICC might serve to harmonize national criminal laws among the States. Jennifer Schense, *Trends Emerging in Implementation of the ICC Statute*, The Monitor, November 2000, at 18.

17 See *Manual for the Ratification and Implementation of the Rome Statute* (2nd ed. 2003), published by the *International Centre for Human Rights and Democratic Development* and *The International Centre for Criminal Law Reform and Criminal Justice Policy* (downloadable from http://www.international.gc.ca/court-cour/guide-manuel.aspx?lang=eng&menu_id=73&menu=R).

18 *Id.*

19 *Id.*

20 *Id.*

21 Women's Caucus for Gender Justice, *The International Criminal Court: The Beijing Platform in Action* (Putting the ICC On The Beijing +5 Agenda) at 8.

22 *Id.*

23 *Id.*

24 *Id.*

25 Lawyers Committee for Human Rights, *Pre-Trial Rights in the Rules of Procedure and Evidence*, Vol. 2, No. 3, International Criminal Briefing Series (Feb. 1999) (expressing concern that the ICC Statute does not protect persons suspected but not yet charged, and calling for additional procedural protections, particularly during interrogation and arrest.)

26 Joanne Lee, *Ratifying and Implementing the Rome Statute*, The Monitor, Nov. 2000, at 3.

27 Rome Statute, at art. 88.

28 Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court*, Policy Analysis, July 16, 1998, in the Internet at www.cato.org/pubs/pas/pa-311.html (noting that many rights taken for granted by Americans would not be available in trials before the ICC). Cathie Adams, *The United Nations*, The Heritage Foundation, November 1998, *available at* <<www.fni.com/heritage/nov98/AdamsCathie.html>>.

29 Kristafer Ailslieger, *Why the United Should Be Wary of the International Criminal Court: Concerns Over Sovereignty and Constitutional Guarantees*, 39 Washburn L.J. 80 (1999). *See* Brian Concannon, Jr., *Beyond Complementarity: the International Criminal Court and National Prosecutions*, 32 Colum. Human

Rights L. Rev. 201 (2000); Lara A. Ballard, *The Impact of an ICC Treaty on U.S. Double Jeopardy Law*, 29 Colum. Human Rights L. Rev. 142 (1997).

30 As early as 1990, the U.S. Congress passed legislation stating that the United States should "explore the need for the establishment of an International Criminal Court." The Congress emphasized, however, that such a Court "should not derogate from established standards of due process, the rights of the accused to a fair trial and the sovereignty of individual nations." *See* Foreign Operations Appropriations Act, 599E, P.L. 101-513, 104 Stat. 2066-2067 (1990).

31 Benjamin B. Ferencz, a former Nuremberg prosecutor, has been a leading voice in support of the ICC for well over a decade. He described himself to these authors as a "one-worlder."

32 Jacques Maritain, Man and the State 204 (1998).

33 The Security Council has authority to delay prosecution for up to 12 months at a time. Such power, however, provides little in the way of a bargaining chip during negotiations to end a reign of terror. Among the other weaknesses is the risk that the delay would be vetoed. *See* Darling, *supra* note 2 (discussing the possibility that the United States would veto a proposed delay in prosecutions related to Darfur).

34 Timothy Waters, *What Now for War Trials after Milosevic?*, Christian Science Monitor, March 2006.

35 *See generally* Ronald J. Rychlak, *Just-War Theory, International Law, and the War in Iraq*, 2 Ave Maria L. Rev. 1 (2004).

Financial Services and E-Commerce

The Troubled Asset Relief Program and Insurers

*By Laura Kotelman**

On October 3, 2008, the Emergency Economic Stabilization Act of 2008 (EESA) established the Troubled Asset Relief Program (TARP) in an effort to restore liquidity and stability to the U.S. financial system. Under the program, the Secretary of the Treasury, acting through a newly created Office of Financial Stability, is authorized to purchase "troubled assets" from "any financial institution." Troubled assets are defined as "residential or commercial mortgages and any securities, obligations, or other instruments that are based on or related to such mortgages," originated or issued on or before March 14, 2008, and "any other financial instruments that the Secretary… determines the purchase of which is necessary to promote financial market stability. Under this Capital Purchase Program (CPP), the Secretary may purchase troubled assets of any financial institution established and regulated in the U.S.

Some insurers are buying savings-and-loan companies to become eligible for the bailout, which was initially targeted at banks and similar financial institutions. Treasury clarified that insurers are qualified to participate in the CPP, provided they are or apply to become federally regulated as holding companies of banks or thrifts. According to the American Council of Life Insurers (ACLI), approximately 48% of life insurance assets are attributable to companies organized as bank or thrift holding companies. On November 14, 2008, four insurance organizations applied to the Office of Thrift Supervision to become thrift holding companies by acquiring savings and loans, setting the stage to become qualified to participate in the CPP.

In recent months, life and property and casualty insurers have taken a big hit from turmoil in the bond markets, where much of their cash is invested. In the third quarter, the industry took tens of billions of dollars of realized and unrealized losses. The risk to the overall economy of big life insurers running low on capital if the market continues to deteriorate may make government assistance necessary—although it is unclear whether the insurers will receive funding. Only $15 billion remains unallocated from the initial $350 billion authorized by Congress. The December 9 list of recipients released by Treasury did not include any of the insurers. It has not requested the remaining $350 billion, which Congress could refuse to release.

Life Insurers

Life Insurers are generally more exposed to distressed and/or illiquid assets and mortgage-backed securities than are P&C insurers. Nevertheless, New York Life, in a press release dated November 6, 2008 stated it would not participate in the CPP. "We are well capitalized with more capital than is required to maintain our triple-A ratings." MassMutual stated in a press release on November 7, 2008, "[O]ur mutual company structure enables us to manage with the long-term interests of our policyholders and customers in mind. Thus, we have not participated in any discussion directly with the Treasury, and we have no intention of participating in the [CPP]." However, in December, Prudential Financial Inc. announced that would seek an unspecified amount of aid through TARP.

Reacting to EESA, Frank Keating, the president and chief executive of the American Council of Life Insurers, said, "If the U.S. government is going to intervene to provide liquidity to the nation's economy, then... the life-insurance industry should be on an even plane" with other financial-services industries. His letter to editor of *The Wall Street Journal* on November 12, 2008 stated that

> Congress explicitly included insurers in the legislation establishing the Troubled Asset Relief Program…. Inclusion of [life insurers that are not eligible as bank or thrift holding companies would be] a reflection of the systemic role they play in the nation's credit markets…. Life insurers are the largest source of bond financing for America's corporations. They provide $2.5 trillion in liquidity to the economy. Thousands of businesses and millions of jobs depend on this financing. Insurers provide another $2.5 trillion in capital to the economy through investments in commercial mortgages, government bonds, and equities…. The nation's economic turmoil has forced life insurers to conserve their capital rather than invest it. As a result, much of the approximately $600 billion insurers will receive in annual premium income won't be flowing through the economy. This represents a major clog in the credit delivery system…. Life insurance companies that choose to participate in the Capital Purchase Program will quickly deploy funding to further the growth and development of American companies and help to restore liquidity and stability to the financial system of the U.S.

Property and Casualty Insurers

Property and casualty insurers are singing a different tune. The American Insurance Association (AIA) stated in a press release dated October 27, 2008.

> We have surveyed our Board of Directors and the substantial majority of the insurers represented by AIA do not support the inclusion of property-casualty insurers in Treasury's Capital Purchase Program. If made available, they will not elect to participate. Those members believe that, as property-casualty insurance writers, they are well-capitalized and well-positioned to weather the current financial market crisis without the assistance of the CPP announced by Treasury. As a result, the property-casualty insurers who are members of AIA strongly prefer to compete in the private market and the substantial majority will elect not to participate in the CPP.

The Property Casualty Insurers Association of America (PCI) press release of October 29, 2008, concurs with the AIA. The PCI Board of Governors believes property casualty

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insurer participation in the CPP "is neither necessary nor in the best interest of property casualty consumers. The board arrived at this position because the industry is generally well-capitalized and managed and is continuing to provide sound and secure products to consumers." PCI urged Congress and Treasury to avoid imposing a recoupment tax on segments of the financial services industry that are not central to the rescue plan. "Insurers, and consumers who sponsor insurers, should not be unfairly penalized by being forced to subsidize other industries in the financial marketplace." PCI maintains that any future assessments should be imposed only on those industries involved and has been working with the Treasury to avoid federal regulation of the property casualty insurance industry and to distinguish it from other less capitalized and solvent industry sectors.

The National Association of Mutual Insurance Companies (NAMIC) press release of October 29, 2008 stated that "NAMIC's policy… is to oppose the expansion of the Treasury's Capital Purchase Program to include the property/casualty insurance industry…. Our members are not interested in participating in any type of program involving direct capital infusion from the U.S. Treasury Department…" Specifically, NAMIC's letter to the Secretary of the Treasury on October 30, 2008 stated, "A survey of NAMIC members conducted Oct. 26-28 shows that an overwhelming majority of member companies have no interest in and no need for a direct capital infusion from the U.S. government. In addition, more than half of the top executives responding to the survey believe their companies could be at a competitive disadvantage if some insurers are successful in obtaining government assistance…" NAMIC urged Treasury to exclude property/casualty insurance companies from any program that would provide direct capital assistance to insurers, and to "leave our solvent and effectively regulated segment of the financial services industry out of any new federal regulatory requirements."

Evan Greenberg, writing to the Secretary of the Treasury on October 27, 2008 in his capacity as Chairman of ACE, stated,

> The infusion of taxpayer capital into insurers (especially at far-below-market rates) will clearly disrupt the normal market forces that sort strong insurers from weak ones…. In the absence of a broken market and a public crisis, we should reward those companies who make prudent decisions and not subsidize those who do not.

Chubb's letter to Secretary of the Treasury on October 28, 2008, stated

> We do not believe that allowing property and casualty insurance companies to participate in the CPP is consistent with the stated purposes of the Act…. In addition, we urge you to consider the anti-competitive impact of bail-outs in our industry…. Participating insurers could try to use the competitive advantage afforded to them by the low-cost CPP capital to build their market share, thereby hurting other industry participants who did not need, or choose not to avail themselves of, the government bail-out under the CPP.

Chubb used the opportunity to bend Treasury's ear on regulatory modernization stating

> A more urgent need for the property and casualty industry is regulatory modernization. Our industry would operate much more efficiently without the constant changes to products, prices and practices foisted upon us by 50 separate state legislatures and 50 regulators. As Secretary of the Treasury, you have championed this type of positive change and we urge you to continue to focus on this effort as the primary source of Treasury assistance to our industry.

State vs. Federal Regulation

Treasury Secretary Henry Paulson is not ruling out the possibility of making insurance companies eligible for TARP assistance. In a press conference on November 25, he said that several insurance companies already qualified for the aid as bank holding companies, but the Treasury has not made a decision to include all insurance companies at this stage. It is not clear whether Secretary Paulson is considering requiring insurance companies to become bank holding companies or to purchase an existing bank to qualify as such, before receiving aid.

The reason that Paulson might not take action is the issue of federal oversight. Paulson is engaged in a battle of sorts with the National Association of Insurance Commissioners (NAIC), the states' insurance regulators, for control of insurance companies. He wants to bring insurance companies under federal control, and this regulatory scheme is vigorously opposed by the states.

Allowing TARP funding for the insurance industry will undoubtedly complicate the issue of regulatory control over insurers, as the state regulators and Treasury will both want oversight of the industry. State insurance commissioners currently regulate all insurance companies, but Secretary Paulson has stated his belief that insurance companies should be under some form of federal supervision. The NAIC believes that there is effective regulation at the state level and that by tapping into that strength maybe they can assist the financial regulators.

One thing is certain. Insurers that decide to purchase an existing bank would come under some measure of federal regulatory control. If an insurer brings itself under partial federal control through its own actions, will Paulson choose to support a request for TARP funding because insurers will inadvertently be subject to the federal oversight he prefers? Federal regulation would be easier to achieve with more companies already partially there.

Free Speech & Election Law

SpeechNow.org and the Paradox of *Buckley v. Valeo*

*By Paul Sherman**

The right to free speech, including the right to speak out about who should be elected to public office, is a fundamental American right, essential to democratic debate. So, too, is the right of individuals to band together and pool their resources to make their advocacy more effective. The Founders recognized this, and enshrined the rights to both free speech and association in the First Amendment.[1] But ever since the Supreme Court's seminal campaign-finance decision in *Buckley v. Valeo*, speakers have been forced to choose between these rights. Specifically, while an individual acting alone may spend unlimited amounts of their own money on ads that call for the defeat or election of federal candidates, groups of individuals may pool no more than $5,000 per person to run identical ads. You can speak freely, or you can associate freely, but you cannot do both. This paradox, an unintended result of the Supreme Court's first major campaign-finance ruling, has gone unconsidered for more than 30 years. But that is about to change, thanks to a legal challenge by a new citizens group, SpeechNow.org, which is on a fast track to the en banc D.C. Circuit.

What is SpeechNow.org?

David Keating founded SpeechNow.org on a simple idea: When politicians pass laws that violate the First Amendment, they deserve to be held accountable at the ballot box. Keating formed SpeechNow.org to give Americans a way to join together, pool their resources, and advocate for federal candidates who agree with them, against those who do not. The organization is meant to amplify the voices of individual Americans and maintain independence from candidates, political parties, corporations, and unions. It accepts contributions only from individuals, not from corporations or labor unions; nor is SpeechNow.org itself incorporated. It never donates to candidates or political parties and does not coordinate its speech with candidates or parties. In short, SpeechNow.org is Americans talking to Americans about an issue of vital public importance

The group is particularly concerned about protecting the right to speak freely about politics. Its members believe that without the right to speak freely about politics and politicians, the right to vote and to participate in the political system—the very right to self-government—is largely meaningless. Indeed, the U.S. Supreme Court has "long viewed the First Amendment as protecting a marketplace for the clash of different views and conflicting ideas."[2] But that marketplace, to truly reflect the underlying principles of the First Amendment, must remain free and unregulated. As the Supreme Court has said, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."[3] The notion that some voices may be limited, that some topics or terms are off limits, that citizens may discuss issues but not candidates, has no place in a free society. Instead, debate on all matters of public concern must be "uninhibited, robust, and wide-open."[4]

As a long-time political activist and leader of grassroots organizations, Keating has seen first-hand how burdensome campaign-finance regulations stifle the marketplace of political ideas. SpeechNow.org's strategy is to counter those regulations and secure greater protection for First Amendment rights by influencing elections. Keating believes the best way to send a message to politicians who fail to respect the First Amendment is to convince people to vote against them—and to elect more speech-friendly representatives. Advocating during elections increases public and media awareness on important issues at a time when people are most attuned to political debate.

But effective political advocacy does not come cheap. For example, at the time it was formed, SpeechNow.org wished to begin advertising in two races with an initial budget of $122,500 for production and airtime buys for television ads in two markets. The group's plan was to aim that initial advertising at two incumbents in Congress who had voted for restrictions on political speech, Republican Representative Dan Burton and Democratic Senator Mary Landrieu. To have greater influence on more congressional elections—or the White House—would take much more funding.

For citizens of more modest means acting alone, such as Brad Russo and Scott Burkhart, being heard is even more difficult. Brad and Scott believe in free speech and are opposed to campaign finance regulation, but lack the resources to reach a mass audience on their own. They can try to write or speak out alone, but their voices will likely be lost in the cacophony of an election. They can contribute money to political candidates, but candidates have their own agendas and may focus on issues other than the ones Brad and Scott care about. Brad and Scott would prefer to contribute to SpeechNow.org so that, in combination with others, they can advance the message of free speech.

SpeechNow.org can give citizens like Brad and Scott a stronger voice by pooling their limited resources with larger contributions. With seed funding from a few larger-dollar donors SpeechNow.org can start buying ads, getting more attention, and finding more supporters, who together can speak more effectively than any one could alone. Indeed, SpeechNow.org's model of political advocacy can be applied to any issue or set of issues a group of citizens cares about, such as the environment, health care or taxes.

Unfortunately, from the start, SpeechNow.org's efforts have been hampered by the very campaign finance laws it opposes. Under the Federal Election Campaign Act (FECA), any time two or more people pool their resources to support or oppose a federal candidate, they become a "political committee" subject to government regulations and limits. [5] By law, the

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group becomes a political committee once it accepts more than $1,000 in contributions or makes more than $1,000 in expenditures—barely enough to put up a website and register a post office box before government regulation kicks in, the most onerous of which is a contribution limit that prevents political committees from accepting any donation greater than $5,000 per donor per calendar year.[6] Political committees also must register with the government and make detailed reports of contributions and expenditures.[7]

If forced to organize and register as a political committee, supporters of SpeechNow.org would lose their associational rights guaranteed by the First Amendment. They could speak without limit only if acting alone. In an era where an ad in a major paper or a modest TV buy in a small market costs $50,000 or more, this would leave effective advocacy available only to the very wealthy. The ability of more modest donors to speak and be heard would be lost.

The contribution limit also denies groups like SpeechNow.org the seed funding they need to get off the ground, run initial ads, and attract more supporters. Raising enough for even a modest ad campaign in $5,000 or smaller increments is a nearly impossible challenge for a new group without any infrastructure or public visibility. Moreover, David Keating started and runs SpeechNow.org as a volunteer in his spare time, making complying with onerous administrative and reporting requirements an even bigger challenge. In short, for a start-up like SpeechNow.org, limiting its ability to raise funds quickly and imposing needless red tape practically guarantees failure before the group even starts.

The Advisory Opinion Process and the Lawsuit

To determine if SpeechNow.org had to register as a political committee, Keating sought guidance from the Federal Election Commission soon after creating the group. In recent years, the FEC has conducted lengthy investigations into the activities of many citizen groups, culminating in millions of dollars in civil penalties.[8] For SpeechNow.org, proceeding without an okay from the FEC could expose it to severe penalties, including fines and jail time, for its speech.[9]

SpeechNow.org argued to the FEC that because it is an independent group of citizens, it should not be regulated as a political committee. Unlike some so-called "527s," SpeechNow.org accepts only contributions from individuals; unlike most PACs, it never donates to or coordinates its activities with candidates or political parties. It will also report its donations and expenditures under the regulations that apply to "independent expenditures"—that is, expenditures on political speech that are made independently of political campaigns or political parties.[10]

Therefore, SpeechNow.org raises none of the concerns that, in the courts and in the court of public opinion, have been the basis for regulating political speech in the name of campaign finance reform. With no link to candidates or parties, there is not even a risk of the appearance of corruption. Corporate and union contributions are banned. And SpeechNow.org's contributions and spending will be fully disclosed to the public within 48 hours of spending $10,000 or more.[11]

Unfortunately, on January 22, 2008, the general counsel's office of the FEC issued a draft advisory opinion concluding that SpeechNow.org's proposed activities would make it a political committee.[12] However, David M. Mason, who was then Chairman of the FEC, wrote another opinion that found SpeechNow.org should be exempt from the contribution limits on political committees.[13] Lacking a quorum at the time, the Commission could not officially adopt the staff's draft opinion or the Chairman's opinion, nor could it approve SpeechNow.org's operational plan by the legal deadline of January 28, 2008. Under the FEC's rules, the failure to issue a binding advisory opinion by the deadline amounts to a denial of the request. That left SpeechNow.org without legal protection and therefore vulnerable to a future enforcement action if it spoke. With no other alternative, SpeechNow.org filed a lawsuit against the FEC on February 14, 2008.

Joining SpeechNow.org in the suit are five of the organization's individual supporters: David Keating, Ed Crane, Fred Young, Brad Russo and Scott Burkhardt. David Keating is the president and treasurer of SpeechNow.org, which he manages in his spare time. He has pledged $5,500 to SpeechNow.org. Professionally, he is the executive director of the Club for Growth. Ed Crane is a founding member of SpeechNow.org, and has pledged $6,000 to SpeechNow.org. Ed is also the founder and president of the Cato Institute. Unfortunately, under the FEC's ruling, both David and Ed's contributions would exceed the maximum contribution limit.

Fred Young is the former president of Young Radiator Company. He believes in SpeechNow.org's mission, and has pledged $110,000 to help get SpeechNow.org off the ground. Like both David and Ed, Fred is prevented from doing so by the $5,000 contribution limit. Fred's contribution also raises a different problem with the law. In addition to limiting how much an individual may contribute to any single political committee, the law also limits the total amount of individual contributions to multiple political committees and total contributions to political committees, parties and candidates.[14] Currently, these limits are set at $42,700 and $108,200 respectively every two years.[15]

Brad Russo of Washington, D.C., and Scott Burkhardt of Chapel Hill, N.C., are passionate supporters of free speech and opponents of campaign finance laws that curb it. Both believe in the mission of SpeechNow.org and want to support it financially, but lack the resources of wealthier donors. Brad found SpeechNow.org through word-of-mouth and Scott found it online. They want to join with SpeechNow.org's larger-dollar donors so that their contributions can effectively advance the cause of free speech.

An Unresolved Question

The Supreme Court has never squarely confronted the question raised by SpeechNow.org's suit, but the paradox itself can be traced back to the Supreme Court's seminal campaign-finance decision in *Buckley v. Valeo*, in which the court considered the constitutionality of the 1974 amendments to the Federal Election Campaign Act.[16] Among other things, those amendments placed limits on the amounts that individuals could contribute or spend in support of federal candidates. The Court struck down the expenditure limits, viewing them

as a direct restriction on the amount of political speech.[17] This holding, recently reaffirmed in *Randall v. Sorrell*, means that individuals may spend unlimited amounts of their own money on independent political advertisements.[18] At the same time, however, the Court in *Buckley* upheld contribution limits, not just to candidates, but also to "political committees" that themselves make contributions to candidates.[19]

The closest the Supreme Court has come to addressing the issue of contribution limits as applied to groups that make independent expenditures was in *California Medical Association v. FEC*.[20] In that case, the Supreme Court upheld the $5,000 contribution limit as applied to a political committee that made both independent expenditures and direct contributions to candidates. Crucially, however, the deciding vote was cast by Justice Blackmun, who wrote separately to note that "a different result would follow if [limits] were applied to contributions to a political committee established for the purpose of making independent expenditures, rather than contributions to candidates."[21] Blackmun reasoned that the California Medical Association was "essentially [a] conduit[] for contributions to candidates, and as such . . . pose[d] a perceived threat of actual or potential corruption. In contrast, contributions to a committee that makes only independent expenditures pose no such threat."[22] As Justice Blackmun's concurrence makes clear, the constitutionality of contribution limits to groups like SpeechNow.org that exclusively make independent expenditures was not before the Court and, in any event, would not have secured a majority of the justices.

While the Supreme Court has never considered the constitutionality of FECA's contribution limits to groups like SpeechNow.org, two courts of appeals have considered similar issues involving state or local campaign-finance laws. In *North Carolina Right to Life, Inc. v. Leake*, the Court of Appeals for the Fourth Circuit invalidated a North Carolina law that imposed contribution limits on groups making only independent expenditures, holding that these contributions posed no risk of corruption.[23] North Carolina later amended its law and did not petition for certiorari to the Supreme Court.[24] The Ninth Circuit also had the opportunity to consider similar issues in *San Jose Silicon Valley Chamber of Commerce Political Action Committee v. City of San Jose*.[25] Unfortunately, that case was resolved on abstention grounds and did not reach the merits of the First Amendment arguments.[26] As a result, the Supreme Court still has not had an opportunity to answer the question SpeechNow.org's suit raises.

SpeechNow.org's Legal Argument

Under well-established U.S. Supreme Court precedent, the First Amendment guarantees individuals the right to speak without limit, so it should be common sense that groups of individuals—like SpeechNow.org—have the same rights. No one should have to sacrifice the First Amendment right to associate in order to exercise the First Amendment right to speak.

More than 30 years ago, the Supreme Court laid down the standard for evaluating individual contribution limits. In *Buckley*, the court held that limits on contributions made directly to political candidates or to groups that give money to political candidates could be justified as necessary to prevent *quid pro quo* corruption—the trading of political favors for campaign contributions.[27] While there is little evidence that such corruption is common, the Court held that even the appearance of *quid pro quo* corruption was enough to uphold contribution limits when money made its way directly into the hands of politicians.[28]

At the same time, the Court made perfectly clear that when individuals spend money independently of candidates, this spending does not create a risk of corruption. First, when the spending is independent, there can be no trading of favors for contributions. Moreover, as the Court held, "Unlike contributions [to candidates], such independent expenditures may well provide little assistance to the candidate's campaign, and indeed may prove counterproductive."[29] Candidates like to control the terms of the debate, and independent speech can change those terms. Indeed, that's why independent speech is so valuable: It brings issues into the debate that candidates might otherwise prefer to ignore.

Because independent expenditures pose no risk of corruption, individuals are allowed to spend as much of their own money as they want on independent ads.[30] So why should SpeechNow.org's independent ads be treated any differently? Independent speech does not somehow become "corrupting" when individuals pool their money to pay for it. Indeed, that is exactly what the FEC Chairman reasoned when he issued a separate opinion on SpeechNow.org's advisory opinion request.

Thankfully the Supreme Court has also long recognized the First Amendment right to association and the importance of like-minded people being able to band together for effective advocacy.[31] It has repeatedly held that when political spending does not raise the threat of corruption, groups have exactly the same right to speak that individuals have. In *Citizens Against Rent Control v. City of Berkeley*, for example, the Court struck down a California law that applied contribution limits to ballot initiative committees. Just like SpeechNow.org's activity, Citizens Against Rent Control's speech was completely independent of political candidates. To the Court, the First Amendment violation was obvious: "To place a Spartan limit—or indeed any limit—on individuals wishing to band together to advance their views on a ballot measure, while placing none on individuals acting alone, is clearly a restraint on the right of association."[32] This restraint, in turn, "plainly impairs freedom of expression."[33]

Buckley, *Citizens Against Rent Control*, and other campaign finance cases establish a presumption in favor of the First Amendment's guarantees of free speech and association, allowing only limited exceptions to prevent corruption or its appearance. SpeechNow.org is an independent group of citizens who simply want to advocate for or against candidates on the basis of their stand on free speech. And advocating for or against candidates isn't "corrupting," it is our constitutional right. Indeed, the whole point of political speech is to influence elections—to convince fellow citizens that on important issues, some candidates are better than others.

The FEC's Legal Argument

The FEC sees things differently. In their view, independent groups like SpeechNow.org poses precisely the same risk of corruption that the Supreme Court held justified contribution limits to political party committees in *McConnell v. FEC.*[34] This is not a risk of *quid pro quo* corruption, but rather the ability to engender the gratitude of political candidates in a way that leads to preferential access and influence. But there are at least two significant problems with this argument. The first and most obvious is that party committees, being composed of officeholders, are different in kind than independent groups like SpeechNow.org. Parties actually have the ability to grant preferential access to officeholders.[35] SpeechNow.org, by contrast, does not; indeed, it has gone to great lengths to insulate itself from officeholders.

The second problem with this argument, when applied to groups like SpeechNow.org that are totally independent of candidates, is that it amounts to saying that potential for gratitude created by independent expenditures is enough to justify regulation of groups making those expenditures. But this reasoning applies with equal force to independent expenditures made by individuals who are independent of candidates. Merely pooling money does not imbue it with corrupting powers, so it can be no less "corrupting" for one individual to spend $100,000 directly than it is for ten individuals to pool $10,000 each for an identical expenditure. Indeed, taken seriously, the FEC's argument would extend even further, beyond money and to all potential sources of disproportionate gratitude, including gratitude for endorsements by newspapers or celebrities. This would stretch the holding of *McConnell* beyond all reasonable bounds, and is certainly not required by the Court's previous campaign-finance decisions. As one commenter has noted, "the Supreme Court has never said that benefit to the candidate, with the inference that the candidate will be grateful for the benefit and will be tempted to provide favors accordingly, is enough to support regulation of campaign money. McConnell clearly held that benefit (even benefit followed by gratitude and temptation) is not sufficient to justify a campaign restriction."[36]

Alternatively, the FEC downplays the burden of contribution limits, relying heavily on the Supreme Court's pronouncement in *Buckley* that "the overall effect of [FECA's] contribution ceilings is merely to require candidates and political committees to raise funds from a greater number of persons and to compel people who would otherwise contribute amounts greater than the statutory limits to expend such funds on direct political expression, rather than to reduce the total amount of money potentially available to promote political expression."[37] But the distinction between contributions and expenditures for "direct political expression" breaks down when contributions are used exclusively for independent expenditures. The Supreme Court itself recognized this only five years after *Buckley* when the Court struck down contribution limits as applied to ballot-issue committees, noting that such limits "automatically affects expenditures" and, in turn, "operate as a direct restraint on freedom of expression."[38] The relevant question, then, is not whether a transfer of money can be described as a "contribution," but whether that transfer of money creates the potential for corruption.

Finally, the FEC has argued that contribution limits are necessary to ensure that advertising disclaimers required by FECA are effective.[39] The theory behind this argument is that viewers reading an advertising disclaimer, which is not required to identify the individual donors who funded the expenditure, will be misled into thinking that the group paying for the ad enjoys broader support than it actually does. This argument ignores the fact that SpeechNow.org's donors will be disclosed to the FEC in independent-expenditure reports that will be freely available on the FEC's website. More fundamentally, this argument is remarkable because it justifies substantive limits on speech as a means of making disclosure more effective. But this is precisely backwards. Disclaimer requirements are justified as a means of making FECA's substantive limits on political activity effective, they are not an end in themselves.[40] There are also far more narrowly tailored ways to achieve the FEC's stated objective, namely, requiring the disclosure of large individual donors within the disclaimer. Indeed, both California and Washington already have similar requirements.[41]

The Future of SpeechNow.org

Thanks to a unique procedural provision in FECA, *SpeechNow.org v. FEC* is on the fast track to an en banc hearing before the D.C. Circuit. Under this procedure, the district court is limited to entering findings of fact and identifying questions of constitutional law, after which it must immediately certify the case to the court of appeals, which hears the matter sitting en banc.[42] Briefing on these issues has been completed and, at the time this article is being written, the case awaits certification to the D.C. Circuit.

The stakes in SpeechNow.org's case are high. If SpeechNow.org is silenced, it would be practically impossible for Americans to join together and speak effectively to other Americans about whom to elect to office. It would be clear that so-called "campaign finance" regulations are really "speech and association" regulations. Perhaps more troubling, defeat for SpeechNow.org would call into question one of the central holdings of *Buckley*: that individuals have an unlimited right to make independent expenditures for or against federal candidates. That would mark a revolutionary shift in the Court's political-speech jurisprudence and would vastly expand Congress's power to regulate the marketplace of ideas.

There is, however, every reason to hope that the D.C. Circuit will not let it come to that. Moreover, given the importance of the issue and the frequency with which the Supreme Court has reviewed campaign-finance laws in recent years, it is also possible that a bad decision by the court of appeals could be promptly corrected.[43] However it is decided, though, it seems likely that SpeechNow.org's case will finally resolve "one of the most important unanswered questions surrounding the constitutionality of campaign finance laws: does Congress have the power to limit contributions to committees that make only independent expenditures?"[44]

Endnotes

1 "Congress shall make no law... abridging the freedom of speech... or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

2 Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981).

3 Buckley v. Valeo, 424 U.S. 1, 48-49 (1976).

4 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

5 Federal Election Campaign Act of 1971 as amended by the Federal Election Campaign Act Amendments of 1974, 2 U.S.C. §§ 431-434, 441a (2007).

6 2 U.S.C. § 441a(a)(1)(C).

7 2 U.S.C. §§ 432, 433, 434(a).

8 Among those fined were: America Coming Together ($775,000), http://eqs.nictusa.com/eqsdocs/000061A1.pdf; Progress for America Voter Fund ($750,000), http://eqs.nictusa.com/eqsdocs/00005AA7.pdf; The Media Fund ($580,000), http://eqs.nictusa.com/eqsdocs/000066D5.pdf; Swift Boat Veterans and POWs for Truth ($299,500), http://eqs.nictusa.com/eqsdocs/00005900.pdf; League of Conservation Voters ($180,000), http://eqs.nictusa.com/eqsdocs/00005905.pdf; and Moveon.org Voter Fund ($150,000), http://eqs.nictusa.com/eqsdocs/000058F4.pdf.

9 *See*, *e.g.*, 2 U.S.C. § 437g(d)(1)(A) (2007) (/Any person who kno wingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution, donation, or expenditure . . . aggregating $25,000 or more during a calendar year shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both/).

10 2 U.S.C. § 431(17).

11 2 U.S.C. § 434(c).

12 AO 2007-32 (SpeechNow.org), *available at* http://saos.nictusa.com/aodocs/966935.pdf.

13 Dissenting Opinion of Chairman David M. Mason in Advisory Opinion Request 2007-32, *available at* http://saos.nictusa.com/aodocs/967169.pdf.

14 *See*, 2 U.S.C. § 441a(a)(3); 11 C.F.R. § 110.5(b)(1).

15 Price Index Increases of Expenditure and Contribution Limitations: Notice of Expenditure and Contribution Limitation Increases, 72 Fed. Reg. 5294, 5295 (Feb. 5, 2007).

16 424 U.S. 1 (1976).

17 *Id.* at 39-51.

18 548 U.S. 230 (2006).

19 424 U.S. at 24-38.

20 453 U.S. 182 (1981).

21 *Id.* at 203

22 *Id.*

23 525 F.3d 274, 291-295 (4th Cir. 2008).

24 2008 N.C. Sess. Laws 150 (Aug. 2, 2008).

25 546 F.3d 1087 (9th Cir. 2008).

26 *Id.* at 1096.

27 *Buckley*, 424 U.S. at 26-29.

28 *Id.* at 27.

29 *Id.* at 47.

30 *Id.* at 47-51.

31 NAACP v. Alabama, 357 U.S. 449, 460 (1958) (recognizing that "[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association. . . .").

32 Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 296 (1981).

33 *Id.* at 299.

34 540 U.S. 93 (2003).

35 *Id.* at 150 ("The record in the present case is replete with similar examples of national party committees peddling access to federal candidates and officeholders in exchange for large soft-money donations.").

36 Richard Briffault, *The 527 Problem...and the* Buckley *Problem*, 73 Geo. Wash. L. Rev. 1701, 1745 (2005).

37 Buckley, 424 U.S. at 21-22.

38 Citizens Against Rent Control, 454 U.S. at 299.

39 2 U.S.C. § 441d(d)(2).

40 *Cf.* Buckley, 424 U.S. at 68 ("[D]isclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.").

41 Cal. Gov't Code § 84506(a)(2); Rev. Code Wash. § 42.17.510(2).

42 2 U.S.C. § 437h.

43 Citizens United v. FEC, 129 S. Ct. 594 (2008) (noting probable jurisdiction); Davis v. FEC, 128 S. Ct. 2759 (2008) (holding the so-called "Millionaire's Amendment" unconstitutional); FEC v. Wisconsin Right to Life, Inc., 127 S. Ct. 2652 (2007) (granting as-applied exemption to BCRA electioneering communication provisions); Wisconsin Right to Life, Inc. v. FEC, 546 U.S. 410 (2006) (holding that McConnell did not foreclose as-applied challenges to BCRA); Randall v. Sorrell, 548 U.S. 230 (2006) (striking down state contribution and expenditure limits).

44 Rick Hasen, *More on SpeechNow.Org Advisory Opinion*, http://electionlawblog.org/archives/.

010106.html (Jan. 24, 2008), last visited Dec. 31, 2008.

Davis v. FEC and the Constitutionality of "Clean Elections" Systems

*By William R. Maurer & Timothy D. Keller**

In a "clean elections" system, taxpayer funded candidates must agree to limit their campaign spending. Imposing limits on campaign spending for candidates who forego taxpayer dollars and instead run traditional campaigns would be unconstitutional. Most clean elections schemes thus rely on "matching," "rescue," or "trigger" funds to level the playing field between publicly funded and traditional candidates and to discourage traditional candidates from exceeding the spending limits imposed on the taxpayer funded candidate. When a traditional candidate raises or spends more money than the taxpayer financed candidate's initial subsidy, the government gives additional money to the taxpayer financed candidate to counteract the amount the privately financed candidate collects or spends. In other words, once a privately financed candidate raises or spends above the "trigger" amount, her exercise of her First Amendment rights results in a direct government subsidy to her opponent. For almost a decade, federal courts have largely upheld such systems against First Amendment challenges. The U.S. Supreme Court's decision in *Davis v. FEC* undermines the reasoning of these decisions and likely spells the end of this new wave of regulating political speech.

The Promise of Reform: Five Years Later

In March 2007, the country marked the five-year anniversary of the Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold"). This coincided with the announcement of fund-raising totals for presidential candidates for the first quarter of 2007.[1] The candidates together collected over $125 million in donations over a year-and-a-half before the 2008 general election. Since then, the country has witnessed both a wave of political scandals and the most expensive presidential election in history.[2]

This was not supposed to happen. McCain-Feingold's proponents argued that the law was necessary to get "soft money" out of campaigns in order to overcome "corruption and the appearance of corruption" associated with large contributions.[3] However, the difference between the law's goal and its results suggests that money in politics will not go away. As this latest "reform" fails to achieve its goals, proponents of regulating political speech continue to propose more expansive regulatory systems.

The most radical idea is a form of taxpayer financed campaigns that proponents call "clean elections," or sometimes "fair elections."[4] According to the proponents, "Fair Elections are a bold solution to the problem of money in politics."[5] Under this system, taxpayers and others are either forced or incentivized to finance the political campaigns of those politicians who participate in the system, regardless of whether the taxpayer supports, opposes, or is disinterested in such politicians' campaigns. In addition, the government attempts to "level" the political playing field by providing funds to counteract the speech of privately financed candidates and independent groups.

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"Clean Elections": The New Wave of Speech Regulation

"Clean elections" systems have been propagating. In Maine,[6] Arizona,[7] and Connecticut,[8] taxpayers and fee payers finance all statewide and state legislative races. Other states finance the campaigns only for certain offices. North Carolina mandates financing of judicial elections,[9] while New Mexico mandates financing of campaigns for state Public Regulation Commission and statewide judicial offices.[10] In the First Session of the 110th Congress, Senator Durbin introduced Senate Bill 1285, the "Fair Elections Now Act."[11] As a Senator, Barack Obama was a co-sponsor of this legislation.[12]

A leading proponent of such "Clean Election" systems has identified some common features of these laws.[13] These include:

- When the system is implemented, it is often accompanied by drastic reductions in the amount of money individuals and groups may contribute to traditional candidates that eschew taxpayer funding.
- A candidate wishing to run his campaign with taxpayer funds must demonstrate a modicum of support by collecting small "seed money" donations and a limited number of small monetary contributions in the $5 to $10 range to establish the viability of their campaigns.
- Once a candidate agrees to run his campaign with public funds, he can no longer accept private contributions, spend personal money on their campaigns, and must agree to limit the amount of money they spend to reach voters.[14]
- Taxpayer financed candidates—and often their opponents—are subject to additional reporting requirements so that the government may track their political activities and ensure that the candidates are complying with the system's restrictions.
- The government makes available generous amounts of "matching," "trigger," or "fair fight" funds, through which it provides additional funds to taxpayer financed candidates when his traditionally funded opponent collects or spends funds greater than those the taxpayer financed candidate receives from the government.

These schemes have had good luck surviving legal challenges. The U.S. Courts of Appeal for the First,[15] Fourth,[16] and Sixth Circuits[17] each upheld facial challenges to such laws. Until recently, only the Eighth Circuit in *Day v. Holahan* had struck down a "clean elections" style system.[18]

Davis v. FEC

The outlook for such systems became significantly dimmer in 2008. In *Davis v. FEC,*[19] the U.S. Supreme Court struck

down a portion of the McCain-Feingold law commonly called the "Millionaire's Amendment." McCain-Feingold limited the size of donations federal candidates may receive from individuals and how much parties may spend on campaign activities coordinated with federal candidates.[20] These restrictions changed, though, when a federal candidate's opponent exceeded an "opposition personal funds amount" (OPFA) by $350,000. The OPFA included both personal funds and other fundraising. Once the personally financed candidate went past the $350,000 limit, the non-self-financing candidate was permitted to receive individual contributions at treble the normal limit, including from individuals who reached the aggregate contributions cap, and was permitted to accept coordinated party expenditures without limit.[21]

Jack Davis, a Democratic candidate for the U.S. House of Representatives, sued to overturn the Millionaire's Amendment. A three-judge panel of the District Court granted summary judgment in favor of the FEC. Davis appealed directly to the U.S. Supreme Court, which reversed.

Justice Alito, writing the majority opinion, began by noting that while contribution limits may be challenged for being too low, they cannot be unconstitutional for being too high. However, the Millionaire's Amendment did not raise contribution limits across the board. Instead, it raised contribution limits only for the non-self-financing candidate and did so only when that candidate's expenditure of personal funds causes the OPFA threshold to be exceeded. The Court had made clear in *Buckley v. Valeo*[22] that the expenditure of personal funds both combated corruption and was constitutionally protected free speech.

The Court found that the Millionaire's Amendment imposed "an unprecedented penalty" on any candidate who robustly exercised their First Amendment right to expend personal funds. In other words, the Millionaire's Amendment "require[d] a candidate to choose between the First Amendment right to engage in unfettered speech and subjection to discriminatory fundraising limitations."[23] Even though a candidate could choose to make large personal expenditures to support their campaigns, "they must shoulder a special and potentially significant burden if they make that choice."[24] Notably, the Court cited to the Eighth Circuit's decision in *Day* for this proposition.[25]

Having identified the burden, the Court then turned to whether it was justified by a compelling state interest. The Court concluded that it was not.[26] The FEC justified the Millionaire's Amendment not on the basis that it eliminated corruption or the appearance of corruption, but on the basis that it "level[led] electoral opportunities for candidates of different personal wealth."[27] This argument, the Court concluded, has "ominous implications because it would permit Congress to arrogate the voters' authority to evaluate the strengths of candidates competing for office…. Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election."[28] The Court concluded, "it is a dangerous business for Congress to use the election laws to influence voters' choices."[29]

Davis and the Future of "Clean Elections"

Does *Davis* spell the end of "clean elections" systems? The answer would seem to be almost certainly, "Yes."

The Court in *Davis* held that the Millionaire's Amendment was unconstitutional because (i) it was discriminatory because one candidate was rewarded by the government while the other was not, (ii) it forced a candidate to choose between vigorously exercising her free speech rights and providing her opponent with government benefits, and (iii) the government sought to "level" the electoral playing field through this policy. "Clean elections" systems possess, and even magnify, all these problems.

First, these systems are notably discriminatory. Where the Millionaire's Amendment gave a non-self-financing candidate the *opportunity* to raise additional money, "clean elections" systems simply give the publicly financed candidate more money and this gift of public funds is entirely dependent on the actions of the privately financed candidate. Where the Millionaire's Amendment gave the non-self-financing candidate a chance to counteract the self-financing-candidate's speech, "clean elections" makes that money a certainty.

Such laws are asymmetrical because the government's money goes to all the privately financed candidate's opponents. Take for instance, Matt Salmon's experience as the 2002 Republican gubernatorial candidate for governor in Arizona. Salmon first had to fight a primary against two publicly funded Republican candidates. He won, but his campaign was broke and many of his contributors had already maxed out their contributions. His two general election opponents, an independent and a Democratic candidate, on the other hand, picked up checks for $615,000 from the state the day after the primary. The state Republican Party made $200,000 in independent expenditures on behalf of Salmon—but that money was matched dollar-for-dollar by additional subsidies directly to his two publicly funded opponents.[30] Even a fundraiser with President George W. Bush did little to alleviate Salmon's financial disparity. As a spokeswoman for Salmon's Democratic opponent explained, "I'm not sure the President realizes he's raising money for both candidates," referring to the Bush event as a "dual fund-raiser."[31] In fact, it was a triple fundraiser given that Salmon had two opponents. In this case, matching funds not only counteracted Salmon's speech, they overwhelmed it. At the end of the campaign, Salmon raised $2,116,203.05[32] but his Democratic opponent received a total of $2,254,740.00.[33]

Worse still, many of these laws also fail to adequately take into account the cost of raising money. In the example above, all of Salmon's opponents were matched based on Salmon's gross fundraising totals, though Salmon estimated that he spent 25 cents for every dollar he raised.[34]

In these circumstances, "clean elections" systems give government funded candidates a free ride on their privately financed opponents' coattails. The result is that a privately funded candidate, like the self-financed-candidate in *Davis,* faces two choices, both bad: accept expenditure limits by running for office with government funds or suffer the punitive provisions of the public campaign finance scheme.

This discriminatory system is not supported by any compelling, or even legitimate, government interest. The proponents of "clean elections" systems have been quite clear (or they were until *Davis* was released) that the entire purpose of a "clean elections" system is to "level the playing field."[35] One candid proponent of King County, Washington's proposed "clean elections" system said that matching funds will have "the benefit of discouraging me from raising a whole bunch of money because I know you're going to get the same amount and so it's a level playing field at whatever that amount is."[36] Undoubtedly, proponents of such systems will now attempt to argue that "clean elections" seeks to accomplish some other governmental goal. This argument seems particularly unpersuasive after these people had been promoting this system as a means to "level the playing field" for years.

Conclusion

Some commentators have argued that the differences between the Millionaire's Amendment and "clean elections" systems are so significant that *Davis* should have little impact on their continued viability.[37] In constitutional terms, however, "clean elections" systems are *worse* than the Millionaire's Amendment because they are more discriminatory than McCain-Feingold. To say that any difference between the two means that "clean elections" systems should presumed to be constitutional is like saying a person is healthy because he has pneumonia instead of a cold.

Both courts and policy makers are beginning to recognize that *Davis* has changed the rules governing "clean elections."[38] *Davis* makes existing laws an area ripe for constitutional challenge and should serve as a warning to legislative bodies seeking to restrict speech by imposing such systems. In that regard, *Davis* makes it likely that advocates of regulation will need to develop different mechanisms in their efforts to suppress speech and association in the coming years.

Endnotes

1 *See Flood of Campaign Cash Shows the Failure of McCain-Feingold,* Examiner.com, Apr. 4, 2007, http://www.examiner.com/a-655501Flood_of_campaign_cash_shows_the_failure_of_McCain_Feingold.html?cid=all-hp-featured_editorial (discussing amounts raised by candidates for 2008 presidential election).

2 Jeanne Cummings, *2008 campaign costliest in U.S. history,* Politico, Nov. 5, 2008, http://www.politico.com/news/stories/1108/15283.html.

3 McConnell v. FEC, 540 U.S. 93, 132-34, 142 (2003).

4 It appears that the proponents' real goal is not to reform how campaigns are financed, but to have their favored policies become law, a situation reformers believe will become more likely once "clean elections" removes the influence of monied interests. *See* Brennan Center for Justice et al., Breaking Free with Fair Elections: A New Declaration of Independence for Congress 1 (March 2007) (hereinafter, *"Breaking Free"*) ("If we want to protect the environment, design a better health care system or improve our energy policy, we need a political system that encourages lawmakers to listen more to voters than to oil and gas companies, pharmaceutical giants and other industries").

5 *Breaking Free*, *supra* note 4, at 1.

6 An Act to Reform Campaign Finance, Me. Rev. Stat. Ann. tit. 21-A, §§ 1121-1128.

7 Citizens Clean Elections Act, Ariz. Rev. Stat. Ann., §§ 16-940 to - 961.

8 An Act Concerning Comprehensive Campaign Finance Reform for State-Wide Constitutional and General Assembly Offices, Conn. Gen. Stat. §§ 9-700 to - 751.

9 North Carolina Judicial Campaign Reform Act, N.C. Gen. Stat. §163-279.61-.70.

10 Voter Action Act, N. M. Stat. § 1-19A-1 to -17. Taxpayers also fund municipal campaigns in cities such as Albuquerque, New Mexico, Article XVI, Charter of the City of Albuquerque; Tucson, Arizona, Tucson City Code, Ch. XVI, Sub. B; and Portland, Oregon, Portland City Code Ch. 2.10.

11 S. 1285, 110th Cong. (2007).

12 http://thomas.loc.gov/cgi-bin/bdquery/z?d110:SN01285:@@@P.

13 *See Breaking Free*, supra note 4, at 6-7.

14 This is a key constitutional problem with "clean elections" systems. The Supreme Court has repeatedly and consistently held that limits on spending by campaigns are unconstitutional. *See Randall v. Sorrell,* 548 U.S. 230, 242 (2006). Thus, if a taxpayer financed scheme coerces a candidate into the system, then the expenditure limits are, in effect, mandatory and therefore unconstitutional.

15 *See* Vote Choice, Inc. v. DiStefano, 4 F.3d 26 (1st Cir. 1993) (upholding Rhode Island's taxpayer financing scheme); Daggett v. Comm'n on Governmental Ethics & Election Practices, 205 F.3d 445 (1st Cir. 2000) (upholding Maine's scheme).

16 North Carolina Right to Life Comm. v. Leake, 524 F.3d 427 (4th Cir. 2008).

17 Gable v. Patton, 142 F.3d 940 (6th Cir. 1998).

18 Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994) (striking down Minnesota's "equal funding" provision with regard to independent expenditures). The Ninth Circuit also reinstated a challenge to Arizona's "clean elections" system after the U.S. District Court dismissed it for failing to state a claim, but the Ninth Circuit's order did not contain any substantive discussion. Ass'n of Am. Physicians & Surgeons v. Brewer, 497 F.3d 1056 (9th Cir. 2007).

19 __ U.S. __, 128 S. Ct. 2759 (2008).

20 2 U.S.C. § 441a-1.

21 *Id.*

22 424 U.S. 1, 52-53 (1976) (per curiam).

23 *Davis,* 128 S. Ct. at 2771.

24 *Id.* at 2772.

25 *Id.* (citing *Day,* 34 F.3d at 1359-60).

26 *Id.*

27 *Id.* at 2773.

28 *Id.* at 2773-74.

29 *Id.* at 2774.

30 Clint Bolick, *Fundraising Arizona: We've Just Seen the Future of Campaign Finance Reform, and it's Not Pretty,* The Weekly Standard, Dec. 2, 2002.

31 Michelle Rushlo, *Bush to Stump for Fellow Republicans in Arizona,* Associated Press, Sept. 26, 2002.

32 http://www.azsos.gov/cfs/PublicReports/2002/94398CFF-CA9F-4BF0-B9C0-746A1E3D6D95.pdf.

33 http://www.ccec.state.az.us/ccecweb/ccecays/elections/candAccts02.asp.

34 *See* Bolick, *supra*, note 30.

35 *See* Public Campaign, *Fair Elections: Leveling the Playing Field* (Undated), *available at* http://library.publicampaign.org/sites/default/files/09-24_fair-elections_factsheet.pdf ("If a candidate runs under the Fair Elections system and is outspent by a privately financed opponent, Fair Fight Funds are available to the candidate, up to a limit, to level the playing field.").

36 Transcript of Interview with King County Councilman Bob Ferguson, http://www.kingcounty.gov/Ferguson/Multimedia/transcript/ComcastNewsmakers.aspx?print=1.

37 Note, 122 Harv. L. Rev. 375, 380 (2008) ("This reading of *Davis* is understandable, but ultimately incorrect. It oversimplifies and overbroadens the Court's reasoning, and it ignores the critical constitutional distinction between government restrictions on speech and government subsidies of speech.").

38 *See* McComish v. Brewer, No. cv-08-1550-PHX-ROS, slip op. at 15 (D. Ariz. Oct. 17, 2008) (findings and conclusions supporting order denying motions for preliminary injunction, but nonetheless holding that constitutional challenges to Arizona's Clean Elections Act have "a high likelihood of success on the merits"); Letter from Albert Porroni, Executive Director & Legislative Counsel, New Jersey State Legislature Office of Legislative Services, to William Castner, Executive Director, New Jersey Assembly Democratic Office (July 21, 2008) (on file with the authors) (legislative counsel concludes that the "rescue money provisions [of "The 2009 New Jersey Fair and Clean Elections Pilot Project Act"]… violate the First Amendment," and relying on *Davis*).

Intellectual Property

In re Blinski: Business Method Patents Transformed?

*By David L. Applegate**

The day before Halloween, the Court of Appeals for the Federal Circuit released its much-anticipated en banc decision in the case of *In re Bernard L. Bilski and Rand A. Warsaw.*[1] But was it a trick or was it a treat? Even discounting for different points of view, no one seems yet to know for sure.

In re Bilski is an appeal to the Federal Circuit from a final decision of the Board of Patent Appeals and Interferences sustaining an examiner's rejection of all eleven claims of U.S. Patent Application, Serial No. 08/833,892. In essence, the application was for getting a U.S. patent on a process of hedging commodities. At issue specifically in *Bilski* were (1) whether the examiner had erroneously rejected the claims of the application for a U.S. patent as not directed to patent-eligible subject matter under 35 U.S.C. § 101, and (2) whether the Board erred in upholding that rejection.[2] At issue more broadly was—and is—the continued vitality of so-called "business method" patents, such as Amazon.com's famous patent on "one-click" shopping over the Internet.[3]

Although patents on processes and even financial patents have been recognized since nearly the adoption of the Constitution, they have become more widespread—and thus at the same time more controversial—in the age of computers and the Internet. At the end of the last decade, the Federal Circuit decided in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*[4] and *AT&T Corp. v. Excel Communications, Inc.*[5] that it was no longer necessary for the courts or the Patent Office to distinguish between "technology-based" and "business-based" patents. With those two decisions, the floodgates opened. Applicants deluged the U.S. Patent and Trademark Office with applications for patents on ways of doing business, from methods of online shopping to methods of raising funds in financial markets.[6] The resulting thicket of patent protection has left many business managers confounded and many critics of "business method" patents and patent holding companies unamused.

I. En banc *Bilski* Issues

Thus when the Federal Circuit agreed on February 15, 2008, to hear the *Bilski* appeal en banc, many hoped that the court would clarify—if not limit—the extent to which "business methods" remain eligible for patent protection under U.S. law in a more general way. Hopes were raised when the Federal Circuit invited amici to address the following five sets of questions:

> (1) whether a claim addressed to a method practiced by a commodity provider for hedging the "consumption risks" associated with a commodity sold at a fixed price is patent-eligible subject matter under 35 U.S.C. § 101 ("Section 101");
>
> .....

> (2) what standard should govern in determining whether a process is patent-eligible subject matter under Section 101;
>
> (3) whether the claimed subject matter was not patent-eligible because it constituted an abstract idea or mental process, and when a claim that contains both mental and physical steps creates patent-eligible subject matter;
>
> (4) whether a method or process must result in a physical transformation of an article, or be tied to a machine, to be patent-eligible subject matter under Section 101;
>
> (5) whether it is appropriate to reconsider *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*[7] and *AT&T Corp. v. Excel Communications, Inc.*,[8] and, if so, whether those cases should be overruled in any respect.[9]

In a fractured decision that generated 132 pages of opinion, including three dissents and one concurrence, the Federal Circuit ultimately answered the first four questions directly and the fifth indirectly. Nonetheless, practitioners and commentators are still puzzling over *Bilski*'s likely practical effect: will it make so-called "business method" patents harder or easier to get—and therefore more or less valuable—in the future?[10]

There is as yet no clear answer. But first, a little background is in order.

II. Patent Law's Constitutional Origins

The Constitutional source of all U.S. patent law is Article I, Section One, Clause Eight of the Constitution, which empowers Congress, among other purposes, to "promote the progress of… the useful Arts" by "securing for limited Times to… Inventors the exclusive right to their respective… Discoveries."[11] Although the Founders' word choice and capitalization now strike us as archaic, the purpose and reasoning behind this clause are clear enough: to promote the general progress of "the arts" (what we now call "science") by providing inventors with the economic incentive of a time-limited monopoly on new "discoveries" or inventions.[12] At the same time it empowers such monopolies, this clause also requires that they be limited in time, implicitly recognizing that—if the "useful arts" are indeed to progress—then knowledge of how to make or use something new and useful can not rightly be permanently restricted to the first person to invent or to discover it.

To promote, rather than restrict, the advance of the "useful arts, it has long been accepted U. S. law that inventions or discoveries are potentially patentable, but abstract ideas or fundamental principles are not.[13] The rule is easy enough to state, but where does one draw the line between potentially patentable and unpatentable subject matter?

In the Industrial Age of the 18th and 19th centuries, the answer seemed fairly clear: logarithms were not patentable, for example, but the slide rule clearly was. In addition, an inventor

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(or "discoverer") first had to "reduce the invention to practice," typically by making a working model and sending it in to the Patent Office. (Making a working model, if nothing else, demonstrated that the inventor actually had an invention, not just an abstract idea, even if that invention were anticipated, obvious, or for some other reason not actually patentable.[14]) But the Patent Office long ago became overwhelmed with models of inventions, and the model-building practice is now archaic; instead, one "reduces an invention to practice" by describing it in words and pictures sufficiently to demonstrate to a person having of ordinary skill in the art how to make and use it.[15]

Even in the 20th century, with the advent of the Electrical Age, the line was not difficult to draw: Faraday's Law was not patentable, but the microwave oven was. But at the dawn of the Internet Age, things somehow seemed to go awry. Since that time, inventors, the Patent Office, and the courts have all seemed to have a harder time in interpreting the Constitutional mandate as implemented by Congress, and in knowing where to draw the line.

III. Statutory Implementation

In keeping with the Constitution's limited grant of power to create patent monopolies, Congress has authorized time-limited patent rights for new inventions and discoveries almost from the start of the republic. Beginning with the original patent statute in 1790, just a year after the Constitution was ratified, and continuing through the current Patent Act of 1952, as from time to time amended, the U.S. has had a patent statute virtually throughout its history. Subject to filing requirements and other limitations, the operative patent statutes have authorized the grant of patents to those who invent or discover something that is new ("novel"), non-obvious (to others of ordinary skill in the "art"), and useful (although the standard of utility is low[16]).

Subject to the conditions and other requirements of title 35 of the U. S. Code, the current 1952 patent statute explicitly limits patent-eligible subject matter to five specified categories—processes, machines, manufactures, compositions of matter, plus new and useful "improvements thereof"—in the following language:

> Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor.[17]

Thus, the threshold of patentability in the United States is to determine whether a claimed invention is a process, a machine, a manufacture, a composition of matter, or an improvement on one of those four things.

Machines, manufactures, and compositions of matter can raise their own patentability issues, but those three categories are for the most part readily understandable. Similarly, the extent of "improvement" necessary for patentability is subject to vigorous debate in litigation on a case-by-case basis, as accused infringers argue that the invention is at best obvious in light of the relevant prior art, if not outright anticipated, but it is generally not difficult to determine if the starting point is a machine, manufacture, or composition of matter. It is the meaning of "process" that has seemed to cause the most trouble, especially in the wake of computer software, electronic communications, and the Federal Court decisions in *State Street Bank* and *AT&T*.

IV. What Does "Process" Mean?

A. Statutory Definition

One difficulty in deciphering the term "process" is that Congress has tautologically used the word "process" itself in its own definition:

> The term *'process' means process*, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.[18]

Up until 1952, U. S. patent statutes dating back to the 1793 Act had used "art" instead of "process," but this too is not particularly helpful. Substituting "art" for "process" as the defined term in Section 100(b) would likewise produce the following tautological definition:

> The term *'art' means* process, *art* or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.

Thus the Supreme Court has long held that the change from "art" to "process" did not alter the scope of eligibility for patent protection because "[i]n the language of the patent law, [a process] is an art."[19] Whatever the answer may be, it is clear that it is not apparent from the face of the statute.

B. Common Parlance v. Supreme Court Jurisprudence

As several amici argued in *Bilski*, the word "process" generally has a broad meaning in lay usage. Citing Webster's New International Dictionary of the English Language, the *Bilski* majority conceded that in 1952, when Congress amended § 101 to include "process," the ordinary meaning of the term was quite broad: "A procedure... A series of actions, motions, or operations definitely conducing to an end, whether voluntary or involuntary."[20]

Still, as *Bilski* itself observed, the Supreme Court has held that "process" as used in § 101 has a narrower meaning.[21] In common parlance, therefore laying out a series of scales of logarithms of numbers end-to-end to achieve the results of multiplication would be a "process," but for § 101 purposes the discovery would not be a "patentable process" until an inventor had achieved the slide rule.

V. *Bilski* en banc

The central issue before the Federal Circuit in *Bilski* was comparable to whether the applicants, Bernard L. Bilski and Rand A. Warsaw, had discovered logarithms or had invented the slide rule (or, some might say, having already seen the slide rule, tried to get a patent on logarithms). In more familiar patent language, did the applicants "seek[] to claim a fundamental principle (such as an abstract idea) or a mental process"—or did they in fact actually reduce to practice a potentially patentable invention?[22] The Bilski applicants' claim 1 was representative:

> A method for managing the consumption risk costs of a commodity sold by a commodity provider at a fixed price comprising the steps of:

> (a) initiating a series of transactions between said commodity provider and consumers of said commodity wherein said consumers purchase said commodity at a fixed rate based upon historical averages, said fixed rate corresponding to a risk position of said consumer;
>
> (b) identifying market participants for said commodity having a counterrisk position to said consumers; and
>
> (c) initiating a series of transactions between said commodity provider and said market participants at a second fixed rate such that said series of market participant transactions balances the risk position of said series of consumer transactions.[23]

In essence, as the Federal Circuit quickly observed, the Bilski applicants' claim is for a method of hedging risk in the field of commodities trading.[24] From that simple observation, and the single proposition that abstract ideas are not patentable, followed thirty-two pages of majority opinion by Chief Judge Michel (joined by Judges Lourie, Schall, Bryson, Gajarsa, Linn, Dyk, Prost, and Moore); seventy-six pages of dissents (forty-one by Judge Newman, twenty-five by Judge Mayer, and ten by Judge Rader); and a twenty-page concurrence by Judges Dyk and Linn that responded to the dissents' assertion that the majority had "usurp[ed] the legislative role."[25]

A. Majority Opinion

Answering questions (1) through (4) from the grant of en banc hearing, a majority of nine judges agreed following a review of prior U.S. Supreme Court and Federal Circuit precedent that, to be patent-eligible subject matter under 35 U.S.C. § 101, a method or process must (a) result in a physical transformation of an article, or (b) be tied to a machine, as purportedly set forth in a sequential trilogy of U. S. Supreme Court cases, *Gottschalk v. Benson*,[26] *Parker v. Flook*,[27] and *Diamond v. Diehr*.[28]

In *Benson* and *Flook*, the *Bilski* majority found, the Supreme Court had expressly left open the possibility that a process outside the confines of the machine-or-transformation test could be patentable, but in *Diamond v. Diehr*, the Supreme Court foreclosed it by failing to mention it. Although academics have criticized this as insufficient foundation for embracing the "machine-or-transformation test" as the exclusive determinant of potential patent eligibility, the *Bilski* majority nonetheless found this reasoning dispositive.[29] Thus, the majority found, the § 101 standard that governs is the "machine-or-transformation" test, and the hedging process at issue before it in *Bilski* was therefore not patent-eligible subject matter.[30]

The *Bilski* majority nonetheless regarded this revelation as merely a clarification of existing law—not an overturning of either *State Street Bank* or *AT&T*—although it also cautioned in a footnote that "[a]s a result, those portions of our opinions in *State Street* and *AT&T* relying solely on a 'useful, concrete and tangible result' analysis" should no longer be relied upon.[31] Because this was merely a clarification of existing law in light of Supreme Court precedent, the majority concluded, "although invited to do so by several amici, we decline to adopt a broad exclusion over software or any other such category of subject matter beyond the exclusion of claims drawn to fundamental principles set forth by the Supreme Court."[32]

B. The Dissents

1. Judge Newman

Writing first in dissent, Judge Newman in essence accused the majority in a forty-one page opinion of being old fogies for imposing a "new and far-reaching restriction" on the scope of patentability more suited to the Industrial Age than "today's Information Age of electronic and photonic technologies, as well as other processes that handle data and information in novel ways."[33] This result, Judge Newman asserted, was also "contrary to statute, contrary to precedent, and a negation of the constitutional mandate," with an unknown "impact on the future, as well as on the thousands of patents already granted."[34]

With respect to the constitutional mandate, Judge Newman based her reasoning on her view that "[u]ncertainty is the enemy of innovation"—which is, after all, the motivating purpose of the Constitution's Patent and Copyright Clause.[35] Considering Supreme Court precedent, Judge Newman expressed her view that *Diamond v. Diehr* made clear that §101 is not an independent condition of patentability but merely a general statement of subject matter eligibility[36] and "directly held that computer-implemented processes are included in Section 101."[37] Moreover, Supreme Court precedents, including *Gottschalk v. Benson, Parker v. Flook*,[38] and *Diamond v. Chakrabarty*,[39] allegedly rejected the limitations imposed by the *Bilski* majority.[40]

Judge Newman also found no support for the majority's conclusion in the pre-Section 101 Supreme Court decisions *O'Reilly v. Morse*,[41] *Cochrane v. Deener*,[42] and *Tilghman v. Proctor*,[43] from which the *Bilski* majority claimed to draw support.[44] Likewise, she found no support in the Federal Circuit's own prior precedents, including *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*,[45] and *AT&T v. Excel*, whose potential patentability test of producing only a "useful, concrete, and tangible result," "can no longer be relied on."[46]

Judge Newman devoted the remainder of her lengthy dissent to a comprehensive review of the English Statute of Monopolies and English common law;[47] the evolution of process patents in the United States;[48] the majority's rejection of its own CCPA and Federal Circuit precedents;[49] the public's reliance on the now-rejected Federal Circuit and Supreme Court precedent;[50] the "uncertain guidance for the future" that the majority's new test provides;[51] and—finally—the irony that the Bilski invention had not even yet been examined for patentability.[52]

Apart from her pique that the majority had unwisely and unnecessarily departed from precedent to create new law on its own, however, Judge Newman's view can perhaps best be summed up in a single sentence:

> The now-discarded criterion of a "useful, concrete, and tangible result" has proved to be of ready and comprehensible applicability in a large variety of processes of the information and digital ages.[53]

She simply saw no need to replace it.

2. Mayer dissent

Judge Mayer's twenty-five-page dissent opinion agrees in essence with the majority that "[t]he patent system has run amok",[54] starting with *State Street Bank*'s alleged allowance of "exclusive ownership of subject matter that rightfully belongs in the public domain."[55] Instead of merely "clarifying" Section 101's requirement of a "machine-or-transformation" therefore, Judge Mayer claims that "the time is ripe to repudiate *State Street* and to recalibrate the standards for patent eligibility, thereby ensuring that the patent system can fulfill its constitutional mandate to protect and promote truly useful innovations in science and technology."[56] For him, the *Bilski* majority therefore did not go far enough.

3. Rader dissent

Speaking last, and most succinctly, in dissent, Judge Rader noted wryly at the beginning of his ten-page discussion that "[t]his court labors for page after page, paragraph after paragraph, explanation after explanation to say what could have been said in a single sentence: 'Because Bilski claims merely an abstract idea, this court affirms the Board's rejection.'"[57] For him, the majority had simply said too much.

C. Dyk and Linn Concurrence

Finally, answering the dissents, Judges Dyk and Inn, in a twenty-page opinion, concurred fully with the majority and explained in detail why "the unpatentability of processes not involving manufactures, machines, or compositions of matter has been firmly embedded in the statute since the time of the Patent Act of 1793, ch. 11, 1 Stat. 318 (1793)."[58]

Looking as far back as the 1790 Act, Judges Dyk and Linn examined the legislative history of the current U. S. Patent Code, cited the "keen understanding of English patent practice" that it reflected,[59] and found that each of the five categories of patentable subject matter recognized by the 1793 Patent Act—carried forward to the current statute—was drawn from either the English Statute of Monopolies or the common law resolution of competing views of its application.[60] Save for "one aberrational patent," Judges Dyk and Linn found, this entire legislative history supported the *Bilski* majority's view that, to be patentable, an invention must be tied to a manufacture or a transformation, including James Watt's famous patent for a steam engine.[61]

Finding this legislative history and intent carried through to the current 1952 statue, as amended,[62] Judges Dyk and Linn also rejected the dissenters' reliance on the crutch of "technological change."[63] First, they responded, the Supreme Court has made clear that statutes must be interpreted in light of the practice at the time of codification, which points to 1793, not 2008.[64] Second, they said, essentially repeating themselves, Supreme Court jurisprudence "offers no warrant for rewriting the 1793 Act."[65] Finally, they observed, business method patents were not exactly unknown in Great Britain (and, by extension, the United States) in 1793, and only one of them had managed to sneak through—the aforementioned "aberration," which later commentators regarded as "clearly contrary to the Statue of Monopolies."[66]

In sum, the majority had it right and the dissents were all wrong.

CONCLUSION

So where does all this leave us? *State Street Bank* is not overruled, merely "clarified." Abstract ideas, mental processes, fundamental truths, and general knowledge remain unpatentable. Inventions or discoveries that are new, nonobvious, useful, and meet the remaining statutory requirements are patentable—so long as they are tied to a machine or result in a physical transformation of matter.

The *Bilski* majority has given us a test—that it insists is not new—that is easy enough to state, but perhaps difficult to apply: unless and until *Bilski* is reversed, overruled, or clarified, to be potentially patentable under 35 U.S.C. § 101, a "process" must involve either a "machine" or a "transformation" from one physical state to another.[67]

Bilski likely does not mean the end of "business method" patents, but will likely result in more careful—sometimes specious—claims drafting, and to more careful scrutiny of applications within the Patent Office.[68] It will almost certainly lead to more challenges in litigation, particularly by well-healed plaintiffs that find themselves otherwise stymied in the use of their own inventions. It may lead to lower licensing fees to patent holding companies, although the effect has apparently not yet been seen on Ocean Tomo.[69]

And perhaps, at bottom, what was at work here was simply what some commentators have suggested—by appearing to rein in the scope of potentially patentable inventions in the guise of merely "clarifying" existing law, consistent with Supreme Court precedent, the Federal Circuit was simply paying obeisance to avoid another intervention by the High Court in this area of the Federal Circuit's special expertise.[70]

Endnotes

1 ___ F.3d___, 88 U.S.P.Q.2d 1385 (Fed. Cir., Oct. 30, 2008).

2 *See Ex parte Bilski*, No. 2002-2257, 2006 WL 5738364 (B.PAI, Sept. 26, 2006).

3 *See* U.S. Patent No. 5,960,411, issued Sept. 28, 1999.

4 149 F.3d 1368, 47 USPQ 2d 1596 (Fed. Cir. 1998).

5 172 F.3d 1352 (Fed. Cir. 1999).

6 In State Street Bank & Trust Co. v. Signature Financial Group, Inc., 149 F.3d 1368 (Fed. Cir. 1998), the Federal Circuit held that a method of transforming data representing discrete dollar amounts into a final share price was patentable where the claims recited computer processor means, storage means, and other means corresponding to an arithmetic logic unit. In *AT&T Corp. v. Excel Communications, Inc.*, 172 F.3d 1352 (Fed. Cir. 1999), the Court found the following year that claims directed to a method of generating a message record and including in the message record an indicator of a "primary interexchange carrier" for use in a telecommunications system were patent-eligible subject matter.

7 149 F.3d 1368 (Fed. Cir. 1998).

8 172 F.3d 1352 (Fed. Cir. 1999).

9 *See In re Bilski*, No. 2007-1130, 2008 WL 417680 (Fed. Cir. Feb. 15, 2008).

10 *See, e.g.,* "In re Bilski and the future of business method patents," http://thepriorart.typepad.com/ the_prior_art/2008/10/in-re-bilski-decided.html.

11 U.S. Const., art. I, sec. 1, cl. 8.

12 *See, e.g., Application of Joliot*, 270 F.2d 954, 959, 47 C.C.P.A. 722, 728, 123 U.S.P.Q. 344 (C.C.P.A 1959) (Rich, J., concurring) ("the purpose of the

patent system is to promote the progress of the useful arts, which is done by granting patents for completed inventions.… Merely propounding the theories according to which they must be made in order to work is not enough.")

13 *E.g.,* Diamond v. Diehr, 450 U.S. 175, 185 (1981); Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948) ("[fundamental principles of knowledge are] "part of the storehouse of knowledge of all men ... free to all men and reserved exclusively to none."); Le Roy v. Tatham, 55 U.S. (14 How.) 156, 175 (1852) ("A principle, in the abstract, is a fundamental truth; an original cause; a motive; these cannot be patented, as no one can claim in either of them an exclusive right."). This is consistent with U.S. copyright law, which also derives from Article I, Section 8, clause 8, where one can not legally monopolize an idea, only its expression. *See, e.g., Eldred v. Ashcroft: Just Another Mickey Mouse Copyright Case?* 3 Engage, The Journal of the Federalist Society Practice Groups 3 (2002).

14 *See, e.g.,* 35 U.S.C. §§ 101, 102.

15 *See* 35 U.S.C. § 112, first paragraph.

16 The standard example of a "non-useful" invention would be a perpetual motion machine, which violates the laws of thermodynamics and therefore would not work. Unsatisfactory though that example may be, it is difficult to posit another example that, in theory, would not meet the threshold of utility.

17 35 U.S.C. § 101.

18 35 U.S.C. § 100 (b) (emphasis added)*; see In re Bilski*, *supra,* slip op. at n. 3 ("Congress provided a definition of 'process' in 35 U.S.C. § 100(b): … However, this provision is unhelpful given that the definition itself uses the term 'process.'")

19 Diamond v. Diehr, 450 U.S. 175, 182-84 (1981) (quoting Cochrane v. Deener, 94 U.S. 780, 787-88 (1877)); *see also In re Comiskey,* 499 F.3d 1365, 1375 (Fed. Cir. 2007*)*; *Bilski* at n. 4.

20 *Bilski*, Slip. Op. at 6.

21 *See* Parker v. Flook*,* 437 U.S. 584, 588-89 (1978). ("The holding [in *Gottschalk v. Benson*, 409 U.S. 63 (1972)] forecloses a purely literal reading of § 101."); *see Benson* at 67.

22 *Bilski*, slip. op. at 7.

23 '892 application c1.1; *see Bilski*, slip. op. at 2.

24 "For example," the Court went on to explain, "coal power plants (i.e., the 'consumers') purchase coal to produce electricity and are averse to the risk of a spike in demand for coal since such a spike would increase the price and their costs. Conversely, coal mining companies (i.e., the 'market participants') are averse to the risk of a sudden drop in demand for coal since such a drop would reduce their sales and depress prices. The claimed method envisions an intermediary, the 'commodity provider,' that sells coal to the power plants at a fixed price, thus isolating the power plants from the possibility of a spike in demand increasing the price of coal above the fixed price. The same provider buys coal from mining companies at a second fixed price, thereby isolating the mining companies from the possibility that a drop in demand would lower prices below that fixed price. And the provider has thus hedged its risk; if demand and prices skyrocket, it has sold coal at a disadvantageous price but has bought coal at an advantageous price, and vice versa if demand and prices fall. Importantly, however, the claim is not limited to transactions involving actual commodities, and the application discloses that the recited transactions may simply involve options, i.e., rights to purchase or sell the commodity at a particular price within a particular timeframe." Bilski, Slip. Op. at 2-3.

25 *Bilski*, Dyk and Linn dissent at 1.

26 409 U.S. 63 (1972).

27 437 U.S. 584 (1978).

28 450 U.S. 175 (1981).

29 Slip. op. at 14. *See, e.g.,* Randy Picker, "In re Bilski: The Fed Circuit Tells Inventors to Stuff It," http://uchicagolaw.typepad.com/faculty/2008/10/in-re-bilski-th.html, visited Monday, December 22, 2008.

30 Slip. op. at 32.

31 Slip. op. at 20, n. 19.

32 *See* slip. op. at 21, n. 23.

33 *Bilski*, Newman dissent at 1.

34 *Id.* at 1.

35 *Id.* at 2.

36 *Bilski*, Newman dissent at 3.

37 *Id.* at 9-10.

38 437 U.S. 584 (1978) (finding a claim to a mathematical formula for calculation of alarm limits for use in connection with catalytic conversion of hydrocarbons was not a "process" within the meaning of Section 101)

39 447 U.S. 303 (1980) (applying Section 101 to the fields of biotechnology and genetic engineering with respect to the patent eligibility of a new bacterium).

40 *Bilski*, Newman dissent at 5-9.

41 56 U.S. (15 How.) 62 (1853).

42 94 U.S. 780 (1876).

43 102 U.S. 707 (1880).

44 *Bilski*, Newman dissent at 13-9.

45 149 F.3d 1368 (Fed. Cir. 1998).

46 *Bilski*, Newman dissent at 29, citing to Maj. Op. at 20 n.19.

47 *Id.* at 17-25.

48 *Id.* at 25-27.

49 *Id.* at 27-29.

50 *Id.* at 30-32.

51 *Id.* at 5-9.

52 *Id.* at 36-39.

53 *Id.* at 29.

54 *Bilski*, Mayer dissent at 24.

55 *Id.* at 20.

56 *Id.* at 25.

57 *Bilski*, Rader dissent at 1.

58 *Bilski,* Dyk/Linn concurrence at 1.

59 *Id*. at 3.

60 *Id*. at 6-8, 16-20.

61 *Id*. at 9, 10-12. The "aberrational patent," explained in the Dyk/Linn concurrence at 15, "was a patent granted to John Knox in 1778 on a 'Plan for assurances on lives of persons from 10 to 80 years of age.'" *Id*. at 15; *see also, id.* at n. 16:

Similarly, another commentator states: 'it might be wondered why none of the many ingenious schemes of insurance has ever been protected by patenting it.' D.F. Renn, John Knox's Plan for Insuring Lives: A Patent of Invention in 1778, 101 J. Inst. Actuaries 285 (1974), available at http://www.actuaries.org.uk/_data/assets/ pdCfile/0006/25278/0285-0289.pdf (last visited Oct. 3, 2008).

62 *Id*. at 16-20.

63 *Id*. at. 12.

64 *Id.*

65 *Id*. at 14.

66 *Id.* at 15.

67 *Bilski*, slip. op. at 19, 20, 23, 29, 32.

68 In *Ex parte Halligan* (BPAI 2008), for example, which post-dates *In re Bilski*, the Board of Patent Appeals and Interferences rejected as unpatentable subject matter under 35 USC § 101 an application claiming a "programmed computer method" that operates to identify trade secret information (Claim 119). The BPAI found, in essence, that the program simply hardcoded the common law rules of trade secrets, then applied those rules to determine whether particular information is a "trade secret." As in *Bilski*, therefore, the BPAI found that the alleged "transformation" involved only legal rights,

not physical or tangible objects, and observed that Claim 119's only tie to a machine was the claim's preamble statement that the method is a "programmed computer method":

> This recitation fails to impose any meaningful limits on the claim's scope as it adds nothing more than a general purpose computer that has been programmed in an unspecified manner to implement the functional steps recited in the claims. Were the recitation of a "programmed computer" in combination with purely functional recitations of method steps, where the functions are implemented using an unspecified algorithm, sufficient to transform otherwise unpatentable method steps into a patent eligible process, this would exalt form over substance and would allow pre-emption of the fundamental principle present in the non-machine implemented method by the addition of the mere recitation of a "programmed computer." Such a field-of-use limitation is insufficient to render an otherwise ineligible process claim patent eligible.

Ex parte Halligan, Appeal No. 2008-1588 (Nov. 24, 2008) at 27. The BPAI expressly did not decide whether a second set of "means-plus-function" claims was particular enough to constitute a "particular machine," instead rejecting them under 35 USC § 112 as indefinite for failing to describe any particular structure in the specification: "The Appellant has failed to disclose any algorithm, and thus has failed to adequately describe sufficient structure, for performing the recited functions of claims 1 and 121 so as to render the claims definite." *Id*. at 18.

69 The Ocean Tomo 300® Patent Index (NYSE Euronext: OTPAT), established in 2003 and billed as "the first intellectual property index," represents a portfolio of 300 companies ranked according to their "Innovation Ratio" (the ratio of their patent value to their book value). *See* http://www.oceantomo.com/indexes.html, visited December 23, 2008. Along with several related indices, it is owned by Ocean Tomo, LLC, headquartered in Chicago. The name "Ocean" purportedly reflects the "cross-oceanic nature of intellectual property" as well as being an "acronym for the adverse possession of property (Open, Continuous, Exclusive, Adverse and Notorious)"; "Tomo" is Japanese for "intelligent and friendly" and "reflects the Asian notion of an integrated, friendly group of related businesses." See http://www.oceantomo.com/index.html and http://www.oceantomo.com/about.html, both also visited December 23, 2008.

70 *Cf*. Warner-Jenkinson Co. v. Hilton Davis Chem. Co. 520 U.S. 17, 40, 117 S.Ct. 1040, 1054 (1997) (reaffirming the vitality of the doctrine of equivalents but leaving its precise application to the Federal Circuit on a case-by-case basis based on its "sound judgment in this area of its special expertise").

International Law & National Security

The Inspirational Power of American Constitutionalism

*By Vojtech Cepl**

It is my belief that the normative order of society, that is, its system of rules of human conduct, is a crucial characteristic of any community of humans. A well-established institutional framework for the creation or modification of that system, one based on the accepted values of the society, is the greatest treasure any society can have. It is therefore hardly a surprise that I consider America's greatest contribution to the world to be its development of constitutionalism. Don't misunderstand my point. The idea of constitutionalism was by no means new; it is as old as Western Civilization, and had been floating around in the minds of theorists for millennia. It was the American innovation to give it concrete existence by creating a living and functioning institution, and to demonstrate that it works in practice and is a superior system.

I understand constitutionalism as the aggregate of two sets of principles fixed into a written document. The first set of principles comprises basic human rights, which is a synonym for the basic rules of natural law. They are what Hans Kelsen called the Gruendnorm, and the related principles of higher law and the hierarchy of norms provides that all other norms must be in harmony with them. The second set defines the main pillars of government, their powers, and mutual relations, based on the old idea of the separation of powers. Federalism, which is in fact the vertical separation of powers, belongs in this second group. It also includes judicial review, America's original contribution to the separation of powers, in the sense that courts work to ensure that the other powers act in conformity with the constitutional order.

It is important to distinguish constitutionalism from parliamentarism. The conflict between these two concepts has played out throughout modern Western history. The latter concept considers the sovereignty of parliament to be the highest aspiration of democracy. The American Founding Fathers were well aware of the genuine danger of placing excessive reliance on majority rule. They understood that it is impotent to prevent the tyranny of the majority and the consequent abuse of minorities (see, for example, Madison's views in *Federalist No. 10*). They understood that it does not always result in the best leaders or best decisions. They viewed constitutionalism as the necessary corrective to majoritarianism: there must be both operating in balance. One can see a clear metamorphosis starting with the British Parliament's assertion of the power to make any law it wishes, through the French Revolution's cry of all power to the Commune, leading finally to the slogan from the Bolshevik revolution: "All power to the Soviets!" Total faith in majority rule is seriously misguided, because as Fareed Zakaria rightly pointed out in *The Future of Freedom*, even in a free and genuine election, such leaders as Belarus's Alexander Lukashenko and Slovakia's Vladimir Meciar can emerge victorious.

In the following description of the historical development of American constitutionalism into a working form of government, I will draw extensively upon the thoughts of Friedrich Hayek—especially *The Constitution of Liberty*.

Despite many drawbacks, the American colonies had certain advantages that allowed the seed of genuine constitutionalism to be planted and to sprout there. Although they were inhabited by disparate and divisive peoples, they were in one respect united: they fervently believed in, and were devoted to, a set of principles about government and its relationship to the people, and they were determined that they should live according to those principles. In this they were favored by a unique combination of circumstances—institutions, benign neglect, and ferment about political ideas. Although the Americans were far behind the more advanced Europeans in culture, manners, etc., and were looked down upon by the latter for that reason, in fact they surpassed the Europeans and were in the first rank in one crucial area—political science. By Lord Acton's estimate they had several thinkers (such as John Adams, Thomas Jefferson, James Madison, Alexander Hamilton, and Ben Franklin) that were the equal of any in Europe (Adam Smith, A.R.J. Turgot, John Stuart Mill, and Wilhelm von Humboldt), and among the general population most people thought about and concerned themselves about, as if it were their business, the basic ordering of society.

The cause of the American Revolution was not higher taxes on tea or even lack of representation, rather, by propounding the theory of the sovereignty of Parliament, the British Parliament's failure to respect limits upon its absolute power. The sovereignty of Parliament appears to embody democracy, so it has always been the rallying cry of the advocates of pure democracy. The Americans considered that, in accepting the doctrine of the sovereignty of Parliament, Britain had betrayed this heritage. The heritage was not one of absolute popular control of government, but of limitation upon the arbitrary exercise of power, by whoever controlled it, by subjecting it to higher law. In sharp contrast to the French Revolution, the American Revolution has always been considered a conservative one. They were fighting to retain their rights as Englishmen. By rejecting the sovereignty of Parliament (of an unlimited and unlimitable law-making body) and applying the conception of limitation of all powers to Parliament, the Americans took up the torch of liberty laid down by the English.

In their conflict with the mother country, the Americans gradually came to see that their conception of proper government diverged considerably from that of the English. For them true representative government did not mean merely the right to elect representatives to a legislative body, which was then entirely free from control; rather true representative govern-

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ment requires a "fixed constitution" which introduces limited government. This is done by a constitution that does not merely designate the source of power (the people as voting in elections), but also the manner of its exercise; that is *limited* exercise. Two crucial concepts mark the distinction—separation of powers and hierarchy of norms (neither of which was genuine in UK at that time). A constitution allocating and distributing powers among the state authorities necessarily limits the power of any of them. The hierarchy of norms requires the constitution to have substantive rules that govern the acts of authorities: the more general norms of higher authority govern the content of those more specific norms of lower authority. In this way, the actions of authorities are controlled.

Hayek explains the higher law concept in a way that reconciles it with the natural growth and evolution of society and with the democratic system. While the idea itself is very old, he emphasized that the American innovation was to put it on paper and then into practice:

> But the idea of making this higher law explicit and enforceable by putting it on paper, though not entirely new, was for the first time put into practice by the Revolutionary colonists. The individual colonies, in fact, made the first experiments in codifying this higher law with a wider popular basis than ordinary legislation. *But the model that was profoundly to influence the rest of the world was the federal Constitution*.

Hayek sees higher law not as incompatible with, or even inimical to, democracy, but rather as a necessary component of it, even as the natural complement and perfection of democracy. Far from allowing unlimited exercise of power according to the majority will (the Hobbesian conception of sovereignty), it is a necessary limitation upon such arbitrary use of power, without which a people would never consent to being governed by majority rule.

The true nature of social institutions and of human reason explains why higher law is a necessary restraint upon the majority: accumulated wisdom of many decades or centuries of development is necessarily better than short-term, *ad hoc* solutions to particular problems. With his concept of "deliberative democracy", Cass Sunstein in *Designing Democracy: What Constitutions Do* refers to the defects of human reason in devising solutions to political and social problems. On the whole, human intellect (whether because it is limited or because distorted by the pull of personal interest) is unable to see that what it desires now is entirely inconsistent with general principles to which essentially all wish to be governed. Hayek concludes from this that "we can therefore approach a measure of rationality or consistency in making particular decisions only by submitting to general principles, irrespective of momentary needs". Thus the power of a temporary majority is subordinate to general principles laid down in advance by a broader majority. Hence, the broader principles can be changed as society gains experience, but not by the arbitrary and ill-conceived *ad hoc* decision of a temporary majority, whose reason is clouded by the pursuit of its short-term aim.

The subordination of short-term aims to general principles is a necessary pre-requisite to democratic decision-making. In a free, democratic society, "power is ultimately not a physical fact but a state of opinion which makes people obey." In this respect, a constitution functions as something of a background agreement, a general understanding anterior to particular exercises of power by constitutionally empowered institutions. It is crucial that "the agreement to submit to the will of the temporary majority on particular issues is based on the understanding that this majority will abide by more general principles laid down beforehand by a more comprehensive body."

The U.S. Federal Constitution was in fact the second U.S. constitution, replacing the defective Articles of Confederation. But the decade of the Confederation was an important period of experimentation in constitutionalism by the newly independent individual states. As an example can be cited John Adam's contribution to the Massachusetts Constitution, "The Encouragement of Literature, Etc.":

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates in all future periods of this commonwealth to cherish the interests of literature and the sciences, and all seminaries of them, especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affectations, and generous sentiments among the people.

They laid down in great detail the principles concerning limitation of power, the creation of a "government of laws, not of men", particularly in the quite extensive bills of rights that were written. Apart from elaborating key principles, however, the state constitutions also contributed to later developments because of their failings. Despite the excellent principles written down in them, the legislatures tended to become dominant. From this the Americans learned that "the mere writing down on paper of a constitution changed little unless explicit machinery was provided to enforce it".

In American constitutionalism the most vital "machinery" for this purpose was the institute of judicial review (the American term for what in Europe is also referred to as constitutional review); that is the power of the courts to decline to apply legislation which they conclude is in conflict with the Constitution. In the American conception, the relation of the Constitution to ordinary laws corresponds to that between ordinary laws and their application to particular disputes. It follows naturally therefrom that courts have the competence to apply the general principles of the Constitution to the particular instances of ordinary legislation, thus acting as a restraint, or check, upon the legislature. As is clear in *Marbury v. Madison*, the courts are merely applying the law to a case before them, albeit constitutional law to particular legislation. Much has been made of the fact that the power of judicial review is nowhere explicitly mentioned in the Constitution, but for those advancing the American type of constitutionalism, it was self-evident that this was a necessary part of a constitution.

In closing I would like to make some observations about how the idea of constitutionalism is quite significant for certain contemporary problems of international law and geopolitics. We just went through a fascinating period of social experimentation with the rebuilding of democracy in Central and Eastern Europe. Of course, we made no new discoveries, as all principles of a free, democratic political system, market economy, and rule of law were known before and well-established in the West. But we did acquire some wisdom, and that is the importance of the sequence of steps in which the transformation should take place. I would like to exploit the *bon mot* of Lord Ralph Dahrendorf to the effect that the East European countries would need six months to change the political system, six years to change the economic system, and sixty years to change the normative system. First and foremost, immediately following the basic changes in the political system, a robust legal framework must be built and only then can one make the change in the economic system. You cannot have a successful privatization process before you have, for example, laws governing bankruptcy, competition, and the stock exchange. We made the basic mistake that the economic transformation preceded the building of a robust legal framework. The core of that framework is, of course, the constitution and it should have been adopted as soon as possible.

The second lesson we learned was that, without the stabilizing anchor of fixed rules in a constitution (which can even be imported, as is shown by the Czech Charter of Fundamental Rights and Basic Freedoms, which draws heavily upon the European Convention, itself based on early documents from the United States), free and fair elections are not a panacea for the ills of society. Let's take as an example respect for private property, which is a long-established part of the culture of countries with a common law tradition. In post-communist countries, where private property was for decades considered immoral, it should be strongly protected by the enforcement of constitutional rules.

The lessons learned concerning American constitutionalism can still be of benefit today when we consider the adoption of the European Constitution or the process for drafting the definitive Iraqi Constitution. First and foremost it is necessary to proceed on the basis of the American tradition of constitutionalism as the corrective of parliamentarism. These contemplations, however, exceed the bounds of this paper.

Kyoto II as Congressional-Executive Agreement: The Emerging Strategy?

*By Christopher C. Horner**

The new Obama administration generated great expectations, not least among those seeking to craft a successor treaty to the 1997 Kyoto Protocol on "global warming." Yet early signals that an Obama administration had no plans to join Europe in agreeing to a successor pact next December, as expected, indicated that this issue would instead prove a stunning disappointment to its champions. Now, however, it appears that Kyoto will be the subject of a controversial effort to sharply revise U.S. environmental treaty practice.

Those parties with high hopes include a broad array of interests: rent-seeking companies, countries, pressure groups and supranational organizations. European Union countries, for example, seek to maintain certain treaty advantages similar to those in the original pact, offering possible avoidance of pain and even financial reward. These included artifices such as the 1990 baseline year against which performance is measured, to give them credit for Kyoto-based greenhouse gas (GHG) emission reductions actually resulting from the post-1990 economic collapse in Central and Eastern Europe. Combined with the ability to pool emissions, this set provided the EU a less onerous path to complying with Kyoto's terms.

Others include exempt, major emitting parties such as China, India, Mexico, Indonesia, Brazil and South Korea. And, of course, Russia hopes to perpetuate wealth transfers helping them modernize their energy infrastructure in the name of combating what remains the subject of a scientifically controversial theory. All of these factors contributed to the Bush administration declining to pursue Kyoto ratification.

Kyoto covers GHG emissions among 37 countries, from 2008-2012. To avoid a gap between regimes, it is generally agreed that a new pact must be adopted at the scheduled meeting in Copenhagen, December 2009. That event was expected to serve as the platform for Kyoto II symbolizing Obama's break with the Bush foreign policy.

The long held presumption was that whomever succeeded Bush would accept U.S. participation in a "binding" pact, even one which still selectively covers only a handful of wealthy nations. This, the story went, would remove the one remaining obstacle to a successful international regime, namely U.S. oppostion. The latter assumption is largely a myth, given that the U.S. signed the 1997 Kyoto treaty but neither the Clinton nor Bush administration sought ratification. Also, there is nothing in the Constitution or statute requiring a president to formally ask the Senate to ratify a signed agreement, only tradition. No senator has showed any interest in forcing matters, likely due to the absence of the two-thirds vote necessary for such an agreement under Article II, Section 2 of the Constitution.

EU officials readily admit a commitment to the issue of "climate change" as a means to establish a "European" political identity. As such, their self-described "world leadership" is at stake, and the tremendous "loss of face" that Europe risks in the event that no new treaty is agreed is an express consideration. Unwelcome realities—such as the initial treaty's failure to reduce emissions, even with great costs, including massive wealth transfers and capital flight ("carbon leakage" to exempt nations)—rarely intrude.

So, the narrative has thrived—Bush "rejected" or "withdrew from" Kyoto in some stark contrast to the Clinton administration—and set the stage for a dramatic gesture by his successor. U.S acceptance of Kyoto's successor was to revive Kyoto as a viable international political and legal enterprise, even if the U.S. was the sole additional country to volunteer to bind its economic fortunes under this pact since it was hatched more than a decade ago.

U.S. Politics

Agence France Press reported the day after Obama's electoral victory:

> One of Barack Obama's first tasks will be to lead the United States back into the heart of the global debate on climate change, ending the country's years of isolation and scepticism. His victory will spark intense relief among negotiators in Europe and Asia.… He would not wait for China and India to act, but insist they must not be far behind making their own binding commitments, Obama aides told *Nature*, the British science journal, last month.

China, India and the rest of the G-77 firmly reject any meaningful commitments under a Kyoto regime. This refusal more than a decade ago doomed U.S. involvement, given that similar treatment among nations was one of two key conditions in the Article II "advice" regarding Kyoto. This took the form of S. Res. 98 ("Byrd-Hagel," July 25, 1997), which had 64 cosponsors and was unanimously adopted by the 105th Congress. The Clinton administration nonetheless verbally agreed to Kyoto five months later, and signed it eleven months after that.

The certain failure of Kyoto or any similar pact to attract two-thirds Senate approval is behind an emerging gambit advocated for the incoming Obama team: inure the world to the idea that U.S. participation in any Kyoto II will not come quickly but instead necessarily faces delay, while negotiating similar commitments to be styled as a congressional-executive agreement(s) that can be tied to the Kyoto regime. Upon gaining permission to negotiate by a simple majority of both houses, in the same manner as employed with the North American Free Trade Agreement, the Obama administration would return to Congress with an agreed pact that also requires only simple majorities in both houses, but with no amendments and no

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filibuster allowed as part of the deliberations.

At first blush, it seems inconceivable that as president Obama would even flirt with the negative fallout from eschewing the earliest opportunity to make this highly symbolic gesture of breaking with a very high profile position associated—however rightly or wrongly—with the Bush administration, particularly given his narrative of "healing" our relationships and improving the U.S.'s international standing.

Yet the few relevant statements made by aides during the campaign and since indicate that this is likely the plan. For example, chief campaign adviser on energy Jason Grumet revealed a schedule of legislating (or, in the absence of congressional action, regulating), domestically before agreeing to a new international pact in order to then "have a meaningful impact in the international discussion." His timeline was for a policy representing that consensus to be developed late in 2010, well after Copenhagen. Success therefore requires bringing the Kyoto community around to understand, accept, and support this approach as the best way to bind the U.S. in the Kyoto scheme.

Europe's costly failure to date and struggles with adopting a substantive internal position going forward surely leave them receptive to such a "game-changing" strategy.

The Obama campaign telegraphed a desire to reverse the Clinton approach of negotiating a "global warming" treaty, then using it to pressure Congress, instead vowing to first agree to something domestically for the purposes of then "meaningfully impact[ing] the international debate." The timeline, on its face, makes plain that the U.S. could not expect to come to Copenhagen ready to sign on to the likely deal, a position already accepted by officials from key pressure groups such as the Pew Center on Global Climate Change.

Therefore President Obama's road to Kyoto II requires first obtaining congressional approval of a domestic law requiring some sub-Kyoto reduction in U.S. GHG emissions (either compared to current levels, or simply returning to 1990 levels, by 2020). Although the economic crisis should rightly give pause, it is instead brazenly invoked as an excuse to impose the Kyoto global warming agenda. This legislation would also, however, provide non-binding negotiating guidelines and authorize the administration to completely rework the U.S.'s international approach. In short, this would include waiving the Constitution's requirement of Senate ratification by reclassifying the product of talks as a congressional-Executive agreement, not a treaty.

UN officials are also already making excuses for why, suddenly, the U.S. should no longer be expected to do that which has been demanded ever since March 2001, when President Bush indicated that he, like President Clinton, would not seek to formalize U.S. participation in Kyoto. For example, Yvo de Boer, executive secretary of Kyoto's implementing organization, the UNFCCC—so titled after Kyoto's parent treaty, the 1992 U.N. Framework Convention on Climate Change[1]—deflected the idea of holding Obama to the same reasoning, "What we've got, through everything that Senator Obama has said so far, we've got pretty much the signal we need. I don't think it makes any sense to unrealistically try and force the pace."

That is a remarkable shift of position. In other words, it is now perfectly acceptable for the U.S. to go through its policy development as it sees fit, because the signal has somehow been received that Obama's approach will nonetheless lead to U.S. inclusion in the extant international process. We see, in calls to radically revise the manner in which we develop our "climate" foreign policy, context for this unannounced change of heart among Kyoto's champions.

The Plan: Kyoto as Congressional-Executive Agreement

Obama aide Grumet's comments combined with private remarks by Democratic Senate aides indicate that the Obama camp is considering a plan advocated by former Clinton State Department official Nigel Purvis. It is in a paper for Resources for the Future, a center-left think tank, titled "Paving the Way for U.S. Climate Leadership: The Case for Executive Agreements and Climate Protection Authority."[2] It explores "whether some international agreements are inherently treaties under the Constitution, or whether the President and Congress have discretion to treat an international agreement as a congressional-executive agreement instead of a treaty."[3]

The author concludes, "The United States should classify new international treaties to protect the Earth's climate system as executive agreements rather than treaties," executive agreements being "complete and equally valid substitutes for virtually all treaties." He assures us that "the courts would be highly likely to uphold the agreement," despite the obvious purpose of circumventing longstanding Senate opposition to the agreement in its original treaty form.[4] He dismisses this mere "historical tendenc[y]" of pursuing the treaty form, though offers no precedent—or "historical tendency"—of simply reclassifying a failed regime as executive agreement to circumvent Senate opposition.[5]

If the Obama administration does pursue the recommended path toward a congressional-executive agreement in lieu of a treaty for a successor to Kyoto, it does not seem that this is to impact the international debate, as is the stated intention, so much as it is to tweak the domestic landscape, significantly altering Congress' role as a way to commit the U.S. to the existing template or framework envisioned for Kyoto II.

Under what Purvis calls CPA ("Climate Protection Authority"), Congress abdicates Article II advice and consent in favor of bicameral, simple-majority up-or-down votes—with Congress also agreeing in advance to set "no international preconditions" but instead offering non-binding negotiating guidance.

This is of course patterned after trade promotion authority (TPA), regularly used in that way over recent decades. TPA was an affirmative gesture to keep special pleaders out of the minutiae. There is no demonstrated need for concentration of negotiating power in the Kyoto context. An even more critical distinction, however, is that TPA was not designed to circumvent a decade of proven inability to gain the necessary two-thirds support in the Senate, as is clearly the present situation.

It is true that the Supreme Court has yet to directly confront constitutional issues surrounding congressional-

executive agreements and the Court seems likely to strive to avoid the matter entirely, as a "political question."[6] But it appears equally likely the Court would look with disfavor on an instance so obviously designed to circumvent Senate opposition (which makes the Senate vote-count in support of any authorization to enter such a pact of great importance).[7]

The desire to preempt congressional "preconditions" is transparently a reaction to the unanimous Byrd-Hagel resolution warning the executive away from any pact significantly harming the U.S. economy or which does not require similar commitments of developing countries, which account for the bulk of recent and projected growth in GHG emissions (particularly the world's first- and third-largest emitters China and India, plus other economies experiencing rapid growth in recent years). Oddly, Purvis expressly offers this in the name of *enhancing* Congress's say in the matter.

In keeping with the theme of harmonizing U.S. policy with Kyoto, effectively entering us in its scheme, Purvis also suggests that the same legislation include agreement to accept a "more stringent emissions target" in the agreement negotiated under this authority. That would occur only once the rest of the top five emitters have ratified it, which notably does not actually require them to commit to anything. That this same exemption was Kyoto's original downfall in the Senate reaffirms the objective is simply to circumvent Article II's super-majority requirement.

Distillation of Pro-EA Arguments

Nigel Purvis argues that, with limitations, the new administration can enter and implement executive agreements of all three types to succeed the Kyoto treaty: sole executive agreements, treaty-executive agreements and congressional-executive agreements. This article focuses on his recommendation of the latter option for a Kyoto successor.

Purvis does not offer examples of EAs, of any sort, encompassing 180+ nations. Such agreements *have* been multilateral if involving a fairly limited number of parties, and relatively far less extensive in terms of obligations imposed upon the U.S. (e.g., the congressional-executive agreement NAFTA, or other forms found in the 1945 Yalta and Potsdam agreements, the 1973 Vietnam peace agreement, and the 1975 Sinai agreements. All still fall short of the dozen major nations required to bring the suggested pact into effect (ratification by countries representing two-thirds of global GHG emissions).

The claim that President Reagan used EAs nearly 3,000 times in fact proves too much, revealing that EAs are as generally used for far more mundane matters than "the greatest threat facing Mankind," not for committing us to energy taxes (either direct or regulatory) and otherwise enormous economic consequences.

In comparing treaties versus executive agreements Purvis shows his purpose, arguing how "[u]nder international law, those two types of instruments are indistinguishable…'the supreme law of the land'…Very importantly, however, *the domestic processes the United States uses to negotiate, review, and approve treaties and executive agreements are quite different*… The United States may deem an international agreement as an 'executive agreement' for purposes of its domestic review, even though the international community may decide to call the pact a 'treaty.'"[8]

This ignores that Kyoto was originally pursued as a treaty for very good reasons, none of which have diminished. The only change prompting this call for reclassification is the demonstrated Senate opposition. Of course, under this approach a Kyoto successor requires 50 Senate votes—not 60 let alone 67, because it will be filibuster-proof—in addition to the easily attained simple House majority.

Purvis offers three principal rationales for pursuing this course: 1) speeding up U.S. entrance into an international global warming treaty, despite that such outcome is by no means a certainty that must simply be expedited; 2) "enhancing the role of Congress in setting climate foreign policy";[9] and 3) ensuring a strong bipartisan climate policy.

Haste Makes Waste

Relevant to the "speed" argument, Purvis does not conceal his hope to eliminate the ratification function altogether, given that satisfying it has proven "a daunting task" which "allows ideological or regional interests to frustrate the will of the majority."[10] Other complaints are that lone senators have held up agreements even, much to his disdain, some which were widely adopted by other nations (this is consistent with the complaint elsewhere that U.S. treaty procedure is unusual compared to other nations, which apparently militates against maintaining the ratification requirement).[11]

Despite citing no evidence that such factions have impeded Kyoto in the Senate or that they are that which the proposed course is designed to remedy—implausible given that the sole Article II "advice" regarding Kyoto was unanimous—Purvis then states "[t]he treaty clause has never worked as the framers of the Constitution intended."[12]

Later he clarifies his position, arguing how the treaty clause has simply become an anachronistic, time-consuming impediment. "The treaty process created by the framers of the Constitution requires an exceptional degree of national consensus that is no longer reasonable given the frequency and importance of international cooperation today."[13] Elsewhere Purvis affirms that his argument is not so much with how the Senate applies Article II ratification authority, but with the authority itself. For example, "We must not cling to preconceived notions of how our country negotiates and reviews international climate agreements."[14]

Revising (Legislative) History

This leaves the risible arguments that circumventing Article II ratification for a Kyoto successor treaty finally ensures a strong bipartisan climate policy, and "[e]nhances the role of Congress in setting climate foreign policy". Both are grounded in the claim, in defiance of all available evidence, that U.S. "climate foreign policy" has "lack[ed] bipartisan negotiating objectives," such that other nations do not know what to expect from us.[15] The preferred, alternative approach ostensibly would ensure that "[o]ther nations understand very clearly what the agreement must look like to secure Congress' blessing."[16]

Nowhere does this recognize that the Senate clearly articulated the U.S. Kyoto position, which other nations sought to subvert, circumvent and otherwise disregard.

This argument for reclassifying Kyoto serially recasts past Senate dealings with the Kyoto issue and otherwise ignores the relevant history. Purvis claims that "[t]he treaty process has harmed the credibility of the United States: in the eyes of the world, we are an unreliable treaty partner."[17] Yet the purportedly reputation-harming obstacle to the U.S. joining an international "global warming" treaty was not any absence of Senate involvement or of a clearly delineated strong bipartisan position. Instead, as even the UN's de Boer now admits, it was that the U.S. executive *ignored* the Senate's advice, encouraging our negotiating partners to follow suit.

Further, Purvis admits on several occasions that, for example, "It is the longstanding practice of the Executive Branch not to take the final steps necessary to bind the United States internationally to treaties duly approved by the Senate unless both houses of Congress have approved needed implementing legislation."[18] In practice, the House of Representatives also conducts hearings on treaties despite the absence of involvement in the ratification function and regularly consults on several levels with the Senate on such matters. There is no support for the notion, therefore, that abrogating the ratification function ensures both houses of Congress are granted a say.

Finally, that Purvis does not propose that the congressional-executive Kyoto agreement be self-executing makes this argument wholly unpersuasive on its face.

Purvis also dismisses the clear Senate record regarding such binding "climate" commitments as mere "inquirie[s] about the domestic process the United States would follow to review amendments and Protocols to the Convention."[19] He graciously volunteers that "the Senate's advice and consent to the "UNFCCC, the treaty which Kyoto and its successor would both purport to amend] may provide no additional basis for the President to implement any executive agreements domestically."[20]

Yet the UNFCCC not only offers no such support, but the Senate made quite plain when ratifying that pact that any efforts to bind the U.S. to further commitments surely would require ratification. The Senate Foreign Relations Committee revisited this history in its authoritative "Treaties and Other International Agreements." The Committee noted its earlier instruction, when reporting UNFCCC to the full Senate in 1992, was that "decisions by the parties to adopt targets and timetables for limiting emissions would have [to be] submitted to the Senate for advice and consent. It noted further [at the time]: that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the 'shared understanding' of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent."[21]

The Congressional Research Service also undermines Purvis' quest in its report "Global Climate Change: Selected Legal Questions about the Kyoto Protocol." Noting how the Bush 41 administration responded agreed that the intention inherent in UNFCCC was that binding commitments specifically required ratification, CRS states:

> The committee made clear, in other words, its view that '[t]he final framework convention contains no legally binding commitments to reduce greenhouse gas emissions' and its intent that any future agreement containing legally binding targets and timetables for reducing such emissions would have to be submitted to the Senate. The first Bush Administration concurred with that view and agreed to submit any such agreement. That commitment was cited during Senate debate on the resolution of ratification as an important element of the Senate's consent. While these statements may not be as legally binding as a formal condition to the Senate's resolution of ratification for the 1992 Convention, it is doubtful that any administration could ignore them.[22]

While this history seems sufficient that no administration might ignore them, Purvis expressly dismisses them as indicating a desire for "Senate approval,"[23] which he indicates did not mean ratification but possibly contemplated a Senate vote as part of more generic bicameral enactment. Further damaging Purvis' argument, CRS also states:

> While the full scope of the President's authority to conclude and implement executive agreements remains a subject of scholarly and political debate, the Senate appears to have anticipated the question when it gave its advice and consent to the Framework Convention on Climate Change in 1992. During the hearing on the Convention, the Senate Foreign Relations Committee propounded to the Administration the general question of whether protocols and amendments to the Convention and to the Convention's Annexes would be submitted to the Senate for its advice and consent.[24]

Purvis euphemizes this legislative history that facially undermines his argument with "[t]he international debate made the Senate attuned to the prospect that the parties to the Convention might agree in the future to legally binding emissions targets."[25]

Also, Purvis argues that the President is fully able to complete such an agreement under existing authorities.[26] Yet, he admits,"[a]lthough legally permissible, this approach would prove politically controversial, vulnerable to changes in political power, and a poor basis for a durable U.S. climate foreign policy."[27] Having said that, he intones, "unilateral Presidential leadership may prove necessary if Congress refuses to act," specifically "unless Congress provides an alternative to the treaty form" by going along with the congressional-executive agreement.[28]

With a final dismissal of U.S. treaty practice and precedent, Purvis concludes about congressional reaction to this approach, "The greatest obstacle to Senate concurrence may be the expectations created by the tendency (albeit inconsistent and not legally binding) of the President and the Senate to use the treaty form for certain types of agreements, including multilateral environmental accords."[29]

CONCLUSION

In 2009 President Obama may ask Congress to sharply revise U.S. environmental treaty practice and precedent, in the context of a successor to the Kyoto "global warming" treaty. The arguments advanced in support of such a course do not withstand scrutiny. The objective is transparently to circumvent demonstrated Senate opposition to such a pact, specifically by using simple majority votes to enter an international agreement

ultimately of the same variety that the Senate will not ratify and a domestic equivalent of which Congress has serially rejected. This precedent must be avoided.

Endnotes

1 Treaty Doc. 102–38. Adopted May 9, 1992, and signed June 12, 1992. Submitted to the Senate September 8, 1992. Approved by the Senate October 7, 1992.

2 Nigel Purvis, "Paving the Way for U.S. Climate Leadership: *The Case for Executive Agreements and Climate Protection Authority,*" Discussion Paper 08-09, April 2008, Resources for the Future, Washington, DC, *available at* http://www.rff.org/RFF/Documents/RFF-DP-08-09.pdf.

3 *Id*. at 21.

4 *Id*. at 39.

5 *Id*. at 24.

6 Purvis does note that "The U.S. Supreme Court has, for more than a century, consistently rejected or sidestepped claims that specific congressional–executive agreements should have been deemed treaties." *Id*. at 22, citing *Field v. Clark*, 143 U.S. 649, 651 (1892)(upholding congressional delegation of authority to the President to approve certain trade and tariffs agreements), and *Made in USA Foundation v. United States*, 56 F. Supp.2d 1226 (1999), *vacated*, 242 F.3f 1300, *cert. denied*, 534 U.S. 1039 (2001)(finding that the President and Congress had the power to conclude NAFTA as a congressional–executive agreement).

7 The Court has ruled against the executive usurping powers reserved by the Constitution to Congress, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This article does not address the constitutional questions surrounding executive agreements but instead the implications and arguments surrounding their use for a successor to the Kyoto treaty.

8 Purvis at 9 (italics original).

9 *Id*. at 5.

10 *Id*. at 10.

11 *Id*. at 11-12.

12 *Id*. at 10.

13 *Id*. at 45.

14 *Id*. at 7.

15 *Id*. at 5.

16 *Id*. at 17.

17 *Id*. at 12.

18 *Id*. at 10.

19 *Id*. at 37.

20 *Id*. at 36.

21 Senate Foreign Relations Committee, "Treaties and Other International Agreements: The Role of the United States Senate," S.Rpt. 106-71, 276, citing Exec. Rept. 102–55, 14.

22 CRS Report for Congress, Updated October 1, 2002, "Global Climate Change: Selected Legal Questions About the Kyoto Protocol," 5 (referencing 138 CONG. REC. 33521 (Oct. 7, 1992) (statement of Sen. McConnell)).

23 Purvis at 38.

24 CRS at 3

25 Purvis at 37, fn. 101.

26 *See, e.g., id*. at 32-33, 45 and 50.

27 *Id*. at 45.

28 *Id*. at 50.

29 *Id*. at 47.

Labor and Employment Law

Title VII Retaliation Claims after *White*: The Struggle to Define Materially Adverse Conduct in the Context of the Reasonable Employee Standard

*By J. Gregory Grisham & Frank L. Day**

On June 22, 2006, the U.S. Supreme Court issued its opinion in *Burlington Northern & Santa Fe Railway Co. v. White*[1] and resolved a split among the circuit courts regarding the correct interpretation of the anti-retaliation provision contained in Title VII of the Civil Rights Act of 1964, as amended ("Title VII").[2]

Title VII was enacted in an effort to end workplace discrimination.[3] To accomplish this goal, section 703 of Title VII made it unlawful for an employer to discriminate against an employee with regard to his or her "compensation, terms, conditions, or privileges of employment" because of the individual's "race, color, religion, sex, or national origin."[4] To augment the protections provided in section 703, Congress also adopted the anti-retaliation provision in section 704(a) of the Act.[5] The anti-retaliation provision generally prohibits employers from penalizing employees who have raised opposition to actions that violate Title VII or have participated in proceedings to vindicate the rights guaranteed by the Act.[6] Unlike section 703 that specifically limits its application to employment decisions that impact an employee's terms, conditions, or privileges of employment, the plain language of section 704(a) states that it is unlawful for an employer "to discriminate" against an employee who had engaged in a protected activity.[7] For this reason, the circuit courts of appeal split on the issue of what employment actions were sufficiently severe and therefore actionable under the "to discriminate" language of the anti-retaliation provision.[8]

Prior to the Supreme Court's decision in *White*, the Sixth, Fourth, and Third Circuit Courts had held that the "to discriminate" language of section 704(a) established the same standard as the anti-discrimination statute for determining if an adverse employment decision was unlawful.[9] Accordingly, an employee could not prevail on a retaliation claim in these circuits unless the employee could show that the alleged act of retaliation had a materially adverse effect on the terms, conditions, or benefits' of employment. The Fifth and Eighth Circuits, on the other hand, adopted a more restrictive approach, holding that an employee must show that the action taken by the employer qualified as an "ultimate employment decision," which is a decision regarding "hiring, granting leave, discharging, promoting, and compensating."[10]

The Seventh Circuit and the District of Columbia Circuit adopted a less restrictive interpretation of the anti-retaliation statute than the circuits above discussed, holding that an employee need not prove that the adverse action negatively impacted the terms or conditions of employment.[11] Instead, these courts of appeal held that an employee needed to show that the adverse action at issue would be considered "material to a reasonable employee," meaning that the challenged action would need to be one that was likely to "dissuade a reasonable worker from making or supporting a charge of discrimination."[12] Lastly, the Equal Employment Opportunity Commission's (EEOC) approach, adopted by the Ninth Circuit, required a plaintiff to show adverse treatment based on a retaliatory motive.[13] This last approach, however, still required the plaintiff to prove that the conduct at issue was likely to deter the plaintiff or others from engaging in protected conduct.

The Supreme Court granted certiorari in *White* to interpret the anti-retaliation statute contained in Title VII, and specifically to delineate what types of harm a plaintiff must allege and prove to establish an actionable claim of retaliation under Title VII.[14] The plaintiff in *White* worked primarily as a forklift operator in the Maintenance of Way Department of Burlington Northern and Santa Fe Railway ("BNSF"), and she was the only female employee in this department.[15] The plaintiff later filed an internal complaint against her direct supervisor, claiming that in addition to other inappropriate comments made in front of her co-workers, he had told her that females should not be working in the department.[16] Her supervisor was eventually suspended for 10 days and required to attend a sexual harassment training session.[17] A short time after making her complaint, the plaintiff was told by another member of management that she was being removed from her job as a forklift operator and reassigned to perform only standard laborer duties.[18] The employer told the plaintiff that the decision was made because co-workers had complained that a "more senior man" should have the "less arduous and cleaner job" of forklift operator.[19]

The plaintiff filed a charge with the EEOC alleging that her employer's decision to assign her different responsibilities was sexual discrimination and retaliation for her having filed a complaint against her supervisor.[20] The plaintiff subsequently filed a second charge with the EEOC, alleging that management had placed her under surveillance and was monitoring her daily activities in retaliation for her initial charge.[21] Several days after BNSF received notice of this second charge, the plaintiff and her supervisor had a disagreement regarding what truck should transport her from one job site to another.[22] BNSF immediately suspended the plaintiff without pay for her alleged insubordination, and she filed an internal grievance with her employer to challenge the discipline imposed.[23] BNSF ultimately determined that the plaintiff had not been insubordinate.[24] Accordingly, BNSF reinstated the plaintiff to her position and awarded her backpay for the 37 days she had been suspended.[25]

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The plaintiff subsequently filed a third charge with the EEOC alleging retaliation based on the suspension.[26] The case proceeded to trial on the plaintiff's allegations that BNSF had violated Title VII by changing her job duties and by suspending her without pay in retaliation for her decision to report her supervisor's inappropriate behavior.[27] A jury returned a verdict in favor of the plaintiff on both of these claims and awarded her $43,500 in compensatory damages.[28] The district court denied BNSF's post-trial motion for judgment as a matter of law.[29] BNSF appealed the judgment, and a divided Sixth Circuit panel reversed the district court, finding in favor of BNSF on the retaliation claims.[30] The Sixth Circuit, sitting en banc, vacated the decision and affirmed the judgment entered by the district court in White's favor on both retaliation claims.[31]

The Supreme Court framed the questions presented for review as follows: (1) "whether Title VII's anti-retaliation provision forbids only those employer actions and resulting harms that are related to employment or the workplace;" and (2) how harmful an act of retaliatory discrimination must be to fall within the scope" of Title VII anti-retaliation provision.[32]

In addressing the first question, the Court analyzed and compared the language contained in the anti-discrimination statute, section 703, with the language of the anti-retaliation statute, section 704.[33] The Court rejected the Sixth Circuit's standard, which required a link between the allegedly retaliatory conduct and the employees "compensation, terms, conditions, or privileges of employment," explaining that section 704 did not contain language limiting retaliatory conduct to the workplace or to actions that affected employment.[34] The Court further reasoned that its interpretation of the law was consistent with the purpose behind the anti-retaliation provision, which the Court noted serves a different purpose than the section of the act dealing with discrimination.[35] The Court concluded its analysis by explaining that a court should determine if a given harm is sufficiently material to qualify as retaliation by assessing whether "a reasonable employee would have found the challenged action materially adverse."[36] The Court provided additional guidance by noting that, in this context, the standard articulated requires a plaintiff to show that the alleged act of retaliation "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[37]

In adopting this standard, the Court stressed the importance of separating non-actionable "trivial harms" from the type of harm that could subject an employer to liability, noting that Title VII "does not set forth a general civility code for the American workplace."[38] The opinion emphasizes that the Court intended its objective reasonable person standard to distinguish materially adverse employment actions from trivial harms that are not actionable as retaliation.[39] The Court further explained that it chose to define retaliation in general terms because "the significance of any given act of retaliation will often depend upon the particular circumstances."[40] The Court stated,

> By focusing on the materiality of the challenged action and the perspective of a reasonable person in the plaintiff's position, we believe this standard will screen out trivial conduct while effectively capturing those acts that are likely to dissuade employees from complaining or assisting in complaints about discrimination.[41]

In applying the new retaliation standard, the Court found that a jury could reasonably have concluded that the adverse actions alleged by the plaintiff were likely to dissuade a reasonable employee from making or supporting a charge of discrimination, meaning the harms alleged were sufficiently material to be actionable; therefore, the Court affirmed the judgment of the Court of Appeals.[42]

The Court's decision in *White* provoked much commentary while lower courts began grappling with the new standard in the context of actual disputes.[43] Some commentators argued that the Court's new standard was difficult to apply by interjecting a subjective fact-specific analysis, thus leading to more litigation and less summary dismissals of lawsuits.[44] This article will review a representative number of court of appeals decisions to illustrate how the new standard has been applied to evaluate the overall impact of *White*.

I. Illustrative Appellate Decisions Applying the Standard Adopted by the Supreme Court

As noted above, the Court in *White* chose to adopt a relatively less restrictive standard for Title VII retaliation cases. Accordingly, some plaintiffs have successfully opposed motions for summary judgment in cases that likely would have been dismissed in favor of the employer had one of the more restrictive standards been adopted by the Court. For example, in *Hawkins v. Anheuser-Busch, Inc.*, the issue before the court of appeals was whether an employer could be held liable for acts of retaliation initiated by a co-worker.[45] The plaintiff in *Hawkins* began working on a new assembly line in January of 2000.[46] One of her new co-workers was a male employee named Robinson.[47] She alleged that Robinson began sexually harassing her in November 2000.[48] The plaintiff reported Robinson's harassment to her supervisor and requested a transfer.[49] The company's Human Resources Department learned of the complaint and made an investigation into the allegations.[50] Interviews were conducted, and the company learned that another female employee, Cunningham, also felt Robinson had sexually harassed her by touching her inappropriately and making offensive sexual comments.[51] These allegations of harassment were consistent with those made by the plaintiff.[52] The company, however, determined that it did not have sufficient evidence of harassment to take any disciplinary action against Robinson.[53]

In addition to alleging sexual harassment, the plaintiff claimed that Robinson retaliated against her once he learned that she had reported him for sexual harassment.[54] A few weeks after she reported Robinson to her employer, someone set fire to her car while it was parked outside of her home.[55] The plaintiff believed that Robinson was responsible, and she gave this information to fire investigators, her direct supervisors, and members of senior management.[56]

One of the supervisors to whom the plaintiff reported this incident confirmed that after the fire, he was having a conversation with Robinson when Robinson implied that he was in fact responsible for the act of vandalism.[57] This same supervisor acknowledged that he knew Robinson was violent based on his past conduct.[58] The Sixth Circuit's opinion also points out that the supervisor had refused to participate

in the criminal prosecution of Robinson because he feared that Robinson would retaliate against him.[59] In addition to this evidence, another member of senior management, who investigated the allegations of sexual harassment, also admitted that he had heard rumors that Robinson had burned the plaintiff's car.[60] This individual had furthermore learned that Robinson had informed two other female employees, whom he also allegedly harassed, that he had burned the plaintiff's car.[61]

The company moved for summary judgment.[62] The district court granted the motion and dismissed the retaliation claim, holding that the Sixth Circuit had not recognized employer liability for co-worker retaliation.[63] The district court explained that the plaintiff had failed to allege any act of retaliation that could be attributed to the employer that would qualify as an "adverse employment action" under the anti-retaliation statute.[64] The district court noted that the plaintiff did not present any evidence that her employer had "condoned or encouraged" Robinson to retaliate against her.[65] The plaintiff appealed the decision and the Sixth Circuit reversed, since it found that the district court had not correctly applied the Supreme Court's opinion in *White*.[66]

This case is significant to this discussion because the Sixth Circuit incorporated the *White* standard into its analysis of whether the plaintiff had properly asserted a claim of co-worker retaliation.[67] The Sixth Circuit held that an employer could be held liable for retaliation initiated by a co-worker if the employer's response "manifests indifference or unreasonableness in light of the facts the employer knew or should have known."[68] Accordingly, the Sixth Circuit in *Hawkins* integrated the reasonable person standard of *White* with the standard it adopted to assess whether a claim of co-worker retaliation was actionable.[69] On this point the court of appeals stated:

> an employer will be liable for the coworker's actions if:
>
> (1) the coworker's retaliatory conduct is sufficiently severe so as to dissuade a reasonable worker from making or supporting a charge of discrimination,
>
> (2) supervisors or... management have actual or constructive knowledge of the coworker's retaliatory behavior, and
>
> (3) supervisors or... management have condoned, tolerated, or encouraged the acts of retaliation, or have responded to the plaintiff's complaints so inadequately that the response manifests indifference or unreasonableness under the circumstances.[70]

Applying this standard, the court of appeals held that the plaintiff had presented sufficient evidence from which a reasonable jury could find that the employer responded to the plaintiff's complaints with indifference.[71] Thus, the plaintiff established a prima facie case of retaliation because Robinson's retaliatory acts were such that a jury could find that they were likely to dissuade a reasonable employee from filing or supporting a charge of discrimination.[72] It is noteworthy that prior to the Court's decision in *White*, it is likely that the court of appeals would have affirmed the order of summary judgment in favor of the employer in this case because Robinson's act of vandalism would not qualify as causing an adverse impact on the employee's terms, conditions, or privileges of employment under the former standard.[73]

A number of other post-*White* decisions support the view that the new standard has made it more difficult for employers to prevail on motions for summary judgment.[74] In *Billings v. Town of Grafton*, the district court dismissed the plaintiff's retaliation claim after finding that her transfer, from one secretarial position to another, did not qualify as a "materially adverse" action.[75] The court of appeals, however, reversed because it found that the plaintiff had presented sufficient objective evidence that her new position was less prestigious, making summary judgment inappropriate.[76] The court of appeals further explained that, unlike her original job, the new position to which plaintiff was transferred was governed by a collective bargaining agreement, forcing the plaintiff to pay union dues and abide by union rules.[77] The First Circuit found that this change could "well dissuade a reasonable worker from making or supporting a charge of discrimination."[78]

In *Williams v. W.D. Sports N.M.Inc.*, the Tenth Circuit addressed the issue of whether a plaintiff could establish a prima facie case of retaliation where she alleged the employer opposed her request for unemployment benefits in retaliation for a sexual harassment charge she filed against the company.[79] The employer argued that its opposition to the plaintiff's unemployment claim was not materially adverse because the plaintiff did not present any evidence to prove that, as a result of its opposition, her unemployment benefits were actually suspended or denied.[80] The district court accepted this argument and dismissed the plaintiff's retaliation claim on the defendant's motion for directed verdict.[81]

The court of appeals reversed the district court, holding that *White* does not require a plaintiff to prove that he or she suffered actual harm to establish a prima facie case of retaliation.[82] Instead, the court held that a plaintiff must merely "show that a jury could conclude that a reasonable employee in [the plaintiff's] shoes would have found the defendant's conduct sufficiently adverse that he or she well might have been dissuaded from making or supporting a charge of discrimination."[83] The court of appeals found that the plaintiff had met this burden by presenting evidence that her employer threatened to destroy her marriage by spreading rumors regarding sexual misconduct if she opposed their decision to terminate her employment.[84] Accordingly, the court of appeals found that the circumstances were such that a jury could reasonably find that the employer's decision to oppose her request for unemployment benefits was retaliation.[85]

Halfacre v. Home Depot, U.S.A., Inc. also serves as a good example of how *White* has been applied to sustain a claim of retaliation where the outcome would likely have been different under the former standard.[86] In *Halfacre*, the plaintiff filed a charge of discrimination against Home Depot, alleging that the company had refused to promote him because of his race.[87] After filing this charge, the plaintiff received a performance evaluation from his supervisor that was the least favorable review he had received while employed by Home Depot.[88] The plaintiff subsequently filed a second charge to allege that he received a lower review in retaliation for filing his charge of discrimination.[89] The plaintiff subsequently filed a lawsuit alleging retaliation and the defendant moved for summary judgment.[90] The district court granted the defendant's motion

for summary judgment as to the retaliation claim, holding that a lower performance review did not qualify as a materially adverse employment decision since it did not alter the terms, conditions, or privileges of his employment.[91] One should note that the district court rendered its decision a short time before the Supreme Court published its decision in *White*.[92]

The Sixth Circuit reassessed whether the plaintiff's allegation that the lower performance review qualified as retaliation in light of *White*.[93] The court of appeals determined that the lower performance evaluation could qualify as actionable retaliation under the new standard and reversed the decision of the lower court.[94] According to the court of appeals, a lower performance evaluation could qualify as an adverse employment action that "could-in certain circumstances-dissuade a reasonable worker from making or supporting a charge of discrimination."[95] It reached this decision because it found that "markedly lower performance-evaluation scores" could "significantly impact an employee's wages or professional advancement."[96] It is noteworthy that prior to *White* the court of appeals would likely have affirmed the district court's decision since a single bad performance evaluation had previously been insufficient to qualify as a materially adverse action in the Sixth Circuit.[97]

By contrast, in *Higgins v. Gonzales*, the Eighth Circuit considered an employee's claim of retaliation involving an alleged lack of supervision and mentoring and a "transfer" to a similar position in another city.[98] The plaintiff was an Assistant United States Attorney ("AUSA") who was assigned to a project that had a two-year duration.[99] At the end of the two-year period, the plaintiff was provided with a similar position in another city.[100] Plaintiff alleged that "floundering should be recognized as an adverse employment action" and argued that her case was comparable to a supervisor that excludes an employee from "networking lunches."[101] The Eighth Circuit rejected her claim, noting that the record on appeal did not reflect that the plaintiff "was actually left to 'flounder' or that she was negatively impacted by the lack of supervision or mentoring."[102] As to the retaliation claim involving the alleged transfer, the Eighth Circuit reasoned that the plaintiff had failed to establish that the employment action was in fact a transfer or that it was a materially adverse action under the facts.[103] For example, the new position in Pierre was offered after the plaintiff's two-year appointment to the position in Rapid City ended by its own terms.[104] In addition, the plaintiff did not allege that the new position was "qualitatively more difficult or less desirable than the one she held in Rapid City."[105] The court of appeals further rejected the plaintiff's argument that the change was materially adverse because she essentially had to "start all over with [sic] with different cases and move to a new school setting with her family."[106] In rejecting this argument, the court of appeals noted that such arguments had been rejected in pre-*White* cases, since otherwise "*any* move would qualify as a materially adverse action because it would force an employee to start over in a new city."[107] Therefore, the Eighth Circuit affirmed the district court's order granting the defendant's motion for summary judgment.[108]

Later, affirming summary judgment in favor of the defendant, the Eighth Circuit in *Clegg v. Arkansas Department of Correction* rejected the retaliation claims of the plaintiff based on allegations of a negative evaluation, failure to provide tools, notices of new department policies and exclusion from meetings, among others, finding these were "trivial harms" under the facts presented.[109] In addressing the allegations of harm related to the evaluation, the court of appeals found that the plaintiff had received a satisfactory evaluation and that training was provided to help the plaintiff improve in the areas where he scored lower than in previous evaluations.[110] With regard to the allegations related to a failure to provide tools, notices of new policies, and exclusion from meetings, the court of appeals found that these matters were immediately remedied after the plaintiff brought these "failures" to the attention of his supervisor or asked to be included in certain meetings[111] Finally, the Eighth Circuit noted that plaintiff's complaints, related to his "contentious" relations with co-workers, were "trivial harms" and not actionable under Title VII.[112]

CONCLUSION

The decisions from the courts of appeals above discussed illustrate that *White* has generally made it easier for plaintiffs to meet the burden of establishing a prima facie case to avoid summary judgment since a broader range of employer conduct now falls within the scope of section 704. Accordingly, it is not surprising that the number of retaliation charges filed with the EEOC has increased significantly since the *White* decision.[113] Despite this expansion of employer liability in retaliation cases, the courts of appeals, particularly the Eighth Circuit, have generally rejected retaliation claims and found "trivial harm" where the allegations relate to basic disputes with co-workers and certain employer conduct, such as a failure to include in meetings, where the complained of action was promptly remedied.[114] One should note, however, that these post-*White* decisions demonstrate that the "objective standard" adopted by the Supreme Court is not nearly as objective and easy to apply as the Court appeared to suggest it would be. The decisions demonstrate the potential for new circuit splits as the courts of appeals struggle to define the requisite level of materiality across a multitude of fact situations involving challenged employer conduct.[115] One practical difficulty for trial courts in applying the *White* standard to dispositive motions is that the judge must determine whether a reasonable jury could find the action taken by the employer was likely to dissuade a reasonable employee from making or supporting a charge of discrimination. This inquiry would in fact be objective if the trial judge was to make this determination by viewing each alleged retaliatory act in isolation without reference to the plaintiff's unique circumstances. The Court in *White*, however, specifically explained that the context within which the employer took the adverse action is a necessary part of the analysis. This subjective component will vary from case-to-case based on the employee's circumstances and the nature of the workplace.[116] For example, the *White* opinion notes that under one set of facts an employer's decision to assign a plaintiff to a different shift could qualify as a materially adverse decision, while under a different set of circumstances this very same act would be a non-actionable

trivial harm.[117] Simply put, the objective "reasonable person" component of the *White* standard appears less predictive of the outcome in a given case since the actual circumstances that the plaintiff is able to prove will dictate how a reasonable person would or would not react to a given employment action.

Endnotes

1 548 U.S. 53 (2006).

2 42 U.S.C. § 2000e-3(a).

3 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) (explaining that Congress adopted the law "to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority groups").

4 42. U.S.C. § 2000e-2(a).

5 Carrington Baker, *A Choice of Rules in Title VII Retaliation Claims for Negative Employer References*, 55 Duke L. J. 153, 158 (2005) (noting that the anti-retaliation provision was enacted because "without such a provision protecting employees who bring claims against their employer, the threat of retaliation could chill potential claims and undermine the effectiveness of Title VII").

6 42 U.S.C. § 2000e-3(a). *See also* Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 555 U.S. __(2009)(interpreting the "opposition clause" of section 704).

7 *Compare* 42. U.S.C. § 2000e-2(a) (explaining in specific terms the adverse actions that are actionable under the ant-discrimination statute) *and* 42 U.S.C. § 2000e-3(a) (noting that it is unlawful for an employer "to discriminate" against an employee as retaliation but not providing any additional guidance regarding what types of adverse decisions satisfy the "to discriminate" requirement.

8 Ashley R. Wright, *An Ambiguous Clarification: How Burlington Northern & Santa Fe Railway Co. v. White's Resolution of a Circuit Split Creates Uncertainty in the Eighth Circuit*, 61 Ark. L. Rev. 161, 161-62 (2008) ("explaining that the federal circuit courts of appeals had come to different conclusions about how far-reaching the phrase "discriminate against" was within the context of the anti-retaliation provision).

9 White v. Burlington Northern & Santa Fe Railway Co., 364 F.3d 789, 796 (6th. Cir. 2004)(en banc); Von Gunten v. Maryland, 243 F.3d 858, 866 (4th Cir. 2001); Robinson v. Pittsburgh, 120 F. 3d 1286, 1300 (3rd Cir. 1997).

10 Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); *See also* Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997).

11 Washington v. Illinois Dept. of Revenue, 420 F.3d 658, 662 (7th Cir. 2005); Rochon v. Gonzales, 438 F.3d 1211, 1217-18 (DC Cir. 2006).

12 *Washington,* 420 F.3d at 662; *Rochon*, 438 F.3d at 1217-18.

13 *White*, 548 U.S. at 60-61 (quoting Ray v. Henderson, 217 F. 3d 1234, 1242-43 (9th Cir. 2000)).

14 *White*, 548 U.S. at 60-61.

15 *White*, 548 U.S. at 57. The plaintiff also performed some "track laborer" duties for her employer which included "removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way." *Id*.

16 *Id*. at 58.

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 *Id.*

25 *Id*. at 58-59.

26 *Id*. at 59.

27 *Id*.

28 *Id.*

29 *Id*.

30 White v. Burlington N. & Santa Fe Ry. Co., 310 F.3d 443, 449 (6th Cir. 2002).

31 *White*, 364 F.3d at 795-800 (6th Cir. 2004) (en banc). All members of the Sixth Circuit en banc voted to uphold the District Court's judgment; however, they differed as to the proper standard to apply. *Id*.

32 *White*, 548 U.S. at 61. The anti-retaliation provision of Title VII, Section 704(a), states as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter. 42 U.S.C. § 2000e-3.

33 *White*, 548 U.S. at 61-64. Section 703 of Title VII reads as follows:

It shall be an unlawful employment practice for an employer -

> (1) to fail or refuse to hire or to discharge 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, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.§ 2000e-3(a).

34 *White*, 548 U.S. at 61-62. The Court noted that according to the rules of statutory construction it had to assume that Congress did not use the same language in section 703 and section 704 because it intended the two statutes to cover different activities. *Id*. at 62-63 (citing and quoting Russell v. United States, 464 U.S. 16, 23 (1983) ("'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'").

35 *White*, 548 U.S. at 63. According to the Court, the anti-discrimination provision was aimed at preventing injury to persons based on their status while the anti-retaliation provision "seeks to prevent harm to individuals based on what they do, i.e., their conduct." *Id*.

36 *Id.* 67-68.

37 *Id*. at 67-68 (quoting *Rochon*, 438 F. 3d, at 1219); *Id.* (quoting *Washington*, 420 F. 3d, at 662)). The Court adopted the standard that had been previously adopted by the Seventh Circuit and District of Columbia Circuit as the proper test to determine whether an alleged act of retaliation was actionable under Section 704 of Title VII.

38 *White*, 548 U.S. at 68 (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 80 (1998)). The Court noted that the courts must "filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing' " *Id.* (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (2006).

39 *Id.* The opinion states, "[w]e speak of *material* adversity because we believe it is important to separate significant from trivial harms. An employee's decision to report discriminatory behavior cannot immunize that employee from those petty slights or minor annoyances that often take place at work and that all employees experience." *Id.* The Supreme Court noted that the purpose of the anti-retaliation statute would not be furthered by allowing

employees to bring claims based on "petty slights, minor annoyances, and simple lack of good manners." *Id.*

40 *Id.* The Court expanded on this concept by noting,

> Context matters. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. A schedule change in an employee's work schedule may make little difference to many workers, but may matter enormously to a young mother with school age children. *Id.*

41 *Id.* at 69-70.

42 *Id.* at 70-73.

43 *See*, *e.g*, Note, "*Employers Beware: Burlington Northern v. White and the New Title VII Anti-Retaliation Standard*," 41 Ind. L. Rev. 479 (2008); Note, *"Runaway Train—The Retaliation Scene After Burlington Northern v. White,"* 68 La. L. Rev. 1025 (Spring 2008); Rachael Alexander, *"Taking the Detour Around Defending Protected Activity: How Burlington Northern & Santa Fe Railroad Co. v. White Unnecessarily Complicates Litigation of Retaliation Claims,"* 27 Rev. Litig. 333 (Spring 2008); Note, *"Expanding the Scope of the Expansive Approach: The Burlington Northern Standard as a Per Se Approach to Federal Anti-Retaliation Law,"* 49 Ariz. L. Rev. 745 (Fall 2007); *See* Wright, *supra* note 8.

44 Notes, "*Walking on Eggshells: The Effect of the United States Supreme Court's Ruling in Burlington Northern & Santa Fe Railroad Co. v. White,"* 41 Loy. L.A. L. Rev. 683, 697-99 (Winter 2008). The author opined that "the 'particular circumstances' component establishes an intricate and arduous standard, which makes it virtually impossible to enforce a uniform and fair standard across the country." *Id.* at 697. The author further opined that under the new standard "a single circumstance can transform a trivial matter into a materially adverse action." *Id.* at 698. In the author's opinion, the new standard will make trial courts less likely to dismiss cases on summary judgment which will create a greater burden on the courts and impose more costs on employers. *Id.* at 698-99. The EEOC's Charge statistics reflect that retaliation charges filed under Title VII increased from 19,560 in Fiscal Year (FY) 2006 to 23,371 in FY 2007. *See* http://www.eeoc.gov/stats/charges.html. In its Fiscal Year 2008 Performance and Accountability Report, the EEOC noted that total charges increased 15.2% in Fiscal Year 2008. *See* http://www.eeoc.gov/abouteeoc/plan/par/2008/par2008.pdf at p. 7.

45 Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 347 (6th Cir. 2008). Four female plaintiffs initiated the lawsuit, but the retaliation claim brought by Ms. Cherri Hill is the one most relevant to the topic raised in this article. Therefore, the discussion will refer to Ms. Hill as the plaintiff.

46 *Id.* at 328.

47 *Id.*

48 *Id.*

49 *Id.* at 329.

50 *Id.*

51 *Id.* Cunningham subsequently denied that Robinson had harassed her when re-interviewed by a different member of management. *Id.* at 330. She subsequently explained that she denied the harassment on this occasion because she feared retaliation from Robinson. *Id.* Cunningham had previously told the plaintiff that Robinson had harassed her, and she even said that Robinson had followed her home on several different occasions. *Id.*

52 *Id.* at 328-30.

53 *Id.* at 329.

54 *Id.* at 344.

55 *Id.*

56 *Id.* at 348.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.* at 347-48.

63 *Id.* at 327.

64 *Id.*

65 *Id.* at 345.

66 *Id.* at 326.

67 *Id.* at 347.

68 *Id.*

69 *Id.*

70 *Id.*

71 *Id.* at 347-48.

72 *Id.* at 349.

73 *White*, 364 F. 3d 789, 796 (6th. Cir. 2005)(en banc).

74 Billings v. Town of Grafton, 515 F.3d 39 (1st Cir. 2008); Williams v. W.D. Sports, N.M., Inc., 497 F.3d 1079 (10th Cir. 2007); Darveau v. Detecon, Inc., 515 F.3d 334 (4th Cir. 2008).

75 *Billings*, 515 F.3d at 46-47.

76 *Id.* at 54. It is important for one to note that a plaintiff's subjective belief that a new position is less prestigious is not sufficient evidence to show that the transfer was "materially adverse." *Id.* at 53-54. Instead, a plaintiff must present objective evidence to show that the position to which he or she was transferred was in fact less prestigious. *Id.*

77 *Id.*

78 *Id.* The court listed a number of other differences between the positions and other factors that bolstered its conclusion that the district court had not correctly applied the standard articulated by the Supreme Court in *White*. *Id.* at 42-55. The plaintiff secretary brought her sexual harassment charge against her immediate supervisor. *Id.* at 41. She was eventually transferred to a new department to separate the plaintiff from said supervisor and banned from entering the office in which her former supervisor worked. *Id.* at 55. The court of appeals explained that banning the plaintiff from the office would likely qualify as a non-actionable petty slight; yet it found that under the circumstances this decision also qualified as materially adverse under the standard set forth in *White*. *Id.* The opinion emphasizes that because of the ban the plaintiff was not able to attend a training session that all of her colleagues attended because it took place in the office of her former supervisor. *Id.* The Supreme Court in *White* noted that the act of not asking an employee to attend lunch was not actionable retaliation absent proof that the lunches were instructional or for training purposes and that attendance was a factor relevant to professional advancement. *Id.* (quoting *White*, 548 U.S. at 69).

79 *Williams*, 497 F.3d at 1088-89.

80 *Id.* at 1088. One key issue in dispute was whether a plaintiff had to show that he or she suffered some form of "tangible economic or psychological harm" to establish a prima facie case of retaliation. *Id.* The court of appeals acknowledged that the Supreme Court had held that Title VII does not protect an employee from "all retaliation." *Id.* Instead, it merely protects them from actions that a reasonable employee would find materially adverse. *Id.* Hence, the Tenth Circuit had to determine whether a plaintiff had to show that he or she suffered some form of tangible harm in order to show that the action taken by the employer could have dissuaded a reasonable worker from making or supporting a charge of discrimination. *Id.*

81 *Id.* at 1084.

82 *Id.* at 1089-90.

83 *Id.* at 1090.

84 *Id.* at 1084.

85 *Id.* at 1090-91. Shortly after plaintiff filed a charge against her employer, she received notice that her employment was terminated. *Id.* at 1084. Her supervisor explained that if she decided to fight the decision the company would make the rumors about her sexual activity public regardless of whether these allegations were true. *Id.* He also threatened to ruin her marriage and reminded her that she had her children to think about. *Id.* Plaintiff continued to pursue her claim, and her employer subsequently submitted a written statement to the unemployment office claiming that it fired plaintiff for cause.

Id. This letter also accused her of sexual misconduct with other employees, theft of company property, and other wrongs. *Id.* The court also noted that the attorney for the company told plaintiff that if she dropped her charge that the company would drop its opposition to her request for unemployment benefits. *Id.* Applying *White*, the Tenth Circuit found that even if the defendant's opposition to her request for benefits did not ultimately cause her to suffer any tangible harm, the facts were still sufficiently adverse for her retaliation claim to be decided by the jury. *Id.* at 1090. The court specifically stated, "we do not doubt that a reasonable employee could well find such a combination of threats and actions taken with the design of imposing both economic and psychological harm sufficient to dissuade him or her from making or supporting a charge of discrimination." *Id.* The opinion emphasizes that "material tangible economic or psychological damages is certainly sufficient but not necessary to satisfy *White's* requisites. *Id.* at 1091.

86 221 Fed. Appx. 424 (6th Cir. 2007).

87 *Id.* at 426.

88 *Id.* at 426-27.

89 *Id.*

90 *Id.* at 427.

91 *Halfacre*, 221 Fed. Appx. at 427; The district court stated that "a performance evaluation that is lower than an employee feels is warranted is not an adverse employment action sufficient to state a claim of discrimination." Halfacre v. Home Depot U.S.A., Inc. No. 04-2483 MA P., 2005 WL 2114060 at *7 (W.D. Tenn. Aug. 26, 2005).

92 *Halfacre*, 221 Fed. Appx. at 431.

93 *Id.* The Eleventh Circuit has also ruled that a negative performance review can qualify as a materially adverse employment decision according to the Supreme Court's decision in *White*. Crawford v. Carroll, 529 F.3d 961 (11th Cir. 2008).

94 *Halfacre*, 221 Fed. Appx. At 431-32.

95 *Id.* at 432. *But see* Baloch v. Kempthorne, 550 F. 3d 1191 (D.C. Cir. 2008)("not achieved" performance evaluation with no impact on position, pay, grade level or promotional opportunities was not materially adverse action).

96 *Id.* at 430-32. The court noted that plaintiff's performance evaluation scores changed significantly after he filed his EEOC discrimination charge. *Id.* at 432. It then explained that if excluding an employee from a training lunch could qualify as materially adverse when it could "significantly impact an employee's wages or professional advancement," then a lower performance evaluation would likewise qualify for the same reasons. *Id.* at 432-33.

97 *Id*. at 430-32. *See* Primes v. Reno, 190 F. 3d 765, 767 (6th Cir. 1999) (an unfavorable performance evaluation without an accompanying adverse employment action, such as a lower wage, is not actionable as a Title VII retaliation claim.); *See, also,* Steele v Schafer, 535 F. 3d 689, 695-97 (D.C. Cir. 2008) (court of appeals reversed and remanded the district court's grant of summary judgment in order for the district court to evaluate the plaintiff's claims under the new standard in *White*, where the plaintiff alleged as retaliatory conduct "the denial of the Y2K award, the issuance of the lowest performance rating of her career combined with the lowest performance bonus in her branch, the denial of the special act award, and the false report to the D.C. Office of Unemployment Compensation contesting her unemployment benefits").

98 481 F.3d 578, 590 (8th Cir. 2007).

99 *Id*. at 581

100 *Id*. at 584. The plaintiff was originally based in Rapid City, South Dakota. *Id*. at 581. She later received and accepted a transfer to Pierre, South Dakota. *Id*. at 584.

101 *Id*. at 590.

102 *Id*. The court of appeals noted that the record reflected a "personality conflict" between the plaintiff and the Deputy USA, but there was nothing in the record to suggest that the situation was so "unbearable or bleak" to deter a reasonable employee from complaining about discrimination. *Id.* The court of appeals acknowledged, however, that plaintiff might be able to establish a claim of retaliation had the plaintiff "actually been left to 'flounder' or was negatively impacted by the lack of supervision or mentoring." *Id*.

103 *Id.*

104 *Id.*

105 *Id.* The court of appeals noted that there was evidence in the record to suggest that plaintiff's job performance improved after she went to Pierre. *Id.*

106 *Id*. at 591.

107 *Id.* (emphasis in original) (*citing* Turner v. Gonzales, 421 F. 3d 688, 697 (8th Cir. 2005)("[the] normal inconveniences associated with any transfer, such as establishing one's professional connections in a new community, are [in]sufficient, without more, to demonstrate a significant change in working conditions").

108 481 F.3d at 591.

109 496 F.3d 922, 929 (8th Cir. 2007).

110 *Id*.

111 *Id*.

112 *Id.* (citing Carpenter v. Con-Way Central Express, Inc., 481 F. 3d 611, 619 (8th Cir. 2007)).

113 *See supra*, note 44. One should note that it is far too early to assume that a causal relationship exists between the decision in *White* and the increasing number of retaliation charges filed with the EEOC. Nonetheless, it is reasonable for one to assume that *White* will be a factor that will help ensure that this trend will continue.

114 *Clegg*, 496 F. 3d 922; *Higgins*, 481 F. 3d 578. *See also* Henry v. Milwaukee County, 539 F. 3d 573, 586-87 (7th Cir. 2008). In *Henry*, the Seventh Circuit found that alleged employer conduct such as "being told not to wear sweaters or eat in front of the juveniles, unspecified 'intimidation' and door slamming by the head of shift, missing or marked up time-cards, occasional early morning phone calls, and not being assigned to work together on the same shift or in easier pods" were trivial harms and not actionable under Title VII. *Id.*

115 Note, *"Employer Liability under Title VII: Creating an Employer Affirmative Defense for Retaliation Claims,"* 29 Cardoza L. Rev. 1319, 1333-34, footnotes 116 & 117 (January 2008). "The lower courts, however, have acknowledged that the Supreme Court's mandate is unclear, and are awaiting further guidance and clarification. In the meantime, courts as well as employers are struggling to determine *White's* ultimate impact." *Id*.

116 *See White*, 548 U.S. at 69. The Court used schedule changes and event invitations as examples of conduct that may or may not be materially adverse based on the employee's particular circumstances. *Id*. Further, job reassignments may be materially adverse changes if the position to which the employee is reassigned is perceived to be a less prestigious or more demanding position in the workplace. *Id*. at 71.

117 *Id*. at 69.

Boston Harbor's Unresolved Presumption: Can Owner-Developers Enter into or Enforce a Project Labor Agreement?

*By William Messenger**

A project labor agreement ("PLA") is a union collective bargaining agreement that all contractors must sign to work on a construction project. In *Boston Harbor*, the Supreme Court held that a government entity acting as an owner-developer of a public construction project could lawfully require compliance with a union-only PLA, without running afoul of federal preemption, on the presumption that a private owner-developer could lawfully take the same action.[1] As a result of this 1993 decision, the use of PLAs on public construction projects has dramatically increased.[2]

But *Boston Harbor*'s underlying presumption is highly questionable. Most private owner-developers cannot lawfully enter into or enforce PLAs under §§ 8(e) and (f) of the National Labor Relations Act (NLRA).[3] These sections generally permit only construction companies to enter into the specialized labor agreements used in the construction industry.

Accordingly, *Boston Harbor* may be a tower built without a foundation. If enforcement of PLAs by private owner-developers is unlawful under NLRA, then enforcement of PLAs by public owner-developers is also unlawful under the rationale of *Boston Harbor*. The very decision that opened the door to government use of PLAs should proscribe the practice.

The courts have never squarely addressed *Boston Harbor's* underlying presumption. The resolution of this issue will likely determine the extent to which PLAs can be imposed by state and local governments on public construction projects.

I. Terminology

Construction projects are governed by a series of hierarchical relationships. At the apex is the "owner-developer," which is the owner of the project and the purchaser of the construction services. It is the entity for which something is being built. For example, a manufacturing company that is having a new factory built is the owner-developer of that project. A school district that is building a new school is an example of a public owner-developer.

Below the owner-developer is the "general contractor" (sometimes called a project manager), which is responsible for managing and coordinating work on the construction project. Below the general contractor are "contractors," which perform the actual construction work.

On a typical project, the owner-developer hires a general contractor, which then subcontracts work to contractors, which then often subcontract portions of their work to other contractors. However, sometimes one entity performs more than one function (e.g., a general contractor may perform some construction work itself).

The degree to which owner-developers involve themselves in the actual construction process varies. At one end of the spectrum are those that leave the details of the construction work to their general contractor. At the other end of the spectrum are owner-developers who act as their own general contractor. Typically, owner-developers do not perform construction work or employ construction workers themselves, but instead rely upon contractors.

II. Project Labor Agreements

A "PLA" is a union collective bargaining agreement that covers all work performed on a construction project. Like most collective bargaining agreements, PLAs usually require that signatory employers recognize the union as the exclusive representative of their employees; contribute to union pension and healthcare funds; operate according to union work rules; follow union procedures for hiring, firing, and disciplining employees; and, in non-Right to Work states, force all employees to pay dues to the union as a condition of employment.[4] However, PLAs differ from collective bargaining agreements used outside of the construction industry in two important ways.

First, PLAs are "pre-hire" agreements, in that employers negotiate the agreements with the unions before the employees are hired or exclusively represented by the unions.[5] This is normally unlawful under the NLRA, which permits employers to recognize and contract with a union only after the union has the support of a majority of employees under § 9(a) of the Act.[6] But § 8(f) of the NLRA creates an exception to this rule for "an employer engaged primarily in the building and construction industry."[7]

Second, PLAs contain "subcontracting clauses" that mandate that signatory employers only subcontract with those who also sign the union PLA.[8] In other words, subcontracting with employers who remain nonunion is prohibited. This is normally unlawful under § 8(e) of the NLRA, which mandates that employers cannot enter into agreements with unions to cease doing business with other employers.[9] But the construction industry proviso § 8(e) creates an exception to this prohibition for "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction."[10]

The use of PLAs in both the private and public sectors is controversial. Opponents point out that the agreements serve only to increase construction costs because they exclude from the competitive bidding process all contractors who wish to operate nonunion.[11] In the public sector, PLAs are apt to be required because of union political influence instead of any true pecuniary benefits.[12] These and other concerns led the Bush Administration to ban contracting authorities from requiring use of PLAs on federal and federally funded construction projects.[13]

Proponents of PLAs usually claim that the union agreements ensure timely completion of construction projects by reducing labor strife.[14] This is a somewhat perverse justification,

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as unions themselves threaten to cause the strife that will delay the project. The rationale makes a PLA akin to the payment of protection money. Moreover, operating nonunion is a more obvious means of eliminating union discord than unionizing the entire project. Nevertheless, use of PLAs is not uncommon in jurisdictions in which unions have political influence.

III. Can Private Owner-Developers Enter Into or Enforce Project Labor Agreements Under §§ 8(e) and (f) of the NLRA?

An owner-developer and its employees are generally not subject to the substantive terms of PLAs, because the agreements govern only those who perform construction work (i.e., contractors and their employees). An owner-developer's role under a PLA is typically limited to forcing contractors to execute and abide by a PLA as a condition of working on the project.[15] However, owner-developers will often negotiate the substantive terms of the PLA to be imposed on contractors and their employees.

It is doubtful that many owner-developers can lawfully negotiate or enforce a PLA under the NLRA. First, most are not "employer[s] engaged primarily in the building and construction industry" that can lawfully negotiate terms of a pre-hire agreement under § 8(f). Second, most owner-developers cannot agree to make execution of a union PLA a condition of doing business without violating § 8(e) of the NLRA because: (a) they are not an "employer in the construction industry," and (b) they lack a collective bargaining relationship with the construction union.

1. An owner-developer will engage in pre-recognition bargaining if it negotiates the substantive terms of a PLA because most affected employees are not exclusively represented by the union (as they have not yet been hired). Pre-recognition bargaining has long been recognized as an unfair labor practice, as § 9(a) of the NLRA permits unions to act as employees' bargaining representatives only *after* being selected for that purpose by a majority of the employees.[16]

Section 8(f) provides a limited exemption to the NLRA's prohibition on pre-recognition bargaining for the construction industry. It states in pertinent part that:

> It shall not be an unfair labor practice... for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged... in the building and construction industry with a labor organization of which building and construction employees are members... because (1) the majority status of such labor organization has not been established under the provisions of [§ 9 of the NLRA] prior to the making of such agreement.[17]

It is only because of § 8(f) that contractors can negotiate pre-hire agreements with construction unions before employees are hired or represented by the union under § 9(a).

But most owner-developers are not "employer[s] engaged *primarily* in the building and construction industry" who can engage in pre-recognition bargaining under § 8(f). A majority of an entity's overall business must be construction work to satisfy this requirement.[18] With the exception of those few owner-developers whose principal business is construction, owner-developers cannot lawfully negotiate the substantive terms of PLAs under § 8(f).

However, the National Labor Relations Board is currently reviewing the law regarding pre-recognition bargaining in *Dana Corp (Int'l Union, UAW),* a lead case that has been pending before the Board for several years now.[19] But barring a sea change in the law regarding the legality of pre-recognition bargaining, most owner-developers will violate the NLRA if they negotiate the substantive provisions of a PLA.

2. An owner-developer certainly violates the basic prohibition of § 8(e) of the NLRA if it agrees with a union to not do business with contractors that do not sign a union PLA or enforce such a requirement. To be lawful, enforcement of a union-only PLA requirement must fall within the construction industry proviso to § 8(e). There are at least two reasons why many owner-developers will not qualify for this exemption to § 8(e)'s prohibitions.

A. Section 8(e)'s construction industry proviso requires that an employer be an "employer in the construction industry." This requirement excludes owner-developers not directly involved in the specifics of a construction project from the proviso's coverage.

Whether an entity is acting as an "employer in the construction industry" is determined on a project by project basis, rather than by the primary business of the entity (unlike under § 8(f)).[20] The degree of control that an entity exercises over labor relations at the construction site is the determining factor in the analysis.[21] Exactly how much control is needed to be an "employer in the construction industry" is unclear, as "there are only a very limited number of relevant Board decisions" on the issue.[22] These decisions each involved fact intensive inquiries, the results of which varied depending on the circumstances.[23]

An employer's requirement that contractors execute a PLA on a construction project cannot, in and of itself, make an entity an "employer in the construction industry" because that would render this phrase inoperative in § 8(e).[24] Some additional degree of involvement in the construction work is necessary to satisfy the plain text of § 8(e)'s construction proviso.

But irrespective of the proviso's exact parameters, it is clear that an owner-developer uninvolved in the construction process will not qualify as an "employer in the construction industry," and hence cannot enforce a union-only PLA requirement under § 8(e). Most notably, this includes owner-developers whose role is limited to financing a construction project.

B. The Supreme Court held that § 8(e)'s construction industry proviso is inapplicable when an employer lacks a collective bargaining relationship with the union in *Connell Constr. Co. v. Plumbers & Steamfitters, Local 100* and in *Woelke & Romero Framing, Inc. v. NLRB.*[25] This limit further precludes owner-developers from lawfully enforcing PLA requirements, as most do not have a representational relationship with a construction union.

The facts in *Connell* mirror a typical owner-developer's role in a PLA. The employer at issue (Connell) was a "stranger" employer, in that the union did not represent or seek to represent any of its employees. [26] Connell's only obligation to the union was its agreement to force contractors with which it did business to execute a contract with the union.

The Supreme Court found that the agreement did not

satisfy the construction industry proviso of § 8(e)—even though Connell was an "employer in the construction industry"—because top-down organizing pressure from stranger employers is repugnant to the statute's legislative purpose. The Court held that the purpose of § 8(e) and related provisions is "to limit 'top-down' organizing campaigns,"[27] and concluded that the "careful limits on the economic pressure unions may use in aid of their organizational campaigns would be undermined seriously if the proviso of § 8(e) were construed to allow unions to seek subcontracting agreements" with stranger employers.[28] Thus, as the Court later reiterated in *Woelke & Romero*, the *Connell* "Court decided that the proviso did not exempt subcontracting agreements that were not sought or obtained in the context of a collective-bargaining relationship."[29]

Connell precludes many (if not most) owner-developers from requiring execution of a PLA because most do not have representational relationships with a construction union. Owner-developers generally do not employ construction workers for a construction union to represent under § 9 of the NLRA.[30] An owner-developer cannot enter into a pre-hire relationship with a construction union under § 8(f) unless "engaged primarily in the building and construction industry." Thus, only those few owner-developers whose principal business is construction work can potentially satisfy *Connell* and enforce a union-only PLA requirement.

However, some argue that § 8(e)'s construction industry proviso may also apply outside of a representational relationship if the agreement is aimed at the so-called "common-situs" problem, i.e. reducing friction between union and nonunion employees at a jobsite.[31] The argument is based on dicta in *Connell* that the proviso might extend "possibly to common-situs relationships on particular jobsites as well" due to congressional concern about the issue.[32]

The argument is unpersuasive. The Court in *Woelke & Romero* later construed *Connell* as permitting subcontracting clauses only in the context of a bargaining relationship,[33] and disavowed the proposition that § 8(e)'s proviso was aimed primarily at the common-situs problem.[34] Moreover, a "common-situs" exception would render *Connell's* prohibition against top-down organizing pressure from stranger employers meaningless, as any subcontracting clause could be justified with a rote incantation that its ostensible purpose is to reduce jobsite friction by excluding nonunion contractors from the project.

Even though *Connell* was decided in 1975, the Board "has yet to determine whether an alternative basis for proviso coverage exists under this *Connell* common-situs dictum."[35] The Board has repeatedly avoided resolving the issue by deciding cases on other grounds, most recently in its 2007 decision in *Indeck Construction* (which had been pending before the Board for 6 years).[36] However, absent a determination that the *Connell* dicta created an alternative basis for satisfying § 8(e)'s construction proviso, the representational relationship required by *Connell* and *Woelke & Romero* precludes most owner-developers from lawfully enforcing PLA requirements.

IV. The Supreme Court in Boston Harbor Holds that Public Owner Developers can Enforce PLAs on the Presumption that Private Owner-Developers can do the Same

In *Boston Harbor*, the Supreme Court addressed the issue of whether a public owner-developer (the Massachusetts Water Resources Authority) could lawfully make execution of a PLA negotiated by its general contractor (Kaiser Engineers, Inc.) a condition of obtaining work on a public construction project.[37] Interference by state or local governments in private sector labor relations is generally preempted by the NLRA.[38] However, the Supreme Court held that the Water Authority's action was not preempted because it was not acting as a government regulator, but rather as a participant in the marketplace.[39]

The crux of the Court's decision was that, "[t]o the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity as purchaser should be permitted to do the same."[40] Without analysis, the Court presumed that a private purchaser of construction services (i.e., an owner-developer) could lawfully agree to choose contractors based on their willingness to execute an agreement with a union.

But as explained above, private purchasers cannot lawfully agree with unions to cease doing business with nonunion contractors, or enforce such requirements, without violating § 8(e) of the NLRA unless they satisfy the statute's construction industry proviso. Most purchasers do not qualify for this exemption to § 8(e) because they are not "employer[s] in the construction industry" and/or lack a representational relationship with a construction union.

Indeed, a private purchaser enforcing a union-only PLA requirement would be imposing exactly the type of top-down organizing pressure from stranger employers that the Supreme Court held unlawful under § 8(e) in *Connell*. Yet, the Court did not mention (much less consider) *Connell* in its *Boston Harbor* opinion.

Moreover, a private purchaser also cannot negotiate the substantive terms of a PLA unless it is an "employer engaged primarily in the building and construction industry" that can lawfully engage in pre-recognition bargaining under § 8(f) of the NLRA. However, this was not an issue in *Boston Harbor* because the general contractor (Kaiser) negotiated the PLA, not the owner-developer (the Water Authority).[41]

The *Boston Harbor* Court did find that the agreement between the *general contractor* (Kaiser) and the union was "a valid labor contract under §§ 8(e) and (f)," because "an employer like Kaiser is engaged primarily in the construction industry."[42] But the Court did not address whether an *owner-developer* analogous to the Water Authority could enforce such an agreement. That a construction contractor like Kaiser can enter into a PLA has no bearing on whether an owner-developer can lawfully do the same under §§ 8(e) and (f) of the NLRA.

There has been significant litigation regarding the use of PLAs by state and local public entities since *Boston Harbor*. Yet, *Boston Harbor's* underlying presumption has not been directly addressed by the courts: whether private owner-developers can lawfully enter into or enforce a union only PLA.[43]

The ultimate resolution of this issue will likely determine the extent to which PLAs can be used in the public sector. *Boston Harbor* holds that a public owner-developer lawfully acts as a "market participant" when it acts as an analogous private owner-developer could lawfully act.[44] It is clear that many (if not most) private owner-developers cannot lawfully negotiate or

enforce PLAs under §§ 8(e) and (f) of the NLRA. Accordingly, the use of PLAs in the public sector is preempted to this extent under the rationale of *Boston Harbor*.

Endnotes

1 Building Trades Council v. Associated Builders and Contractors of Massachusetts, Inc., 507 U.S. 218 (1993) ("Boston Harbor").

2 *See* Dr. Herbert R. Northrup & Linada E. Alario, *Government-Mandated Project Labor Agreements in Construction, The Institutional Facts and Issues and Key Litigation*, 19 Gov. Union Rev. 3, 22-25 (2000).

3 29 U.S.C. §§ 158(e) and (f).

4 *See* Building & Const. Trades Dept., v. Allbaugh, 295 F.3d 28, 30 (D.C. Cir. 2002); *Boston Harbor*, 507 U.S. at 230; Jim McNeff, Inc. v. Todd, 461 U.S. 260, 265-266 (1983).

5 *See supra,* note 4.

6 *See* Ladies Garment Workers v. NLRB, 366 U.S. 731, 736 (1961); Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 533-34 (D.C. Cir. 2003); Majestic Weaving Co., 147 NLRB 859 (1964), enforcement denied on other grounds, 355 F.2d 854 (2d Cir. 1966).

7 29 U.S.C. § 158(f).

8 *See* Allbaugh, 295 F.3d at 30; Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 656-57 (1982).

9 "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work." 29 U.S.C. § 158(e).

10 *See supra* note 9.

11 *See* Vincent E. McGeary & Michael G. Pellegrino, *Project Agreements and Competitive Bidding: Monitoring the Back Room Deal*, 19 Seton Hall Legis. J. 423, 449-50 (1995) ("It is axiomatic that reducing the pool of eligible bidders will increase costs," and "[s]tudies show that union labor increases costs over open shop contractors by twenty to sixty percent"); *see also* Northrup & Alario, *supra* note 2, at 35-37; Maurice Baskin, *The Case Against Union-Only Labor Project Agreements*, 19 Construction Law 14 (Jan. 1999).

12 *See* McGeary & Pellegrino, *supra* note 11, at 431-34; Northrup & Alario, *supra* note 2, at 22, 57-58.

13 *See* Allbaugh, 295 F.3d at 30 (discussing and upholding Executive Order 13202).

14 *See* Northrup & Alario, *supra* note 2, at 28-30.

15 *Allbaugh*, 295 F.3d at 30.

16 *See supra,* note 6; *see also* Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 Lab. Law. 165, 176-77 (1996) (General Counsel for AFL-CIO acknowledging that "discussing the terms of a future collective bargaining agreement, should the union demonstrate majority support" is an unfair labor practice "[u]nder *Majestic Weaving*").

17 29 U.S.C. § 158(f).

18 *See* Pekowski Enterprises, Inc. d/b/a the Expo Group, 327 NLRB 413, 428-29 (1999); C.I.M. Mechanical, 275 N.L.R.B. 685, 689 (1985); Carpet, Linoleum and Soft Tile Local 1247 (Indio Paint and Rug Center), 156 NLRB 951, 960-61 (1966); Frick Co., 141 NLRB 1204, 1209 (1963); *but see* A. L. Adams Construction v. Georgia Power, 733, F.2d 853, 857 (11th Cir. 1984) (analyzing § 8(f) on a project by project basis).

19 Dana Corp. (Int'l Union, UAW), NLRB Case No. 7-CA-46965 *et seq*.; *see* William L. Messenger, "Pre-Recognition Agreements: Can Employers Lawfully Acquire Control over the Future Representative of their Employees under § 8(A)(2) of the NLRA?," 7 Engage 2, 131 (October 2006) (discussing issues presented in Dana).

20 Los Angeles Bldg. & Constr. Trades Council (Church's Fried Chicken), 183 NLRB 1032, 1036-37 (1970); Carpenters Local 743 (Longs Drug), 278 NLRB 440, 442 (1986).

21 *See supra,* note 20.

22 Glens Falls Building & Constr. Trades Council (Indeck Const.), 325 NLRB 1084, 1087 (1998) ("Indeck I"), further proceedings, 350 N.L.R.B. No. 42 (2007) ("Indeck II").

23 Compare Longs Drug, 278 NLRB at 442; Carpenters Chicago Council (Polk Bros.), 275 NLRB 294 (1985); Columbus Bldg. & Constr. Trades Council (Kroger Co.), 149 NLRB 1224 (1964), *with* Church's Fried Chicken, 183 NLRB at 1036-37; Carpenters (Rowley-Schlimgen), 318 NLRB 714 (1995).

24 The construction industry proviso to § 8(e) exempts agreements by an "employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction." If an agreement "relating to the contracting or subcontracting of work... at the site of the construction" was itself sufficient to make an entity an "employer in the construction industry," this phrase would be superfluous. The statute would operate the same if the words "in the construction industry" were excluded. This is contrary to the settled rule that every word in a statute have operative effect. Cooper Industries, Inc. v. Aviall Services, Inc., 543 U.S. 157, 167 (2004).

25 Connell Constr. Co. v. Plumbers & Steamfitters, Local 100, 421 U.S. 616, 633 (1975); Woelke & Romero Framing, Inc. v. NLRB, 456 U.S. 645, 653 & n.8 (1982).

26 *Connell*, 421 U.S. at 620.

27 *Id*. at 632

28 *Id*.

29 Woelke & Romero, 456 U.S. at 653 (discussing Connell, 421 U.S. at 633).

30 *See* Indeck II, 350 NLRB No. 42 at * 5 (holding that owner-developer of cogeneration power plant did not have representational relationship under Connell because it employed no employees on the construction project).

31 *See*, e.g., Indeck I, 325 NLRB at 1087-91 (Member Gould, concurring).

32 *Connell*, 421 U.S. at 633.

33 Woelke & Romero, 456 U.S. at 653 & n.8; *see also* id. at 663 ("we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship").

34 *Id*. at 662.

35 Indeck II, 350 NLRB No. 42, at *5.

36 *See* Indeck II, 350 NLRB No. 42, at *5 (not resolving whether subcontracting clause entered into outside of representational relationship is saved by common-situs justification by finding that clause was not intended to address common-situs issue); Iron Workers Pacific Northwest Council (Hoffman Construction), 292 NLRB 562, 580-81 (1989) (same); Colorado Building & Construction Trades Council (Utilities Services Engineering), 239 N.L.R.B. 253, 255-56 (1978) (same).

37 *Boston Harbor*, 507 U.S. at 221-22.

38 *See, e.g.,* Chamber of Commerce of U.S. v. Brown, 554 U.S. ___, 128 S. Ct. 2408, 2412 (2008); Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 618-19 (1993).

39 *Boston Harbor*, 507 U.S. at 232-33; *see also* Brown, 128 S. Ct. at 2415.

40 *Boston Harbor*, 507 U.S. at 231; *see also id*. at 231-32 ("where analogous private conduct would be permitted, this Court will not infer such a restriction"); *id*. at 233 ("when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act... it does not 'regulate' the workings of the market forces") (quotation omitted).

41 *Boston Harbor*, 507 U.S. at 221-22.

42 *Id*. at 231.

43 Research did not reveal any federal decisions that analyzed whether a PLA imposed by a public owner-developer is not saved by the market participant doctrine because an analogous private developer could not lawfully take the same action, other than a recent unreported opinion by the District Court for the Central District of California in *Johnso v. Rancho Santiago Community College District*, Case No. 04-cv-00280 (Oct. 23, 2008), on appeal, Case No. 08-5693 (9th Cir. 2008). Note that *Colfax Corp. v. Illinois State Toll Highway Authority*, 79 F.3d 631, 634-35 (7th Cir. 1996), did not analyze this issue, but instead whether a contractor could enter into a pre-hire agreement under the NLRA (which was conceded by the appellant).

44 *See supra,* note 40.

The Employee Free Choice Act and the South

*By R. Pepper Crutcher**

The Employee Free Choice Act (EFCA)[1] is among the top items on President Obama's legislative agenda; it was a clear campaign promise to a core constituency—organized labor. Most Southern business and political leaders strongly oppose EFCA's practical elimination of secret ballot union representation elections, as well as its imposition of labor contracts through government-controlled interest arbitration. They see EFCA as a rustbelt effort to impose a failed business model on sunbelt employers. Because EFCA is perceived to threaten decades of social and economic development progress, aggrieved state legislatures may well retaliate by passing laws that purport to regulate union organizing, strikes, and related activities already regulated by the National Labor Relations Act (NLRA). Opponents of such state laws may argue, based on decades of judicial decisions, that the NLRA pre-empts state regulation of labor relations. Southern business and political leaders are already preparing to fight this battle.

The ingenuity and determination of state legislators should not be underestimated. States may enact some measures that they cannot enforce, calculating some political advantage to be gained from doing so.[2] But they may also surround the zone of pre-emption with new union regulations, and employers—a group heretofore favoring federal pre-emption—may seek to shrink its reach through creative litigation of existing pre-emption doctrines.

I. EFCA's Expected Impact in the South

Those unfamiliar with union organizing law and tactics in the South may misunderstand the trepidation over EFCA. The South's recent industrial expansion has been largely non-union. In most industries and in most places, for many years union organizing has been a steep hill with a heavy load. If wage-earners there are to be enticed, the lure must be something else. Savvy union organizers, therefore, target employees already disposed to favor unions for other reasons—political affiliation, perceived community status related to union membership or stewardship, and, in some cases, pride in a craft or profession seen to be suffering from employer corner-cutting. Unions do best when these attributes are found within a group or community that tends to express political preferences as a block. A union wins by solidifying super-majority support early, without employer knowledge or opposition, and retaining that support through the election, usually because the employer fails to appreciate and address the nature of the union's true appeal.

Employees who do not share these attributes are kept out of the union solicitation loop as long as possible, for fear that, if approached, they will inform management of the fact and nature of the union's campaign. An early, correctly targeted, employer response almost always dooms an organizing campaign. If a union is to win, it must hold a card signature super-majority before the employer discovers what's up. For that reason, inability to solicit a card super-majority during the "silent" campaign phase usually leads a union to abandon the campaign.

Political fault lines that in other parts of the nation divide people into partisan, economic, or religious camps tend, in much of the South, to divide people by race. For the reasons just described, Southern union organizing success most often comes in campaigns that sell a non-economic message to African-Americans whose super-majority support alone is sufficient to constitute a majority of votes cast in a government-conducted, secret ballot election held a few weeks to a few months later. Others in the workforce are welcomed during the public phase of electioneering; their votes may be needed if the employer understands and addresses the union's appeal in such a way as to prompt some African-American voters to change their minds.

This pattern does not describe every successful union campaign. It remains possible to organize a Southern work force in a racially blind manner. Nevertheless, race-conscious organizing is the rule, not the exception. And in all representation campaigns, employer and dissenting employee expression often leads to a change of views by many who initially signed union cards impulsively, or due to peer pressure. Both sides understand that switching sides is possible only because of the secret ballot. Many employees will tell their supervisors that they are against the union, then vote "YES," while many employees will tell their co-workers that they are union supporters, then vote "NO."[3] One fact of life explains most union campaign failures: many African-Americans sign a union card, tell their co-workers that they favor the union, then vote "NO" in the election.

So understood, the point of substituting card signatures for secret ballot elections seems to be to prevent potential dissenters from hearing a credible employer response, and to deprive employees of a realistic chance to change their minds about the merits of union representation. People who see it this way expect unions to intensify their focus on workforces in which they can achieve an African-American card signature super-majority which is alone sufficient to constitute an absolute majority of the potential bargaining unit, then demand recognition by card check, effectively disenfranchising other employees.[4] Employers who have strong cases to make won't get a hearing. Southern employers privately fear that having a super-majority African-American workforce may come to be regarded as a competitive disadvantage. If their fears prove to be justified, the corrosive effect on workplace racial progress could be significant.

EFCA solves another union organizing problem in another worrisome way. If, after a card check representation win and ninety days of bargaining, a union has not won its

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desired contract, it may invoke arbitral resolution of contract terms on thirty days notice.[5] A common union campaign assurance is that employees won't have to live with a contract that they don't vote to accept, and that, if the union fails to perform as promised, employees can decertify it. This leads some employees to sign cards with a relatively low commitment to the union, in the belief that a card signature mistake can be remedied later. If they knew that a contract might be imposed by a government-appointed arbitrator, without employee consent, and that they would have no opportunity to decertify the union until the contract's expiration years later, many would not sign the card. Unions are unlikely to include those details in their card signature solicitations and, because card-based recognition may be achieved without employer knowledge, employees won't hear those facts from employers, either.

Southerners also worry that unions with rust belt bases—the UAW, for example—will use pro-union, government arbitration proceedings to impose the failed Detroit business model on them, depriving Southern businesses of their labor market advantages. This is considered a direct threat to the Southern auto component and assembly plants making BMW, Mercedes, Honda, Hyundai, Mitsubishi, Nissan, Toyota, and (soon) Volkswagen vehicles, and for the scores of thousands of jobs supported by those plants.

In short, EFCA reasonably is regarded as a harbinger of significant social and economic dislocation and regression in much of the South. State legislatures might not want this fight, but they won't take this lying down.

II. National Labor Relations Act Pre-Emption of State Labor Regulation

States regulated labor unions before Congress asserted its New Deal commerce powers in the National Labor Relations Act.[6] When it joined the game, Congress said almost nothing about the NLRA's pre-emptive effect. When Congress amended the NLRA in the 1947 Taft Hartley Act, it jotted just a few notes on the subject.[7] Not until the Labor Management Reporting and Disclosure Act of 1959[8] did Congress express a clear view of co-existing state authority to regulate unions, saying:

> Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal Law or before any court or other tribunal, or under the constitution or bylaws of any labor organization.[9]

This code section, headed, "Retention of existing rights of members," has not caused much erosion of NLRA pre-emption, despite the Fifth Circuit's opinion that rights protected by the LMRDA are immune to NLRA pre-emption[10] because LMRDA rights are narrow and procedural.[11]

Deprived of clear Congressional guidance, the U.S. Supreme Court has had to cut and sew federal labor law pre-emption doctrines to fit the particular cases coming before it. For decades, the Court explained its task as divining some unexpressed, or partially expressed, congressional intent.[12] More recently, the Court has justified decisions by forecasts of practical consequences and expressions of policy preferences, in effect acknowledging its role as lawgiver in this area.[13]

There are today three main federal labor law pre-emption doctrines. *Garmon* pre-emption[14] rejects state regulation of conduct that is arguably protected or prohibited by the NLRA, unless the conduct is only of "peripheral concern" to the NLRA scheme or the state regulatory interest is "deeply rooted in local feeling." *Machinists* pre-emption[15] invalidates state laws that regulate matters that the NLRA implicitly assigned to the free market. So-called "§ 301" pre-emption[16] mandates that all suits over union contracts, even in state courts, be resolved under a federal common law of labor relations.[17] The three doctrines' common purpose is to frustrate use of state legal rules or processes to stack the deck in favor of management or labor. *Garmon* and § 301 pre-emption focus upon overlapping processes, rules and remedies for labor relations rights and remedies while *Machinists* pre-emption targets other manipulation of state and local government by NLRA-regulated unions and employers. Because no doctrine rests on a clear congressional pronouncement about a statute's pre-emptive effect, and because each is adapted to suit the policy preferences of the current Court majority, all three pre-emption doctrines invite creative lawyering.

Nevertheless, the law is sufficiently well-settled that no state should attempt to trump federal union contract law, or to regulate arguably NLRA-protected or NLRA-prohibited union conduct, unless there is a credible case that the subject is only a peripheral NLRA concern or that the state regulatory interest is deeply rooted in local feeling.

A. Futile Efforts to Tie Union Contract Rights to State Law

Federal courts consistently reject ploys to make union contract rights dependent on state law.[18] Consequently, no state may mandate that its courts, for example, condition union contract enforcement on a finding of fair, secret ballot, representation election. Because federal common law exclusively governs the interpretation, application and enforcement of union contracts, that statute would be invalidated under the Supremacy Clause, even in a state court,[19] assuming that an union would thereafter file suit in that state's courts.

There is no § 301 pre-emption, however, when neither the state prohibition nor its remedy requires an interpretation or application of the union-employer agreement, and some cases stretch this principle to transparency.[20]

B. Some Support from "Peripheral Concern" Cases

The "peripheral concern" exception to *Garmon* pre-emption opens some doors for state regulation, but the exception is most often applied when the regulated conduct involves the union and the employee and does not directly affect the employer-employee relationship.[21] Nevertheless, the Court in *Belknap v. Hale*[22] permitted fired striker replacements to sue their former employer under Kentucky contract and tort law for deceptively promising them "permanent" employment. The Court ruled that the NLRA neither protects nor prohibits such deception, and NLRA enforcement doesn't much depend on whether such suits will make strikes harder to settle.

Citing LMRDA regulation of representative selection processes as proof that Congress did not intend related NLRA rights to be absolute, *Brown v. Hotel & Restaurant Employees*

Local 54[23] permitted New Jersey to bar felons from leadership roles in casino employee unions and trust funds. The Court has ruled that the NLRA does not redress complaints about internal union fines,[24] unless the fine is retaliation for conduct protected by NLRA § 7.[25] Since judges must determine arguable NLRA protection or prohibition in the first instance in order to decide the pre-emption, or not, of claims arising from union-employee disputes, similar NLRA precedent will argue in favor of state regulation, especially if the conduct appears to be subject to the LMRDA and its anti-pre-emption rule.[26]

C. A Wide Range of "Deeply Rooted Interest" Cases

Though the Supreme Court has left little room for states to regulate NLRA-protected conduct, it has permitted states to regulate, even to outlaw, and to punish severely, some conduct that the NLRA also prohibits, when the state's interest is deemed to be "deeply rooted in local feeling." As an extreme example, NLRA § 8(b) forbids a union to coerce employee support, and physical assault certainly is within the ambit of "coercion," but the NLRA prohibition does not deprive states of the right to prosecute the case of such an assault.[27]

Thus, *Construction Workers v. Laburnum Construction Corp*.[28] permitted a state to award tort damages for loss incurred by a non-union contractor that abandoned a project due to threatened union violence. In *Farmer v. Carpenters*[29] the Court permitted state emotional distress remedies for union harassment of a dissident even though the NLRA arguably applies. The more extreme the abuse, the stronger is the argument that the state and Congress are regulating different conduct. State defamation remedies, at least when available to a public figure, are available even if the defamation is arguably protected or prohibited by the NLRA because of its relation to a labor dispute.[30]

Fraud and misrepresentation claims usually escape pre-emption, when unrelated to rights asserted under a collective bargaining agreement and when they cannot be characterized as re-cast bad faith bargaining charges subject to NLRA § 8(a)(5).[31]

Reading scores of cases applying *Garmon*, *Machinists* and § 301 pre-emption doctrines reminds one that rules are made to be broken. Courts in this area allow "good" breaks and forbid "bad" breaks, and it takes years to obtain a reliable ruling about any sort of new break.

III. States will Forbid Fraudulent Solicitation and Presentation of Financial Obligation Cards (FOC's)

For the reasons explained above, states appear to lack authority, or any real opportunity, to deny or to modify enforcement of labor contracts imposed by arbitrators pursuant to the EFCA. Section 301 pre-emption is more than adequate to frustrate such efforts. Nor will states be able to deprive unions of bargaining rights won through EFCA card-check processes. Though EFCA neither creates nor references any process for discovery, proof or remedy of fraudulent practices used to obtain representation authorizations, the National Labor Relations Board has regulated such conduct, partially and occasionally, in its representation and unfair labor practice cases.[32] That skinny body of work likely will be held to preclude state regulation of union solicitation misconduct relating to representation determinations, simply because the alternative would be to permit collateral attack of NLRB certification decisions.

Consequently, many Southern employers and bamboozled employees will find themselves saddled with FMCS-imposed labor agreements to which they did not agree, at the behest of union representatives that the employees had only fleeting, if any, opportunity to select or reject. Many adverse consequences are foreseeable. One might well ask whether, at that point, any state regulation matters. The answer is that money always matters in business and in politics. No dangerous wrongdoer plots or pursues a predictably unprofitable wrong. For unions, representation rights and contracts are too often means to the critical end—revenue from represented employees. Fortunately, states may have just enough authority to deter and to remedy abusive card solicitations in ways that cause unions to prefer secret ballot elections.

The zone of least pre-emption seems to lie where the LMRDA Bill of Rights meets the NLRA's peripheral concern and the state's deeply rooted interest. Fraud, including forgery, in the solicitation of dues check-off or other financial obligation cards may, in some circumstances, be an NLRA § 8(b) violation,[33] but in few cases would it seem to be a central concern of the Act. And such misconduct is partially addressed in the LMRDA's Bill of Rights of Union Members, which expressly disclaims pre-emption of state regulation. For example, in *Rector v. Local Union No. 10*[34] the district court ruled that the NLRA did not pre-empt the LMRDA suit of a union member expelled for nonpayment of dues. The employee contended that the union told him that he would not have to pay dues while on workers compensation leave.

While § 301 solely governs the enforcement of labor contracts between unions and employers, a union seeking to enforce a member's financial obligations does so in state court, under state law, unless the employer has contracted to handle those matters by payroll deduction.[35] Therefore, states may expect affirmance of their authority to legislate on that subject. If EFCA's contract arbitration mandate survives delegation doctrine scrutiny and if the appointed arbitrators habitually impose dues check-off in their contract orders, unions will escape state scrutiny, and therefore all meaningful scrutiny, of their FOC practices.[36] But if not, state regulation may make the road to union Utopia a rough one.

The Supreme Court has not decided whether a state may refuse to enforce financial obligation cards obtained in violation of state law. At worst for state legislators, this is an open invitation. Nor has the Court decided whether a state may sanction—criminally and/or civilly—one who fraudulently solicits, obtains or presents a financial obligation card. As noted above, there is good reason to think that such laws would satisfy both the "peripheral concern" and "deeply rooted interests" tests.

Therefore, Southern states should be expected to enact laws like these:

- The solicitor of any financial obligation card or other

document that creates union financial obligations for an FLSA non-exempt, hourly paid employee must give certain written disclaimers;

• any direct, personal, solicitation must be preceded by a written communication of its purpose, identifying the solicitor;

• the solicitor must offer a minimum twenty-one day period to consider the solicitation before a signature is required;

• the solicitor may not accept an authorization before advising the employee in writing that the authorization is a legal contract and that the employee should consult an attorney before signing;

• the FOC must prominently display on its face that the employee may revoke it with seven days by properly sending actual notice to an addressee named thereon within that time;

• no false statement of material fact may be communicated during or in connection with the solicitation;

• the solicitor must verify the employee's identity by viewing a government-issued form of photo identification and must retain with the original authorization a copy of the ID viewed, for as long as the authorization is effective, and for at least five years after the authorization expires;

• compliance must be proven as an essential element of any action to enforce any financial obligation arising from the authorization;

• courts are authorized to hear and determine any dispute as to the interpretation, application and/or enforcement of such authorizations, whether filed by the union or the employee (or the employer, if there has been a request for payroll deduction);

• any false statement or fraudulent practice employed in the solicitation shall be a complete bar to enforcement and shall entitle the employee to recover losses, civil money penalties, costs and fees, and shall entitle any employer that honored the document to recover its related administrative costs, attorney fees and litigation costs;

• application of the employee's signature by another (not a legal guardian) shall be a misdemeanor, and a felony if more than $500 is obtained by means of the fraud, unless the employee testifies under oath that he authorized the signature;

• the Attorney General shall have authority to inspect retained authorization records, which must be maintained in the state, and to prosecute related crimes.

Fearing judicial hostility to dues collection suits, unions long have sought to persuade the NLRB to compel employers to agree to deduct and remit employee dues, fees, fines, etc., but the Board has ruled that, "no party can be required to agree to any particular substantive bargaining provision."[37] While the National Labor Relations Act forbids bad faith bargaining, an employer may in good faith refuse to deduct dues,[38] leaving the union with only state jurisdiction to enforce members' financial obligations.

Since forgery, fraud and false personation are crimes traditionally within state police powers, there seems to be no good argument that state interest in such conduct is less deeply rooted than state interests in civil tort remedies. Further, while NLRA § 8(b) may prohibit criminal conduct of that sort when it renders a dues deduction authorization involuntary, precedent suggests that the particular method of coercion is a peripheral NLRA concern, and so subject to state regulation. Such state efforts would support congressional efforts to embed in the LMRDA a broad proscription of such union tactics, so as to trigger the LMRDA's anti-pre-emption clause.

CONCLUSION

If EFCA becomes law in its current form, Southern legislatures can be assumed to retaliate. Some popular measures will be pre-empted. Indeed, their unenforceability may enhance their popularity. But some legislators will seek to surround the pre-empted zone with new regulation of the employee-union financial relationship, and this they may do. If neither FMCS arbitrators nor NLRB majorities compel employers to grant dues check-off, unions holding EFCA card check certifications may find them greatly overvalued. In that situation, unions might offer to submit to secret ballot elections if employers agree to include dues check-off in a contract following that more trustworthy selection. Thus, over time, in a round about way, state laws might deter the solicitation abuse that EFCA invites.

Endnotes

1 EFCA is expected to be introduced in the 111th Congress, after failure in the 110th Congress, due to inability to break a June 2007 Republican filibuster.

2 Former Congressman Ernest Istook (R – Okla.) and others announced on December 30, 2008, a national campaign, called "Save Our Secret Ballot," to amend state constitutions to require secret ballot union representation elections. *See* http://www.foxnews.com/politics/2008/12/30/business-group-pushes-secret-union-ballots/.

3 In a secret ballot election conducted by the National Labor Relations Board pursuant to 29 U.S.C. § 159, the pre-printed ballot asks the voter whether he or she wants to be represented for collective bargaining purposes by the petitioner labor organization. There is a "YES" box and a "NO" box. A valid ballot cast in such an election shows a clear, but anonymous mark, in one of two boxes. A union is certified as the employees' representative if it wins a majority of the valid ballots cast. *See* 29 CFR § 102.69; NLRB Casehandling Manual, Part Two: Representation Proceedings §§ 11306.6, 11340.7 and Form NLRB 707N2 (single petitioner election).

4 EFCA establishes no process or rule for distinguishing legitimate from fraudulent solicitations or signatures.

5 EFCA prescribes no process and no rules of decision for such proceedings; it merely directs the Federal Mediation and Conciliation Service to prescribe regulations for such disputes. This invites a delegation doctrine challenge – *i.e.*, the contention that Congress invalidly delegated its legislative role to an administrative agency. *See* Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 472 (2001). The Court last invalidated a federal statute on this ground in 1935. *See* Schecter Poultry Corp v. United States, 295 U.S. 495 (1935) (that portion of the National Industrial Recovery Act that made certain trade groups self-regulating).

6 *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (no commerce power to regulate labor relations through Bituminous Coal Conservation Act of 1935); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (U.S. Constitution Art. I, § 8 authorizes Congress to regulate labor relations).

7 Congress then added section 14(b), the well known "right to work" law, leaving states free to outlaw contracts requiring union membership as a condition of employment. Congress also added little known § 14(c), permitting states to regulate union-employer relations which the National Labor Relations Board formally elected not to regulate, and § 14(a), disclaiming any authority for compelling an employer to bargain with its supervisors. *See* 29 U.S.C. § 164.

8 29 U.S.C. § 401 et seq.

9 29 U.S.C. § 413.

10 *See* Fulton Lodge No. 2, Machinists, v. Nix, 415 F.2d 212 (5th Cir. 1969).

11 If minority amendments are permitted during debate of EFCA, one might usefully add to the LMRDA a union member right to be free from coercion and fraud in connection with solicitation of representation and financial obligation card signatures, thus triggering the LMRDA's anti-pre-emption rule.

12 *See* Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966).

13 *See* Building & Construction Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 227 (1993) (Boston Harbor union construction mandate not preempted); Chamber of Commerce v. Brown, 128 S.Ct. 2408 (2008) (California labor neutrality statute pre-empted).

14 San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).

15 Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132, 140 (1976).

16 So-called because LMRA § 301, 29 U.S.C. § 185, created federal subject matter jurisdiction of labor contract actions.

17 Textile Workers Union of America v. Lincoln Mills of Ala., 353 U.S. 448, 456-57 (1957).

18 *See generally* cases compiled in The Developing Labor Law Ch. 28.IV. B.

19 Teamsters Local 174 v. Lucas Flour, 369 U.S. 95 (1962) (federal § 301 common law governs even in state courts exercising their concurrent jurisdiction over § 301 actions).

20 *See, e.g.*, Livadas v. Bradshaw, 512 U.S. 107 (1994) (California's pay on termination law not pre-empted as to union-represented employees even though enforcement depended on whether and what wages were due under the labor contract).

21 *Cf.* Machinists v. Gonzales, 356 U.S. 617 (1958) (permitting member's tort suit against union arising from member's expulsion under union constitution) *with* Street, Electrical, Ry. & Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971) (*Gonzales* distinguished and limited as not involving employment termination resting on construction of union security clause of union contract.)

22 463 U.S. 491 (1983).

23 468 U.S. 491 (1984).

24 NLRB v. Boeing Co., 412 U.S. 67 (1973).

25 Pattern Makers v. NLRB, 473 U.S. 95 (1985).

26 *See* Fulton Lodge No. 2, Machinists, v. Nix, 415 F.2d 212 (5th Cir. 1969) (LMRDA coverage trumps NLRA pre-emption).

27 Machinists Lodge 76 v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976) (because personal violence and property destruction is at the core of state regulatory interests, state regulation cannot be federally pre-empted absent an express, clear direction of Congress.)

28 347 U.S. 656 (1954).

29 430 U.S. 290 (1977).

30 Linn v. Plant Guard Workers Local 114, 383 U.S. 53 (1966).

31 *Cf.* Northwestern Ohio Administrators v. Walcher & Fox, Inc., 270 F.3d 1018 (6th Cir. 2001), *cert. denied*, 535 U.S. 1017 (2002) (union's fraudulent misrepresentations about labor agreements not NLRA regulated because the union was not representing employees at that juncture) *and* Galveston Linehandlers, Inc. v. ILA Local 20, 140 F. Supp. 2d 741 (S.D. Tex. 2001) (union fraud was perpetrated to enhance its concealed interest in a competitor) *with* Ackers v. Celestica Corp., 2007 WL 894470, 2007 U.S. Dist. LEXIS 24400 (S.D. Ohio 2007), *aff'd*, 274 F. App'x. 450 (6th Cir. 2008) (claim of fraudulent inducement of union concessions during contract bargaining).

32 The NLRA is silent and the Board has made no rule. Interested readers should consult the NLRB Casehandling Manual, Part Two: Representation Proceedings, §§ 11028 – 11029, to see what appears to be the Board's only narrative description of a policy for handling *representation* card fraud and forgery evidence. The Board treats such questions as internal administrative matters, not litigable by employers. The Board appears to have no published policy for handling evidence of financial obligation card fraud or forgery, except in the rare instance that such misconduct could violate 29 U.S.C. § 158(b), and thus be litigable in a Board unfair labor practice proceeding.

33 The NLRB has held both union and employers guilty of § 8 unfair labor practices when they cooperated in deducting union assessments from employee wages without a voluntary authorization, as required by 29 U.S.C. § 186 (LMRA § 302). *See* NLRB v. Food Fair Stores, 307 F.2d 3 (3rd Cir. 1962) (coercion of strike assessment deductions). It seems safe to assume that the Board would so rule if a union fraudulently obtained or presented financial authorization cards.

34 625 F.Supp. 174 (D. Md. 1985).

35 *See* Baltimore Mailers Union No. 888 v. Moore, 881 F.Supp. 217 (D.Md. 1995) (§ 301 jurisdiction not established by assertion that dues collection claim arose under union constitution).

36 *See, e.g.,* SeaPak v. National Maritime Union, 300 F. Supp. 1197, 1200 (S.D. Ga. 1969), *aff'd*, 423 F.2d 1229 (5th Cir. 1970) (per curiam, adopting District Court's opinion), *aff'd*, 400 U.S. 985 (1971) (mem.), disapproving a Georgia statute that made dues deduction authorizations revocable at will, on grounds of pre-emption by 29 U.S.C. sec. 186(c)(4), which requires that a written assignment for deduction of union dues shall not be irrevocable for more than one year, because the "area of checkoff of union dues has been federally occupied to such an extent under § 301 [*sic*] that no room remains for state regulation in the same field."

37 *J&C Towing Co*., 307 NLRB 198 (1992).

38 *See Overnite Transportation Co*., 307 NLRB 666 (1992).

Litigation

Oral Argument in *Wyeth v. Levine* Marks Change in Drug Litigation Preemption Debate

*By Eric Lasker**

On November 3, 2008, the Supreme Court heard oral argument in *Wyeth v. Levine*[1] to decide the extent to which FDA approval of drug marketing and labeling should preempt personal injury lawsuits brought against prescription drug manufacturers. As of the drafting of this article, the Court has yet to hand down its ruling, and the outcome of the dispute between the two litigating parties is far from clear. What is clear, however, is that there has been a fundamental shift in the nature of the preemption debate. While prescription drug product liability plaintiffs historically have argued that FDA regulatory oversight imposes only "minimum standards" that state common law can exceed without any preemptive conflict, in the *Levine* argument plaintiff's counsel conceded that state tort law claims would be preempted by some types of FDA regulatory action. In so conceding, counsel effectively abandoned the "minimum standards" shibboleth, opening the door to case-by-case determinations of preemption focused on the nature of FDA's drug-specific regulatory decisions.

If accepted by the Court, plaintiff's concession in *Levine* means that preemption arguments will become a permanent fixture in prescription drug product liability litigation. The unanswered question is where the *Levine* Court will draw the line between FDA actions that preempt state tort law and FDA actions that do not. This article first reviews the plaintiffs' preemption concession in the *Levine* oral argument and then discusses the elements of FDA regulatory action—what did FDA know and what did it do with that knowledge—that may be determinative in future preemption disputes in prescription drug litigation.

I. Plaintiff's Abandonment of the Minimum Standards Preemption Argument

Plaintiffs have long argued in prescription drug product liability litigation that there can be no conflict between FDA regulation of prescription drugs and state tort law because FDA sets only minimum standards of safety in the labeling and marketing of prescription drugs. Under this view, FDA approval establishes only the "floor" upon which state tort law could build without conflicting with federal law. This position prevailed in the Vermont Supreme Court in the *Levine* case, which soundly rejected Wyeth's argument that the failure-to-warn personal injury claim brought by Ms. Levine conflicted with FDA approval of the drug label:

> [A] system under which federal regulations merely set minimum standards with which manufacturers must comply is fully consistent with Congress' primary goal in enacting the FDCA, which is to protect consumers from dangerous products, as well as Congress' stated intent that the FDCA must not weaken the existing laws, but on the contrary it must strengthen and extend that law's protection of the consumer.[2]

The Vermont Supreme Court opinion rejected the possibility of preemption by viewing state tort law as a complementary supplement to federal safety objectives. "[S]tate law serves as an appropriate source of supplementary safety regulation for drugs by encouraging or requiring manufacturers to disseminate risk information beyond that required by FDA under the act."[3]

In contrast, pharmaceutical manufacturers and FDA have argued that FDA approval involves a balance between providing sufficient warnings to inform physicians of drug risks and avoiding unwarranted warnings that could discourage medically beneficial drug treatment. In the preamble to its January 2006 Final Rule on prescription drug labeling, FDA explained that it viewed its regulation of prescription drugs as imposing both a floor and a ceiling on drug warning labels.[4] FDA explained:

> Given the comprehensiveness of FDA regulation of drug safety, effectiveness, and labeling under the act, additional requirements for the disclosure of risk information are not necessarily more protective of patients. Indeed, they can erode and disrupt the careful and truthful representation of benefits and risks that prescribers need to make appropriate judgments about drug use. Exaggeration of risk could discourage appropriate use of a beneficial drug.[5]

When viewed from this perspective, state tort law claims conflict with FDA prescription drug regulation when they impose liability based on a lay jury's judgment as to necessary warning language that differs from the balance struck by FDA.

In the proceedings first in the Vermont Supreme Court and then in their United States Supreme Court briefing in *Levine*, the plaintiff appeared to hold strongly to the "minimum standards" position. In the *Levine* oral argument, however, the plaintiff took a dramatically different course, acknowledging that there could be a preemptive conflict between FDA drug approval and state tort law in some circumstances. That concession was made first in response to a question by Justice Alito that focused specifically on the facts in the *Levine* case, where Wyeth had been held liable for failing to contraindicate IV-push administration of the drug phenergan despite FDA's approval of a label that allowed for such use:

> Justice Alito: Well, suppose the record showed that the FDA clearly considered whether IV push should be contraindicated and concluded it should not be and prescribed the label that now appears on that drug; and then, as some of the other arguments have referenced, the very day after FDA made that ruling, Ms. Levine was injured. Would you still—would she still have a claim in your view, a non-pre-empted claim?

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Plaintiff's Counsel: *That would be pre-empted.* And the reason it would be pre-empted is because the FDA would have considered and rejected on the basis of the same information or similar information the very duty that underlies the State claim.[6]

Justice Alito's question was obviously designed to present the starkest conflict between an FDA regulatory decision and a state common law duty, and the question could not have come as a surprise to the plaintiff's counsel. Under the plaintiffs' traditional formulation of the preemption argument, the answer to this (and any similar) question is straightforward: because FDA is deciding only upon the "minimum standard" in drug labeling, FDA's decision cannot conflict with a state common law duty imposing a higher standard, and state common law accordingly is not preempted. Ms. Levine's counsel's decision instead to concede preemption in this hardest-case fact scenario must have been a premeditated calculation to strike a more moderate legal position before the Court, perhaps in tacit response to the Court's rejection of the minimum standards argument in its medical device preemption opinion last term in *Riegel v. Medtronic, Inc*.[7]

Having abandoned the minimum standards, bright-line position, however, the plaintiff's counsel appeared not to have clearly thought out where to redraw the preemption line. This problem became readily apparent when Justices Scalia and Souter began pressing the plaintiff's counsel on the implications of his concession. By conceding that a labeling decision by a fully informed FDA is preemptive at least on the day after that decision was made, the plaintiff's counsel tied the preemption question not to the nature of FDA regulatory determinations generally (*i.e.*, Can FDA regulatory determinations ever conflict with state tort law liability?) but to the nature of the specific FDA regulatory determination at issue (i.e., Did FDA's regulatory determination conflict with state tort law liability in this instance?). While the plaintiff's counsel may have hoped to limit the magnitude of his concession by conceding preemption only on the "very day after" FDA made its regulatory decision, he had no analytical support for a temporal preemption requirement. Instead, he was quickly placed in the position of arguing that the viability of a state tort law claim depended upon a showing that there was at the time of the alleged injurious prescription additional information about the drug risks as to which FDA was unaware when it made its labeling decision:

Justice Souter: … The only time—you're saying pre-emption does not occur when there is—forget the word "new for a moment—when there is further information, information in addition to what the FDA was told, whether it's 1,000 years old or discovered yesterday; and if there is liability predicated on further information beyond what FDA was told, then there is not pre-emption. Is that a fair statement of your position?

Plaintiff's Counsel: That's fair …[8]

The plaintiff's counsel appeared at this point to recognize the implications of his concession (as did many of his plaintiff counsel brethren in the gallery who, from the author's vantage point, could be heard whispering strident objections to his answers). But his efforts to modify his argument led him to even more tenuous ground. The plaintiff's counsel fell back on another traditional plaintiff preemption argument that a drug is "misbranded" under the federal labeling regulations if a drug manufacturer fails to revise a drug label "to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug."[9] Plaintiffs traditionally have relied upon this regulation to argue that a drug manufacturer is obligated to add safety warnings to a drug label independent of any FDA regulatory determination and can be held liable under state tort law for failing to do so. But having acknowledged that an informed FDA regulatory determination approving the existing label would preempt state tort law liability, plaintiff's counsel was unable to explain how the purported separate federal regulatory obligation to include appropriate safety warnings on a label would change the preemption analysis. This led to the following, somewhat bizarre, exchange in which plaintiff's counsel argued that a drug could be misbranded under federal law but immune from civil liability for inadequate warning under state tort law:

Justice Souter: [I]f the so-called misbranding is determined to be misbranding based upon information which was given to the FDA, as I understand your position, you would admit that there was preemption.

Plaintiff's Counsel: I – I think there is preemption, but that doesn't mean …

… Let me try to untangle it this way. The fact that there is pre-emption and you cannot bring a State law failure-to-warn claim doesn't mean that the drug isn't misbranded …

Justice Souter: In other words, I think you are saying if there—if there would be pre-emption it may be misbranded, but there cannot be any recovery in a State tort suit.

Plaintiff's Counsel: That's correct.[10]

For long-time followers of preemption jurisprudence, the plaintiff's concession in the *Levine* argument that FDA regulatory approval preempts at least some state tort law claims harkens back to a similar concession made by plaintiffs in *Cipollone v. Liggett Group, Inc.*, in an oral argument in January 1992 shortly after Justice Thomas replaced Justice Marshall on the Court. *Cipollone* addressed the question whether the Federal Cigarette Labeling and Advertising Act (the "1965 Act") and/or the Public Health Cigarette Smoking Act (the "1969 Act") preempted state tort law claims against cigarette manufacturers. At the time, the question whether state tort law imposed "requirements" that could give rise to preemption was at least somewhat in doubt.[11] Instead of trying to hold the line against any preemption of state tort law, however, the plaintiff's counsel acknowledged in oral argument that the 1969 Act did protect cigarette manufacturers from tort claims based on the argument that they should have provided warnings stronger than those required in the Surgeon General's warning.[12] What followed was a sharply divided but seminally important opinion in which the Supreme Court for the first time held that federal law preempted certain types of state tort law personal injury claims.[13]

With the plaintiff likewise having conceded the broader preemption argument in *Levine*, the stage appears set for the *Levine* Court as well to issue a major ruling limiting the scope of a burgeoning area of state tort law litigation.[14] As

with *Cipollone*, however, the Court is unlikely to issue a broad preemption ruling that would preclude prescription drug state tort law claims in all cases. Although Wyeth did not make the type of broad concession that defined plaintiff's argument, Wyeth focused its appeal in *Levine* on the strong factual record of FDA's informed control over the phenergan label, and thus provided the Court with many avenues for a narrow preemption ruling. The key question discussed below, then, is down which avenue the Court—and as a result prescription drug preemption in general—is likely to proceed.

II. Drawing the Line on Prescription Drug Preemption

Predicting the Supreme Court's ruling from questioning at oral argument is a perilous task at best, but if we are to assume that the Court will accept plaintiff's concession and find that an informed FDA regulatory determination is preemptive, the Court will still be faced with three major questions: (1) What is an "informed" FDA for purposes of preemption? (2) What types of FDA regulatory action are preemptive? and (3) Which side bears the burden of proof in answering questions 1 and 2? Each of these questions is addressed in turn.

A. What is an Informed FDA for Purposes of Preemption?

FDA regulations impose significant pre-approval and post-marketing disclosure requirements on drug manufacturers,[15] and these requirements are designed to insure that FDA has all of the safety information needed to ensure the proper labeling and marketing of prescription drugs. Preemption opponents contend, however, that FDA is understaffed and unable to meaningfully process the information that it receives. Moreover, the very comprehensiveness of FDA's disclosure requirements provides fertile grounds for plaintiff arguments that pharmaceutical manufacturers have not provided FDA with required safety information that would have led FDA to a different labeling determination. If FDA is not informed of the drug's risks, the argument continues, then a state tort law requirement imposed with knowledge of those risks cannot be contrary to any FDA determination and cannot be preempted.

During the *Levine* argument, the United States appearing as amici curiae in support of Wyeth, agreed that preemption should not apply where a pharmaceutical manufacturer failed to provide the FDA with new information that FDA believes would negate the provisions on the label.[16] But as Ms. Levine's counsel subsequently noted, "the dispute is… what constitutes new information."[17] Plaintiffs will argue for a broad definition of "new information" that would encompass virtually any piece of scientific data that relates to a given risk, including the accumulation of additional anecdotal reports of injury (even if the rate of such reports as a percentage of prescriptions has not changed from prior history) or new analysis of prior submitted data. Under this broad definition, any preemption defense would be short lived indeed, ending as early as the first new case report to be received after FDA approval of a drug label.

In its *Levine* argument, the United States provided the Court with a more sensible definition of new information, citing to the recently enacted changes being effected ("CBE") regulation in which FDA clarified its long-standing understanding of the type of new safety information that would authorize a pharmaceutical manufacturer to add warnings to a drug label prior to—but still subject to—FDA approval.[18] As now clearly defined in 21 C.F.R. § 314.3(b), "newly acquired information" means:

> [D]ata, analyses, or other information not previously submitted to the agency, which may include (but are not limited to) data derived from new clinical studies, reports of adverse events, or new analyses of previously submitted data (e.g., meta-analyses) if the studies, events or analyses reveal risks of a different type or greater severity or frequency than previously included in submissions to FDA.

This definition identifies the type of new information that FDA considers sufficient for a presumptive change in a drug label and, accordingly, provides a meaningful standard for a court in deciding questions of preemption. If new safety information is not of the type that FDA views sufficient to allow a CBE labeling change, then FDA's lack of knowledge of the information cannot form the basis for a state tort law requirement that a pharmaceutical manufacturer add warnings to a drug label without conflicting with FDA's regulatory authority.

B. What Types of FDA Regulatory Action are Preemptive?

Having defined the type of safety information FDA must have to make an informed decision, the next question that courts will face is what types of FDA regulatory action are preemptive. In a case-by-case analysis, preemption will arise where state tort law would impose a requirement on a pharmaceutical manufacturer that is different from the requirement imposed by FDA based upon the same information. But what actions must FDA have taken to establish that the requirements imposed in the approval of the drug label reflect FDA's considered judgment of the safety information before it?

The easiest case is when there is concrete evidence that FDA had specifically considered and rejected increased warnings based upon the same safety information identified by plaintiffs in state tort litigation. Indeed, it was plaintiff efforts to pursue state law claims in this factual scenario in the early 2000s with respect to SSRI antidepressants and nicotine replacement therapies that caused FDA to assert preemption arguments through amicus filings and that has resulted in the most significant implied preemption appellate rulings in drug litigation to date.[19]

Although there was evidence of an express FDA rejection of stronger warning language in *Levine*, the questioning at the oral argument focused on a more common fact pattern in which a specific FDA regulatory decision can only be inferred. In *Levine*, the plaintiff argued that the phenergan label should have included a contraindication against IV-push administration, but Wyeth demonstrated that the FDA-approved label both warned of the danger of IV administration of the drug and, in four separate provisions, included instructions to doctors that were specific to IV-push administration.[20] In this fact pattern, the drug label itself (both warning of risks and instructing on use) demonstrates an informed and balanced decision by FDA with respect to the warning at issue that should preempt state tort law claims.

Moving further along the spectrum brings us to the most difficult cases in which FDA approves a drug label but then takes no action whatsoever over an extended period of time as additional safety information is received. While arguments for preemption can be made in these cases as well, this fact pattern likely will continue to pose the greatest challenge to pharmaceutical companies pursuing preemption defenses.

C. Which Side Bears the Burden of Proof?

At the close of his argument, Ms. Levine's counsel sought to impose a new hurdle to pharmaceutical manufacturers asserting preemption: that the manufacturer should bear the burden of proving that there was no new safety information of which FDA was unaware that could have resulted in a different FDA labeling determination.[21] This argument provoked an apparent split between Justices Kennedy and Breyer, with Justice Kennedy suggesting that requiring a pharmaceutical manufacturer to prove that it had fully informed FDA of safety risks ran afoul of many states' rebuttable presumption of regulatory compliance, and Justice Breyer suggesting that a drug company should at least bear a burden of producing evidence showing that it had disclosed to FDA the safety information at issue.[22]

Given the potentially central importance of Justice Breyer and/or Justice Kennedy in forming a majority opinion, the issue of how the burden of proof is allocated may play a key part in the *Levine* ruling. The importance of this issue is demonstrated by Ms. Levine's ultimate argument in her counsel's oral presentation to the Court. Faced with the specific language in the phenergan label relating to IV-push administration, Ms. Levine's counsel argued that FDA "was never put to the test of deciding comparative risks and benefits of IV push versus IV drip."[23] This assertion was not, however, based upon any affirmative evidence. (When questioned by Justice Souter, counsel pointed only to the lack of any FDA correspondence mentioning such an analysis.[24]) Rather, Ms. Levine's counsel relied on pure ipse dixit reasoning, arguing that "the catastrophic risks of IV push are so dramatic, no reasonable person could have made a safety determination to allow this drug with its risks."[25]

Ms. Levine's argument that FDA can be presumed to have ignored safety information in its files flies in the face of FDA's statutory charge to insure the safety and efficacy of prescription drugs and the extensive federal regulatory regime in which pharmaceutical manufacturers are required to provide safety information both prior to initial drug approval and post marketing. While pharmaceutical manufacturers would be well advised to be proactive in dealings with FDA to insure a proper documentary record of FDA's consideration of safety risks, the argument that pharmaceutical companies can ignore federal labeling requirements (so as to comply with varying state tort law requirements) based upon assumed FDA disregard for properly submitted safety information is fanciful at best. The burden of proving such FDA disregard so as to allow for state tort law claims should lie with the plaintiff as part of his ordinary burden of proof.

CONCLUSION

With the concessions made by plaintiff's counsel in the *Levine* oral argument, it appears likely that the Supreme Court will recognize the viability of an implied preemption defense in prescription drug product liability litigation. But the scope of that preemption defense remains uncertain. With important questions to be decided as to what FDA must know and what FDA must do for preemption to apply, and uncertainty as to who will bear the burden of proof, the Supreme Court in *Levine* should provide much needed guidance to the parties in future prescription drug product liability cases.

Endnotes

1 128 S. Ct. 1118 (2008) (No. 06-1249), *granting petition for certiorari from*, *Levine v. Wyeth*, 944 A.2d 179 (Vt. 2006).

2 Levine v. Wyeth, 944 A.2d 179, 190 (Vt. 2006) (internal citations and quotation marks deleted), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 06-1249).

3 *Id.* at 192 (quotation marks omitted).

4 *See* Final Rule, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922 (Jan. 24, 2006).

5 *Id.* at 3935. *See also* Brooks v. Howmedica, 273 F.3d 785, 796 (8th Cir. 2001) ("There are... a number of sound reasons why the FDA may prefer to limit warnings on product labels. Warnings about dangers with less basis in science or fewer hazards could take attention away from those that present confirmed, higher risks."); Dowhal v. SmithKline Beecham Consumer Healthcare, 88 P.3d 1, 13 (Cal. 2004) ("Against the benefits that may be gained by a warning must be balanced the dangers of overwarning and of less meaningful warnings crowding out necessary warnings, the problems of remote risks, and the seriousness of the possible harm to the consumer.").

6 Wyeth v. Levine, Transcript of Oral Argument at 33-34, 2008 WL 4771230 (U.S. Nov. 3, 2008) (emphasis added).

7 128 S. Ct. 999, 1008 (2008) ("State tort law that requires a manufacturer's catheters to be safer, but hence less effective, than the model the FDA has approved disrupts the federal scheme.")

8 *Levine*, 2008 WL 4771230 at 38.

9 21 C.F.R. § 201.80.

10 *Levine*, 2008 WL 4771230 at 39-40.

11 Eight years earlier, a majority of the Court had suggested that there could be a preemptive conflict between state tort claims and federal requirements but had held in the case before it that an injured worker was not preempted from bringing a punitive damages claim against the owner of a nuclear energy plant regulated by the Nuclear Regulatory Commission. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

12 *See* Cipollone v. Liggett Group. Inc., No. 90-1038, 1992 WL 687857, **18-19 (U.S. Jan. 13, 1992). In an earlier oral argument prior to Justice Thomas's appointment to the Court, plaintiffs had argued more strongly against preemption in any circumstances. *See Cipollone v. Liggett Group, Inc.*, No. 90-1038, 1991 WL 636252 (U.S. Oct. 8, 1991).

13 Cipollone v. Liggett Group. Inc., 505 U.S. 504 (1992).

14 State tort law claims against pharmaceutical manufacturers have increased dramatically in recent years, as evidenced by the twenty federal multidistrict litigations challenging the adequacy of FDA-approved drug labeling pending in federal court; all but one of which began in 2000 or later. See Jud. Panel on Multidistrict Litig., Distribution of Pending MDL Dockets (May 13, 2008), *available at* http://www.jpml.uscourts.gov.

15 *See* 21 C.F.R. §§ 314.50, 314.80, 314.81,

16 *Levine*, 2008 WL 4771230 at 16.

17 *Id.* at 33.

18 *Id.* at 19-20; *see also* Final Rule, Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices, 73 Fed. Reg. 49603-01 (Aug. 22, 2008).

19 *See* Colacicco v. Apotex, Inc., 521 F.3d 253, 272 (3d Cir. 2008) (state tort law claims against SSRI manufacturer preempted because "FDA has publicly rejected the need for a warning that plaintiffs argue state law requires"); *Dowhal*, 88 P.3d at 11(Cal. 2004) (holding preempted a nicotine replacement therapy warning requirement under California Proposition 65 that was specifically rejected by FDA).

20 *See Levine*, 2008 WL 4771230 at 5-6.

21 *Id.* at 47.

22 *Id.* at 48-51.

23 *Id.* at 42.

24 *Id.* at 43.

25 *Id.* at 42.

Professional Responsibility & Legal Education

The Discipline of Prosecutors: Should Intent be a Requirement?

*By Hans P. Sinha**

The American prosecutor is an amalgam in terms of historical background. The office as it appears today draws its foundation from the British Attorney General, the French *procureur publique* and the Dutch *shout*.[1] Add to this mix of common and civil law pedigree the uniqueness of the American landscape and society, and one gets a distinct and unique public servant. Paramount among the defining aspects of the American prosecutor is his immense power. He, or she,[2] simply wields an enormous amount of discretion in terms of when to prosecute, whom to prosecute, and how to prosecute. In the famous words of Justice Jackson:

> The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard. Or he may go on with a public trial. If he obtains a conviction, the prosecutor can still make recommendations as to sentence, as to whether the prisoner should get probation or a suspended sentence, and after he is put away, as to whether he is a fit subject for parole. While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.[3]

This power is to a large extent unregulated. While the prosecutor works within a heavily ordered system in terms of rules, in terms of exercising his "tremendous discretion," the prosecutor is virtually ungoverned. This is how we as a nation have determined it should be. We want our prosecutors to be able to wield their power, to execute the laws of the land in an impartial manner, free from political or other interference.[4] Hence reforms seeking to rein in the prosecutor's discretionary power generally fail.

As with any power, however, there is an attendant responsibility. Recognizing that unfettered discretion may lead to abuse, or, as the Supreme Court stated, that discretion without standards "encourages an arbitrary and discriminatory enforcement of the law,"[5] rules designed to guide the prosecutor in his quest to be and act as a Minister of Justice[6] do exist. Primary among those are the various states' Rules of Professional Conduct, and primary among those is the one rule that speaks directly to prosecutors, namely Rule 3.8—the Special Responsibilities of a Prosecutor. Rule 3.8 has been referred to as the "pinnacle of the rules pyramid."[7] Not only does it speak directly to prosecutors, prosecutors are the only ones who have a rule written specifically for them.[8]

The American Bar Association's Model Rule 3.8 consists of eight sections. These parts deal with the prosecutor's duty to not charge unless probable cause exists, to assure the accused has obtained counsel, to not induce an unrepresented accused to waive certain pretrial rights, to disclose to the defense exculpatory material, to not subpoena lawyers to the grand jury unless certain pre-conditions have been met, to refrain from making extrajudicial comments, and to make reasonable efforts to investigate possible wrongful convictions and to remedy such convictions.[9] While all sections of Rule 3.8 are important, section (d) dealing with the prosecutor's duty to divulge exculpatory material, i.e. evidence that tend to negate the guilt of the defendant, may very well be the pinnacle of the pinnacle. Model Rule 3.8(d) mandates that:

> The prosecutor in a criminal case shall:
>
> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[10]

This duty to disclose exculpatory material speaks to the very essence of the prosecutor; he simply cannot fulfill his role as a Minister of Justice if he withholds from the defense, and thus by extension from the jury, evidence that tends to negate the guilt of the defendant. By doing so, the prosecutor not only has subverted the fact-finding process of an adversary trial, but he has also succumbed to the temptation of putting his advocate role above his Minister of Justice role. This a prosecutor must never do. While he simultaneously wears two hats, that of an advocate and that of a Minister of Justice, his Minister of Justice hat is a ten-gallon Stetson, his advocate hat a small fedora; at all times the Stetson envelopes the fedora.

But, in a system composed of human beings, mistakes will happen. The question then becomes what shall happen to prosecutors who err in this regard? Should all be subject to discipline regardless of the circumstances surrounding the non-disclosure? Or should a distinction be made between those prosecutors who err in good faith and those who deliberately withhold exculpatory evidence? In other words, should intent be a pre-requisite to discipline a prosecutor under whose watch exculpatory material was not divulged?

Simple as this question may seem, there is a divergence among both state Rules of Professional Conduct and state high courts that have examined the issue, as well as between two sets of ABA rules guiding prosecutors' conduct. Subsequent to the most recent amendment of ABA Model Rule 3.8, there also

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exists an inherent contradiction with regard to this issue within the language of Model Rule 3.8 itself.

State Rule Variations

No participant or observer of the criminal justice system would argue that a prosecutor who knowingly and intentionally withholds exculpatory material from the defense should not be subject to discipline. As the Alabama 1887 Code of Ethics, the first code of ethics written for American lawyers, stated, "[t]he state's attorney is criminal, if he presses for a conviction, when upon evidence he believes the prisoner innocent."[11] There is, however, a distinction between a prosecutor who, as in the words of the Alabama Code, knowingly seeks to convict an innocent person, and a prosecutor who fails to disclose exculpatory evidence. Unlike the knowing wrongful prosecution of an innocent person, admittedly reprehensible and criminal conduct, the failure to turn over exculpatory material is not so easily categorized. Just determining what is exculpatory material can at times be open to differing interpretations, as can whether the failure to turn over such evidence had a material effect on the subsequent outcome of the proceeding. The annals are full of cases seeking to interpret and decide these questions in the context of whether a defendant's due process rights were violated as a result of the action, or, more appropriately in this context, inaction on the part of a prosecutor failing to disclose certain information to the defense.

Regardless of the subtleties involved in determining when the failure to divulge exculpatory material has violated a defendant's due process rights or not, the legal profession is unified in the belief of the importance of the prosecutor's Minister of Justice duty to divulge evidence or information that tends to negate the guilt of the defendant. Thus, while states tweak, and at times even completely omit, certain sections of Model Rule 3.8,[12] no state abandons the concepts espoused in Rule 3.8(d).[13] In fact, out of the nation's fifty-one state level jurisdictions (counting the District of Columbia), thirty-six have adopted the language of Model Rule 3.8(d) verbatim.[14] Another twelve states have made only minor changes.[15]

In the face of this uniformity, two jurisdictions, Alabama and the District of Columbia, stand apart. These two jurisdictions differ from all others, and from the Model Rules, in that they have incorporated an intent element in their Rule 3.8(d) language.

Alabama Rule 3.8(d) reads:

> The Prosecutor in a criminal case shall:
>
> (d) *not willfully* fail to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.[16]

Similarly, the District of Columbia also includes an intent element in the equivalent section of the District's Rules of Professional Conduct. District of Columbia Rule 3.8(e)[17] thus reads:

> The Prosecutor in a Criminal Case Shall Not:
>
> (e) *Intentionally* fail to disclose to the defense, upon request and at a time when use by the defense is reasonably feasible, any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused or to mitigate the offense, or in connection with sentencing, *intentionally* fail to disclose to the defense upon request any unprivileged mitigating information known to the prosecutor and not reasonably available to the defense, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.]"[18]

Both Alabama and the District of Columbia have seemingly made conscious decisions to ensure that only a prosecutor who *intentionally* violates Rule 3.8(d) will be subject to discipline in their jurisdictions. The District's language is clear; violations of Rule 3.8(d) are limited to "*intentional*[]" failures of disclosure. Although Alabama uses "willfully" as opposed to "intentionally," the effect is the same. In fact, the comments to Alabama Rule 3.8 note that the "disciplinary standard is limited to a *willful* failure to make the required disclosure."[19] Certainly both Alabama and the District of Columbia would swiftly and decisively discipline any prosecutor who willfully or intentionally decided to withhold exculpatory material from the defense. However, these jurisdictions also seem to have taken the corresponding position that a prosecutor who in *good faith* made an honest mistake in terms of what is exculpatory material and what is not, and thus inadvertently and unintentionally withheld what was later determined to be exculpatory material, should not be subject to disciplinary sanctions.

State Supreme Court Variations

Alabama and the District of Columbia are the only jurisdictions that have included an intent requirement in their respective Rule 3.8(d) language. Interestingly, however, out of the two state high courts that have examined this issue, both applying Rule 3.8(d) language that *did not* contain a specified intent requirement, one found intent was an element of a Rule 3.8(d) violation, while the second found that although intent might be taken into account for sentencing, it was not a requirement for the offense itself.

In the first case deciding whether intent is an element in a Rule 3.8(d) violation, the Colorado Supreme Court held it was. In *In the Matter of Attorney C.,* the Colorado high court was faced with a prosecutor who had twice failed to timely turn over exculpatory material. In the first incident, the prosecutor was prosecuting a domestic violence case. Prior to a preliminary hearing, the prosecutor realized she had in her file a letter from the victim wherein the victim recanted her original version of the alleged assault and instead provided a version of events that was consistent with the accused's defense.[20] Although the prosecutor recognized the letter was exculpatory, she declined to turn it over to the defense until after the hearing. The defense counsel filed a motion for sanctions referring in part to the disclosure requirement of Rule 3.8(d) of the Colorado Rules of Professional Conduct.[21] Colorado Rule 3.8(d) at the time mirrored the Model Rule language, requiring that a prosecutor "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused…"[22] Upon receiving the complaint, the district attorney's office entered into horse-trading with the defense counsel, agreeing to dismiss the prosecution if

the defense attorney withdrew the motion for sanctions. This ultimately was the final outcome of this incident.[23]

Five months later, the same prosecutor and the same defense counsel again met in court, this time in a sexual assault cases involving a child victim. As in the prior incident, the prosecutor learned of exculpatory material prior to a preliminary hearing. The nature of the material again was in the form of a changed version of events by the victim. Although the prosecutor recognized the material was exculpatory, she declined to turn it over to the defense until after the hearing. Once she did divulge the information, the defense counsel filed a motion for sanctions (which was dismissed by the trial court), and the district attorney's office again eventually dismissed the charges.[24] Ultimately a disciplinary charge was also filed against the prosecutor.

In examining the case, the Colorado Supreme Court agreed with the disciplinary board's conclusion that the prosecutor in both instances had failed to disclose exculpatory material.[25] However, the court also noted that the board had found the prosecutor's failure to disclose such exculpatory evidence to be negligent for the first instance and knowing for the second instance. Concluding that in Colorado, "a prosecutor violates Rule 3.8(d) *only* if he or she acts *intentionally*,"[26] the Colorado high court declined to find a violation of the rule and reversed the disciplinary board's imposition of a public censure of the prosecutor.[27]

Two years after the Colorado case, the Louisiana Supreme Court had an opportunity to examine the same issue. In a case involving a prosecutor failing to turn over a witness statement, disciplinary proceedings were brought against the prosecutor.[28] The Louisiana Disciplinary Hearing Committee, after conducting a formal hearing, concluded that the prosecutor reasonably believed the statement was inculpatory instead of exculpatory and recommended that the disciplinary charges against the prosecutor be dismissed.[29] Upon reviewing the hearing committee's recommendation, the disciplinary board found a "technical" violation of Louisiana Rule 3.8(d)[30], but, considering mitigating factors, and in particular the prosecutor's "good faith and *lack of intent*," the board found that no formal discipline was warranted.[31] The Louisiana Supreme Court, in a decision subsequent to the Colorado decision, yet without mentioning or acknowledging the Colorado opinion or its rationale, agreed with the board that a violation of Rule 3.8(d) had occurred.[32] The Louisiana Supreme Court, however, unlike the Colorado Supreme Court, found that a mental element is not incorporated in Rule 3.8.[33] Thus, in terms of a Rule 3.8(d) violation in Louisiana, the prosecutor's intent, or lack thereof, is irrelevant. A good faith prosecutor who makes an honest mistake in failing to disclose exculpatory material is as susceptible to a disciplinary sanction as is the prosecutor who intentionally withholds exculpatory material. A Louisiana prosecutor's mental element only comes into play in terms of the *sanction*, not in terms of whether a violation occurred. Accordingly, the Louisiana Supreme Court, rejecting the hearing committee's and the disciplinary board's findings and recommendations, concluded that the prosecutor had knowingly violated Rule 3.8(d), and imposed a sanction of a three-month suspension, such suspension being fully deferred upon the condition of no additional misconduct for a one year period.[34]

Based upon these two cases, as it stands now, prosecutors in all but four jurisdictions do not know under what standards they are operating in terms of potential discipline when exculpatory material is not divulged to the defense. Alabama, District of Columbia and Colorado attorneys all know that only a willful or intentional violation will subject them to discipline. Louisiana attorneys know that intent is not a requirement for discipline, and that at the very minimum a knowing violation will subject them to discipline. Attorneys in the remaining jurisdictions are left to wonder how their high courts may rule on this issue. Unfortunately, if they turn to the ABA Model Rules, they are not provided much more definite guidance either.

Model Rule Variations

One would think that the American Bar Association, nominally the organization that speaks for the American legal profession as a whole, composed of the most learned and articulate of our society, would speak with one voice on this issue. Such is not the case. The ABA has promulgated two sets of rules that address a prosecutor's duty to disclose exculpatory material. One is the "Model Rules of Professional Conduct," the other is the "Prosecution Function Standards." These two sets of rules take different approaches in terms of whether discipline of prosecutors who fail to disclose exculpatory material should be limited to intentional violations or not. And, as if this disparity is not enough, Model Rule 3.8, since its most recent amendment in 2008, also contain an inherent contradiction in this regard.

ABA Model Rule and ABA Prosecution Standard Contradition

The Colorado Supreme Court, as part of its rationale for finding that intent is an element of a Rule 3.8(d) violation, cited to the fact that while the Model Rule 3.8(d) language might be silent as to an intent requirement, the American Bar Association Prosecution Function Standard 3-3.11, *Disclosure of Evidence by the Prosecutor*, specifically incorporates an intent element.[35] In fact, as the Colorado Supreme Court observed, "the ABA specifically added 'intentionally' to the standard subsequent to its original enactment."[36] As such, the ABA's own Prosecution Standard addressing the duty of the prosecutor to disclose exculpatory material, holds that "[a] prosecutor should not *intentionally* fail to make timely disclosure to the defense…" of exculpatory material.[37] This stands in sharp contrast with the ABA's Model Rules of Professional Conduct. As noted above, the language of Model Rule 3.8(d), does *not* include an intent requirement. Considering that the Prosecution Standards are generally viewed as being aspirational, the highest ethical and professional conduct prosecutors should aspire to maintain and fulfill, and the Model Rules outline the bare minimum ethical conduct that a prosecutor should not fall below,[38] this disparity and contradiction is especially troubling. No wonder that two sister-states, Colorado and Louisiana, both with languages tracking Model Rule 3.8, could come to such inapposite conclusions.

This contradiction is not limited to the Rules and the Standards. A similar contradiction also exits within Model Rule 3.8 itself. By not including an intent requirement in section

(d) of Rule 3.8, and considering that the ABA did include such a requirement in the equivalent section of its Prosecution Standard, i.e. Standard 3-3.11(a), one can safely surmise that this omission was by design, and not by happenstance. This conclusion is strengthened by the fact that the comment pertaining to section (d) of Rule 3.8, does not address intent in any way.

Up to this point, while there was a conflict between the pertinent ABA Model Rule and ABA Prosecution Standard, at least Model Rule 3.8 was not internally inconsistent. This changed in February of 2008, however, when the ABA House of Delegates added sections (g) and (h) to Rule 3.8. These new sections, adopted by voice vote and without debate, no less,[39] pertain to the prosecutor's duties when faced with evidence of wrongful convictions. Section (g) requires a prosecutor who "knows of new, credible and material evidence creating a reasonable likelihood" that a person was wrongfully convicted, to make prompt disclosure to an appropriate authority, or if the conviction was obtained in the prosecutor's jurisdiction, examine the evidence and undertake further investigation.[40] Section (h) outlines the next logical step of the prosecutor's duty in this regard, mandating that once the prosecutor "knows of clear and convincing evidence" establishing a convicted person's innocence, he "shall seek to remedy the conviction."[41]

These duties are in no way new. The obligation of the prosecutor to ensure that wrongful convictions do not occur, and the corresponding duty to do everything in his power to remedy a wrongful conviction, were always part of a prosecutor's Minister of Justice role. However, this is an area where prosecutors admittedly in the past have forced their advocate Fedora hats over their Minister of Justice of Stetsons, and turned blind eyes to their over-reaching duty to remedy wrongful convictions with the same force and dedication as they seek convictions. As such, articulating these duties in separate sections of Rule 3.8 can only do good, and should be welcomed by all.

What is interesting, however, is that a newly added comment of Rule 3.8 seems to validate good faith mistakes by a prosecutor pertaining to his post-conviction duties. Comment [9] of Rule 3.8 explains that:

> A prosecutor's independent judgment, made in *good faith*, that the new evidence is not of such nature as to trigger the obligations of sections (g) and (h), though subsequently determined to have been erroneous, does *not constitute a violation* of this Rule.[42]

In other words, a prosecutor who makes a good faith decision *pre-conviction* that a piece of evidence is not exculpatory *is* subject to discipline if that decision is subsequently determined to have been erroneous, while a prosecutor who makes a good faith decision *post-conviction* that a piece of evidence does not establish a defendant was wrongfully convicted, even if that decision was later determined to have been equally erroneous, *is not* subject to discipline. Making such a distinction is simply nonsensical. Remedying a wrongful conviction on the tail end is just as much a part of a prosecutor's Minister of Justice duties, as is ensuring a fair trial and preventing a wrongful conviction on the front end. Either no honest, hard-working prosecutor who happens to make a good faith mistake should be subject to a Rule 3.8 violation, or all should be.

CONCLUSION

A layperson may say so what? What difference does it make what the threshold standard for imposing discipline on prosecutors for violating Rule 3.8(d) is? Should we not simply make sure that all prosecutors play by the rules and that no person is wrongfully convicted? The answer to that is a resounding yes. However, in a system devised and run by human beings, such will not always be the case. The question then becomes what should happen to prosecutors who err? Should jurisdictions follow the path blazed by Colorado, Alabama, and the District of Columbia, and by the ABA in Prosecution Standard 3-3.11(a), or should jurisdictions follow the road chosen by Louisiana, and (presumably) ABA Model Rule 3.8(d)? The answer to this question may lie in how one views prosecutors in general: whether one believes that prosecutors as a whole are good and take their dual roles as advocates and Ministers of Justice seriously, that either all prosecutors are bad, or that the system granting them such enormous discretionary power by definition overwhelms even the most moral and just person, thus leading prosecutors to over-emphasize their advocacy role as opposed to their Minister of Justice role. But while consistency among state rules may be desirable, and consistency among different rules and standards promulgated by the same organization expected, at the very minimum the one Model Rule of Professional Conduct specifically drafted for prosecutors should be internally consistent. Absent such consistency, we are likely to find high courts of different jurisdictions again coming to as different conclusions as did the Colorado and the Louisiana Supreme Courts. No one in or out of the criminal justice system would be served by such an outcome.

Endnotes

1 Joan E. Jacoby, *The American Prosecutor in Historical Context*, 31 Prosecutor, Jun. 1997, at 33.

2 The author out of readability will use the male pronoun throughout this article, as opposed to the more obtuse "he or she" or "s/he" versions. The male pronoun was selected by a flip of the coin.

3 Robert H. Jackson, "*The Federal Prosecutor*," 24 J. Am. Jud. Soc. 18 (1940).

4 With the exception of the disturbing and utterly flagrant politicization of the United States Department of Justice, the flagship of the American Prosecutor institution, during the presidency of George W. Bush, American prosecutors as a whole have remained remarkably devoid of politics.

5 Papachristou v. City of Jacksonville, 92 S.Ct. 839, 847 (1972).

6 The comment to the American Bar Association's Model Rules of Professional Conduct, Rule 3.8 – the Special Responsibilities of a Prosecutor, holds that "[a] prosecutor has the responsibilities of a minister of justice and not simply that of an advocate." Model Rules of Professional Conduct: 1908 Centennial Edition 2008, Center for Professional Responsibility, American Bar Association 88 (2008), [hereinafter Model Rules].

7 Hans P. Sinha, *Prosecutorial Ethics: The Duty to Disclose Exculpatory Material*, 42 Prosecutor, March 2008, at 20-21, noting that in terms of relevance to prosecutors, the Rules of Professional Conduct can be viewed as a pyramid, with the most relevant rules on top, followed by rules of less relevance on the subsequent tiers.

8 Part of the reason a specific rule has been promulgated for prosecutors ties in with prosecutorial immunity. As the Supreme Court has noted, in lieu of society granting prosecutors the vast shield of immunity, the "prosecutor

stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." Imbler v. Pachtman, 96 S.Ct. 984, 994 (1976). It is also interesting to note that no other attorneys have a rule written specifically for them.

9 The American Bar Association Model Rule 3.8 reads in its entirety: Rule 3.8 Special Responsibilities of a Prosecutor. The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause; (b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; (c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing; (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; (e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes: (1) the information sought is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution; and (3) there is no other feasible alternative to obtain the information; (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule. (g) When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction, (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit. (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction. Rule 3.8, Model Rules, *supra* note 6, at 87-88.

10 Model Rule 3.8(d), Model Rules, *supra* note 6, at 88.

11 Rule 12, 1887 Code of Ethics of the Alabama State Bar Association, *reprinted in* Gilded Age Legal Ethics: Essays on Thomas Goode Jones' 1887 Code 50 (Occasional Publications of the Bounds Law Library, University of Alabama School of Law 2003).

12 Sinha, *supra* note 7, at 21, noting that a majority of states modify section (f) dealing with extra-judicial statements, and that some even entirely omit section (b) dealing with the duty to advice defendant of his right to counsel.

13 *Id.*

14 *Id.* n.7, listing the thirty-six jurisdictions that have adopted Model Rule 3.8(d) verbatim as being AK, AR, AZ, CO, CN, DE, FL, HI, ID, IN, IO, KS, KY, MA, MD, MI, MN, MS, MO, MT, NC, NE, NH, NV, OK, OR, PA, RI, SC, SD, TX, VT, WA, WI, WV and WY.

15 *Id.* n.8 listing those states with minor edits to the Model Rule 3. 8 language as being GE, IL, ME, ND, NJ, NY, OH, TN, UT, VA, NM and LA. Note that while New York remains a Model Code jurisdiction, its DR 7-103(B) language is similar to the Model Rule's 3.8 language. *Id.* California has not adopted either the Model Code or the Model Rules. *Id.* n9.

16 Alabama Rules of Prof'l Conduct, Rule 3.8(d) (emphasis supplied).

17 The Model Rule 3.8(*d*) equivalent language appears in section (*e*) of the District of Columbia's Rule 3.8.

18 District of Columbia Rules of Prof'l Conduct, Rule 3.8(e) (emphasis supplied).

19 Alabama Rules of Prof'l Condcut, Rule 3.8, cmt. (emphasis supplied).

20 *In the Matter of Attorney C*, 47 P.3d 1167, 1169 (Colo. 2002).

21 *Id.* The motion was also based upon a failure to adhere to Rule 16 of the Colorado Rules of Criminal Procedure. *Id.*

22 *Id.* at 1169. Note that the language of Colorado Rule 3.8(d) actually contained a drafting error, substituting "of" for "or," thus reading "…make timely disclosure of all evidence *of* information…" The Colorado Supreme Court noted this was a mere typographical error. *Id.* n3.

23 *Id.* at 1168.

24 *Id.* at 1169.

25 *Id.* at 1172.

26 *Id.* at 1168 (emphasis supplied).

27 *Id.*

28 *See In re Roger Jordan, Jr.*, 913 So.2d 775 (La. 2004).

29 *Id.* at 780.

30 At the time, Louisiana Rule 3.8(d) tracked the Model Rule language, reading in pertinent part that the prosecutor must "[m]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused…" *Id.* at 777, n2.

31 *Id.* (emphasis supplied).

32 *Id.* at 782.

33 *Id.* at 783.

34 *Id.* at 784.

35 Prosecution Standard 3-3.11 – *Disclosure of Evidence by the Prosecutor,* American Bar Association Standards for Criminal Justice: Prosecution and Defense Function, 3rd ed., American Bar Association (1993). Prosecution Standard 3-3.11, section (a), reads in full: "A Prosecutor should not intentionally fail to make timely disclosure to the defense, at the earliest feasible opportunity, of the existence of all evidence or information which tends to negate the guilt of the accused or mitigate the offense charged or which would reduce the punishment of the accused." *Id.*

36 *Attorney C*, 47 P.3d at 1174.

37 Prosecution Standard 3-3.11(a), *supra* note 36 (emphasis supplied).

38 Indeed, the Honorable E. Norman Vassey, Chair of the ABA Commission on Evaluation of the Rules of Professional Conduct (1997-2002) ("Ethics 2000"), in his introduction to the Centennial edition of the Model Rules, noted that the Commission "retained the primary *disciplinary function* of the Rules, resisting the temptation to preach aspirationally about 'best practices' or professionalism concepts." *Chair's Introduction*, Model rules, *supra* note 6, at xvi (emphasis supplied).

39 See 24 Law. Man. Prof. Conduct 92 (2008), noting that not only were the motions to amend Rule 3.8 by adding sections (g) and (h) "approved by voice vote, and with no debate," they were also approved despite the Department of Justice having "asked that consideration of the motion be postponed." *Id.*

40 Section (g) of Model Rule 3.8 reads in full: "When a prosecutor knows of new, credible and material evidence creating a reasonably likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall: (1) promptly disclose that evidence to an appropriate court or authority, and (2) if the conviction was obtained in the prosecutor's jurisdiction (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit. *See* Model rules, *supra* note 6, at 88.

41 Section (h) of Model Rule 3.8 reads in full: "When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction." *See* Model Rules, *supra* note 6, at 88.

42 Comment [9], Rule 3.8, Model Rules of Professional Conduct, Model Rules, *supra* note 6, at 90 (emphasis supplied).

Religious Liberties

Monumentally Speaking: *Pleasant Grove City v. Summum*

*By Kimberlee Wood Colby**

In a case brought by a quirky religion against a small city council, *Pleasant Grove City, et al., v. Summum, a corporate sole and church,* No. 07-665,[1] the Supreme Court grapples with the critical distinction between private speech and government speech, a demarcation necessary to the proper application of both the Free Speech Clause[2] and Establishment Clause[3] that currently perplexes the lower courts.[4] The case arose when the city council of Pleasant Grove, Utah, refused to allow Summum, a religious group, to erect a monument featuring its principles, or "Seven Aphorisms," in a public park next to a Ten Commandments monument installed in 1971 by the Fraternal Order of Eagles.

The Ten Commandments monument is largely a red herring: the case raises a free speech rather than a religious liberty issue. The specific question before the Court is whether the Free Speech Clause requires the city to allow any private group to place its individual monument in a city park alongside other permanent monuments. The case does not involve a federal Establishment Clause challenge to the city's display of the Ten Commandments monument or a Free Exercise Clause challenge to the city's denial of Summum's request for access.[5]

At oral argument on November 12, 2008, the Court wrestled with three key themes: 1) if monuments in public parks are government speech, and the limits to be placed, if any, on the ability of government to speak in viewpoint discriminatory ways; 2) the implications for future Establishment Clause doctrine of ruling that a Ten Commandments monument is government speech; and 3) the shortcomings of the Court's current public forum analysis for determining access of private speakers to public spaces.

The city's victory seems a near certainty. The question is whether the Court reaches that result by further defining the nascent government speech doctrine or on the narrow ground that selection of monuments simply falls outside forum analysis or through a broad restructuring of public forum analysis. Interestingly, because the decision could have far-reaching consequences for private speakers, many conservative organizations in their briefs amici curiae cautioned the Court that any decision should be written to prevent antagonistic government officials from designating all expression on public property as "government speech" in order to exclude citizens from expressing their religious or conservative viewpoints in public spaces.

I. Factual Background

A. Summum's Mission

According to Summum's website, "'summum' means 'the sum total of all creation'"[6] and has as its mission "[t]o help you liberate and emancipate you from yourself and turn you into an Overcomer."[7] Claude Rex Nowell King[8] founded Summum around 1975 in Utah, after having a series of encounters "with Beings not of this planet" who "opened [his] awareness to the Principles."[9] Summum teaches that its basic principles, the Seven Aphorisms, were given to Moses before he received the Ten Commandments; however, Moses decided the Israelites were not yet ready for the Aphorisms and substituted the Ten Commandments.[10]

Since its founding, Summum has endeavored to have its Seven Aphorisms monument erected next to Ten Commandments monuments on courthouse lawns and in public parks in several Utah cities.[11] The Tenth Circuit's decision to require Pleasant Grove to erect the Summum monument can best be understood in the context of several earlier cases and two Supreme Court cases involving displays in parks, which are:

- 1973: The Tenth Circuit holds the Ten Commandments monument erected by the Fraternal Order of Eagles near the entrance to the Salt Lake County courthouse does not violate the Establishment Clause.[12]
- 1995: In *Capitol Square Review and Advisory Board v. Pinette,*[13] the Supreme Court holds that Ohio must allow the Ku Klux Klan to erect a temporary, unattended display of a religious symbol, a cross, on statehouse grounds on an equal access basis with other community groups allowed to erect temporary, unattended displays.
- 1997: When Summum sues to erect its "Seven Aphorisms" monument next to the Salt Lake County Ten Commandments monument, the Tenth Circuit holds that both monuments are private religious speech protected by the First Amendment.[14]
- 2002: When Summum sues Ogden, Utah, either to remove a Ten Commandments monument on municipal grounds or to allow Summum to install its monument,[15] the Tenth Circuit rejects the city's claim that the Ten Commandments monument is government speech rather than the Eagles' private speech.[16]
- 2005: In *Van Orden v. Perry,*[17] the Supreme Court holds that the Establishment Clause is not violated by a Ten Commandments monument donated by the Eagles 40 years earlier and installed on Texas state capitol grounds.
- 2007: The Tenth Circuit keeps alive Summum's lawsuit against Duchesne, Utah, challenging the city's refusal to transfer a small plot of parkland to Summum after the city transferred to a private party a similar plot of parkland upon which a Ten Commandments monument stands.[18]

B. Summum Sues Pleasant Grove

In 2003, the Pleasant Grove city council refused to allow Summum to place its monument in a public park next to a Ten Commandments monument erected by the Eagles.[19] The

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Society of Separationists had separately sued Pleasant Grove to compel removal of the Ten Commandments monument as a violation of the Establishment Clause.[20]

Donated by the Eagles in 1971, the Ten Commandments monument is but one of fifteen permanent displays in Pleasant Grove's Pioneer Park. Eleven privately donated displays include: a millstone from the town's first flour mill, a stone from the first Mormon Temple in Nauvoo, Illinois, a wishing well, an historic winter sheepfold, the town's first granary and first fire station, park benches, a tree and plaque in memory of a citizen, and a brick monument commemorating September 11, 2001.[21] The park also contains the town's first city hall, the oldest extant Utah school building, a log cabin, and a rose garden planted to honor two residents.[22]

Pleasant Grove denied Summum's request on the ground that permanent displays in Pioneer Park were limited to items which "directly relate to the history of Pleasant Grove" or are "donated by groups with long-standing ties to the Pleasant Grove community."[23] Pleasant Grove subsequently adopted a written policy that an "item must directly relate to the history of Pleasant Grove and have historical relevance to the community." An item must be "donated by an established Pleasant Grove civic organization with strong ties to the community or… a historical connection with Pleasant Grove City."[24] Importantly, in seeking injunctive relief under the federal Free Speech Clause to erect its monument in Pioneer Park,[25] Summum stipulated that its monument did not meet either criterion of the policy.[26]

C. The Tenth Circuit Orders Installation of Summum's Monument

The Tenth Circuit reversed the district court's denial of a preliminary injunction and entered injunctive relief.[27] The court rejected both the city's argument that it had not created a public speech forum that triggered access for the Summum monument and the city's alternative suggestion that the monument was governmental speech, for which the city cited the Supreme Court's application of Establishment Clause analysis to a virtually identical Eagles' monument in *Van Orden*.[28] Reiterating its earlier rulings,[29] the Tenth Circuit ruled that the Ten Commandments monument was the Eagles' private speech. Relying on *Pinette*,[30] the Tenth Circuit rejected the city's reliance on *Van Orden* to characterize the monument as governmental speech because "the Establishment Clause prohibits governmental *endorsement* of religion, which can occur in the absence of direct governmental speech."[31] The Tenth Circuit also distinguished cases in which "the Supreme Court chose not to apply forum principles in certain contexts in which the government has discretion to make content-based judgments in selecting what *private* speech it makes available to the public."[32]

Instead, the Tenth Circuit determined that Pioneer Park was a traditional public forum, defining "the relevant forum" as the "permanent monuments in the city park."[33] Strict scrutiny applied because the city "exclude[d] monuments on the basis of subject matter [historical relevance] and the speaker's identity [organization with ties to community]."[34] Because the city had not "offer[ed] any reason why" its "interest in promoting its history" was compelling, Summum had demonstrated a substantial likelihood of success on the merits.[35] The court left open the question whether the city's policy was a "post hoc façade for content-based discrimination."[36] In balancing the harms to the parties, the court dismissed as "speculative" the city's "contention that an injunction… will prompt an endless number of applications for permanent displays in the park."[37]

D. Dissents from Rehearing Draw the Battle Lines

The Tenth Circuit evenly split on its denial of rehearing en banc with three opinions that foreshadowed the arguments presented to the Supreme Court.[38] In a dissent joined by Judge Gorsuch, Judge McConnell hammered the panel's decision "that managers of city parks may not make reasonable, content-based judgments regarding whether to allow the erection of privately-donated monuments in their parks."[39] He emphasized the ruling's ramifications: "Every park in the country that has accepted a VFW memorial is now a public forum for the erection of permanent fixed monuments; they must either remove the war memorials or brace themselves for an influx of clutter."[40] Nor could "[a] city that accepted the donation of a statue honoring a local hero" refuse "to allow a local religious society to erect a Ten Commandments monument—or for that matter, a cross, a nativity scene, a statue of Zeus, or a Confederate flag."[41]

Instead, Judge McConnell reasoned "that any messages conveyed by the monument" are "government speech"[42] because Pleasant Grove "owned the monuments, maintained them, and had full control over them"[43] and "could have removed them, destroyed them, modified them, remade them, or … sold them."[44] By accepting donation of the monuments and displaying them on its property, the city "embraced the message[] as [its] own."[45] Judge McConnell noted that in *Van Orden,*[46] "[w]ithout dissent on this point, the Court unhesitatingly concluded the [Ten Commandments] monument was a *state* display, and applied Establishment Clause doctrines applicable to government speech."[47] If the monument is government speech, the government "'may make content-based choices'" and "adopt whatever message it chooses—subject, of course, to other constitutional constraints, such as those embodied in the Establishment Clause."[48]

In a separate dissent, Judge Lucero also denounced the panel's decision as "forc[ing] cities to choose between banning monuments entirely, or engaging in costly litigation where the constitutional deck is stacked against them."[49] He disagreed, however, with Judge McConnell's premise that the monument was government speech, because "private parties conceived the message and design of the monuments without any government input."[50] Stressing that a monument is "permanent" rather than "transitory" speech,[51] Judge Lucero discerned a "limited" rather than "traditional" public forum, in which the city "may make content-based determinations about what monuments to allow… but may not discriminate as to viewpoint."[52] He noted "some indications that the cities engaged in impermissible viewpoint discrimination by denying Summum access."[53]

In response to the dissents, Judge Tacha denied that the panel opinion opened the "floodgates to any and all private speech"[54] and protested that there was no distinction "between transitory and permanent expression for purposes of forum analysis."[55] Warning against "an unprecedented, and dangerous, extension of the government speech doctrine,"[56] Judge Tacha feared that characterizing monuments as government speech

"would allow the government to discriminate among private speakers in a public forum by claiming a preferred message as its own," effectively "remov[ing] the government's regulation of permanent non-religious speech from all First Amendment scrutiny."[57]

II. The Supreme Court Weighs Government Speech, the Establishment Clause, and Forum Analysis

Judging from the tenor of oral argument (admittedly a hazardous business), the Supreme Court seems likely to reverse. Quite simply, the Court is unlikely to require a government that honors a war hero, or a particular war's fallen fighters, to permit a private party to erect a monument assailing the war hero's honor, or the justness of the war.[58] Similarly, when the government commemorates the victims of the September 11th attacks, it need not countenance a private party's memorial for the Al-Qaeda terrorists in the same park. The federal government may erect a statue of General Grant in front of the Capitol without similarly honoring General Lee.[59] To promote tourism or civic pride, a city may invite private organizations to decorate statuary animals for installation in public locations, without accepting an animal rights group's statue portraying a mistreated circus animal.[60]

While the result seems fairly straightforward, the path by which the Court will reach its result is less clear. The Court is sorting through the amorphous boundaries of current government speech doctrine, the implications of finding a Ten Commandments monument to be government speech for future Establishment Clause litigation, and the shortcomings of current forum analysis for regulating placement of monuments from private donors in public parks.

A. Government or Private Speech?

The parties' briefing focused on whether government's placement of a monument from a private donor on government property constitutes private speech or government speech. Drawing on Judge McConnell's dissent, Pleasant Grove and the United States,[61]as amicus, both urged the Court to hold that the selection of monuments for placement in public parks constitutes government speech.

The Court's nascent government speech doctrine[62] recognizes the obvious: governments throughout history have engaged in their own speech in order to advance specific social, economic, and political agendas. Equally as obvious, private individuals are necessarily involved in government speech—both in determining what government will say and serving as government's actual mouthpieces. Government cannot speak without human agents.

Denomination of speech as *either* private *or* government speech is crucial for at least two reasons. First, it determines whether the government may restrict speech based upon content or viewpoint without violating the Free Speech Clause. Under public forum analysis, government may almost never limit access for private speakers to public property on the basis of viewpoint, and often may not limit access on the basis of content.[63] When the government is the speaker, however, it presumably may limit its speech on the basis of both content and viewpoint.[64] Therefore, if the selection of monuments is government speech, the city's denial of access is permissible even if the decision is based on the content or viewpoint of the Summum monument.

Second, the determination that speech is private or government is critical to the proper application of both the Establishment and Free Speech Clauses when a religious speaker seeks access to public facilities. As the Court has repeatedly explained, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[65] In upholding the right of access for private religious speakers to government property, the Court often has rejected the government's claim that the Establishment Clause would be violated by equal access for religious speakers because students or the general public might mistakenly view the religious speech as endorsed by the government.[66]

In order to avoid the difficulty of categorizing speech as private or government, at oral argument, Justice Souter suggested that the Court recognize a hybrid category of mixed private and government speech,[67] as at least one amicus curiae brief urged.[68] A "mixed speech" category, however, would further complicate public forum analysis, which already suffers from ill-defined categories that even federal judges find head-splittingly difficult to apply.[69] Indeed, current forum analysis is so malleable that government officials sometimes attempt to manipulate their forum policies in order to exercise unbridled discretion in their grants or denials of access depending on a speaker's viewpoint.[70]

1. When and How Private Speech Becomes Government Speech

At oral argument, the primary battlefield was the definition of *when and how* a privately donated monument becomes government speech. The Ten Commandments monument in Pioneer Park bears an inscription indicating it was donated by a private party, the Eagles, who also chose its message. Obviously, if the city had commissioned all the objects on display in its park and had dictated the message conveyed by each object, the objects would constitute government speech.

Like most governments, however, over several decades, the city accepted display objects from a variety of private individuals and organizations. That a display object has transmuted from private into government speech seems to follow from the fact that the city effectively owns, controls, and maintains the display.[71] To decide that an object donated by a private organization could never become government speech would mean that a city could never accept a private donation without opening its park to all other displays offered by any private organization. Thus, a city would have to turn down a generous collector's offer of a Rodin sculpture for fear of having to accept an egotistical citizen's sculpture of himself.

Summum itself conceded that privately donated displays, including a Ten Commandments monument, could be converted into government speech, but only if the government demonstrated it had "adopted" the speech by a formal resolution, a sign next to the monument indicating it reflected the city's views, or a formal designation as a government monument.[72] In order to finesse the dramatic national impact of its argument, Summum maintained that most monuments' messages already were government speech (either initially commissioned

or subsequently adopted by a government[73]) but contended that Pleasant Grove had failed to take the steps necessary to adopt the Eagles' Ten Commandments monument as its own.[74] Summum's adoption argument encountered heavy skepticism from several Justices, including Justice Souter who suggested the requirement might be "almost a silly exercise in formality"[75] in light of the fact that the city permitted the monument to be installed and then maintained it for many years.

2. The Risks for Conservative Speakers of an Expansive Government Speech Doctrine

Pleasant Grove and the United States argued that government speech does not necessarily equate with the *actual message inscribed* on the monument but instead is *the process of selecting the object for display*.[76] That is, the government need not agree with an object's superficial message in order to consider the object worthy of display. New York City probably does not concur with John Lennon's wish for "no countries" in his "Imagine" lyrics, even though the city commemorates the song with a memorial plaque embedded in Central Park. Similarly, a city could display the Ten Commandments as recognition of the city's cultural heritage without adopting its religious injunctions as the government's own message.

Summum urged that if "selection" alone were enough to convert private speech into government speech, the government could circumvent basic equal access doctrine and engage in content and viewpoint discrimination against, and even among, religious speakers.[77] Government could use the government speech doctrine to "shield itself from the prohibition on content- and viewpoint-discrimination simply by taking title to expressive items before granting preferential access to a forum."[78] For example, "[a] school could…'select' secular speakers for preferential access to its facilities and exclude religious speech, on the theory that it had thereby adopted the message of the secular speakers as its own and immunized itself from Free Speech Clause review."[79]

If unchecked, the government speech doctrine could suck the already thin oxygen out of public forum protection of religious and conservative speech. While the "government speech by selection" argument works well in the context of selection of monuments for display in parks, government must not be allowed to transform a genuine expressive forum—whether traditional public forum, designated public forum, or nonpublic forum—into a free speech "dead zone" simply by invoking the government speech doctrine.

According to several amici, including the Boy Scouts, veterans groups, and conservative religious advocacy groups, *government censorship* could readily be rehabilitated as *government speech*, through "selection" or "adoption" of preferred private speech, to the exclusion of unpopular conservative or religious speakers. For example, the American Legion and other veterans groups warned that "[a]bsent clear limitations and guidelines, this case could be misused to permit government co-opting of private speech as government speech in order to rob truly private speech of its protection."[80] Similarly, the Boy Scouts reminded the Court that, despite the Court's upholding the Scouts' right to exclude homosexual individuals from Scout leadership,[81] the Scouts have been subject to numerous "attacks by persons who seek to exclude Boy Scouts from participation in government programs and attacks from government entities themselves."[82] As the Scouts further noted, government officials "have been excluding religious and other groups from access to facilities and programs on account of their religious or moral values and their efforts to maintain their distinctive identities."[83]

Many government officials are biased against religious or conservative speakers. As Supreme Court precedents demonstrate,[84] religious speech has been particularly vulnerable to government attempts to gerrymander a forum by claiming that all speech in the forum is government speech or (at a minimum) government-sponsored speech.[85] In its amicus brief, the Alliance Defense Fund urged the Court specifically to note that "gerrymandering to exclude private religious expression is unlawful."[86] Too often in the past, government officials seeking to exclude religious speakers have claimed that all speech in a forum was sponsored by the government, endorsed by the government, or otherwise attributable to the government, so that the religious speakers must—or, at a minimum, could—be excluded without violating the Free Speech Clause.[87] Allowing the government to exclude all religious speech simply by claiming it was adopting as its own all speech on a particular piece of government property would seriously jeopardize the hard-fought protection gained by private religious speakers in the face of secularists' assaults on religious speech in the public square over the past three decades.

In particular, school officials frequently exclude religious speakers from a speech forum by claiming all speech in the forum is government-sponsored speech. For example, a New Jersey school district allowed all community groups to send informational fliers home to parents via students' backpacks but refused to allow a religious community group to do the same, primarily on Establishment Clause grounds, but also on the grounds that the fliers were school-sponsored speech. Then-Judge Alito found that the community groups' fliers were private speech rather than "[s]chool- or government-sponsored speech" because the school district was not trying "to convey its own message but simply assisting community organizations."[88] The Supreme Court itself has disapproved of school districts' attempts to circumvent equal access for religious student groups by claiming that all student groups were school-sponsored and, therefore, a religious student group could be excluded because "obviously" a school could not sponsor its speech.[89]

Furthermore, the Becket Fund for Religious Liberty explained that some *permanent* speech on government property may be private rather than government speech. Governments often raise funds for schools, stadiums, zoos, or parks by inviting private citizens to purchase bricks or tiles inscribed with the purchasers' own messages for permanent installation on government property. Predictably, some government officials have insisted that the Establishment Clause requires exclusion of private citizens' religious messages.[90] For example, the Chicago Park District sold blank bricks to citizens, who could dictate any message, but rejected a couple's brick dedicated to their children because it included the name of Jesus.[91] Parents of two Columbine victims were not allowed to include religious themes on their tiles that were among hundreds of tiles painted by community members for inclusion in the high school's new wall mural. The school asserted that all tiles painted by com-

munity members constituted government speech.[92]

Nor does a government approval process transform private speech into government speech. Even in the traditional public forum, such as streets and parks, government officials routinely require prior approval of the time and place of a parade, rally, or protest.[93] Courts have sometimes relied on the existence of an approval process to buttress the characterization of speech as "government speech" or "government-sponsored" speech. Such circular reasoning, however, could easily eviscerate freedom of speech.

Finally, religious speech is particularly vulnerable to suppression through forum manipulation because government officials often suppress religious speech out of a mistaken notion that the Establishment Clause prohibits even private religious speech on public property. After the Establishment Clause's proper scope is explained to them, government officials too often switch to *post hoc* rationalizations to justify their censorship. A deplorable example occurred recently in a high school near Yorktown, Virginia, the site of George Washington's final victory securing American independence. School officials required a high school teacher to remove from his bulletin board a National Day of Prayer poster portraying General George Washington kneeling in prayer.[94] School policy allowed teachers to place items of personal interest on their classroom bulletin boards, including pictures of sports figures.[95] School officials initially ordered the picture removed because they believed it violated the Establishment Clause but then switched to a "curriculum control" claim (essentially a particularized "government speech" claim) to justify their censorship of George Washington's picture.[96]

Then a picture of George Washington praying is censored in Virginia schools—and that suppression is upheld by a federal appellate court[97]—concerns about expansion of government speech doctrine merit careful attention. Government speech doctrine needs to be crafted to ensure protection of conservative and religious speakers from government officials' censorship.

3. Is Viewpoint Discrimination Permissible?

A basic presumption of government speech doctrine is that, once speech is determined to be government speech, the government may choose its message free from the usual constraints on content or viewpoint discrimination. Indeed, "when the State is the speaker…it is entitled to say what it wishes,"[98] and "some government programs involve, or entirely consist of, advocating a position."[99] As the Deputy Solicitor General observed during oral argument, if the government could not advocate a particular viewpoint, the United States could not participate as amicus curiae.[100]

This common sense view that government must be allowed to advocate its own viewpoint to the exclusion of other viewpoints[101] contrasts starkly with the bedrock premise that government may not engage in viewpoint discrimination among private speakers.[102] During oral argument, several justices voiced concern as to whether government speech really should operate without even a minimal viewpoint neutrality requirement. Justice Stevens posited the hypothetical of whether the government could delete the names of homosexual members of the military from a war memorial.[103] Justice Breyer and Justice Kennedy echoed similar concerns.[104] Justice Breyer also queried whether the government could accept sculptures for a sculpture garden only by Democratic sculptors while rejecting Republican sculptors' pieces.[105]

B. Establishment Clause Violation?

At oral argument, the Court unexpectedly dwelled on the Establishment Clause implications for future Ten Commandments cases of holding a Ten Commandments monument to be government speech. Chief Justice Roberts almost immediately asked Pleasant Grove's counsel: "[Y]ou're really just picking your poison, aren't you? I mean, the more you say that the monument is Government speech to get out of… the Free Speech Clause, the more it seems to me you're walking into a trap under the Establishment Clause."[106] Justice Kennedy initially characterized the issue as "critical."[107] Justice Ginsburg disputed the city's assertion that *Van Orden* settled the Establishment Clause question "[b]ecause you don't have here a 40-year history of this monument being there."[108] Pleasant Grove's counsel countered: "There is a 36 year history here."[109] To which Justice Scalia quipped: "I think 38 is the cut-off point."[110]

The Court's focus on the Establishment Clause was unexpected for three reasons. First, Summum chose not to bring a federal Establishment Clause claim, so it cannot be a ground for decision in this case.[111] Second, in *Van Orden,*[112] the Court held that Texas' display of a nearly identical Ten Commandments monument did not violate the Establishment Clause. Third, Justice Alito's replacement of Justice O'Connor, a *Van Orden* dissenter, presumably buttresses the longevity of the Court's plurality opinion upholding the display's constitutionality.

Despite not bringing an Establishment Clause claim, Summum pressed a second Establishment Clause violation:[113] by excluding the Seven Aphorisms monument while including the Ten Commandments monument, Pleasant Grove discriminated among religious viewpoints.[114] Unlike most allegations of viewpoint discrimination, this allegation might be considered a constitutional violation even if the speech is government speech because the Establishment Clause restricts government speech.[115]

C. Forum: Traditional, Designated, Nonpublic, or Nonexistent?

1. Private Speech in a Traditional Public Forum

For the past twenty-five years, access for private speakers to government property has been controlled by the categorization of the forum to which access is sought. The three categories of fora and their corresponding levels of speech protection are: 1) a traditional public forum, such as public parks, streets, and sidewalks, from which a private speaker may not be excluded except for a compelling state interest; 2) a designated public forum in which the government has opened specific government space to a broad range of speakers from which a private speaker may not be excluded except for a compelling state interest, except that the government may restrict the forum to specific subject matter or speaker class; and 3) a nonpublic forum in which the government has reserved its space for specific purposes and may exclude speakers if the exclusion is reasonable and viewpoint-neutral.[116]

Relying heavily on *Pinette*,[117] in which the Supreme Court required equal access for a private group's unattended display of a religious symbol, Summum primarily rested its argument

on the fact that a park is the quintessential traditional public forum. Therefore, the city's policy was unconstitutional because it refused monuments based on content ("historical relevance") and speaker identity ("organization with strong ties to the community" or "historical connection" to the city).[118] Even though Summum stipulated that it did not meet the criteria of the policy,[119] it must be allowed to erect its monument because the park is a traditional public forum to which access may not be limited on the basis of content of speech or class of speaker.

Summum's strongest argument may also be its weakest: if a park is a traditional public forum for the purpose of placement of monuments by private individuals, as Summum argued, then the presence of the Eagles' Ten Commandments monument (or any monument at all) is *irrelevant*. That is, Summum has a right to erect its monument in a public park that has no monuments in it, simply by virtue of the fact that the park is a traditional public forum. Summum stoutly argued that a city may shut its parks to all permanent displays,[120] but there is no logical reason why this is so if the park is a traditional public forum for placement of monuments by private speakers.[121] At argument, Justice Souter and Justice Ginsburg challenged this use of traditional public forum analysis for privately created, permanent monuments.[122]

Here the intuitive recognition that there is something different between temporary speech and permanent speech resonates. Judge Lucero's dissent below rested on the sense that a park is *the* traditional public forum for speech like leafleting, carrying signs, oratory, and even unattended displays that remain in place a few weeks, but not "for all uses, particularly for the installation of permanent displays."[123] As Pleasant Grove and the United States urge, there is "no historic tradition of depositing unapproved, unattended monuments on public parkland" for substantial periods of time.[124]

Importantly, at oral argument, several Justices expressed frustration with forum analysis as the only framework for determining free speech rights of private speakers on government property.[125] Justice Kennedy deemed "this case… an example of… the tyranny of labels…. [I]t just seems wooden and rigid to say… it's a public forum for something that will last 30 years for which there is only limited space. It just doesn't make common sense."[126] A few days before, at oral argument in *Ysursa v. Pocatello Education Association,* Chief Justice Roberts had "confessed" he had "never understood forum analysis."[127]

Change in forum analysis is overdue because it has become an increasingly muddled and bewildering doctrine both in the Supreme Court and the courts below.[128] The categorization of the relevant forum has become disturbingly unpredictable even for lawyers well-versed in the area. Ironically, public forum analysis itself threatens to chill private speech because it is too vague for the lower courts to apply with the consistency and predictability necessary to allow citizens to know where and when they may safely speak in public space. It seems unwise, however, to make a substantial overhaul of the doctrine in a case in which alternatives to public forum analysis have not been briefed.[129]

2. Private Speech but Forum Analysis does not Apply in this Specific Context

Because forum analysis does not work well for many situations involving private speakers' access to government space, the Supreme Court sometimes abandons forum doctrine. In *American Library Association,* a plurality noted that "forum analysis and heightened judicial scrutiny are incompatible" with the government in its role as patron of the arts, television broadcaster, or librarian.[130] The *difference* between the "no forum" approach and the "government speech" approach is subtle: the speech simply is not explicitly recognized as government speech. Yet the result is the same. As an alternative to finding the city's selection of monuments to be government speech, therefore, the Court may decide that no forum for private speech exists in the government's selection process of privately donated objects for permanent display in a park.[131]

CONCLUSION

When the result reached by a lower court seems particularly extreme, the Supreme Court may be tempted to respond in kind. While this case presents an opportunity for drastic development of government speech doctrine or dramatic discarding of public forum analysis, a narrower approach under either doctrine is more likely to achieve the desired outcome: preservation of the government's ability to control placement of monuments in public parks and simultaneous protection of conservative and religious speakers' expression of currently unpopular viewpoints in public spaces.

Endnotes

1 Summum v. Pleasant Grove, 483 F.3d 1044 (10th Cir.), *reh'g denied by an equally divided court,* 499 F.3d 1170 (10th Cir. 2007), *cert. granted,* 128 S. Ct. 1737 (2008) (No. 07-665).

2 *See, e.g.,* Johanns v. Livestock Mktg. Assoc., 544 U.S. 550, 557-559, 562-564 (2005) (whether speech is government or private determines Free Speech Clause protection).

3 *See, e.g.,* Bd. of Ed. of Westside Cmty. Schs. (No. 66) v. Mergens, 496 U.S. 226, 250 (1990) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (original emphasis).

4 Recent cases wrestling with the delineation between government and private speech have focused on highway sponsorship signs, specialty and vanity license plates, and fundraising programs in which the public is invited to purchase tiles or bricks inscribed with personalized messages to be installed in sidewalks or walls. *See, e.g.,* Sons of Confederate Veterans v. Comm'r of Va. Dep't. of Motor Vehicles, 288 F.3d 610, 621 (4th Cir. 2002) (specialty plates owned by government but private speech); Perry v. McDonald, 280 F.3d 159, 166 (2d Cir. 2001) (vanity plates constitute private speech on government-owned property); Planned Parenthood of S.C. v. Rose, 361 F.3d 786, 794 (4th Cir. 2004) (specialty plates are mixture of private and government speech); Robb v. Hungerbeeler, 370 F.3d 735, 744-45 (8th Cir. 2004) (state adopt-a-highway program signs are both private and government speech); Demmon v. Loudoun Cty. Pub. Schs., 342 F. Supp.2d 474, 489 (E.D. Va. 2004) (personalized messages on bricks in school walkway are private speech); Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918, 923-924 (10th Cir. 2002) (tiles affixed to school wall are school-sponsored speech but not government speech).

5 Summum brought claims under the Utah Constitution's establishment and free speech clauses that the Tenth Circuit found it had waived. *Pleasant Grove,* 483 F.3d at 1047-48 & n.3.

6 Summum, Summum Sealed Except to the Open Mind, About Summum, http://www.summum.us/about/ (last visited Dec. 15, 2008).

7 Summum, The Purpose and Mission of Summum, http://www.summum.us/about/purpose.shtml (last visited Dec. 15, 2008).

8 Summum, Claude "Corky" Rex Nowell (King) aka Corky Ra—a Brief Biography, http://www.summum.us/about/corkybio.shtml (last visited Dec. 15, 2008).

9 Summum, The First Encounter, http://www.summum.us/about/firstencounter.shtml (last visited Dec. 15, 2008). The Seven Principles apparently are Psychokinesis, Correspondence, Vibration, Opposition, Rhythm, Cause and Effect, and Gender. *See* Summum, Seven Summum Principles, http://www.summum.us/philosophy/principles.shtml (last visited Dec.15, 2008). *See also* Summum v. City of Ogden, 297 F.3d 995, 998 n.2 (10th Cir. 2002) (describing "Seven Principles Monument" in more detail).

10 Brief for Respondent at 1-2 & n.1, Pleasant Grove v. Summum, No. 07-665 (U.S. Aug. 15, 2008) (hereinafter "Resp. Br.") (citing Summum, The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (visited Aug. 15, 2008)). *See* Resp. Br. at 4 n.4.

11 The precise wording of the proposed monument is not in the record; however, the inscription for another proposed Summum monument containing the Seven Principles is found at *City of Ogden,* 297 F.3d at 998 n.2. *See* Resp. Br. at 4 n.4 (noting website location of depiction of proposed monument).

12 Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973).

13 Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

14 Summum v. Callaghan, 130 F.3d 906, 919-921 (10th Cir. 1997).

15 *City of Ogden,* 297 F.3d at 998.

16 *Id.* at 999, 1004-1006 (applying Tenth Circuit's factors for distinguishing private from government speech in *Wells v. City and County of Denver,* 257 F.3d 1132, 1140-42 (10th Cir. 2001)).

17 545 U.S. 677 (2005).

18 Summum v. Duchesne, 482 F.3d 1263 (10th Cir.), *reh'g denied by an equally divided court,* 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed*, No. 07-690 (U.S. Nov. 21, 2007).

19 *Pleasant Grove,* 483 F.3d at 1047.

20 Soc'y of Separationists v. Pleasant Grove, 416 F.3d 1239 (10th Cir. 005) (remanding to district court in light of *Van Orden,* 545 U.S. 677, and *McCreary v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005)).

21 Brief for the United States as Amicus Curiae Supporting Petitioners at 2-3, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2521267 (hereinafter "U.S. Br.").

22 U.S. Br. at 3.

23 *Pleasant Grove,* 483 F.3d at 1047.

24 Appendix to the Petition for Writ of Certiorari, App. H at 1h-4h (hereinafter "Pet. App."). The policy is unclear whether an item must meet both criteria or simply one. *Id.* at 3h (no conjunction between two criteria). See Resp. Br. at 6-7, 22-23 (criticizing policy's ambiguity). The policy also provides that the item must not create a safety hazard or be obscene. Pet. App., App. H at 4h.

25 Summum did not bring federal Establishment Clause or Free Exercise Clause claims. While Summum brought claims under the Utah Constitution's establishment and free speech clauses, it waived those claims. *Pleasant Grove,* 483 F.3d at 1047-1048 n.3.

26 Brief for Petitioners at 7 n.3, Pleasant Grove v. Summum, No. 07-665 (U.S. June 16, 2008), 2008 WL 2445506 (hereinafter "Pet. Br.").

27 *Pleasant Grove,* 483 F.3d at 1057.

28 *Id.* at 1047 n.2.

29 *City of Ogden,* 297 F.3d at 1006; *Callaghan,* 130 F.3d at 913, 919.

30 515 U.S. 753.

31 *Pleasant Grove,* 483 F.3d at 1047 n.2 (citing *Pinette,* 515 U.S. at 774 (O'Connor, J., concurring in part and concurring in judgment)).

32 *Id.* at 1052 n.4 (citing *United States v. Am. Library Ass'n,* 539 U.S. 194, 205 (2003) (plurality opinion) (library book selection); *Ark. Educ. Television Comm'n v. Forbes,* 523 U.S. 666, 673 (1998) (programming selection by public broadcaster); *Nat'l Endowment for the Arts v. Finley,* 524 U.S. 569, 585 (1998) (awarding grants to artists)).

33 *Pleasant Grove,* 483 F.3d at 1050.

34 *Id.* at 1052.

35 *Id.* at 1053. The court similarly rejected the city's interests in aesthetics and safety as insufficiently narrowly tailored. *Id.* at 1055.

36 *Id.* at 1055 n.9.

37 *Id.* at 1056.

38 499 F.3d 1170 (10th Cir. 2007) (Lucero, J., dissenting from denial of rehearing en banc); *id.* at 1174 (McConnell, J., dissenting from denial of rehearing en banc); *id.* at 1178 (Tacha, J., response to dissents). The Tenth Circuit simultaneously denied a petition for rehearing en banc in *Summum v. Duchesne,* 482 F.3d 1263 (10th Cir. 2007) (Summum sought to force city to sell it a plot of parkland), *reh'g denied by an equally divided court,* 499 F.3d 1170 (10th Cir. 2007), *petition for cert. filed,* No. 07-690 (U.S. Nov. 21, 2007).

39 499 F.3d at 1174-75 (McConnell, J., dissenting).

40 *Id.* at 1175 (McConnell, J., dissenting).

41 *Id.* (McConnell, J., dissenting).

42 *Id.* (McConnell, J., dissenting).

43 *Id.* at 1176 (McConnell, J., dissenting). Judge McConnell agreed that a government could by policy or action "create designated public forums with respect to fixed monuments," although the city had not done so here. *Id.* at 1175 (McConnell, J., dissenting).

44 *Id.* at 1177 (McConnell, J., dissenting).

45 *Id.* (McConnell, J., dissenting).

46 545 U.S. 677.

47 499 F.3d at 1175-76 (McConnell, J., dissenting) (original emphasis). Judge McConnell cited numerous recent federal appellate decisions treating Ten Commandments displays as state action and/or government speech in Establishment Clause challenges. *Id.* at 1176 (McConnell, J., dissenting) (citing *ACLU Neb. Foundation v. City of Plattsmouth,* 419 F.3d 772, 778, 774 (8th Cir. 2005); *Van Orden v. Perry,* 351 F.3d 173, 176 (5th Cir. 2003); *Adland v. Russ,* 307 F.3d 471, 489 (6th Cir. 2002); *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766, 770 (7th Cir. 2001); *Books v. City of Elkhart,* 235 F.3d 292, 301 (7th Cir. 2000); *Modrovich v. Allegheny,* 385 F.3d 397, 399-400 (3d Cir. 2004)).

48 499 F.3d at 1177 (McConnell, J., dissenting) (quoting *Rosenberger v. Rector and Visitors of the Univ. of Va.,* 515 U.S. 819, 834 (1995)); *id.* at 1178 (McConnell, J., dissenting) (accepting that the monuments could be challenged under the Establishment Clause and refusing "to speculate on the outcome of any such litigation").

49 *Id.* at 1174 (Lucero, J., dissenting).

50 *Id.* at 1172 (Lucero, J., dissenting).

51 *Id.* at 1171 (Lucero, J., dissenting).

52 *Id.* (Lucero, J., dissenting).

53 *Id.* at 1174 (Lucero, J., dissenting).

54 *Id.* at 1178 (Tacha, J., response).

55 *Id.* (Tacha, J., response).

56 *Id.* at 1179 (Tacha, J., response).

57 *Id.* at 1182 (Tacha, J., response).

58 Pleasant Grove and the United States emphasized the "parade of horribles" likely if government may not discriminate on the basis of content or viewpoint in accepting or rejecting monuments for public parks. *See* Pet. Br. at 50-53 (numerous examples, including "notorious" minister's attempt to

erect anti-homosexual monuments in public parks); U.S. Br. at 19-20, 28.

59 People for the Ethical Treatment of Animals v. Gittens, 414 F.3d 23, 29 (D.C. Cir. 2005). As a factual note, the federal government commissioned and paid for the General Grant statue in front of the Capitol. U.S. Br. at 16-17 & n.7.

60 *Gittens,* 414 F.3d at 25-26.

61 *See* Pet. Br. at 18, 20-22; U.S. Br. at 15.

62 *See* Johanns v. Livestock Mktg. Assoc., 544 U.S. 550 (2005); Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001); Rust v. Sullivan, 500 U.S. 173 (1991). *See also,* Note, *Government Speech Doctrine—Compelled Support for Agricultural Advertising*, 119 Harv. L. Rev. 277, 278 (2005).

63 *See, e.g., Rosenberger*, 515 U.S. at 829-830.

64 *See Johanns,* 544 U.S. at 533 ("Government's own speech…is exempt from First Amendment scrutiny.").

65 *Mergens*, 496 U.S. at 250 (plurality op.) (Equal Access Act, 20 U.S.C. §§ 4071-4074 (2008), did not violate Establishment Clause and required equal access for student religious group to public secondary school facilities).

66 *See, e.g.,* Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001) (Free Speech Clause required, and Establishment Clause did not prohibit, equal access for religious community group to elementary school classrooms after school); *Rosenberger,* 515 U.S. 819 (same for religious student publication to student activity fees funding by public university); *Pinette*, 515 U.S. 753 (same for unattended, temporary display of cross on state capitol grounds); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (same as to religious community group seeking evening use of school auditorium); *Mergens,* 496 U.S. 226 (federal Equal Access Act required access for high school religious student group and Establishment Clause not violated); Widmar v. Vincent, 454 U.S. 263 (1981) (Free Speech Clause required, and Establishment Clause did not prohibit, equal access for religious student group to university facilities). *But see* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (student-led pre-game prayer was not private speech but government-endorsed speech that violated Establishment Clause).

67 Transcript of Oral Argument at 11-13, 30-31, Pleasant Grove v. Summum, 128 S. Ct. 1737 (U.S. Nov. 12, 2008) (No. 07-665), 2008 WL 4892845, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-665.pdf (hereinafter "Transcript of Oral Argument").

68 *See* Amicus Curiae Brief of the American Jewish Congress in Support of Respondent at 27-33, Pleasant Grove v. Summum, No. 07-665 (U.S. Aug. 19, 2008), 2008 WL 3895913 (proposing test to analyze hybrid speech); Resp. Br. at 44 (citing Planned Parenthood of S.C., 361 F.3d at 793 (specialty plates as "mixture of private and government speech" to which private speech protection against viewpoint discrimination applied); Robb, 370 F.3d at 744-45 (state Adopt-A-Highway program included both private and government speech)).

69 *See, e.g., Callaghan,* 130 F.3d at 914 ("[T]here is some confusion over th[e] term [limited public forum] in the case law….Summum's (and the district court's) confusion is readily understandable in light of the inconsistent manner in which the Supreme Court itself has used this term."); Hopper v. City of Pasco, 241 F.3d 1067, 1074 (9th Cir. 2001) ("The designated public forum has been the source of much confusion."); Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) ("[O]ur Circuit's analysis of what constitutes a 'designated public forum,' like our sister Circuits', is far from lucid. Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.') (citations omitted); Christian Legal Soc'y v. Walker, 453 F.3d 853, 865 n.2 (7th Cir. 2006) ("The forum nomenclature is not without confusion. Court decisions also speak of "limited public" fora; most recently this phrase has been used interchangeably with "nonpublic" fora, which means both are subject to a lower level of scrutiny….But "limited public forum" has also been used to describe a subcategory of "designated public forum," meaning that it would be subject to the strict scrutiny test…. That confusion has infected this litigation.") (citations omitted); Goulart v. Meadows, 345 F.3d 239, 249 (4th Cir. 2003) ("There is some confusion over the terminology used to describe this third category, as the Supreme Court and lower courts have also used the term 'limited public forum.'").

70 *See, e.g.,* City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 769-72 (1988). *Compare, e.g.,* Child Evangelism Fellowship v. Montgomery Cty. Pub. Schs., 457 F.3d 376, 386-389 (4th Cir. 2006) (access required for community religious group that had been denied access under forum policy that conferred unbridled discretion for school officials to grant access to community groups in viewpoint discriminatory manner) (the author was co-counsel for Child Evangelism Fellowship) *with* Goulart v. Meadows, 345 F.3d 239, 244, 254-255 (4th Cir. 2003) (homeschooler community group denied access to community center for educational activities the homeschoolers wanted to count toward fulfilling state educational requirements, even though they could use community center for broad variety of "enrichment activities," including activities *subsequently* reported toward state educational requirements).

71 U.S. Br. at 13-14 (citing Serra v. General Servs. Admin., 847 F.2d 1045, 1049 (2d Cir. 1988) (artist who challenged government's decision not to display his sculpture "relinquished his own speech rights in [the] sculpture when he voluntarily sold it to [the government]")).

72 Resp. Br. at 33-34.

73 *Id.* at 13, 33-34, 54-58.

74 *Id.* at 13, 34-36.

75 Transcript of Oral Argument at 38, 50-56.

76 Pet. Br. at 32-34; U.S. Br. at 8, 17, 19.

77 Resp. Br. at 37.

78 *Id.* at 14. *See* Note, *Government Speech Doctrine—Compelled Support for Agricultural Advertising*, 119 Harv. L. Rev. at 278 ("[A]lthough the First Amendment must make some allowance for government speech, if this doctrine is not carefully limited, it may pose a grave threat to the First Amendment's ability to guard against government distortions of the speech market."); *id.* at 285 ("Government speech seems to present the significant risk of a 'falsified majority,' a self-perpetuating feedback loop in which a majority is maintained not by virtue of the idea uniting it, but through continual reinforcement.") (citation omitted).

79 Resp. Br. at 37 (citing *Lamb's Chapel,* 508 U.S. 384). *See also id.* at 41-42 (noting Court could have reached opposite results in *Pinette*, 515 U.S. 753, and *Rosenberger*, 515 U.S. 819, under government speech doctrine).

80 Brief Amici Curiae of the American Legion, et al., in Support of Petitioner at 13-14, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2555218.

81 Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

82 Brief of Amicus Curiae Boy Scouts of America in Support of Neither Party at 1, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2555221 (hereinafter "BSA Br.") (citing numerous actions to deny Boy Scouts access to government property, including: Barnes-Wallace v. Boy Scouts of Am., 530 F.3d 776 (9th Cir. 2008) (challenge to city lease of park because Scouts require members to believe in God); Winkler v. Gates, 481 F.3d 977 (7th Cir. 2007) (challenge to Defense Department's aid to Scouts' annual jamboree); Evans v. Berkeley, 129 P.3d 394 (Cal. 2006) (city denied berthing space to sailing program based on Scouts' membership requirements); Boy Scouts of Am. v. Wyman, 335 F.3d 80 (2d Cir. 2003) (Connecticut denied participation in government employees' charitable giving campaign because of Scouts' membership requirements); Boy Scouts of Am. v. Till, 136 F.Supp. 2d 1295 (S.D. Fla. 2001) (school district denial of meeting space in public school due to Scouts' membership requirements)).

83 *Id.* at 7.

84 See cases listed *supra* note 66.

85 *See, e.g., Pinette,* 515 U.S. at 760 (Scalia, J., majority op.) ("government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince") (original emphasis); *Mergens,* 496 U.S. at 244-245 (O'Connor, J., plurality op.) (rejecting circumvention of equal access by which "school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club on the basis of its speech content.").

86 Brief of Amici Curiae, Alliance Defense Fund and Family Research Council, Supporting Petitioners at 12, Pleasant Grove v. Summum, No. 07-

665 (U.S. June 23, 2008), 2008 WL 2521266.

87 See government officials' claims in the cases listed *supra* note 66.

88 Child Evangelism Fellowship of N.J. v. Stafford Twp. Sch. Dist., 386 F.3d 514, 524-525 (3rd Cir. 2004) (Alito, J.) (noting that the school did not write, pay for, or have any role in producing the fliers which contained a disclaimer of school sponsorship) (the author was co-counsel for Child Evangelism Fellowship). *See also,* Westfield High School L.I.F.E. Club v. City of Westfield, 249 F. Supp.2d 98, 115-118 (D. Mass. 2003) (rejecting school district prohibition of high school students' distribution of candy canes with religious message in school hallways by claiming all speech by student group bore school's "imprimatur").

89 *See, e.g., Mergens,* 496 U.S. at 248 (plurality op.) (school district claiming that all student groups were curriculum-related, including a "Surf Club" in Lincoln, Nebraska); Donovan v. Punxsutawney Area Sch. Bd., 336 F.3d 211, 224-225 (3d Cir. 2003) (rejecting school district attempt to define forum to exclude religious group); Pope v. East Brunswick Bd. of Ed., 12 F.3d 1244, 1253-54 (3d Cir. 1993) (same).

90 Kiesinger v. Mexico Academy and Cent. Sch., 427 F. Supp.2d 182 (N.D.N.Y. 2006) (school district removed bricks purchased by citizens for school sidewalk if they referred to Jesus but left bricks referring to God); Demmon v. Loudoun Cty. Pub. Sch., 342 F. Supp.2d 474 (E.D. Va. 2004) (school officials removed bricks with crosses from school walkway).

91 Brief Amici Curiae of the Becket Fund for Religious Liberty and Robert and Mildred Tong in Support of Petitioners at 1, 4-5, Pleasant Grove v. Summum, No. 07-665 (U.S. June 23, 2008), 2008 WL 2555220 (discussing Tong v. Chicago Park Dist., 316 F.Supp. 2d 645 (N.D. Ill. 2004)).

92 Fleming v. Jefferson Cty. Sch. Dist., 298 F.3d 918 (10th Cir. 2002) (school district invited school community to paint tiles for Columbine High School wall but rejected tiles with religious symbols). The Tenth Circuit found the tiles to be "school-sponsored" speech rather than "government speech" but allowed the parents' religious speech to be excluded. *Id.* at 923-924.

93 *See, e.g.,* Thomas v. Chicago Park Dist., 534 U.S. 316 (2002).

94 Lee v. York Cty. Sch. Div., 484 F.3d 687 (4th Cir. 2007).

95 *Id.* at 690-691.

96 *Id.* at 691, 698-700 & n.17.

97 *Id.* at 689.

98 *Rosenberger,* 515 U.S. at 833.

99 *Johanns,* 544 U.S. at 559. Other cases have noted this aspect of government speech without actually holding that government speech was at issue. *See, e.g.,* Legal Servs. Corp., 531 U.S. at 541; Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229, 235 (2000); Ark. Ed. Television Comm'n v. Forbes, 523 U.S. 666, 674-675 (1998); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring in the judgment); Rust v. Sullivan, 500 U.S. 173, 194-195 (1991); Wooley v. Maynard, 430 U.S. 705, 717 (1977).

100 Transcript of Oral Argument at 28.

101 See *supra* note 99.

102 *See, e.g., Rosenberger,* 515 U.S. at 829 ("Viewpoint discrimination is thus the most egregious form of content discrimination.")

103 Transcript of Oral Argument at 23-24.

104 *Id.* at 23-29.

105 *Id.* at 27.

106 *Id.* at 4.

107 *Id.* at 5.

108 *Id.* at 7.

109 *Id.*

110 *Id.*

111 Summum brought claims under the Utah Constitution's establishment and free speech clauses that the Tenth Circuit found it had waived. *Pleasant Grove,* 483 F.3d at 1047-48 & n.3. Even those amici who are strict separationists urged that the judgment below be reversed, albeit urging that the "proper framework for adjudicating Summum's claims" was the Establishment Clause rather than the Free Speech Clause. Brief of American Jewish Committee, Americans United for Separation of Church and State, Anti-Defamation League, Baptist Joint Committee for Religious Liberty, and People for the American Way Foundation as Amici Curiae in Support of Neither Party at 34, Pleasant Grove v. Summum (U.S. June 23, 2008), No. 07-665, 2008 WL 2550615.

112 545 U.S. 677.

113 Resp. Br. at 12 ("[T]he record shows a targeted anti-Summum gerrymander, aimed at suppressing one particularly disfavored religious view. The City has thus transgressed the most fundamental First Amendment boundaries, taking sides in a theological debate by granting preferential access to a traditional public forum."); *id.* at 20-21, 53.

114 Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

115 *See, e.g.,* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (student-led pre-game prayer was not private speech but government-endorsed speech that violated Establishment Clause).

116 *See generally* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44-46 (1983); *Forbes,* 523 U.S. at 677-78.

117 515 U.S. 753.

118 Resp. Br. at 11; Pet. App., App. H at 3h.

119 Pet. Br. at 7 n.3.

120 Resp. Br. at 10, 18-19, 29, 43, 48, (citing *Pinette,* 515 U.S. at 761 (plurality opinion); *id.* at 783 (Souter, J., concurring)).

121 Pet. Br. at 39-40.

122 Transcript of Oral Argument at 45 (Justice Souter: "[Y]our use of public forum is just by kind of remote analogy here, and …I'm not sure that it's helping you or would help us if we used it as criterion for decision."); *id.* at 44 (Justice Ginsburg: "I don't know of any tradition that says people can come to the park with monuments and put them up if they will, so long as they meet the equivalent of time, place and manner."); *id.* at 46 (Justice Kennedy: "[Y]ou can stick with it as long as you want…but suppose that we were to say that we were unconvinced by the comparison between speeches and parades on the one hand and monuments on the other, so we did not apply the public forum analogy.").

123 499 F.3d at 1173 (Lucero, J., dissenting).

124 Pet. Br. at 43; U.S. Br. at 13.

125 Transcript of Oral Argument at 24 (Justice Breyer: "[T]he problem I have is that we seem to be applying these subcategories in a very absolute way. Why can't we…ask the question…is the restriction proportionate to a legitimate objective?...[A]re we bound…to apply what I think of as an artificial kind of conceptual framework?").

126 Transcript of Oral Argument at 35.

127 Transcript of Oral Argument at 34, Ysursa v. Pocatello Education Association, 128 S. Ct. 1762 (Nov. 3, 2008) (No. 07-869), 2008 WL 4771231, available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-869.pdf. (Chief Justice Roberts: "Since we are in confessional mode, I've never understood forum analysis.")

128 See *supra* note 69.

129 *E.g.,* Empl. Div. v. Smith, 494 U.S. 872 (1990) (Court unexpectedly overhauled free exercise of religion analysis without briefing on issue of new test).

130 *Amer. Library Ass'n,* 539 U.S. at 204-205 (plurality opinion) (selection of public library books); *Finley,* 524 U.S. at 585 (government funding of art); *Forbes,* 523 U.S. at 673 (public television broadcasting).

131 Pet. Br. at 42; U.S. Br. at 21 n.13.

Two Visions, Two Results: Making Sense of the Disagreement over the Application of the Ministerial Exception to Teachers in Parochial Schools

*By G. David Mathues**

Most religious believers, whatever their age, see their minister once or twice a week for one or two hours a time. By contrast, children who attend a religiously-affiliated school spend six or seven hours a day with their teachers. Parents of these children, who often select the school for religions reasons, whose children spend far more time at school than at church, might be surprised to learn that while the First Amendment protects the church's ability to hire and fire a minister, courts cannot agree as to whether it also protects the religious school's ability to hire or fire a teacher. In legalspeak, the courts disagree over the scope of the ministerial exception. This article addresses this persistent and important dispute.

I. Summary and History of the Ministerial Exception

The ministerial exception gives religious institutions broad freedom in selecting their leaders. Technically speaking, there are two ministerial exceptions: one is statutory, and one is constitutional. The *statutory* ministerial exception appears in Title VII and allows religious institutions to hire and fire all of their employees based on an employee's religion without fear of a lawsuit.[1] Thus, while the manager of a McDonalds cannot hire only Catholics, a Catholic school may. The *constitutional* ministerial exception derives from the First Amendment, and bars suits against religious institutions based on any of Title VII's provisions and on certain other employment laws.[2] Thus, while the manager of the McDonalds cannot hire only males as cooks, a synagogue may hire only males as rabbis. But while the constitutional exception is broader than the statutory exception in that it bars a larger class of employment suits, the constitutional exception is narrower in that it applies to a smaller class of employees.[3] The constitutional exception applies only to employees of a religious institution who perform a "ministerial" or "spiritual" function. The constitutional exception is also more complicated, more frequently litigated, is the focus of this article. Cases, including cases involving teachers at parochial schools, usually turn on the definition of "spiritual function."

The Fifth Circuit first articulated the constitutional ministerial exception in the 1972 case of *McClure v. Salvation Army*.[4] The plaintiff, an ordained minister in the Salvation Army, sued her employer under Title VII for sex discrimination. The court recognized that "[t]he minister is the chief instrument by which the church seeks to fulfill its purpose,"[5] and applied the Supreme Court's church government cases, which held that churches should be free from state interference in matters of church government as well as church doctrine.[6] Because allowing a minister to sue the church over an employment dispute would permit the State to "intrude upon matters of church administration" and make the State the final arbiter between the church and its employees,[7] the court held that the Free Exercise Clause barred McClure's suit. Since *McClure*, eight other circuits have considered the ministerial exception. All have agreed that the constitutional exception exists,[8] but they do not agree which constitutional provision creates the exception.[9]

The ministerial exception continues to provoke debate in both the courts and the academy.[10] This clash should not be surprising, because the ministerial exception lies at a crossroads between two foundational American values: equality and religious freedom.[11] Supporters see the exception as critical to religious freedom and a reminder of the limits on state power; foes see the exception as an anachronistic license to engage in noxious discrimination. Going forward, this disagreement is most likely to focus on the definition of "minister," because while the ministerial exception's existence appears settled, its scope is not.[12] The courts define "ministers" as those who exercise a "spiritual function" or "carry [a religion's] spiritual message."[13] An employee performs a spiritual function if the employee's "primary duties" consist of matters like "teaching, spreading the faith, church governance, supervision of a religious order, or supervision of participation in religious ritual and worship."[14] But while courts generally agree on the test, they disagree strongly on how to apply the test.

II. The Ministerial Exception and Teachers in Religious Schools

There are two reasons for examining the clash over the definition of "minister" in the context of teachers at religious schools. First, whether a teacher fulfills a "spiritual function" is an intriguing question. On the one hand, even opponents of the ministerial exception must admit that a clergy member performs a spiritual function. On the other, many supporters of the ministerial exception would agree that a part-time church groundskeeper does not perform a spiritual function.[15] But teachers perform duties that appear both spiritual and secular. Teachers may lead the class in prayers, teach theology, and serve as a role model. But a teacher also may explain multiplication tables, grade English papers, and drive for a field trip. Given this split in a teacher's responsibilities, it should not be surprising that "there are courts on both sides"[16] of this oft-litigated issue.

Second, and more importantly, how we see the relationship between the ministerial exception and teachers in religious schools reveals our views on two deeper issues: the source of the ministerial exception, and the nature of religion itself. Of course, a full discussion of these issues lies well beyond the scope of this article, but we should recognize our underlying assumptions, because these assumptions will shape our views on other questions of religious freedom. The following four cases, two on each side, illustrate both the different views on whether a teacher fulfills a "spiritual function" and the premises underlying those views.[17]

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A. Decisions Not Applying Ministerial Exception to Teachers

In *Guinan v. Roman Catholic Archdiocese of Indianapolis*, plaintiff Ruth Anne Guinan taught fifth grade at a parochial school for eleven years.[18] She was 52 years old when her contract was not renewed, and she sued for age discrimination. The school invoked the ministerial exception, arguing that Guinan was serving in a spiritual role as a teacher in the parochial school. The court acknowledged that Guinan always taught at least one class in religion, organized Mass once a month, and that one of her "principle duties [was] to be an 'example of Christianity'" to her students.[19] Nevertheless, it ruled that because she taught "mostly secular" subjects and because the school did not require that all teachers be Catholic, she was not a minister and that therefore the ministerial exception did not apply.

In repeating that Guinan's teaching duties were "secular," the court discounted the importance of responsibilities as a worship leader and accepted without analysis the idea that "spiritual" duties could be separated from "secular" duties. The most remarkable example of this rigid mode of thought came when the court noted that Guinan taught a class called "Images of God," which was "basically a sex-education program for human growth and development,"[20] but insisted that there was nothing "religiously oriented" about the program. How a program entitled "Images of *God*" could be secular, especially when the belief that mankind was made in the image of God has played such an influential role in the Catholic Church's teaching on sexual matters,[21] the court left unexplained.[22]

In another case, Jewel Redhead taught fifth grade at a school run by the Seventh-Day Adventist Church for several years without incident. But when she became pregnant outside of marriage and refused to marry the child's father, the school fired her for "immoral conduct," contrary to Adventist teachings.[23] When she sued for pregnancy discrimination, the school argued that Redhead was a minister because she led worship, acted as a role model, and most importantly because parents sent their children to the Seventh-Day Adventist school so that children would obtain an education that "complies with the teachings of the church."[24]

The federal district court rejected these arguments, characterizing Redhead as a "lay employee," because she taught only one hour of Bible every day and "spent the remainder of her time teaching secular subjects." The court admitted that the school could fire teachers for conduct it saw as a "grievous sin," but refused to dismiss the case because it saw a question of fact as to whether the school enforced its policy unevenly.[25] In the court's view, because questions of pretext could be answered without delving into church doctrine, the ministerial exception did not apply.[26] After the Second Circuit vacated and remanded the case,[27] the district court adhered to its original decision, relying even more heavily on its initial claim that the ministerial exception should not apply because judging the issue of pretext did not require investigating church doctrine. As the court put it, while some church employment disputes risk unconstitutional "entanglement" in doctrinal disputes, "employment disputes that a court can decide without having to question the validity or plausibility of a religious belief, or having to favor a certain interpretation of religious doctrine, do not post a similar risk" and therefore do not call for the ministerial exception.[28]

B. Decisions Applying the Ministerial Exception to Teachers

In *Clapper v. Chesapeake Conference of Seventh-Day Adventists*, the Fourth Circuit confronted a case that strongly resembled *Redhead*.[29] As in *Redhead*, the defendant school argued that the teacher carried out a spiritual function because he led the students in worship and prayer, acted as a role model, was required to be a member of the church, and instructed the students from a religious perspective.[30] Like Jewel Redhead, plaintiff Clapper countered that his overall duties were secular. Indeed, *Redhead* looks like a better case for applying the ministerial exception. Redhead was fired for conduct that clearly violated the Adventist schools' moral code, but in *Clapper*, the school argued that it declined to renew Clapper's contract because of declining enrollment and Clapper's negative teaching reviews.[31] Yet *Clapper*, not *Redhead*, applied the ministerial exception to the teacher.

Clapper noted that teachers at the defendant school led the classes in worship and prayer, but the court recognized that the teachers' role as spiritual leaders ran deeper.[32] It focused on the constant, daily interaction between the teachers and students, the teachers' status as a role model, and the teachers' responsibility to "incorporate the teachings of the Seventh-Day Adventist Church whenever possible."[33] *Clapper* even quoted from, and relied on, the Adventists' Education Code, which stated that the church's school "influences [children] more continuously than any other agency of the church."[34] For these reasons, the court held that "enforcement of Clapper's action would substantially infringe upon the Chesapeake Conference's right to choose its own spiritual leaders."[35]

Just as *Clapper* contrasts with *Redhead*, *Staley v. Indian Community School of Milwaukee, Inc.*,[36] contrasts with *Guinan*. The Indian Community School was a private elementary and middle school that sought to "offer students an education based on traditional Indian spiritual practices and cultural principles."[37] While the school taught the same subjects as any other primary school, it also "expose[d] students to as much Indian culture and spiritual belief in the classroom as possible."[38] Marny Staley taught at this school for several months until she was fired. The school said it fired her because she failed to respect the Indian religious tradition of the school; she claimed that she was a victim of racial and religious discrimination.[39] When she sued, the school invoked the ministerial exception.

Staley recognized that Native American culture and religion are inseparable, and that the line between the "sacred and the profane does not exist in Native American cultures."[40] Given this connection between culture and religion, and the school's mission to expose students to Native American culture and religion, the court reasoned that a teacher was the means by which the school's message was transmitted to the students. Therefore, the court found that the teacher fulfilled a "spiritual function," applied the ministerial exception, and dismissed the case.[41]

III. Evaluating the Ministerial Exception With Respect to Teachers

The question now becomes whether *Guinan* and *Redhead*, or *Staley* and *Clapper*, applied the ministerial exception correctly. Remember that under the prevailing "primary duties" test, "if the employee's primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship," the employee performs a "spiritual function" and is therefore a minister and covered by the ministerial exception.[42] A straightforward reading of this language seems to favor applying the exception to teachers. The test speaks of "teaching," and of "spreading the faith," and teachers in religious schools do both and see both as important to their mission. Furthermore, courts, including the Supreme Court, have made equally clear that the ministerial exception protects a church's right to decide matters of governance and organization.[43] When the church operates the school, it follows that selecting teachers is a matter of organizing one arm of the church.[44] Given these arguments, the question becomes why courts continue to disagree on applying the exception to teachers.

The answer is that in applying the primary duties test to teachers, the courts rely on their assumptions on two deeper issues. The first is the constitutional source of the ministerial exception. One view on this issue, expounded most recently by Judge Posner, roots the ministerial exception in an Establishment Clause judgment that courts should not "interfere in the internal management of churches as they sometimes do in the management of prisons or school systems."[45] Posner argues that because the state is not competent to adjudicate disputes over "liturgies," "schisms," and other matters of religious doctrine, and because such disputes are often resolved by selecting a minister, courts should not judge employment disputes between churches and ministers.[46] The D.C. Circuit demonstrated Posner's reasoning when it applied the exception to a suit between a Methodist minister and his superiors.[47] The minister claimed that he was denied a promotion because of his age; the bishops countered that they followed their Book of Church Discipline and based their judgment on the "gifts and graces" of the minister.[48] The court dismissed the case, explaining that it could not imagine "an area of inquiry less suited to a temporal court for decision [than] evaluation of the 'gifts and graces' of a minister."[49] Posner, and the D.C. Circuit's position, is partially justified, because Establishment Clause principles do support the ministerial exception.[50]

If the Establishment Clause offers the *only* support for the ministerial exception, the case for applying the exception to teachers looks weak.[51] This follows from the fact that most employment lawsuits revolve around two questions: what are the qualifications for the job, and was the plaintiff fired for poor performance, or some other reason? With clergy members, the courts admit that they cannot decide what qualifies someone for a clergy position or what constitutes good job performance by a clergy member without violating the Establishment Clause. Thus, they apply the ministerial exception to bar cases brought by members of the clergy. By contrast, courts often believe that they can judge whether a teacher was qualified or whether a teacher should have been terminated, and therefore refuse to apply the ministerial exception to teachers in parochial schools. *Redhead* took this exact path, ruling that the case did not involve a dispute over religious doctrine, that the court was capable of determining why the plaintiff was fired, and that the ministerial exception did not apply.[52]

But the Establishment Clause is not the only constitutional source for the ministerial exception. As other courts and commentators have recognized, the Free Exercise Clause requires a robust ministerial exception and supports applying that exception to teachers in religious schools.[53] Justice Brennan's prescient analysis lays the groundwork for why the exception should cover teachers:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. 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.[54]

Brennan went on to explain that "[w]hile a church may regard the conduct of certain functions as integral to its mission, a court may disagree.... As a result, the community's process of self-definition would be shaped in part by the prospects of litigation."[55]

A church's ability to define itself and its message turns on the church's ability to determine who will carry that message. As the Third Circuit explained, because a religious community must be free to communicate its religious message, and because a minister is the "embodiment" and "voice" of that message, "any restriction on the church's right to choose who will carry its message necessarily infringes upon its free exercise right to profess its beliefs."[56] And when a church operates a school, selection of teachers is just as important as selection of ministers, because the teacher plays such a pivotal role in communicating the church's worldview to the students. A religious school does not exist merely to teach the "Three R's," but to communicate a religious community's meaning to the children. Many parents who choose a religious education for their children do so precisely because they understand this truth. So did *Clapper*, which saw the "primary purpose" of the Adventist school as theological, not pedagogical, and therefore applied the ministerial exception when *Redhead* did not, even on less favorable facts.[57]

Justice Brennan's warning about allowing a church's identity to be shaped by the prospects of litigation applies to schools. If a school determined that a teacher failed to sufficiently "incorporate the teachings" of Seventh-Day Adventism, or any other faith, into her classroom, how is a court any more fit to judge this determination than to judge whether someone has the "gifts and graces" of a minister?[58] The obvious answer is that a court cannot make such a judgment, and a court that understands the Free Exercise mandate of the ministerial exception will not make such a judgment.

The second philosophical question concerns the nature of religion itself. Is religion merely a private matter, that can be quarantined off into theology classes and worship services, or

is it something that by its nature permeates every aspect of the believer's life? Our current, post-Enlightenment culture often assumes that religion is just a matter of private belief, but few devout believers take so crabbed a view of their faith. As Douglas Laycock points out, "most serious believers believe that the religious aspects of their lives cannot be segregated or isolated from the other aspects of their lives" and "reject the model of religion as something private, reserved for Sunday morning or Friday night, and irrelevant to the rest of the week."[59]

Here, *Staley* looks in the right direction but fails to look far enough: there is no line between the sacred and the profane in Native American religions, but in many other religions that same line is permeable or non-existent.[60] Once again, many parents who send their children to religious schools understand this truth. They do not send their children to religious schools merely to take a theology class, but to participate in "an ongoing tradition of shared beliefs,"[61] and to learn how "their religious commitments are relevant to their other roles" in society.[62]

Turning back to *Staley* and *Guinan*, we see the consequences of these two views of religion. While *Guinan* saw "religion" as something limited to theology classes, *Staley* saw it as something that permeated the entire educational process. Thus, *Staley* found that the teacher performed a spiritual function and applied the ministerial exception, but *Guinan* viewed the teacher as a secular employee and did not. If *Staley* had followed the same approach as *Guinan*, the Indian Community School would have been forced to defend its decision to fire Staley for being "insensitive" to Native American religions in front of a court that rejected the schools' concept of religion. Suffice it to say that such a scenario would not favor the school. Adopting *Guinan*'s limited view of "religion" would leave little room for religious communities to transmit their identity through schools, force religious schools to made decisions about their mission in the shadow of litigation, and even undermine religious liberty in other areas. [63]

Eventually, the Supreme Court will resolve the split over whether teachers in religious schools are covered by the ministerial exception. When it does, it will have to choose between two sets of assumptions in interpreting the "primary duties" test. One set views the ministerial exception as a creature solely of the Establishment Clause and views religion as a private matter than can (and perhaps should) be quarantined off from the rest of life; the other views the exception as critical to the Free Exercise Clause and religion as something that can permeate every aspect of a believer's life. The choice ought to be easy.

Endnotes

1 42 U.S.C. § 2000e-1(a) (2000).

2 Hollins v. Methodist HealthCare, Inc., 474 F.3d 223, 225 (6th Cir. 2007).

3 Joshua D. Dunlap, Note, *When Big Brother Plays God: The Religion Clauses, Title VII, and the Ministerial Exception*, 82 Notre Dame L. Rev. 2005, 2009 (2007).

4 460 F.2d 553 (5th Cir. 1972).

5 *McClure*, 460 F.2d at 558–59.

6 *McClure*, 460 F.2d at 560.

7 *McClure*, 460 F.2d at 560.

8 *See* Rweyemamu v. Cote, 520 F.3d 198, 207 (2d Cir. 2008); Petruska v. Gannon Univ., 462 F.3d 294, 305 (3d Cir. 2006); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1303–04 (11th Cir. 2000); Bollard v. California Province of the Society of Jesus, 196 F.3d 940, 945 (9th Cir. 1999); EEOC v. Catholic Univ. of Am., 83 F.3d 455, 463 (D.C. Cir. 1996); Young v. N. Ill. Conference of United Methodist Church, 21 F.3d 184, 185 (7th Cir. 1994); Scharon v. St. Luke's Episcopal Presbyterian Hospitals, 929 F.2d 360, 362 (8th Cir. 1991); Rayburn v. Gen. Conference of Seventh-Day Adventists, 772 F.2d 1164, 1170 (4th Cir. 1985).

9 *Rweyemamu* listed the Free Exercise Clause, the Establishment Clause, and a version of the Expressive Association doctrine as possible sources. *Rweyemamu*, 520 F.3d at 205.

10 For recent activity in the courts, see Schleicher v. Salvation Army, 518 F.3d 472, 474 (7th Cir. 2008) (Posner, J.) and *Petruska*, 462 F.3d at 294 (panel initially rejected ministerial exception, but on rehearing accepted it). For recent scholarship, compare Gregory A. Kalscheur, *Civil Procedure and the Establishment Clause: Exploring the Ministerial Exception, Subject Matter Jurisdiction, and the Freedom of the Church*, 17 Wm. & Mary Bill Rts. J., (forthcoming 2008) (arguing in favor of the ministerial exception) and Dunlap, *supra* Note 3, (same), with Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 Fordham L. Rev. 1965, 2004 (2007) (arguing against the exception) and Sara Fulton, Note, Petruska v. Gannon University: *Cracks in the Stained Glass Ceiling*, 14 Wm. & Mary J. Women & L. 197 (2007) (same). For a recent discussion within *Engage*, see Thomas C. Berg, *Ministers, Minimum Wages, and Church Autonomy*, Engage: J. Federalist Soc'y Prac. Groups, June 2008, at 135.

11 *EEOC*, 83 F.3d at 460 ("This case presents a collision between two interests of the highest order: the Government's interest in eradicating discrimination in employment and the constitutional right of a church to manage its own affairs free of government interference."); Oliver S. Thomas, *The Application of Anti-Discrimination Laws to Religious Institutions: The Irresistible Force Meets the Immoveable Object*, 12 J. Nat'l Ass'n Admin. L. Judges 83, 83 (1992).

12 Of course, the Supreme Court might grant certiorari and reject the ministerial exception. Nevertheless, given the unanimity of the courts of appeal, the prolonged silence from the Supreme Court even after *Employment Division v. Smith*, 494 U.S. 872 (1990), and the consequences of a contrary ruling (is the Supreme Court really going to order the Catholic Church to ordain female priests?), I think that scenario is unlikely.

13 *Petruska* , 462 F.3d at 306.

14 *Petruska*, 462 F.3d at 307.

15 Although a reasonable argument exists that the ministerial exception should cover all church employment decisions, *see* Dunlap, *supra* note 3, at 2008, no court has not accepted this argument. *But see* Elvig v. Calvin Presbyterian Church, 397 F.3d 790, 798 (9th Cir. 2004) (Kleinfeld, J., dissenting from denial of rehearing en banc) (arguing that ministerial exception should shield almost all church employment decisions).

16 EEOC v. Hosanna-Tabor Evangelical Lutheran Church and Sch., 582 F.Supp.2d 881, 888 (E.D. Mich. Oct. 23, 2008).

17 All four cases are federal cases, but state courts have also split on this question. *Compare, e.g.*, Weishuhn v. Catholic Diocese of Lansing, 756 N.W.2d 483 (Mich. App. Ct. 2008) (exception applies to elementary school teacher) *with* Coulee Catholic Schs. v. Labor and Indus. Review Com'n, Dept. of Workforce Dev., 752 N.W.2d 341, 344 (Wis. App. 2008) (exception does not apply to elementary school teacher).

18 42 F. Supp.2d 849, 805 (S.D. Ind. 1998).

19 *Guinan*, 42 F. Supp.2d at 850–51.

20 *Guinan*, 42 F. Supp.2d at 851.

21 *See, e.g.*, John Paul II, The Theology of the Body (1997).

22 The court's statement may have been due to poor fact development, because the district court noted that Guinan's description of the class was the only description in the record. *Guinan*, 42 F. Supp.2d at 851.

23 *Redhead v. Conference of Seventh-Day Adventists*, 440 F. Supp.2d 211, 215–16 (E.D.N.Y. 2006).

24 *Redhead*, 440 F. Supp.2d at 214.

25 *Redhead*, 440 F. Supp.2d at 223 ("Thus, while a religious school employer may validly seek to impose moral doctrine upon its teaching staff, punishment singularly directed at the Hester Prynnes, without regard to the Arthur Dimmesdales, is not permissible.").

26 *Redhead*, 440 F. Supp.2d at 222.

27 The remand was for reconsideration in light of *Rweyemamu*. *Redhead v. Conference of Seventh-Day Adventists,* 566 F. Supp.2d 125, 128 (E.D.N.Y. 2008).

28 *Redhead*, 566 F. Supp.2d at 133.

29 16 F.3d 1208, 1998 WL 904528 (4th Cir. Dec. 29, 1998).

30 *Clapper*, 1998 WL 904528 at *2–3.

31 *Clapper*, 1998 WL 904528, at *4.

32 *Clapper*, 1998 WL 904528, at *7.

33 *Clapper*, 1998 WL 904528, at *7.

34 *Clapper*, 1998 WL904528, at *2.

35 *Clapper*, 1998 WL 904528, at *6.

36 351 F. Supp.2d 858 (E.D. Wis. 2004).

37 *Staley*, 351 F. Supp.2d at 862.

38 *Staley*, 351 F. Supp.2d at 863. For example, the school held pipe ceremonies, a sweat lodge, and traditional prayer ceremonies around a "spirit pole." *Id.*

39 *Staley*, 351 F. Supp.2d at 864.

40 *Staley*, 351 F. Supp.2d at 867.

41 *Staley*, 351 F. Supp.2d at 869.

42 *Petruska*, 462 F.3d at 304 n.6 (quoting *Rayburn*, 772 F.2d at 1168).

43 *Petruska*, 462 F.3d at 306 (citing *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952)).

44 Of course, not all religious schools are directly operated by a church. The closer the relationship between a religious school, and a specific church denomination or congregation, the stronger the case for applying the ministerial exception to that school's employment decisions.

45 *Schleicher*, 518 F.3d at 475. For other supporters of Posner's view, see e.g., *Gellington*, 203 F.3d 1299 at 1304; Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 Wash. & Lee L. Rev. 347, 410 (1984).

46 *Schleicher*, 518 F.3d 472 at 475.

47 Minker v. Baltimore Annual Conference of the United Methodist Church, 894 F.2d 1354, 1355 (D.C. Cir. 1990).

48 *Minker*, 894 F.2d at 1356.

49 *Minker*, 894 F.2d at 1357.

50 *Berg*, *supra* note 12, at 136.

51 Some commentators have suggested that the current "primary duties" test itself raises serious Establishment Clause issues, because the prevailing definition of "spiritual function" reflects a "familiar, but by no means universal, view of ministers as employees with leadership or worship roles, or direct responsibilities for the spread of the church's message." Kathleen A. Brady, *Religious Organizations and Free Exercise: The Surprising Lessons of* Smith, 2004 B.Y.U. L. Rev. 1633, 1693–94 (2004); *see also* Stephen L. Carter, The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion 142–43 (1994). From this viewpoint, because this test favors a particular type of church, it threatens to "establish" that church through government support. The logical consequence of this viewpoint is that courts should be very deferential towards a church's claim that an activity is "spiritual," and if accepted, this viewpoint would strengthen the case that the ministerial exception should apply to employment suits brought by teachers at religions schools.

52 *Redhead*, 566 F. Supp.2d at 133.

53 *Hollins*, 474 F.3d at 225; *Petruska*, 462 F.3d at 306–07; Brady, *supra* note 50, at 1698.

54 *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 342 (1987) (Brennan, J., concurring).

55 *Amos*, 483 U.S. 327 at 343–44 (Brennan, J., concurring).

56 *Petruska*, 462 F.3d at 306–07.

57 *Clapper*, 1998 WL 904528, at *7.

58 *Cf. Minker*, 894 F.3d at 1357.

59 Douglas Laycock, *The Rights of Religious Academic Communities*, 20 J.C. & U.L. 15, 16 (1993).

60 *See, e.g.,* Brady, *supra* note 47, at 1697 (stating that "where Catholic organizations are involved, such a division between secular and religious activities is not possible" because "[f]or Catholic Church, social services activities are no more secular than worship and preaching."). Many Protestants agree that the divide between the secular and the scared does not exist. Abraham Kuyper, a turn-of-the-century Dutch Calvinist pastor who later served as Prime Minister of the Netherlands and helped found the Free University of Amsterdam wrote that "no single piece of our mental world is to be hermetically sealed off from the rest, and there is not a square inch in the whole domain of our human existence over which Christ, who is Sovereign over all, does not cry: 'Mine!'" *Sphere Sovereignty*, in Abraham Kuyper: A Centennial Reader 488 (James D. Bratt ed., 1998). However, Kuyper's statement should not be taken as a call for theocracy, and readers familiar with Kuyper will not make that mistake. For a short discussion of Kuyper's thought and influence, see David A. Skeel, Jr., *The Unbearable Lightness of Christian Scholarship*, 57 Emory L.J. 1471, 1507–09 (2008).

61 *Amos*, 483 U.S. 327 at 343–44 (Brennan, J., concurring).

62 Laycock, *supra* note 54, at 16. Indeed, in other arenas, the courts have recognized the religious character of religious schools. Intellectual consistency suggests that they should do the same here. *See, e.g.*, *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) ("In short, parochial schools involve substantial religious activity and purpose.").

63 For example, in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995), over whether a university could fund student publications by all student groups except religious groups. If one thinks that religious commitments cannot be isolated from other aspects of a believer's life, it follows that the university's suppression was unconstitutional viewpoint discrimination because it limited speech on any issue that came from a religious viewpoint. *See Rosenberger*, 515 U.S. at 831–32 (majority op.). By contrast, if one sees religious beliefs as private matters unrelated to other areas of life, the university's suppression looks like permissible content discrimination, because the university identified one particular topic (religion) that can be separated from all other topics and denied funding. *See id.*at 898–99, (Souter, J., dissenting).

Equal Treatment for Religious Expression after *Colorado Christian University v. Weaver*

*By Stuart J. Lark**

> We know that faith and values can be... the foundation of a new project of American renewal. And that's the kind of effort I intend to lead as president of the United States.
>
> President Barack Obama

The Bush Administration conceived the so-called "Faith-Based Initiative" to leverage the efforts of religious organizations in addressing various social and educational needs. The initiative reflects in part the principle that religious organizations, in exercising their call to serve others, often share with the government a common purpose. This principle resonates with President Obama and he is continuing the initiative, albeit with some changes.[1]

The initiative also reflects the principles of religious liberty underlying the First Amendment. These principles, unfortunately, are both more complex and more contentious than the "common purpose" principle. They have, for instance, generated substantial controversy regarding how much religious content faith-based organizations can include in the social or educational services they provide with government funds.[2]

There are essentially two views on religious expression as it pertains to direct grants to private organizations selected *without regard to religion.* Professors Ira C. Lupu and Robert W. Tuttle have written extensively on the faith-based initiative and have argued that the Establishment Clause does and should require the *exclusion* of religious content from otherwise qualifying activities, particularly if the content is "transformative" or "indoctrinating."[3]

Others (including this author) have argued that in a religiously neutral program, the Establishment Clause should *accommodate* private religious expression that furthers the purposes of the program.[4] Among other things, excluding such expression from government funded programs has the effect of marginalizing religious viewpoints, an effect which increases as the role of government increases.

The Bush Administration walked the line between these two positions, closely adhering to the ambiguity in the applicable U.S. Supreme Court precedents regarding the meaning of the phrase "inherently religious activities" (which the Court has held cannot be directly funded even in a religion-neutral program).[5] Faced with vague restrictions on religious expression, some faith-based organizations have chosen to forego the funds available to their secular counterparts so as to preserve their distinctive religious mission. Others have chosen to participate in the initiative and muddle through, sometimes to their legal detriment. In the absence of definitive guidance, a growing number of court cases have adopted the exclusionary position.[6]

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The Tenth Circuit's recent decision in *Colorado Christian University v. Weaver*,[7] however, strongly affirms the accommodation position. The decision effectively exposes and rejects the discrimination that results when government excludes religious perspectives and approaches from general educational or social service programs. And although the decision does not directly reject the exclusionary position as applied to direct funding, it does lay a foundation for future challenges to this position.

I. Integrated Religious Expression in *Colorado Christian*

Colorado Christian involved a challenge to a student aid program established by the State of Colorado. The program provided scholarships to in-state students attending an accredited institution of higher education in the state. However, the program excluded otherwise qualifying institutions which were "pervasively sectarian."[8] This exclusion reflected the Supreme Court's Establishment Clause doctrine at the time of the program's creation, which held that "no state aid at all may go to institutions that are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones."[9] The statute enumerated various criteria to determine whether an institution is "pervasively sectarian." Applying these criteria, the state permitted a Methodist university and a Catholic university to participate in the program, but denied participation to a Buddhist university and Colorado Christian University (CCU).[10]

The following three characteristics of CCU's educational program emphasize how the pervasively sectarian exclusion discriminated against religious viewpoints integrated into the program.

1. CCU Satisfied All of the Non-Religious Requirements of the Student Aid Program

CCU is a fully accredited higher educational institution which offers a comprehensive undergraduate and graduate program rooted in the arts and sciences.[11] Among other subjects typically taught at such institutions, CCU students learn the laws of science,[12] the techniques of educating, the theorems of mathematics, and the algorithms of computer science.[13] Upon graduation, these students hold degrees from an accredited institution and are fully qualified to begin their careers in their chosen professions. CCU graduates may pursue careers ranging from business to teaching to computer related occupations. In addition, such graduates may pursue post-graduate degrees in engineering, law, medicine, and other fields.

Based on these factors, the Colorado Commission on Higher Education (CCHE), the agency responsible for administering the program, expressly acknowledged that CCU qualified to participate in the student aid programs in every respect except for the restriction on "pervasively sectarian" institutions.

2. CCU's "Christ-Centered" Educational Program Teaches "Secular" Subjects from a Christian Perspective

CCU provides its educational program within a distinctly Christian environment which nurtures Christian spiritual maturity—the ability to live in accordance with what students understand to be reality. But CCU's concept of a "Christ-centered" education extends beyond a nurturing environment; it reaches to the philosophical underpinnings of knowledge and truth.

CCU's educational program seeks to integrate biblical concepts with the arts, sciences, and professional fields. This integration expands upon the "secular" aspects of these programs. CCU strives to produce graduates who are not only competent in their fields of study but equipped to analyze the knowledge they have gained from a Christian perspective. In this regard, CCU's programs are both "secular," in the sense that they produce graduates with the requisite knowledge and skills to contribute to society, and "religious," in the sense that they equip graduates to analyze knowledge and make life choices based on Christian principles.

One such biblical concept is the relationship set forth in the Bible between God and the material world.[14] Applying this relationship, the president of another Christian college has described a "Christ-centered" chemistry course as follows:

> Chemicals... obviously behave the same for Christians as they do for non-Christians. At that level... there should be no difference at all [between a "Christ-centered" course and a nonreligious course]. But I want more for our students.... I want them not only to be fascinated and delighted by the intricacies of chemical behavior, but also to realize that what they're exploring is the handiwork of the Lord Jesus Christ.... I want them to delight in what they're learning about chemistry, but as Christians I also want them to see at every moment what these things are telling them about the One they know as their Savior, so that in the end they are lifted up to him, even in a chemistry course.[15]

As this example demonstrates, a Christ-centered education "...is marked by courses and curricula which are rooted in and are permeated by a Christian worldview, rather than a secular worldview (often disguised as a supposedly neutral worldview)."[16]

3. CCU's "Christ-centered" Educational Program is no more "Ideological" than any other Educational Program

Most colleges and universities have some kind of mission or institutional values statement. For instance, Regis University in Denver, a Catholic institution, describes its mission to "provide value-centered undergraduate and graduate education."[17] As part of this education, Regis students "examine and attempt to answer the question: 'How ought we to live?'"[18] Given that Regis states that its mission is consistent with Judeo-Christian principles, it appears that the values around which its educational programs are centered (and which presumably are used to answer the question of how one ought to live) reflect Regis' understanding of Christian values. By way of contrast, Colorado College in Colorado Springs identifies as its core values a shared commitment to: value all persons, live with integrity, nurture an ethic of environmental sustainability and encourage social responsibility.[19] These values appear to track those of modern secularism.

This country's earliest institutions of higher education were founded to teach from expressly Christian viewpoints.[20] However, the predominant defining values today are more likely to be "egalitarianism, environmentalism, self-esteem, and other products of modern secular liberal thought."[21] The important point about these differences is that there is no "neutral" reference point from which to evaluate them. With respect to the change in the predominant value system in education from Christianity to secularism, Professor (now Judge) McConnell has noted:

> It is essential to recognize that secularism is not a neutral stance. It is a partisan stance, no less "sectarian," in its way, than religion. In a country of many diverse traditions and perspectives—some religious, some secular—neutrality cannot be achieved by assuming that one set of beliefs is more publicly acceptable than another.[22]

The view or presupposition that chemicals are created by God is, of course, a religious and philosophical viewpoint. Indeed, it is a viewpoint that stands in sharp contrast to the presupposition that chemicals are derived from purely natural causes. However, the difference in presuppositions is simply that—a philosophical difference about the nature of reality. The state is not neutral when it chooses to fund the secular viewpoint and not fund the religious viewpoint.

The pluralism underlying the First Amendment supports a rich diversity of educational institutions offering different perspectives in the marketplace of ideas. To ensure the continued vitality of this marketplace, and to preserve this pluralism, no otherwise qualifying institution should be excluded from benefits offered to all solely because the content of its programs reflect religious convictions.

II. No Funding of Religious "Indoctrination" in Secular Education: The District Court's Exclusionary View of *Colorado Christian*

CCU's challenge asked whether the state could exclude CCU and its students from a student aid program for which they otherwise qualify solely because of the religious character of CCU and its educational program. The district court held not only that it could, but that it must.[23] The district court acknowledged that the "pervasively sectarian" exclusion in the student aid program was presumptively unconstitutional because it discriminated on the basis of religious character. However, the court determined that the exclusion survived strict scrutiny because it was narrowly tailored to a compelling state interest.

The court found this interest by interpreting Colorado constitution Article IX, § 7 to prohibit the funding of "religious education."[24] In addition, the court broadly defined "religious education" to include not only "exclusively religious" education such as religious vocational training, but also educational programs which, like CCU's, integrate religious viewpoints into the teaching of "secular" subjects. The court held that Art. IX, § 7 prohibits funding for institutions "whose purportedly 'secular' instruction is predominated over and inextricably entwined with religious indoctrination."[25] The exclusion turned not on whether CCU's educational program provided sufficient "secular" educational value—indeed the

state acknowledged that it did—but rather on whether it was otherwise too religious.

It should be noted that this interpretation is certainly not obvious from the wording of Art. IX, § 7, which, on its face, speaks to *sectarian institutions*, not to *religious activity*.[26] In this regard, the district court appears to have been informed by the Colorado Supreme Court's analysis in *Americans United for Separation of Church and State v. Colorado*.[27] In that case, the court upheld the participation of Regis College, an admittedly sectarian institution, in the same student aid program. In the course of the opinion, the court claimed that, notwithstanding its plain language, Art. IX, § 7 allowed aid to sectarian institutions where there is limited "risk of religion intruding into the secular educational function of the institution" or where there is not "the type of ideological control over the secular educational function which Art. IX, § 7, at least in part, addresses."[28]

The district court also asserted that Art. IX, § 7 is essentially identical to the Washington constitutional provision at issue in *Locke v. Davey*.[29] But the Washington provision, which prohibits the use of government funds for "religious worship, exercise or instruction," addresses religious activity, not sectarian institutions. Also, the Court in *Locke* narrowly interpreted the Washington constitutional provision to apply only to the narrow state interest asserted in not funding the religious training of clergy.[30]

In any event, having identified a state interest in not funding secular education provided from a religious viewpoint, the district court concluded that the "pervasively sectarian" exclusion was narrowly tailored to this interest.[31] The district court noted that the pervasively sectarian exclusion does not "exclude all sectarian institutions, [but] only those in which religion intrudes upon secular instruction."[32] The district court noted also that by definition a pervasively sectarian institution is one in which the "religious mission predominates over its secular educational role."[33] Accordingly, as a pervasively sectarian institution,

> it is not just CCU's "courses in theology or Biblical studies" that raise the risk of public funding of religious indoctrination; by definition, religion influences and predominates over CCU's secular instruction as well. It is not simply a question of excluding Biblical studies or theology from funding—indeed, students at generally sectarian colleges can receive tuition assistance for such studies, *Americans United,* 648 P.2d at 1076—but rather, a question of excluding funding for all religious indoctrination, whether it be found in a theology lecture or in an accounting course.[34]

III. Impermissible Religious Discrimination and "Indoctrination" Quotients: The Tenth Circuit's Accommodating View of *Colorado Christian*

The Tenth Circuit, in an opinion fortuitously written by Judge Michael McConnell, reversed the district court and sided with CCU. The court's opinion helpfully prohibits both discrimination among religious institutions based on their religiosity and actions by government officials to discern the religious meaning in an organization's activities. However, by holding that the pervasively sectarian exclusion is not narrowly tailored to the state interest articulated by the district court, the decision leaves open the possibility that the state could, with appropriate revisions to the statute, exclude otherwise qualifying educational programs based on their religious character.

A. Government Cannot Favor Organizations Based on their Religiosity

The court concluded that the *pervasively sectarian* test violated the First Amendment because it "necessarily and explicitly discriminate[d] among religious institutions"[35] and "the discrimination is expressly based on the degree of religiosity of the institution and the extent to which that religiosity affects its operations, as defined by such things as the content of its curriculum and the religious composition of its governing board."[36]

The court rejected an argument that the discrimination was based not on religion but rather on the type of institution (e.g., between "moderately religious" and "primarily religious" institutions). The court observed that there is "no reason to think that the government may discriminate between 'types of institutions' on the basis of the nature of the religious practice these institutions are moved to engage in."[37]

In contrast to the district court, the Tenth Circuit held that this discrimination did not survive heightened scrutiny.[38] The court held that the district court's reliance on Art. IX, § 7 was "mistaken," and that, because the aid is indirect, the Colorado Supreme Court "would likely uphold the program even if CCU were admitted."[39] Although this analysis yielded a favorable result for CCU, it did so without evaluating the merits of the state's interest in not funding religious education.

In this regard, it should be noted that the court relied upon a somewhat incomplete and dismissive reading of *Americans United*. Specifically, the Tenth Circuit noted that in "*Americans United*, the court upheld the scholarship programs at issue here against state constitutional challenge on the basis of the indirect nature of the aid, the higher-education context, and the availability of the aid to students at both public and private institutions."[40] But the Tenth Circuit failed to note that the Colorado Supreme Court also included the pervasively-sectarian exclusion as a factor which ensured that the program complied with Art. IX, § 7.[41] In a footnote, the Tenth Circuit does acknowledge that the Colorado Supreme Court thought the exclusion was important specifically because it protected against ideological control over secular education addressed by Art. IX, § 7.[42] The Tenth Circuit summarily concluded, nevertheless, that the Colorado Supreme Court did not hold that the exclusion was necessary to protect this interest.[43]

It is true that in identifying a number of factors which ensured that the program complied with Art. IX, § 7, the Colorado Supreme Court did not expressly state that each of them was necessary. But neither did it state that any subset of them was sufficient.[44] Therefore, the Tenth Circuit potentially misreads the interest protected by Art. IX, § 7 as interpreted by the Colorado Supreme Court in two ways: (1) by holding that the interest is not implicated in a program providing indirect aid and (2) by holding that the pervasively sectarian exclusion is not necessary to protect the interest.

B. Government Cannot Determine the Indoctrination Quotient of Activities

As a second and independent basis for striking down the pervasively sectarian exclusion, the Tenth Circuit held that the statutory criteria used to determine the religious character of an institution required government officials to make unconstitutional "judgments regarding contested questions of religious belief or practice."[45] This portion of the decision may prove to have greater impact on the law.

Among other things, the *pervasively sectarian* test required government officials to determine whether an institution's curriculum required religion courses that tended to indoctrinate or proselytize.[46] The court observed that the line "between 'indoctrination' and mere education is highly subjective and susceptible to abuse."[47] Indeed, "whether an outsider will deem [CCU's] efforts to be 'indoctrination' or mere 'education' depends as much on the observer's point of view as on any objective evaluation of the educational activity.... Many courses in secular universities are regarded by their critics as excessively indoctrinating, and are as vehemently defended by those who think the content is beneficial."[48] Based on these observations, the court concluded in what is perhaps the money line of the opinion that "[t]he First Amendment does not permit government officials to sit as judges of the '*indoctrination' quotient* of theology classes."[49]

The *pervasively sectarian* test also required government officials to inquire into whether any policy of an institution's governing board has the image or likeness of a particular religion.[50] The court held that government officials could not evaluate this factor because "[i]t is not for the state to decide what Catholic—or evangelical, or Jewish—'policy' is on education issues."[51] A third factor was whether the students, faculty, trustees or funding sources of an institution are "primarily" of a "particular religion."[52] The court noted that identifying a "particular religion" required a definition of ecclesiology and that "the government is not permitted to have an ecclesiology, or to second-guess the ecclesiology espoused by our citizens."[53]

IV. The Improved Prospects for Equal Funding of Religious Expression after *Colorado Christian*

Colorado Christian puts one or two more nails in the coffin of the pervasively sectarian doctrine. The decision prohibits government officials from excluding religious educational institutions from government programs for which they otherwise qualify based solely on their *institutional* religious character, particularly where other religious institutions are participating. But as discussed above, the decision evaded the merits of the state interest which was articulated in *Americans United* and relied upon by the district court. Specifically, the Tenth Circuit left unchallenged the proposition that the State could establish a funding program that excludes otherwise qualifying educational *activities* based on their religious character (i.e., where there is "ideological control over the secular educational function").

If such a program is permitted, it will effectively turn the demise of the pervasively sectarian doctrine into a hollow victory. For the defining characteristic of a pervasively sectarian institution such as CCU is that its religious convictions permeate all of its activities. Therefore, an exclusion of activities which are too religious is no better for CCU than an exclusion of institutions which are pervasively sectarian.

In the terminology used in the case law, the core issue unresolved by *Colorado Christian* is whether the phrase "inherently religious activities" (or "religious education" or "religious indoctrination") should be construed broadly to encompass religious viewpoints on or approaches to secular activities, or narrowly to apply only to exclusively religious activities. Although the Tenth Circuit did not reach this issue, its decision strengthens the position that a broad exclusion of religious expression is presumptively unconstitutional under the Free Exercise Clause, and that it is not required to comply with the Establishment Clause.

A. Colorado Christian Limits the Application of Locke in Constitutional Challenges to Religious Discrimination in Government Programs.

As discussed below, a broad religious exclusion is not neutral with respect to religion and is therefore presumptively unconstitutional under the Free Exercise Clause.[54] Generally, a law that is not neutral is subject to strict scrutiny and must be narrowly tailored to advance a compelling governmental interest.[55] However, whether this standard applies to government funding was called into question in *Locke v. Davey*, a case in which the U.S. Supreme Court held that a state may exclude clergy training from a general scholarship program.[56]

Noting that the only interest upheld in *Locke* was a state interest in not funding the religious training of clergy,[57] the Tenth Circuit declined to extend *Locke* to all decisions regarding government funding of religious education.[58] The court held that *Locke* "does not imply that states are free to discriminate in funding against religious institutions however they wish, subject only to a rational basis test."[59] Indeed, the court observed that the restriction in *Locke* applied only to a "distinct category of instruction" and not to an entire program of education, and that students were permitted to attend pervasively religious schools.[60]

The Tenth Circuit's reading of *Locke* indicates that general First Amendment principles would apply to the exclusion of religious expression from religion-neutral programs. These principles point to the conclusion that a broad exclusion is unconstitutional.

1. A Broad Exclusion Results in Religious Discrimination

A long line of cases establish that when the government excludes private religious expression that is otherwise within the scope of a government program (e.g., by denying government resources for such expression), it engages in religious viewpoint discrimination. In *Good News Club v. Milford Central School*, a Bible club challenged a school policy pursuant to which "any group that promotes the moral and character development of children was eligible to use the school building."[61] Nevertheless, the club was denied access to the school because the policy prohibited use "by any individual or organization for religious purposes."[62]

The Court held that the exclusion of the club based on its religious nature "constitutes unconstitutional viewpoint discrimination" because "the [club] seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint."[63] The Court rejected the argument "that something that is 'quintessentially religious' or 'decidedly religious in nature' cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint."[64] Indeed, the Court observed, there is "no logical difference in kind between the invocation of Christianity by the [club] and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons."[65]

Several years earlier, in *Rosenberger v. Rectors of the Univ. of Virginia*, the Court held that a public university student club funding policy engaged in viewpoint discrimination when it excluded religious publications.[66] The Court characterized the discrimination as follows:

> [The policy] does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, not the general subject matter, resulted in the refusal to make... payments, for the subjects discussed were otherwise within the approved category of publications.[67]

This discrimination is precisely what results under a broad exclusion of religious expression. For instance, even if CCU's "Christ-centered" education program is an "essentially religious endeavor," as the district court asserted,[68] it is still the teaching of secular subjects from a particular viewpoint (just as the "quintessentially religious" Bible club activities in *Good News Club* were characterized by the Court "as the teaching of morals and character development from a particular viewpoint"[69]). Indeed, just as Colorado College extends its viewpoints regarding the value of all people and environmental sustainability into its educational programs, so CCU extends its viewpoints regarding God's role in nature into its educational programs.

Although *Good News Club* and *Rosenberger* analyzed the legality of the discrimination under the Free Speech Clause, the discriminatory character of the exclusions also raises Free Exercise concerns. Specifically, denying funding to a "Christ-centered" education in this context, as required under a broad exclusion, constitutes religious discrimination and violates the neutrality required by the Free Exercise Clause.[70]

2. Private Religious Expression in furtherance of a Religion-Neutral Program is not attributed to the Government

The Establishment Clause analysis in this context turns on whether the student aid results in governmental indoctrination.[71] The U.S. Supreme Court has consistently held that indirect aid does not implicate the Establishment Clause because the choices of recipients of indirect aid to use the funds for religious activities are not attributable to the government.[72] With respect to direct aid, the Court's precedents suggest that private religious expression, even if it in some sense constitutes religious indoctrination, is not attributable to the government if it is conducted in furtherance of the objectives of a religiously neutral program. In such a program, only a narrow exclusion, one which applies only to exclusively religious activity that does not further the secular purposes of the program, is necessary to satisfy Establishment Clause requirements.

In its most recent case involving direct aid to religious schools, a four-justice plurality of the Court held that

> the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action.[73]

The plurality further stated that "[i]n distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[74]

In applying the neutrality principle to the question of attribution, the plurality explained that

> If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination.[75]

On this basis, the plurality concluded that if "eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern."[76]

The Court has required neutrality to avoid attribution in other cases involving aid to private organizations. Most recently, in *University of Wisconsin v. Southworth*, the Court rejected a challenge to a fee collected from students at a public university and used to fund student organizations on a viewpoint neutral basis.[77] The Court noted that in *Rosenberger* it had rejected the argument "that any association with a student newspaper advancing religious viewpoints would violate the Establishment Clause."[78] Instead, the Court had held "that the school's adherence to a rule of viewpoint neutrality in administering its student fee program would prevent 'any mistaken impression that the student newspapers speak for the University.'"[79] Applying this rationale, the Court concluded that "[v]iewpoint neutrality is the justification for requiring the student to pay the fee in the first instance and for ensuring the integrity of the program's operation once the funds have been collected."[80]

Because a narrow construction of religious education can be applied in a religion-neutral manner (by analyzing whether the activity furthers the secular purposes of the government program), it is sufficient to satisfy the Establishment Clause. By way of contrast, a broad construction actually undermines the neutrality that the Court has held is necessary to avoid attribution because it requires the use of religious criteria to distinguish among permitted and prohibited activities.

Professors Lupu and Tuttle have argued that attribution

for Establishment Clause purposes should turn not on neutrality but on predictability. That is, religious expression by a private grant recipient should be attributed to the government if a government official could reasonably foresee that the recipient would engage in such expression.[81] They argue that this broader standard for attribution is necessary because the Establishment Clause uniquely constrains government action.[82] It does not follow, however, that the unique character of the Establishment Clause necessarily makes the government responsible for private religious expression it can reasonably foresee when the recipient is selected without regard to religion. In fact, a majority of the Court has arguably held at least twice, *Rosenberger* and *Southworth*, that neutrality is sufficient to avoid attribution for Establishment Clause purposes.[83]

Finally, Professors Lupu and Tuttle argue that indirect aid is the *only* type of program in which religious expression can be integrated into a government funded activity.[84] But if indirect aid were the only means by which attribution could be avoided with respect to religious activities, then a governmental entity could intentionally disfavor religious viewpoints with impunity by incorporating a direct aid component into a program and then hiding behind the Establishment Clause. This result, facilitated by a broad exclusion, turns the Establishment Clause on its head.

3. The Court's Decisions have Never Clearly Described the Religious Activities that must be Excluded from a Religion-Neutral Government Program

In contrast with the *Mitchell* plurality, Justice O'Connor held that in addition to neutrality, the Establishment Clause prohibits actual diversion of government aid to religious indoctrination.[85] However, Justice O'Connor did not identify precisely what activities would constitute impermissible religious indoctrination in a neutral aid program. Noting that the school aid program challenged in the case prohibited the use of the aid for "religious worship or instruction," Justice O'Connor simply held that this restriction was sufficient to avoid Establishment Clause violations.[86]

The case that described prohibited activities most closely is *Bowen v. Kendrick*.[87] In *Bowen*, the Court held that a government aid program may violate the Establishment Clause if the funds are expended on "specifically religious activities" or for "materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith."[88] The Court did not, however, define these terms.

While it is anyone's guess what the Court thought these terms meant, the logic of the opinion supports a narrow interpretation. For instance, the Court held that no "express provision preventing the use of federal funds for religious purposes" was required because the general statutory constraints on the use of the funds were sufficient.[89] Since such general statutory constraints would not exclude integrated religious content in activities furthering the program's purposes, the restricted religious expression must include only exclusively religious activities.

In addition, the Court stated that "evidence that the views espoused on questions such as premarital sex, abortion, and the like happen to coincide with the religious views of the program grantees would not be sufficient to show that the grant funds are being used in such a way as to have a primary effect of advancing religion."[90] On this basis, the "views of a particular faith," which the Court held could not be funded, do not include religious views on the subject matter of the program. Put differently, the phrase "views of a particular faith" is intended to be defined narrowly to apply only to views on exclusively religious subjects outside the scope of the program.

B. Colorado Christian Constrains the Authority of Government Officials to Administer a Broad Exclusion of Religious Viewpoints in Otherwise Qualifying Activities

The holding in *Colorado Christian* that the religious determinations required in the pervasively sectarian test are unconstitutional applies with equal force to similar determinations regarding the religious character of activities. The Tenth Circuit based its holding in part on the fact that the Court in *Rosenberger* had rejected an argument, put forth by the dissent, the government officials could distinguish between materials containing religious indoctrination and evangelism and materials containing a descriptive examination of religious doctrine.[91]

The Tenth Circuit also relied on *New York v. Cathedral Academy*,[92] a case in which the Court struck down a statute which allowed religious schools to obtain reimbursements for costs incurred with respect to certain examinations, provided the examinations were not too religious. The statute required government officials to "review in detail all expenditures for which reimbursement is claimed, including all teacher-prepared tests, in order to assure that state funds are not given for sectarian activities."[93] The Court rejected this audit, noting that it would place religious schools "in the position of trying to disprove any religious content in various classroom materials" while at the same time requiring the state "to undertake a *search for religious meaning* in every classroom examination offered in support of a claim."[94] The Court concluded that "[t]he prospect of church and state litigating in Court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment."[95]

These cases call into question the government's authority to parse out religious indoctrination from otherwise qualifying activities. They also provide additional support for a narrow reading of the religious activity restrictions in *Bowen.* Taken together, *Bowen* and *Cathedral Academy* require government officials to identify "specifically religious activities" or "explicitly religious content" or activities "designed to inculcate the views of a particular faith" without also engaging in a "search for religious meaning."[96] The only way that the *Bowen* standards can be implemented in a manner consistent with *Cathedral Academy* (and *Rosenberger*) is if they are narrowly defined to apply only to exclusively religious activities. As narrowly defined, government officials need only determine whether funded activities lack appropriate secular content.

In a similar manner, determining whether any activity expresses the views of a particular religion on a subject requires both an ecclesiology as to what a particular religion is and a determination as to what the views of that religion are on the

subject. However, "the government is not permitted to have an ecclesiology" or "to decide what Catholic—or evangelical, or Jewish—'policy' is" on a subject.[97]

Further, these cases undermine the distinction Professors Lupu and Tuttle have proposed between religious indoctrination, which may not be funded, and other religious expression which may be funded. They have argued that a health program which "promotes the integration of religious spirituality and faith as inherent components of public health delivery systems" and which "brings together health care professionals, clergy [and] students... in a 'transformative educational process'" may not constitute religious indoctrination.[98] The critical issue, they argue, is "whether the program merely teaches participants about the importance of spirituality in many patients' lives, or engages in forbidden religious indoctrination of participants."[99] Such a determination, however, appears inconsistent with *Colorado Christian* since it will effectively require a judgment regarding the "indoctrination quotient" in the activities.[100]

In short, a broad exclusion requires government officials (and private citizens) to answer questions about religion that have eluded philosophers and theologians for centuries. Even if government officials possessed the requisite wisdom, they lack the institutional authority to make such religious determinations. A narrow exclusion, by contrast, only requires government officials to do precisely what they are trained to do—assess whether an activity furthers the government's purposes."

Religious Expression in the Public Square

In articulating his views on religion in society, President Obama has asserted that "[s]ecularists are wrong when they ask believers to leave their religion at the door before entering the public square."[101] Nevertheless, his initial statements regarding religious expression in government funded programs suggest that this is precisely what he intends to require.[102]

Of course, the position of any one administration does not affect the underlying constitutional standards. Private individuals should be permitted to integrate religious expression into religion neutral government funded programs because the First Amendment protects such expression. As the government increasingly underwrites the activities constituting the public square, the protection of private religious expression in such activities will become increasingly important. Otherwise, the result will be a *pervasively secular* public square in which religious voices are marginalized and genuine pluralism is lost.

Further, even if the sole motivation for a faith-based initiative is utilitarian (i.e., certain faith-based organizations may just get better results), prohibiting religious expression in the delivery of services is counterproductive. Such prohibition removes from the faith-based providers that which makes them most effective. As the author C.S. Lewis observed in a similar context:

> In a sort of ghastly simplicity, we remove the organ and demand the function. We make men without chests and expect of them virtue and enterprise. We laugh at honor and are shocked to find traitors in our midst. We castrate and bid the gelding be fruitful.[103]

Endnotes

1 Partnering with Communities of Faith, available at http://www.religionandsocialpolicy.org/docs/general/FS_PCF_FINAL.pdf.

2 Ira C. Lupu and Robert W Tuttle, The State of the Law-2008, A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations, The Roundtable on Religion and Social Welfare Policy, Dec. 2008, ii-iii, available at www.religionandsocialpolicy.org/docs/legal/state_ofthe_law_2008.pdf.

3 *See, e.g.,* Lupu and Tuttle, State of the Law, at 5-6, 17-24; Ira C. Lupu and Robert W Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1 (2005), at 75-89 ("Faith-Based Initiative").

4 *See generally,* Stuart J. Lark, Religious Expression, *Religious Expression, Government Funds and the First Amendment*, 105 W.Va. L. Rev. 317 (2003) ("Religious Expression"). This argument is often made in connection with the related argument that excluding such expression violates the Free Speech and Free Exercise Clauses and, at least arguably, is not required under current Establishment Clause case law.

5 Lupu and Tuttle, State of the Law, at 18-24.

6 *Id.* at 24-25.

7 Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir. 2008).

8 *Id.* at 1250.

9 *Id.* at 1251 (quoting Roemer v. Bd. of Pub. Works, 426 U.S. 736, 755 (1976).

10 *Id.*

11 CCU currently offers over 20 majors, which include accounting, biology, computer information systems, education, English and mathematics. CCU Profile, *available at* http://www.ccu.edu/friends/press.pdf.

12 For example, CCU's general chemistry class covers atomic structure, stoichiometry, chemical bonding, and gas and solution chemistry. Academic Catalog 2007-2008, *available at* http://www.ccu.edu/catalog/2007-08/courses/chm.asp.

13 CCU strives to sustain a community of faculty, administrators and staff who exemplify excellence in their professional fields. More than three-fourths of CCU's faculty has earned post-graduate degrees. CCU Profile, *available at* http://www.ccu.edu/friends/press.pdf. CCU's faculty includes professors holding doctorate degrees from the following institutions: the University of California-Berkeley, Harvard University, the University of Wisconsin-Madison, the University of Colorado, the University of Denver, Colorado State University and Oxford University (among others). Academic Catalog, *available at* http://www.ccu.edu/catalog/2007-08/faculty/faculty.asp.

14 Although there are obviously many different views of this relationship, one description is as follows:

Only God is truly independent; all created things, including the chemical elements chemists study, are utterly contingent upon him. They depend for their existence and their properties upon him in every instance, at all points and at every moment. Thus the very chemicals we study are Christ's handiwork and, if we allow them, they will declare to us his glory (Psalm 19:1).

Duane Litfin, Conceiving the Christian College 160 (Wm. B. Eerdmans Publg. Co. 2004).

15 Litfin, Conceiving the Christian College at 76-77.

16 *Id.* at 83 (quoting Stephen V. Monsma, Christian Worldview in Academia, Faculty Dialogue 21 (Spring-Summer 1994): 146).

17 Our Mission, *available at* http://www.regis.edu/regis.asp?sctn=abt.

18 *Id.*

19 CC Mission and Core Values, *available at* www.coloradocollege.edu/welcom/mission

20 *See* The Christian College: A History of Protestant Higher Education in America 40 (Baker Academic 2nd ed. 2006) (describing the religious affiliations of the initial higher educational institutions in this country, including Harvard, Yale and Princeton). *See generally,* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L.G.

43 (1997) (discussing the history of Protestant values in public education).

21 Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?* 21 Cardozo L. Rev. 1243, 1264 (2000).

22 *Id*. at 1264.

23 Colo. Christian Univ. v Baker, 2007 U.S. Dist. LEXIS 36531 (D. Colo. May 18, 2007).

24 *Id*. at *4, *51.

25 *Id*. at *53.

26 The district court quotes the relevant portions as follows:

Neither the general assembly, nor [other governmental bodies] shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any... college [or] university... controlled by any church or sectarian denomination whatsoever.

Id. at *30.

27 648 P.2d 1072 (Colo. 1982).

28 *Id*. at 1084.

29 *CCU*, 2007 U.S. Dist. LEXIS 36531 at *30 (citing Locke v. Davey, 540 U.S. 712 (2004)).

30 *Locke*, 540 U.S. at 723 n.5.

31 *CCU,* 2007 U.S. Dist. LEXIS 36531 at *53.

32 *Id*.

33 *Id*. at *54 (quoting *Americans United*, 648 P.2d at 1082).

34 *Id*. (footnote omitted).

35 *CCU*, 534 F.3d at 1258.

36 *Id*. at 1259.

37 *Id*.

38 *Id*. at 1267-68.

39 *Id*. at 1268.

40 *Id*. at 1268 (citing *Americans United*, 648 P.2d at 1083-1084).

41 *Americans United*, 648 P.2d at 1084.

42 CCU, 534 F.3d at 1268 n.10.

43 *Id*.

44 *Id*.

45 *Id*. at 1261.

46 *Id*. at 1262.

47 *Id*.

48 *Id*.

49 *Id*. at 1263 (emphasis added).

50 *Id*.

51 *Id*.

52 *Id*. at 1264.

53 *Id*. at 1265.

54 Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531 (1993) (citing Employment Div., Ore. Dept. of Human Res. v. Smith, 494 U.S. 872 (1990)).

55 *Id*. at 531–32.

56 540 U.S. 712 (2004).

57 *Id*. at 723 n5.

58 *CCU*, 534 F.3d at 1254-55.

59 *Id*. at 1256.

60 *Id*. at 1255, 1257 n.4.

61 533 U.S. 98, 108 (2001) (internal quotation omitted).

62 *Id*. at 103.

63 *Id*. at 109.

64 *Id*. at 111.

65 *Id*.

66 515 U.S. 819 (1995).

67 *Id*. at 831.

68 CCU, 2007 U.S. Dist. LEXIS 36531 at *26.

69 *Good News Club*, 533 U.S. at 111.

70 See, e.g., Lark, Religious Expression, at 330-335, 338-342; *Hartmann v. Stone,* 68 F.3d 973 (6th Cir. 1995).

71 Agostini v. Felton, 521 U.S. 203, 234 (1997).

72 Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Witters v. Wash. Dept. of Servs., 474 U.S. 481 (1986).

73 Mitchell v. Helms, 530 U.S. 793, 809 (2000) (plurality).

74 *Id*.; *see also id.* at 838 (O'Connor, J., concurring) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges).

75 *Id*. at 809-810.

76 *Id*. at 820 (plurality).

77 529 U.S. 217, 233 (2000).

78 *Id.*

79 *Id*. (citing *Rosenberger*, 515 U.S. at 841). *See also Agostini*, 521 U.S. at 230 ("the criteria by which an aid program identifies its beneficiaries [is relevant to assessing] whether any use of that aid to indoctrinate religion could be attributed to the State"). For further discussion of the attribution principle, see Lark, Religious Expression, at 350-352.

80 *Id.*

81 Lupu and Tuttle, Faith-Based Initiative, at 64-65.

82 *Id*.

83 *Supra*, notes 78-80. Further, a predictability standard would seem to extend to indirect aid (e.g., voucher) programs, since in such programs the recipient's use of the aid for religious activity may be just as foreseeable.

84 Lupu and Tuttle, Faith-Based Initiative, at 74.

85 Mitchell, 530 U.S. at 840-42 (O'Connor, J., concurring).

86 *Id*. at 849.

87 487 U.S. 589, 621 (1988). For a discussion of other cases, see Lark, Religious Expression, at 344-50.

88 *Id*. at 621.

89 *Id*. at 614.

90 *Id*. at 621.

91 *CCU*, 534 F.3d at 1262 (citing Rosenberger, 515 U.S. at 867, 876, 877 (Souter, J., dissenting)).

92 434 U.S. 125 (1977).

93 *Id*. at 132.

94 *Id*. at 132-33 (emphasis added).

95 *Id*. at 133.

96 Cf. *Bowen*, 487 U.S. at 621, with *Cathedral Academy*, 434 U.S. at 132-33.

97 *CCU*, 534 F.3d at 1265.

98 Lupu and Tuttle, Faith-Based Initiative, at 87-88.

99 *Id*.

100 It also imposes a chilling effect on the program participants who risk losing funding if they cross the line. This effect would be increased if they

were required to certify that their activities did not constitute religious indoctrination. Further, such certification would not solve the constitutional issue since government officials would still be required to monitor such compliance with such certification.

101 Call to Renewal address, available at http://www.barackobama.com/20006/06/28/call_to_renewal_keynote_address.php.

102 Partnering with Communities of Faith, *supra*, note 1.

103 C.S. Lewis, The Abolition of Man 35 (Macmillan Publg. Co. 1947).

Telecommunications & Electronic Media

The FCC's Stalled Attempt to Breathe Life into Commercial Leased Access of Cable Television

*By Henry Weissmann & Eric Tuttle**

Back in the 1980s and 1990s, when the only way to get television programming was through cable or over-the-air broadcast, Congress decided that the cable industry had too much market power. In response, Congress enacted several restrictions on cable operators' ability to decide what programs to carry, including: (1) "must-carry" rules, requiring cable operators to dedicate some channels to carrying local broadcast stations, (2) "PEG" rules, requiring cable operators to dedicate other channels to public, educational, and governmental programming, and (3) "leased access" rules, requiring cable operators to dedicate yet other channels for unaffiliated commercial programmers who were unable to convince operators to carry their programs voluntarily.

These restrictions, and the FCC's implementation of them, were problematic from the start. Most obviously, the whole purpose of this regime is to deprive cable operators of the right to exercise editorial control—a right that lies at the core of the First Amendment. Nevertheless, in the mid-1990s, the Supreme Court rejected First Amendment challenges to the must-carry rules by a slim 5-4 vote.[1]

These restrictions have not gotten better with age. The premise of this regulatory regime—that there are insufficient outlets for independent voices—has come under increasing attack. For example, in many areas, consumers can now obtain programming over rival cable systems built by telephone companies and from direct broadcast satellite systems. In this context, it should hardly come as a surprise that leased access is not being used much. If a programmer has a good product, there are plenty of ways of getting it to the public.

What should come as a surprise is the FCC's response. Rather than view the absence of demand for leased access as a sign that the regulation is unnecessary, the FCC regarded it as a sign of market failure requiring further regulation. In February 2008, the FCC adopted rules that slashed the regulated price of leased access, even to the point of making it free in some instances. The FCC applied these rules even to areas in which cable operators face competition from wireline entrants; indeed, the FCC even applied the rules to wireline entrants themselves. The Sixth Circuit quickly stayed the FCC's rules, and the Office of Management and Budget (OMB) disapproved them as well.

This article describes the background of the leased access regime, the FCC's rules, and the pending legal challenges.

I. Origins and Development of the Leased Access Statute

Congress created the leased access scheme in the Cable Communications Policy Act of 1984 (the "1984 Act").[2] The 1984 Act required cable operators to set aside 10–15% of their channels for lease to programmers unaffiliated with the operator.[3] Operators were free to set the rates, terms, and conditions for leased access consistent with the purposes of the statute;[4] programmers could challenge these rates and terms as unreasonable by seeking relief in court or from the FCC, but reasonableness would be presumed.[5] Cable operators were denied any editorial control over leased access programming, but were permitted to use the designated channels for programming of their choice if they were not being used for leased access.[6]

In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Act"), Congress amended the leased access provisions of the 1984 Act by giving the FCC authority to regulate the maximum price and other terms and conditions of leased access channel use—subject to a continuing requirement that leased access use not adversely affect a cable system's financial condition, operation, or development.[7]

The legislative history of the 1984 and 1992 Acts reveals two rationales for requiring cable operators to provide access channels. The first, particularly evident in the 1984 Act, is a hostility to cable operator editorial discretion—a form of speech practiced by cable operators in selecting the programming they wish to carry. For example, the reporting House Committee for the 1984 Act explicitly stated that its "overriding goal in adopting [the leased access provisions was] divorcing cable operator editorial control over a limited number of channels," and expressed a desire to ensure carriage of "programming which represents a social or political viewpoint that a cable operator does not wish to disseminate."[8]

The second rationale, particularly evident in the 1992 Act, was a desire to remedy what Congress regarded as anticompetitive trends in the cable industry due to excessive market power. The reporting Senate Committee for the 1992 Act found that the vast majority of communities at the time had only one cable system, and that cable operators were using their local monopoly status, vertical integration with cable programmers, and "bottleneck" control of programming to the detriment of independent programmers; in this environment, market forces, absent government regulation, would be "unable to cure cable's bottleneck problems."[9] Leased access was seen as an "important safety valve" for these conditions.[10]

II. The FCC's Initial Implementation of Leased Access

Through a series of rulemakings from 1993 to 1997, the FCC implemented its authority to set caps on leased access rates and to regulate other terms and conditions.[11] As to rates,[12] the FCC settled on an approach based on the "implicit fee" that cable programmers effectively pay to operators, as middlemen, for carriage. The implicit fee for a given channel is supposed to represent the cable operator's markup for that channel—the difference between what subscribers pay the operator to receive the channel and what the operator pays the programmer to carry it.[13]

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In adopting this approach, the FCC determined that the leased access statute requires it to balance the interests of leased access programmers and cable operators. Diversity through leased access is to be encouraged, but only in ways that fully compensate cable operators, because Congress did not intend cable operators to subsidize leased access programming.[14] Accordingly, the FCC's obligation was to set a reasonable rate cap, regardless of whether that cap would in fact increase use of leased access.[15] The FCC also found that leased access programming results in significant costs and decreased advertising revenue for operators, and causes subscribers to devalue entire packages (known as "tiers") of channels because leased access programming is generally less desirable to subscribers and disrupts channel lineups.[16]

The FCC set the maximum leased access rate at the operator's *average* implicit fee.[17] Some leased access programmers argued that the FCC should set the maximum rate at the *lowest* implicit fee, on the theory that operators forced to carry leased access programming will necessarily displace the existing channels with the lowest implicit fees. The FCC did not adopt this approach, which it viewed as unrealistic. First, the value placed on a particular channel by subscribers is unknown because subscribers purchase most channels in tiers, so the implicit fee for a given channel can only be estimated. Second, the implicit fee for a channel does not in fact correspond to the overall value of the channel to the operator, and thus to the likelihood that the operator would bump that channel. For example, channels that are very popular with subscribers are likely to have low implicit fees because they tend to cost the operator the most to carry.[18]

The FCC's rules were upheld by the D.C. Circuit in 1998.[19] The court affirmed the FCC's reading of the statute to require full compensation to operators for leased access use. It noted in particular that the legislative history behind the 1992 Act showed that "Congress never intended to ensure financial success for leased access programmers," and that the Senate Committee had "frankly acknowledged that leased access might not be economically viable."[20] The court also upheld the FCC's specific rate methodology as reasonable.[21]

III. The FCC's Recent Attempt to Stimulate Use of Leased Access

Leased access remained relatively little-used even following the 1992 amendments and the FCC's implementing regulations. A 2006 survey by the FCC revealed that the average cable system carried 0.7 leased access channels.[22] Users of leased access tended to fall into two categories: part-time programmers capable of generating revenue directly from viewers (such as home shopping programs, infomercials, adult content, and certain kinds of religious programming), and low-power broadcast stations that do not qualify for the "must-carry" rules.[23]

On February 1, 2008, several months after seeking comments on "the current status of leased access programming,"[24] the FCC announced new regulations for leased access that reversed course from the approach it had taken in 1997. Rather than viewing its task under the statute as setting a fair rate regardless of the effect on leased access use, this time the FCC's goal was to address the "underutilization of leased access" and to "make the leased access channels a more viable outlet" by "mak[ing] adjustments to the rate calculations that should lower prices."[25] Further, while the FCC purported to still view the statute as requiring a balancing of interests between leased access programmers and cable operators, it concluded that leased access rates could result in net lost revenue for cable operators, so long as they did not "materially affect the financial health of a cable system"; the FCC "should set the leased access rates as low as possible" consistent with that requirement.[26]

In an about-face from the 1997 regulations, the FCC adopted a "marginal implicit fee" approach,[27] concluding that the average implicit fee rate methodology overcompensates cable operators because it represents more than the value of the channel that actually gets displaced to make room for leased access.[28] The FCC "assume[d]" that the channel to get bumped would be the one with the lowest implicit fee, or at least decided to set its rules to "encourage such a result."[29] The FCC made no attempt to explain away its prior conclusion that a channel's implicit fee is an abstract estimate that bears no relationship to the actual value of a channel to the cable operator.

Under the FCC's new approach, the maximum rate for leased access on a particular tier of channels is determined by the lowest implicit fees calculated for channels voluntarily carried by the operator on that tier.[30] Where cable operators purchase channels from programmers in bundles, the FCC mandated without explanation that all of the fees paid for the bundle be allocated to the top-rated channel in the bundle, with all other channels in the bundle receiving an implicit fee of zero.[31] Out of a concern that cable operators might somehow game their programming tiers to make leased access unaffordable, the FCC further imposed a "maximum allowable rate" of ten cents per subscriber per month, which applies whenever any particular cable system's marginal implicit fee would otherwise exceed that amount.[32] The FCC authorized cable operators to petition the FCC to exceed this maximum allowable rate on a showing of equity, public interest, and facts justifying the system's particular rate, but the FCC would presume that its formula provides the best rate.[33]

Beyond the changes to the rate formula, the FCC imposed a number of other terms and conditions designed to encourage use of leased access. For example, cable operators would be required to designate a leased access liaison and make available within three days of any request a host of detailed information concerning the system's technical information and costs, as well as a sample contract and documentation justifying all policies, terms, and fees.[34] The FCC also amended its dispute resolution procedures to expand discovery of information relating to the operator's calculation of leased access rates.[35] Finally, the FCC required cable operators to file annual reports with the FCC concerning leased access rates, usage, and complaints.[36] As a number of these and other regulations required approval from the OMB under the Paperwork Reduction Act,[37] the FCC delayed the effective date of many of its new rules—including the rate rules—pending OMB approval.[38]

Three of the FCC's five Commissioners observed in their separate statements that there had been inadequate public comment and review on the new rate methodology. This was grounds for two of those Commissioners to dissent

from the Order,[39] but Commissioner Adelstein—while frankly acknowledging that "the methodology was invented by staff out of whole cloth without sufficient public input, independent review or any transparency"—nevertheless supported the Order because interested parties could seek reconsideration.[40]

IV. The Judicial Challenge and Aftermath

The National Cable & Telecommunications Association (NCTA), a national trade association of cable operators, and several individual cable operators and leased access programmers filed petitions seeking judicial review of the FCC's Order that were consolidated into a single proceeding before the Sixth Circuit. The NCTA also sought an emergency stay of the Order from the Sixth Circuit.

The NCTA argued that the FCC's Order was unlikely to withstand judicial scrutiny because it failed to comply with the leased access statute or the Administrative Procedures Act (APA). In the NCTA's view, the Order ignored the statutory requirement that leased access rates not "adversely affect" a cable system's financial condition or development, which means fully compensating operators for the cost of leased access, even if that results in limited leased access use. Evidence submitted by the NCTA indicated that the FCC's new rules would result in a leased access rate of *zero* or near-zero in many cases (thanks largely to the rule allocating all value in a bundle of channels to the top-rated channel), which falls far short of full compensation. Moreover, the FCC's failure to explain its departure from its previous views of the statute and of the usefulness of a channel's implicit fee as a measure of its value to the operator, and its failure to develop record evidence in support of its assumptions, violated the APA. Finally, the NCTA attacked the FCC's failure to seek proper notice and comment on its new rules as required by the APA.[41]

The NCTA further argued that it would be irreparably harmed by the flood of leased access demand that was likely to follow the FCC's lowering of leased access rates to zero. This would impose serious disruption on cable operators' channel lineups, angering and confusing subscribers who would turn to services not subject to leased access rules. Moreover, the FCC's burdensome new disclosure requirements would impose unrecoupable implementation costs and expose sensitive competitive data to public dissemination.[42]

The FCC argued that the NCTA's claims were barred for failure to exhaust them before the agency. In the FCC's view, comments during the rulemaking proceeding that generally opposed decreases in leased access rates were insufficient to exhaust the NCTA's specific challenges to the adopted rate formula; as the NCTA could not have known the particular methodology until after the Order was released, the NCTA had to first raise its claims with the FCC by way of a petition for reconsideration.[43] The FCC further insisted that "basic economic principles" supported its assumption that leased access programming would displace the lowest-performing channels, and that the marginal implicit fee would offset any lost revenue from this displacement; it was the NCTA's obligation to bring any contrary evidence to the agency's attention during the rulemaking procedure. Moreover, the "safety valve" procedure permitting operators to exceed maximum allowable rates could correct for any problems in the FCC's assumptions.[44] The FCC dismissed the NCTA's claims of irreparable injury as speculative.[45]

Verizon, represented by the authors (among others), filed a brief in support of the NCTA's stay request focusing mostly on the First Amendment problems with the FCC's Order.[46] As Verizon argued, these problems independently justified a stay because First Amendment harms are by nature irreparable.[47]

The Supreme Court has held that by exercising editorial discretion, cable operators engage in speech protected by the First Amendment. [48] The FCC's Order burdens these First Amendment rights, Verizon argued, by forcing cable operators to carry more leased access programming and reducing cable operators' editorial discretion to select the programs that they wish to transmit. Although the D.C. Circuit had previously rejected a facial challenge to the leased access statute, it did so on the assumption that the statute would not in fact burden operator speech because "programmers have not and will not lease time on the channels set aside for them."[49] The FCC's Order, on the other hand, is expressly designed to stimulate leased access use.

Verizon argued that, even assuming that the FCC's Order furthers important governmental interests in general, there is no basis for applying it in geographic areas where there is effective cable competition, or to new entrants attempting to challenge a cable incumbent. Incumbents' bottleneck control over programming has always supplied the essential justification for cable regulations in the face of First Amendment scrutiny,[50] and such control cannot exist in the hands of a new entrant or where there is effective competition.[51] Indeed, the D.C. Circuit previously struck down the FCC's similar refusal to exempt from another speech-burdening regulation those cable operators subject to competition; as here, the FCC could not show that competitive operators would produce a mix of programming "inferior" to that produced by the regulation.[52]

The FCC challenged Verizon's argument on the theory that Verizon had failed to exhaust its claims with the agency by filing a petition for reconsideration. The FCC further argued that the leased access statute draws no distinction between competitive and monopolistic cable operators, and that the FCC is therefore under no obligation (and perhaps lacks authority) to create an exception to its rate regulations for competitive operators or new entrants.[53]

On May 22, 2008, the Sixth Circuit granted the FTCA's request for a stay.[54] The court concluded that the "NCTA has raised some substantial appellate issues."[55] It also cast doubt on the FCC's exhaustion arguments, noting that a petition for reconsideration is a prerequisite for review only where the appellant relies on legal or factual questions upon which the FCC had "no opportunity to pass," and that an agency necessarily has an opportunity to pass on the validity of the rationale it actually put forth and the adequacy of its justifications.[56] The court further found that the NCTA "demonstrated some likelihood of irreparable harm" flowing the large increase in requests for leased access expected to result from the rate reduction.[57]

Before merits briefing could begin on petitioners' challenges to the Order, the OMB issued a decision disapproving of the Order's information collection requirements. Among other things, the OMB concluded that the FCC's rate regulation would result in increased requests for leased access

and corresponding burdens on cable operators, and that the FCC failed to justify these burdens.[58] As a result, according to the terms of the FCC's Order[59] and the Paperwork Reduction Act,[60] most of the new leased access rules (including the rate formula) could not go into effect without further action by the OMB or the FCC. The Sixth Circuit accordingly agreed to hold the challenges to the Order in abeyance.[61]

One of the petitioners who opposed the NCTA's stay motion subsequently filed a request with the FCC to override the OMB action and to modify the new rate methodology to allow cable operators reasonably to allocate the fees paid for a bundle of channels rather than allocating all value to the highest-rated channel.[62] The request noted the cable operators' argument that, as a result of the bundling rule, many cable systems would have a maximum leased access rate of zero, and urged the FCC to "address this potential flaw in its new rate calculation."[63] On September 10, 2008, the FCC sought public comment on this request.[64] A number of comments have been submitted, but as of the date of writing the FCC has taken no further action.

Conclusion

With new entrants in the video services industry, not to mention higher capacity cable systems and new forms of media like the Internet, programmers have a variety of outlets to distribute content that viewers want to see. In its zeal to "prop[] up a regulatory regime that is past its prime," as dissenting Commissioner McDowell charitably observed,[65] the FCC chose to simply ignore this state of affairs and even its own prior conclusions about the economics of leased access. As the Sixth Circuit and the OMB have now suggested, agencies will not always get away with doing that, particularly when important speech rights are at stake.

Endnotes

1 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622 (1994); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180 (1997).

2 Cable Communications Policy Act of 1984 ("1984 Act"), Pub. L. No. 98-549, 98 Stat. 2779 (1984) (codified as amended at 47 U.S.C. §§ 521-611 (2006)); *see also* H.R. Rep. No. 98-934, at 30-31 (1984), as reprinted in 1984 U.S.C.C.A.N. 4655.

3 1984 Act, *supra,* note 2, sec. 2, § 612 (codified as amended at 47 U.S.C. § 532(b)(1) (2006)).

4 *Id.* (codified as amended at 47 U.S.C. § 532(c)(1) (2006)).

5 *Id.* (codified as amended at 47 U.S.C. § 532(d),(e),(f) (2006)).

6 *Id.* (codified as amended at 47 U.S.C. § 532(b)(4),(c)(2) (2006)).

7 *See* Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"), Pub. L. No. 102-385, sec. 9(b), 106 Stat. 1460, 1484 (1992) (amending 47 U.S.C. §§ 532 (c)(1), (c)(4)).

8 H.R. Rep. No. 98-934, at 48, 50; *see also id.* at 30.

9 S. Rep. No. 102-92, at 23-26, 50-53 (1991), as reprinted in 1992 U.S.C.C.A.N. 1133. *See also id.* at 18 (stating a "policy to rely, to the maximum feasible extent, upon greater competition to cure market power problems," and noting that while some governmental oversight was necessary "where no competition exists," such oversight "should end as soon as cable is subject to effective competition"); 1992 Act, *supra,* note 7, sec. 2(b)(2) (codified at 47 U.S.C. § 521 hist. n. 2(b)(2) (2006)) (stating "the policy of the Congress in this Act to . . . rely on the marketplace, to the maximum extent feasible, to achieve [the] availability" of a diversity of information sources).

10 S. Rep. No. 102-92, at 32. As the reporting Senate Committee summarized: "The legislation reported by the Committee is largely designed to remedy market power in the cable industry. In this context, the leased access provision takes on added importance—in addition to First Amendment concerns. It can act as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access [or] be given access on unfavorable terms." *Id.* at 30.

11 *See* Value Vision Int'l, Inc. v. FCC, 149 F.3d 1204, 1205-08 (D.C. Cir. 1998) (discussing and citing FCC orders and proposed rulemaking).

12 The FCC also set various terms and conditions for leased access, including a leased access programmer's right to: (1) demand carriage on a tier with at least 50% subscriber penetration; (2) lease time in half-hour increments at pro-rated rates for part-time use; and (3) resell their leased access slots. *Id.* at 1208.

13 *Id.* at 1207.

14 *Id.* at 1209.

15 *Id.* at 1210.

16 *Id.* at 1208, 1210-11.

17 *Id.* at 1208, 1211. *See also id.* at 1207 n.3, 1208 (describing FCC's methodology in detail).

18 *Id.* at 1211.

19 *Id.* at 1209-13.

20 *Id.* at 1209.

21 *Id.* at 1210-12.

22 Report on Cable Industry Prices, Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992: Statistical Report on Average Rates for Basic Service Cable Programming Service, and Equipment, MM Docket No. 92-266, 21 F.C.C. R. 15087, 15089-90 at ¶ 9, 2006 WL 3797869 (F.C.C. Dec. 27, 2006).

23 Report and Order on Leased Access ("2008 Order"), MB Docket No. 07-42, 23 F.C.C.R. 2909, 2992, 2008 WL 294648 (F.C.C. Feb. 1, 2008) (Dissenting Statement of Commissioner Robert M. McDowell).

24 In re Leased Commercial Access, Notice of Proposed Rule Making, MB Docket No. 07-42, 22 F.C.C.R. 11222, 11224-25, 2007 WL 1744321 (F.C.C. June 15, 2007).

25 2008 Order, *supra*, note 23, at ¶¶ 39, 41; *see also id*. at 2987 (Statement of Chairman Kevin J. Martin) ("Our order, therefore, is designed to increase the use of leased access channels.").

26 *Id.* ¶¶ 38 & n.122, 42.

27 The FCC decided that it would not apply its new rate methodology to home shopping programs or infomercials, for now, out of concern that such programmers would simply migrate to leased access from the voluntary commercial arrangements they had with cable operators. *Id.* ¶¶ 37, 74-75; *see also id.* at 2992 (Dissenting Statement of Commissioner Robert M. McDowell) (questioning the constitutionality of this content-based distinction).

28 *Id.* ¶¶ 41-42.

29 *Id.* ¶¶ 38, 42.

30 *Id.* ¶¶ 43-45.

31 *Id.* ¶ 43 n.137.

32 *Id.* ¶¶ 47-48. The FCC arrived at this number by computing the marginal implicit fee for a hypothetical cable network based on average national data and a host of assumptions, and similar alternative approaches, and noting that in none of its hypothetical calculations did the per-subscriber fee exceed 10 cents per month. *Id.* at 2957 (Appendix D)..

33 *Id.* ¶ 49.

34 *Id.* ¶¶ 12-32.

35 *Id.* ¶¶ 51-65.

36 *Id.* ¶¶ 66-69.

37 Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995) (codified at as amended at 44 U.S.C. §§ 3501-3520 (2006)).

38 2008 Order, *supra*, note 23, at ¶¶ 50, 84, 86, 89.

39 *Id*. at 2991 (Statement of Commissioner Deborah Taylor Tate); *id.* at 2992 (Dissenting Statement of Commissioner Robert M. McDowell) ("[T]he Commission developed the current 'average implicit fee' methodology in 1997 after extensive review of the economic studies and policy discussions at that time. The record in this proceeding, and our consideration of it, do not come close to reaching that level of careful analysis. The least we could have done was to seek comment on any changes to the current rate formula.").

40 *Id.* at 2989 (Statement of Commissioner Jonathan S. Adelstein).

41 Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (April 22, 2008); *see also* Petitioner's Reply to Oppositions to Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 8, 2008); Brief of Intervenors TV One Group in Support of Emergency Motion for Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 5, 2008).

42 Emergency Motion for a Stay, *supra.*

43 As the NCTA argued in reply, such a rule would create a catch-22 and permit agencies to insulate their regulations from judicial review for years after they take effect. If the agency is carefully vague in its request for comment, it will be able to argue that it gave sufficient notice of the rule under the APA, but that any specific challenges to the rule are unexhausted and must be raised with the agency by a petition for reconsideration. A petition for reconsideration deprives courts of jurisdiction to review the order until the petition is resolved, *see, e.g.*, Tennessee Gas Pipeline Co. v. FERC, 9 F.3d 980 (D.C. Cir. 1993), and in the meantime the agency is under no obligation to stay its order or to deal with the petition in an expeditious manner. *See* Petitioner's Reply to Oppositions to Emergency Motion for a Stay, *supra*, note 41.

44 Opposition of FCC to Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 2, 2008); *see also* United Church of Christ's Opposition to Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (April 29, 2008).

45 Opposition of FCC to Emergency Motion for a Stay, *supra*.

46 *See* Response Of Verizon in Support of the NCTA's Emergency Motion For A Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 5, 2008)

47 *See, e.g.*, United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth., 163 F.3d 341, 363 (6th Cir. 1998).

48 *See* Turner Broad. Sys., Inc. v. FCC (Turner I), 512 U.S. 622, 638 (1994) ("[C]able operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment. Through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, cable... operators seek to communicate messages on a wide variety of topics and in a wide variety of formats." (internal citations and quotation marks omitted)); *see also* Denver Area Educ. Telecomms. Consortium, Inc. v. FCC (Denver), 518 U.S. 727, 737-38 (1996) (plurality opinion) (recognizing that "this Court has held [that] the editorial function itself is an aspect of 'speech,'" protecting a cable operator's "freedom to speak as an editor"); *id.* at 822 (Thomas, J., concurring in part and dissenting in part) (noting that cable "operators' editorial discretion" is something "all recognize as fundamentally protected").

49 Time Warner Entm't Co., L.P. v. FCC (Time Warner I), 93 F.3d 957, 971 (D.C. Cir. 1996).

50 *See, e.g.*, Turner I, 512 U.S. at 633-34, 656, 661 (noting Congress's observations of anti-competitive trends in the cable industry, such that a cable operator enjoyed "bottleneck monopoly power" over television programming and could "silence the voice of competing speakers with a mere flick of the switch"); Denver, 518 U.S. at 738 (plurality opinion) (observing that "communities typically have only one cable system," and that "concern about system operators' exercise of this considerable power originally led government—local and federal—to insist that operators provide leased and public access channels free of operator editorial control"); Turner Broad. Sys., Inc. v. FCC (Turner II), 520 U.S. 180, 208-13 (1997) (noting evidence of cable operators' incentive and ability to favor affiliated cable programming networks over independent programming); *id.* at 197-98, 206 (plurality opinion) (noting that "cable operators possess a local monopoly over cable households," and that increasing horizontal and vertical concentration exacerbated these problems); *id.* at 227-28 (Breyer, J., concurring) (agreeing that a cable system "at present (perhaps less in the future) typically faces little competition, [and] that it therefore constitutes a kind of bottleneck that controls the range of viewer choice"); Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 577 (1995) (noting that cable is "a franchised channel giving monopolistic opportunity to shut out some speakers"; "[t]his power gives rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed"); Time Warner Entm't Co., L.P. v. United States, 211 F.3d 1313, 1317, 1319-20, 1321-22 (D.C. Cir. 2000) (relying on cable operators' "bottleneck monopoly power" in rejecting a facial attack on statutory restrictions on cable operators' speech); *see also supra*, notes 9-10.

51 Competitive cable operators and new entrants lack "bottleneck monopoly power" because they must attract and hold subscribers who are free to switch to a competing service with more desirable programming. These providers have every incentive to carry programming from diverse sources in order to differentiate their service and to appeal to a broad range of subscribers. As the D.C. Circuit has said, competition "spurs a firm's search for the best price-quality trade-off" in acquiring programming and limits a cable operator's "*ability* to indulge in favoritism" at the expense of programmers that its subscribers prefer. Time Warner Entm't Co., L.P. v. FCC (Time Warner II), 240 F.3d 1126, 1138-39 (D.C. Cir. 2001). The FCC itself has recognized, in an analogous context, that "[w]here systems face effective competition, their incentive to favor an affiliated programmer will be replaced by the incentive to provide programming that is most valued by subscribers," and that "effective competition will preclude cable operators from exercising the market power which originally justified channel occupancy limits." *Id.* at 1138 (quoting Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C.R. 6828, 6862 at ¶ 231, 1993 WL 479493 (1993)).

52 Time Warner II, 240 F.3d at 1137-39 (considering challenge to FCC regulation requiring 60% of a cable operator's channel capacity to be set aside for non-affiliated programmers).

53 *See* Reply of FCC to Reponses of Verizon and TV One Group in Support of Emergency Motion for a Stay, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 14, 2008).

54 Order, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (May 22, 2008).

55 *Id.* at 4.

56 *Id.* at 3-4 (quoting and citing 47 U.S.C. § 405(a) (2006)); Qwest Corp. v. FCC, 482 F.3d 471, 474-77 (D.C. Cir. 2007); Cellnet Commc'n, Inc. v. FCC, 149 F.3d 429, 442 (6th Cir. 1998); Comsat Corp. v. FCC, 250 F.3d 931, 937 (5th Cir. 2001); MCI Telecomm. Corp. v. FCC, 10 F.3d 842, 845 (D.C. Cir. 1993); AT&T Corp. v. FCC, 394 F.3d 933, 938 n.1 (D.C. Cir. 2005)).

57 *Id.* at 4-5.

58 Notice of Office of Management and Budget Action, OMB Control No. 3060-0568 (July 7, 2008).

59 2008 Order, *supra*, note 23, at ¶¶ 50, 84, 86, 89.

60 *See* Paperwork Reduction Act of 1995, *supra*, note 37, 44 U.S.C. § 3507(f) (2006); 5 C.F.R. §§ 1320.5(f), 1320.15 (2008).

61 *See* Order, United Church of Christ Office of Communications, Inc. v. FCC, No. 08-3245 (and consolidated cases) (July 25, 2008).

62 Request of United Church of Christ to Override the Action of the OMB and to Modify the Commission's Report and Order, MB Docket No. 07-42 (Aug. 26, 2008), available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6520050519.

63 *Id.* at 6.

64 Public Notice, Media Bureau Seeks Comment on Request of United Church of Christ, Office of Communication, Inc., Media Access Project Regarding Leased Access Order, MB Docket No. 07-42 (rel. Sept. 10,

2008), available at http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-08-2080A1.pdf.

65 2008 Order, *supra*, note 23, at 2992 (Dissenting Statement of Robert M. McDowell).

Broadcast "Fairness" in the Twenty-First Century

*By Robert Corn-Revere**

The broadcast Fairness Doctrine, which formally existed from 1949 to 1987, required broadcast licensees to air "controversial issues of public importance" and to do so in a "balanced" way. The FCC eliminated most aspects of the policy in 1987 during the heyday of Reagan administration deregulation. At least in spirit, the Fairness Doctrine has remained an article of faith among those who believe that freedom of expression is far too precious a commodity to be left in the clutches of private hands. "Fairness" enthusiasts have tended the glowing embers of a philosophy of the First Amendment and broadcast regulation that once was at full flame in the 1969 Supreme Court decision *Red Lion Broadcasting Co. v. FCC*.[1] They have nurtured the fervent hope that, one day, a more regulatory-minded Congress and FCC would reaffirm the government's authority to oversee news and public affairs programming. Some believe that with the Obama administration their day has come.

During the presidential campaign, and particularly since the election, conservative talk radio and the blogosphere has been abuzz with rumors that the Democratic agenda would include reviving the Fairness Doctrine. These concerns were echoed by established pundits: George Will warned that an effort to restore the doctrine would be a product of "reactionary liberalism,"[2] while former FCC General Counsel Bruce Fein has written that "[t]he Democratic Party intends to brandish the Fairness Doctrine to marginalize the influence of conservative talk show hosts by making expression of their controversial views cost-prohibitive."[3] A *Wall Street Journal* editorial similarly predicted that the Fairness Doctrine was "likely to be re-imposed" under a Democratically-controlled Congress as part of an effort "to shut down talk radio and other voices of political opposition."[4]

Such warnings have triggered an intense debate that is not so much about the merits of the Fairness Doctrine as it is about whether the threat of the doctrine's return is real. Craig Aaron, communications director of the advocacy group Free Press has described concern over the Fairness Doctrine being revived as being "completely imaginary," comparing the danger to that presented by Bigfoot, killer bees, and fluoride in the drinking water.[5] Likewise, Steve Benen wrote in the *Washington Monthly's* "Political Animal" column that such concerns are "ridiculous," and "*no one is seriously trying to reinstate the Fairness Doctrine*."[6] A similar claim was articulated by Marin Cogan of *The New Republic*, who wrote that the Fairness Doctrine "has almost no support from media-reform advocates."[7]

It is true that evidence of efforts to restore the Fairness Doctrine as it existed before 1987 is quite thin. No bills have yet been introduced to bring back the policy, and most of the concerns appear to have been triggered by comments attributed to House Speaker Nancy Pelosi, Senator Jeff Bingaman, and others.[8] Also, much has been made of the fact that Senator Charles Schumer tweaked Fox News during an interview when he quipped, "I think we should all be fair and balanced, don't you?"[9] Despite such tidbits suggesting support for the doctrine, an aide to Barack Obama wrote to the trade magazine *Broadcasting & Cable* last summer to say that Obama does not support reviving the Fairness Doctrine.[10] This, however, was not enough to dissuade Representatives Mike Pence and Greg Walden, along with 148 co-sponsors, from introducing a bill to block the return of the Fairness Doctrine.[11] A corresponding bill in the Senate had 28 sponsors.[12]

The identical language of the two bills is simple and direct. It would prohibit the FCC from re-imposing any "requirement that has the purpose or effect of reinstating or repromulgating (in whole or in part) the requirement that broadcasters present opposing viewpoints on controversial issues of public importance, commonly referred to as the 'Fairness Doctrine', as repealed in *General Fairness Doctrine Obligations of Broadcast Licensees*."[13] The bills' introduction prompted a number of Democratic legislators to deny that there was any move afoot to reinstate the doctrine.[14]

But focusing on the specific set of rules and policies once known as the Fairness Doctrine misses the essential point. Framed in this narrow way, the current debate is a false one, and it would be a mistake to assume that the dispute represents a core difference of principle between liberals and conservatives. To begin with, the debate is not really about the Fairness Doctrine *per se*, since it was entirely ineffectual, and many (if not most) serious observers doubt that a re-codified rule that imposed the same or similar requirements would survive a judicial challenge. Moreover, there is no dispute about the fact that prominent advocates among both liberals and conservatives, Republicans and Democrats, are proposing various regulations that would perpetuate the philosophy underlying *Red Lion Broadcasting Co.*, as well as that set forth in *FCC v. Pacifica Foundation, Inc.*,[15] that radio and television content, and perhaps other media, must be subject to government control.

A Vast Bipartisan Conspiracy?

Given the recent vocal opposition to the Fairness Doctrine in the interest of preserving conservative talk radio, it is easy to forget that many prominent conservatives championed the doctrine before its demise. Phyllis Schlafly was a vocal proponent of the Fairness Doctrine because of what she described as "the outrageous and blatant anti-Reagan bias of the TV network newscasts," and she testified at the FCC in the 1980s in support of the policy "to serve as a small restraint on the monopoly power wielded by Big TV Media."[16] Senator Jesse Helms was another long-time advocate of the Fairness Doctrine, and conservative groups Accuracy in Media and the American Legal Foundation actively pursued fairness complaints at the FCC against network newscasts.[17] More recently, a Republican-

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controlled FCC under Kevin Martin has advocated far more extensive controls over broadcast and cable programming, including news and public affairs. These proposed regulations include requirements governing local programming, restrictions on the use of video news releases, and other new rules that would extend content controls beyond broadcasting. These initiatives have been embraced by liberal media activists, who have said they will seek to ensure that the FCC under the Democrats will adopt and enforce the proposals of the Martin Commission.

The common denominator of the liberal and conservative factions is the overriding belief that traditional First Amendment protections should not be applied to broadcasting or other electronic media. Professor Cass Sunstein, for example, has written in support of a host of regulations, including the Fairness Doctrine, not only for broadcasting but for newspapers as well.[18] In supporting such rules, he has acknowledged that, "it will be necessary to abandon or at least qualify the basic principles that have dominated judicial, academic, and popular thinking about speech in the last generation." His position is that press autonomy "may itself be an abridgement of the free speech right."[19] In this counterintuitive view, the First Amendment's command that "Congress shall make no law... abridging the freedom of speech, or of the press" should be read as a constitutional mandate for media regulation by the government.

Professor Angela Campbell, a frequent advocate of media regulation, similarly acknowledges that existing and proposed content controls on broadcasting are incompatible with traditional First Amendment principles. In a recent essay entitled "The Legacy of *Red Lion*," she writes that "[i]n both *Red Lion* and *Pacifica*, the Court upheld regulations that would have been found unconstitutional if applied to other media." She advocates a wide range of broadcast regulations based on a simple balancing of interests, and criticizes traditional First Amendment analysis because it "only balances the government interests served by the regulation against the free speech interests of the regulated party."[20] However, "program producers want to create and distribute programming, advertisers want to create and distribute advertisements, and many regular people want to express their views and share their ideas and creations." Traditional First Amendment analysis, she observes, "often fails to take into account all of the relevant interests."[21] Based on this balancing approach, Professor Campbell takes issue with a number of bedrock First Amendment principles, such as the command that "the Government may not 'reduc[e] the adult population... to... only what is fit for children.'"[22] She concludes that "we are not well-served by the mechanical application of the traditional [First Amendment] approach to broadcast media, *or to any media*." [23]

Professor Campbell put this sentiment in more concrete terms in an amicus brief filed in *FCC v. Fox Television Stations, Inc*. on behalf of a number of child advocacy organizations. The case involves the FCC's regulation of "fleeting expletives" as part of the FCC's broadcast indecency policy, and the amicus brief, filed "in support of neither party," urges the Court to preserve the government's authority to regulate broadcast content. "[W]hatever the outcome in this case, Campbell writes, it is of "great importance to *Amici*" that "the Court continues to recognize the constitutional legitimacy of the FCC's statutory public interest oversight of television broadcasters." The brief urges the Court not to use the *Fox* case as a vehicle to revisit the constitutional findings in *Red Lion*, which involved the Fairness Doctrine. [24]

Whether or not the agenda for the new administration includes any plans for restoring the Fairness Doctrine, there appears to be a clear interest among regulatory activists to perpetuate and expand the government's control over media content in ways that would have the same, or perhaps an even more significant impact on news and public affairs programming. Mark Cooper of the Consumer Federation of America has written that broadcasters "should continue to be subject to public interest obligations and oversight," and that "[a]t this moment, when we are implementing 'change we can believe in,' we must locate the debate over communications and media policy within the broader debate over failure of market fundamentalism."[25] He suggests that "[t]he most important thing we can do to reform the FCC is to force it to take seriously its obligation to protect and promote the public interest as defined in the Communications Act and restore the pragmatic, progressive principles of the New Deal." Among other things, Cooper advocates reinvigorating "the commitment to diversity and localism in the broadcast media."[26]

Other proponents of a more regulatory FCC similarly discount any intention of bringing back the Fairness Doctrine while at the same time advocating different means to achieve the same end. Thus, Professor Marvin Ammori, counsel to the advocacy group Free Press, describes the controversy about the Fairness Doctrine as "largely manufactured" by "right-wing radio hosts and bloggers" while at the same time argues that "Congress and the FCC should focus on more effective means of fostering local and national public information and diversity of viewpoints, primarily by fostering responsiveness to local tastes and diverse and antagonistic sources of information."[27]

What such regulations might entail was spelled out in a joint report of Free Press and the Center for American Progress entitled *The Structural Imbalance of Political Talk Radio*. It advocates imposing new national and local ownership caps on radio stations, reducing license terms from eight to three years, requiring licensees to use a standardized form "to provide information on how the station serves the public interest," and imposing a spectrum fee of between $100 and $250 million "[i]f commercial radio broadcasters are unwilling to abide by these regulatory standards."[28] In short, advocates of new regulations are shunning the Fairness Doctrine not because it is incompatible with the First Amendment, but because it does not go far enough. As Professor Ammori writes, lack of current support for the Fairness Doctrine is best explained by its ineffectiveness—it was "easy to avoid, difficult to enforce, and is at most a second-best solution."[29]

The Free Press/Center for American Progress report on talk radio similarly concludes that the Fairness Doctrine is an inadequate policy solution, but it maintains that "the Fairness Doctrine was never formally repealed."[30] It explains that "the public obligations inherent in the Fairness Doctrine are still in existence and operative," and its proposal for "structural" regulations are simply another way of implementing "fairness"

principles in order to address "the imbalance in talk radio programming." [31] A Heritage Foundation blog describes this strategy—denying that anyone wants to re-impose the Fairness Doctrine while simultaneously advocating even more intrusive regulations on broadcast speech—as a "Jedi mind trick." Paraphrasing Obi Wan in the first *Star Wars* movie, it is like saying "this is not the 'Fairness Doctrine' you're looking for." [32]

"Localism" is the New Fairness

Speaking of misdirection, those who express concern that an Obama-appointed FCC might adopt a "stealth" Fairness Doctrine in the guise of other rules ignore the recent past. The Bush Administration's FCC under Kevin Martin has already issued rulings that would extend government control over newscasts based on *Red Lion*, and it laid the groundwork for the supposedly "structural" controls advocated by Free Press. Not only would these initiatives impose unprecedented levels of FCC oversight with respect to news and public affairs programming, they would expand these regulations beyond broadcasting to include cable television and potentially other media. In that respect, part of the Bush legacy is a movement to perpetuate and extend the restrictive view of the First Amendment set forth in *Red Lion*.

This is evident in the list of accomplishments Chairman Martin issued to the press when he announced his resignation to make way for the new administration.[33] In a thirteen-page attachment listing the "principal achievements of the FCC under Chairman Kevin J. Martin," the press release states that under his tenure "the FCC made clear that it takes seriously the public interest obligations of broadcasters." Accomplishments highlighted in support of this claim include imposing merger conditions to enforce children's television rules, enforcing broadcast indecency rules, proposing that Congress adopt new regulations to restrict televised violence, and advocating a la carte requirements for the sale of video programming. Additionally, the release states that the Commission under Chairman Martin "completed a longstanding initiative to study localism in broadcasting and made proposals to ensure that local stations air programming responsive to the needs of their service communities." [34]

New Enhanced Disclosure Requirements and Proposed Localism Mandates

The FCC's "achievement" of a new rule mandating "enhanced disclosure" of broadcast programming, and a proposed regulation to enforce "localism" requirements would give the federal government far greater power over editorial autonomy that was ever imposed using the Fairness Doctrine. The FCC released the texts of two rulemaking orders in early 2008 with the purpose of codifying localism mandates.[35] The Report and Order on enhanced disclosure requires stations to file quarterly reports detailing their programming in granular detail. A standardized form requires stations to identify programming by specific program categories, provide explanations of its editorial choices, and to certify that the station has complied with a number of FCC programming rules.[36]

The degree of detail required is more substantial than that ever required of broadcasters—far more detailed than the information broadcasters were required to gather prior to the deregulation of the 1980s. The new form requires television stations to report, for both analog and digital programming streams, the average number of programming hours devoted each week in eleven specified categories, including national news, local news produced by the station, local news produced by some other entity (who must be identified), programming devoted to "local civic affairs," coverage of local elections, public service announcements, and paid public service announcements. To comply with this requirement, every day's programming must be timed, classified, and recorded so that the weekly averages to be reported can be computed.[37] For each programming category, licensees must describe how it determined that the programming met community needs.[38] This will require a minute-by-minute review of station operations, and daily updates to be able to provide the necessary reports when they are due.

In adopting the new reporting requirements the FCC disclaimed "altering in any way broadcasters' substantive public interest obligations."[39] Specifically, it stated that its decision "does not adopt quantitative programming requirements or guidelines" and it "does not require broadcasters to air any particular category of programming or mix of programming types."[40] But even without the adoption of any new public interest mandates, the entire point of the new reporting requirements is to subject the editorial decisions of licensees to greater oversight. More importantly, however, the enhanced disclosure requirements were adopted in anticipation of other new public interest requirements that will be enforced using the newly compiled information. Thus, while this order adopting the reporting form may not mandate "quantitative programming requirements or guidelines," it acknowledges that such mandates "are being considered and addressed in other proceedings."[41] The main vehicle for such mandates is the Commission's rulemaking on broadcast localism, which proposes both substantive programming requirements and procedural changes that will significantly increase government authority over broadcast content.

Thus, the same day the FCC issued the Report and Order on enhanced disclosure, it also released the text of its *Report on Broadcast Localism and Notice of Proposed Rulemaking* in which it proposed new programming requirements that dovetail with the new reporting forms.[42] The FCC proposed a number of measures that would subject editorial decisions to greater governmental scrutiny. Most notably, the Commission tentatively concluded that it "should reintroduce specific procedural guidelines for the processing of renewal applications for stations based on their localism programming performance."[43] Stations that fail to meet the minimum quantitative "guidelines" would be subjected to further scrutiny at license renewal time.

Not surprisingly, the reporting requirements embodied in the enhanced disclosure form were woven into the fabric of the Commission's proposals to enhance local programming. The FCC observed that the forms "will help licensees document the kind of responsive programming that they have broadcast in a manner that is both understandable to the

public and of use in the Commission's review of license renewal applications." The disclosure forms were among the measures the Commission adopted "to increase the public awareness of, and participation in our license renewal proceedings," and to provide "listeners and viewers a meaningful opportunity to provide their input through the filing of a complaint, comment, informal objection, or petition to deny a renewal application." [44]

Because of the possibility that "watchdog" organizations might not participate spontaneously, the Commission also proposed that "licensees should convene permanent advisory boards comprised of local officials and other community leaders, to periodically advise them of local needs and issues."[45] If this plan ultimately is adopted, such advisory boards would become "an integral component of the Commission's localism efforts."[46] In the rulemaking proceeding, the Commission asked how to identify the relevant community organizations that should participate, whether members should be selected or elected, and how frequently licensees should be required to meet with the advisory boards. The Commission also suggested that other community outreach efforts should be considered as possible mandates for broadcasters. In this regard, it asked whether these requirements should be imposed using rules or guidelines, and noted how the recently adopted standardized disclosure form "will require broadcasters to describe any public outreach efforts undertaken during the reporting period." [47]

Given the level of federal oversight that would be provided by localism guidelines coupled with enhanced disclosure requirements, it is small wonder that there is little interest in reviving the Fairness Doctrine. The localism regime would permit review of *all* news and public affairs programs—not just the few "unbalanced" reports that may happen to draw complaints. And, unlike the Fairness Doctrine, which resulted in protracted administrative proceedings to determine whether a given broadcast had been "fair," the localism requirements would be tied automatically into the license renewal process. Thus, rather than wait for a disaffected individual or organization to file a complaint, the proposed regulations would incorporate "permanent advisory boards" into a bureaucracy designed to ensure that broadcasters' editorial choices serve the "public interest," however that term may be defined by a particular administration.

FCC Inquiry and Enforcement Actions Regarding Video News Releases

The Commission under Kevin Martin also engaged in significant oversight of specific editorial decisions in news programming in recent decisions involving "video news releases." Like traditional press releases often used as the starting point for a story by print journalists, video news releases provide video footage that is picked up by television stations and incorporated, in whole or in part, into broadcast news stories. The extent to which print and television journalists rely on such releases to the exclusion of independent reporting no doubt presents an issue of journalistic ethics.[48] But it also has raised significant questions about the extent of FCC authority over news judgment.

The Commission exerted jurisdiction over the use of video news releases under its rules governing sponsorship identification. Those rules, adopted pursuant to Sections 317 and 507 of the Communications Act, generally require that broadcast stations and cable systems must disclose when payment has been received or promised for the airing of program material.[49] Although the disclosure rules generally apply only to situations where compensation is offered or provided in exchange for programming, the FCC's rules also require such identification where programming material from outside sources is aired during presentations of a controversial issue.[50] This long-dormant vestige of the Fairness Doctrine was not eliminated when the FCC terminated other corollaries of the policy, and has not yet been tested by judicial review.

Nevertheless, it was revived by the FCC in a series of Commission actions beginning in 2005. Starting with a Public Notice, the FCC sent a strong message that it intended to enforce the disclosure rules on newscasts that included material from video news releases even when no compensation was promised or paid for the broadcasts.[51] This was followed by the issuance by the Commission of forty-two Letters of Inquiry to seventy-seven broadcast licensees to investigate possible rule violations.[52] The Commission's Enforcement Bureau later issued Notices of Apparent Liability against Comcast alleging violations of the sponsorship identification rules and imposing potential fines of $20,000.[53] Comcast filed oppositions to the findings.

The FCC's actions with respect to video news releases raise a number of significant constitutional questions. To begin with, they implement a philosophy of governmental oversight of news judgment that the Commission previously had rejected when it first "declar[ed] the doctrine obsolete and no longer in the public interest" based on findings that "the fairness doctrine chilled speech on controversial subjects, and… interfered too greatly with journalistic freedom."[54] The FCC had found that the doctrine "was inconsistent with both the public interest and the First Amendment" because it imposed substantial burdens on the editorial choices of broadcasters.[55] While it would be unthinkable for the government to impose fines on print reporters for failing to disclose when they quote a portion of a press release, the Commission's decisions on video news releases expand the premise of *Red Lion*, that the government has a much freer hand to regulate broadcast journalists. More importantly, the proposed fines imposed on Comcast assume that the FCC may penalize *a cable operator* for making such an editorial choice, thus extending *Red Lion* beyond the broadcast medium. This is a step the Supreme Court has been unwilling to take. [56]

Constitutional Questions Ahead

Whether or not Congress or the FCC in the Obama administration seeks to resurrect the Fairness Doctrine, there will be significant First Amendment questions to be resolved about the government's ability to regulate broadcast news and public affairs programs. These issues will come to a head sooner if the new administration seeks to perpetuate or expand on regulatory initiatives that were begun under its Republican predecessors. The threshold question will not be whether

the doctrine of *Red Lion* may be extended to newer media, but whether this exception to traditional First Amendment jurisprudence is still valid in the new media environment.

It has been forty years since the Supreme Court decided *Red Lion*, based on "'the present state of commercially acceptable technology' as of 1969."[57] Since then, both Congress and the FCC have found that the media marketplace has undergone vast changes. For example, the legislative history to the Telecommunications Act of 1996 suggested that the historical justifications for the FCC's regulation of broadcasting require reconsideration. The Senate Report noted that "[c]hanges in technology and consumer preferences have made the 1934 [Communications] Act a historical anachronism." It explained that "the [Communications] Act was not prepared to handle the growth of cable television" and that "[t]he growth of cable programming has raised questions about the rules that govern broadcasters" among others.[58] The House of Representatives' legislative findings were even more direct. The House Commerce Committee pointed out that the audio and video marketplace has undergone significant changes over the past 50 years "and the scarcity rationale for government regulation no longer applies."[59]

The FCC has reached similar conclusions over the years. When it ended enforcement of the Fairness Doctrine in the mid-1980s, for example, the Commission "found that the 'scarcity rationale,' which historically justified content regulation of broadcasting... is no longer valid."[60] More recently, in complying with the congressional mandate to conduct a biennial review of broadcast regulations, the FCC again found that the media landscape has been transformed.[61] It concluded that "the modern media marketplace is far different than just a decade ago," finding that traditional media "have greatly evolved" and "new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history."[62]

Since then, a 2005 FCC staff report picked up where the 1987 Fairness Doctrine decision left off and concluded that the spectrum scarcity rationale "no longer serves as a valid justification for the government's intrusive regulation of traditional broadcasting."[63] It criticized the logic of the scarcity rationale for content regulation and added that "[p]erhaps most damaging to The Scarcity Rationale is the recent accessibility of all the content on the Internet, including eight million blogs, via licensed spectrum and WiFi and WiMax devices." Content regulation "based on the scarcity of channels, has been severely undermined by plentiful channels."[64] People coming of age in this environment enjoy an "extraordinary level of abundance in today's media marketplace" and thus "have come to expect immediate and continuous access to news, information, and entertainment."[65]

In this context, it is far from a foregone conclusion that the Supreme Court (or, for that matter, other reviewing courts) would accept the technological assumptions upon which *Red Lion* is based. It has been a long time since the Court has directly confronted the constitutional status of broadcasting, and where the issue has come up in dictum, its endorsement of *Red Lion* has been lukewarm at best. In *Turner Broadcasting System v. FCC*, for example, the Court rejected the government's bid to extend the principles of *Red Lion* to the regulation of cable television. After noting the Commission's "minimal" authority over broadcast content, the Court pointed out that "the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable television."[66] The judicial environment does not seem as if it will be hospitable to new efforts to reinvigorate or expand broadcast-type content controls.

Conclusion

Much ink has been spilt in a false debate over whether a new Democratic administration and a supermajority in Congress will try to bring back the Fairness Doctrine as a tool to muzzle the vociferous opposition of talk radio. But such tools were fashioned by the recently departed Republican administration and by an FCC chairman who claimed to be a conservative. The real issue in the debate over "fairness" in the twenty-first century is not about which regulation will be employed, or who is its primary champion. It is whether the legal fiction of *Red Lion* will continue to permit broadcasters or others to be excluded from well-established First Amendment protections traditionally applied to mass media.

Endnotes

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Doctrine, Broadcasting & Cable, Jan. 8, 2009; Ira Teinowitz, Bills Would Block FCC on Fairness Doctrine, TV Week, http://www.tvweek.com/news/2009/01/bills_would_block_fcc_on_fairn.php (Jan. 7, 2009).

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17 *Id*. at 31, 33-34.

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20 Angela J. Campbell, *The Legacy of Red Lion*, 60 Admin. L. Rev. 783, 788 (Fall 2008).

21 *Id*.

22 *Id*. (quoting Reno v. ACLU, 521 U.S. 844, 875 (1997) (other citations omitted)).

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36 *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, 23 FCC Rcd. 1274 (2008) ("*Standardized and Enhanced Disclosure Requirements*").

37 *Id*. at 1300 (Appendix B).

38 *Id*.

39 *Id.* at 1275, 1287, 1292.

40 *Id.* at 1287.

41 *Id.* at 1275, 1287. *See also id*. at n.96 ("As noted above, broadcasters' substantive public interest obligations are being considered in other proceedings.").

42 *Report on Broadcast Localism and Notice of Proposed Rulemaking*, 23FCC Rcd. 1324 (2008).

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44 *Id*. at 1335, 1357.

45 *Id*. at 1344.

46 *Id*. at 1336.

47 *Id*. at 1336-37.

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55 RTNDA, 184 F.3d at 876. *See also* Syracuse Peace Council v. FCC, 867 F.2d at 658 ("Commission declared that the fairness doctrine chills speech and is not narrowly tailored to achieve a substantial government interest" and "consequently… under… Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969), and its progeny… the fairness doctrine contravenes the First Amendment"). *See also id*. at 668 ("in its discussion of the fairness doctrine as a whole the Commission relied heavily on its view that government involvement in the editorial process was offensive") (citing Fairness Report, 102 FCC2d at 190-94; Syracuse Peace Council, 2 FCC Rcd at 5050-52, 5055-57).

56 Turner Broadcasting System v. FCC, 512 U.S. 622, 637 (1994) (because of "fundamental technological differences between broadcast and cable transmission" the application of "the more relaxed standard of scrutiny adopted in Red Lion and the other broadcast cases is inapt when determining the First Amendment validity of cable regulation"); United States v. Playboy Entmt. Group, Inc., 529 U.S. 803, 815 (2000) (citing "key difference" between cable and broadcasting in striking down indecency regulations imposed on cable operators).

57 News America Publishing, Inc. v. FCC, 844 F.2d 800, 811 (D.C. Cir. 1988) (quoting Red Lion, 395 U.S. at 388). *See* Meredith Corp. v. FCC, 809 F.2d 863, 867 (D.C. Cir. 1987) ("the Court reemphasized that the rationale of Red Lion is not immutable").

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60 Meredith Corp., 809 F.2d at 867, citing Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC2d 143 (1985) ("*1985 Fairness Doctrine Report")*. *See* Syracuse Peace Council, 867 F.2d at 660-666 (discussing *1985 Fairness Doctrine Report* and upholding FCC's decision to repeal the fairness doctrine).

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62 *Id*. at 13647-48.

63 John W. Berresford, *The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed* (Media Bureau Staff Research Paper, March 2005) at 8. FCC staff research papers are unofficial studies

and do not necessarily reflect the position of the Media Bureau or the Commission.

64 *Id*. at 11. The report also concludes that alternative rationales for broadcast content regulations are similarly flawed. *Id*. at 18-28. For a more comprehensive discussion of various justifications for broadcast content regulation, *see* Robert Corn-Revere, ed., Rationales and Rationalizations (Media Institute 1997).

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FCC v. Fox and the Future of the First Amendment in the Information Age

*By Adam Thierer**

On November 4th, 2008, the Supreme Court heard oral arguments in the potentially historic free speech case of *Federal Communications Commission v. Fox Television Stations, Inc.* This case, which originated in the Second Circuit Court of Appeals, deals with the FCC's new policy for "fleeting expletives" on broadcast television. The FCC lost and appealed to the Supreme Court. By contrast, the so-called "Janet Jackson case"—*CBS v. FCC*—was heard in the Third Circuit Court of Appeals. The FCC also lost that case and has also petitioned the Supreme Court to review the lower court's ruling.

These two cases reflect an old and odd tension in American media policy and First Amendment jurisprudence. Words and images presented over one medium—in this case broadcast television—are regulated differently than when transmitted through any other media platform (such as newspapers, cable TV, DVDs, or the Internet). Various rationales have been put forward in support of this asymmetrical regulatory standard. Those rationales have always been weak, however. Worse yet, they have opened the door to an array of other regulatory shenanigans, such as the so-called Fairness Doctrine, and many other media marketplace restrictions.[1]

Whatever sense this arrangement made in the past, technological and marketplace developments are now calling into question the wisdom and efficacy of the traditional broadcast industry regulatory paradigm. This article will explore both the old and new rationales for differential First Amendment treatment of broadcast television and radio operators and conclude that those rationales: (1) have never been justified, and (2) cannot, and should not, survive in our new era of media abundance and technological convergence.

I. Process vs. Substance: Which Will the Court Address?

The Second and Third Circuit cases have been preoccupied with procedural issues, the Administrative Procedures Act (APA) in particular. To varying degrees, both the FCC and the broadcast industry plaintiffs have been dancing around the substantive First Amendment issues at stake. The broadcasters aim to prove that the FCC went too far, too fast in expanding broadcast indecency regulations and fines to cover "fleeting expletives" (*FCC v. Fox*) and fleeting images (*CBS v. FCC*). The FCC says it was justified in taking action in those cases and that the courts should defer to its judgment.

The Supreme Court may resolve these cases on those narrow procedural grounds and punt the substantive First Amendment issues to another day. But the days of punting fundamental issues down the road will soon come to an end. The First Amendment—at least as the FCC and the courts read it today—is a house divided; a veritable jurisprudential Twilight Zone in which identical words and images are being regulated in completely different ways depending on the mode of transmission. Leading media law scholars have noted that a regulator viewing the same program on six different screens in the same room would not be able to determine the regulatory treatment of each screen until they determine how the signal had been transmitted to each one.[2] That is because, as the authors of another communications law book note, "The central problem is that communications law has always been based on different rules for different media" and "different levels of First Amendment protection. Unfortunately, this no longer reflects technological reality."[3] And as Randolph May noted in *Engage* last October, classifying services and determining free speech rights based on technical characteristics or functional features—what he calls "techno-functional constructs"—no longer makes practical sense or is legally justifiable.[4]

Indeed, this current distribution channel-based legal arrangement will grow increasing unsustainable as more and more media content migrates to unregulated platforms and as media platforms and technologies converge. The rise of "convergence culture" will be the undoing of the rationales that have traditionally been offered in defense of regulating broadcast spectrum and speech differently than all other platforms.[5] Those three rationales are: (1) Scarcity; (2) Public ownership / licensing; and (3) "Pervasiveness." Scarcity and public ownership will be discussed only briefly since the pervasiveness rationale is at the heart of most modern battles over speech regulation, as is the case in *FCC v. Fox* and *CBS v. FCC.*

II. Scarcity

Spectrum "scarcity" has long been held out as the *sine qua non* for broadcast radio and television regulation in America. Generally speaking, the scarcity rationale for regulation states that because more people want spectrum licenses than are available, government can and should impose special obligations on those who possess such licenses.

Spectrum scarcity was used to justify the broadcast licensing scheme enshrined in the Radio Act of 1927 and Communications Act of 1934. Supreme Court decisions such as *NBC v. United States* (1943)[6] and *Red Lion Broadcasting Co. v. FCC* (1969)[7] then made the scarcity rationale sacrosanct, and legitimized comprehensive government regulation of broadcasters in the process.

While scarcity is the primary rationale for regulation of the broadcast spectrum and corresponding content controls, it is a very weak one. Even if spectrum is scarce, that fact hardly makes the case for government control. Every natural resource is inherently scarce in some sense. For example, there is only so much coal, timber, or oil on the planet, but that does not mean government should own or license those resources. In the 1986 D.C. Circuit case *Telecommunication Research & Action Center v. FCC*, the case that overturned the FCC's "Fairness Doctrine," then-Judge Robert Bork argued that, "All economic goods are scarce… Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. The attempt

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to use a universal fact as a distinguishing characteristic leads to analytical confusion."[8]

While some resources are more abundant or scarce in nature than others, most economists agree that property rights, pricing mechanisms, contracts, and free markets provide the most effective way to determine who values resources most highly and allocate them efficiently. In fact, the government created artificial scarcity within the spectrum by exempting it from market trading and the pricing system.[9] Simply stated, government ownership and control of spectrum exacerbates, rather than solves, the scarcity problem. As Ithiel de Sola Pool, author of *Technologies of Freedom*, explained in 1983: "The scheme of granting free licenses for use of a frequency band, though defended on the supposition that scarce channels had to be husbanded for the best social use, was in fact what created a scarcity. Such licensing was the cause not the consequence of scarcity."[10]

Importantly, if outlet scarcity is the determining factor, why isn't the FCC regulating newspapers? In 1991, Jonathan Emord, author of *Freedom, Technology and the First Amendment*, noted that "[I]t is simply not the case that the broadcast media are more scarce than the print media. Indeed, the inverse is true and is exacerbated with each passing moment."[11] For example, the number of broadcast TV and radio stations in America has doubled since *Red Lion* was decided in 1969, while daily newspapers have been in a steady state of decline since that time.[12] Daily newspapers are now more "scarce" than broadcast television stations, but they have not received diminished First Amendment rights.[13]

Moreover, practically speaking, even if scarcity was once a legitimate concern within the broadcast sector, it certainly is not today considering the cornucopia of media choices at the public's disposal.[14] With the rise of the multichannel video marketplace (cable and satellite TV), satellite radio, DVDs, mobile media, and the Internet and online video, "scarcity is the last word that would come to mind in regard to the vast array of communications outlets available today," concludes *Chicago Tribune* columnist Steve Chapman.[15] Indeed, to the extent citizens bemoan anything today it is information overload, not information scarcity.

Thus, scarcity—of outlets or opinions—is an outmoded justification for differential treatment of the broadcast platform.

III. Public Ownership / Licensing

The continued existence of the FCC's licensing regime for electromagnetic spectrum leads to oft-repeated claims that broadcast spectrum is "owned by the American people" or "belongs to the American people." Therefore—or so this line of reasoning continues—any set of rules can be adopted for broadcasting (for both economic and content-related purposes) that Congress or the FCC deem appropriate, since they are acting on behalf of "the people."[16] Speech regulation is one of the ways the FCC exercises that control.

But this logic does not hold in other licensing situations. Government licensure does not diminish speech rights for citizens when they obtain a driver's license, or the rights of doctors when they get a license to practice medicine. Similarly, "A lawyer needs a license to practice law, yet the government does not force a lawyer to spend equal time defending clients of opposite views," notes Bruce Fein, a former general counsel at the FCC.[17] "It is patently absurd to suggest that a license requirement in an industry is enough to allow the taking away of First Amendment rights," he argues.[18]

Nor does government ownership of an asset confer unbounded powers of speech suppression. Governments own parks, libraries, buildings and other property, but that does not lessen the speech rights of those who reside on or use that government property.[19] Others have argued that the very act of licensing broadcasters in general is unconstitutional. Matthew Spitzer, for example, has argued that, "the First Amendment must be read so as to prevent the government from owning all of the spectrum" since absolute government ownership of spectrum gives the government far too much control over private electronic communication.[20] Spitzer likens the situation to a hypothetical Federal Paper Commission that has been given control over all uses of paper and ink and the ability to license newspapers "in the public interest." Such an enactment would clearly offend the First Amendment as an unjust government encroachment upon the rights of the press. But that is essentially the system that governs broadcasting in America today.

Moreover, broadcast spectrum is nothing like a public park or a town square. Broadcast licenses are owned by private entities and are traded on the open market for significant sums of money. The vast majority of TV and radio licenses have traded hands a least once; many have been sold multiple times. Broadcasters also sell shares in their companies on the stock market and have private shareholders. These facts distinguish broadcasting from public property.

The "People's Airwaves" argument has also been thoroughly discredited by the FCC itself in a 2005 report by John W. Berresford, a staff attorney with the FCC's Media Bureau, who also called the scarcity rationale into question.[21] Berresford's report argued that:

> Most likely, some newspapers and musical instruments are made from trees that grew on government land. No one would claim that they are therefore made of The People's Wood and that the federal government may regulate the content of those newspapers or require that the music played on the instruments address controversial public issues and express differing views.…

Finally, even if the airwaves did belong to the people, the same cannot be said of traditional broadcasters' land, transmitters, buildings, studio equipment, personnel, and audiences gained through years of sending out popular content. Those things belong exclusively to the broadcasters and their shareholders.[22]

For these reasons, the "people's airwaves" argument is not a valid excuse for differential treatment of the broadcast spectrum or broadcast speech.

IV. Pervasiveness

A fresh excuse for asymmetrical regulation of broadcasting was concocted in the late 1970s: "pervasiveness." Unfortunately, in a creative bit of judicial activism, it was the Supreme Court that dreamed up this theory and gave it legitimacy. In *FCC v. Pacifica Foundation* (1978), the famous "seven dirty words" case, the Supreme Court held that:

Of all forms of communication, broadcasting has the most limited First Amendment protection. Among the reasons for specially treating indecent broadcasting is the *uniquely pervasive presence* that medium of expression occupies in the lives of our people. Broadcasts extend into the privacy of the home and it is impossible completely to avoid those that are patently offensive. Broadcasting, moreover, is *uniquely accessible to children*.[23]

The staying power of this rationale has proven formidable. After *Pacifica*, the courts moved to adopt a "channeling" or "safe harbor" approach to indecency regulation, requiring that broadcasters wait until after 10:00 p.m. to air potentially objectionable content. In *Action for Children's Television v. FCC III* (1995), the U.S. Court of Appeals for the D.C. Circuit held that the FCC could impose restrictions on broadcast indecency between the hours of 6:00 a.m. and 10:00 p.m.[24]

But the pervasiveness rationale suffers from several shortcomings.

A. "Intruder" or Invited Guest?

The most obvious problem with the logic of "pervasiveness" is that it assumes parents are fundamentally incapable of controlling broadcast media. In holding the broadcast signals were uniquely pervasive and an "intruder" in the home, the *Pacifica* Court forgot that signals are worthless without a receiving device. And those receiving devices—television sets and radios—do not walk into the home uninvited. Parents put them there.

Once parents bring these devices into the home, it should not absolve them of their responsibility to monitor how their children use them. After all, parents do not bring other products home—such as cars, weapons, liquor, or various chemicals—and then expect the government to assume responsibility from there. But that is essentially the logic that the Supreme Court used in *Pacifica* to justify broadcast television and radio regulation.

This "media-as-invader" logic is particularly faulty considering how much effort and money adults must expend to bring media devices into the home. Over-the-air broadcast programming may be "free," but the devices needed to receive those signals are not. The same logic applies to newer media technologies. Cable television, for example, requires a monthly subscription that averages over $40 per month for expanded basic service.[25] And connecting to the Internet requires the purchase of a computer and a monthly Internet access service account.

Ironically, it is print media (newspapers, weekly readers, magazines, etc.) that are probably the most accessible to average Americans—many at little or no cost—and yet print outlets are accorded the most stringent First Amendment protections. It seems much more likely that a free, community-based weekly newspaper, delivered to one's doorstep without even asking for it, is more of an "intruder" than the television set, cable set-top box, or Internet connection, which cost significant sums and take more effort to bring into the home.[26] As former FCC Chairman Michael Powell argued in a 1998 speech, "The TV set attached to rabbit ears is no more an intruder into the home than cable, DBS, or newspapers for that matter. Most Americans are willing to bring TVs into their living rooms with no illusion as to what they will get when they turn them on."[27]

B. Are Parents Powerless?

The pervasiveness rationale for broadcast regulation also fails because parental controls, rating systems, and content tailoring technologies make it easier than ever before for parents to manage media in their homes and in the lives of their children.[28] It is impossible to consider video programming an "intruder" in the home when tools exist that can help parents almost perfectly tailor viewing experiences to individual household preferences.

When Justice Stevens argued in *Pacifica* that broadcast signals represented an "intruder" in the home, he supported that claim by noting that "Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[29] While that may have reflected the state of technology at the time, it is completely at odds with modern realities, at least for television. In 1978, the viewing experience was a more passive affair and consumers had very few ways to control that experience unless they turned off the television altogether. Today, by contrast, viewers (including parents) have the tools to "tune in and out" at will, and they have abundant "prior warnings" about program content thanks to the existence of ratings, program information, and electronic program guides.

And it is not just the V-Chip, which lets parents filter broadcast programs by rating.[30] For the 86 percent of Americans who subscribe to cable and satellite television, their set-top boxes come equipped with advanced video screening technology.[31] More importantly, new video technologies, such as DVD players, digital video recorders (DVRs) and video on demand (VOD) services, are changing the way households consume media and are helping parents better tailor viewing experiences to their tastes and values.[32] These tools help parents restrict or tailor the viewing experience *in advance* according to their values and preferences. Parents can amass an archived library of only the programming they wish their children to consume.

Of course, this is less true for over-the-air *radio* programming, which remains difficult for parents to block or filter. But broadcast radio is increasingly dominated by talk radio and most youngsters consume audio over alternative devices and platforms. There are some ways parents can better control audible media over digital platforms such as iTunes and satellite radio, which can designate and block some content as "explicit."[33]

These developments have profound implications for debates over the regulation of broadcast programming. As noted below, as parents are given the ability to more effectively manage their family's viewing habits and experiences, it will lessen—if not completely undercut—the need for government intervention on their behalf. It allows us to move away from the more paternalistic notion of "community standards"-based regulation, and toward a family-based "household standard."

C. What Happens When Everything is Pervasive?

Whatever legitimacy *Pacifica's* "pervasiveness" logic might have once had as a motivating factor for the unique regulatory treatment of broadcasting, it is being completely undercut by modern marketplace developments. As NBC noted in a filing before the Second Circuit U.S. Court of Appeals in late 2006:

> The nearly 30 years since *Pacifica* have similarly eviscerated the notion that broadcast content is "uniquely accessible to children" when compared to other media. The availability of alternative media sources is even more pronounced with respect to younger generations than with adults…

Like all media content, broadcast programming is accessible by children to some degree, but certainly it is no longer *uniquely* available when compared to the countless other avenues through which children up to age 18 receive information. These technological developments have doctrinal significance. Now that *Pacifica*'s underpinnings have been undermined, there is no reasoned basis for treating content-based restrictions on the speech of broadcasters differently than content-based restrictions on other speakers.[34]

The FCC's Berresford agrees:

> If new media are now as pervasive and invasive as only traditional broadcasters once were, should the new media's content be supervised as only the latter have been? To expand such supervision to the new media would risk reducing adults to only content fit for children—a failing of potentially Constitutional dimensions. It may be, on the contrary, that the spread of new media, with hundreds of new channels, should cause regulation of indecency in traditional broadcasting to end. If what is pervasive today is hundreds of channels and billions of web pages, no one channel, show, or page is as pervasive as the Big Networks' shows were in the heyday of their three-member oligopoly.[35]

In other words, in a world of technological convergence and media abundance, *everything is equally pervasive*. It is illogical to claim that broadcasting holds a unique status among all the competing media outlets and technologies in the marketplace. And even if some broadcast stations and programs continue to fetch a large number of viewers/listeners, this cannot be the standard by which lawmakers determine a medium's First Amendment treatment. The danger with such a "popularity equals pervasiveness" doctrine is that it contains no limiting principles.[36] If Congress can regulate content on a given media platform whenever 51 percent of the public bring it into their homes, then the First Amendment will become an empty vessel. Indeed, it would mean that cable television, DVD players, and the Internet could be regulated today since more than 50 percent of U.S. households have access.[37]

Indeed, critics of *Pacifica* have long pointed out that the fundamental problem with pervasiveness as the linchpin of modern broadcast regulation is that it is overly-broad and could be applied to any media outlet that was randomly determined by regulators to be particularly pervasive in our lives or "uniquely accessible to children." It turns children into the equivalent of a "constitutional blank check."[38] Author Jonathan Wallace warned of this "specter of pervasiveness" in a 1998 Cato Institute report on the subject:

> [T]he logic of pervasiveness could apply to cable television, the Internet, and even the print media. If such logic applies to any medium, it could apply to all media. In this way, the pervasiveness doctrine threatens to curtail severely the First Amendment's protection of freedom of speech.[39]

At least so far, there has been no support from the courts for extending regulation to new media outlets using this rationale. Early attempts to regulate content on cable television have been uniformly rejected by the courts.[40] Similarly, when congressional lawmakers sought to impose restrictions on the Internet in the mid-1990s, the Supreme Court rejected the effort. In striking down the Communications Decency Act's effort to regulate indecency online, the Supreme Court declared in *Reno v. ACLU* (1997) that a law that places a "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving" the same goal.[41] And several lower courts have rejected regulation of video game content on similar grounds.[42]

What is most interesting about these recent Internet and video game decisions is that the same logic could be applied to broadcasting. Indeed, as noted, many "less restrictive alternatives" are available to parents today to help them shield their children's eyes and ears from content they might find objectionable, regardless of what that content may be.

D. The Move from "Community Standards" to "Household Standards"

If it is the case that families now have the ability to effectively tailor media consumption to their own preferences—that is, to craft their own "household standard"—the regulatory equation should also change. Regulation can no longer be premised on the supposed helplessness of households to deal with broadcast content flows if families have been empowered to make content determinations for themselves.

In fact, in another recent decision, the Supreme Court confirmed that this would be the new standard to which future government enactments would be held. In *United States v. Playboy Entertainment Group* (2000),[43] the Court struck down a law that required cable companies to "fully scramble" video signals transmitted over their networks if those signals included any sexually explicit content. Echoing its earlier holding in *Reno v. ACLU,* the Court found that less restrictive means were available to parents looking to block those signals in the home. Specifically, the Court argued that

> [T]argeted blocking [by parents] enables the government to support parental authority without affecting the First Amendment interests of speakers and willing listeners—listeners for whom, if the speech is unpopular or indecent, the privacy of their own homes may be the optimal place of receipt. Simply put, targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.[44]

More importantly, the Court held that

> It is no response that voluntary blocking requires a consumer to take action, or may be inconvenient, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.[45]

This is an extraordinarily high bar the Supreme Court has set for policymakers wishing to regulate modern media content. Not only is it clear that the Court is increasingly unlikely to allow the extension of broadcast-era content regulations to new media outlets and technologies, but it appears certain that judges will apply much stricter constitutional scrutiny to *all* efforts to regulate speech and media providers in the future, including broadcasting. As Geoffrey R. Stone of the University of Chicago School of Law has noted

> The bottom line, then, is that even in dealing with material that is "obscene for minors," the government cannot *directly* regulate such material... Rather, it must focus on empowering parents and other adults to block out such material at their own discretion, by ensuring that content-neutral means exist that enable individuals to exclude constitutionally protected material they *themselves* want to exclude. Any more direct regulation of such material would unnecessarily impair the First Amendment rights of adults.[46]

Thus, the courts have largely foreclosed government regulation of most other media platforms outside of broadcasting and placed responsibility over what enters the home squarely in the hands of parents. This makes the pervasiveness rationale for asymmetrical broadcast regulation even more difficult to justify.

E. What about Reversing the Pervasiveness Test?

With the "pervasiveness" rationale becoming increasingly archaic and indefensible, some have suggested flipping the justification on its head to preserve asymmetrical regulation of the broadcast spectrum. That is, while the traditional pervasiveness test focused on the ubiquity and supposed intrusiveness of broadcast signals, the new standard would focus on broadcasting as the only safe haven from the other types of media, which are actually now more pervasive in the lives of children than broadcasting.

For example, during oral arguments in *FCC v. Fox*, U.S. Solicitor General Gregory Garre suggested that the government actually had a *stronger* case today when it regulates broadcasting because there are so many other unregulated platforms where kids might see or hear objectionable media. As Garre argued:

> We actually think that the fact that there are now additional mediums like the Internet and cable TV, if anything, underscores the appropriateness of a lower First Amendment standard or safety zone for broadcast TV, because Americans who want to get indecent programming can go to cable TV, they can go to the Internet.[47]

It is important not to lose sight of the fact that Garre and the FCC are conceding that broadcast pervasiveness, as traditionally understood, is increasingly moot. Nonetheless, they wish to preserve the regulatory authority the pervasiveness doctrine sanctions to ensure broadcasting remains under the yoke of regulation.

Garre and the FCC are asking the Court to once again engage in creative judicial activism to concoct a fresh legal rationale for differential First Amendment treatment of broadcasters. Instead of closing the book on *Pacifica's* misguided contortion of the First Amendment, this proposal seeks to turn the old rationale on its head in an attempt to prop up an unjust regulatory construct. In doing so, this proposal to reinvent pervasiveness would make a mockery of the rule of law. For the past 30 years, broadcasters have been told they are second-class citizens in the eyes of the First Amendment because they were "pervasive" and "uniquely accessible." Now that their hegemony is being eroded rapidly by a myriad of media competitors who are actually *more* pervasive, broadcasters are now being told they must remain shackled by special restrictions. In other words: Damned if you do, damned if you don't! In essence, there is no way for broadcasters to escape regulation and gain full First Amendment protection, even though their competitors remain largely free of such burdens.

V. Will the Sky Fall Absent Government Regulation?

Practically speaking, what is driving efforts to continue asymmetrical regulation of broadcasting is the fear that, without it, broadcast television and radio would become a veritable den of iniquity. But such Chicken Little scenarios are highly unlikely to develop because of ongoing viewer and advertiser pressure. Broadcast television and radio broadcasters seek a *mass* audience. While cable and satellite networks have the luxury of targeting certain demographic niches or specialized interests, broadcasters do not. Broadcasters have to ensure their product appeals to as many people as possible to attract and retain large audiences and a steady flow of advertising dollars to support their significant programming expenditures.

Thus, broadcasters must be more cautious than cable or satellite programmers to ensure they do not alienate large portions of their viewing or listening audience. "In a free marketplace, whether broadcast or print, advertisers and subscribers will not eagerly support materials, whether delivered on the air or on the doorstep, that are as likely to offend as to attract potential customers," noted former Reagan Administration FCC Chairman Mark Fowler and FCC advisor Daniel L. Brenner in 1982.[48]

Consider newspapers. *The New York Times* and *The Washington Post* are fully protected by the First Amendment and free to publish "indecent" material whenever they wish, even on page one if they so desire. But they never do. These print media outlets understand that reader and advertiser loyalty is vital to their ongoing success and that publishing explicit material or coarse language in their pages would likely offend a significant portion of their audience. Similarly, even those television and radio broadcasters who might want to push the envelope a bit more in the absence of regulation know that they have to be careful to strike the right balance or else they run the risk of losing viewers and advertisers.

In fact, we have evidence that this is already the case. There is currently nothing stopping broadcasters from airing whatever programming they choose after 10:00 p.m. at night, since the FCC's "safe harbor" ends at that time. Why is it, then, that broadcasters are not airing soft-core pornography or vulgar programming at 10:00 each night? It is because broadcasters know there would be hell to pay with their audience and advertisers if they did. Just because a broadcast company *can* run something does not mean they will. In this way, audience and advertiser pressure can provide a strong check on broadcast content determinations.

In conclusion, there are no justifications left to prop up *Red Lion, Pacifica*, or any of the traditional rationales for asymmetrical regulation of broadcasters. As Randolph May noted in *Engage* recently, "With the revisiting of [those cases], the Court can establish a new First Amendment paradigm for the electronic media… much more in keeping with the Founders' First Amendment vision."[49] The Supreme Court should take the opportunity to do so in the *Fox* and *CBS* cases.

Endnotes

1 For an inventory of these various media regulations, see Brian Anderson & Adam Thierer, A Manifesto for Media Freedom (2008).

2 Harvey L. Zuckman, et. al, Modern Communications Law (1999), at 153.

3 T. Barton Carter, et. al, Mass Communications Law (2000), at 600.

4 Randolph J. May, *Charting a New Constitutional Jurisprudence for the Digital Age*, Engage, Oct. 2008, at 109.

5 Henry Jenkins, founder and director of the MIT Comparative Media Studies Program and author of *Convergence Culture: Where Old and New Media Collide*, defines convergence as "the flow of content across multiple media platforms, the cooperation between multiple media industries, and the migratory behavior of media audiences who will go almost anywhere in search of the kinds of entertainment experiences they want." Henry Jenkins, Convergence Culture: Where Old and New Media Collide (2006), at 2.

6 NBC v. United States, 319 U.S. 190 (1943).

7 Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).

8 Telecomm. Research & Action Center v. FCC, 801 F.2d 501, 508 (D.C. Cir. 1986).

9 "[I]t can be argued that the spectrum was scarce because demand exceeded supply. This is almost invariably the case when a good with value is given away for free. If a market price had been assigned to spectrum from the start (which in effect is done when licenses are bought and sold later on), then it would be no more or less scarce than are pencils, VCRs or Lexus automobiles. Moreover, it may have been put to better uses initially if those who obtained it had to pay for it." Benjamin M. Compaine, "Distinguishing Between Concentration and Competition," *in* Benjamin M. Compaine and Douglas Gomery, eds., Who Owns the Media? Competition and Concentration in the Mass Media Industry, (2000), 557.

10 Ithiel de Sola Pool, Technologies of Freedom (1983), at 141. "Clearly it was policy, not physics, that led to the scarcity of frequencies. Those who believed otherwise fell into a simple error in economics," Pool concluded.

11 Jonathan Emord, Freedom, Technology and the First Amendment (San Francisco: Pacific Research Institute, 1991), at 284.

12 Adam Thierer, Media Myths: Making Sense of the Debate over Media Ownership (Washington, D.C.: The Progress & Freedom Foundation, 2005), at 20-21, http://www.pff.org/issues-pubs/books/050610mediamyths.pdf

13 "Because daily newspapers are much more scarce than are radio and television choices, should there be a fairness doctrine for the *New York Times*?" George Will, *Broadcast 'Fairness' Fouls Out,* Wash. Post, Dec. 7, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/12/05/AR2008120503194.html.

14 Adam Thierer and Grant Eskelsen, *Media Metrics: The True State of the Media Marketplace* (Washington, D.C.: The Progress & Freedom Foundation, 2008), http://www.pff.org/mediametrics.

15 Steve Chapman, *You* Will *Watch the Debates*, Chic. Tribune, Oct. 15, 2000, at 19.

16 *See Red Lion* at 389-90.

17 Bruce Fein, *First Class First Amendment Rights for Broadcasters*, Harv. J. Law & Pub. Pol'y 10, 1 (1997), at 84.

18 *Id.*

19 "When dealing with streets, parks, or other traditional [public] fora, the First Amendment precludes the government from doing as it pleases with its property. Instead, the government many 'own' the streets and parks in the sense that it can regulate traffic, control hours of parking, and so forth, but it many not, in general, control the content of what is expressed there or impose unreasonable time, place, or manner regulations on such expression." Matthew L. Spitzer, *The Constitutionality of Licensing Broadcasters*, 64 N.Y.U. Law Rev. (1989), at 1033.

20 Spitzer, *supra* at 1042.

21 John W. Berresford, "The Scarcity Rationale for Regulating Traditional Broadcasting: An Idea Whose Time Has Passed," Federal Communications Commission, *Media Bureau Staff Research Paper*, 2005-2, March 2005, at 19, http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257534A1.pdf.

22 *Id.* at 19.

23 FCC v. Pacifica Foundation, 438 U.S. 726, 727-8 (1978) (emphasis added).

24 Action for Children's Television v. FCC III, 59 F. 3d 1249, (D.C. Cir. 1995).

25 "Industry Overview," National Cable & Telecommunications Association, *available at* http://www.ncta.com/Docs/PageContent.cfm?pageID=86.

26 "[B]roadcast signals may even be less intrusive than printed expression which may be perceived while blowing by as litter on a street, laying on a coffee table, or being displayed in a newsrack." Fred H. Cate, *The First Amendment and the National Information Infrastructure*, 30 Wake Forest Law Review 1 (1995), at 41.

27 "Willful Denial and the First Amendment," *Remarks by Michael K. Powell before the Media Institute*, April 22, 1998, *available at* http://www.fcc.gov/Speeches/Powell/spmkp808.html

28 *See* Adam Thierer, *Parental Controls and Online Child Protection: A Survey of Tools and Methods* (Washington, DC: The Progress & Freedom Foundation, 2009).

29 *Pacifica* at 748.

30 *See* www.fcc.gov/vchip and www.thetvboss.org

31 A comprehensive survey of the content controls that cable television providers make available to their subscribers can be found on the National Cable and Telecommunications Association's (NCTA) "Control Your TV" website. http://controlyourtv.org.

32 *See* Adam Thierer, "Parental Control Perfection? The Impact of the DVR and VOD Boom on the Debate over TV Content Regulation" by, Progress & Freedom Foundation, *Progress on Point* 14.20, October 2007, http://www.pff.org/issues-pubs/pops/pop14.20DVRboomcontentreg.pdf.

33 Thierer, *supra* note 38, at 67-69.

34 *Brief for Intervenors NBC Universal, Inc. and NBC Telemundo License Co.,* U.S. Court of Appeals for the Second Circuit, Docket Nos. 06-1760-AG, 06-2750, November 22, 2006, at 55-6. (emphasis in original).

35 Berresford, *supra* note 18, at 29.

36 I have addressed the dangers of "popularity equals pervasiveness" notions elsewhere. *See* Adam Thierer, *Thinking Seriously about Cable and Satellite Censorship: An Informal Analysis of S. 616, The Rockefeller-Hutchison Bill*, Progress & Freedom Foundation *Progress on Point* no. 12.5, April 2005, www.pff.org/issues-pubs/pops/pop12.6cablecensorship.pdf; Adam Thierer, *Moral and Philosophical Aspects of the Debate over A La Carte Regulation*, Progress & Freedom Foundation *Progress Snapshot* 1.23, December 2005, www.pff.org/issues-pubs/ps/ps1.23alacarte.pdf.

37 Robert Corn-Revere, *Can Broadcast Indecency Regulations Be Extended to Cable Television and Satellite Radio*, Progress & Freedom Foundation *Progress on Point* 12.8, May 2005, http://www.pff.org/issues-pubs/pops/pop12.8indecency.pdf.

38 Lawrence H. Winer, "Children Are Not a Constitutional Blank Check," *in* Robert Corn-Revere, ed., Rationales and Rationalizations (Washington, D.C.: The Media Institute, 1997), at 69-123.

39 Jonathan D. Wallace, *The Specter of Pervasiveness:* Pacifica*, New Media, and Freedom of Speech*, Cato Institute *Briefing Paper*, No. 35, February 12, 1998, http://www.cato.org/pubs/briefs/bp-035es.html. Similarly, Pool noted of *Pacifica* that, "This aberrant approach… could be used to justify quite radical censorship." Pool, *supra* note 10, at 134.

40 Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982); Community Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D.C. Utah 1985), *aff'd sub nom. Jones* v. *Wilkinson*, 800 F.2d 989 (10th Cir. 1986), *aff'd mem*. 480 U.S. 926 (1987); Cruz v. Ferre, 755 F.2d 1415, 1419 (11th Cir. 1985); Denver Area Educational Telecommunications Consortium v.

FCC, 518 U.S. 717 (1996); United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).

41 Reno v. ACLU, 521 U.S. 844 (1997). *See also* Ashcroft v. ACLU, 535 U.S. 564 (2002) upholding an injunction against the Child Online Protection Act (COPA), which also sought to regulate underage access to material deemed "harmful to minors."

42 *See* Adam Thierer, *Fact and Fiction in the Debate over Video Game Regulation*, Progress & Freedom Foundation *Progress Snapshot* 13.7, March 2006, www.pff.org/issues-pubs/pops/pop13.7videogames.pdf

43 United States v. Playboy Entertainment Group, 529 U.S. 803 (2000).

44 *Id.* at 815.

45 *Id.* at 824.

46 Geoffrey R. Stone, "The First Amendment Implications of Government Regulation of 'Violent' Programming on Cable Television," National Cable and Telecommunications Association, October 15, 2004, at 10, www.ncta.com/ContentView.aspx?hidenavlink=true&type=lpubtp5&contentId=2881.

47 Transcript of oral arguments in *FCC v. Fox*, U.S. Supreme Court, No. 07-582, November 4, 2008, at 17-18, http://www.supremecourtus.gov/oral_arguments/argument_transcripts/07-582.pdf.

48 Mark S. Fowler and Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Texas Law Review 2 (1982), 230.

49 May, *supra* note 4, at 113.

Book Reviews

The Invisible Constitution

By Laurence H. Tribe

*Reviewed by Paul Horwitz**

The Book of Hebrews tells us that faith is "the substance of things hoped for, the evidence of things unseen." Readers of this journal might expect from *any* book by Laurence Tribe, let alone one titled *The Invisible Constitution*, rather more of the former than the latter. They might be surprised. There is more than a little hint in this book of analysis driven by "things hoped for" and not proven. But much of this book focuses convincingly on "the evidence of things unseen"—of postulates and principles that are found nowhere in the Constitution in explicit terms, but which are every bit as authoritative, and necessary, as the written Constitution itself.

Early on, Tribe sums up his project: "This is a book about what is 'in' the United States Constitution but cannot be *seen* when one reads only its text." The "visible Constitution," he writes, "necessarily floats in a vast and deep—and, crucially, invisible—ocean of ideas, propositions, recovered memories, and imagined experiences that the Constitution as a whole puts us in a position to glimpse." The Constitution, for Tribe, is much more than the sum of its parts. It consists of invisible rules and principles—constitutional "dark matter"—that undergird the written text and without which the text, and the Constitution more broadly understood, would be a shadow of its proper self.

This approach to understanding the Constitution builds on what Tribe describes as the paradox of any written constitution. As constitutionalists have long recognized, the Constitution as a written text cannot legitimize itself. Even if it came packaged with an explicit set of instructions for how to interpret it, we would have to refer to a host of interpretive principles to understand it. We do so by reading in all the assumptions that faithful readers must employ. In the Constitution's case, that includes not only a careful parsing of the text, but an understanding of its history, its development, and the background assumptions—assumptions about the rule of law, federalism, and much more—that help the document make sense. In that sense, Tribe is right to say that "what holds us in [the Constitution's] grip, and what we treat as its meaning, cannot be found in the written text alone but resides only in much that one cannot perceive from reading it." The visible Constitution thus requires an invisible Constitution. In a somewhat contradictory fashion, Tribe derives textual support for his view from the Ninth and Tenth Amendments, which suggest a universe of extratextual rights retained by the states and the people.

Many of Tribe's examples are time-worn and familiar. Generations of law students have become painfully familiar with the aptly named dormant Commerce Clause, for example; when the Supreme Court held in 2005 that this unwritten constitutional principle was not altered by the Twenty-First Amendment, it presented a stark example of the invisible Constitution triumphing over the text itself.

Federalism is another word that appears nowhere in the Constitution, but whose impact stretches beyond the list of limitations on congressional power over the states found in Article I, section 10, as the anti-commandeering cases, with their reference to the "postulates" underlying the Constitution, demonstrate. Tribe also suggests that states may not secede from the Union, "an axiom written in blood rather than ink," a result of the Civil War. And Tribe is surely right to suggest that the debates over the meaning of the Fourteenth Amendment's guarantee of equal protection have as much to do with "the Constitution's invisible, unstated presuppositions" about the meaning of equality as with the text itself.

Not all of his examples are so uncontroversial. Tribe argues that "self-government writ large is the overarching theme of our Constitution," and this leads him to reconstruct a bold set of justifications for some of the most contested constitutional law issues over the last century. In partial defense of the Court's notorious decision in *Lochner v. New York*, he argues that in some circumstances "interpersonal arrangements are entitled, under the invisible Constitution of self-government, to presumptive protection from interference by the forces of government and officialdom." The problem with *Lochner*, he says, was simply that the employee-employer relationship in that case was not one of "genuine reciprocity and equality." But this defense of *Lochner* is, of course, largely a stalking horse for his defense of privacy rights, including the right to abortion and the right to engage in same-sex activities. The protection of these and similar rights, he says, "represent extensions of an axiom of respect for self-government that pervades the Constitution."

In large measure, Tribe's approach to the invisible Constitution is both attractive and at least somewhat necessary. Tribe acknowledges that the content of the invisible Constitution is subject to debate. He recognizes that the invisible Constitution may be malleable, but argues that its relatively consistent contours suggest that it is not simply "the legal equivalent of Play-Doh." He rejects some arguments, such as those for the existence of positive welfare rights, as too attenuated to be a clear part of the invisible Constitution. And although his most controversial readings may serve liberal jurisprudential interests, he suggests that the invisible Constitution ultimately contains elements that lean both right and left. His basic examples of the invisible Constitution are chosen with care and will not come as a shock to any reader of the Court's opinions. There is plenty of evidence in this book of "things unseen."

Nor is Tribe's book simply a knock at textualism or originalism or a brief for living constitutionalism. All but the most robotic forms of textualism and originalism recognize that the Constitution must be read in light of background understandings and "invisible" postulates. At most, this is a critique of wooden textualism or originalism, and of those who would ignore not just founding history, but subsequent history and popular consensus. At its core, *The Invisible Constitution* is really an argument for a reading of the Constitution which recognizes the importance of the constitutional superstructure and the need for meta-rules of constitutional interpretation. This is not

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new, although Tribe may take the argument in new directions; he certainly acknowledges the influence of Charles Black and his famous structural interpretation of the Constitution.

Surface attractions aside, however, there are aspects of Tribe's account of the invisible Constitution that will not convince doubters and should trouble even its adherents. At the level of specifics, not all of his examples are wholly convincing. His reading of *Lochner* and the privacy cases, for example, leaves much room for disagreement over whether the invisible Constitution really contains a presumption against relationships that involve "hierarchy and exploitation," and does not tell us when that presumption applies. His suggestion that government torture *must* be "categorically forbidden by the Constitution," although he thinks no constitutional provision forbids it, simply because it is "an affront to everything America stands for," presumes rather than proves its conclusion. And, having already argued that substantive due process rights would have been better located within the Fourteenth Amendment's Privileges or Immunities Clause, he leaps to the argument that we cannot now "stick to the text" of the Due Process Clause because to do so would condone a host of terrible results. Not so. To insist on "sticking to the text" in this instance is simply to insist on reading the *right* part of the text. It seems odd to allow the invisible Constitution to triumph here simply because the Court happened to misread the Privileges or Immunities Clause. To do so only distorts the actual text and prolongs the Court's error.

At a higher level of abstraction, there is a larger problem. Tribe may be right to say that it is impossible to "generate constitutional law entirely from within a constitutional text." Some meta-interpretive rules are surely necessary. Some of them may even be substantive rules, not just procedural ones. But Tribe does not justify the *breadth* of the substantive rules he proposes. We could just as easily imagine an approach to the invisible Constitution that emphasizes the primacy of the written text and strives to be as parsimonious as possible in generating unwritten substantive rules. Tribe's general point about the invisible Constitution may be true, but he hardly justifies the sweeping invisible principles that he proposes in these pages. They are "the substance of things hoped for," not "things unseen" but proven.

Moreover, some of Tribe's prose is as thick as molasses: pity the poor reader who encounters the quicksand of language discussing "the plane determined by the vertices of the 'life, liberty, property' triangle" and "the pyramid formed from that triangle when the axis indicated by the Take Care Clause of Article II is included." The book is also a marvel of repetition. Sentence after sentence in the first hundred pages announces what Tribe will be saying, what the book is about, what he has already done, and what he will not be doing. Shorn of its repetition, this short book could be shorter still.

That repetition comes at the expense of his last and most novel section, which introduces six "modes" of reading the invisible Constitution. These modes—playfully but unhelpfully illustrated with graphics drawn by Tribe himself—are dubbed the "geometric, geodesic, global, geological, gravitational, and gyroscopic" modes of constructing the invisible Constitution. Tribe says that his alliterative approach comes "at some loss in transparency of meaning." That is an understatement. This discussion, which is crammed into the last quarter of the book, is far less clear and convincing than it might be. It is a shame that the most original section of his book is also the least developed and persuasive.

That said, Tribe's aim is to provoke a discussion, not to end it. In that, *The Invisible Constitution* must be counted as a success, although perhaps not as great a success as he would hope. What is most persuasive in this book will come as no surprise to those—textualists and non-textualists alike—who already understand that the Constitution rests on broader interpretive principles; what is most innovative in the book may still be too underdeveloped to elicit much useful dialogue. But Tribe nevertheless does a fine job of demonstrating the necessity and value of plumbing the depths of the Constitution's "dark matter."

Law and the Long War

By Benjamin Wittes

Terror and Consent

By Philip Bobbitt

*Reviewed by Vincent J. Vitkowsky**

Public attention to the war on terror has waned. The financial crisis, general weariness, and a natural preference to live within the fiction that the threat is contained have all contributed to this state of affairs. Unfortunately, the terrorists' war on us continues.

In response to the September 11 attacks, the Bush Administration implemented a policy built primarily on the law of armed conflict and the exercise of executive authority. This was an appropriate paradigm for the immediate aftermath, when it was imperative to attack and neutralize al Qaeda. To that Administration's credit, for over seven years its efforts have been successful in protecting the U.S. at home.

But public advocacy explaining these choices was not a high priority for the Bush Administration. Over time these policy choices had two negative consequences. First, within the U.S., the treatment of terrorist suspects became politically divisive. The public dialogue has been dominated by misinformation, misunderstanding, and partisan posturing. Next, the nation's reputation in the international community suffered. Granted, protecting American lives is more important than promoting the illusion of an international consensus that, by the nature of reality, cannot fully exist. Yet more could have been done to engage our principal allies, whose support and cooperation are vital.

In the long run, the law of armed conflict is neither sufficiently comprehensive nor sufficiently nuanced to address the full threat. Even assuming that counterterrorism policy could be determined primarily by the Executive Branch, participation from Congress could provide considerable public acceptance and support. The next Administration should work with Congress to build a comprehensive legal architecture for counterterrorism.

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This legal architecture must be designed for two purposes. The first and most vital is the prevention of future attacks through detention and interrogation of would-be attackers. The secondary purpose is punishment for attacks which have already occurred. This priority is what makes the legal dimension to counterterrorism different from criminal law, and what makes criminal law inadequate. Its preventive function is much more incidental than central. As a result, an effective system would almost surely require the creation of specialized national security courts with specific, carefully designed procedures.

Americans need to understand the baseline Constitutional parameters, analyze, and debate the policy options, and agree on the best framework to protect themselves. A calm, comprehensive discussion of the legal architecture should be a matter of paramount priority.

Both Benjamin Wittes' *Law and the Long War: The Future of Justice in the Age of Terror* and Philip Bobbitt's *Terror and Consent: The Wars for the Twenty-First Century* make important contributions to this discussion.

Benjamin Wittes writes with clarity and discipline. He is a former editorial writer for the *Washington Post*, and a fellow at the Brookings Institution, but his analysis defies stereotypes. He is evenhanded in his criticism, objecting to the Bush Administration's "consistent—sometimes mindless—aggressiveness and fixation on executive authority." But he also takes on the Administration's critics, whenever their opposition is "not a tenable position for anyone with actual responsibility for protecting a country."

Wittes is a pragmatist who understands the need for powers of presidential preemption against terrorist attacks. His book frames the issues central to the structure which Congress must create to legitimize this power.

His analysis is replete with respect for the duty of consequentialism. His chapter on detention and trial recognizes the need to cross what he calls a "psychological Rubicon," acknowledging that there are some people "too dangerous to set free but impossible to put on trial." He would distinguish between aliens, on the one hand, and citizens and permanent resident aliens, on the other. For aliens, he suggests a statutory scheme modeled on the administrative detention procedures for detaining the insane, and offers a few broad outlines. A federal judge should serve as an impartial finder of fact. The detainees should be provided competent counsel. Standards for admissibility of evidence should be relaxed. Detention could continue indefinitely, as long as the detainee poses a substantial threat to the security of the United States.

To implement this system, Wittes calls for the creation of a specialized national security court, broadly fashioned after the FISA court. His priority is on prevention, but he argues that this court also should be used for trials, instead of the general criminal courts.

For citizens and permanent resident aliens, however, Wittes sees the criminal courts as the only viable option for now. Here, he would limit administrative detentions to a fixed period, suggesting six months to neutralize, interrogate, and build a case for trial.

Wittes shows his intellectual integrity in the chapter entitled "An Honest Interrogation Law." He starts with the observation that except for the purest ideologues, serious people recognize that consequentialism may at times compel coercive interrogation. This is necessary not just in the hypothetical ticking time bomb scenario, but also in the interrogation of high-ranking terrorists with operational knowledge of many future potential attacks, such as Khalid Sheikh Mohammed. He marshals the evidence to support his view that there is a strong possibility that "the president of the United States [Bush] may be telling the truth and that America would be giving up a lot of intelligence of titanic importance if it forswore all coercion in all circumstances." His policy proposal is to establish baseline rules for permissible techniques for CIA interrogation which are restrictive and somewhat transparent, while keeping the granular details in a classified version available only to the congressional intelligence committees. Deviations from the baseline would be permitted upon a presidential finding to the intelligence committees identifying the specific need for other methods concerning specific detainees, as well as the specific methods—never torture—to be used. The aggregate number of such findings would be publicly available each year, but not the details. Most critically, his proposal would provide vital protections for the men and women trying to protect the country. It would immunize the interrogators from all civil and criminal liability for carrying out the methods specified within the finding.

For anyone seriously interested in developing a legal structure to help prevent terrorist attacks, *Law and the Long War* is essential reading, cutting to the chase.

Philip Bobbitt's *Terror and Consent* is something else. It is a challenging adventure for the curious. Bobbitt is a professor at Columbia Law School who writes with intricacy, complexity, and showy erudition. Everything is analyzed from multiple historical, social, and geopolitical perspectives. He tries to connect everything to everything else, and argues that almost everyone else is wrong most of the time. The frequent lack of structure in his chapters, paragraphs, and sentences, the idiosyncratic use of headings and subheadings, the distracting placement of mid-sentence non-essential footnotes, and the absence of a remotely useful index all challenge the reader. Yet if one is willing to work long and hard, there are insights worth digging out, and even a few especially valuable recommendations.

For present purposes, the important point is that in many important respects, after his convoluted analysis, Bobbitt's fundamental conclusions tend to be consistent with those of Wittes, save one.

Bobbitt, too, urges the creation of a federal court with special jurisdiction over terrorism cases, whose principal interest would be to implement a statutorily-created comprehensive system of preventive detention. The court would have special evidentiary rules to permit the use of hearsay, anonymous witnesses, testimony by affidavit, and non-Mirandized self-incriminating statements. He would also keep the ordinary federal courts available in some cases.

Bobbitt, too, recognizes the duty of consequentialism. As he puts it, "the moral calculus is different for public officials." He thus recognizes the need for coercive interrogation, but here his analysis takes a strange turn. He argues that "there ought

to be an absolute ban on torture or coercive interrogations for the purpose of collecting tactical information, with the acceptance that this ban will be violated in the 'ticking bomb' circumstance." He would subject the interrogators in those circumstances to an ex-post facto jury trial as to whether a reasonable person would have violated the "absolute" ban. This is asking far too much of the public servants who do this disagreeable but essential work, often under great stress, and always with imperfect information. They deserve the benefit of clear guidelines, clear authority, and immunity. In short, they deserve the benefit of the proposal made by Wittes.

On close reading, Bobbitt also appears to support limited coercive interrogation of detainees within the operational leadership of terrorist organizations, for the purpose of collecting strategic information, with the prior approval of a non-governmental jury. He offers no suggestions as to how this might operate practically and in real time.

In the strongest and most valuable portion of his book, Bobbitt extensively covers a subject that Wittes does not address at all, and here he makes his most important contributions. He analyzes the need to reform international law, proposing twelve concrete initiatives relating to terrorism and non-proliferation. Reform of international law is surely daunting, yet worth the attempt. The U.S. should lead this effort, to demonstrate its commitment to the rule of law, which in itself would have symbolic importance. More importantly, Bobbitt's proposals on counter-proliferation are specific enough to produce real security benefits. One is to seek an international convention making it a crime against humanity to trade in biological or fissile stocks for weapons, or to materially facilitate such trade through financing or transport. Another is to seek a UN Security Council resolution that would permit the physical interdiction of nuclear-related products going to countries that fail the IAEA's standards of transparency, cooperation, and verification.

America and other liberal democracies are faced with ongoing threats from patient enemies. Both these books should be studied by the new Administration, coolly and deliberately, but quickly, before the next attack.

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