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THE JOURNAL OF THE FEDERALIST SOCIETY PRACTICE GROUPS

SPECIAL ISSUE:
SUPREME COURT RETROSPECTIVE

Administrative Law and Regulation

The Supreme Court's Standing Problem

*By Ronald A. Cass**

A STANDING START

Standing is a concept that at its core signals a peculiar problem. In ordinary damage actions, the question of standing is irrelevant: either you can prove that you have been wronged in a way that generates liability or you cannot. But where a claimant seeks something else—especially a declaration that a government agent has acted improperly, with or without a corresponding command for different action—standing law is critical. Without some limitation on who can sue, the courts become conduits for constant challenges to the decisions of the other branches of government, transforming the least dangerous branch into the most powerful one, with unlimited second-guessing authority.

Initially, the Supreme Court found standing to challenge government action in only two settings—claimants either needed a legal right implicated in the litigation, as where they had been denied something to which they were legally entitled, or they needed a specific grant of authority to come into court. The divergent conclusions in *Perkins v. Lukens Steel Co*.[1] and *FCC v. Sanders Bros. Radio Station*[2] illustrate the application of those tests, with Sanders Bros. granted standing only because the Communications Act expressly authorized suit by any "person aggrieved or whose interests are adversely affected" by a decision of the FCC.

The Administrative Procedure Act, which was drafted contemporaneously with the *Lukens Steel* and *Sanders Bros.* decisions, provided for the two alternative avenues to judicial review of agency action, declaring that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[3] The matter seemed settled for the next quarter century. After Justice William O. Douglas wrote the majority opinion in *Association of Data Processing Service Organizations v. Camp*,[4] blending the two tests into a single, slightly incoherent hybrid, however, all bets were off. The Court has struggled now for forty years to bring sense to the law of standing. Based on recent performance, that struggle continues.

STANDING'S RISE AND FALL

The Court's move toward more permissive standing culminated in the infamous *SCRAP* decision—*United States v. Students Challenging Regulatory Agency Procedures*[5]—allowing a suit concocted by five law students as a project. Their appeal of an Interstate Commerce Commission decision to allow an across-the-board rate increase (which the students said violated the National Environmental Protection Act by failing to give a discount to recyclable materials) provided the thinnest imaginable basis for standing, yet contained enough allegations of personal harm from the damage the claimants hypothesized would be visited on the environment to satisfy five members of the Court. It is not unfair to characterize *SCRAP* as a triumph of artful pleading over practical judgment.

Until recently, *SCRAP* stood as the acknowledged high-water mark for standing. Decisions almost immediately after *SCRAP*—such as *United States v. Richardson*,[6] *Schlesinger v. Reservists Committee to Stop the War*[7] and *Warth v. Seldin*[8]—rejected suits as failing to state a real case or controversy as required by Article III, the unwaivable minimum for standing. Although those cases were not cast as appeals of agency action, the Court's insistence on both specific, particularized harm and its redressability from the litigation as constitutionally mandated elements of standing marked a clear turn away from *SCRAP*. Despite a decidedly unsteady line in the Court's standing decisions, by the time Justice Antonin Scalia penned the majority opinion in *Lujan v. Defenders of Wildlife*[9] it was widely conceded that the heyday of easy standing had gone. Indeed, while not formally overruling it, *Lujan* seemed to signal that *SCRAP* would not be decided the same way if the case came before the Court again.

Lujan in fact was very similar to *SCRAP*. Both cases were based on purported violations of environmental laws that were broadly drafted and gave rights of citizen suit. Both were predicated on assertions that plaintiffs would not be able to enjoy particular aspects of the environment that the laws protected absent some change in government action. Both claims stretched credulity in their connection of the supposed injury to the agency action at issue. The most significant difference between *Lujan* and *SCRAP* was not the claimed basis for standing but the way the Court responded to it.

Despite the assertion by Justice John Paul Stevens that the *Lujan* majority showed special disdain for environmental plaintiffs, the Court's reluctance to entertain challenges to administrative action lightly—especially at the behest of individuals who failed to demonstrate injuries that were substantially and immediately connected to the challenged conduct—was part of a broader pattern of concern about the roles of the courts and the political branches of government. During the 1980s and 1990s, the justices had become more concerned about being asked to intervene in essentially political disputes, a concern that had held sway prior to the 1960s. While the justices have not been shy about invalidating laws they view as inimical to constitutional command, they have been wary about being made the deciders of last resort in ordinary political contests.

The prevailing view has been that Congress has primacy in deciding how far to go in reducing environmental threats—or addressing other concerns—and in assigning responsibilities for administering duly enacted congressional policy choices to members of the executive branch. Judges can be asked to resolve

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legal disputes that require decision whether administrators have carried out relevant legislative directives. But the courts do not sit as general courts of revision. In that vein, the Court, most notably in *Heckler v. Chaney*,[10] turned away suits asking the judicial branch to decide when agencies should file enforcement actions—those matters are generally committed to agency discretion and not subject to judicial review. The resistance to grants of standing that effectively eliminate any restriction on judicial appeals of administrative decisions is part and parcel of the view that courts' review role is as an adjunct to legal disputes, not as the final stage in ordinary political disputes. Justice Scalia made that point emphatically in *Lujan*.

SPLIT DECISIONS

Although the view articulated by Justice Scalia in *Lujan* has gained ground over the past three decades, the justices have not been of one mind as to just how much courts should defer to the other branches, and how ready courts should be to instruct agencies on their assigned duties. Recent standing decisions illustrate the divisions.

Prior to Chief Justice John Roberts and Justice Samuel Alito joining the Court, the Court appeared to be divided into three blocs with respect to standing. Justices Breyer, Ginsburg, Souter, and Stevens were generally aligned on the pro-standing side. Justices Scalia and Thomas formed the bloc most skeptical of standing claims. Chief Justice Rehnquist along with Justices O'Connor and Kennedy occupied territory between those camps. While some cases adhered to the *Lujan* line, alignment of any justice from the middle group with the "soft standing" crowd moved the Court to a decidedly different posture.

In *Federal Election Commission v. Akins*,[11] Justice Stephen Breyer's majority opinion found standing for individuals who disagreed with positions taken by the American Israel Public Affairs Committee (AIPAC) to challenge the Federal Election Commission's decision not to pursue AIPAC for alleged violations of federal election laws. The claim was that AIPAC was a "political committee" engaged primarily in supporting candidates, rather than an issue-oriented entity, and therefore was required to provide information about its supporters and other matters to the FEC. Having failed to persuade the FEC that AIPAC had violated the law the complainants sought judicial direction that would mandate enforcement activity. The Court found that complainants had a sufficient personal interest to challenge the FEC decision, emphasizing that a different decision on AIPAC's status would have required AIPAC to disclose information desired by complainants.

Akins illustrates a sharp divide between the "soft standing" and the "hard standing" camps. Dissenting Justices Scalia, O'Connor and Thomas saw the outcome in *Akins* as starkly at odds with *Heckler* as well as with the standing analysis in *Lujan.* The dissenters expressed again their strong concerns that overly liberal standing rules transfer power from the political branches to the courts in ways at odds with constitutional design. That concern supports a more restrictive rule. Justice Breyer and the majority, however, were not concerned about the general issue of institutional competence, preferring to address the matter on the basis of the individual case. The broad right-of-review provision at issue in *Akins* persuaded the majority that the political branches had knowingly subjected FEC enforcement choices to judicial review, which in the majority's view eliminated the basis for prudential concerns with standing.

Essentially the same division and same result obtained in *Friends of the Earth v. Laidlaw Environmental Services, Inc.*[12] Two environmental groups were given standing to sue the defendant corporation for failing to comply with restrictions on its discharge of certain pollutants. Justice Ruth Ginsburg's opinion for the majority accepted plaintiffs' assertions of personal harm from the violations, notwithstanding the district court's findings that the violations had no adverse effect on the environment and the absence of support for the alleged personal connections to the supposed environmental harms. The majority made clear its willingness to accept the vaguest assertions of personal harm from environmental degradation as sufficient for standing when legislation included a broad right-of-review provision, moving the Court back toward its position in *SCRAP*. Justices Scalia and Thomas again registered a vigorous dissent.

STANDING IN THE ROBERTS COURT

The addition of Chief Justice Roberts and Justice Alito to the Court has shifted the center of gravity on standing issues slightly toward the standing skeptics. Roberts and Alito have staked out territory between the Scalia-Thomas position and Justice Kennedy's less clearly defined (and more malleable) approach. Their voting pattern, however, looks very similar to the "hard standing" justices, leaving Kennedy now as the lone swing vote.

Like Chief Justice Rehnquist and Justice O'Connor, whom they succeeded, the newest members of the Court accept the *Lujan* formulation requiring claimants to demonstrate "an injury that is concrete, particularized, and actual or imminent, fairly traceable to the defendant's challenged behavior, and likely to be redressed by a favorable ruling."[13] Like Scalia and Thomas, Roberts and Alito are skeptical of broadly empowering judges to supervise the other branches. They see judges as required to evaluate those branches' compliance with legal commands only as part of the courts' mandate to adjudicate legal rights in more defined conflicts between discrete parties. In Lon Fuller's terms, the newest justices join with Scalia and Thomas in seeing courts as arbiters of concrete, bipolar arguments, not "polycentric" disputes that implicate large numbers of potential contestants. But the new Chief Justice and Justice Alito are more willing than Justices Scalia and Thomas to try and fit those instincts within the language of prior cases and to address them on a case-by-case basis.

So, for instance, in *Hein v. Freedom from Religion Foundation, Inc.*,[14] Justice Alito wrote a decision, joined by the Chief Justice and Justice Kennedy, rejecting a challenge to executive use of funds to support conferences and other outreach to faith-based organizations. The plurality accepted the precedent of *Flast v. Cohen*,[15] which had allowed taxpayer standing to challenge congressional spending programs as violating the Establishment Clause, but the plurality concluded that *Hein* differed from *Flast* in questioning discretionary executive actions, rather than specific congressional action. For Alito, Roberts, and Kennedy, that difference put plaintiffs outside the limited ambit of taxpayer standing approved in

Flast. While Justice Kennedy wrote separately to emphasize his support for *Flast*, Roberts and Alito were content to accept it in form, but not in substance. The remaining six justices saw no meaningful difference between the claims in *Hein* and *Flast*, with Justices Scalia and Thomas urging express overruling of *Flast* and Justices Souter, Stevens, Ginsburg, and Breyer arguing that standing in *Hein* should follow directly on the basis of *Flast*'s precedent.

As in *Hein*, Chief Justice Roberts and Justice Alito generally have agreed with Justices Scalia and Thomas on outcomes even if not on analysis. In cases like *DaimlerChrysler v. Cuno*[16] and *Lance v. Coffman*[17] (both rejecting standing), and *Davis v. FEC* (confirming standing), those four justices were in accord. They were in accord as well in *Massachusetts v. Environmental Protection Agency*,[18] dissenting from the majority's conclusion that standing existed for Massachusetts to obtain judicial review of the EPA's decision not to regulate carbon dioxide emissions as a pollutant under the Clean Air Act.

Massachusetts v. EPA deserves special attention because, with Justice Kennedy swinging over to the "soft standing" crowd for that case, the Court finally rendered a decision that threatened *SCRAP*'s position as the epitome of liberal standing. The majority opinion, written by Justice Stevens, predicated standing on a conjectural set of claims that, even if accepted, hardly amounted to a demonstration of harm that was actual or imminent. Turning Justice Stevens's complaint in *Lujan* about the Court's inhospitable treatment of environmental claims on its head, *Massachusetts v. EPA* is best explained by the majority's extraordinary solicitude for any suit assertedly filed to protect the environment. As Chief Justice Roberts's opinion for the four dissenting justices explains, it is difficult to state with a straight face that *any* of the traditional requisites for Article III standing was met. Instead, standing rested on a remote, speculative, generalized harm that was extremely unlikely to be significantly ameliorated—much less remedied—by the actions plaintiffs sought. Further, the dramatic revision of standing law there was merely prelude to a decision requiring the majority to bend, twist or overlook a host of other administrative law doctrines to reach its desired result.

LOOKING AHEAD

Standing law today defies ready description in neutral, analytic terms. The tug-of-war between the four-justice "soft standing" bloc and the four justices that take a harder line toward standing continues to produce decisions that swing between those poles. Although Justice Kennedy may find the outcomes congenial in all cases, no one else seems able to articulate a coherent rationale for the pattern of Supreme Court decisions over the last decade. It remains to be seen whether the Court will drift toward the liberal standing position of thirty-five years ago or return to the harder standing line taken for much of the 1980s and 1990s. For the moment, the Court's standing decisions constitute a warning that real injury and actual redressability will most likely be required—but they also invite appeals to the instincts that brought Justice Kennedy along in a case that defied all the imprecations of the prior three decades about the risks of making standing law an open door.

Endnotes

1 310 U.S. 113 (1940).
2 309 U.S. 470 (1940).
3 5 U.S.C. § 702.
4 397 U.S. 150 (1969).
5 412 U.S. 669 (1973).
6 418 U.S. 166 (1974).
7 418 U.S. 208 (1974).
8 422 U.S. 490 (1975).
9 504 U.S. 555 (1992).
10 470 U.S. 821 (1985).
11 524 U.S. 11 (1998).
12 528 U.S. 167 (2000).
13 Davis v. Federal Election Commission, 128 S.Ct. 2759, 2768 (2008).
14 127 S.Ct. 2553 (2007).
15 392 U.S. 83 (1968).
16 547 U.S. 332 (2006).
17 127 S.Ct. 1194 (2007)
18 127 S.Ct. 1438 (2007).

Federal Preemption at the Supreme Court

*By Daniel E. Troy & Rebecca K. Wood**

> This Constitution, and the Laws of the United States... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> - U.S. Constitution, art. VI, cl. 2

It has been a striking time for federal preemption at the Supreme Court. Last term, the Court heard six preemption cases, deciding four in favor of federal preemption by large margins, one against preemption, and coming to a draw in the sixth case, in which Chief Justice Roberts did not participate.[1] In the coming term, the Court is poised to hear two additional significant preemption cases.[2] Although the number of preemption cases considered by the Court this term is actually somewhat below the historical average, the Court does appear to be deciding in favor of preemption somewhat more often than usual, and by greater margins.[3] This term's preemption decisions tended to reflect broad agreement, with a series of nine-, eight-, and seven-Justice majorities—often joining together some of the Court's most liberal and conservative members. The following Table illustrates the point.

October 2007 Term: Cases Involving Federal Preemption

Case	*Vote*			*Preemption Upheld*	*Express Preemption*
	Majority (* wrote)	Concur	Dissent		
Rowe v. N.H. Motor Trans. Ass'n	9 *Breyer*, Roberts, Stevens, Kennedy, Souter, Thomas Ginsburg, Alito, Scalia (in part)*	2 *Ginsburg, Scalia (in part)*	0	Yes	Yes
Riegel v. Medtronic	8 *Scalia*, Roberts, Kennedy, Souter, Thomas, Breyer, Alito, Stevens (in part)*	1 *Stevens (in part and in judgment)*	1 *Ginsburg*	Yes	Yes
Preston v. Ferrer	8 *Ginsburg*, Roberts, Stevens, Scalia. Kennedy, Souter, Breyer, Alito*	0	1 *Thomas*	Yes	Functionally (see discussion)
Exxon Shipping Co. v. Baker	8 (on this point) *Souter*, Roberts, Scalia, Kennedy, Thomas, Stevens, Ginsburg, Breyer (Alito took no part)*	2 *Scalia, Thomas*	0	No	Yes
Chamber of Commerce v. Brown	7 *Stevens*, Roberts, Scalia, Kennedy, Souter, Thomas, Alito*	0	2 *Breyer, Ginsburg*	Yes	Functionally (see discussion)
Warner-Lambert v. Kent	4 *unreported (Roberts took no part)*	0	4 *unreported*	*no opinion*	No

Critics from a variety of perspectives contend that the Court has "display[ed] a troubling trend" in favor of federal preemption that is inconsistent with the Court's supposedly traditional presumption against preemption.[4] We unpack this charge and offer several observations that may help explain where the Court is coming from and where it is going.

From the outset, it is worth pausing to review some preemption fundamentals. Simply stated, preemption is the power of federal law to trump state law in certain circumstances. Of course, preemption is nothing new. It is rooted in the Supremacy Clause of the Constitution, which establishes that the federal "Constitution, and the Laws of the United States... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[5] Under well-known standards, federal preemption may be "expressed or implied" in the pertinent federal regime.[6] Express preemption involves discerning the meaning of an explicit preemption provision. There are "at least two types of implied pre-emption: field pre-emption... and conflict pre-emption."[7] Field preemption recognizes limited, but exclusive, areas of federal domain even in the absence of an explicit preemption provision from Congress.[8] Conflict preemption tends to paint with a narrower brush and applies to particular issues "where it is impossible for a private party to comply with both state and federal law,"[9] or where state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" or of a federal agency acting within the scope of its congressionally delegated authority.[10]

Preemption debates can make for odd coalitions that appear to defy conventional Left/Right, liberal/conservative analysis.[11] On the one hand, plaintiffs' counsel, consumer groups, and state officials may contend that federal preemption improperly displaces the states' traditional police power to protect their citizens, particularly in matters involving public health and safety. On the other hand, federal agencies and

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entities regulated by those agencies may urge that preemption is a necessary bulwark "against unwarranted and inconsistent state interferences with the national economy and against aggressive trial lawyers and attorneys general who upset carefully crafted regulatory compromises."[12] Even advocates of federalism, within its proper sphere, may recognize a profound need to protect regulated entities from contrary state-law liabilities when conduct is closely regulated and mandated by federal government action. Indeed, although their voting records are still emerging, it may well be that notwithstanding a general sympathy towards federalism (at least where the federal government is intervening in areas beyond its proper domain), Chief Justice Roberts and Justice Alito—both of whom were federal executive and judiciary branch officials for years before being elevated to the Court—are comfortable with upholding the exercise of federal power, at least when it occurs within its properly delegated realm. Indeed, they both joined the pro-preemption majority in each of the four preemption decisions they both participated in this term.

The tendency towards lopsided majorities that emerged in this term's preemption cases may be part of a more general and self-conscious effort by the Court to produce less fractured decisions and may also reflect several features about those cases. We make three general observations about the Court's current preemption cases:

First, there is a significant focus on statutory interpretation, rather than grand constitutional conflicts, such as federalism. Although not completely silent, the lurking federalism debate was largely quiet this term, especially where Congress had spoken in an express preemption provision or federal policy was otherwise clear. Indeed, a majority of the Court's cases involved express preemption—which requires discerning the meaning of an express statutory provision, rather than divining Congress's intent through the application of implied conflict preemption principles—or some functionally similar form of federal statutory analysis. This is not to suggest that implied preemption arguments are weaker as a doctrinal matter,[13] but the absence of text as a focal point may lead to a tendency to fracture and open the door to more controversial aspects of a preemption analysis. Unless one posits that the statutes at issue this term were simply unusually clear—a point that seems questionable given that the Court accepted review to answer disputes in the lower courts about their meaning—there seems to be something else going on. One answer is that they reflect a concerted and self-conscious effort, under the guidance of the new Chief Justice, to build consensus, even if it means issuing narrower rulings.

At his confirmation hearing, Chief Justice Roberts expressed a commitment to working towards increased clarity and uniformity in decisions: "one of the things that the Chief Justice should have as a top priority is to try to bring about a greater degree of coherence and consensus in the opinions of the court" because "we're not benefited by having six different opinions in a case."[14] In keeping with this goal, there has been some apparent movement towards narrower opinions that avoid hot-button, controversial issues in favor of a narrower position more justices can join. Although it is too soon to tell whether this will be a hallmark of the Roberts Court, a noticeable feature overall this term has been a decrease in 5-4 decisions. Overall, only 11 of the 67 signed opinions (16.4%) were decided 5-4; last term, in contrast, there were 24 split decisions in 69 signed opinions (34.3%).[15] In addition, the Court's business cases appeared to produce a higher level of agreement than non-business cases: though these cases accounted for less than 30% of the overall caseload, nearly half were decided by 9-0 or 8-1 margins.[16] For those living under these decisions, of course, this development may be something of a two-edged sword. On the one hand, increased clarity and certainty of legal rules as embodied in a single majority opinion may make it easier to appreciate and plan for risk—at least in fact patterns that closely resemble the case the Court decided. On the other hand, extremely narrow consensus opinions that hew closely to the circumstances in the given case may offer scant guidance beyond the four corners of the circumstances presented. Paradoxically, this may actually leave parties with less certainty and necessitate more litigation to unpack the outer boundaries of the Court's decision.

Second, other things being equal, the Court appears more inclined towards preemption where a case involves matters of special national interest or where an expert federal agency has issued a calibrated judgment that is threatened by contrary state action. The Court seems receptive to the plight of regulated entities that, absent preemption, would be subjected to a patchwork of dueling state and federal burdens. Of course, as detailed below, the perspective from which one begins this analysis—that of the regulating federal agency or the state—may influence where one ends up.

Third, a related point: the Court appears to take some comfort in the reality of a federal agency having applied its expert judgment within the scope of its delegated power and urging that there be preemption. It generally did so, however, without expressly wading into a formal—and sometimes divisive—analysis of the nature or degree of deference due to the agency.

I. Focus on Statutory Interpretation

A significant feature of this term's preemption cases is that rather than explicitly turning on sweeping philosophical debates about the merits of federal power-versus-federalism (sometimes embodied in presumptions about preemption)[17] or wading into administrative law battles about the degree of deference due federal agencies, many opinions hewed closely to the text of the federal statute, with a practical nod to the federal interests at stake in the overall federal scheme relating to that subject matter. Critics of judicial overreaching can take some comfort in this approach for interpretations that more closely follow the statutory text tend to give the political branches greater control.

Perhaps as a result of this tailored approach, this term's cases tended to produce significant pro-preemption majorities. Indeed, on the same day in February 2008, the Court issued a trio of preemption decisions in which it spoke in nearly one voice:[18] *Rowe v. New Hampshire Motor Transportation Association*[19] was unanimous on the core holding (with two justices also writing separate concurrences); *Riegel v. Medtronic, Inc.*[20] and *Preston v. Ferrer*[21] each had only one dissenter (with

one justice in *Riegel* also separately concurring in part with the majority). As detailed below, each of these cases turned on a federal statute with an express preemption provision—or at least a federal provision that operated very much as such. The Court embraced a textual approach, conscious of the overall statutory setting in which the provision arose, rather than engaging in a broader inquiry into any potential congressional purpose less readily reflected in the statutory language itself. Put another way, even if "[t]he purpose of Congress is the [Court's] ultimate touchstone" in judging preemption,[22] where that purpose can be discerned from text and statutory context, the justices appear to have been able to assemble larger coalitions in favor of preemption, without delving into perhaps more controversial discussions of legislative intent or other hot-button methods for decision-making.

Indeed, in both *Rowe* and *Riegel*, the Court's interpretation of the statutes' preemption clauses stayed close to the language of the express preemption provision—even though a minority of justices expressed doubt about whether Congress actually intended the preemption that resulted from this reading. For example, as Justice Stevens put it in his separate concurrence in *Riegel*, even though the "significance" of the express preemption provision perhaps "was not fully appreciated until many years after it was enacted" and "[i]t is an example of a statute whose text and general objective cover territory not actually envisioned by its authors," nevertheless, "'it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'"[23] Thus, although Justice Stevens "agree[d]" with the "description of the actual history and principal purpose of the pre-emption provision at issue in this case" articulated in Justice Ginsburg's dissent, he—like the remaining seven justices—was "persuaded that its text *does* preempt."[24]

In contrast, as detailed below, where the preemption analysis did not principally involve construing an express preemption provision, the justices tended to be more fractured.

A. Rowe v. New Hampshire Motor Transport Association

In *Rowe*, the Court rejected a State's intent-based policy arguments about what the pertinent federal regime meant. Instead, the Court parsed the express preemption clause and focusing on precedent interpreting similar statutory language. At issue was an express preemption provision of the Federal Aviation Administration Authorization Act of 1994 (FAAAA) that prohibits states from enacting "any law 'related to' a motor carrier 'price, route, or service.'"[25] In the face of this provision, Maine enacted a law requiring companies shipping tobacco products into the state to use a delivery service that assured recipients were at least eighteen years old.[26] Invoking its earlier interpretation of similar preemption language in the Airline Deregulation Act of 1978, the Court began its analysis with the general principle of statutory interpretation that "'when judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its judicial interpretations as well.'"[27] Although the Court acknowledged that the Maine provision, in referencing "shippers" rather than "carriers," "is less 'direct' than it might be," even so, the effect is the same: "carriers will have to offer tobacco delivery services that differ significantly from those that, in the absence of [state] regulation, the market might dictate."[28] Accordingly, it is preempted.[29]

Maine urged that there should be an implied public health exception to the express preemption provision because its law "help[s] it prevent minors from obtaining cigarettes" and "federal law does not pre-empt a State's efforts to protect its citizens' public health, particularly when those laws regulate so dangerous an activity as underage smoking."[30] The state contended that an implied public health exception could be discerned based on legislative history and a separate federal enactment denying federal funds to states that refuse to forbid tobacco sales to minors.[31] Criticizing Maine's proposed exception as amorphous and without apparent limits, the Court made quick work of rejecting these arguments. Surveying the statute's list of express exceptions to the preemption provision, it found that none resembled the state's theory and refused to read into the statute exceptions that were not made explicit.[32] The Court likewise readily concluded that neither the legislative history nor a separate federal enactment answered the question presented.[33]

More broadly, the Court emphasized that a state's traditional interest in public health does not solve the preemption question here because "'[p]ublic health' does not define itself" and may depend on the "kind and degree" of the applicable risk. [34] Here, if all states individually could regulate carrier services, national uniformity would be undermined:

> Given the number of States through which carriers travel, the number of products, the variety of potential adverse public health effects, the many different kinds of regulatory rules potentially available, and the difficulty of finding a legal criterion for separating permissible from impermissible public-health-oriented regulations, Congress is unlikely to have intended an implicit general "public health" exception.[35]

Justice Ginsburg, who might be expected to be more receptive to arguments that sound in Congress's ultimate purpose, concurred in the result, even though she wrote separately to note that Congress probably did not intend a preemption outcome.[36] Noting that at the time of the FAAAA's passage there was a strong federal policy in favor of restricting minors' access to tobacco, she encouraged Congress to fill the "perhaps overlooked" regulatory gap FAAAA created.[37]

B. Riegel v. Medtronic

The Court continued its focus on the text of an express preemption provision in *Riegel*. There, the Court held that the express preemption provision of the Medical Device Amendments of 1976 (MDA) to the Federal Food, Drug, and Cosmetic Act (FDCA) barred certain state-law claims regarding the 1% of medical devices to which FDA had extended pre-market approval (PMA). The PMA process is FDA's most rigorous level of review, in which it determines the safety and effectiveness of a specific medical device after many hundreds or thousands of hours of agency review and imposes parameters on every aspect of the device, including its design and labeling.[38] The MDA prohibits States from enforcing any "requirement" for medical devices that is "different from, or in addition to, any [federal] requirement applicable... to the device."[39]

Riegel followed from the logic of *Medtronic, Inc. v. Lohr*,[40] in which FDA's generally less vigorous oversight of so-called 510(k) medical devices was held insufficient to impose federal "requirements" within the meaning of the express preemption provision. In so doing, *Lohr* juxtaposed the 501(k) process against the "rigorous" PMA process, observing that "[t]he § 510(k) notification process is by no means comparable to the PMA process."[41] It concluded that 501(k) review is "quite unlike a case in which the Federal Government has weighed the competing interests relevant to the particular requirement in question, reached an unambiguous conclusion about how those competing considerations should be resolved in a particular case or set of cases, and implemented that conclusion via a specific mandate on manufacturers or producers."[42] In the wake of *Lohr*, the vast majority of lower courts had recognized preemption in the PMA context.[43]

Riegel echoed this analysis.[44] See § III, *infra*. After concluding that PMA review imposed federal "requirements," the Court relied on a line of precedent to hold that state law claims—including common law claims and jury verdicts—constitute state "requirements" under the provision.[45] Because the state requirements plaintiff sought to enforce were different from the federal requirements, they were preempted under the terms of the express preemption provision.[46]

The sole *Riegel* dissenter, Justice Ginsburg, failed to persuade any other justice to withhold preemption based on a reading of what Congress may have intended when it enacted the MDA. Indeed, Justice Scalia, writing for the eight-justice majority, emphasized that its decision turned on the plain text of the statute and that it "is not [the Court's] job to speculate upon congressional motives."[47] In contrast, in dissent, Justice Ginsburg recounted the history surrounding the legislation's enactment, emphasizing that Congress passed the MDA around the time of the Dalkon Shield litigation, which had resulted in hundreds of lawsuits.[48] Given this context, the dissent opined that Congress was familiar with common law suits over medical devices and would have preempted common law claims more clearly if it had intended to do so.[49] As noted, this view failed to sway even one other justice, notwithstanding a nod from Justice Stevens to Justice Ginsburg's historical examination, in the face of the statutory enactment.

C. Preston v. Ferrer

Although there is some debate about whether it involves an express preemption provision as such, Preston provides another example of a large majority of Justices coalescing around the text of a federal provision that expressly privileges arbitration elected by private contract over court-based adjudication.[50] As all but one justice agreed, the Federal Arbitration Act (FAA) "declares a national policy favoring arbitration of claims that parties contract to settle in that manner" that "forecloses state legislative attempts to undercut the enforceability of arbitration agreements."[51] Indeed, "[t]he FAA's displacement of conflicting state law is now well-established and has been repeatedly affirmed."[52]

This case involved a contract between a television personality (Judge Alex) and his talent agent that required the parties to arbitrate "'any dispute... relating to the terms of [the contract] or the breach, validity, or legality thereof... in accordance with the rules [of the American Arbitration Association].'"[53] Judge Alex challenged the validity of the contract, urging that such matters must be heard by the state labor commissioner.[54] Justice Ginsburg, writing for an 8-1 majority, observed that the "best way to harmonize" the competing provisions was for the arbitrator, not the state labor commissioner, to decide the contract's validity under state law.[55] Even though the state eventually would have allowed arbitration to occur following the labor commissioner's review, such a delay in final resolution would be contrary to the FAA's purpose, to speed dispute resolution.[56] Alone in dissent, Justice Thomas did not expressly critique the majority's interpretation of the FAA, but wrote briefly to adhere to his position that the FAA does not apply to state proceedings.[57]

D. Chamber of Commerce v. Brown

Although the National Labor Relations Act (NLRA) contains no express preemption provision as such, a seven-Justice majority seized on language in a recent NLRA amendment, concluding that it "forcefully buttresses the pre-emption analysis," rendering preemption "both implicit and explicit" and making this case even "easier" than prior NLRA cases on point.[58]

At issue in *Brown* were provisions of California law that forbid employers that received state funds from using those funds to "assist, promote, or deter union organizing."[59] The Court held that Congress "implicitly mandated" preemption of certain matters "necessary to implement federal labor policy," including that "certain zones of labor activity be unregulated."[60] Although the NLRA prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing]" employees in their decisions whether to organize,[61] a later amendment to the Act clarified that an employer's "express[ion] of any views, argument, or opinion" about organizing that contains no threat of reprisal or a promise of benefit is not prohibited.[62] The Court focused on this amendment, calling it "explicit direction from Congress"[63] that employers and employees both should be allowed to enter a "free debate" about unionization.[64] Because the California statute curtailed this debate, the NLRA preempted it.

In dissent, Justices Breyer and Ginsburg urged that the case for preemption in the NLRA's text was not nearly as clear as the majority suggested. For one thing, the state statute did not explicitly regulate employers' speech. Employers that received state funds still could have expressed their opinion about union organizing; the state statute only said not to "do so on [the state's] dime."[65] The dissent charged that the majority's reliance on the state statute's preamble implicitly recognized this deficiency given that it was the preamble, rather than the statute's text, that detailed the state's policy "not to interfere with an employee's choice" about whether to unionize.[66] A reading of the statute more sympathetic to the state's position would have been that the state was merely trying to control how its money was spent and wanted to disengage from aiding one side in a labor dispute, in harmony with federal labor policy. But the presence of express language from Congress appeared to tip the balance for the majority.

E. Exxon Shipping Co. v. Baker

Although the focus of the *Exxon* case was punitive damages, the Court also had occasion to address briefly whether an express preemption provision of the Clean Water Act (CWA) preempts the availability of maritime punitive damages under federal common law.[67] The pertinent statutory provision protects "navigable waters... , adjoining shorelines, ... [and] natural resources," of the United States, subject to a savings clause that reserves "obligations... under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any oil."[68] Although the Court struggled to discern the company's precise preemption theory, all eight justices participating in the decision found it "too hard to conclude that a statute expressly geared to protecting 'water,' 'shorelines,' and 'natural resources' was intended to eliminate *sub silentio* oil companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals."[69] The Court also found "untenable" the argument that the CWA "somehow preempts punitive damages," but not compensatory damages.[70] Although the Court's preemption analysis is minimal, this appears to join the general trend of large majorities of justices coalescing around a specific statutory provision—this time all agreeing there was no preemption under the text.

F. Warner-Lambert v. Kent

In *Kent*—the sole exclusively implied preemption case the Court heard last term—the vote fractured 4-4.[71] Although there is no opinion from which reliably to discern what animated the different justices' votes, in contrast to the super-majorities witnessed in the five decisions in which the Court coalesced around an express (or pseudo-express) preemption provision, the absence of an express provision may have made consensus more difficult. This is not to suggest that the case for implied preemption is necessarily weaker in a given case than in the express preemption context—indeed, as detailed below, there was a strong case for implied preemption in *Kent*—but only that the absence of an express statute may open the door to additional doctrinal issues that make it harder for the Court to reach broad agreement. We address some of those currents below.

II. Federal and State Interests

Although the presence of express preemption provisions in a majority of the Court's cases allowed it to avoid focusing—or fracturing—on federal-versus-state power issues, there still appears to be a tendency to uphold preemption where the issue at hand was thought to be fundamentally federal. Indeed, although the Court sometimes has recognized a presumption *against* preemption in matters traditionally "reserved" to the states,[72] the rationale for any such thumb-on-the-scale evaporates when the federal government acts in an area in which it has "exclusive, or at least plenary, authority to regulate"[73] or where there is a conflict between federal and state law because "one can assume that Congress or an agency ordinarily would not intend to permit a significant conflict" between federal and state law.[74]

Historically, for example, the Court has been particularly willing to preempt state laws that touch on foreign affairs.[75] This approach is echoed in other federal contexts in which Congress, or an expert federal agency to which Congress delegated decision-making authority, see § III, *infra*, already has balanced and resolved competing policy objectives.[76] Indeed, despite the overall focus on statutory analysis, this theme played out in this term's decisions in which the Court noted established national policies governing motor carrier transportation (*Rowe*),[77] regulation of complex medical devices (*Riegel*),[78] arbitration of private disputes (*Preston*),[79] and labor law (*Brown*)[80] which the state laws at issue would undermine.

There also was a strong argument for the uniquely federal nature of the question at issue in *Kent*. That case involved a product liability suit filed against a pharmaceutical company alleging personal injuries caused by taking a prescription medication. Michigan, where the patients filed the suit, provides a statutory defense to suits against manufacturers of prescription drugs that were approved by FDA and in compliance with FDA requirements.[81] The state statute creates an exception to this defense, however, which requires the state fact-finder to speculate whether (1) the manufacturer intentionally withheld or misrepresented information to FDA that was required to be submitted under various provisions of federal law (2) that would have materially affected FDA's decision to approve the drug for nationwide marketing or withdraw it.[82] Although the plaintiffs asserted that this exception applied, FDA itself never found any violation of its federal disclosure requirements or took any action to withdraw the product because of fraud on the agency.[83] The Solicitor General and the company contended that determining whether there had been proper disclosures to a federal agency and how an agency would respond to any fraud on it was a matter exclusively reserved to the agency itself.[84] Indeed, the Court had previously held in *Buckman Company v. Plaintiffs' Legal Committee* that "[s]tate-law fraud-on-the-FDA claims inevitably conflict with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives" and are therefore preempted.[85]

The Second Circuit below, however, procedurally distinguished the claims in *Kent* from *Buckman*, ruling that the claims here were not for fraud-on-the-FDA per se, but "sound[ed] in traditional state tort law."[86] As the Solicitor General and the company pointed out, however, this is a distinction without a difference. Consistent with *Buckman*, "the relationship between a federal agency and the entity it regulates is inherently federal in character because the relationship originates from, is governed by, and terminates according to federal law" and "[p]olicing fraud against federal agencies is hardly a field which the States have traditionally occupied."[87] The Court's divide in *Kent* may stem from a difference of opinion in whether to view the question presented as sounding in traditional state tort law or in federal law. Where you start may be where you end up.

Whether the Court begins from the perspective of the federal or state interest may partly explain the outcome in the other preemption cases as well. In *Brown*, for example, the state argued for its prerogatives in controlling how its own state treasury funds were used. But the Court viewed *Brown* as primarily implicating federal labor policy instead of a state's control over its funds. Nor was the Court receptive to arguments

that the state statute actually was consistent with and furthered federal labor policy. Indeed, the *Brown* dissent argued that Congress had even used language identical to the state statute to prevent employers from using federal funds to interfere with union organizing.[88] What was good for the federal goose, California argued, was good for the state gander. Nevertheless, the Court reasoned that the state statute improperly implicated "federal labor policy" because Congress intended to strike a balance on employer speech that neither violated the employers' First Amendment rights nor coerced employees.[89] That balance prevented states such as California from "opening the door to a [fifty]-state patchwork of inconsistent labor policies."[90]

The Court used similar language to describe the nature of the federal interest in *Riegel* and *Buckman*. In *Riegel*, the Court noted that state tort law threatens the federal agency's cost-benefit analysis.[91] See § III, *infra*. In *Buckman*, a state tort law finding that the manufacturer had made false statements to FDA was preempted because of the "delicate balance" FDA must strike in evaluating submissions from regulated entities and the need to prevent a "deluge of information" from being submitted to the agency during the approval process out of nothing more than a self-protective desire to avoid potential state tort liability rather than for a legitimate federal regulatory purpose.[92] Thus, even though the justices may be more apt to fracture in the absence of an express preemption provision, a properly defined federal interest may still bode well for preemption.

III. Federal Agency Expertise and Review

The rise of the administrative state has brought with it heavy federal regulation. Compliance costs can burden regulated entities, particularly as they endeavor to meet local, state, federal, and international demands. This can put regulated entities in inconvenient or even untenable positions as they cope with regulations that may impose competing and even mutually exclusive requirements. These realities have resulted in an apparent increase in *actual* deference to the federal agency in at least two senses.

First, although the Court has not been enthusiastic about undertaking formal administrative deference analyses—and detailing what degree of deference various agency interpretations of the statutes, regulations or other matters they author or administer are entitled to under the well-known but often divisive frameworks of *Chevron*, *Auer*, and *Skidmore*[93]—in practice, the Court nonetheless has tended to follow the agency's position on whether there should be preemption. For example, as one commentator has observed, in all but one of the recent preemption cases involving product liability issues, the Court has *in fact* followed the federal agency's preemption position (be it pro or con in a given case), even though the Court generally did not engage in a formal agency deference analysis.[94]

In *Lohr*, for instance, the Court simply stated that the agency's interpretation—in that case, against preemption for the less heavily regulated medical devices at issue in that case—"substantially informed" its reading of the express preemption statute.[95] Similarly this term, Justice Scalia, writing for the majority in *Riegel*, again picked up on this "substantially informed" language with respect to the agency's position that the more heavily regulated devices at issue in that case implicated federal "requirements" within the meaning of the preemption provision; but the Court did not explicitly cite agency deference doctrine or provide further explanation.[96] Indeed, on another point, the Court sidestepped deciding the case on administrative law grounds even though they may have supported the majority's view. The plaintiffs had pointed to an FDA regulation that limited the pertinent statute's preemptive scope where "state or local requirements [were] of general applicability" to argue against preemption.[97] FDA interpreted its own regulation only to withhold preemption from general duties such as fire codes or rules about trade practices, not the tort duties at issue in *Riegel*.[98] There is a strong argument that the agency's reading of its own regulation was entitled to substantial deference under *Auer*. Yet Justice Scalia "[n]either accept[ed] nor reject[ed]" FDA's interpretation, avoiding the matter and concluding that the regulation was unnecessary to the outcome of the case.[99]

Second, as noted above, the Court has a history of crediting federal agency balancing of complicated policy issues when contrary state law threatens to disrupt that balance. Where an expert federal agency has considered an issue within the proper bounds of its authority, the Court appears to give significant deference to the agency about the proper solution. One possibility is that the Court may extend actual deference to an agency's view where the Court is convinced about the rigor of the process Congress or the agency has devised for reviewing a particular policy issue. This review of the regulator may be born of a growing recognition of the agencies' comparative competency to make decisions in highly technical areas.

In *Riegel*, for example, the Court assessed the comparative advantage of having an expert agency make technical public health judgments about the safety and effectiveness of complex medical devices, instead of a jury. The majority opinion, while disclaiming reliance on anything but the controlling statutory text, took care to detail FDA's extensive process for determining whether certain medical devices are safe and effective. The opinion devoted numerous pages of discussion to FDA's "rigorous regime of premarket approval" in which "FDA spends an average of 1,200 hours reviewing each application" and reviews a "multivolume application" that includes "a full description of the methods used" in manufacturing and processing the device."[100]

As between a jury and FDA, the former is likely to be less competent at determining trade-offs between a device's safety and effectiveness because the jury "sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court."[101] It would "make little sense" for Congress to have intended dual FDA and jury determinations of medical device safety, the opinion concluded, because where those determinations conflict they would expose device manufacturers to contradictory obligations.[102] Consistent with this approach, in the earlier *Lohr* case, the Court also had looked to the rigor of the federal agency review to aid in deciding whether state actions were preempted. Observing that the review at issue in *Lohr* merely judged a device's "*equivalence* [to other devices], not safety" and did "not in any way denote official FDA approval of [the] device" the Court came to the opposite conclusion,

that no preemption was warranted for the different category of devices at issue in *Lohr*.[103]

In the upcoming term, the Wyeth prescription drug preemption case provides the Court with an opportunity to revisit its actual deference to agency expertise and an agency's call for preemption.[104] In *Wyeth*, although Congress charged FDA with determining the appropriate warnings for prescription drugs marketed in the United States—and even though the agency was "fully aware of the risk" ultimately visited on the plaintiff and approved calibrated warning language alerting prescribers to that potential risk[105]—the plaintiff challenged the warning as inadequate and told the jury "we don't rely on the FDA to... make the safe[ty] decision" or determine "the extent to which [a company] should have warned" because "FDA doesn't make the decision, you do."[106]

The plaintiff's argument ignores the federal regulatory process for approving prescription drugs for marketing on the nationwide market—an issue reserved to FDA and its statutory predecessors for over a century[107]—and may become a focus of the analysis if the Court adheres to the interpretive methods discussed above. The United States and other amici detail FDA's extensive labeling review process.[108] In striking parallel to the PMA process at issue in *Riegel*, FDA's review process for prescription drugs is "expert" and "rigorous," "scrutiniz[ing] everything about the drug," and the goal of which is to "strike a balance" between notifying prescribing physicians and their patients about a drug's potential dangers and overwarning (which may lead to prescribing physicians avoiding treatments whose potential benefits would outweigh their potential risks for a particular patient out of unsubstantiated fears).[109] Indeed, this balance is peculiarly difficult in the context of prescription drugs because the potential for harm is often inseparable from the potential for benefit.[110]

Justice Breyer appeared to foreshadow this core issue in *Wyeth* when questioning plaintiffs' counsel at the *Kent* oral argument:

> You came up and began and said this drug has side effects that hurt people. And that's a risk when you have a drug, and it's a terrible thing if the drug hurts people. There's a risk on the other side. There are people who are dying or seriously sick, and if you don't get the drug to them they die. So there's a problem. You've got to get drugs to people and at the same time the drug can't hurt them. Now, who would you rather have make the decision as to whether this drug is, on balance, going to save people or, on balance, going to hurt people? An expert agency, on the one hand, or 12 people pulled randomly for a jury rol[l] who see before them only the people whom the drug hurt and don't see those people who need the drug to cure them?[111]

Thus, even where there is no express preemption provision, there is a powerful argument to defer to federal expertise at least where a matter is one of proper federal concern and the agency is acting well within the proper scope of its congressionally delegated power. The alternative is to disregard congressional design and place regulated entities between the rock of federal mandates and the hard place of trying to comply with a patchwork of different and competing state-law standards.

CONCLUSION

Perhaps in keeping with the new Chief Justice's expressed goal of forging consensus opinions, there was considerable uniformity in the justices' votes in this term's preemption cases. The Court's text-based approach to interpreting express preemption provisions provided a pivot point for securing broad consensus and avoiding perhaps more controversial issues of federalism and agency deference. Although reluctant to wade into formal federalism debates, the Court seemed particularly sympathetic to preemption where the matter at hand was significantly federal. With the exception of foreign affairs, however, it may be difficult to predict with certainty whether a given matter that may have both federal and state law features will be viewed principally from a state or federal vantage point. Finally, the Court has tended to preempt state laws when federal agencies make considered, often technical judgments with respect to highly regulated matters within their congressionally delegated expertise. In according *actual* deference to the procedural and substantive judgments of expert agencies, though, the Court generally avoided wading into formal, and often divisive, administrative law analysis.

Endnotes

1 See Table, *infra*. The pro-preemption decisions are: Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008); Preston v. Ferrer, 128 S. Ct. 978 (2008); Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008); and Rowe v. N.H. Motor Trans. Ass'n, 128 S. Ct. 989 (2008). The Court rejected preemption in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), see note 67, *infra*, and divided 4-4 in *Warner-Lambert v. Kent*, 128 S. Ct. 1168 (2008) (per curiam), with the Chief Justice recusing. See note 71, *infra*.

2 *See* Wyeth v. Levine, No. 06-1249 (filed Mar. 12, 2007) (addressing preemption of state-law challenges to prescription drug warnings approved by FDA) (to be argued Nov. 3, 2008); Altria Group v. Good, No. 07-562 (filed Oct. 26, 2007)) (addressing preemption of state-law challenges to statements in cigarette advertising authorized by the Federal Trade Commission) (to be argued Oct. 6, 2008).

3 From 1983 to 2003, the Court decided on average more than 6.3 preemption cases per term, and upheld federal preemption in about half of them. *See* Note, *New Evidence On The Presumption Against Preemption: An Empirical Study of Congressional Responses To Supreme Court Preemption Decisions*, 120 Harv. L. Rev. 1604, 1613 (2007). Last term, the Court upheld federal preemption in four of six cases. *See* Table, *infra*.

4 *See, e.g.,* Erwin Chemerinsky, *Troubling Trend in Preemption Rulings*, 44 JTLA Trial 62 (2008) ("One would expect that a conservative Court, committed to protecting states' rights, would narrow the scope of federal preemption. After all, a good way to empower state governments is to restrict the federal government's reach. Restricting pre-emption gives state governments more autonomy. But there is every indication that the Roberts Court, although unquestionably conservative, will interpret pre-emption doctrines broadly when businesses challenge state and local laws.").

5 U.S. Const. art. VI, cl. 2.

6 *E.g.,* Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992).

7 *Id.*

8 *See, e.g.,* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992) (plurality opinion).

9 *Id.*

10 *E.g.,* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99 (1984) (citation omitted); *see also* Hillsborough County, Fla. v. Automated Med. Labs., Inc., 471 U.S. 707, 713 (1985).

11 *See, e.g.,* Richard A. Epstein & Michael S. Greve, "Introduction: Preemption in Context," 1-21 *in* Federal Preemption: States' Powers, National Interests (Epstein & Greve, eds., 2007).

12 *Id.* at 1.

13 *See generally* Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 352 (2001) ("[N]either an express pre[]emption provision nor a savings clause '[b]ars the ordinary working of conflict pre[]emption principles.'") (quoting Geier v. American Honda Motor Co., 529 U.S. 861, 869 (2000)).

14 Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005), *available at* 2005 WL 2237124.

15 *See generally* Jason Harrow, Measuring "Divisiveness" in OT06, SCOTUSblog.com, July 2, 2007 http://www.scotusblog.com/wp/measuring-divisiveness-in-ot06/; Charles Lane, *Narrow Victories Move Roberts Court to Right*, Wash. Post, June 29, 2007, at A4.

16 *See generally* Harrow, *supra* note 15; Lane, *supra* note 15, at A4. Overall, the number of unanimous decisions was 17.9% in the 2007 Term, down from 37.7% in the 2005 Term and 23.9% in the 2006 Term. *See generally* Rupal Doshi, Georgetown Univ. Law Ctr. Sup. Ct. Inst., Supreme Court of the United States October Term 2006 Overview 4 (2007).

17 The notion of a presumption *against* preemption arose in the context of field preemption. *See generally* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (discussing the "assumption" that the "historic police powers of the States" are not superseded where "Congress legislate[s]... in [a] field which the States have traditionally occupied" unless Congress makes its intent to do so "clear and manifest"). Although the Court's decisions have not always been consistent, there is a strong argument that no such presumption applies in the face of an express preemption provision. Indeed, in *Riegel*, the notion of a presumption against preemption garnered only a single dissenting vote. *See* 128 S. Ct. at 1006-07, 1013-14; *see also* Sprietsma v. Mercury Marine, 537 U.S. 51, 62-63 (2002) (concluding that the Court's "task of statutory construction must in the first instance focus on the plain wording of the [express preemption] clause, which necessarily contains the best evidence of Congress' pre-emptive intent"); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 664 (1993) (same).

18 *See* Tony Mauro, *The Majority Flexes Its Muscles*, Legal Times, Feb. 25, 2008 (quoting Robin Conrad, U.S. Chamber of Commerce, referencing February 20, 2008 as "quite a hat trick" when the Court issued these three pro-preemption decisions in one day); Table, *supra*.

19 128 S. Ct. 989.

20 128 S. Ct. 999.

21 128 S. Ct. 978.

22 *Cipollone*, 505 U.S. at 516 (internal quotation omitted, first alteration original).

23 *Riegel*, 128 S. Ct. at 1011 (Stevens, J., concurring) (quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79-80 (1998)).

24 *Id.* (emphasis added).

25 *Rowe*, 128 S. Ct. at 993 (quoting 49 U.S.C. § 14501(c)(1)).

26 *Id.* at 993-94.

27 *Id.* at 994 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71, 85 (2006)).

28 *Id.* at 996.

29 *Id.* at 992.

30 *Id.* at 996.

31 *Id.* at 996-97.

32 *Id.*

33 *Id.*

34 *Id.* at 997.

35 *Id.*

36 *Id.* at 998-99 (Ginsburg, J., concurring).

37 *Id.* at 999.

38 *Riegel*, 128 S. Ct. at 1011.

39 *Id.* at 1003 (quoting 21 U.S.C. § 360k(a)).

40 518 U.S. 470 (1996).

41 *Id.* at 477-79.

42 *Id.* at 501.

43 *See, e.g.,* McMullen v. Medtronic, Inc., 421 F.3d 482 (7th Cir. 2005), *cert. denied,* 547 U.S. 1003 (2006); Cupek v. Medtronic, Inc., 405 F.3d 421 (6th Cir.), *cert. denied sub nom.* Knisley v. Medtronic, 546 U.S. 935 (2005); Horn v. Thoratec Corp., 376 F.3d 163 (3d Cir. 2004); Brooks v. Howmedica, Inc., 273 F.3d 785 (8th Cir. 2001) (en banc); Martin v. Medtronic, Inc., 254 F.3d 573 (5th Cir. 2001); *but see* Goodlin v. Medtronic, Inc., 167 F.3d 1367 (11th Cir. 1999).

44 *Riegel*, 128 S. Ct. at 1006-07.

45 *Id.* at 1007-08.

46 *Id.*

47 *Id.* at 1009.

48 *Id.* at 1014-15 (Ginsburg, J., dissenting).

49 *Id.*

50 The pertinent Federal Arbitration Act provision provides that "'a written provision in any… contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction… *shall be valid, irrevocable, and enforceable*, save upon such grounds as exist at law or in equity for the revocation of any contract'" as a matter of general applicability. *Preston*, 128 S. Ct. at 983 (quoting 9 U.S.C. § 2) (emphasis added). To be sure, the Court previously observed that the FAA "contains no express pre-emptive provision," instead treating the statute as involving implied conflict preemption. Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989). But Preston did not embrace this analysis, and otherwise held that reliance on Volt "is misplaced." *Preston*, 128 S. Ct. at 998.

51 *Id.* at 983 (internal quotation and alterations omitted).

52 *Id.* (internal quotation omitted).

53 *Id.* at 982 (quoting contract) (alterations and omissions in the original).

54 *Id.*

55 *Id.* at 989.

56 *Id.* at 986.

57 *Id.* at 989 (Thomas, J., dissenting).

58 *Brown*, 128 S. Ct. at 2414.

59 *Id.* at 2410-11 (quoting Cal. Gov't Code §§ 16645-16649 (West Supp. 2008)).

60 *Id.* at 2411-12.

61 *Id.* at 2413 (quoting 29 U.S.C. § 158(a)(1)).

62 *Id.* (quoting 29 U.S.C. § 158(c)).

63 *Id.* at 2414.

64 *Id.* at 2413.

65 *Id.* at 2420 (Breyer, J., dissenting).

66 *Id.* at 2411, 2415.

67 128 S. Ct. 2605, 2612-16 (2008). It should be noted that *Exxon* involved "preemption" in a somewhat different sense than that described above, in that the issue was whether an express statutory provision of federal law could preempt *federal* maritime common law claims.

68 *Id.* at 2618 (citing 33 U.S.C. § 1321(b) & (o)) (alteration and second omission in original).

69 *Id.* at 2619.

70 *Id.*

71 In *Kent*, the Chief Justice recused and the remaining eight justices divided 4-4. Consistent with its practice, the Court issued a per curiam opinion affirming the judgment below by an equally divided Court; it did not issue a substantive opinion or identify how any justice voted. Such dispositions effectively leave the legal landscape where the Court found it and are "not entitled to precedential weight." Rutledge v. United States, 517 U.S. 292, 304 (1996).

72 *See* note 17, *supra*.

73 Thomas W. Merrill, *Agency Preemption: Speak Softly, But Carry a Big Stick?,* 11 Chap. L. Rev. 363, 387 (2008) (arguing for a presumption in *favor* of preemption in matters within exclusive or plenary federal control); *see also* United States v. Locke, 529 U.S. 89, 108 (2000) (where a matter has long been subject to federal control, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers").

74 *Geier*, 529 U.S. at 885; *see* Felder v. Casey, 487 U.S. 131, 138 (1988) ("Under the Supremacy Clause of the Federal Constitution, '[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law,' for 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'") (citations omitted).

75 *See, e.g.,* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 377-78 (2000) (holding state law preempted because Congress had "calibrated [foreign] policy [in] a deliberate effort to steer a middle path" that left no place for competing state action) (internal quotation omitted).

76 *See, e.g., Geier,* 529 U.S. 861.

77 128 S. Ct. 989.

78 128 S. Ct. 999.

79 128 S. Ct. 978.

80 128 S. Ct. 2408.

81 *See* Mich. Comp. Laws § 600.2946(5).

82 *See* Mich. Comp. Laws § 600.2946(5)(a).

83 *See* Brief for the United States as Amicus Curiae Supporting of Petitioners at 5, 21, Warner-Lambert Co. v. Kent, No. 06-1498 (Nov. 28, 2008), 2007 WL 421889 ("U.S. Kent Br."); Desiano v. Warner-Lambert & Co., 467 F.3d 85, 87 (2d Cir. 2006), *aff'd by an equally divided court sub nom*., Warner-Lambert v. Kent, 128 S. Ct. 1168 (2008).

84 *See e.g.,* U.S. Kent Br. at 6-7 ("Michigan law is preempted to the extent it requires courts to determine whether a manufacturer defrauded FDA and whether FDA would have denied or withdrawn approval of a drug but for the fraud."); *Garcia v. Wyeth-Ayerst Labs*., 385 F.3d 961 (6th Cir. 2004) (same).

85 531 U.S. at 350.

86 *Desiano*, 467 F.3d at 94.

87 *Buckman*, 531 U.S. at 347 (internal quotation omitted); *see* U.S. Kent Br. at 9-10.

88 *See Brown*, 128 S. Ct. at 2420 (Breyer, J., dissenting).

89 *Id*. at 2412.

90 *Id*. at 2418.

91 *Riegel*, 128 S. Ct. at 1008.

92 *Buckman*, 531 U.S. at 348, 350-51.

93 *See* Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (recognizing the legally binding effect of formal and non-arbitrary interpretations of ambiguous statutory provisions by the agency charged with administering those provisions); Auer v. Robbins, 519 U.S. 452, 461 (1997) (recognizing that an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation omitted); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (recognizing some lesser degree of deference in other circumstances "depend[ing] upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade").

94 *See* Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 Geo. Wash. L. Rev. 449, 477 (Apr. 2008) ("Out of the preemption muddle, then, a glimmer of clarity emerges at least with respect to the products liability cases—the Court's final decisions line up with the positions urged by the agency."). Those cases are *Lohr*, 518 U.S. 470; *Geier*, 529 U.S. 861; *Buckman*, 531 U.S. 341; *Sprietsma*, 537 U.S. 51; and *Riegel*, 128 S. Ct. 999. The one outlier is *Bates v. Agrosciences LLC,* 544 U.S. 431 (2005), in which the Court rejected the agency's pro-preemption position. In *Kent*, the agency also favored the pro-preemption position, but the Court did not issue a precedential opinion addressing the issue. *See supra*. Thus, perhaps the lesson learned from these cases is that without the federal agency's support, preemption may be difficult; with it, preemption is likely, but not guaranteed.

95 *Lohr*, 518 U.S. at 495-96 (observing that FDA "is uniquely qualified to determine whether a particular form of state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and, therefore, whether it should be pre-empted") (internal quotation omitted); see *id.* at 506 (noting FDA's "special understanding of the likely impact of both state and federal requirements, as well as an understanding of whether (or the extent to which) state requirements may interfere with federal objectives") (Breyer, J., concurring). The *Lohr* majority perhaps did not go so far, however, as to "admit to deferring to [FDA's] regulations," and, to the dissent's mind at least, it was an open question whether "an agency regulation determining the pre-emptive effect of *any* federal statute [was] entitled to deference." *Id*. at 512 (O'Connor, J., concurring in part and dissenting in part).

96 *Riegel*, 128 S. Ct. at 1006.

97 *Id.* at 1010 (quoting 21 C.F.R. § 808.1(d)(1)) (alteration omitted).

98 *Id*.

99 128 S. Ct. at 1011.

100 See *id*. at 1003-05 (internal quotation omitted).

101 *Id*.

102 *See id.* at 1008.

103 *Lohr*, 518 U.S. at 493 (emphasis in original).

104 We will not repeat here the full case for FDA preemption in many prescription drug contexts, which has been developed extensively elsewhere. *See, e.g.,* Brief for the United States as Amicus Curiae Supporting Petitioner, Wyeth v. Levine, No. 06-1249 (June 2, 2008), 2008 WL 2308908 ("U.S. Levine Br.") (arguing that the Federal Food, Drug and Cosmetic Act (FDCA) preempts state tort claims that would impose liability for the use of labeling FDA approved after being informed of the relevant risk); Brief of DRI—The Voice of the Defense Bar as Amicus Curiae in Support of Petitioner, Wyeth v. Levine, No. 06-1249 (June 3, 2008) 2008 WL 2355772 ("DRI Levine Br.") (arguing that "[p]ermitting States—and lay fact-finders—to serve as quasi-regulators able to require additional warnings inconsistent with FDA's own judgments creates irreconcilable conflicts with federal law and thwarts the attainment of important [federal] public health objectives"); Daniel E. Troy, "The Case for FDA Preemption," 81-112 *in* Federal Preemption, *supra* (making case for preemption "to protect the FDA's mission and objectives, as defined by Congress, against independent threats emanating from state tort law").

105 U.S. Levine Br. at 1-7.

106 Joint Appendix at 211-12, 217, Wyeth v. Levine, No. 06-1249 (May 27, 2008), 2008 WL 2309484.

107 *See, e.g.,* Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (1906); United States v. Walsh, 331 U.S. 432, 434 (1947) ("The [FDCA] rests upon the constitutional power resident in Congress to regulate interstate commerce" and Congress has regulated drugs "[t]o the end that the public health and safety might be advanced.").

108 *See, e.g.,* U.S. Levine Br. at 1-4, 11-15; DRI Levine Br. at 4-16.

109 U.S. Levine Br. at 11, 13, 17.

110 *E.g.,* U.S. Levine Br. at 8-9, 16-17; Troy, *supra* note 104, at 84.

111 Oral Argument Transcript at 30, Warner-Lambert Co. v. Kent, No. 06-1498 (Feb. 25, 2008), 2008 WL 495030.

Judicial Deference to Agency Action

*By Thomas W. Merrill**

One of the most important questions in administrative law concerns how closely and critically judges review action taken by administrative agencies. This is often said to be the question of what "scope of review" courts will use in assessing a challenge to an agency decision.

Generalizing broadly, one can distinguish three types of agency determinations: findings of fact, conclusions of law, and determinations of policy. There is obviously interaction and overlap here. Views of law and policy will influence which facts are relevant, findings of fact can influence policy judgments, and questions of law shade off into questions of policy. But in principle, these types of agency determination are distinct, and are associated with different traditions regarding the appropriate scope of review.

Consider, by way of illustration, a decision of the Environmental Protection Agency (EPA) setting a standard for permissible exposure levels to air-borne mercury. The decision will include findings of fact about the effects on human health from exposure to different levels of mercury in the air. It will also include policy judgments, such as what frequency of disease or death in the population is acceptable based on exposure to air pollutants, and whether industry should be expected to incur costs in abating such pollution that exceed the expected benefits from the abatement. And it will include legal judgments about what procedures the EPA should follow in answering the factual and policy questions presented, and whether the statutes enacted by Congress constrain the policy judgments the agency must make in setting a standard. Once EPA resolves these issues, and establishes an exposure standard, its decision is likely to be challenged in court on one or more of these dimensions, either by environmental groups that think the standard should be tougher, or by industry groups that think it is too demanding. The court hearing such challenges will have to decide what the proper scope of review is as to each of the issues raised by the challengers. This will require a prior determination of whether the issue is one of fact, law, or policy.

The verbal formulas that courts employ in describing the scope of review are based on the Administrative Procedure Act (APA). Sometimes the scope of review is prescribed by a more specific statute that applies to a particular agency. But even here, Congress tends to use the verbal formulas found in the APA, and courts interpret these formulas in light of precedents based on the APA.

Questions of fact are governed by the "substantial evidence" standard when the agency decision is based on a record complied at a hearing; otherwise fact questions are reviewed under the "arbitrary, capricious or abuse of discretion" standard.[1] Questions of policy are governed by the "arbitrary, capricious or abuse of discretion" standard.[2] Questions of law, according to the APA, are to be resolved by the court itself exercising independent judgment. The APA says: "[T]he reviewing court shall decide all relevant questions of law," and shall hold unlawful and set aside agency action that is found to be "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or "without observance of procedure required by law."[3] As we shall see, the Supreme Court has significantly modified—some would say ignored—the APA's provisions regarding the scope of review of questions of law.

The verbal formulas themselves do not tell us very much about the actual scope of review that courts apply in reviewing agency decisions. The real question in every case is how much deference the court will give to executive or agency determinations. The possibilities here range along a spectrum, from complete deference, on the one hand, to complete substitution of judgment, on the other. Nearly everyone recognizes that some issues belong at one end of the spectrum or the other. The President's decision about who he will nominate to serve as the head of a department or agency would be regarded by everyone as one as to which the courts will give complete deference. It is said to be a "political question" or "unreviewable." A question about whether an agency was constituted in an unconstitutional manner, perhaps because the head of the agency was not properly appointed by the President, would be recognized by nearly everyone as something the courts should decide independently, without giving any weight to the views of the agency. Courts here are said to exercise "independent judgment" or to decide the question "de novo." The history of administrative law, very broadly speaking, has witnessed an evolution from a world in which most exercises of judicial review clustered around one of the two poles—courts either refused to review administrative action at all or decided matters or themselves—to one in which most action by administrative agencies falls somewhere in between these two poles. Courts will generally review agency action when it is challenged by an aggrieved party. But in doing so, the courts will give some weight or deference to the views of the agency, rather than simply deciding the matter themselves.

A critical question in the great preponderance of administrative law cases, therefore, is just how much deference courts should give to the agency along the particular dimensions of the particular agency decision that has been challenged. This question is answered not so much by the verbal formulas employed as by applying loose conventions developed by courts in reviewing agency decisions. The U.S. Supreme Court plays a leading role in establishing these conventions. Lower court judges, agencies, and lawyers attend carefully to the Supreme Court's decisions reviewing agency action. One or two Supreme Court decisions do not necessarily establish a convention. But a reasonably consistent pattern of review by the Court over time defines an attitude or "mood"[4] about how much deference to give to agency determinations of fact, policy, and law. Other legal actors emulate this attitude or mood. The result has a significant impact on the distribution of power among the branches within our system of government.

With respect to review of findings of fact by administrative agencies, the attitude or mood appears to be fairly stable. Whether the case calls for application of the "substantial

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evidence" standard, or the "arbitrary, capricious, or an abuse of discretion" standard, the courts will give very considerable deference to the fact findings of administrative agencies. Deference is not as great as has traditionally been applied in reviewing jury verdicts. Jury verdicts will be set aside only if the reviewing court is convinced that no rational person could find as the jury did. Agency fact findings are probed a bit more deeply. Where agency findings concern scientific or technical questions as to which agencies presumably have greater expertise than courts, courts probably give agencies more deference than they would give to a trial judge on review of fact findings in a bench trial.

The Supreme Court seemed like it might unsettle this stable convention in *Allentown Mack Sales and Service v. NLRB*.[5] The opinion for the Court, by Justice Scalia, sent a mixed message. On the one hand, the opinion explicitly equated the "substantial evidence" standard with the convention that applies in reviewing jury verdicts.[6] As we have seen, the understanding that had evolved before *Allentown Mack* was that courts would apply somewhat more searching review to findings by agencies than they traditionally have done to juries. On the other hand, the Court's opinion gave very close scrutiny to the National Labor Relations Board's findings in the case—a far more intense criterion than conventionally applies to jury verdicts, and indeed, more intense than has traditionally been applied to agency fact finding. Subsequent decisions, however, both of the Supreme Court and of lower courts, have not treated *Allentown Mack* as changing the established scope of review. The decision illustrates the proposition that one Supreme Court decision does not establish a convention, at least insofar as scope of review is concerned. As things presently stand, there is no indication that the Court is posed to change the scope of review for questions of fact. Very substantial deference to agencies remains the watchword.

The story with respect to review of policy decisions is different. The APA indicates that courts should apply a deferential "arbitrary and capricious" standard to agency policy decisions. What this was originally understood to mean is not entirely clear, although the verbal formula seems to invoke the very great deference that courts traditionally have given to trial management decisions by trial judges, for example decisions ruling on the admissibility of evidence. Starting in the 1970s, however, lower courts, especially the Court of Appeals for the D.C. Circuit, began applying a much more demanding scope of review to agency policy decisions. This came to be known as the "hard look" doctrine.[7] The idea was that agencies were required to take a "hard look" at certain policy implications of their decisions, and that courts would monitor the explanations provided by the agency in order to satisfy themselves that the agency had given these implications the attention they deserved. This nebulous idea eventually congealed into the understanding that agencies had to support their policy determinations with detailed reasons, especially in response to objections raised by interested parties in the administrative proceedings.

In an important decision in 1983, *Motor Vehicle Manufacturers Ass'n v. State Farm Automobile Ins. Co.*,[8] the Supreme Court appeared to endorse the "hard look" concept. The Court overturned a decision of the National Highway Traffic Safety Administration for failing to address adequately certain objections to rescinding an automobile safety standard. In the ensuing years since *State Farm*, criticisms of "hard look" review have mounted. Critics have noted that it is always possible to write a more complete explanation for any action; consequently, the standard permits courts to second-guess almost any administrative decision they do not like. "Hard look" review also creates incentives for agencies to conduct elaborate inquiries and write lengthy statements justifying their actions. This has led to the claim that this style of review has produced an "ossification" of the regulatory process. Agencies do not issue as many regulations as they should to provide guidance to the public, or they seek to evade judicial review by making policy in surreptitious ways that fly beneath the radar screen.

The Supreme Court has never acknowledged these criticisms. Nor has it repudiated *State Farm*. After *State Farm*, however, the Court avoided applying anything like full-blown "hard look" review in any decision. To some extent, this may reflect the Court's perception that "hard look" issues are specific to individual controversies, and do not present the kind of general legal issue that the Court ordinarily grants review to resolve. Nevertheless, it is probably the case that few if any of the current justices holds a strong brief for perpetuating aggressive "hard look" review. Given the persistent academic criticism, it is not inconceivable that the Court will reconsider the doctrine sometime in the future. Whether the Court reaffirms "hard look" review or trims it back may well depend on whether future justices are sensitive to the costs of demanding too much of agencies, and are aware of the potential for judicial manipulation that this creates.

By far the most controversial set of issues about the scope of review concerns questions of law decided by agencies. The APA, as we have seen, appears to reflect the understanding that courts should decide questions of law—at least "pure" questions of law as opposed to questions involving the application of law to particular facts—independently, without deferring to the views of administrative agencies. In the decades following the adoption of the APA in 1946, some inroads were made on this understanding. Courts would defer to agency interpretations if they were adopted contemporaneously with the enactment of the statute, or if they had been consistently maintained for a long time, on the ground that these sorts of interpretations probably reflect congressional intent. And courts would defer to agency interpretations when Congress had explicitly delegated authority to an agency to interpret and statutory term. But the basic understanding remained that ordinarily courts would interpret statutes independently, thereby providing a check on the exercise of agency discretion.

Then, in 1984, the Court announced what appeared to be a very different understanding of the scope of review of questions of law. In *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[9] the Court reaffirmed that courts should examine statutes independently, using traditional tools of statutory interpretation, in order to determine whether Congress had resolved the "precise question at issue."[10] But if the statute was silent or ambiguous on the question, courts should defer to the agency's interpretation, provided it was a reasonable or as the court said "permissible" reading.[11] This seemingly

shifted authority dramatically from courts to agencies over matters of statutory interpretation. Previously the Court had recognized that courts should defer to agency interpretations when Congress has explicitly delegated authority to interpret to an agency; *Chevron* seemed to say that Congress should be deemed to delegate authority to interpret to an agency whenever it leaves a gap or ambiguity in a statute that the agency is charged with administering.

The *Chevron* doctrine has blossomed into the most frequently litigated and hotly debated issue in administrative law. *Chevron* itself gave multiple reasons for why agencies should have primary authority in resolving gaps or ambiguities in statutes. The Court mentioned the traditional view that agencies have greater expertise, particularly in interpreting technical provisions with which they have greater familiarity.[12] It also mentioned the superior accountability of agencies to the public, given that agencies answer to the President, who is elected by all the people.[13] A third explanation was that Congress, by delegating authority to make policy judgments to the agency, should be understood also to want statutory gaps and ambiguities resolved primarily by the agency, because the process of filling gaps and resolving ambiguities also entails resolving policy questions.[14] In recent years, the Court has had to face a number of difficult issues about the meaning and scope of the *Chevron* doctrine. For example, the Court has had to decide whether agency interpretations must be announced in a proceeding that has the "force of law" in order to receive *Chevron* deference, or whether interpretations that are merely advisory such as opinion letters or amicus briefs are also entitled to such deference. In *United States v. Mead Corp.*,[15] the Court indicated that interpretations rendered in proceedings that lack the "force of law" are not entitled to *Chevron* deference. But the Court's opinion, written by Justice Souter, was unclear as to the rationale for this limitation, as was its understanding of the meaning of "force of law."

Whatever its rationale and scope, *Mead* effectively creates three tiers of deference in matters involving questions of law. If the conditions for *Chevron* deference are met, then courts must accept reasonable agency interpretations of statutory gaps and ambiguities. If *Chevron* does not apply, and the issue is one as to which the agency has special expertise, then Courts are to ask whether the agency interpretation is "persuasive," given a variety of contextual factors such as the consistency with which the interpretation has been maintained by the agency. This is known as *Skidmore* deference.[16] Finally, if neither *Chevron* nor *Skidmore* applies, perhaps because the statute applies to all agencies and hence no agency has any special expertise in the matter, then courts are to interpret the statute without giving any deference to agency views.

Another vexing issue concerns the question whether agency interpretations trump judicial interpretations rendered before the agency has offered an interpretation eligible for *Chevron* deference. Decisions reached shortly after *Chevron* was decided held that agency interpretations must yield to prior judicial interpretations. Then the Court reversed course, and in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*,[17] held that agency decisions trump prior judicial interpretations, provided the agency interpretation otherwise qualifies for *Chevron* deference. Many variations on this question remain undecided, such as what happens when a court upholds an agency decision applying *Skidmore* deference, and then the agency changes its mind in a decision entitled to *Chevron* deference.

A third troubling issue, which remains unresolved, is whether agency decisions interpreting statutes to preempt state law are entitled to *Chevron* deference. Preemption is grounded in statutory interpretation, but it also has major consequences for the division of powers between the federal government and the states. In particular, a determination of preemption displaces state authority in the area preempted, leaving the federal government with a monopoly of regulatory authority. Agency expertise is relevant here, because agencies have a good sense of what impact the continued application of state law will have for a federal regulatory scheme. But state interests may not be well represented or well served by federal agencies, and states may not easily accept agencies as having primary authority over preemption questions. The question whether *Chevron* applies in this context was raised but not reached in *Watters v. Wachovia Bank, N.A.*[18] Three dissenting justices (Stevens, Roberts and Scalia) reached the issue and said *Chevron* should not apply here.

Questions about the scope of the *Chevron* doctrine do not divide justices along familiar ideological lines. Three distinctive perspectives can be discerned on the Court.

One perspective, which is associated most closely with Justice Clarence Thomas, resolves these issues by attending to the logic of implied delegation. This perspective understands *Chevron* to be grounded in a delegation from Congress to the agency to make policy, including the resolution of gaps and ambiguities in the statute the agency administers. The implied delegation theory strongly suggests that *Chevron* should be limited to occasions when an agency exercises its delegated power by acting with the force of law, and that agency interpretations that reflect an implied delegation should trump prior judicial interpretations. Justice Thomas's majority opinions in *Christensen v. Harris County*,[19] a precursor of *Mead* and *Brand X*, are clear examples of this perspective.

Another perspective, which is associated with Justice Antonin Scalia, would resolve these issues by treating *Chevron* as a simplifying rule about the appropriate scope of review of questions of law. The virtue of *Chevron*, from this perspective, is that it eliminates much of the clutter that has complicated the determination of the appropriate scope of review, notwithstanding the apparent simplicity of the APA. Courts should determine whether the statute has a clearly preferred meaning. If it does, that is the meaning they should enforce. If it does not, they should defer to any reasonable official agency interpretation. Consistent with this perspective, Justice Scalia dissented in both *Mead* and *Brand X*. *Mead*, according to Justice Scalia, created undue complexity in determining the scope of review. *Brand X* he disparaged for creating unnecessary instability and devaluing judicial authority.

A third perspective, associated perhaps most clearly with Justice Breyer, sees *Chevron* as just one decision in a larger universe in which the scope of review of questions of law is driven by a mix of pragmatic factors. This perspective in effect

driven by a mix of pragmatic factors. This perspective in effect treats *Skidmore* as the true expression of the scope of review, with courts weighing the persuasiveness of agency interpretations case by case, looking to multiple factors.[20] *Chevron* simply emphasizes one factor—whether authority to interpret as been delegated to the agency—but was not intended to eliminate other factors. This perspective, by denying that there is anything distinctive about the *Chevron*, has the effect of muddying questions about the scope of review, to the point where no structure can be discerned at all.

CONCLUSION

Future appointments to the Supreme Court will undoubtedly have an important effect on the shape and scope of the *Chevron* doctrine. As is revealed by the distinctive perspectives of Justices Thomas and Scalia on these issues, it is difficult to predict how larger jurisprudential commitments will translate into positions on the scope of review of administrative action. Justice Thomas's clear commitment to the implied delegation conception of *Chevron* may provide the most promising basis for achieving coherence in this area of the law. His views are grounded in a plausible reading of *Chevron* and leading post-*Chevron* decisions, they reflect a rigorous commitment to the logic of those decisions, and they have commanded the support of a majority of justices in recent critical cases, such as *Chrestensen* and *Brand X*. Justice Scalia has been unable to convince any other justice to embrace his perspective on the nature and scope of *Chevron*. And Justice Breyer's rootless pragmatism seems to invite courts to do whatever they want to do, rather than delineate a sound conception of proper institutional roles between reviewing courts and agencies.

Endnotes

1 *See* 5 U.S.C. § 706(2) (E); id. § 706(2)(A).

2 *Id.* § 706(2)(A).

3 5 U.S.C. § 706; id. § 706(2)(C), (D).

4 *See* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) (observing that Congress in adopting the "substantial evidence" formula for review of fact questions did not change the verbal formula but evidenced a "mood" that required a more searching scope of review than had been applied in the past).

5 522 U.S. 359 (1998).

6 *Id.* at 366-67.

7 The phrase was coined by Judge Harold Leventhal in *Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir. 1970).

8 463 U.S. 29 (1983).

9 467 U.S. 837 (1984).

10 *Id.* at 842.

11 *Id.* at 843.

12 *Id.* at 865.

13 *Id.*

14 *Id.* at 844.

15 533 U.S. 218 (2001).

16 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

17 545 U.S. 967 (2005).

18 127 S.Ct. 1559 (2007).

19 529 U.S. 576 (2000).

20 *See* Barnhart v. Walton, 535 U.S. 212, 221-22 (2002) (Breyer, J.).

Civil Rights

Justice Kennedy's Stricter Scrutiny And the Future of Racial Diversity Promotion

*By Nelson Lund**

More than half a century after *Brown v. Board of Education*, the Supreme Court is closely and bitterly divided about the meaning of that decision, and about the meaning of the Equal Protection Clause to which it appealed. The first major decision of the Roberts Court, *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[1] took a small step away from a constitutional vision that permits racial discrimination by the government whenever courts believe that the effects on society will be salutary. Amid the doctrinal shambles created by the Rehnquist Court, this is a healthy development. We may hope, but should not assume, that the Court will take significant additional actions to curtail the use of racial classifications by the government, and by private parties subject to statutes that on their face forbid racial discrimination. It is also quite possible that new appointments to the Court will produce a massive shift in the other direction, which would open the way for the entrenchment and expansion of racially discriminatory policies throughout American society.

After reviewing the principal modern strand of equal protection decisions involving non-remedial racial classifications in the field of education,[2] this article describes and assesses the decision in *Parents Involved*.

I. *Bakke*

In 1978, the Supreme Court first gave serious consideration to what Nathan Glazer called "affirmative discrimination." In *Regents of the University of California v. Bakke*,[3] which arose from a quota that reserved 16% of the seats in a state medical school for minority students, four Justices concluded that the Civil Rights Act of 1964 forbids such discrimination.[4] Justice Stevens, along with Chief Justice Burger and Justices Stewart and Rehnquist, relied on the statutory language: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[5] Four others (Justices Brennan, White, Marshall, and Blackmun) broadly concluded that both the statute and the Constitution permit the use of "benign" racial quotas and preferences that do not stigmatize any group or impose the brunt of their adverse effects on those least well represented in the political process.[6] Writing only for himself, Justice Powell concluded that the statute and the Constitution forbid blatant quotas, like those at issue in the *Bakke* case itself, but allow more subtle systems of racial discrimination.[7]

Rejecting the unmistakably clear terms of the statute, Powell claimed to find indications in the legislative history that it would sometimes be permissible to discriminate against whites in programs covered by the statute. Unfortunately for his position, there were repeated statements by the bill's major proponents, including Senator Hubert Humphrey, confirming what the statute said, namely that discrimination against persons of any race is forbidden.[8] Nor was Powell able to produce a single statement by anyone in Congress indicating that the bill would permit discrimination against any racial group.

Desperately, Powell pointed to statements which he thought meant that some members of Congress believed that "the bill enacted constitutional principles," thus justifying a conflation of statutory meaning with Fourteenth Amendment judicial decisions.[9] But this gambit, too, was analytically empty. First, none of the proponents said that constitutional principles permit discrimination against some racial groups. Second, the fact that some members of the enacting Congress believed that the language of the bill was consistent with *their* interpretation of the Constitution hardly implies that they believed the meaning of what they wrote could be changed if *somebody else* interpreted the Constitution differently. And even if one accepted the proposition that Congress meant to codify whatever the constitutional case law was in 1964, Powell himself acknowledged that even as of 1978 the Court had *never* "approved preferential classifications in the absence of proved constitutional or statutory violations."[10]

The four advocates of "benign" discrimination joined Powell in rewriting the statute to say that recipients of federal funds may discriminate on the ground of race, color, or national origin whenever a majority of the Supreme Court concludes that the Constitution allows such discrimination. That holding has since been reaffirmed, making the text of the Civil Rights Act essentially irrelevant in this area.

While the Court held that only its own evolving equal protection doctrine would determine what kinds of racial discrimination governments would be permitted to practice, the *Bakke* Court could not agree on what that doctrine was going to be. Writing for himself alone, Powell purported to apply traditional strict scrutiny, under which all racial discrimination is forbidden unless it is "precisely tailored to serve a compelling governmental interest."[11] He then concluded that a medical school's interest in assembling a racially diverse student body is a compelling interest because it serves what Powell cryptically called the First Amendment goal of promoting the "robust exchange of ideas."[12] Turning to the narrow tailoring prong of the test, Powell endorsed the Harvard admissions approach, which purports to treat race and ethnicity as one "factor" along with others, thus making it difficult to prove which whites are being rejected because they are white and which are being rejected for other reasons.

Because it is obviously meaningless to treat anything as a "factor" unless it will sometimes be the deciding factor, the Harvard/Powell approach unquestionably entails racial

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discrimination. Nor does Powell's approach put any meaningful limits on this practice, as is clear once one actually thinks about the implications of his soothing comment that those who lose out to preferred minorities will not have been "foreclosed from *all* consideration" because of their race or ethnicity.[13] And lest there be any doubt that Powell thought that the narrow-tailoring requirement left schools with extraordinarily wide latitude to discriminate, he helpfully added that "a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy [like Harvard's], would operate it as a cover for the functional equivalent of a quota system."[14]

For at least two reasons, *Bakke* settled almost nothing as a matter of constitutional doctrine. First, Powell's position was inconsistent with that of the four other Justices who had reached the constitutional issue, and it was debatable what the "narrowest grounds" for the Court's judgment were under the *Marks* rule.[15] Second, Powell's reliance on the First Amendment suggested that the reach of the *Bakke* holding did not extend beyond the realm of higher education.

II. *Gratz* and *Grutter*

Outside the context of university admissions, which *Bakke* suggested might be uniquely affected by the First Amendment, the Burger and Rehnquist Courts produced a series of opinions that created as much uncertainty as *Bakke* produced in the field of education. In a series of cases involving employment, government contracting, and government licenses, the Court was sharply divided between those who would almost never uphold the use of racial preferences except to remedy proven discrimination and those who would frequently uphold discrimination aimed at benefiting select racial minorities.[16] Justice O'Connor, who was often the deciding vote, took a middle position in which she purported to apply strict scrutiny on a case-by-case basis, but did not seek to articulate clear rules that could be applied in a consistent and predictable manner.

In 2003, the Court finally put an end to a quarter century of uncertainty about the constitutionality of racial discrimination in university admissions. Responding to a circuit split about the implications of the splintered result in *Bakke*, the Court reviewed two cases involving preferential admissions to the University of Michigan's undergraduate college and to its law school. These decisions can be summarized quite succinctly: the Court adopted Justice Powell's position in *Bakke* as the law of the land.

In *Gratz v. Bollinger*,[17] the undergraduate college had used a mechanical system that gave certain minorities a fixed number of bonus points in the admissions process. In a majority opinion for five Justices written by Chief Justice Rehnquist, the Court applied strict scrutiny and invalidated the system, much as Powell had rejected the mechanical quota in *Bakke*.[18] In the more significant case involving the law school, *Grutter v. Bollinger*,[19] Justice O'Connor wrote a 5-4 four majority opinion upholding a system in which certain minorities had their race treated as a "plus factor" in admissions.

The Court's opinion in *Grutter* summarized Powell's position in *Bakke*, and expressly adopted it.[20] The crucial elements were as follows. First, the law school offered its desire for a "diverse student body" as the compelling governmental interest that justified its policy of ensuring the admission of a "critical mass" of blacks, certain selected Hispanics, and American Indians. The Court deferred to what it accepted as the state's educational judgment, alluding to "a special niche in our constitutional tradition" occupied by universities and citing Powell's reliance on the First Amendment.[21] The Court added that it was also influenced by its belief that America needs to produce a racially diverse cadre of future leaders. Second, the Court held that the law school's program was narrowly tailored because it entailed the "individualized consideration" of applicants, in which characteristics other than race were considered along with race, and in which a rejected applicant from a disfavored race is not "foreclosed from *all* consideration for that seat simply because he was not the right color or had the wrong surname."[22]

The Court's opinion rejected the proposition that the school was required to begin by exhausting the use of race-neutral alternatives that might have achieved its racial diversity goals. One obvious and facially race-neutral alternative would have been to hold an admissions lottery among all applicants who had the minimum qualifications deemed necessary for successful law school performance; another alternative would have been to decrease the emphasis for all applicants on undergraduate GPA and LSAT scores. The Court specifically rejected the proposition that the school was required even to consider achieving the desired diversity by means that "would require a dramatic sacrifice of... the academic quality of all admitted students."[23]

Finally, the Court acknowledged that a "core purpose" of the Fourteenth Amendment was to eliminate governmentally imposed racial discrimination, and inferred from this that discriminatory programs like Michigan's must be "limited in time" and must have a "logical end point."[24] No time limits were imposed, however, and the Court seemed to imply that racial preferences might be used forever if certain minorities continued to be disproportionately screened out by admissions standards that involve what the Court called "academic quality." The Court did require "periodic reviews" to determine whether racial discrimination is still needed to achieve the desired diversity, but seemed to leave it completely up to the schools to determine how much diversity they want and how much racial discrimination is needed to achieve that much diversity.[25]

The *Grutter* majority purported to apply a familiar constitutional test, but in fact radically transformed its meaning. As Powell had suggested in *Bakke*, "strict scrutiny" was taken to mean virtually no scrutiny, at least as to university admissions policies that discriminate against certain races, such as whites and Asians. To put the point another way, *Grutter* creates a safe harbor for such discrimination that extends over the whole ocean, except for one little cove that contains strictly unbending quotas and absolutely mechanical preferences like those at issue in *Bakke* and *Gratz*. To see how radically *Grutter* reshaped the constitutional standard of review, consider the Court's responses to a few of the objections that were raised in the dissenting opinions.

First, as Justice Thomas pointed out, the Court had previously approved governmental racial discrimination only in the service of two "compelling interests": national security

during wartime and providing a remedy for past discrimination by the government. In *Grutter*, the Court found a compelling state interest in a public law school's desire to effect marginal changes in the nature of classroom discussions and related educational activities. This is especially striking when combined with the Court's refusal to require the Michigan law school even to consider relaxing the highly selective academic standards it applies to most applicants. The "compelling" state interest is only a desire to make marginal and speculative educational improvements without compromising the school's perceived status as an elite institution.

This is a strange use of the term "compelling state interest." Thomas noted that 10% of the nation's states have no public law school at all and only three other states maintain schools that are comparable to Michigan's in terms of perceived status and selectivity. How exactly is it that Michigan has a "compelling" interest in having any public law school at all, let alone a highly selective one, let alone a highly selective one that uses radically different admissions standards for different racial groups? We are never told.

Furthermore, the supposedly compelling nature of Michigan's interest as a state in maintaining a school of this kind becomes even harder to take seriously when one considers the facts: a) that less than 6% of applicants to the Michigan bar are graduates of the Michigan Law School; b) that only 27% of the students at the law school are from Michigan; and c) that less than 16% of the school's students remain in the state after graduation.[26] "Compelling state interest" seems to mean a governmental desire that the Court finds consistent with its own pragmatic judgments about what is good for American society.

Second, as Justice Thomas also pointed out, the Court's refusal to require the law school to consider facially race-neutral methods of increasing racial diversity contrasts quite strikingly with its decision in *United States v. Virginia*.[27] In that case, the Court required an all-male military school to admit women despite the school's contention that doing so would require it to adopt less effective educational methods and would change the character of the institution. Although that case applied the supposedly *more relaxed* standard of "intermediate scrutiny," considerations of academic freedom and the First Amendment were given no apparent weight in the Court's analysis.

The *Grutter* majority ignored Justice Thomas' discussion of *United States v. Virginia*, thus leaving unrebutted the inference that strict scrutiny was now less strict than intermediate scrutiny had been only a few years before. Or that the First Amendment gives more academic freedom to law professors than to professors at a military academy. Or that what really drove the Court in both cases was its own assessment of the social value of the challenged practices.

Third, the Court says that "outright racial balancing… is patently unconstitutional,"[28] and accepts without question the law school's claim that it was not engaged in such balancing. This would be less striking were it not for the fact that Chief Justice Rehnquist's dissenting opinion proved beyond any reasonable doubt that the law school was in fact engaged in outright racial balancing. Over a period of several years, the school admitted the favored minorities in almost perfectly exact proportion to their share of the applicant pool. Furthermore, it was able to achieve this result only by treating some of these minorities very differently than others.[29]

The Court made no effort to explain how the school's "critical mass" rationale for its program could lead it to admit twice as many blacks as Hispanics, or why it chose to relax its admissions standards for blacks much more than for Hispanics.[30] The majority responded to Rehnquist by noting that the statistics on actual enrollment showed more variation than the statistics on admissions. But that is obviously a result of the fact that the school has little ability to control which admitted students actually enroll. What the school *could* completely control—who was admitted and who was rejected—was almost perfectly controlled to reflect the racial balance in the applicant pool. The Court's response to Rehnquist contains nothing to undermine his conclusion that the school's "alleged goal of 'critical mass' is simply a sham."[31]

The majority's rejection of Rehnquist's analysis—or more precisely, his conclusive demonstration—together with its reshaped conception of a compelling governmental interest, effectively reduces strict scrutiny to something like rational basis review. So long as the Court can imagine or hypothesize some connection between a government's decision and some purpose of which the Court approves on grounds of social policy, *Grutter* indicates that it can be upheld. And this is so even in a case where the facts show that the government is actually engaged in a sham that conceals a practice that the Court itself says is "patently unconstitutional."

The precedent to which *Grutter* bears the greatest formal resemblance is *Plessy v. Ferguson*.[32] Like the *Grutter* Court, the *Plessy* majority acknowledged that the object of the Fourteenth Amendment "was undoubtedly to enforce the absolute equality of the two races before the law."[33] Notwithstanding this admission, however, *Plessy* held that racial segregation laws were constitutionally permissible if they pass the following test: "[E]very exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[34] This is essentially the same test deployed in *Grutter*, which treated the Michigan Law School's diversity plan as a reasonable means toward the "important and laudable" goal of promoting classroom discussions that are "livelier, more spirited, and simply more enlightening and interesting."[35]

The *Plessy* Court was also plainly concerned with the adverse effects that might flow from judicial interference with a practice that was highly valued by politically powerful interests.[36] Similarly, the *Grutter* Court emphasized its view that it is crucially important to our society—and especially to American business and the American military—to ensure that more people of certain racial backgrounds attend what are perceived to be elite schools.[37] And, like the *Plessy* Court, *Grutter* accepted the government's utterly implausible and unsubstantiated claim that it had constitutionally permissible purposes in adopting the challenged practices.[38]

The *Plessy* decision, of course, included a lone dissent from Justice Harlan, disputing the majority's legal analysis and eloquently challenging the majority's view that enforced

segregation would promote racial harmony. *Grutter* provoked an equally eloquent, and much better reasoned, dissent from Justice Thomas.[39] Programs like the one at issue in *Grutter* have always been quite unpopular with the general public,[40] and Thomas's critique of their effects is extremely powerful. The *Grutter* majority opinion, however, probably does reflect the dominant opinion in contemporary elite culture.

The extraordinary breadth of the elite consensus is illustrated by Richard Epstein's heroic effort to reconcile support for governmental racial preferences with libertarian principles.[41] Professor Epstein rightly calls his a "shaky" defense, for it requires him to contend that a government agency should be allowed to engage in racial discrimination, notwithstanding the obvious public choice objections and the obvious historical evidence that confirms these objections. Professor Epstein's response begins with the libertarian premise that racial discrimination by private actors ought to be allowed and with the analytical point that free markets will place significant constraints on irrational discrimination:

> I have noted the close analytical connection between the antidiscrimination norm and the presence of monopoly power. The former should be used as an effort to limit the state as well as private use of monopoly power. On this view, however, the antidiscrimination principle has no role to play to the extent that it is invoked to limit the ordinary principle of freedom of association as it applies to those private individuals and firms that do not possess any monopoly power at all.... [O]nce any individual or institution is stripped of that monopoly power, then everyone else finds their strongest protection in the power to go elsewhere if they do not like the terms and conditions on which any one provider chooses to offer some goods or services. Free entry thus becomes the low-cost antidote to discrimination and abuse in competitive settings.[42]

Assuming that these starting points are valid, how can one justify discrimination by the greatest monopoly of all, namely the government? Professor Epstein's surprising answer is that government universities are adequately and appropriately disciplined by competition from private institutions, many of which have voluntarily decided to engage in such discrimination. In order to evaluate this argument, one ought to consider the fact that what we have here is competition between government agencies staffed by self-perpetuating groups of life-tenured professors on one side, and tax-exempt, nonprofit, government-subsidized institutions staffed by self-perpetuating groups of life-tenured professors on the other. To say the least, such competition does not curtail irrational and ill-motivated discrimination in the same way as competition among business firms whose owners suffer real economic consequences when they engage in irresponsible behavior.

A little glimpse of the reality underlying Michigan's professions of good faith was provided in the testimony of the former admissions director at the law school. "He testified that faculty members were 'breathtakingly cynical' in deciding who would qualify as a member of underrepresented minorities. An example he offered was faculty debate as to whether Cubans should be counted as Hispanics: One professor objected on the grounds that Cubans were Republicans."[43] Sure enough, Cubans were excluded from this government-operated law school's diversity program.[44]

Even in the business world, the "voluntary" nature of racial preference programs is something of a myth.[45] And in law schools, these programs are effectively mandatory. A school that refused to employ racial preferences would soon be threatened with disaccreditation by the American Bar Association,[46] a government-designated monopolist whose approval is needed before a law school's graduates can be admitted to the bar in many states.[47] Given the severe adverse consequences that most schools would suffer if there were even a public threat of disaccreditation, it is no surprise that everyone "voluntarily" does just what this government-designated accrediting monopolist wants done.[48] Thus, Professor Epstein's "classical liberal" defense of governmentally imposed racial preferences is even shakier than he acknowledges.

His conclusion, however, is one that enjoys nearly universal approbation among his professional peers. This apparent consensus may be somewhat misleading. Perhaps modern universities are, as Allen Kors has said, ruled by faculties with a minority of zealots and a majority of cowards, and by administrations with a minority of ideologues and a majority of careerists with double standards.[49] In any event, opponents of racial preferences are routinely treated as racists or at best disgustingly insensitive moral dullards. Perhaps some who publicly acquiesce in the views of their domineering colleagues do not really share those views. But they do acquiesce.

The same elites who so strongly defend today's racial preferences are merciless in their condemnation of *Plessy*'s endorsement of enforced racial segregation. It is worth recalling, however, that enforced segregation was strongly supported by the dominant elites of the *Plessy* era, and especially by the intellectual forebears of today's progressive thinkers.[50] Today's leaders support a different kind of racial discrimination than those of a century ago, and one that has surely been much less pernicious. Still, it remains to be seen whether our elite thinkers will eventually attract the same kind of contempt that they now express for the views of their predecessors.

III. *Parents Involved*

In retrospect, Justice Kennedy's dissent in *Grutter* takes on special significance. He agreed with the majority that Justice Powell's *Bakke* approach should be adopted by the Court. Under that approach, university admission programs "may take account of race as one, nonpredominant factor in a system designed to consider each applicant as an individual, provided the program can meet the test of strict scrutiny by the judiciary."[51] Kennedy's disagreement with the majority lay in the application of strict scrutiny. Unlike the majority, he recognized that Michigan's program was "a delusion used by the Law School to mask its attempt to make race an automatic factor in most instances and to achieve numerical goals indistinguishable from quotas."[52]

Like *Grutter*, the Roberts Court's first case in this area was decided 5-4. *Parents Involved* arose from pupil assignment policies adopted by two local school districts. Both districts tried to keep the racial composition of each school within a specified range defined by reference to the demographic makeup of the entire district (crudely characterized as white/non-white by one district, and as black/non-black by the other). To that end, they closed certain schools to certain students—who

would otherwise have had a right to attend—if admitting those students would contribute to what the authorities regarded as excessive racial imbalance. The Court applied strict scrutiny and held the policies unconstitutional.

Chief Justice Roberts' majority opinion distinguished *Grutter* in two respects. First, *Grutter* had treated student body diversity as a compelling interest, but this was at least in part because of special First Amendment considerations that applied only in the context of higher education. Exactly what the First Amendment has to do with any of this was left unexplained. Second, *Grutter* involved racial classifications that were part of a "highly individualized, holistic review."[53] The policies in this case, by contrast, resemble those in *Gratz* because they used racial classifications in a "nonindividualized, mechanical" way.[54] The Court's statement is not inaccurate as a report of what *Grutter* said, but it constitutes another misguided judicial endorsement of Justice Powell's sophistical distinction between using race as "a" factor that will be the deciding factor in some set of decisions and using race as "the only" factor in some set of decisions.

The Court invalidated both pupil assignment plans, primarily on the related grounds 1) that their effects on the schools' racial balance were so minimal that they could not have been necessary to accomplish any goal that could be regarded as compelling, and 2) that the districts failed to consider other methods of achieving their stated goals, which were in any event too amorphous to justify the use of crude racial classifications. This is a narrow holding.

In a portion of his opinion joined only by a plurality of four, Roberts also concluded that racial balancing, under whatever name, is not a constitutionally permissible goal. Because the goals of these school districts were framed in terms of local demographics, this case was distinguished from *Grutter*, where the Court had concluded (accurately or not) that Michigan's law school had not counted back from its applicant pool to arrive at the number of minorities needed for educationally beneficial diversity in its student body.

Justice Kennedy wrote separately to emphasize his endorsement of race-conscious policies aimed at encouraging racially diverse student bodies. In his view, racial balancing is not an unconstitutional goal,[55] but it must be pursued by means that do not involve differential treatment of individuals "based solely on a systematic, individual typing by race."[56] Kennedy gave several examples of policies that would not even need to be subjected to strict scrutiny: keeping track of students by their race; siting new schools and drawing attendance zones with an eye toward racial balancing; allocating resources and recruiting students and teachers so as to promote racial diversity in the schools.

Justice Breyer's lengthy dissent for four Justices argued that the policies at issue were permissible attempts by the school districts to combat the effects of phenomena such as residential housing patterns, and thus to achieve the kind of racial integration aimed at by *Brown v. Board of Education*. Chief Justice Roberts' plurality opinion and Justice Thomas' concurrence sharply criticized Breyer's reading of *Brown* and other precedents, as well as the dissent's contention that the legality of racial discrimination should be determined by little more than the motives of those engaging in it. Kennedy made similar criticisms of Breyer's dissent, though in milder terms.

Parents Involved is significant primarily because it declines to continue down the path pointed out by *Grutter*. As the swing vote, Justice Kennedy's views are the best predictor of future decisions in this area, at least in the near term, and will probably be treated more or less as the law by most of the lower courts. As one would expect from his *Grutter* dissent, Kennedy has reaffirmed his strong reluctance to approve direct discrimination against individuals except as a last resort. It is worth noting that he took this position in a case involving policies that burdened members of all races, which judges as conservative as Alex Kozinski and Michael Boudin would have upheld.[57] This confirms that Kennedy does not regard the term "strict scrutiny" as an all-purpose incantation that can be used to bless appealing outcomes. Kennedy takes the narrow tailoring requirement seriously and he does not think that "as a last resort" means "whenever convenient or efficient or politically expedient."

At the same time, one must recognize that Kennedy has firmly rejected the proposition that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[58] This makes it difficult to predict how much indirect or "nonindividualized" discrimination he (or, until he provides further elaboration, the lower courts) will permit. The discriminatory policies at issue in *Parents Involved*, moreover, were crude and sloppy, which made it very easy to find that they failed the "narrow tailoring" test. With a modicum of ingenuity, school districts may be able to find more subtle means of achieving the same effects, just as *Grutter* showed how to evade *Gratz*'s ban on mechanical racial preferences.

Kennedy seemed to suggest as much by alluding approvingly to "a more nuanced, individual evaluation of school needs and student characteristics that might include race as a component."[59] This comment, and some of his opinion's other reflections on race and education, indicate that he sees a legitimate role for "benign" or affirmative discrimination in American schools. This may portend developments that will disappoint most conservatives, even if we are not witnessing what Heather Gerken hopefully and condescendingly calls a "dawning awareness" in Kennedy of certain "complexities" in these issues.[60]

Grutter itself, moreover, is untouched by *Parents Involved*. Nothing in the Roberts opinion or the Kennedy opinion implies a willingness to put meaningful constraints on the grossly discriminatory admissions policies that pervade higher education, or to undo the mockery that *Grutter* made of strict scrutiny. Nor has the Court, or any Justice, offered a meaningful explanation of the creepy Powell/*Grutter* assertion that the First Amendment should be read as a license for the government to discriminate against college and university students on the basis of their race. Until that happens, or *Grutter* is overruled, this area of the law will remain offensively incoherent.

CONCLUSION

Remarkably little has changed since *Bakke*.

• In 1978, four members of the Court would have allowed the government virtually unfettered discretion to practice what

they regarded as benign forms of racial discrimination. Three decades later, four members of the Court take essentially the same position, and will clearly not be deterred by any of the contrary precedents that have built up during that period.

• In 1978, four Justices read the Civil Rights Act of 1964 to forbid racial discrimination without regard to the motive for the challenged policy. Today, four members of the Court would give the Fourteenth Amendment (and thus perhaps also the Civil Rights Act) a roughly similar interpretation, though it is not clear how far they would go in challenging existing precedent.

• In 1978, Justice Powell's middle position was that racial discrimination practiced for judicially approved diversity purposes is permissible, but that care must be taken to limit its reach and obscure the identity of its victims. Today's swing Justice has expressly endorsed Powell's legal formula,[61] although Kennedy's application of this approach seems less latitudinarian than the one suggested in Powell's *Bakke* opinion.[62]

How much longer will this equilibrium remain stable? We seem to be one vote away from significant progress toward a relatively robust enforcement of antidiscrimination principles. We are also but one vote away from the opposite approach, which would endorse virtually any discriminatory law that a court believes was "enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[63] It is hard to believe that the Court will not shift in one direction or the other fairly soon. But one might have said the same thing in 1978.

Endnotes

1 127 S. Ct. 2738 (2007).

2 This discussion is drawn largely from Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 Nw. U. L. Rev. 249 (2004).

3 438 U.S. 265 (1978).

4 *Id.* at 408, 412-21 (Stevens, J., concurring in the judgment in part and dissenting in part).

5 42 U.S.C. § 2000d.

6 438 U.S. at 324-79 (Brennan, J., concurring in the judgment in part and dissenting in part).

7 *Id.* at 269-320 (opinion of Powell, J.).

8 *See, e.g.*, *id.* at 414-16 (Stevens, J., concurring in the judgment in part and dissenting in part).

9 *Id.* at 285 (opinion of Powell, J.).

10 *Id*. at 302; *see also id*. at 307.

11 *Id*. at 299.

12 *Id*. at 312-14.

13 *Id*. at 318 (emphasis added).

14 *Id*.

15 "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977) (quotation marks and citation omitted).

16 For a review of the cases, see Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 Nw. U. L. Rev. 249, 262-75 (2004).

17 539 U.S. 244 (2003).

18 Justice Breyer concurred in the judgment but did not join Rehnquist's majority opinion.

19 539 U.S. 306 (2003).

20 The Court did not conclude that Powell's opinion represented binding precedent. *See id*. at 325.

21 *Id*. at 329.

22 *Id*. at 341 (quoting Powell's opinion in *Bakke*, 438 U.S. at 318) (emphasis added).

23 539 U.S. at 340. The "dramatic sacrifice" of what the Court calls "academic quality" that would result from decreasing the emphasis on undergraduate GPA and LSAT scores was amply illustrated by statistics drawn from the record in the case. *See, e.g.*, Grutter v. Bollinger, 137 F. Supp. 2d 821, 864 (E.D. Mich. 2001); Grutter v. Bollinger, 288 F.3d 732, 797 & nn.22-23 (2002) (Boggs, J., dissenting).

24 539 U.S. at 341-42.

25 "We take the Law School at its word that it would 'like nothing better than to find a race-neutral admissions formula' and will terminate its race-conscious admissions program as soon as practicable." *Id*. at 343 (quoting respondents' brief). The Court went on to say that it "expects" racial preferences to become unnecessary within twenty-five years. *Id*. Contrary to Justice Thomas's reading, *id*. at 351, I do not think the Court "held" that preferences would become unconstitutional within that period. Rather, the Court seems only to have made a prediction whose significance, if any, is a function of the Justices' clairvoyance.

26 *See Grutter*, 539 U.S. at 359 (Thomas, J., concurring in part and dissenting in part).

27 518 U.S. 515 (1996).

28 *Grutter*, 539 U.S. at 330 (citations omitted).

29 *See id.* at 381-83 (Rehnquist, C.J., dissenting).

30 *See id*. at 382.

31 *Id*. at 383. *Cf.* Johnson v. Transp. Agency, 480 U.S. 616, 662-64 (1987) (Scalia, J., dissenting) (contending that the characterization of the facts in the case by the majority and by Justice O'Connor were inconsistent with factual findings by which the Court was bound under Fed. R. Civ. P. 52(a)).

32 163 U.S. 537 (1896).

33 *Id*. at 544. Similarly, the *Grutter* Court acknowledged that a "core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." 539 U.S. at 341 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

34 163 U.S. at 550.

35 539 U.S. at 330 (quoting the District Court).

36 "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation." 163 U.S. at 551.

37 *See* 539 U.S. at 330-32. In *Bakke*, Justice Powell "assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification." 438 U.S. at 310. *Grutter*'s conclusion about the societal benefits of programs like those at the University of Michigan is at least arguably consistent with the premise underlying this statement in Powell's opinion.

38 163 U.S. at 551 ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."). *Cf.* the *Grutter* majority's inapt response to Chief Justice Rehnquist's dissent.

39 For a critique of the legal reasoning in both the majority and dissenting opinions in *Plessy*, see Nelson Lund, *The Constitution, the Supreme Court, and Racial Politics*, 12 Ga. St. U. L. Rev. 1129 (1996). For the reasons discussed

above, I believe that Thomas's legal critique of the *Grutter* majority is sound. Thomas's analysis of the likely consequences of the majority's decision, moreover, is much more detailed than the conclusory statements in the analogous passages in Harlan's *Plessy* dissent.

40 *See, e.g.*, Gail L. Heriot, *Strict Scrutiny, Public Opinion, and Affirmative Action on Campus: Should the Courts Find a Narrowly Tailored Solution to a Compelling Need in a Policy Most Americans Oppose?*, 40 Harv. J. Legis. 217, 225-28 (2003) (summarizing evidence of widespread public opposition to racial preferences).

41 Richard A. Epstein, *A Rational Basis for Affirmative Action: A Shaky But Classical Liberal Defense*, 100 Mich. L. Rev. 2036 (2002).

42 *Id*. at 2050.

43 Grutter v. Bollinger, 539 U.S. 306, 393 (2003) (Kennedy, J., dissenting).

44 Grutter v. Bollinger, 137 F. Supp. 2d 821, 824 n.1 (2001).

45 *See, e.g.,* Roger Clegg, "Striking a Balance: EEO, Diversity, and Affirmative Action," Testimony before the Equal Employment Opportunity Commission, May 16, 2006, http://www.ceousa.org/index.php?option=com_docman&task=doc_view&gid=147&Item; *Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761, 765 (1976).

46 *See*, *e.g.*, Gail Heriot, *The ABA's 'Diversity' Diktat*, Wall St. J., April 28, 2008.

47 *See, e.g.*, Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60, 71 n.60 (2004); *see also* American Bar Association, *The American Bar Association's Role in the Law School Accreditation Process*, *at* http://www.abanet.org/legaled/accreditation/abarole.html (last visited May 21, 2008) ("The Council of the ABA Section of Legal Education and Admissions to the Bar is the United States Department of Education recognized accrediting agency for programs that lead to the first professional degree in law.").

48 *See, e.g.*, Stewart E. Sterk, *Information Production and Rent-Seeking in Law School Administration: Rules and Discretion*, 83 B.U. L. Rev. 1141, 1145 n.9 (2003); *see also* Ronald A. Cass, *The How and Why of Law School Accreditation*, 45 J. Legal Educ. 418, 422-23, 425 (1995).

49 Alan Charles Kors, *On the Sadness of Higher Education*, The New Criterion, May 2008, at 9.http://www.newcriterion.com/articles.cfm/On-the-sadness-of-higher-education-3831.

50 *See, e.g.*, Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 258-62 (2002); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1, 49-53 (1999).

51 *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

52 *Id*. at 389.

53 127 S. Ct. at 2753.

54 *Id*. at 2753-54.

55 *Id*. at 2789 (Kennedy, J., concurring in part and concurring in the judgment).

56 *Id*. at 2792.

57 *See id*. at 2796-97 (discussing the views of Kozinski and Boudin).

58 *Id*. at 2791 (quoting Chief Justice Roberts' plurality opinion). As Justice Breyer points out, the aphorism appears to have originated in Judge Carlos Bea's dissent in the court below. *See id*. at 2833-34 (Breyer, J., dissenting); *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 426 F.3d 1162, 1222 (2005) (Bea, J., dissenting) ("The way to end racial discrimination is to stop discriminating by race.").

59 127 S. Ct. at 2793.

60 *See* Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 Harv. L. Rev. 104, 107, 113, 121, 123-24 (2007).

61 *Grutter*, 539 U.S. at 387 (Kennedy, J., dissenting).

62 *Grutter*'s radical dilution of the strict scrutiny test was quite consistent with, even if not absolutely implied by, Powell's comment that "a court would not assume that a university, professing to employ a facially nondiscriminatory ["plus factor"] admissions policy, would operate it as a cover for the functional equivalent of a quota system." 438 U.S at 318.

63 *Plessy*, 163 U.S. at 550.

Anatomy of a Lawsuit: *District of Columbia v. Heller*

*By Robert A. Levy**

It took nearly 5-1/2 years of litigation, a feckless 32-year handgun ban in the nation's capital, and a 69-year-old Supreme Court case, muddled and misinterpreted by appellate courts across the country. At the end, on June 26, 2008, by a 5-4 vote, the Supreme Court proclaimed unequivocally that the Second Amendment secured an individual right to keep and bear arms for self-defense. That was the holding in *District of Columbia v. Heller*, the most important Second Amendment case in U.S. history. Here's how it happened: the legal team, the timing, the plaintiffs, the location, the role of the National Rifle Association, and how the Justice Department nearly undermined our efforts.

THE LEGAL TEAM

Late in 2002 I was approached by Clark Neily, an attorney at the Institute for Justice (IJ), where I serve on the board of directors. Although decades apart in age (he's 40, I'm 66), Clark and I maintain a close friendship after clerking together on the federal courts. We also share a political philosophy centering on strictly limited government and expansive individual liberties. Clark and his colleague at IJ, Steve Simpson, had decided the time was right to file a Second Amendment challenge to Washington D.C.'s handgun ban. I was asked to become a member of the legal team, explore the prospects for a lawsuit, help with preliminary research, and provide funding.

At roughly the same time, I came in contact with Dane Von Breichenruchardt, who heads the Bill of Rights Foundation. Dane introduced me to Dick Heller, a private police officer who believed strongly in Second Amendment rights and wanted to challenge D.C.'s gun laws. Dick became our sole surviving plaintiff—about which more in a moment. Persuaded by Clark's and Steve's preliminary legal analyses, and heartened by Dick's enthusiasm, I agreed to sign on, and then convinced my Cato Institute associate, Gene Healy, to join us.

After our team of lawyers completed a more detailed review of the legal landscape, we resolved to move ahead. Clark and Steve had provided the strategic insight, but Steve was not able to participate in the litigation because of his duties at IJ. And because Clark, Gene, and I were busily engaged on other projects, we set out to hire an outside lawyer to serve as lead counsel. That position was filled by Alan Gura, 37, a private attorney in the DC area who had been a law clerk at IJ. Thus, four of the five original attorneys had ties to IJ; two attorneys had ties to Cato, as did one of the plaintiffs (Cato vice president, Tom Palmer).

Neither organization was directly involved in the litigation, but both supported the lawsuit and filed amicus (friend-of-the-court) briefs. Indeed, Justice Antonin Scalia cited IJ's brief favorably in his *Heller* majority opinion. Equally important, Cato and IJ provided extensive help with media relations—supervised by John Kramer, IJ's consummate communications expert. And perhaps most important, the *Heller* lawsuit had an IJ imprint from the outset. Fashioned as a public interest lawsuit, *Heller* required sympathetic clients, a media-savvy approach, and strategic lawyering—in short, the same characteristics that had brought IJ before the Supreme Court three times in the past six years, in cases involving eminent domain, interstate wine shipments, and school choice.

After we filed the lawsuit in February 2003, Gene Healy was called away by the press of other business. That left a three-man team—Alan Gura, Clark Neily, and I—which remained intact throughout the litigation. And therein lies an interesting sidebar: I had no prior litigation experience, much less a case before the Supreme Court. Clark was an experienced and talented trial and appellate litigator, but he too had no Supreme Court experience. Ditto for Alan, who, as lead counsel, had primary responsibility for crafting the briefs and arguing our case before three courts, including the Supreme Court. Not surprisingly, when the Supreme Court agreed to review *Heller*, I was besieged with advice from concerned allies to have a Supreme Court superstar argue the case. I was warned that someone like Ted Olson or Ken Starr was needed to go up against former solicitor general Walter Dellinger, who had agreed to argue on behalf of the city.

I rejected that advice, for several reasons: First, Alan had piloted our winning effort before the U.S. Court of Appeals for the District of Columbia Circuit. That was no small accomplishment—the first ever federal appellate decision to overturn a gun control regulation on Second Amendment grounds. Second, Alan had immersed himself in gun-related issues over more than five years. He knew the material cold, whereas a new attorney—even a superstar—would have a short, steep learning curve. Third, and most important, Alan had agreed to work on *Heller* for subsistence wages. He had made significant professional and financial sacrifices, in return for which I had committed to him that he would carry the ball, however far the case advanced. In the end, I was not willing to renege on that commitment. Clark fully supported that decision.

THE TIMING

Looking back, fair-minded observers on both sides of the case acknowledge that our legal team—outmanned, out-financed, and inexperienced—performed commendably, capped by Alan's confident and persuasive oral argument before the Supreme Court. Our victory evolved over more than a half-decade, beginning with our first court submission in early 2003. Why, though, did we file at that time—three decades after enactment of the D.C. gun ban; seven decades after the Supreme Court's decision in *United States v. Miller*?

Three triggering events precipitated the litigation. First, there was an outpouring of scholarship on the Second Amendment, and some of it came from self-identified liberals

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who concluded that the Amendment secured an individual, not a collective, right. Harvard's Alan Dershowitz, a former American Civil Liberties Union board member, says he "hates" guns and wants the Second Amendment repealed. But he has condemned "foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right…. They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like." Harvard's Laurence Tribe, another respected liberal scholar, and Yale's professor Akhil Amar both recognize that there is an individual right to keep and bear arms, albeit limited by what they call "reasonable regulation in the interest of public safety."

In that respect, Tribe and Amar agree with advocates for gun-owners' rights on two fundamental issues: (1) the Second Amendment confirms an individual rather than a collective right; and (2) that right is not absolute; it is subject to regulation. To the extent there was disagreement, it hinged on what constitutes permissible regulation—that is, where to draw the line. It was apparent to us that D.C.'s ban fell on the impermissible side of that line.

The second triggering event was a 2001 decision by the U.S. Court of Appeals for the Fifth Circuit in *United States v. Emerson.* The Fifth Circuit was bound by the Supreme Court's *Miller* precedent, but concluded that *Miller* upheld neither the individual rights model of the Second Amendment nor the collective rights model. *Miller* decided simply that a sawed-off shotgun was not self-evidently the type of weapon that was protected. But the Fifth Circuit went further. It held that the Constitution "protects the right of individuals, including those not then actually a member of any militia… to privately possess and bear their own firearms… suitable as personal individual weapons."

That right is not absolute, said the appellate court. Killers do not have a constitutional right to possess weapons of mass destruction. Some persons and some weapons may be restricted. Indeed, the court held that Dr. Timothy Joe Emerson's individual right under the Second Amendment could be temporarily curtailed because there was reason to believe he might have posed a threat to his estranged wife. But setting Emerson's personal situation aside, the Fifth Circuit—alone in 2001 among all the federal appellate courts that tried to make sense of *Miller*'s elusive logic—subscribed to the individual rights model of the Second Amendment.

The Supreme Court declined to review *Emerson*. Although the Fifth Circuit's interpretation of the Second Amendment differed fundamentally from the interpretation of all other federal appellate courts, the high Court sidestepped the question—probably because Dr. Emerson had lost. In the end, the Fifth Circuit upheld the federal statute at issue in *Emerson*. That meant the statute was still good law in all U.S. jurisdictions. So the Supreme Court had no practical or pressing need at that time to resolve the Second Amendment debate.

The third triggering event was an unambiguous pronouncement on the Second Amendment from the Justice Department under former U.S. Attorney General John Ashcroft. First, in a letter to the NRA, he reaffirmed his long-held belief that all law-abiding citizens have an individual right to keep and bear arms. Ashcroft's letter was supported by 18 state attorneys general, including six Democrats. The letter was followed by a Justice Department brief filed in opposition to Supreme Court review of the *Emerson* case. Despite opposing Supreme Court review, the Justice Department expressly argued, for the first time in a formal court submission, against the collective rights position. Later, in 2004, the Justice Department affirmed its view of the Second Amendment in an extended and scholarly staff memorandum opinion prepared for the Attorney General. The opinion concluded that "[t]he Second Amendment secures a right of individuals generally, not a right of States or a right restricted to persons serving in militias."

THE PLAINTIFFS

Having decided that the timing was ripe, we turned next to the selection of plaintiffs. One of the disadvantages of public interest law is that the clients do not pay. One of the major advantages, however, is that we could be very selective in our choice of issues and, especially, plaintiffs. For starters, we knew that the case would unfold not only in the courtroom but in the court of public opinion. Accordingly, we needed plaintiffs who would project favorably and be able to communicate with the media and the public. Ideally, they should be diverse—by gender, race, profession, income, and age. They should believe fervently but not fanatically in Second Amendment rights, fear for their safety within their homes, and have need of a loaded weapon for self-defense. Naturally, we wanted law-abiding, responsible citizens, with no criminal record, but a compelling story to tell.

In satisfying those criteria, we exhausted our contacts in the legal community, looked for names in newspaper articles and letters to the editor, spoke to friends and friends of friends, considered dozens of preliminary prospects, interviewed a smaller number, and settled finally on six. The plaintiffs comprised three men and three women, ranging in age from their mid-twenties to their early sixties. Four were white; two were African-American.

The lead plaintiff, Shelly Parker, was a neighborhood activist who lived in a high-crime area in the heart of the city. Drug dealers and addicts harassed residents of her block relentlessly. Ms. Parker decided to do something about it. She called the police—to no avail, time and again—then encouraged her neighbors to do the same. She organized block meetings to discuss the problem. For her audacity, Shelly Parker was labeled as a troublemaker by the dealers, who threatened her at every opportunity. Shortly before we filed the case, a dealer tried to break into her house, cursing and yelling, "Bitch, I'll kill you. I live on this block, too." He was charged with felony threat but acquitted. Shelly Parker knew that the police wouldn't do much about the drug problem on her block. She wanted a functional handgun within her home for self-defense; but she feared arrest and prosecution because of D.C.'s unconstitutional gun ban.

A second plaintiff, Dick Heller, was a special police officer who carried a handgun every day to provide security for a federal office building, the Thurgood Marshall Judicial Center. But when he applied for permission to possess that

handgun within his home, to defend his own household, the D.C. government turned him down. Among the other plaintiffs was a gay man assaulted in California on account of his sexual orientation. While walking to dinner with a co-worker, he encountered a group of young thugs yelling "faggot," "homo," "queer," "we're going to kill you and they'll never find your bodies." He pulled his handgun—which his mother had given him, anticipating just such a need—out of his backpack and his assailants retreated. He could not have done that in Washington, D.C.—not even if the assailants had entered his home.

Originally, the case was captioned *Parker v. District of Columbia*—named after our lead plaintiff, Shelly Parker. That changed when five of our six plaintiffs, including Parker, were dismissed for lack of legal standing. Only Dick Heller remained. From that point forward, his name was substituted for Shelly Parker's.

"Standing" is a complex doctrine requiring that plaintiffs demonstrate that they have suffered a "redressable injury" before they can have their lawsuit heard by a court. In this instance, only Dick Heller had applied to register a firearm and been rejected by the District. The denial of Heller's application was his injury. By contrast, the other plaintiffs had not tried either to register a weapon or obtain a license. Instead, they had simply declared their desire to have a loaded firearm in their homes, and then claimed that D.C.'s gun laws frustrated that goal. The court, applying the District's unique standing doctrine, noted that the plaintiffs had not actually broken any law. According to the court, their risk of prosecution was not sufficiently credible or imminent to constitute injury. Hence, no standing for five of six plaintiffs.

In D.C., law-abiding citizens who have not applied for registration cannot challenge the city's gun laws; that privilege is reserved to law-breaking citizens. Responsible plaintiffs are barred from court; only criminals can sue. Nor is it possible for most would-be plaintiffs in D.C. to follow Heller's example and apply for registration. In that respect, D.C.'s rules are the ultimate Catch-22. No one can register an imaginary handgun; he or she must own one to register it. But from 1976 until now, it has been illegal to buy a handgun in Washington, D.C. And federal law says it's illegal to buy a handgun anywhere except the state in which the buyer resides. Thus, to obtain standing today, a D.C. resident would have to move out of D.C., buy a gun, move back to D.C. with proof of ownership, and then apply for registration.

As for Heller, he had legally acquired a handgun years ago. He could not keep the gun in his D.C. home, but he did have the paperwork to prove the weapon was his. Dane Von Breichenruchardt, who had introduced Heller to us, prevailed on Heller to apply for registration in July 2002, seven months before we filed the lawsuit. When we became aware that Heller had followed Dane's advice and registration had been denied, we included a statement to that effect in our complaint and, later, an affidavit from Heller as well as a copy of his rejected application. Those documents proved sufficient to confer standing on Heller. Technically, because we were not seeking monetary damages for each client, one plaintiff was all we needed to stop D.C. from enforcing its unconstitutional gun ban. But the five other plaintiffs were sorely disappointed.

Consequently, we asked the Supreme Court to restore standing to our five dismissed plaintiffs. Without explanation, however, the Court refused to review D.C.'s standing doctrine. Here's what that means: nearly everywhere in the country, except in the nation's capital, courts do not require citizens first to violate a law in order to contest its constitutionality. Yet, when it comes to restrictions on firearms ownership, D.C. says that a threat of enforcement is not sufficient to confer standing. The plaintiffs in our case were specifically threatened with prosecution by D.C. officials—in open court, in newspaper interviews, and in a town meeting. Still, no standing.

Moreover, fear of enforcement—even without threats—causes people to refrain from doing what they would otherwise do. If a person could show he would have acquired a handgun, but did not out of concern that he would be prosecuted, then he has suffered the type of injury that is classic in pre-enforcement suits. Consider, for example, an abortion or First Amendment case. Would a pregnant woman have to be charged for having an illegal abortion before she could assert standing to challenge a restrictive law? If a shop owner wants to test a statute banning storefront political posters, does he first have to display the poster and risk punishment? Not even D.C. would impose such impediments to raising those constitutional claims. Evidently, however, the Second Amendment is different. When it comes to keeping arms for self-defense, D.C.'s shameful message is: "If you want to challenge the law, first you have to break it."

THE LOCATION

Even though we were unable to obtain standing for five plaintiffs under D.C.'s prohibitive rules, the nation's capital was still the best venue to file our lawsuit. First, the city's rate of gun violence was, and is, among the highest in the nation. Second, D.C. had the most restrictive gun laws of any major city—in fact, the most sweeping gun laws in the history of the country. Essentially, all handguns acquired after 1976 were banned; no handguns acquired before 1976 could be carried anywhere—even from room to room in a person's own home—without a permit, which in practice was never issued; and all rifles and shotguns in the home had to be unloaded and either disassembled or trigger-locked.

Because of D.C.'s draconian regulations, we were able to pursue an "incremental" Second Amendment strategy—analogous to the strategy that Thurgood Marshall and the NAACP had pursued with great success in the civil rights arena. That meant: (1) seek only narrow relief—i.e., don't ask the Court, in its first Second Amendment case since 1939, for permission to carry concealed weapons in public or to own a machine gun; (2) focus solely on the Second Amendment—no statutory issues or other constitutional issues that might distract the Court; and (3) challenge only the worst provisions of DC law—a ban on all functional firearms in all homes of all people at all times for all purposes—thereby negating the city's claim that its regulations are "reasonable."

Our third reason for selecting D.C. involved the legal question of "incorporation." Until the Fourteenth Amendment was ratified in 1868, the Bill of Rights applied only against the

federal government. Unlike most of the other Ten Amendments, which have now been "incorporated" against the states by means of the Fourteenth Amendment, the applicability of the Second Amendment to the states has not been resolved. By filing our Second Amendment challenge in Washington, D.C., we did not have to address that issue. The U.S. Congress, not a state, is constitutionally empowered "To exercise exclusive Legislation in all Cases whatsoever" over the nation's capital—which means the Bill of Rights directly limits Washington, D.C., laws.

Fourth, D.C. is where the federal government lives. That means Second Amendment claims against the federal government can be litigated in D.C., no matter where a rights violation allegedly occurred. It's always proper to sue a defendant where the defendant resides. In that respect, D.C. was clearly the most important of all the judicial circuits. A victory in D.C. would alter Second Amendment jurisprudence not only for cases arising under D.C. law, but for all cases arising under federal law as well—no matter where the claim initially surfaced. Moreover, the U.S. Justice Department, which defends federal statutes against Second Amendment claims, was already on record as supporting an individual right to keep and bear arms.

Finally, the U.S. Court of Appeals for the District of Columbia Circuit was the only federal appellate court that had not yet fleshed out its view of the Second Amendment. In order to reach the Supreme Court—which was our principal objective—we had to create a split of authority among the appellate circuits that only the Supreme Court could resolve. Inconsistent federal law from circuit-to-circuit is typically the single most important criterion in persuading the high Court to accept a case for review. All of the other federal appellate courts had disallowed Second Amendment challenges to gun control regulations. Only in D.C. did we have a chance of convincing a federal appellate court, for the first time, to declare a gun regulation unconstitutional.

THE ROLE OF THE NRA

With our legal team in place, the right timing, great clients, and the perfect venue, all we needed was a few dollars to cover litigation costs. That's an area where I was able to help—with generous assistance from Clark, who received no compensation, and Alan, who received next-to-no compensation. Other gun-rights advocates and organizations had offered financial aid. But we didn't want the case portrayed as litigation that the gun community was sponsoring. First and foremost, our interest was to ensure that the D.C. government complied with the text, purpose, structure, and history of the Second Amendment. For us, *Heller* was about the Constitution; guns merely provided context.

Another advantage in funding the lawsuit ourselves was the ability to retain complete control over plaintiff selection, legal arguments, and litigation strategy. That did not mean we ignored potential alliances with groups like the NRA. Indeed, when we first considered filing a lawsuit, we notified the NRA and sought input from its Second Amendment specialists. To our surprise, the NRA advised us not to proceed. The NRA's stated concern was that the case might be good enough to win at the appellate level, but would not be victorious before a less-than-hospitable Supreme Court. As a result, we could win the battle, but lose the war.

We declined the NRA's advice for a number of reasons. First, and most important from our perspective, the Fifth Circuit's 2001 *Emerson* decision had prompted criminal defense attorneys nationwide to raise Second Amendment defenses to gun charges. We feared that one of those cases would eventually make its way to the Supreme Court, resulting in an accused murderer or drug dealer becoming the poster child for the Second Amendment. Second, the Court looked more favorable from a Second Amendment perspective than it had looked in some time. And with a Republican president filling vacancies, we thought the Court's composition might even improve by the time our case wound its way up. (In fact, it did.) Third, the gun controllers had more to lose than we did. Federal appeals courts covering 47 states had denied that the Second Amendment protected a private, individual right. Those decisions could be no worse even if we lost in the Supreme Court. On the flip side, 44 states had their own statutory or constitutional provisions protecting an individual right to bear arms, and 48 states allowed concealed carry with varying degrees of police discretion. None of those laws rested on the Second Amendment, so they too would be unaffected if the Supremes did the wrong thing. Fourth, we had the support—or so we thought—of the Department of Justice, which could easily change its view under a more liberal administration.

Accordingly, we went forward despite the NRA's opposition. Two months later, evidently not wishing to remain on the sidelines, the NRA sponsored a copycat suit, *Seegars v. Ashcroft* (later *Gonzales*), in the same court, raising many of the same issues and asking virtually the same relief. The NRA then filed a motion to consolidate its case with ours—a none-too-subtle attempt to take control of the litigation. Of course, we opposed that motion, and after three months of legal wrangling, we won: the suits were not consolidated. That was good news. But now there were two different Second Amendment suits moving through D.C.'s federal courts on parallel tracks—one of which was wholly unnecessary and, as we shall see, legally weaker.

By chance, the NRA's suit—filed months after ours and assigned to a different judge—was decided first. The NRA lost, then appealed to the U.S. Court of Appeals in D.C. We too lost at the trial court level, and appealed shortly thereafter. But the NRA litigation had reached the appellate court before ours, so the court put our case on hold pending the outcome of the NRA appeal, which seemed likely to dictate the outcome of our appeal as well. At that point the NRA had accomplished its objective: it had taken control of the litigation.

That was not to last very long. The NRA had—mistakenly, in our view—sued not only the city of Washington, D.C., but also the Justice Department. And it was the Justice Department, not the city, which raised a standing defense to the NRA lawsuit. As noted above, plaintiffs are required to demonstrate concrete injury in order to file suit. Pursuant to the D.C. Circuit's idiosyncratic Second Amendment standing doctrine, it's not enough for a plaintiff to assert an interest

in owning a prohibited gun. Instead, the would-be plaintiff must actually apply to register a forbidden weapon, and then be denied by the city. Unlike Mr. Heller in our case, none of the NRA's *Seegars* plaintiffs had submitted the requisite application. All were dismissed by the court of appeals for lack of standing. And because the *Seegars* decision never addressed the underlying Second Amendment question, our case was allowed to go forward.

We hoped that would be the end of our problems with the NRA. Unfortunately, it was not. The NRA's next step was to renew its lobbying effort in Congress to repeal the D.C. gun ban. Ordinarily that would have been a good thing, but not this time. Repealing D.C.'s ban would have rendered the *Heller* litigation moot. After all, no one can challenge a law that no longer exists. And of course *Heller* was a much better vehicle to vindicate Second Amendment rights than an act of Congress. Among other things, legislative repeal of the D.C. ban could simply be reversed by the next liberal Congress. Nor would repeal of D.C.'s ban have any impact on the raft of criminal cases filed in other jurisdictions. Any one of those cases might reach the Supreme Court and become the vehicle for reading the Second Amendment out of the Constitution. By contrast, a foursquare pronouncement from the Supreme Court upholding a challenge by law-abiding citizens in *Heller* would establish lasting precedent and eventually have significance in all 50 states.

After expending considerable time and energy in the halls of Congress, we were able, with help, to frustrate congressional consideration of the NRA-sponsored bill. By that time, the NRA had apparently decided the political climate was not right for legislative repeal. Therefore, we were told, the NRA would put repeal on the backburner and support our lawsuit. Happily, that promise was kept. Once committed, the NRA was a valued ally in the Supreme Court phase of our case—garnering support from the gun rights community, crafting amicus briefs, and joining our battle against a Justice Department that we thought was on our side.

HOW THE JUSTICE DEPARTMENT NEARLY UNDERMINED OUR EFFORTS

Incredibly, there were 67 amicus briefs filed with the Supreme Court in the *Heller* case—47 for us, 19 for the city, and 1 supposedly split brief from the Justice Department. That's not a record, but it's very close to the top. (All of the briefs, along with other Court filings and articles, are posted on our website, www.dcguncase.com, which has developed into a leading repository of scholarship on the Second Amendment.) Many of the briefs, too numerous to mention by name, were enormously helpful. But potentially the most unhelpful—and perhaps the most surprising—was the brief filed by Solicitor General Paul Clement for the Justice Department.

The Department's announced position under Attorney General John Ashcroft was that "the Second Amendment secures a right of individuals" not restricted to militia service. Without abandoning that principle altogether, the Bush Justice Department under Attorney General Michael Mukasey significantly diluted it by recommending an elastic standard for determining whether a handgun ban is permissible. How elastic? The SG's brief urged the courts to consider "the nature and functional adequacy of available alternatives" to banned firearms. Imagine, in a First Amendment context, advising courts to weigh the "functional adequacy" of magazines in a city that banned all newspapers. To implement its toothless standard, the SG proposed that *Heller* be remanded to the lower courts, which would engage in "appropriate fact finding" to determine whether DC's gun ban—the most far-reaching on American soil since the British disarmed the colonists in Boston—passed constitutional muster.

That came as quite a shock to those of us who believed the administration's professed allegiance to gun owners' rights. What we got instead was a recommendation that could have been the death knell for the only Second Amendment case to reach the Supreme Court in nearly 70 years. Rather than a definitive statement that the D.C. handgun ban is unreasonable by any standard, the Justice Department suggested a course that would have entailed years of depositions and expert testimony, followed by an eventual return to a Supreme Court that could well have grown more hostile during the intervening years. That possibility could not have been overlooked by the savvy Justice Department lawyers who crafted the strategy. In effect, a so-called conservative administration threw a lifeline to gun controllers—paying lip service to an individual right while simultaneously stripping it of any real meaning. After all, if the D.C. ban could survive judicial scrutiny, it is difficult to envision a regulation that would not.

Supporters of the Constitution could only hope that the Supreme Court would embrace an individual rights view of the Second Amendment while rejecting the notion that D.C. could treat the Amendment as if it did not exist. Lamentably, when the time came to take sides in this long-simmering debate, the Bush administration—supposed proponent of gun rights and devotee of the Constitution—stood for a watered-down version of the Second Amendment that refused to declare a categorical ban on all functional firearms within the home "unreasonable," and argued that such a ban might even be consistent with a right to keep and bear arms that the Constitution says "shall not be infringed."

Thankfully, waiting in the wings was the NRA. With organizational skills and political connections, the NRA was able to gather support for a congressional amicus brief. It was signed by 250 members of the House of Representatives, including 68 Democrats; by 55 members of the Senate, including 9 Democrats; and by Dick Cheney, not as vice president, but in his capacity as president of the Senate. It was a remarkably powerful demonstration that the political branches—and derivatively, the people—were on our side, notwithstanding the administration's bewildering and pernicious brief.

The rest is history. On June 26, 2008, the highest Court in the land revived the Second Amendment and set the stage for nationwide reclamation of the right celebrated during the Framing era as "the true palladium of liberty."

Corporations, Securities & Antitrust

The Supreme Court's 2005-2008 Securities Law Trio: *Dura Pharmaceuticals, Tellabs,* and *Stoneridge*

*By Allen Ferrell**

Business law is clearly an area that the Supreme Court has turned its attention to in recent years with important consequences. Nevertheless, it still remains fair to say that Supreme Court securities law opinions are relatively infrequent, especially in light of the profound impact securities law, and securities litigation in particular, have on the U.S. capital markets and publicly-traded firms. At the same time, the securities opinions the Court does issue typically have a powerful impact and often set the stage for the next set of issues that will become the focal point of litigation. In the last three years there have been three Supreme Court opinions in the securities law field that stand out: *Dura Pharmaceuticals, Inc., v. Broudo*,[1] *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,[2] and *Stoneridge Investments Partners, LLC v. Scientific-Atlantic, Inc.*,[3] from the most recently concluded term of the Court.

All three of these decisions dealt with the most important source of liability exposure firms and firm management face today: class action litigation utilizing a Rule 10b-5 cause of action. The damage claims presented by plaintiffs in these cases can run into the billions of dollars. And therein lies their importance. Indeed, the Rule 10b-5 liability exposure of a number of U.S. companies has substantially increased recently as a result of a new wave of Rule 10b-5 class action complaints being filed over the course of the last year due to losses arising from subprime and Alt-A mortgage exposure. As of February 18, 2008, there have been 136 class action suits filed based on subprime and Alt-A losses.[4] In the following six months, yet another wave of class action complaints were filed as the losses from subprime and Alt-A mortgages escalated and the number of companies affected by these losses increased.

This article will review these three recent securities opinions focusing on the possible implications these cases hold for the future and the litigation issues that will likely come to fore as a result of the Court's reasoning in these cases. I will begin my discussion with the first, and in many ways the most interesting, of these opinions: the Court's 2005 *Dura Pharmaceuticals* opinion.

I. "Loss Causation": *Dura Pharmaceuticals* and Beyond

In Rule 10b-5 actions, plaintiffs must plead and prove that a defendant's alleged misconduct, such as misreporting financial information in the firm's SEC disclosures, actually *caused* the losses for which plaintiffs are seeking damages. The "loss causation" requirement is of fundamental importance given the huge volume of class action complaints filed against corporate defendants relying on a Rule 10b-5 cause of action and the fact that there are any number of factors that can affect a stock's price over time that have nothing whatsoever to do with the revelation of misconduct by a corporate defendant, such as the market learning of misstated firm financials. Exclusion of these non-fraud factors can have, indeed typically does have, a dramatic effect on the liability exposure of defendants.

The issue of "loss causation" is not only important in Rule 10b-5 actions but also actions brought against corporate defendants pursuant to Section 11 of the Securities Act of 1933; the second most popular cause of action utilized by class action attorneys. Section 11 provides a cause of action for investors under certain circumstances with respect to material misstatements in a firm's registration statement with the default measure of damages being rescissionary damages. However, the defendants can reduce its Section 11 damages to the extent that they can establish that rescissionary damages would exceed the losses actually caused by the material misstatements in the registration statement. In other words, defendants have an affirmative "loss causation" defense in Section 11 actions which can be of critical importance in situations where the stock price has declined significantly over the class period as rescissionary damages are likely to be quite large.

In an unanimous opinion authored by Justice Breyer, the Supreme Court in *Dura Pharmaceuticals*[5] for the first time squarely addressed the "loss causation" requirement in Rule 10b-5 actions. In the *Dura Pharmaceuticals* case itself, the company had publicly announced that it expected FDA approval for a new asthmatic spray device, an announcement which plaintiffs claimed was a misrepresentation. Some ten months later, the Dura Pharmaceuticals Company announced that its sales forecast for one of its antibiotic products were lower than expected, resulting in a steep decline in Dura Pharmaceuticals' stock price. Predictably, a Rule 10b-5 class action lawsuit was filed against Dura Pharmaceuticals with the class period running from the date of the alleged misrepresentation till the release of the lowered sales forecast. Interestingly, a number of months after the lowered sales forecast, Dura Pharmaceuticals did in fact announce the FDA's denial of its application for approval of its asthmatic spray device with no statistically significant stock market reaction associated with the announcement. A chart of Dura Pharmaceuticals' stock price during this time period is summarized in Figure I below. As readily apparent from Figure I (above, right), plaintiffs selected as the end of their purported class period the date with the largest stock price decline.

The Supreme Court concluded that plaintiffs had failed to allege loss causation for the losses they were seeking in their complaint. In the course of its analysis, beyond emphasizing the importance of "loss causation", which in itself has had a substantial impact on subsequent Rule 10b-5 class actions, the Court rejected the Ninth Circuit's position (on appeal from which the

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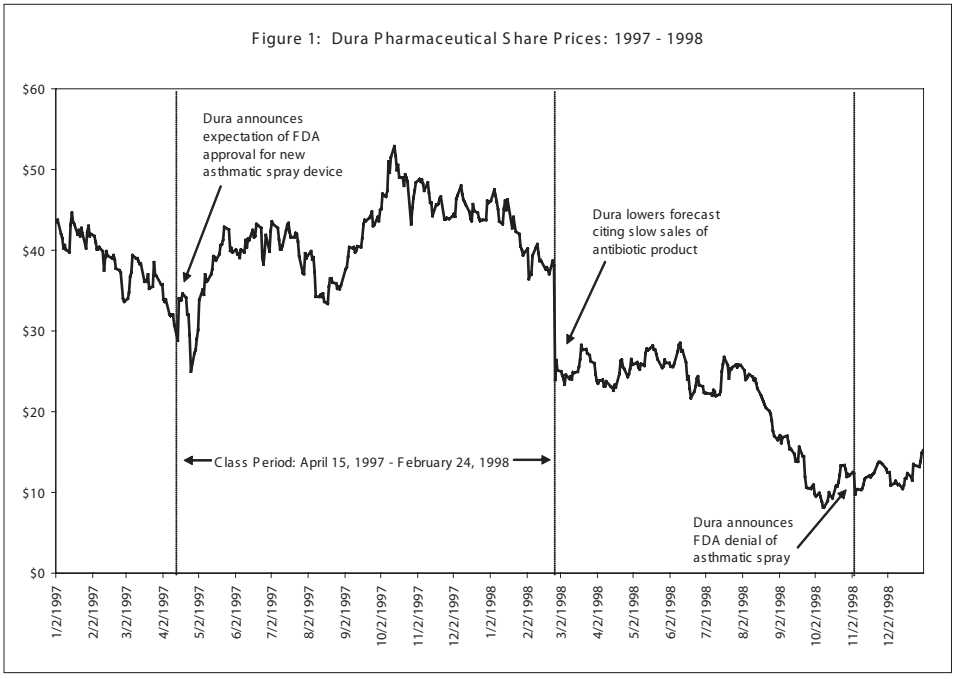
case was being heard) that the mere fact that a securities' price might have been inflated at the time of purchase, relative to its true value, as a result of the defendant's alleged misrepresentation concerning the likelihood of FDA approval simply does not establish that any of the plaintiffs' losses were caused by the misrepresentation. The Supreme Court's reasoning on this issue was entirely predictable given that an investor who purchases at an inflated price might well not be harmed given that he or she might sell that same security at an equally inflated price. The Ninth Circuit's position on loss causation was simply at odds with common sense as well as the law of other circuits.



More interesting and telling than the Court's rejection of the Ninth Circuit's reasoning is its description of the "loss causation" requirement. In particular, there are three aspects of the Court's opinion that are noteworthy. First, the Court emphasized the common law tort origins of the "loss causation" requirement. Second, the Court stressed the fact that the goal of U.S. securities law, and Rule 10b-5 in particular, is "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." Third, the Court went out of its way to point out that the plaintiffs' failure in their complaint "to claim that [the company's] share price fell significantly *after the truth became known*" (emphases added) undermined the contention that the plaintiffs' losses were in fact caused by the misrepresentation.

This third aspect of the Court's opinion bears further discussion. A number of courts and commentators have interpreted this language as requiring that there be a "corrective disclosure" in order for loss causation to exist.[6] That is to say, the market learning of the Rule 10b-5 actionable misconduct, such as a material misrepresentation, is a necessary prerequisite to a showing of "loss causation." The notion that there must be a "corrective disclosure" in order for there to be "loss causation" long predates the Supreme Court's opinion in *Dura Pharmaceuticals,*[7] but it is the first time that the issue had been discussed by the Supreme Court in the context of the "loss causation" requirement. And the requirement of a "corrective disclosure" has figured prominently in district court and appellate court decisions subsequent to *Dura Pharmaceuticals*. For instance, in a decision released July 25, 2008, the Ninth Circuit explained, in the course of affirming a dismissal of a Rule 10b-5 class action complaint, that in order to plead loss causation a "complaint must allege that the practices that the plaintiff contends are fraudulent were revealed to the market and caused the resulting losses."[8] The court concluded that this was not done in the complaint and hence was properly dismissed.

A key battleground in securities class action litigation in the aftermath of the *Dura Pharmaceuticals* decision has therefore been which types of disclosures will be deemed to be "corrective disclosures." The critical importance of the "corrective disclosure" component of the loss causation analysis was powerfully demonstrated in a decision by the United States District Court for the District of Arizona in August of 2008 in which a jury verdict awarding plaintiffs some $277.5 million in damages in a Rule 10b-5 class action was overturned.[9] The court overturned the jury's finding of damages, pointing to the plaintiffs' failure to provide evidence at trial establishing that there were in fact corrective disclosures revealing to the market the defendants' misconduct.

The identification of a "corrective disclosure" is not only important as it is a necessary precondition to there being "loss causation," however, but also because the stock market reaction to such disclosures (controlling of course for contemporaneous market and industry conditions) will typically constitute the basis for plaintiffs' damage estimates. Accordingly, plaintiffs will tend to argue that disclosures with the largest negative stock market reaction are "corrective disclosures" so as to claim the largest conceivable damage award. Indeed, one of the leading plaintiff's expert witnesses on "loss causation" has argued in print that disclosures which reveal the "true financial condition" of a company that was supposedly being concealed by the defendant's misrepresentations should be deemed to be "corrective disclosures," *even* if the disclosure does not actually reveal the fact that there had been misconduct.[10] Under this aggressive definition of "corrective disclosure" disclosures such as reduced sales forecasts and lower projected earnings which make no reference whatsoever to fraudulent conduct

can constitute "corrective disclosures." Needless to say this is an approach that defendants have strongly resisted with some success. Most prominently, the court in *Ryan v. Flowserve Corp.*[11] rejected the "true financial condition" theory of "corrective disclosure" as inconsistent with *Dura Pharmaceuticals*. In short, as it has become clear that corrective disclosures are an integral component of the loss causation analysis, and the stock market reaction thereto, the struggle between plaintiffs and defendants in Rule 10b-5 class action litigation has shifted towards competing interpretations of the concept of "corrective disclosure."

Another important battleground will be the applicability of the *Dura Pharmaceuticals* loss causation analysis to ERISA class action litigation against ERISA plan fiduciaries, including firms with ERISA plans (such as 401(k) and pension plans). These suits are potentially quite costly as there is no need to establish that, as is necessary for a Rule 10b-5 suit, the defendants acted recklessly or intentionally. Directly raising the applicability of the *Dura Pharmaceuticals* loss causation analysis is the fact that plaintiffs are typically more aggressive in their damage estimates in ERISA litigation often claiming as damages losses from declines in the firm's stock price that are due to market-wide or industry-wide stock market movements. This can result in dramatic damage claims in a situation where the market generally is steeply falling.[12] In a Rule 10b-5 action, such losses would clearly be excluded from being considered damages caused by a misrepresentation. The ERISA statute itself merely states that the ERISA fiduciary shall "make good to such plan any losses to the plan *resulting* from each such [fiduciary] breach..."[13] In light of the substantial number of ERISA suits that have recently been filed against investment banks and mortgage originators with ERISA plans, the relevance of *Dura Pharmaceuticals* to the proper interpretation of the word "resulting" will be an important contested issue.

II. *Tellabs* and Pleading

The Supreme Court, some two years after *Dura Pharmaceuticals,* addressed the pleading requirements for Rule 10b-5 actions in its *Tellabs* opinion.[14] The case was widely watched by the securities bar as the risk to defendants poised by class action suits tends to increase once the class action complaint survives a motion to dismiss (and even more so if the complaint survives a motion for summary judgment). In *Tellabs*, the Court concluded that the Private Securities Litigation Act's requirement that plaintiffs must "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind"[15] is satisfied when "an inference of scienter [is as] cogent and at least as compelling as any opposing inference of nonfraudulent intent."[16] Despite the widespread interest in the case, and the reports in the press characterizing the opinion as "pro-defense," the *Tellabs* opinion in fact left relatively little changed in the balance of power between defendants and plaintiffs. This is a function of several aspects of the opinion.

First, and most abstractly, the tone of the opinion with respect to securities class action litigation was more favorable than that of either the *Dura Pharmaceuticals* opinion or the Court's subsequent opinion in *Stoneridge.* The very first line of the opinion states that "meritorious private actions to enforce federal antifraud securities laws" constitute an "essential supplement" to actions brought criminally and civil action brought by governmental agencies. The Court then goes to the trouble of repeating this point later explaining that nothing in the Private Securities Litigation Act "casts doubt" on viewing private securities litigation as an "indispensable tool."[17]

Second, and more specifically, the pleading requirements for Rule 10b-5 actions in some circuits prior to *Tellabs* were actually stricter than that adopted by the *Tellabs* Court. In other words, while *Tellabs* heightened the pleading requirements in some circuits, such as the Seventh Circuit, from which the *Tellabs* was on appeal from, it had the effect of lowering the pleading requirements in other circuits. The First Circuit, for instance, explained that the *Tellabs* pleading standard lowered the requirements adopted by the First Circuit pre-*Tellabs* as to the strength of the inference needed to plead scienter.[18] Proving the point, the First Circuit subsequently reversed a district court's dismissal of a securities class action complaint as it was dismissed pursuant to the First Circuit's pre-*Tellabs* standard, rather than the more forgiving *Tellabs* standard under which the complaint passed muster.[19] For some circuits, such as the Second Circuit, it is doubtful whether there was any meaningful alteration of the pleading standard as a result of the *Tellabs* opinion. For instance, the Second Circuit in a recent case reviewing the dismissal of a complaint failed to even cite *Tellabs* choosing to rely for its analysis on pre-*Tellabs* Second Circuit case law.[20]

Third, there is language in the *Tellabs* opinion that could be used to substantially undermine the pleading standard the Court purported to be adopting. The Court states, "While it is true that motive can be a relevant consideration, and personal financial gain may weigh heavily in favor of a scienter inference, we agree with the Seventh Circuit that the absence of a motive allegation is not fatal."[21] This line is potentially quite important, as it is quite common, indeed standard practice, for a class action complaint to allege that managerial defendants, such as board members, had a personal financial interest in an inflated stock price during the class period as a result of insider sales that occurred during this period and the value of management stock options that were exercised. Of course, an unconstrained deployment of this language is not foreordained. Whether this language undermines the official *Tellabs* pleading requirement will ultimately depend on how district courts interpret the words "can be" a relevant consideration and "may" weigh heavily in favor of a scienter inference. This is likely to be an important source of contention between plaintiffs and defendants in future litigation.

III. *Stoneridge*: Third Party Liability and Rule 10b-5's Reliance Requirement

Without question, the securities case that has attracted the most attention, concern and comment both in the general financial press as well as among securities practitioners and commentators of the three cases is the *Stoneridge Investments Partners, LLC v. Scientific-Atlantic, Inc.*[22] case from the Supreme Court's 2007 Term. The saga surrounding what position the Solicitor General would take in its Supreme Court brief in

the case, and the differences of opinion between a divided SEC commission and the Treasury Department as to what the government's position in the case should be, powerfully attests to the importance of the case. The attention lavished on the case was in fact well-justified. An opinion allowing plaintiffs to proceed on a Rule 10b-5 "scheme" liability theory against firms (Motorola and Scientific-Atlantic) based on those firms entering into allegedly deceptive contracts with a third firm (Charter Communications) designed to inflate reported operating revenues and cash flow at that third firm would have significantly increased the liability exposure of a wide swath of companies. It bears emphasis, in assessing the implications of permitting such a suit to proceed, that neither Motorola nor Scientific-Atlantic "issue[d] any misstatement relied on by the investing public, nor were they under any duty to Charter investors and analysts to disclose financial information useful in evaluating Charter's true financial condition."[23]

While the Court's conclusion that the lawsuit could not proceed against Motorola and Scientific-Atlantic based on Rule 10b-5 was correct, both on legal as well as policy grounds, the doctrinal rationale actually provided by the court for this conclusion was unfortunately quite weak. This failure will undoubtedly lead to unnecessary litigation and uncertainty. Specifically, the Court concluded that the plaintiffs, purchasers of Charter Communications stock, did not "rely" on the alleged deceptive conduct of Motorola and Scientific-Atlantic and hence the suit could not proceed against these two firms as the Rule 105-b "reliance" requirements was unsatisfied. Strikingly, the court provided no discernable reason for why the *Basic Inc. v. Levinson*[24] fraud-on-the-market means of establishing "reliance" did not apply. The plaintiffs had alleged after all that Charter Communication's disclosures, which were disseminated to the market, contained fraudulently inflated operating revenues and cash flow figures; inflated figures that were allegedly the result of the deceptive contracts with Motorola and Scientific-Atlantic.

Instead, the court merely asserted that the link between the alleged deceptive conduct by Motorola and Scientific-Atlantic and the plaintiffs' stock purchases was "too remote,"[25] too "indirect,"[26] and too "attenuated"[27] to establish "reliance" by the plaintiffs on the deceptive conduct. Besides the obvious tension with the *Basic* decision that such an approach to the "reliance" element of Rule 10b-5 represents, the fundamental weakness with this analysis is that merely asserting that the link between the alleged deceptive conduct and the plaintiffs' stock purchases is too tenuous fails to provide any guidance or framework for determining when the link between deceptive conduct and plaintiff stock purchases in future cases will likewise be deemed too tenuous for reliance purposes. The phrases "too remote," too "indirect," and too "attenuated" are legal conclusions rather than legal analysis.

It is true that the Court, besides merely using various synonyms for "indirect" in characterizing the link between the alleged deceptive conduct and the plaintiffs' stock purchases, makes passing reference to the deceptive contracts "[taking] place in the marketplace for goods and services" (given that the contracts concerned the sale of set top cable boxes to Charter by its suppliers, Motorola and Scientific-Atlantic) and "not in the investment sphere."[28] But this is of little use. How the distinction between the "investment sphere" and the "marketplace for goods and services" is to be drawn in future cases is left unexplained. Nor is it clear what the implications would be if the deceptive conduct did occur in the "investment sphere." Does this mean that in such a situation even an "indirect" link between deceptive conduct and plaintiff stock purchases would be consistent with reliance existing for purposes of Rule 10b-5? Or is it that the distinction between "indirect" and "direct" connections between deceptive conduct and plaintiff stock purchases turns on whether the conduct occurs in the "investment sphere"? Or is the fact that the deceptive conduct occurs in the "investment sphere" a factor, although not necessarily dispositive, as to the "directness" of the connection? If so, what are the other factors and how are they to be weighed?

There is still yet another troubling aspect of the Court's reasoning in *Stoneridge* in terms of future cases. The Court explicitly rejected the position that there "must be a specific oral or written statement before there could be liability" but rather simply stated that "[c]onduct itself can be deceptive..."[29] The reason why the suit could not proceed against Motorola and Scientific-Atlantic according to the Court was the failure to satisfy the "reliance" element, *not* that the conduct in question was non-deceptive. But the Court fails to provide any guidance on what type of conduct by non-talking parties, like Motorola and Scientific-Atlantic, will be deemed "deceptive" and hence potentially actionable under Rule 10b-5.

A far preferable route for the Supreme Court to have taken, one that would have provided a far clearer doctrinal framework that would have sensibly built on the Court's earlier analysis in *Central Bank of Denver* v. *First Interstate Bank*,[30] would have been to conclude that the conduct by Motorola and Scientific-Atlantic was simply not "deceptive" within the meaning of Rule 10b-5. The Court had concluded in *Central Bank* after all that there was no "aiding and abetting" liability in private Rule 10b-5 class action litigation.[31] It would have been easy to conclude that plaintiffs' "scheme" liability theory was in fact just a semantic repackaging of an aiding and abetting theory. That is, plaintiffs' real complaint was that Motorola and Scientific-Atlantic aided and abetted Charter's misleading financial disclosures which resulted in plaintiffs purchasing Charter shares at inflated prices. Such an approach was taken by the Fifth Circuit in a case in which plaintiffs attempted to bring a Rule 10b-5 class action against various banks that allegedly entered into transactions with Enron that enabled Enron to disseminate misleading financial reports resulting in an inflated price for Enron shares.[32] The Fifth Circuit carefully explained the contours of "deceptive" conduct for purposes of Rule 10b-5, after which it concluded that the conduct of the banks in question simply did not constitute "deceptive" conduct under Rule 10b-5. Interestingly, the Supreme Court refused the petition for certiorari seeking review of the Fifth Circuit's opinion one week after it issued the *Stoneridge* opinion, despite the fact that it was at least arguable that some of the bank transactions with Enron were in the "investment sphere."

Endnotes

1 544 U.S. 356 (2005).

2 551 U.S. __ (2007).

3 552 U.S. ___ (2008).

4 *See* Jennifer Bethel, Allen Ferrell & Gang Hu, "Legal and Economic Issues in Subprime Litigation" at Table I, *forthcoming* Brookings volume on the subprime crisis.

5 544 U.S. 356.

6 *See* Allen Ferrell & Atanu Saha, *The Loss Causation Requirement for Rule 10B-5 Causes of Action: The Implications of Dura Pharmaceuticals v. Broudo*, 63 Business Lawyer 163 (2007)

7 *See, e.g.,* the Second Circuit's 1987 opinion in *Ackerman v. Oryx Communications, Inc.*, 810 F.2d 336.

8 Metzler Inv. GMBH v. Corinthian Colleges, Inc., No. 06-55826.

9 In re Apollo Group, Inc. Securities Litigation, 04-CV-2147-PHX-JAT (August 4, 2008).

10 Thorsen, Kaplan, & Hakala, *Rediscovering the Economics of Loss Causation*, 6 Bus. & Sec. L. 93.

11 245 F.R.D 560 (N.D. Tex. 2007).

12 The Enron ERISA litigation settled for some $85 million.

13 29 U.S.C. 1109 (2000) (emphasis added).

14 551 U.S. __ (2007).

15 15 U.S.C. section 78u-4(b)(2) (emphases added).

16 551 U.S. at __.

17 551 U.S. ___, n.4.

18 ACA Financial Guaranty Corp. v. Advest, Inc., 512 F.3d 46 (1st Cir. 2008).

19 Mississippi Public Employees' Retirement System v. Boston Scientific Corp., 2008 WL 1735390 (April 16, 2008).

20 *See* Bay Harbour Management LLC v. Carothers, No. 07-1124-CV (June 24, 2008).

21 551 U.S __.

22 552 U.S. ___.

23 In re Charter Comm. Sec. Litig., 443 F.3d 987, 992 (8th Cir. 2006).

24 485 U.S. 224 (1988).

25 (Slip. Op. at pp. 8, 10).

26 (Slip. Op. at p.8).

27 (Slip. Op. at p.11).

28 (Slip. Op. at 16).

29 (Slip. Op. at 7).

30 511 U.S. 164 (1994).

31 *Central Bank*, 511 U.S. at 177.

32 Regents of Univ. of Cal. v. Credit Suisse First Boston, 482 F.3d 372 (2007).

The Antitrust Revolution

*By Lino A. Graglia**

The history of antitrust law over the past four decades has been one of drastic, indeed it is not too much to say, revolutionary change. Almost every significant antitrust doctrine was modified or reversed in the direction of lessening liability. The Warren Court (1953-'69) functioned in an era—the era that culminated in Great Society optimism and student-led utopianism—when the general view seemed to be that there could hardly be too much law and regulation, at least economic regulation. The Court's majority, and to a large extent the Department of Justice, seemed to operate with a suspicion of and presumption against the operation of free markets. The astounding result is that, with a single exception in a peculiar private case, over a period of eighteen years (1956-'74) no antitrust plaintiff, government or private, lost in the Supreme Court.[1] Antitrust had almost achieved the legal system's ideal of complete predictability.

The purpose of antitrust has been a matter of uncertainty and controversy from the beginning. Was it meant to serve political, social, or (even) moral ends? Or was its purpose purely economic? More specifically, was it meant to protect competition in the interest of consumer welfare that is served by low prices and high output or, on the contrary, to protect small business from competition? Judges tended from the beginning to favor the latter view,[2] and in the Warren Court efficiency and low prices could be reasons to condemn rather than approve challenged conduct.[3]

It is interesting to compare later Courts' treatment of the Warren Court's expansion of antitrust to their treatment of its even greater and more important expansion of constitutional law. President Nixon was extremely fortunate in being able to make four Supreme Court appointments early in his first term, including the chief justice, Warren Burger. As to constitutional law, the Burger Court's performance proved to be extremely disappointing to those who expected a change of direction—turning out to be, as a book title put it, "The Counter-Revolution That Wasn't."[4] In fact, the Burger Court continued the constitutional revolution.[5]

The situation as to antitrust was very different. The reason may be that constitutional law is pure policy judgment, while antitrust has a connection to reality that makes a degree of objective evaluation possible. Critics of the Warren Court's antitrust decisions could show that they were often based on factual assumptions that, as nearly everyone now agrees, were simply mistaken.[6] The Burger Court sat in an era, influenced by Milton Freedman, George Stigler, and other Nobel prize-winning economists at the University of Chicago, of lowered expectations and increased skepticism of government economic regulation. The result was widespread deregulation of industries subject to specific economic regulation and a lessening of antitrust restrictions on industries supposedly subject to free market competition.

Although Section 1 of the Sherman Act prohibits "every contract, combination…, or conspiracy, in restraint of trade,"[7] it was early and necessarily—since the purpose of every contract is to restrain—decided that it prohibited only "unreasonable" restraints on trade.[8] Under the resulting "Rule of Reason," only business practices found to be net anticompetitive and without efficiency justification were (and are) illegal. Some practices, however, have been declared to be always or almost always anticompetitive and without justification—and therefore are said to be illegal per se. Because a challenged practice's anticompetitive effects and lack of justification are typically very difficult to show—largely because they characterize few business practices—the Rule of Reason tends to become a rule of legal per se.[9] The Rule of Reason means that antitrust plaintiffs will rarely win and, therefore, that few antitrust suits will be brought. The liberal justices of the Warren Court dealt with the "problem" by tending to declare nearly all challenged practices illegal per se.

The Warren Court

Minimum price fixing agreements, both horizontal (between or among competitors) and (dubiously) vertical (between buyers and sellers) were held illegal per se from the beginning.[10] The Warren Court extended the prohibition to vertical maximum price fixing agreements,[11] i.e., agreements to keep prices down. A pre-existing supposed per se rule against tying arrangements was solidified and extended by the Warren Court to the point that it could be a violation of the Sherman Act for a manufacturer to sell its product on favorable credit terms.[12] Such a sale, the Court held, could be an illegal per se tie of the product to the availability of the credit. The Court similarly reaffirmed and extended a supposed per se rule against boycotts or concerted refusals to deal to the extent that a violation could be found in a manufacturer's refusal to sell to a particular dealer.[13]

The apparent Warren Court rule as to mergers was, as Justice Stewart once pointed out in dissent, that "the Government always wins."[14] Mergers of small companies in highly competitive industries that would hardly be noticed today were found to be antitrust violations.[15] Competition by firms with a large market share put them in danger of being found guilty of monopolization.[16] Combinations of competitors in productive joint ventures were held illegal per se despite the fact that their apparent effect was to increase rather than lessen industry competition.[17] Regional price cutting by a large firm competing with a smaller firm could result in liability for illegal price discrimination under the Robinson-Patman Act[18] or attempted monopolization by predatory pricing under Section 2 of the Sherman Act.[19]

The acme of the Warren Court's drive for universal per se antitrust liability was undoubtedly reached in its 1978 decision in *United States v. Arnold Schwinn & Co*.[20] To the disbelief of nearly all commentators and lower court judges, the Court declared illegal per se all restraints placed on dealers by manufacturers in connection with the sale of their goods. The result was a bonanza for plaintiff antitrust lawyers who could almost surely find some

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restraint on a dealer in every manufacturer-dealer agreement and therefore establish a violation with no need to show an anticompetitive effect or lack of justification. Combined with antitrust's mandatory treble damages and attorney's fees for successful plaintiffs and the Warren Court's virtual preclusion of summary judgment for antitrust defendants,[21] the extortion potential was unparalleled.

The Burger Court

In what is surely one of the most amazing reversals of direction ever in a major field of law, nearly all of this was changed in the Burger (1969-'86) and Rehnquist (1986-'05) Courts and continues to be changed in the Roberts Court. After an era of continuous expansion, antitrust has entered an era of almost continuous contraction. The per se rule is essentially gone, rejected explicitly in some areas and implicitly in others, giant mergers are regularly approved, monopolists are permitted to compete vigorously, predatory pricing claims are treated with extreme skepticism, price discrimination is treated like predatory pricing, conspiracies have been made more difficult to prove, the paradoxical single-firm conspiracy concept is gone, and summary judgment is available to antitrust defendants.

The first indication of a change came in 1974 in *United States v. General Dynamics Corp.*,[22] ending the government's unbroken streak of victories in merger cases. Instead of finding a violation, as before, on the basis of statistics by simply manipulating market definitions to find that the merged company had a substantial market share and that the merger significantly increased market concentration, the Court upheld the merger by looking at actual industry conditions and likely competitive effects. In an opinion by Justice Stewart, the former dissenter, with four justices formerly in the majority dissenting—itself a strong indicator of change—the Court found the merged coal company's current market share less important than its future prospects, which were limited because of diminishing coal reserves.

The change of direction became clear three years later with the Court's 1977 decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.,*[23] essentially initiating the modern antitrust era. The fact of change was evident enough from the Court's willingness to explicitly overrule—overrulings being virtually unknown in the history of antitrust—the *Schwinn* decision of ten years earlier that epitomized the Warren Court's attraction to the per se rule. The revolutionary significance of *Sylvania* lay, however, primarily in the fact that Justice Powell's opinion for the Court, with only Justices Brennan and Marshall dissenting and Justice White concurring separately, was based upon and strongly endorsed the view of antitrust taken by the Chicago School of economics. The sole objective of antitrust, the Court agreed with the Chicago School, should be the purely economic one of maximizing consumer welfare.[24] Only practices which may result in limiting output and raising prices, therefore, should be matters of antitrust concern. The writings of the two leading proponents of the application of Chicago School economics to antitrust, Robert Bork and Richard Posner, are cited and relied on throughout the *Sylvania* opinion.[25] The historic debate as to whether the purpose of antitrust is to protect competition or, on the contrary, protect small businesses from the rigors of unrestrained competition was definitively settled in favor of the former.

Reversing the Warren Court's affinity for per se rules, Justice Powell began his discussion of the relevant law with the assertion that that the Rule of Reason is "the prevailing standard of analysis." "*Per se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." Only agreements or practices that have a "pernicious effect on competition and lack any redeeming virtue" can be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[26] Under these "demanding standards,"[27] as he put it, it is doubtful that any business agreement or practice is illegal per se other than naked agreements—involving no integration of facilities or operations—not to compete. *Schwinn* had to be overruled, therefore, because vertical territorial restraints imposed by manufacturers on dealers are not necessarily lacking in redeeming virtue. They may, in fact, be useful or essential to efficient distribution by, for example, enabling dealers to make necessary investments in facilities or marketing without fear that their prices will be undercut by other dealers in the brand who benefit from but do not make such investments. The restraints may thus enable manufacturers to overcome the "free rider" problem.[28]

The promise of *Sylvania* has been kept by the Supreme Court in nearly all of its later decisions (although complete consistency is, of course, too much to expect). In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[29] two years after *Sylvania*, the Court in effect abolished the per se rule even as to horizontal price fixing, the paradigm of antitrust offenses. Composers and other owners of copyright music organized two selling agencies to market copyright licenses to television networks and other users. They sold the music exclusively through a "blanket license" which entitled the buyer for a fixed price to use all or any of the music in any amount. Although composers retained the right to market their music separately, the practical effect of the arrangement was to end price competition among them. The Court reversed a court of appeals holding that the arrangement constituted horizontal price fixing illegal per se. The question, the Court said, was not whether "the blanket license involves 'price fixing' in the literal sense." "Price fixing," it explained, is merely a "short-hand way of describing certain categories of behavior to which the *per se* rule has been held applicable."[30] But the per se rule is applicable, as the Court pointed out in *Sylvania,* only to practices that are "plainly anticompetitive" and without "redeeming virtue." The competitive effect and possible redeeming virtue of a practice, that is, must be investigated before it can be condemned, which is to say in effect that there is no per se rule.

The Court purported to revive the per se rule for horizontal price fixing four years later in *Arizona v. Maricopa County Medical Society*.[31] A large number of doctors in Maricopa County, Arizona, agreed on a schedule of maximum prices for various medical services to be charged patients insured under a program in which the doctors participated. Justice Stevens, the sole dissenter in *BMI,* joined by Justices Brennan and Marshall and the unpredictable Justice White, wrote the opinion in a

4-3 decision, supposedly holding the arrangement illegal per se. He did so, however, only after substantial discussion of the arrangement's alleged anticompetitive effects and justifications. Justice Powell's dissent, joined by Chief Justice Burger and Justice Rehnquist, seems clearly correct that the arrangement was not plainly anticompetitive and without redeeming virtue—it permitted creation of an arguably efficient and convenient health plan—and therefore could not be declared illegal per se consistently with *Sylvania* and *BMI.* The liberals, it seemed, simply enjoyed a brief return to power on a short-handed Court.

Two practices in addition to horizontal (and vertical) price fixing and market division often said to be illegal per se are group boycotts or concerted refusals to deal and tying arrangements. In 1988, in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*,[32] the Court, in an opinion (surprisingly) by Justice Brennan, in effect did to the supposed *per se* rule as to group boycotts what *BMI* had done as to horizontal price fixing. The rule applied, the Court announced, not to all but only "certain concerted refusals to deal or group boycotts," namely those "likely to restrict competition without any offsetting efficiency gain." The rule has "generally" been applied, Justice Brennan said, to efforts by "dominant" firms to deny competitors necessary suppliers, facilities, or markets by practices "not justified by plausible arguments that they were intended to enhance overall efficiency."[33] Group boycotts are illegal per se, therefore, only when shown to fail the Rule of Reason.

Tying arrangements—the sale of product A, the tying product, on condition that the buyer also take product B, the tied product—are also said to be subject to a per se rule. This was always dubious, however, as the rule supposedly required some degree of market power in the tying product and some effect in the market for the tied. The supposed anticompetitive evil of tying, the use of monopoly power to gain additional monopoly power, was shown by simple economic analysis to be baseless. Tying can be used as a price discrimination device (which is not necessarily objectionable), but not to increase or multiply monopoly power, and it can have efficiency justifications, such as quality control or reducing production or marketing costs.[34]

It appeared, therefore, that the supposed tie-in per se rule could not survive *Sylvania*. This was the position take by four justices, Justice O' Connor, joined by Chief Justice Burger and Justices Powell and Rehnquist, concurring in *Jefferson Parish Hospital District No. 2 v. Hyde*.[35] The majority, however, in an opinion by Justice Stevens, asserted that it was "too late in the day" for such a drastic move, whatever its merits.[36] Although the Stevens opinion refused to explicitly abolish the supposed per se rule for tie-ins, it very much limited its application by insisting that the power requirement, previously reduced to a formality, was to be taken seriously. The defendant hospital was found not guilty of tying anaesthesiological services to surgery, not because the idea is preposterous, but because its 30% market share in the tying product (surgery) market was found insufficient to meet the power requirement.

It was only a matter of time, it seemed, before the supposed per se rule for tie-ins would be explicitly rejected. In *Eastman Kodak Co. v. Image Technical Services, Inc.*[37] (1992), however, it was applied in the context of a motion for summary judgment with no question raised as to its validity. In an opinion by Justice Blackmun, the Court held that the plaintiff was to be heard on its claim that Kodak tied machine service to machine parts. Since Kodak was the sole source for many of its machine parts, the parts were found, ludicrously, to meet *Hyde's* power requirement. The Court also considered it significant that Kodak imposed the tie after some machines had already been sold, i.e., to some customers who were "locked-in." Only Justices O'Connor and Thomas joined Justice Scalia in dissent, pointing out that it made no sense to condemn the parts-service tie when Kodak could have without question tied both parts and service to its machines, which, being in a competitive market, did not meet the power requirement. The Court, it seems, in a temporary throwback to the use of antitrust to protect the little from the big, came to the aid of cut-off independent service providers and hapless machine purchasers. That the state of the per se rule as to tie-ins remains precarious, nonetheless, is indicated by its explicit rejection by the Court of Appeals for District of Columbia Circuit in *United States v. Microsoft Corp.* (2007)[38] as inapplicable in the software context.

Perhaps the earliest example of the creation of a per se rule in antitrust was the Court's 1911 decision in *Dr. Miles Medical Co. v John D. Park & Sons, Co.,*[39] holding illegal per se under Section 1 of the Sherman Act a minimum resale price agreement between a manufacturer and its dealer. The decision was based on the misapplication of an irrelevant common law rule against restraints on alienation and the erroneous assumption that a vertical, manufacturer-dealer, price fixing agreement is necessarily equivalent to a horizontal agreement among dealers. In 1968 in *Albrecht v. Herald Co.*,[40] a suit by a cut-off newspaper deliverer who charged more than the agreed-upon price, the Warren Court's enthusiasm for antitrust liability was such that it extended the prohibition to maximum vertical price fixing agreements, a clear example of using antitrust to favor small businessmen over consumers.

Since vertical minimum price restraints serve very much the same purposes, such as avoiding the free-rider problem, as vertical non-price restraints, it seemed clear that *Dr. Miles* (much less *Albrecht*) could not survive *Sylvania*, as Justice White's concurring opinion in *Sylvania* pointed out. Congress, however, had seemingly expressed its approval of *Dr. Miles* just two years earlier by enacting the 1975 Consumer Protection Act.[41] The Act repealed the 1936 Miller-Tydings Act, which authorized the states to enact "fair trade" laws permitting manufacturers to escape *Dr. Miles*. The *Sylvania* Court was therefore understandably reluctant to explicitly overrule *Dr. Miles*, and instead undertook (unsuccessfully) to distinguish it.[42]

Dr. Miles and *Albrecht* clearly, it seemed, had to go. Beginning with the easier task, the Court explicitly overruled *Albrecht's* prohibition of vertical maximum price fixing in 1997 with *State Oil Co. v. Khan.*[43] Then, finally, two terms ago in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[44] the newly reconstituted Roberts Court explicitly overruled the ninety-six-years-old *Dr. Miles* over the stare decisis-based objections of the minority.

Although antitrust law is essentially anti-monopoly law, monopoly as such is, for good reason, not prohibited. It may, after all, be the result of a patent, exceptional business skill, or a market able to support only one efficient firm. It can therefore sensibly be condemned only if it is the result of merger(s) or of anticompetitive conduct. The evil of monopoly is that a monopolist may maximize profits by restricting output and raising prices. However, in *United States v. Aluminum Co. of America* (Alcoa),[45] the leading monopolization case of the mid-twentieth century, the Second Circuit held an alleged monopolist guilty of monopolization not for restricting but for expanding output and keeping prices low. This was an "exclusionary practice," the court reasoned, because it made it more difficult for new companies to enter the industry. The result was to institute a regime of soft competition in which it was dangerous for a company with a large market share to compete lest it be found guilty of monopolization by excluding or injuring smaller competitors. Antitrust became, at least for dominant firms, a means not of protecting but of discouraging competition.

That, too, saw a drastic change in the Burger Court era. The most important monopoly case of the era was the government's suit against IBM, which the government dismissed in 1982 as baseless after a costly thirteen-year struggle.[46] A dozen private suits against IBM spawned by the government case also ended in IBM's favor.[47] Perhaps the only real monopolization suit to reach the Burger Court was *Berkey Photo, Inc. v. Eastman Kodak Co.*, a suit by a small camera manufacturer against Kodak, complaining that Kodak, a film monopolist, drove it out of business by introducing a new size of camera and matching film without giving the plaintiff advance notice. The Second Circuit, explicitly rejecting its earlier *Alcoa* decision as "a litigant's wishing well," and making clear that even a monopolist is permitted and indeed encouraged to compete, reversed a jury verdict for the plaintiff.[48] The Supreme Court, rejecting a rare opportunity to explicate monopolization law, denied plaintiff's petition for certiorari, letting the decision stand.[49] Justice Powell, joined by Justice Rehnquist, dissented from the denial, finding it "little less than bizarre" and "difficult to fathom" that a claim could be based on a monopolist's failure to assist a competitor.[50]

Having declined to hear a real monopolization case, the Court, a few years later, as if to prevent the law from falling into boring rationality and predictability, agreed to hear a specious one, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*.[51] Defendant Aspen Skiing, operator of skiing facilities on three mountains in Aspen, Colorado, declined to continue an agreement with plaintiff Highland, operator of a somewhat lesser skiing facility on a fourth mountain, to sell a multi-day all-lift ticket, granting skiers access to any of the mountains. Antitrust, one might think, would be more concerned with the agreement that ended price competition between the parties than with its termination. The Court, however, in an opinion by Justice Stevens, first assumed that Aspen Skiing was a monopolist, despite the fact that it was in competition with many other "destination" (non-regional) skiing facilities in Colorado and elsewhere. Then, doing precisely what Justices Powell and Rehnquist considered "bizarre" in *Berkey Photo*, found Aspen Skiing guilty of illegal monopolization for failing to continue to cooperate with and assist its smaller competitor. As in *Kodak*, the Court seemed to succumb again to the pre-Chicago School temptation to use antitrust to protect not competition, but a small competitor injured by competition. Fortunately, the decision is peculiar enough—Aspen almost surely would not have incurred antitrust liability if it had never cooperated with Highland in the first place—that it has had very little precedential value.[52]

Except for the fact that decisions made by a committee cannot be expected to be consistent, it would be difficult to believe that the Court that decided the *Kodak* tie-in case in 1992, apparently letting sympathy trump economics, could decide *Brooke Group v. Brown & Williamson Tobacco*[53] a year later, arguably letting economics trump reality. Predatory pricing, selling below cost by a large and wealthy company to drive a smaller competitor into bankruptcy, has been the *bête noir* of antitrust from the beginning.[54] Economic analysis indicates that for many reasons it is not likely to be a successful business strategy, but it has nonetheless been the basis of many monopolization, and probably most attempt-to-monopolize, suits. The small competitor who cannot meet the lower prices of a large competitor is strongly tempted to charge and even believe that he was crushed not by a superior product but just by greater wealth. One of the most important steps taken by the Burger Court to reduce antitrust liability was its virtually total elimination of predatory pricing as a viable basis for an antitrust claim.

The Court's 1986 decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[55] is significant in two respects. First, it demonstrated that summary judgment had become a realistic possibility for antitrust defendants, which was not the case in the Warren Court era.[56] Second and perhaps even more important, Justice Powell's opinion for the Court adopted the Chicago School's extreme skepticism as to the anticompetitive potential of predatory pricing. Incurring present-day losses from below-cost pricing to drive an equally efficient competitor from the market and gain monopoly power is a rational business strategy only if the losses can be recouped, with interest, from monopoly profits in the future, but that is highly speculative. The competitor may, for example, obtain funding and not go bankrupt, a bankrupt competitor may reorganize and reenter the market with a low cost overhead, or monopoly prices may quickly cause old or new competitors to enter the market.[57] The result, the Court concluded in *Matsushita,* is that "predatory pricing schemes are rarely tried, and even more rarely successful."[58]

Brooke Group presented the very rare situation in which it appeared that the plaintiff's claim of predatory pricing had a degree of plausibility. Unlike in the usual case, the plaintiff was able to show that the defendant did in fact sell its product below cost—and not only full cost, which may minimize loss, but apparently variable or incremental cost, which is loss-increasing—and did so for a very substantial period of time (eighteen months).[59] The plaintiff was further able to show from the defendant's files, also quite unusually, that the defendant acted with the specific intent to hinder competition.[60] All of this was not enough to prevent grant of summary judgment to

the defendant. Below-cost pricing does not of itself establish a predatory pricing claim; that it "may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured." There is a "second prerequisite." Plaintiff must be able to show that defendant had "a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered." Without recoupment the predatory pricing scheme will be unsuccessful and "unsuccessful predation is in general a boon to consumers."[61] Because of competitive conditions in the cigarette industry—not historically noted, however, the dissent pointed out, for intense competition—the plaintiff would not be able, the Court determined, to make this showing.

With *Brooke Group*, predatory pricing essentially dropped out of antitrust as a feasible means of establishing a monopolization or attempt to monopolize claim. As if that were not enough, *Brooke Group* also, simultaneously, virtually eliminated from antitrust the likelihood of a successful suit for primary line price discrimination (injuring competition with a competitor of the seller) under the Robinson-Patman Act. The Act prohibits, with various exceptions and qualifications, sales of a product to different buyers at different prices "where the effect… may be substantially to lessen competition or tend to create a monopoly."[62] Such price discrimination can injure competition, *Brooke Group* holds, only when the complained-of lower price is predatory, and the meaning of predatory is essentially the same for a price discrimination case under the Robinson-Patman Act as for a monopolization or attempt-to-monopolize case under Section 2 of the Sherman Act. In both cases, in addition to a showing of a price below some measure of cost (which the Court has repeatedly declined to specify)[63] there must be a showing of (for the Robinson-Patman Act) a "reasonable prospect" and (for Section 2 of the Sherman Act) a "dangerous probability" of recoupment.[64] The Robinson-Patman Act, enacted less to protect competition than to protect small businessmen from competition, was in effect converted into a true antitrust law.

The "attempt to monopolize" offense under by Section 2 of the Sherman Act seemed perhaps to have the greatest potential for antitrust plaintiffs. Section 1 has the threshold requirement of proof of a conspiracy or some concert of action. Section 2's monopolization offense applies to single firm conduct, but requires a showing that the defendant has monopoly power, which usually requires showing that the defendant has a large share (perhaps 70% or more) of a defined relevant product and geographic market. The attempt offense, however, requires proof of neither a conspiracy nor monopoly power. It presumably requires only anticompetitive conduct and a degree of market power sufficient to create a "dangerous probability" that a monopoly will result. Courts sympathetic to small firms crushed by larger competitors often had little difficulty in finding this lesser power requirement met.

In 1964, the highly sympathetic Ninth Circuit effectively dispensed with the power requirement entirely by simply holding, uniquely, that it could be inferred from the fact of the allegedly anticompetitive conduct.[65] Incredibly, the Supreme Court allowed this anomaly to stand for thirty-nine years, until its 1993 decision in *Spectrum Sports, Inc. v. McQuillan* (1993).[66] The attempt to monopolize offense, the Court finally announced, requires plaintiff to define the market defendant is allegedly attempting to monopolize and to show that "defendant's economic power in that market" is sufficient to create a "dangerous probability of monopolization." The result, especially in combination with the Court's skeptical view of predatory pricing claims, is largely to pull the teeth of the attempt offense, depriving it of much of what was thought to be its potential.

In a decision of lesser but still some importance, the Burger Court definitively rejected the possibility of basing Section 1 liability on an intra-enterprise (or "bathtub," as it was sometimes called[67]) conspiracy. In *Copperweld Corp. v. Independence Tube Corp.* (1984),[68] the Court held that a corporation cannot conspire with a wholly owned subsidiary, as had sometimes earlier been held or assumed, even if it is separately incorporated. Another route of possible escape from Section 1's conspiracy requirement has been shut off.

The Roberts Court

The Burger and Rehnquist Courts have so thoroughly revised antitrust law in accordance with the Chicago School's purely economic approach and in the direction of lessening liability as to leave little more, it would seem, for the purportedly more conservative Roberts Court to do. In fact, however, the Roberts Court has been unusually active in antitrust, deciding three cases with full opinion in the 2005 term and four in the 2006 term, all in favor of the defendants. An antitrust plaintiff that seemingly could not lose in the Warren Court, now, on the basis of results to date, seemingly cannot win.

In *Texaco, Inc. v. Dagher* (2005),[69] the Court held that it was not illegal price-fixing for two oil companies that had formed a joint venture to refine and sell gasoline to agree on the product's selling price, even though it was sold under their individual brand names. In *Illinois Tool Works, Inc. v. Independent Ink, Inc*. (2005),[70] involving the tying of unpatented supplies to a patented machine, the Court rejected the presumption of earlier cases that a patent is evidence of market power. The Court explained that its former "strong disapproval of tying arrangements has substantially diminished." As a result, a plaintiff alleging illegal tying must make "a showing of market power in the tying product" and that requirement is not met by the fact that the product is patented.[71]

The Court's decision in the third case, from the October 2005 term, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[72] is not likely to have wide application, but illustrates the Court's continuing limitation of the scope of the Robinson-Patman Act by insisting that its requirement of injury to competition is to be taken seriously. A manufacturer did not commit illegal secondary line price discrimination (discrimination injuring competition between buyers) under the Act, the Court held, by making some sales to other dealers on more favorable terms than some sales it made to the plaintiff. Reversing the court of appeals, the Court held that there could be no illegal secondary line price discrimination absent proof that plaintiff and other dealers competed for sales to the same customer.

In the 2006 term, in *Credit Suisse Securities (USA) LLC v. Billing*,[73] the Court dismissed as precluded by securities law a

suit by investors claiming a conspiracy by underwriting firms in violation of Section 1 of the Sherman Act. In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*,[74] the Court held that the *Brooke Group* test for predatory selling—sales below an appropriate measure of cost plus a reasonable probability of recoupment—applied also to the unusual situation of alleged predatory buying, i.e., buying at high prices to deny competitors needed supplies. Plaintiff must show, first, that the predatory (high-cost) buying led to below-cost sales of the product and, second, that the defendant had a reasonable probability of recoupment by obtaining a buying monopoly that would enable it to recover (with interest) its costs. The chief significance of the decision probably lies, again, in the Court's insistence that antitrust plaintiffs show actual or potential injury to competition.

The most litigated issue in antitrust law is the existence of a conspiracy in a suit under Section 1 of the Sherman Act. In the usual case, plaintiff alleges a conspiracy in very general or conclusory terms and hopes then to find enough evidence through discovery proceedings to bring the issue to a jury. In *Bell Atlantic Corp. v. Twombly*,[75] a potentially highly significant decision, the Roberts Court made this harder for plaintiffs to do. After quoting the statement from *Brooke Group* that mere parallel action by competitors, even interdependent parallel action, is "not in itself unlawful," the Court held that to avoid dismissal plaintiff must allege "enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement."[76] The Court explicitly rejected the statement in an earlier case that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." The plaintiff must allege facts that "suggest[] an agreement."[77]

Finally, in *Leegin*,[78] as already noted, the Roberts Court overruled the venerable *Dr. Miles* decision making resale price maintenance illegal per se, completing the movement from a regime where almost everything to a regime where nothing is illegal per se. The Court has effectively come close to recognizing this by agreeing that "there is no bright line separating *per se* from Rule of Reason analysis."[79]

More useful and accurate than trying to maintain the Rule of Reason/illegal per se distinction might be the proposition that the law today is that only naked agreements not to compete are necessarily illegal. Such agreements are, by definition, anticompetitive, and that should be enough, in the interest of legal clarity and certainty—whatever their possible merits in some cases—to condemn them. In all other cases, the antitrust plaintiff should be required to show actual or potential anticompetitive effects possibly raising the monopoly problem of output reduction. The result is that antitrust law and litigation have been much reduced and antitrust has at last become, at least arguably, a genuine public welfare measure.

Endnotes

1 From 1956 when the government lost *United States v. E. I. Dupont de Nemours & Co.*, 351 U.S. 377 (the Cellophane Case) until 1974 when it lost *United States v. General Dynamics*, 415 U.S. 486, it won all of its cases in the Supreme Court except *White Motor Co. v. United States*, 372 U.S. 253 (1963), which was remanded to the lower courts for further consideration. The only exception was *Tampa Electric Co. v. Nashville Coal Co.* (1961), a private action against a defendant who was obviously using antitrust as an excuse to renege on a contract. Even that, however, did not keep Justices Black and Douglas from dissenting.

2 In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 333 (1897), the first antitrust case decided by the Supreme Court, the Court stated that a combination that "may even temporarily or perhaps permanently, reduce the price of an article" should nonetheless be found to violate the Sherman Act if the effect is to drive "out of business the small dealers and worthy men whose lives have been spent therein, and who might be unable to readjust themselves to their altered surroundings."

3 In *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962), the Court considered it a reason to condemn a merger that national shoe chains "can market there own brands at prices below those of competing independent chains." Congress sought to protect "viable, small, locally-owned businesses," the Court said, even if "occasional higher costs and prices might result."

4 Vincent Blasi, The Counter-Revolution That Wasn't (1983).

5 *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

6 *See, e.g.*, Robert Bork, The Antitrust Paradox (1978); Richard Posner, Antitrust Law (2nd ed. 2001).

7 26 Stat. 209; 15 U.S.C.A. §§ 1-7.

8 Standard Oil Co. v. United States, 221 U.S. 1 (1911).

9 *See*, Richard A. Posner, *The Rule of Reason and the Economic Approach, Reflections on the Sylvania Decision,* 45 U. Chi. L. Rev. 1, 14 (1977) (the rule of reason is "in practice… little more than a euphemism for non-liability").

10 United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (horizontal); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911) (vertical).

11 Albrecht v. Herald Co., 390 U.S. 145 (1968).

12 Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 4951 (1969).

13 Klors v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959). (plaintiff alleged a manufacturer conspiracy).

14 United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966).

15 *Id.*

16 United States v. Aluminum Co. of America, 148 F2d 716 (2nd Cir 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curium*, 347 U.S. 521 (1954).

17 United States v. Topco Assoc., Inc., 405 U.S. 596 (1972); United States v. Sealy, Inc. 388 U.S. 350 (1967).

18 49 Stat. 1526 (1936), 15 U.S.C.A. f 13.

19 Utah Pie Co. v. Cont'l Bakery Co., 386 U.S. 685 (1967).

20 388 U.S. 365 (1967).

21 Poller v. Columbia Broad. Sys., 368 U.S. 464 (1962).

22 415 U.S. 486 (1974).

23 433 U.S. 36 (1977).

24 It is not a function of antitrust, the Court said, to protect the "autonomy of independent businesses," for "an antitrust policy divorced from market considerations would lack any objective benchmarks." *Id.* at 53 n. 21.

25 *Id.* at, *e.g.*, 48 n.13, 51 n. 18, 53 n. 21, 55, 56.

26 *Id.* at 49-50, quoting Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958).

27 *Id.* at 50.

28 *Id.* at 55.

29 441 U.S. 1 (1979).

30 *Id.* at 9.

31 457 U.S. 332 (1982).

32 472 U.S. 284 (1985).

33 *Id.* at 290, 294.

34 *See, e.g.*, Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 514 n.9 (White, J. dissenting).

35 466 U.S. 2 (1984).

36 *Id.* at 9.

37 504 U.S. 451 (1992).

38 253 F. 3d 34 (D.C. Cir. 1998).

39 220 U.S. 373 (1911).

40 390 U.S. 145 (1968).

41 89 Stat. 801 (1975), amending 15 U.S.C. f.1, 45(a).

42 *Sylvania*, 433 U.S. at 51 n.18.

43 522 U.S. 3 (1997).

44 127 S.Ct. 2705 (2007).

45 178 F. 2d 416 (2nd Cir. 1945) (lack of a quorum precluded Supreme Court review).

46 *In re IBM Corp.*, 687 F. 2d 591 (2nd Cir. 1982).

47 *See, e.g.*, Telex Corp. v. IBM, 510 F. 2d 894 (10th Cir. 1975); California Computer Products v. IBM, 613 F. 2d 727 (9th Cir. 1979).

48 603 F. 2d 263 (2nd Cir. 1979).

49 444 U.S., 1093 (1980).

50 *Id.* at 1094.

51 472 U.S. 585 (1985).

52 *See, e.g.*, Olympic Equip. Leasing Co. v. Eastern Union Telegraph, 797 F. 2d 370 (7th Cir. 1986) (opinion by Posner, J.)

53 509 U.S. 209 (1993).

54 It was an element of the finding of monopolization by the Standard Oil Co., United States v. Standard Oil Co., 220 U.S. 1 (1911), though later analysis indicates it may have never occurred. John McGee, *Predatory Pricing Revisited*, 23 J. Law & Econ. 289 (1980).

55 475 U.S. 574 (1986).

56 *See*, Poller v. Columbia Broad. Sys., 368 U.S. 464 (1962).

57 *See*, Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263 (1981).

58 *Matsushita*, 475 U.S. at 589.

59 *Brooke Group*, 509 U.S. at 231.

60 *Ibid.* (a reasonable jury could conclude that Brown & Williamson "envisioned or intended this anticompetitive course of events").

61 *Id.* at 234.

62 49 Stat. 1526 (1936), 15 U.S.C. n.§ 13.

63 *Brooke Group*, 509 U.S. at 222 n. 1.

64 *Id.* at 224.

65 Lessig v. Tidewater Oil Co., 327 F. 2d 459 (9th Cir. 1964).

66 447 U.S. 113 (1993).

67 From the pre-jacuzzi era in which it was assumed that a person in a bathtub was alone.

68 467 U.S. 113 (1993).

69 126 S. Ct. 1276 (2005).

70 126 S. Ct. 990 (2005).

71 *Id.* at 1286.

72 126 S. Ct. 860 (2009).

73 127 S. Ct. 2383 (2007).

74 127 S. Ct. 1069 (2007).

75 127 S. Ct. 1955 (2007).

76 *Id.* at 1964-65.

77 *Id.* at 1968.

78 127 S. Ct. 2705 (2007).

79 California Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999), quoting Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla, 468 U.S. 85, 104 n.26 (1984).

Criminal Law and Procedure

The Supreme Court's 21st Century Trajectory in Criminal Cases

*By Tom Gede, Kent Scheidegger & Ron Rychlak**

With the recent, important changes in the composition of the U.S. Supreme Court, the Court has effectively pushed the field of criminal law and procedure into new and occasionally unintended directions. Generally, the decisions have not appeared especially partisan or ideologically driven. Nor does any particular alignment of justices regularly manifest itself. There have, however, been several interesting cases that suggest certain trends for the future—in particular, noteworthy developments in sentencing, the death penalty, and Fourth Amendment jurisprudence. Some of these cases were decided before all of the personnel changes took place, but they remain relevant in terms of identifying trends.

I. SENTENCING

Foremost in the category of cases with unforeseen results are the decisions following the Court's holding in *Apprendi v. New Jersey* (2000).[1] In *Apprendi*, the Court held that the Fourteenth Amendment right to due process and the Sixth Amendment right to trial by jury, taken together, require any fact used to enhance a sentence beyond the statutory maximum, other than the fact of a prior conviction, be found by a jury beyond a reasonable doubt. The *Apprendi* Court effectively negated state statutory provisions that allowed a trial judge to enhance a sentence if the judge found, by a preponderance of the evidence, certain conditions which related to the offense. In *Apprendi*, the enhancement was based on the finding that the defendant committed the crime with a purpose to intimidate a person or group because of, *inter alia,* race.

The decision triggered a flurry of questions, cases, and quandaries concerning its application in state court to consecutive sentencing and the death penalty, as well as to retroactivity and harmless error,[2] and in federal court to the entire sentencing scheme set forth in the Sentencing Reform Act of 1984.[3]

Within two years of *Apprendi*, the Supreme Court in *Ring* v. *Arizona*[4] held that it was impermissible for "the trial judge, sitting alone" to determine the presence or absence of the aggravating factors required by Arizona law for imposition of the death penalty.[5] The Court rested the jury trial guarantee on whether an increase in a defendant's authorized punishment was imposed contingent on a finding of a fact. Sidestepping what constitutes "authorized punishment," and relying on *Apprendi*, the Court viewed Arizona's enumerated aggravating factors as "the functional equivalent of an element of a greater offense," calling for the Sixth Amendment guarantee of a jury determination.[6]

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By 2004, the Supreme Court had before it another case, *Blakley v. Washington*,[7] arising from a state court, but one involving a statutory sentencing scheme that provided for a "standard range" of sentencing. The state trial judge had enhanced the defendant's sentence for second degree kidnapping to 90 months, based on an aggravating factor—the defendant's cruelty.[8] This was above the upper limit of the "standard range" (53 months), but below the statutory maximum for second degree kidnapping (10 years). In *Blakley*, the Court—in a 5-4 decision authored by Justice Scalia—followed *Apprendi* to invalidate the sentence, holding the defendant had the right to have any fact used to enhance the sentence above "statutory maximum of the standard range" be determined by the jury beyond a reasonable doubt. The Court treated the upper limit of the state's standard range of sentencing as the "statutory maximum," above which the constitutional due process and jury guarantees applied.

The consequences of the *Blakely* decision were immediately apparent. Justice O'Connor wrote: "[B]ecause the practical consequences of today's decision may be disastrous, I respectfully dissent," noting the "'effect' of today's decision will be greater judicial discretion and less uniformity in sentencing." She pointed to the "damage" that would be done to the state and federal statutory schemes meant to replace earlier indeterminate sentencing laws, the latter of which she described as a "system of unguided discretion [that] inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories." The federal scheme meant to replace indeterminate sentencing was the Sentencing Reform Act (SRA). It was the next target.

United States v. Booker and the Sentencing Reform Act

Federal sentencing had been reformed significantly with the passage of the SRA in 1984. The SRA was written to overcome perceived deficiencies in indeterminate sentencing and the rehabilitative ideal.[9] It created the United States Sentencing Commission, and directed the Commission to devise guidelines to be used for sentencing, effectively making all federal criminal sentences determinate.[10] Importantly, it made the Sentencing Commission's guidelines binding on the courts, allowing the judge to depart from the applicable guideline only if the judge found an aggravating or mitigating factor that the Commission did not adequately consider when formulating guidelines.[11] If such a factor were found, the judge had to state "the specific reason" for imposing a sentence different from that described in the guideline.

By 2005, the Court faced squarely whether *Apprendi* and *Blakely* required finding a Sixth Amendment violation in the application of the federal sentencing guidelines under the SRA, with *United States v. Booker* and *United States v. Fanfan*. The case involved sentencing by a federal judge who found by a preponderance of evidence factors that enhanced Booker's

sentence. Booker appealed to the Seventh Circuit, claiming that the sentencing guidelines violated his Sixth Amendment rights, as the judge, and not a jury, determined his sentencing range with facts other than his criminal history. The Seventh Circuit found that the judge's application of the guidelines did violate the Sixth Amendment under *Blakely*. On petition from the United States, the Supreme Court took both Booker's case and a similar case from Maine, *United States v. Fanfan*, to consider whether *Apprendi* applied to the federal sentencing guidelines.

The Court found a Sixth Amendment violation, but it issued two five-member majority opinions, one authored by Justice Stevens and another by Justice Breyer, with only Justice Ginsburg joining both opinions. Justice Stevens noted the federal sentencing guidelines are mandatory and binding on sentencing judges. Were they merely advisory, their application would not implicate the Sixth Amendment. Because, for *Apprendi* purposes, the maximum sentence a judge may impose is solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, the government, under Justice Steven's opinion, would have to prove to the jury all facts needed for the judge to consider in determining the sentencing range. Justice Breyer's majority, however, rejected this as a remedy, and held the mandatory nature of the guidelines must be severed from the overall sentencing law in order to overcome the Sixth Amendment violation, making the guidelines advisory only.

In reaching its decision, the majority severed and excised two provisions of the SRA: the provision that made the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), and the provision governing appellate review of sentences, including de novo review of departures from the applicable range. Accordingly, after *Booke*r the Guidelines are no longer binding on sentencing courts, and they are reviewable for "unreasonableness" on appeal. The Court noted that its decision had to be applied to all cases on direct review.

In later cases, the Court plowed ahead with what standards of "reasonableness" courts of appeals should apply when reviewing sentences imposed by district courts. First, in *Rita v. United States* (2007),[12] the Court tackled whether a sentence ought to be presumed reasonable when it is *within* the range recommended by the sentencing guidelines, holding that when a district judge's discretionary decision in a particular case accords with the guidelines, the court of appeals may presume that the sentence is reasonable. Just weeks before the *Rita* decision, the Court had dismissed as moot *Claiborne v. United States*,[13] a case that involved a sentence *below* the range recommended by the guidelines. In *Gall v. United States,*[14] the Court reached the question of a sentence *below* the bottom of the guideline range and found it reasonable under a deferential abuse-of-discretion standard. And in *Kimbrough v. United States*[15] the Court first noted that *Booker* made the guidelines as applied to various cocaine offenses (both crack and powder cocaine) merely advisory. It then held that a district judge may consider the disparity between the guidelines' treatment of crack and powder offenses and subsequently determine that a *within-guidelines* sentence is "greater than necessary" to serve the objectives of sentencing.

These decisions have left many wondering how to proceed post-*Booker*. The Court has made clear that the "recommended" guidelines range is relevant, but that courts of appeals must review all sentences—"whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."[16] After the *Kimbrough* decision was released, there was much commentary on the lack of uniformity and consistency that would result. Not surprisingly, at the *Kimbrough* argument, Justice Scalia openly stated: "Indeed, it might be quite impossible to achieve uniformity through advisory guidelines, which is why Congress made them mandatory." Justice Thomas went further, writing in his dissenting opinion that, in making the guidelines mandatory, "Congress did not mandate a reasonableness standard of appellate review…. By rejecting this statutory approach, the *Booker* remedial majority has left the Court with no law to apply and forced it to assume the legislative role of devising a new sentencing scheme."[17]

Booker's lasting impact is that it firmly establishes the federal sentencing guidelines as advisory. Some prognosticators have suggested that this would return the courts to the situation before the SRA. Whether or not that is the case, *Booker* has made clear that the sentencing guidelines remain an important consideration in the imposition of federal sentences. Sentencing judges still must take account of the guidelines and the other sentencing goals reflected in the SRA. The Sentencing Commission also has continued statutory responsibilities.

II. TRENDS IN CAPITAL CASES

In capital cases, the Supreme Court has largely followed a middle path for the last twenty years. The Court has pruned back the application of the death penalty by excluding certain categories of murders and murderers. At the same time, the Court has taken steps to limit the obstruction of the death penalty by some hostile federal courts and has largely refrained from imposing new procedural requirements under the "death is different" rubric that characterized its jurisprudence from the 1970s through the mid-1980s. However, hardly anyone is satisfied with the status quo, and there are indications that the Court could take a sharp turn in the next few years. That turn could be in the direction of finally making the death penalty effective again, or it could be in the direction of abolition of the punishment.

Two Decades of Turmoil

Historically, there have been very few constitutional restraints on sentencing procedure. Sentences could be mandated strictly from the crime committed,[18] or the sentencing judge could be given wide discretion over what sentence to impose and what factors and evidence to consider in imposing it.[19] However, in the 1972 case of *Furman v. Georgia*,[20] the Supreme Court grafted a procedural requirement for capital cases on to the Eighth Amendment and struck down all of the then-existing death penalty statutes on the ground that their broad scope and excessive discretion rendered them arbitrary in application. When the Court considered a new generation of capital sentencing statutes four years later in *Gregg v. Georgia,*[21] and its companion cases,[22] it decided that only "guided discretion" statutes, narrowing the scope of potentially

capital cases but providing for sentencer discretion, would pass constitutional muster. Mandatory sentencing systems, enacted by California, New York, and several other states in the well-founded belief that they were required by *Furman*, were declared unconstitutional in *Woodson* v. *North Carolina*.[23]

Furman was not expressly based on the danger of racial prejudice. However, as Justice Thomas noted years later, "[i]t cannot be doubted that behind the Court's condemnation of unguided discretion lay the specter of racial prejudice—the paradigmatic capricious and irrational sentencing factor."[24] There can also be little doubt that the prejudice of greatest concern was prejudice against black defendants, i.e., that black men were being sentenced to death while white men were sentenced to life for indistinguishable crimes.[25] The post-*Furman* reforms approved in the *Gregg* cases were a great success in addressing this problem, as the opponents' own studies reveal. A study of Georgia cases funded by the NAACP Legal Defense and Education Fund concluded, "What is most striking about these results is the total absence of any race-of-defendant effect."[26]

In the years that followed *Gregg*, the Supreme Court was not content to simply leave in place the reforms it had wrought. Instead, it continued to invent additional procedural requirements for capital cases. Narrow, shifting majorities on the Court produced a haphazard serious of decisions with no unifying theme. Justices Brennan and Marshall remained dead-set against the death penalty in all cases, and occasionally they garnered enough additional votes to strike down a sentence that appeared unfair or unjustified to another three justices. The Supreme Court struck down, as unconstitutionally vague, language that numerous state legislatures had copied from the draft Model Penal Code.[27] The Court forbade the use of probation reports in the way that the courts had routinely used them in noncapital cases and a way it had previously upheld in a capital case.[28] In *Booth v. Maryland* (1987),[29] the Court declared victim impact evidence unconstitutional in capital cases. The next year in *Mills v. Maryland*, the Court created a new requirement that jurors cannot be required to agree on the mitigating circumstances, but rather that each juror must decide them for himself, striking down a standard instruction drafted by a committee of the Maryland bar and approved as a rule of court by that state's highest court.[30]

By far the most extensive of the post-*Gregg* requirements, though, was the rule of *Lockett v. Ohio*.[31] That case expanded the requirement of sentencer discretion to include a requirement that the sentencer be allowed to consider any and all circumstances the defendant proffered as mitigating.[32] This sweeping judicial fiat had no basis in the text or history of the Eighth Amendment. Ironically, it was authored by Chief Justice Warren Burger. Burger had been appointed by President Nixon, who had campaigned on a promise to appoint "strict constructionists" to the Court. Justice White denounced the opinion, although concurring in the result for other reasons, as a betrayal of the *Furman* principle of evenhandedness.[33] Just two years earlier, the Court had upheld sentencing systems in Florida and Texas that instructed the juries to consider a discrete number of circumstances. Eventually, the Court held in *Hitchcock v. Dugger* [34] and *Penry v. Lynaugh* [35] that *Lockett* required the reversal of sentences in cases where the jury had been instructed precisely in the terms of the statutes it had previously upheld.

A Procedural Plateau

In the 1990s and continuing to the present day, the Court's capital sentencing procedure jurisprudence has been largely in a state of equilibrium. The Court has not created major new rules unique to capital cases, as it did previously, but with one exception it has continued to enforce the restrictions it previously created. The equilibrium is probably due in part to a realization on the part of the Court that its procedural mandates had gone far enough. As early as 1987, the Court had declined to open up a major new branch of litigation based on statistics claiming sentencing bias based on the race of the victim.[36] However, the trend was also undoubtedly affected by changes in the Court's membership.

William Rehnquist, who had consistently dissented from expansion of constitutional restrictions on capital sentencing, succeeded Warren Burger as Chief Justice, and the equally conservative Antonin Scalia took Rehnquist's associate justice seat. Anthony Kennedy succeeded Lewis Powell and at least initially was more restrained about inventing constitutional limitations.[37] David Souter succeeded William Brennan, and while he has not been as favorable to the prosecution in criminal cases as many had hoped, he was certainly much more favorable than the intransigent Brennan.[38]

Justice Scalia had originally gone along with enforcing precedents established before he joined the Court. He wrote the *Hitchcock* decision, for example. However, by 1990, Justice Scalia denounced the contradiction between the evenhandedness principle of *Furman* and the *Lockett* line of cases and announced he would no longer follow the latter.[39] He concluded, as Justice White had earlier, that the *Lockett* rule could not be reconciled with the principle of *Furman*, and he announced that he would not follow *Lockett* in the future.

In the 1991 case of *Payne v. Tennessee*,[40] the Court overruled *Booth v. Maryland* and allowed victim impact evidence in capital cases. *Booth* and *Lockett* in combination had created the intolerable imbalance of allowing the defense to bring in all the problems of the defendant's entire life, while the victim remained little more than a name and an unseen, unknown abstraction.[41] *Booth* is the only pro-defendant capital case to be overruled in the modern era, though. All the other "death is different" restrictions on sentencing procedure, no matter how thin their justification, remain as constitutional mandates, beyond the ability of legislatures to modify in the light of experience.

Justice Marshall's dissent in *Payne* was his last death penalty opinion. He retired that summer and was succeeded by Justice Thomas, the most dramatic change in viewpoint of any Supreme Court succession in many years. By 1993, in a concurring opinion in *Graham v. Collins*,[42] Justice Thomas concluded that the "anything goes" rule of mitigation in the *Lockett* line of cases had gone too far and "makes a mockery of the concerns about racial discrimination that inspired our decision in *Furman*."[43] However, other developments precluded a major correction of this dubious line.

First, Justice Blackmun's position on constitutional limitations on capital punishment had drifted a long way. He had always been personally opposed to it, but in 1972 he dissented in *Furman*, stating his opposition as a matter of policy but acknowledging that the policy was not for the judiciary to make. "We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible."[44] By 1996, he had yielded to temptation and announced that he would vote for exactly the overstep he had denounced twenty-four years earlier.[45]

Second, Bill Clinton was elected President in 1992. Justice White retired at the end of that term and was succeeded by Ruth Bader Ginsburg. While not a hard-core opponent of capital punishment in the Brennan-Marshall mode, she tends to favor the defendant in capital cases to a considerably greater degree than did Justice White. Stephen Breyer succeeded Justice Blackmun the following year, though that succession was not a large change, given how far Justice Blackmun had drifted.

Third, Justice O'Connor, who held the deciding vote on many matters in this era, remained solidly committed to maintaining and even expanding the *Lockett* line. In a 1987 case of the rape and murder of a teenage girl, she wrote of "defendants who commit criminal acts that are *attributable* to a disadvantaged background,"[46] simply assuming a hotly disputed causal connection between background and crime. It is evident in her opinions from *Brown* until her retirement that she considers the "bad childhood" defense strongly mitigating,[47] while others consider it weak to irrelevant.[48]

As discussed in Part I, the Court has made one major change in sentencing procedure that affects capital cases, but it was not based on a "death is different" rationale. In a line of cases beginning with *Apprendi v. New Jersey*,[49] a noncapital case, the Court extended the Sixth Amendment right of jury trial to certain factors affecting sentencing. Specifically, under *Apprendi* the jury trial right extends to factors that have a function which the Court finds practically indistinguishable from elements that distinguish a higher degree of offense from a lower one. In *Ring v. Arizona*,[50] the *Apprendi* rule was applied to disapprove a practice expressly approved by the Court against the same challenge four times from 1976 to 1990.[51] The *Ring* opinion contains one brief paragraph on stare decisis,[52] and it makes no mention at all of the massive reliance of multiple states on the *Walton* precedent.

Trimming the Outliers: Lockett, Habeas, and Effective Assistance

With the close division on the Court preventing major doctrinal changes in either direction on capital sentencing procedure, much of Court's capital case work since 1991 has consisted of correcting what it perceives as errors in application of its precedents by lower courts. Those precedents were being applied quite differently in different courts and regions. The Supreme Court has reversed death sentences where it believed lower courts had been too limited in applying the *Lockett* rule[53] and reinstated them where the lower courts, primarily the Ninth Circuit, had been too expansive.[54]

The Court also moved to rein in the excessive reversals of death sentences by changing the law of habeas corpus. That writ had originally been a very limited procedure to review the legality of detention, and a habeas court could not look behind a judgment of conviction by a court of general jurisdiction.[55] At the height of the Warren Court era, habeas corpus had become for all practical purposes a second appeal, and a third, and a fourth.[56] Federal district courts had as much leeway to overturn decisions of the states' highest courts as did the Supreme Court itself, and there were no firm limits on the number of times a judgment could be attacked. State court decisions that correctly followed Supreme Court precedents in effect at the time could be attacked in federal court with a claim that a new rule should be created and imposed retroactively on the states.[57]

In 1989, the Court cracked down on the creation and application of new rules of procedure on habeas corpus in *Teague v. Lane*.[58] In 1991, the Court limited the repeated use of habeas corpus to attack a judgment already upheld on a first petition.[59] In 1996, Congress acted to crack down harder on repeated petitions and to forbid lower federal courts from overturning state court decisions merely because the courts disagreed on a question not yet settled by the Supreme Court. The state court decision could be collaterally attacked only if it were contrary to or an unreasonable application of Supreme Court precedent.[60] In the 2000 case of *Williams v. Taylor*,[61] the habeas petitioner sought to effectively nullify this provision by interpreting it to make essentially no change in the law, contrary to all the statements of both supporters and opponents as the bill passed through Congress,[62] and contrary to the interpretation of every federal court of appeals to consider the question to that point. Astonishingly, four justices voted for this repeal-by-interpretation,[63] with only a bare majority affirming that the statute meant what everyone believed it meant when it was enacted.[64] The Court has applied this statute numerous times since then to correct misuses of habeas corpus by lower federal courts to overturn death sentences.[65]

From 2000 through the end of Justice O'Connor's tenure, the Court gave closer scrutiny to claims of ineffective assistance of counsel in the penalty phase. The Court had recognized a right to such assistance in *Strickland v. Washington* (1984),[66] but it denied relief in that case and did not grant certiorari to review a denial of relief on that ground until *Williams v. Taylor*.[67] In *Williams*, the Court held 6-3 that the defendant's attorneys had been ineffective in their failure to discover and present the "bad childhood" mitigation evidence.[68] Three years later, in *Wiggins v. Smith*, a 7-2 opinion by Justice O'Connor, counsel was deemed ineffective for not hiring a "forensic social worker" to compile a "social history report."[69]

Finally, in 2005 the Court overturned a death sentence in a case from the Third Circuit, *Rompilla v. Beard*.[70] Rompilla's trial counsel had investigated his family history by interviewing the members of his family, a seemingly reasonable approach. The Court found that he was ineffective because a file he should have examined for other reasons contained leads that contradicted what the family had told him. Justice Kennedy wrote the dissent in this 5-4 case. "Today the Court brands two committed criminal defense attorneys as ineffective... because they did not look in an old case file and stumble upon

something they had not set out to find.... Under any standard of review the investigation performed by Rompilla's counsel in preparation for sentencing was not only adequate but also conscientious."[71] Seven months later, Justice O'Connor was succeeded by Justice Alito, the author of the Third Circuit opinion upholding Rompilla's sentence. The Court has not granted review to any death row inmates claiming ineffective assistance in the penalty phase since then.

Trimming the Outliers: Categorical Exclusions

While the Court has pulled back from creating new sentencing procedure requirements specifically for capital cases, it has moved full speed ahead creating new categorical exclusions. That is, the Court has carved out categories of offenders and offenses exempt from the death penalty altogether, regardless of the procedure by which the penalty is determined.

Justice White first proposed a categorical exclusion in place of a procedural requirement in his opinion concurring in the judgment in *Lockett*. Rather than requiring that the jury be allowed to consider any and all mitigating circumstances, a rule he saw as an "about-face" from *Furman*,[72] Justice White would have exempted Sandra Lockett on the ground that she was merely an accomplice to a robbery and had no intent to kill.[73] Justice White later found a majority for his no-intent rule as applied to felony-murder accomplices in *Enmund v. Florida*,[74] but the Court later backed off somewhat in *Tison v. Arizona*.[75] Execution of killers under 18 received a similarly muddled treatment in *Thompson v. Oklahoma*[76] and *Stanford v. Kentucky*.[77] *Penry v. Lynaugh* effectively precluded execution of severely or profoundly retarded persons,[78] but mild to moderate retardation was a mitigating factor to be weighed by the sentencer, not a categorical exclusion.[79] The Court excluded the death penalty as the punishment for rape of an adult woman, reserving the question of rape of a child, in *Coker v. Georgia*.[80]

Beginning in 2002, the Court's attitude toward categorical exclusions suddenly changed. *Atkins v. Virginia*[81] excluded the mildly and moderately retarded, effectively overruling *Penry*. The 6-3 majority included Justice O'Connor, who wrote *Penry*, and Justice Kennedy, who joined that part of *Penry*.[82] Three years later, *Roper v. Simmons*,[83] a bare majority redrew the age limit at the eighteenth birthday. Justice Kennedy wrote the opinion. After another three years, *Kennedy v. Louisiana* answered the question left open in *Coker* and prohibited the death penalty for any nonfatal crime against an individual victim.[84] Justice Kennedy wrote the opinion again, and again the decision was 5-4. The two newest justices, Chief Justice Roberts and Justice Alito, were in the dissent. In six years, the Court had gone much further with categorical exclusions than it had in the preceding twenty-six.

Where Next?

Why the sudden change? Justice Kennedy's opinion in *Kennedy* contains a hint. The opinion notes the *Furman* requirement of greater consistency, the *Lockett* requirement of greater individualization, and the "tension" between the two. "This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude," the opinion says, citing Justice Scalia's *Walton* concurrence. "For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself," the opinion continues, citing Justice Stevens' concurrence in *Baze v. Rees*. And what of the Court as a whole, as distinct from its individual members? "Our response to this case law, which is still in search of a unifying principle, has been to insist upon confining the instances in which capital punishment may be imposed."[85]

This intriguing passage states that the recent categorical limitations are a response to a body of caselaw that all recognize is unsatisfactory. The long series of narrowly divided opinions since 1972 has not produced a "happy medium" but rather a situation that no one is happy with. Thirty-six years after the anti-death-penalty side thought it had abolished that punishment, America still has the death penalty. Twelve years after Congress enacted the Antiterrorism and Effective Death Penalty Act, though, the death penalty is still ineffective. The process of review takes too long, costs too much, and too often results in reversal. The Supreme Court has long recognized deterrence as a major reason for the death penalty,[86] and there is now strong empirical support for a deterrent effect.[87] However, there is also empirical support for the common belief that the deterrent effect is weakened by long delays and frequent overrulings.[88]

Does this passage from *Kennedy* presage a major change in the Court's death penalty jurisprudence? Given that no one believes that the status quo is desirable policy or mandated by the original understanding of the Constitution, a major change seems due. If there is a change, what direction will it take? That may depend, to a large extent, on who is elected President this November. With the Court as close to even division as it is, a single appointment could make a dramatic shift. It is not difficult to see new appointees from the political left being willing to take the path that Justices Blackmun and Stevens have already taken, that the problems are unsolvable and capital punishment must be scrapped altogether. Even without such a sweeping decree, capital punishment could be slowly killed by application of the *Lockett* and *Strickland* rules in a way that makes it prohibitively expensive. A candidate who states that he personally supports the death penalty may nonetheless appoint justices who will end it.

On the other hand, it is equally likely that new appointees with a conservative bent may agree with Justices Scalia and Thomas that *Lockett* is both illegitimate and the cause of the problem, and that *Lockett* should simply be overruled. If we could eliminate all the litigation over *Lockett* and over whether counsel were effective in investigating and presenting the evidence that *Lockett* requires, a very large chunk of the review process would disappear. Add full enforcement of the Antiterrorism and Effective Death Penalty Act of 1996, and a genuinely enforced death penalty could finally be at hand.

III. THE FOURTH AMENDMENT

In recent years, the Supreme Court has continued to protect the privacy and sanctity of the home.[89] Vehicles have received less protection, and some categories of people— notably parolees—have been stripped of some privacy protections. In many of these cases, the Court seems interested in drawing bright lines. The issue worthy of most attention relates to the exclusionary rule. At least one of the recent decisions suggests

that the Court is prepared to consider significant developments in that rule. With four search and seizure cases on the docket this fall, the Court will have a good opportunity to leave its mark in this area.

The Home

In *Kyllo v. United States* (2001),[90] a federal agent used a thermal-imaging device to scan a triplex to determine whether Kyllo was using high-intensity lamps to grow marijuana. The results led to a warrant and to Kyllo's arrest. In a 5-4 opinion delivered by Justice Scalia, the Court held that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant." Justice Stevens, dissenting, argued that the procedure: "did not invade any constitutionally protected interest in privacy," and was therefore not a violation of the Fourth Amendment.

The Roberts Court rendered its first Fourth Amendment opinion in *Georgia v. Randolph*.[91] In a 5-3 decision, with Justice Alito taking no part, the Court held that without a search warrant, police could not constitutionally search a house in which one resident consents to the search while another resident objects. The Court distinguished this case from the "co-occupant consent rule" announced in *United States v. Matlock*,[92] which permitted one resident to consent in the co-occupant's absence.

Scott Randolph and his wife Janet had separated, but were residing in the same home when the events in question took place. She called the police to report that after a domestic dispute her husband took their son away. When officers reached the house, in addition to her other complaints, she told them that her husband used cocaine. Shortly thereafter, Scott returned and denied the cocaine charge. (He said that it was his wife who abused drugs and alcohol.)

One of the officers asked Scott for permission to search the house, but he refused to give it. The officer then asked Janet for consent, which she readily gave. In fact, she led the officer upstairs to a bedroom that she identified as Scott's, where the sergeant noticed a section of a drinking straw with a powdery residue. He left the house to get an evidence bag from his car. When the officer returned to the house, Janet withdrew her consent, but the police obtained a search warrant, and they seized evidence that was used against Scott at trial.

The Supreme Court held that when two co-occupants are present and one consents to a search while the other refuses, the search is not constitutional. Justice David Souter, in the majority opinion, wrote: "it is fair to say that a caller standing at the door of shared premises would have no confidence that one occupant's invitation was a sufficiently good reason to enter when a fellow tenant stood there saying, 'stay out.' Without some very good reason, no sensible person would go inside under those conditions." As such, a police officer conducting a search in this situation would not meet the reasonableness requirement of the Fourth Amendment. The Court emphasized a theme that runs through many of its recent Fourth Amendment cases: the formalism and simplicity that comes with a bright line rule.

In his first published dissent, Chief Justice Roberts argued that when a co-tenant shares his home he should assume the risk that his co-occupant may admit authorities without his consent:

> A person assumes the risk that his co-occupants—just as they might report his illegal activity or deliver his contraband to the government—might consent to a search of areas over which they have access and control.

Vehicles

In *Brendlin v. California*,[93] the Roberts Court unanimously held that when a vehicle is stopped at a traffic stop, the passenger as well as the driver is seized within the meaning of the Fourth Amendment. In this case, police stopped Karen Simeroth's car for expired registration. Bruce Brendlin, who had a warrant out for his arrest, was riding in the passenger seat. Police found methamphetamine, marijuana, and drug paraphernalia in the car and on Simeroth's person. In state court, Brendlin filed a motion to suppress the evidence, claiming that the stop was an unreasonable seizure in violation of the Fourth Amendment.

The trial court held that Brendlin had not been "seized" within the meaning of the Fourth Amendment, so it denied the motion. The California Supreme Court held that the driver of the car is the only one detained in a traffic stop. The movement of any passengers is also stopped as a practical matter, but the court considered this merely a necessary byproduct of the detention of the driver. Since he was never "seized," he could not claim a violation of the Fourth Amendment.

In an opinion authored by Justice Souter, the Court said: "We resolve this question by asking whether a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' between the police and himself." The Court concluded that Brendlin would have reasonably believed himself to be detained and subject to the authority of the police. Thus, he was justified in asserting his Fourth Amendment rights.[94] To accept the state's arguments, the Court said, would be to "invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal."[95]

Parolees

Randolph and *Brendlin* are generally considered pro-defendant and pro-civil liberties. Other cases have favored police authorities and their search for evidence. *Samson v. California*,[96] decided just weeks after Justice O'Connor left the Court, determined that parolees may be subjected to warrantless, suspicionless searches of their person and property by government officials at any time.[97]

A police officer recognized Donald Samson on the street and knew him to be on parole. The officer had heard from other officers that Samson "might have a parolee at large warrant." He parked his police car and approached Samson. Sampson told the officer that he "was in good standing with his parole agent," and the officer confirmed over his police radio that Samson was not subject to a parole warrant. He was, however, on parole for a prior parole violation.

The officer conducted a search of Samson based solely on his status as a parolee. One of Samson's conditions of parole stated that he had agreed to "search and seizure by a parole officer or other peace officer at any time of the night or day,

with or without a search warrant or with or without cause." This condition was required by California Penal Code Section 3067 (a). The officer found methamphetamines in Samson's possession. In a 6-to-3 decision authored by Justice Thomas, the Court held that Samson "did not have an expectation of privacy that society would recognize as legitimate." Parole allows convicted criminals out of prison before their sentence is completed. An inmate who chooses to complete his sentence outside of direct physical custody, however, remains in the Department of Correction's *legal* custody until the conclusion of his sentence, and therefore has significantly reduced privacy rights. The written consent to suspicionless searches, along with reduced privacy interests as a parolee, combined to make the search constitutional.[98]

Justices Stevens, Souter, and Breyer dissented, arguing that parolees have an expectation of privacy greater than that of prisoners, which was violated in this case.

The Exclusionary Rule

Certainly the most controversial Fourth Amendment case yet to come from the Robert's Court is *Hudson v. Michigan*,[99] in which the majority called into question the central role of the exclusionary rule to Fourth Amendment analysis. In a 5-4 decision that was re-argued after Justice O'Connor's departure, the Court affirmed the Michigan State Court of Appeals in refusing to exclude evidence gathered in legally questionable circumstances.

The Detroit police, executing a search warrant for narcotics and weapons, entered Booker Hudson's home in violation of the "knock-and-announce" rule. The Court, in an opinion by Justice Scalia, held that the exclusionary rule should not be applied in this circumstance. In so holding, the Court explained that the knock and announce rule exists to protect interests such as preventing "violence in supposed self-defense by the surprised resident," giving the suspect "the opportunity to comply with the law and to avoid the destruction of property occasioned by a forcible entry," and giving residents "the 'opportunity to prepare themselves for' the entry of the police." These interests, as the Court reasoned, have "nothing to do with the seizure of the evidence." As such, the Court held that the exclusionary rule should not apply.

On one hand, *Hudson* might be seen as adding just one additional exception to numerous others that attach to the exclusionary rule. Unlike previous cases, however, a majority of the Court strongly implied that several existing remedies are viable alternatives, or even superior alternatives.[100] That may mean that the Court is prepared to quit chipping away at the exclusionary rule, and actually re-think its viability as the primary remedy for each and every Fourth Amendment violation, regardless of the circumstances of the harm that it may cause.

Justice Scalia wrote in his opinion for the majority that: "We cannot assume that exclusion in this context is necessary deterrence simply because we found that it was necessary deterrence in different contexts and long ago. That would be forcing the public today to pay for the sins and inadequacies of a legal regime that existed almost a half century ago."[101] New developments in the law since the exclusionary rule was originally applied to the states—such as the expansion of civil rights plaintiffs' access to § 1983 suits, the provision of attorneys fees to victorious parties in such suits, and "a new emphasis on internal police discipline"—justify creating broad exceptions to the exclusionary rule. The lingering question, of course, is whether a rule that is so riddled with exceptions should remain the rule.[102]

The Court's most recent Fourth Amendment case, *Virginia v. Moore* (2008),[103] held that when state law calls for non-custodial ticketing, an unauthorized custodial arrest can nevertheless support a search incident to the arrest of the defendant. Virginia police stopped David Lee Moore after receiving a radio call alerting them that he was driving on a suspended license. State law specified that this infraction called for the issuance of a citation and summons to appear in court. The officers, however, arrested Moore. After reading him his *Miranda* rights, they asked for and received consent to search his hotel room. Once they arrived at the room, they decided to search his person, and they discovered sixteen grams of crack cocaine.

The Court held unanimously that the search did not violate Moore's constitutional rights. Writing for an eight-justice majority (with Ginsburg concurring), Justice Scalia stated that the existence of probable cause gave the arresting officer the right to make the arrest and perform a reasonable search of the accused to ensure the officer's safety and to safeguard evidence. States may impose stricter requirements, Scalia wrote, but "when states go above the Fourth Amendment minimum, the Constitution's protections concerning search and seizure remain the same."

As with several search and seizure cases that it has decided recently, the Court seemed interesting in making a bright line rule to assist officers who have to make the decisions. There are also elements of concern about the reach of the exclusionary rule in this case. That certainly is where most Court observers are focused. There are now so many exceptions to the exclusionary rule, it seems clear that unless the Court's precedents absolutely require its application, a majority of the justices are reluctant to exclude evidence for a reason unrelated to its reliability.

The exclusionary rule was adopted in federal courts in 1914.[104] It was not, however, made binding on the states until 1961.[105] Since the vast majority of criminal cases have always been tried in state courts, the exclusionary rule had only a limited impact. When it was confined to federal cases, as Justice Rehnquist pointed out, its chief "beneficiaries... were smugglers, federal income tax evaders, counterfeiters, and the like."[106] Once it was made applicable to the states, it was immediately controversial.

One of the exclusionary rule's strongest critics was Chief Justice Burger. In *Bivens v. Six Unknown Federal Narcotics Agents*,[107] he filed a dissent, arguing that civil sanctions or other means could be used to enforce constitutional rights. The idea of police deterrence, according to Burger, was nothing more than a "wistful dream" with no support, because there was no direct sanction of the police. The prosecutor, who ends up losing the case, had no part in the wrongdoing; the time lapse between the violation and the sanction was so long that any educational value was lost; that police do not always aim toward prosecution, but rather toward stopping crime; the cost (releasing criminals) was

too high; and that there was no proportionality to this remedy (a murderer gets the same relief as a petty criminal).

Over the years, the Court has tried to address many of Burger's concerns by crafting exceptions.[108] Thus, evidence which is acquired in violation of the Fourth Amendment can be used or heard by a grand jury in determining the sufficiency of an indictment, and it can also be used in civil suits.[109] It can also be admitted to impeach the credibility of the defendant's trial testimony[110] or at sentencing.[111] The inevitable discovery doctrine allows admission of evidence that might otherwise have been excluded, and the independent source exception allows evidence to be admitted in court if knowledge of the evidence is gained from an independent source that is completely unrelated to the illegality at hand.[112] If a magistrate is erroneous in granting a police officer a warrant, and the officer acts on the warrant in good faith, then the evidence resulting in the execution of the warrant is not suppressible.[113]

These exceptions were carved into the exclusionary rule because it is far too blunt of a remedy. There are cases where exclusion makes sense, but too often it fails to protect the citizen's constitutional rights, it interferes with the efforts at trial to reach justice, and it makes society more dangerous by letting wrongdoers avoid punishment.

The Court currently has four search and seizure cases on the docket.[114] Those cases will present the Court with the opportunity to address the numerous problems with the exclusionary rule. One would be surprised to see it entirely abandoned, but one would be even more surprised to see it retained without significant modification.

CONCLUSION

Criminal cases are often controversial, and the Supreme Court rarely avoids criticism. In recent years, many commentators have expressed concern over whether the Roberts Court would sufficiently protect the rights of criminal defendants. It is certainly clear that some recent decisions will make it easier to deter crime by punishing violators. Other cases, however, show that the current Court is very concerned about the rights of those accused of crime.

In cases reviewed herein, the Supreme Court gave district court judges more discretion in sentencing (most demanded for downward departures from the Sentencing Guidelines), struck down some death penalty laws, and protected the sanctity of the home (while suggesting that the exclusionary rule might be tweaked). That certainly does not suggest a pro-prosecution bias on the part of the justices. In fact, on a recent panel at the ABA's annual meeting this past August, the former U.S. Solicitor General under President Clinton, Drew S. Days, III, of Yale Law School, reviewed recent criminal cases and concluded that they showed that the Roberts Court is particularly concerned about whether people are adequately protected in the criminal process.[115]

Looking ahead, the Roberts Court is poised to continue addressing criminal law and criminal procedure issues with an eye toward protecting society from crime and protecting citizens from over-aggressive governmental actors. That can be a hard line to draw, and well-intended people can disagree over where it should be drawn, but carefully drawing it is an obligation that has been recognized every justice on the Court. That is at least one element of what all Americans should want from their Supreme Court.

Endnotes

1 530 U.S. 466, 120 S.Ct. 2348 (2000).

2 *See* Baroni & Leinenweber, *Illinois* Apprendi *Case Law: Two and a Half Years of Broad Application and Rapid Evolution*, Journal of DuPage County Bar Ass'n DCBA Brief (Jan. 2003).

3 P.L. No. 98-473, 98 Stat. 1987, 18 U.S.C. 3351 et seq., and 28 U.S.C. 991-98.

4 536 U.S. 584 (2002).

5 *Id.* at 588-89.

6 *Id.*

7 542 U.S. 296 (2004).

8 The trial judge could exceed the "standard range" if he or she finds "substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann. §9.94A.120(2).

9 Mistretta v. United States, 488 U.S. 361, 367 (citing S. Rep. No. 98-225 (1983)).

10 28 U.S.C. 991, 994.

11 *Mistretta*, 488 U.S. at 368, n. 4; 18 U.S.C. 3553(a), (b).

12 551 U.S. ___ (2007).

13 551 U.S. ___ (2007).

14 552 U.S. ___ (2007).

15 552 U.S. ___ (2007).

16 551 U.S. ___ (2007).

17 *See* Otis, William G., *From Apprendi to Booker to Gall and Kimbrough: The Supreme Court Blunders its Way Back to Luck-of-the-Draw Sentencing*, 9 Engage: The Journal of the Federalist Society Practice Groups 2, 42.

18 *See* Apprendi v. New Jersey, 530 U.S. 466, 478-79 (2000) (describing criminal sentencing "as it existed during the years surrounding our Nation's founding").

19 *See, e.g.,* Williams v. New York, 337 U.S. 241, 245 (1949).

20 408 U. S. 238.

21 428 U. S. 153 (1976).

22 Proffitt v. Florida, 428 U. S. 242 (1976); Jurek v. Texas, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

23 428 U.S., at 305.

24 Graham v. Collins, 506 U. S. 461, 484 (1993) (concurring opinion).

25 *See id*. at 482-83.

26 D. Baldus, G. Woodworth & C. Pulaski, *Equal Justice and the Death Penalty* 150 (1990); *see also* D. Baldus, G. Woodworth, G. Young, & A. Christ, *The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis*, Executive Summary 14 (2001) ("no significant evidence of disparate treatment on the basis of race of the defendant"); D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001), http://www.judiciary.state.nj.us/baime/baimereport.pdf (New Jersey); R. Paternoster, et al., An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction 26 (2003); Scheidegger, *Smoke and Mirrors on Race and the Death Penalty*, 4 Engage: The Journal of the Federalist Society Practice Groups 2, 42.

27 *See* Maynard v. Cartwright, 486 U.S. 356, 363-364 (1988); Model Penal Code §210.6(3)(h) (1962 draft), quoted in Gregg, 428 U.S., at 193-94, n.44.

28 *See* Gardner v. Florida, 430 U.S. 349 (1977); *cf.* Williams v. New York,

337 U.S. 241, 245 (1949).

29 482 U.S. 496.

30 486 U.S. 367.

31 438 U. S. 586 (1978) (plurality opinion).

32 *See id*., at 605.

33 *See id*., at 622.

34 481 U.S. 393 (1987).

35 492 U.S. 302 (1989).

36 *See* McCleskey v. Kemp, 481 U.S. 279 (1987); *see also* Scheidegger, *supra* note __, at 42. The rule proposed in *McCleskey* would have effectively imposed a racial quota on capital sentencing, a quota that could not be achieved given the discretion mandated by *Gregg*, *Woodson*, and *Lockett*.

37 *See, e.g.,* Johnson v. Texas, 509 U.S. 350, 364-65 (1993) (giving a narrow interpretation to *Penry*, preserving *Jurek* to some extent); *but see* Abdul-Kabir v. Quarterman, 127 S. Ct. 1654 (2007) (*per curiam*) (giving a broad interpretation to *Penry* and effectively abandoning the narrower interpretation in *Johnson*); *see also id*. at 1679-1680 (Roberts, C.J., dissenting).

38 *See, e.g.,* Stringer v. Black, 503 U.S. 222, 238 (1992) (Souter, J., dissenting).

39 Walton v. Arizona, 497 U.S. 639, 661-73 (1990), *overruled on other grounds by* Ring v. Arizona, 536 U.S. 584 (2002).

40 501 U.S. 808 (1991).

41 *See id*., at 822.

42 506 U.S. 461, 478-500 (1993).

43 *Id*. at 500.

44 408 U.S. at 411.

45 Callins v. Collins, 510 U.S. 1141, 1143 (1994).

46 California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) (emphasis added).

47 *See, e.g.,* Williams v. Taylor, 529 U.S. 362, 415-16 (2000) (concurring opinion).

48 *See, e.g.,* James Q. Wilson, *Sorry I Killed You, But I Had A Bad Childhood*, 17 Cal. Lawyer (6) 42 (1997).

49 530 U.S. 466 (2000). *See supra* notes 1-8 and accompanying text.

50 536 U.S. 584 (2002).

51 *See* Walton v. Arizona, 497 U.S. 639, 647-48 (1990).

52 536 U.S., at 608.

53 *See, e.g.,* Smith v. Texas, 543 U.S. 37 (2004) (*per curiam*).

54 *See, e.g.,* Ayers v. Belmontes, 549 U.S. 7 (2006).

55 *Ex parte Watkins*, 28 U.S. 193, 207 (1830).

56 *See* Sanders v. United States, 373 U. S. 1 (1963) (virtually eliminating the rule against successive petitions); Fay v. Noia, 372 U.S. 391 (1963), *overruled by* Coleman v. Thompson, 501 U. S. 722 (1991) (virtually eliminating rule against claims defaulted on appeal).

57 *See, e.g.,* Harris v. Pulley, 692 F. 2d 1189 (CA9 1982), *rev'd* Pulley v. Harris, 465 U.S. 37 (1984) (declaring California death penalty law unconstitutional because it has no comparative proportionality review, a feature not required by any Supreme Court precedent.)

58 489 U.S. 288.

59 McCleskey v. Zant, 499 U.S. 467 (1991).

60 28 U.S.C. §2254(d)(1).

61 529 U.S. 362 (2000).

62 "As one commentator accurately recounts, in both houses of Congress section 2254(d) 'was called a "deference" standard by every member who spoke on the question, opponents as well as supporters.' Kent S. Scheidegger, *Habeas Corpus, Relitigation, and the Legislative Power*, 98 Colum. L. Rev. 888, 945 (1998)." Matteo v. Superintendent, 171 F. 3d 877, 890 (CA3 1999).

63 *See* 529 U.S., at 389.

64 *See id*. at 412-13.

65 *See, e.g.,* Bell v. Cone, 535 U. S. 685 (2002); Brown v. Payton, 544 U.S. 133 (2005).

66 466 U.S. 668.

67 529 U.S. 362 (2000).

68 529 U.S., at 395.

69 539 U.S. 510, 517-18, 524 (2003).

70 545 U.S. 374 (2005).

71 *Id*. at 296-397 (dissenting opinion).

72 438 U.S., at 622.

73 *See id*. at 628.

74 458 U.S. 782 (1982).

75 481 U.S. 137 (1987).

76 487 U.S. 815 (1988).

77 492 U.S. 361 (1989).

78 492 U.S. 302, 333 (1989).

79 *See id*., at 340.

80 433 U.S. 584, 597 (1977).

81 536 U.S. 304 (2002).

82 *Penry* himself received a third penalty trial after *Atkins*. The jury found he is not retarded. *See* Penry v. State, 178 S.W.3d 782, 785 (Tex. Crim. App. 2005).

83 543 U.S. 551 (2005).

84 128 S.Ct. 2641, 2659-60 (2008). The opinion leaves open the question of crimes against society as a whole such as treason and espionage.

85 *Id*. at 2659.

86 Gregg v. Georgia, 428 U.S. 153, 185-186 (1976) (lead opinion).

87 "The literature is easy to summarize: almost all modern studies and all the refereed studies find a significant deterrent effect of capital punishment." Rubin, Testimony Before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Committee on the Judiciary, United States Senate, An Examination of the Death Penalty in the United States, 109th Cong., 2d Sess., February 1, 2006, S. Hrg. 109-540, <http://judiciary.senate.gov/testimony.cfm?id=1745&wit_id=4991>

88 Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Studies 283 (2004); Mocan & Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. Law & Economics 453 (2003).

89 *But see* Hudson v. Michigan, 126 S.Ct. 2159 (2006), discussed *infra*.

90 533 U.S. 27 (2001).

91 126 S. Ct. 1515 (2006).

92 415 U.S. 164 (1974).

93 551 U.S. ___ (2007), *available at* <http://www.oyez.org/cases/2000-2009/2006/2006_06_8120/> (last visited Thursday, July 24, 2008).

94 The Court noted that its ruling would not extend to more incidental restrictions on freedom of movement, such as when motorists are forced to slow down or stop because other vehicles are being detained.

95 *Cf. Indianapolis v. Edmond*, 531 U.S. 32 (2000) (highway checkpoint programs, whose primary purpose is the discovery and interdiction of illegal narcotics, found inconsistent with the Fourth Amendment).

96 126 S.Ct 2193 (2006).

97 In *United States v. Knights*, 534 U.S. 112 (2001) the Court upheld a California law providing that individuals on probation could be stopped and searched at any time during the probationary period upon reasonable suspicion of criminal activity, as opposed to the usual requirement of probable

cause. The Court found that such searches were "reasonable" under the Fourth Amendment. Writing for a unanimous Court, Chief Justice Rehnquist held that probation was merely one stop along a "continuum" of possible punishments facing a convicted criminal ranging from "solitary confinement in a maximum-security facility to a few hours of mandatory community service."

98 *Cf.* Ferguson v. City of Charleston, 532 U.S. 67 (2001) (testing and prosecution of pregnant women for cocaine use held unconstitutional); Lawrence v. Texas, 539 U.S. 558 (2003) (privacy for homosexuals).

99 126 S.Ct. 2159 (2006).

100 In 1988, the Justice Department released the *Guidelines on Constitutional Litigation*, which criticized the Exclusionary Rule, saying that it "lacks a constitutional basis." U.S. Dep't of Justice, Office of Legal Pol'y, *Guidelines on Constitutional Litigation* (Feb. 19, 1988). These *Guidelines* instructed prosecutors to urge that the Exclusionary Rule not be applied in cases where a "more efficacious sanction," such as disciplinary action or civil suit against the officer violating the Constitution, may be applied. The *Guidelines* suggested that the Exclusionary Rule should not be applied "where the responsible officer will or has been subjected to disciplinary action" or "where a civil suit is pending against the responsible officer."

101 At oral argument in *Hudson*, Justice Scalia remarked to counsel for the petitioner that *Mapp* was outdated. He said that "*Mapp* was a long time ago. It was before section 1983 was being used, wasn't it?" For a transcript of the first oral argument, *see* 2006 WL 88656 (U.S.), 74 USLW 3422.

102 The attorney for the defendant in *Hudson*, David A Moran, has written:

> I have found through experience that when one argues a case in the United States Supreme Court, it can be more than a bit difficult to put the resulting decision in perspective. Depending on whether one wins or loses (and I've had both experiences), it is all too easy to think of the case as either the most important breakthrough in years or the death of the law as we know it. I hope the reader will apply the appropriate degree of skepticism, therefore, when I say that my 5-4 loss in *Hudson v. Michigan*1 signals the end of the Fourth Amendment as we know it.

David A Moran, *The End of the Exclusionary Rule, Among Other Things: The Roberts Court Takes on the Fourth Amendment, 2005-2006*, Cato Supreme Court Review 283 < http://www.cato.org/pubs/scr/2006/moran.pdf> (last visited Thursday, July 24, 2008).

103 <http://www.scotusblog.com/wp/wp-content/uploads/2008/04/06-1082.pdf> (last visited Thursday, July 24, 2008).

104 Weeks v. United States, 232 U.S. 383 (1914).

105 Mapp v. Ohio, 367 U.S. 643 (1961).

106 California v. Minjares, 443 U.S. 916 (1979).

107 403 U.S. 388 (1971).

108 Does strict adherence to the exclusionary rule lead to a restrictive reading of the Fourth Amendment? *See* Christopher Sloboggin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. Ill. L. Rev. 363 (1999).

109 United States v. Calandra, 414 U.S. 338 (1974) (The exclusionary rule is inapplicable at grand jury hearings.)

110 I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (exclusionary rule inapplicable at civil deportation hearings); United States v. Janis, 428 U.S. 433 (1976) (exclusionary rule inapplicable at civil tax hearings).

111 United States v. McCrory, 930 F.2d 63, 69 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1037 (1992).

112 Nix v. Williams, 467 U.S. 431 (1984) (inevitable discovery); People v. Arnau, 58 NY2d 27, 32-33 (1982) (independent source exception).

113 United States v. Leon, 468 U.S. 902 (1984) (if evidence is seized under the authority of an invalid warrant, it will not be suppressed if a reasonable officer acting in good faith would have relied on the warrant). *See also* Rakas v. Illinois, 439 U.S. 128 (1978) (if the police did not violate the defendant's personal constitutional rights, he would lack standing to object to the admission of the resulting illegally obtained evidence); Wong Sun v. United States, 371 U.S. 471 (1963) (if the evidence is so attenuated from the illegal conduct of the police that it cannot be said that it was obtained from the exploitation by the police of that illegal conduct, then the evidence will not be suppressed).

114 In *Pearson, et al. v. Callahan*, the Court will decide whether, for qualified immunity purposes, police officers may enter a home without a warrant on the theory that the owner consented to the entry by previously permitting an undercover informant into the home. In *Herring v. United States*, the issue is whether the good-faith exception to the exclusionary rule applies when evidence seized incident to a warrantless arrest, conducted in sole reliance on an inaccurate report from other law enforcement personnel regarding the existence of an outstanding warrant. In *Arizona v. Gant*, the Court will evaluate whether the Arizona Supreme Court effectively "overruled" the bright-line rule of *New York v. Belton,* by requiring in each case that the State prove after-the-fact that the search of a vehicle's recent occupant justifies a contemporaneous warrantless search of the automobile's passenger compartment on that basis of inherent danger. Finally, in *Arizona v. Johnson*, the Court will address whether, in the context of a vehicular stop for a minor traffic infraction, an officer may conduct a pat-down search of a passenger when the officer has an articulable basis to believe the passenger might be armed and presently dangerous, but had no reasonable grounds to believe that the passenger is committing, or has committed, a criminal offense.

115 *See SCOTUS Review, American Press & War, the 14th Amendment, Human Rights, Climate Change, Women in Law, and Immigration*, Bar Watch Bulletin August 0, 2008 <http://www.fed-soc.org/publications/pubid.1144/pub_detail.asp>.

Federalism and Separation of Powers

Respecting the Democratic Process: The Roberts Court and Limits on Facial Challenges

*By William E. Thro**

Judicial review—the ability of the courts to invalidate a law because it is contrary to the state and/or federal Constitutions—is the power to nullify the results of the democratic process.[1] "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people."[2] If, as Tocqueville suggested, every political question becomes a judicial one,[3] there is a real possibility that judges will become a "bevy of platonic guardians."[4] Instead of focusing on "the provisions of our laws rather than the principal concerns of our legislators,"[5] courts may attempt to give substance to individual desires or aspirations.[6] Rather than invalidating statutes only when contrary to the text or structure of the Constitution, judges may strike down laws simply because the policy choices expressed are "uncommonly silly."[7] Embracing "a myth of the legal profession's omnicompetence that was exploded long ago," the judiciary micro-manages government departments.[8]

One way to diminish the possibility of undemocratic platonic guardians is to limit the scope of judicial review.[9] It is one thing for a court to declare that a statute is unconstitutional as applied to a particular narrow circumstance.[10] After all, "judicial power includes the duty 'to say what the law is.'"[11] It is quite another to say a statute is facially unconstitutional—it is "invalid *in toto*" and, thus, "incapable of any valid application."[12] Because passing on the constitutionality of legislation is "the gravest and most delicate duty that [the judiciary] is called upon to perform,"[13] "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program."[14] Indeed, facial challenges "are fundamentally at odds with the function of the… courts in our constitutional plan. The power and duty of the judiciary to declare laws unconstitutional is in the final analysis derived from its responsibility for resolving concrete disputes brought before the courts for decision."[15] As Justice Scalia explained, it is

> fundamentally incompatible with [the constitutional] system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion—which a federal court should never issue at all, and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non* advisory opinions. I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?[16]

A jurist who respects the democratic process will not invalidate a statute in all of its applications—except where there is no possible valid application.

Since John Roberts became Chief Justice in 2005,[17] the Court has shown new respect for the democratic process.[18] While the Roberts Court[19] recognizes that the Constitution is distrustful[20] of "any entity exercising power"[21] and will check the exercise of power,[22] it increasingly has refused to "frustrate the expressed will of Congress or that of the state legislatures"[23] by passing on the constitutionality of "hypothetical cases thus imagined."[24] The Court "has rejected broad challenges to new laws while at the same time leaving open the door to a more targeted attack on some of the laws' provisions."[25] The net effect is to require litigants actually to prove that statutes are unconstitutional in their operation rather than hypothesizing about situations that may not exist. Instead of forcing legislatures to craft narrow statutes conforming to broad judicial rules, the Court crafts narrow judicial rules to limit otherwise broad statutes.

I. OVERVIEW OF FACIAL CHALLENGES

In order to understand the significance of the Roberts Court's new limits on facial challenges, it is first necessary to understand the nature of facial challenges.

There are three ways to challenge the constitutionality of a statute in federal court. First, a litigant may bring an as-applied challenge alleging that the statute is unconstitutional in the specific circumstances before the court.[26] As-applied challenges ultimately respect the democratic process.[27] If "judicial power includes the duty 'to say what the law is,'"[28] then it surely includes the duty to assess the constitutionality of a statute as applied to the circumstances before the Court. Indeed, as-applied challenges arguably are the only type of constitutional challenge contemplated by our constitutional system.[29]

Second, a litigant may bring a standard facial challenge[30] by alleging "that no set of circumstances exists under which the Act would be valid"[31] or that the statute lacks "a plainly legitimate sweep."[32] Like all facial challenges, a standard facial challenge requires the Court to address circumstances that are not specifically before the Court and, if successful, to render a broad decision. In this respect, standard facial challenges disrespect the democratic process. However, because there is "a heavy burden of persuasion" and because courts must

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"give appropriate weight to the magnitude of that burden,"[33] standard facial challenges alleging no set of circumstances pose fewer problems for the democratic process. The most recent example of a successful standard facial challenge is the District of Columbia gun case.[34]

Third and most significantly, in some limited contexts, litigants may bring a facial challenge alleging overbreadth.[35] In a facial challenge alleging overbreadth, the law is invalidated in *all* applications because it is invalid in *many* applications.[36] In an overbreadth challenge:

> The showing that a law punishes a "substantial" amount of protected free speech, "judged in relation to the statute's plainly legitimate sweep," suffices to invalidate *all* enforcement of that law, "until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression."[37]

Facial challenges alleging overbreadth not only "invite judgments on fact-poor records, but they entail a further departure from the norms of adjudication in federal courts: overbreadth challenges call for relaxing familiar requirements of standing to allow a determination that the law would be unconstitutionally applied to different parties and different circumstances from those at hand."[38] Like all facial challenges, a facial challenge alleging overbreadth requires the court to address circumstances that are not specifically before the court and, if successful, to render a broad decision. However, unlike a standard facial challenge, a facial challenge alleging overbreadth does not require a showing that the statute is always unconstitutional. It simply requires a showing that the statute is unconstitutional in many applications. Because a statute is invalidated in all applications simply because it is unconstitutional in some applications, facial challenges alleging overbreadth show the greatest disrespect for the democratic process.

Because of the enormous jurisprudential costs, the Court has "recognized the validity of facial attacks alleging overbreadth (though not necessarily using that term) in relatively few settings, and, generally, only on the strength of a specific reason[ ]… weighty enough to overcome the Court's well-founded reticence."[39] In the last years of the twentieth century, the Supreme Court entertained overbreadth challenges in the free speech,[40] right to travel,[41] abortion,[42] and congressional enforcement of the Fourteenth Amendment contexts.[43] "Outside these limited settings, and absent a good reason," the Court has refused to entertain facial challenges alleging overbreadth.[44]

II. NEW LIMITS ON FACIAL CHALLENGES

The decision to entertain a facial challenge—whether based on no set of circumstances or overbreadth—has enormous consequences for the judicial craft. As the Court recently explained:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'"[45]

If the Court allows a facial challenge, there are implications for the burden of proof, the remedy that may be employed, and the scope of the judicial rule that will result. Recognizing these consequences, the Roberts Court has imposed both implicit and explicit limits on facial challenges—particularly facial challenges alleging overbreadth.

First, the Supreme Court has cast serious doubt on the viability of facial challenges alleging overbreadth in the abortion context. Previously, the Court had indicated that it would invalidate an abortion statute in all applications simply because the statute was unconstitutional in a "large fraction" of applications.[46] However, in upholding the federal partial birth abortion statute, the Court expressed disapproval of facial challenges alleging overbreadth in the abortion context.[47] As the Court explained:

> [T]hese facial attacks should not have been entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. The Government has acknowledged that pre-enforcement, as-applied challenges to the Act can be maintained. *This is the proper manner to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.*
>
> *The latitude given facial challenges in the First Amendment context is inapplicable here*.... It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. "[I]t would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation." *For this reason, "[a]s-applied challenges are the basic building blocks of constitutional adjudication."*[48]

In the abortion context, the principles of judicial restraint require federal courts to adjudicate the constitutionality of abortion statutes on a case-by-case basis, not to make broad pronouncements regarding litigants and circumstances not before the Court.

To be sure, the Court did not explicitly reject facial challenges alleging overbreadth in the abortion context. Instead, it noted that facial challenges of any sort "impose 'a heavy burden' upon the parties maintaining the suit. What that burden consists of in the specific context of abortion statutes has been a subject of some question. We need not resolve that debate."[49] Nevertheless, by expressing disapproval of facial challenges alleging overbreadth in the abortion context and by refusing to entertain such a challenge in *Gonzale*s, the Court sent a clear signal regarding the use of such challenges in the future.

If the Court were to reject explicitly facial challenges alleging overbreadth, it would revolutionize abortion jurisprudence. Any statute imposing significant restrictions

on abortion may be applied in an unconstitutional manner. Because facial challenges alleging overbreadth generally have been available in the abortion context, abortion rights advocates used the possibility of *some* unconstitutional applications to invalidate the statute in *all* applications. Thus, the States' ability to regulate abortion in a significant manner has been limited, if not effectively abolished. However, if facial challenges alleging overbreadth are not permitted in the abortion context, the possibility of some unconstitutional applications will not prevent the enforcement of the statute. All abortion litigation will be narrow as-applied challenges rather than sweeping overbreadth challenges. While abortion statutes may be invalidated in some applications, the statutes will be enforceable in other applications.

Second, by restricting the remedial powers of federal courts, the Roberts Court has imposed implicit limits on facial challenges alleging overbreadth. Articulating the scope of federal court remedial powers, the Court observed:

> Three interrelated principles inform our approach to remedies. First, we try not to nullify more of a legislature's work than is necessary, for we know that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." It is axiomatic that a "statute may be invalid as applied to one state of facts and yet valid as applied to another." Accordingly, the "normal rule" is that "partial, rather than facial, invalidation is the required course," such that a "statute may... be declared invalid to the extent that it reaches too far, but otherwise left intact."
>
> Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from "rewrit[ing] state law to conform it to constitutional requirements" even as we strive to salvage it. Our ability to devise a judicial remedy that does not entail quintessentially legislative work often depends on how clearly we have already articulated the background constitutional rules at issue and how easily we can articulate the remedy. In *United States v. Grace,* for example, we crafted a narrow remedy much like the one we contemplate today, striking down a statute banning expressive displays only as it applied to public sidewalks near the Supreme Court but not as it applied to the Supreme Court Building itself. We later explained that the remedy in *Grace* was a "relatively simple matter" because we had previously distinguished between sidewalks and buildings in our First Amendment jurisprudence. But making distinctions in a murky constitutional context, or where line-drawing is inherently complex, may call for a "far more serious invasion of the legislative domain" than we ought to undertake.
>
> Third, the touchstone for any decision about remedy is legislative intent, for a court cannot "use its remedial powers to circumvent the intent of the legislature." After finding an application or portion of a statute unconstitutional, we must next ask: Would the legislature have preferred what is left of its statute to no statute at all? All the while, we are wary of legislatures who would rely on our intervention, for "[i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside" to announce to whom the statute may be applied... "This would, to some extent, substitute the judicial for the legislative department of the government."[50]

Where "[o]nly a few applications of [a statute] would present a constitutional problem," federal courts should not choose "the most blunt remedy" of invalidating a statute in its entirety.[51] Instead, the federal courts are limited to issuing "a declaratory judgment and an injunction prohibiting the statute's unconstitutional application."[52]

Because a federal court's remedial power is limited to enjoining only the unconstitutional applications of a statute, it is difficult to see how the overbreadth doctrine could apply outside of the First Amendment free speech context. By its very terms, the overbreadth doctrine invalidates a statute in *all* applications simply because it is unconstitutional in *some* applications. Indeed, by holding that lower federal courts should not have entertained such a challenge to a federal abortion statute,[53] the Court reinforced the implicit message of *Ayotte*—facial challenges alleging overbreadth are not permitted outside of the First Amendment free speech context.

Third, the Court seems to be limiting facial challenges alleging overbreadth to the First Amendment free speech context. In 2004, the Court indicated in *Sabri* that it allowed facial challenges alleging overbreadth in many contexts including abortion.[54] Since 2004, the Court has never allowed a facial challenge alleging overbreadth outside of the First Amendment context. Moreover, its discussions of facial challenges alleging overbreadth have referred only to the First Amendment.[55] Admittedly, these references are dicta not binding in a future case.[56] However, the *Sabri* language arguably is also dicta.

Of course, despite its apparent rejection of facial challenges alleging overbreadth in other contexts, the Court has reaffirmed the viability of the doctrine in the First Amendment free speech context.[57] However, the Court has refined the overbreadth doctrine so that it is more difficult for litigants to prevail. "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[58] In determining the reach of the statute, "'the elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[59] The Court must "interpret statutes, if possible, in such fashion as to avoid grave constitutional questions."[60] If "an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems."[61] If courts narrowly construe the statute, it is far less likely that it will be facially invalidated on overbreadth grounds.[62] Moreover, even in the First Amendment context, the "'strong medicine' of the overbreadth doctrine" may not be available when the targets of the statute "are sufficiently capable of defending their own interests in court that they will not be significantly 'chilled.'"[63] Furthermore, as the Court emphasized, "the 'mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge.'"[64]

Fourth, a more subtle, but equally significant shift has occurred in the Court's sovereign immunity jurisprudence.[65] Prior to 2004, the Supreme Court's decisions invalidating or upholding Congress' attempts to diminish the States' sovereign immunity were facial holdings. [66] *Garrett, Kimel, Alden, Florida Prepaid,* and *Seminole Tribe* rejected abrogation for all applications of the statute at issue.[67] Similarly, *Hibbs* upheld abrogation for all applications of the statute at issue.[68] In sharp contrast, recent decisions invalidating or upholding Congress' efforts to diminish the States' sovereign immunity

are as-applied, rather than facial, holdings.[69] For example, in *Georgia*, the Court did not find abrogation for all ADA Title II claims in the prison context, but only for those claims that actually involve a violation of the Fourteenth Amendment.[70] Similarly, in *Lane*, the Court did not find abrogation for all ADA Title II claims in all contexts, but only for claims involving the fundamental right of access to the courts.[71] This new emphasis on as-applied rather than facial holdings casts serious doubt on the continued validity of the facial aspect of the pre-2004 holdings.[72] For example, if Congress may abrogate sovereign immunity for statutory claims involving an actual constitutional violation,[73] then that portion of *Garrett* holding that Congress may not abrogate sovereign immunity for ADA Title I a claim involving constitutional violations is suspect.[74] Similarly, if Congress may abrogate sovereign immunity for statutory claims involving an actual constitutional violation,[75] then that portion of *Florida Prepaid* holding that Congress may not abrogate sovereign immunity for intellectual property claims that allege an unconstitutional taking of property is suspect.

III. THE JURISPRUDENTIAL IMPLICATIONS

As the title of this essay suggests, these new limits on facial challenges result in a greater respect for the democratic process. This greater respect has significant jurisprudential implications for: (1) the burden of proof for litigants who wish to pursue a facial challenge; (2) the remedial powers of the judiciary when confronted with an unconstitutional application of a statute; and (3) the scope of the Court's rulings. The discussion below details all three implications.

First, these new limitations impose a greater burden of proof on litigants who wish to pursue a facial challenge. Respect for the democratic process requires the judiciary to refrain from "speculation" and the "premature interpretation of statutes on the basis of factually barebones records."[76] "Although passing on the validity of a law wholesale may be efficient in the abstract, any gain is often offset by losing the lessons taught by the particular, to which common law method normally looks."[77] As the Court explained:

> In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about "hypothetical" or "imaginary" cases. The State has had no opportunity to implement I-872, and its courts have had no occasion to construe the law in the context of actual disputes arising from the electoral context, or to accord the law a limiting construction to avoid constitutional questions. Exercising judicial restraint in a facial challenge "frees the Court not only from unnecessary pronouncement on constitutional issues, but also from premature interpretations of statutes in areas where their constitutional application might be cloudy."[78]

Thus, the focus of any facial constitutional challenge will be on actual evidence, not conjecture.

Some of the election cases from the October 2007 term demonstrate the point. In *Crawford*—a facial challenge to Indian's voter identification statute—the Court refused

> to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified rejected a facial challenge to Indiana's voter identification requirement.[79]

Similarly, in *Washington State Grange*—a facial challenge to the Washington's primary system—the Court rejected the plaintiff's argument about voter confusion:

> Of course, it is *possible* that voters will misinterpret the candidates' party-preference designations as reflecting endorsement by the parties. But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion. Because respondents brought their suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused. *Indeed, because I-872 has never been implemented, we do not even have ballots indicating how party preference will be displayed.*[80]

In rejecting both facial challenges, the Court left open the possibility that some future plaintiff might demonstrate that the statute was unconstitutional as applied to them.[81] However, such a challenge will require facts, not fantasy.

Second, these new limitations on facial challenges restrict the remedial powers of the judiciary. Respect for the democratic process requires that laws "embodying the will of the people" be "implemented in a manner consistent with the Constitution."[82] Even if a statute is unconstitutional in the circumstances of the case, the statute can still be enforced in other circumstances not involved in the case. Legislatures are not required to rewrite existing laws simply because the laws are unconstitutional in some applications. Nor are legislatures required to draft their new statutes as narrowly as possible. If the democratic process results in a broad law that is unconstitutional in many instances, but constitutional in some instances, the statute remains on the books and enforceable in some limited circumstances.

To illustrate, consider Virginia's sodomy statute, which prohibits oral and anal sex between *all* persons in *all* circumstances.[83] Since *Lawrence* held that States generally may not prosecute private sexual conduct between consenting adults, the statute is unconstitutional in many applications.[84] Yet, Virginia's sodomy statute has some constitutional applications.[85] "Despite its use of seemingly sweeping language, the holding in *Lawrence* is actually" a narrow as-applied holding.[86] *Lawrence* forbids any governmental "intrusion upon a person's liberty interest when that interest is exercised in the form of *private*, consensual sexual conduct between *adults*."[87] While *Lawrence* established "a greater respect than previously existed in the law for the right of consenting *adults* to engage in private sexual conduct,"[88] it has *no impact* on the ability of the States to prosecute sexual conduct between an adult and a minor[89] or sexual conduct that occurs in public. Thus, Virginia's sodomy statute is constitutional as applied to conduct involving a minor[90] or conduct that occurs in public.[91]

Third, the new limitations preclude broad judicial holdings. Respect for the democratic process requires "that courts should neither 'anticipate a question of constitutional law in advance of the necessity of deciding it' nor 'formulate a rule of constitutional law broader than is required by the precise

facts to which it is to be applied.'"[92] There is no duty "to resolve questions of constitutionality with respect to each potential situation that might develop."[93] "As-applied challenges are the basic building blocks of constitutional adjudication."[94] Yet, a commitment to narrow decisions is not a rejection of clear bright-line rules. Nor is it an embrace of vague and amorphous judicial balancing tests. Rather, a commitment to narrow decisions simply means that the court will adopt narrow precise bright-line rules rather than broad bright-line rules.

The Court's recent sovereign immunity jurisprudence demonstrates the point. In 2005, I suggested in these pages that the Court's sovereign immunity jurisprudence should be simplified.[95] I proposed a bright-line rule—Congress may diminish sovereign immunity for statutory claims that involve a constitutional violation, but Congress may not diminish sovereign immunity for statutory claims that do not involve a constitutional violation. In 2006, *Georgia* adopted the first half of the proposed rule—Congress may always diminish sovereign immunity for statutory claims involving a constitutional violation,[96] but expressly reserved the second half of the proposed rule—whether Congress may diminish sovereign immunity for statutory claims that do not involve a constitutional violation.[97] Since *Georgia*, the lower courts have held that Congress may not diminish sovereign immunity for non-constitutional claims involving disabled parking permits,[98] but may diminish sovereign immunity for non-constitutional claims involving disability discrimination in higher education.[99] While the decisions conflict with respect to the broad question—whether Congress may diminish sovereign immunity for non-constitutional claims, the decisions are consistent on a narrow precise question—whether Congress may diminish sovereign immunity for non-constitutional claims in either the parking or higher education contexts. The broader issue may never be fully resolved by the Court, and the narrower issues must await a conflict regarding the same context.

CONCLUSION

If the democratic process is limited by a written constitution and if the ultimate meaning of the written constitution is determined by the courts, the potential power of the judiciary is unlimited. If the courts are to be mere umpires rather than serious players, then the judiciary must respect the democratic process. The Roberts Court's new limitations on facial challenges "signal a basic shift in litigating constitutional claims."[100] While the Court certainly will vindicate the fundamental values of the Constitution, it will not indulge in speculation, invalidate constitutional applications of statutes, or render broad decisions. In sum, the Court's role will play a reduced role in American life.

Endnotes

1 *See* John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 4 (1982).

2 Regan v. Time, Inc., 468 U.S. 641, 652 (1984) (White, J., joined by Rehnquist, C.J. & O'Connor, J., announcing the judgment of the Court).

3 Alexis de Tocqueville, Democracy In America 310 (Arthur Goldhammer, trans., The Library of America ed. 2004) (1835).

4 *See* Griswold v. Connecticut, 381 U.S. 479, 526 (1965) (Black, J., dissenting) (quoting Learned Hand, The Bill of Rights 70 (1958)).

5 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79 (1998).

6 *See* Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (1997).

7 *See* Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting).

8 People Who Care v. Rockford Bd. of Educ., 111 F.3d 528, 536 (7th Cir. 1997).

9 Unlike the federal judiciary, the People generally can express their dissatisfaction with the state judiciary. In many States, judges are directly elected in partisan or non-partisan races. In other States, the People are allowed to determine whether an individual judge will be retained in office. Although these measures do provide a degree of accountability to the electorate, they are far short of the guarantees of direct election and equal representation that characterize the legislative and executive branches.

10 *See* County Court v. Allen, 442 U.S. 140, 154-55 (1979).

11 Sanchez-Llamas v. Oregon, 126 S. Ct. 2669, 2684 (2006). Full disclosure—I argued the case on behalf of the Virginia respondents.

12 Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 n.5 (1982).

13 Rostker v. Goldberg, 453 U.S. 57, 64 (1981).

14 Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975). Traditionally, the Supreme Court has been hesitant to invalidate a statute on its face until "state courts [have] the opportunity to construe [the statute] to avoid constitutional infirmities." New York v. Ferber, 458 U.S. 747, 768 (1982).

15 Younger v. Harris, 401 U.S. 37, 52 (1971).

16 City of Chicago v. Morales, 527 U.S. 41, 77 (1999) (Scalia, J., dissenting) (citations omitted) (emphasis original).

17 For a comprehensive discussion of the process that led to the selection of both Chief Justice Roberts and Justice Alito, see Jan Crawford Greenburg, Supreme Conflict: The Struggle for the Supreme Court (2007).

18 For a review of the early years of the Roberts Court and its significance for education law, see William E. Thro, *The Roberts Court At Dawn: Clarity, Humility, and the Future of Education Law*, 222 Education Law Reporter 491 (2007).

19 To be sure, not all members of the Roberts Court share this view of the Constitution. For example, Justice Breyer has articulated a vision of the Constitution that is much more trusting of the exercise of power through the democratic process. *See* Stephen Breyer, Active Liberty: Interpreting Our Democratic Constitution (2005). For a critique of Justice Breyer's constitutional vision, see William E. Thro, *A Pelagian Vision for Our Augustinian Constitution: A Review of Justice Breyer's Active Liberty*, 32 Journal of College & University Law 491 (2006).

20 This distrust of humans exercising power is firmly rooted in the prevailing theology of the Framing era. As Professor Hamilton explained:

> One of the dominating themes of Calvin's theology is the fundamental distrust of human motives, beliefs, and actions. On Calvin's terms, there is never a moment in human history when that which is human can be trusted blindly as a force for good. Humans may try to achieve good, but there are no tricks, no imaginative role-playing, and no social organizations that can guarantee the generation of good …. Thus, Calvinism counsels in favor of diligent surveillance of one's own and other's actions, and it also presupposes the value of the law (both biblical and secular) to guide human behavior away from its propensity to do wrong.

Marci Hamilton, "The Calvinist Paradox of Distrust and Hope at the Constitutional Convention," *in* Christian Perspectives on Legal Thought 293, 295 (Michael W. McConnell, Robert F. Corchran, Jr., & Angela C. Carmella, eds. 2001).

21 *Id.* at 293.

22 Although such a perspective is firmly rooted in the Protestant theology of Calvin, it is also consistent with the Roman Catholic notion of subsidiarity, first expressed by Pope Leo XII. *See* Robert F. Cochran, Jr., "Tort Law and

Intermediate Communities: Calvinist and Catholic Insights" *in* Christian Perspectives on Legal Thought 486, 488-89 (Michael W. McConnell, Robert F. Corchran, Jr., & Angela C. Carmella, eds. 2001).

23 Barrows v. Jackson, 346 U.S. 249, 256-57 (1953).

24 United States v. Raines, 362 U.S. 17, 22 (1960).

25 David Savage, *About Face*, ABA Journal, July 2008.

26 Ulster County Court v. Allen, 442 U.S. 140, 154-55 (1979)

27 *Morales*, 527 U.S. at 74 (Scalia, J. dissenting).

28 *Sanchez-Llamas*, 126 S. Ct. at 2684.

29 *Morales*, 527 U.S. at 74 (Scalia, J. dissenting).

30 There is some uncertainty regarding the criteria for a standard facial challenge. As the Court explained:

Under *United States v. Salerno*, a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," *i.e.*, that the law is unconstitutional in all of its applications. While some Members of the Court have criticized the *Salerno* formulation, all agree that a facial challenge must fail where the statute has a "'plainly legitimate sweep.'"

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184, 1190 (2008) (citations omitted). The difference between "no set of circumstances" and "plainly legitimate sweep" is more theoretical than substantive. It is the difference between always unconstitutional and almost always unconstitutional. As a practical matter, this is a distinction without a difference.

31 United States v. Salerno, 481 U.S. 739, 745 (1987).

32 Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623 (2008) (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court).

33 *Crawford*, 128 S. Ct. at 1621-22 (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court).

34 District of Columbia v. Heller, 128 S. Ct. 2783, 2821-22 (2008).

35 Sabri v. United States, 541 U.S. 600, 609-10 (2004)

36 *See* Virginia v. Black, 538 U.S. 343, 375 (2003) (Scalia, J., joined by Thomas, J., dissenting). Full disclosure—I was on brief for Virginia.

37 Virginia v. Hicks, 539 U.S. 113, 118-19 (2003) (citations omitted). Full disclosure—I was on brief for Virginia.

38 *Sabri*, 541 U.S. at 609.

39 *Id.* at 609-610.

40 Broadrick v. Oklahoma, 413 U.S. 601, 612-13 (1973).

41 Aptheker v. Secretary of State, 378 U.S. 500, 505-14 (1964).

42 Stenberg v. Carhart, 530 U.S. 914, 938-46 (2000). *See also* Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 895 (1992). Prior to *Casey*, the Court has explicitly applied the *Salerno* "no set of circumstances" test in the abortion context. Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 514 (1990) (statute requiring parental notification). *See also* Webster v. Reproductive Health Servs., 492 U.S. 490, 523-24 (1989) (O'Connor, J., concurring) (statute prohibiting use of public facilities for performing abortions).

43 City of Boerne v. Flores, 521 U.S. 507, 532-35 (1997).

44 *Sabri*, 541 U.S. at 610.

45 *Washington State Grange*, 128 S. Ct. at 1191 (citations omitted).

46 *Stenberg*, 530 U.S. at 938-946. *See also Casey*, 505 U.S. at 895. However, there is a conflict among the Circuits on the question of whether the federal courts may allow facial challenges alleging overbreadth to abortion statutes. The Fifth Circuit has held that such challenges are not permitted. *See* Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992) (per curiam).*See also* Causeway Med. Suite v. Ieyoub, 109 F.3d 1096, 1102-03 (5th Cir. 1997) (declining to reverse *Barnes*). However, other Circuits have concluded that facial challenges alleging overbreadth are permitted in the abortion context. *See* Planned Parenthood v. Heed, 390 F.3d 53, 58 (1st Cir. 2004), *rev'd on other grounds sub nom*. Ayotte v. Planned Parenthood, 546 U.S. 320 (2006); Planned Parenthood v. Farmer, 220 F.3d 127, 142-43 (3rd Cir. 2000); Planned Parenthood. v. Lawall, 180 F.3d 1022, 1025-26 (9th Cir. 1999), *amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999); Women's Med. Prof. Corp. v. Voinovich, 130 F.3d 187, 193-96 (6th Cir. 1997); Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996); Planned Parenthood v. Miller, 63 F.3d 1452, 1456-58 (8th Cir. 1995). *Cf.* A Woman's Choice-East Side Women's Clinic v. Newman, 305 F.3d 684, 687 (7th Cir. 2002) (treating the *Salerno* standard as merely a "suggestion" in the abortion context). The Fourth Circuit has taken a contradictory approach. Early decisions—that have never been overruled—apply *Salerno*. *See* Greenville Women's Clinic v. Commissioner, 317 F.3d 357, 362 (4th Cir. 2002) (Greenville Women's Clinic II); Greenville Women's Clinic v. Bryant, 222 F.3d 157, 165 (4th Cir. 2000) (Greenville Women's Clinic I); Manning v. Hunt, 119 F.3d 254, 268-69 (4th Cir. 1997). More recent decisions—including a post-*Gonzales* decision—allow facial challenges alleging overbreadth. *See* Richmond Med. Center for Women v. Hicks, 409 F.3d 619 (4th Cir.), *reh'g denied*, 422 F.3d 160 (4th Cir. 2005), *cert. granted, judgment vacated, and remanded sub nom.* Herring v. Richmond Med. Center for Women, 127 S. Ct. 2094 (2007), *on remand*, 527 F.3d 128 (4th Cir. 2008), *pet. for reh'g filed* (4th Cir. June 2, 2008). Full disclosure—I argued the case on behalf of the Virginia prosecutors.

47 Gonzales v. Carhart, 127 S. Ct. 1610, 1638 (2007).

48 *Id.* at 1638-39 (emphasis added, citations omitted).

49 *Id.* at 1639 (citations omitted).

50 *Ayotte*, 546 U.S. at 329-30 (2006) (citations omitted).

51 *Id.* at 330-31.

52 *Id.* at 331.

53 *Gonzales*, 127 S. Ct. at 1638.

54 *Sabri*, 541 U.S. at 609-10.

55 *See Washington State Grange,* 128 S. Ct. at 1191 n.6 ("Our cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad."); *Gonzales*, 127 S. Ct. at 1639 ("The latitude given facial challenges in the First Amendment context is inapplicable here.").

56 Central Virginia Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006). Full Disclosure—I argued the case.

57 United States v. Williams, 128 S. Ct. 1830, 1838 (2008). As the Court explained:

> According to our First Amendment overbreadth doctrine, a statute is facially invalid if it prohibits a substantial amount of protected speech. The doctrine seeks to strike a balance between competing social costs. On the one hand, the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas. On the other hand, invalidating a law that in some of its applications is perfectly constitutional-particularly a law directed at conduct so antisocial that it has been made criminal-has obvious harmful effects. In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute's overbreadth be substantial, not only in an absolute sense, but also relative to the statute's plainly legitimate sweep. Invalidation for overbreadth is "'strong medicine"' that is not to be 'casually employed.'

Id. (citations omitted).

58 *Williams*, 128 S. Ct. at 1838.

59 *Gonzales*, 127 S. Ct. at 1631 (citation omitted).

60 Federal Election Comm'n v. Akins, 524 U.S. 11, 32 (1998).

61 INS v. St. Cyr, 533 U.S. 289, 300 (2001).

62 *Williams*, 128 S. Ct. at 1847 (Stevens, J., joined by Breyer, J., concurring).

63 Davenport v. Washington Educ. Ass'n, 127 S. Ct. 2372, 2383 n.5 (2007).

64 *Williams*, 128 S. Ct at 1844. *See also* Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 800 (1984).

65 There are two ways for Congress to diminish the sovereign immunity of the States. First, Congress, using the Fourteenth Amendment Enforcement Clause, U.S. Const. amend. XIV, § 5, may abrogate sovereign immunity. *See*

United States v. Georgia, 546 U.S. 151, 158-59 (2006). Second, Congress may use either the Spending Clause, U.S. Const. art. I, § 8, cl.1 or the Compact Clause, U.S. Const. art. I, § 10, cl. 3 to exact waivers of sovereign immunity. College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686-87 (1999). While Congress always may abrogate sovereign immunity for statutory claims involving a constitutional violation, *Georgia*, 546 U.S. 151, 158-59; Tennessee v. Lane, 541 U.S. 509, 518 (2004), it generally may not abrogate sovereign immunity when the statutory claims do not involve a constitutional violation. *See* Board of Trs. of Univ. of Alabama v. Garrett, 531 U.S. 356, 364 (2001); Kimel v. Florida Bd. of Regents, 528 U.S. 62, 78 (2000); Alden v. Maine, 527 U.S. 706, 748 (1999); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savs. Bank, 527 U.S. 627, 636 (1999); Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996) (all holding that the States were immune from statutory claims that did not involve constitutional violations). *But see* Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 736 (2003) (holding that Congress can abrogate sovereign immunity for statutory claims that do not involve a constitutional violation, but do involve gender discrimination); Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) (Congress may abrogate sovereign immunity for general discrimination claim that may well have been a constitutional violation.).

66 *See* Richard H. Fallon, Jr., Daniel J. Meltzer, & David L. Shapiro, Hart & Wechsler's The Federal Courts and the Federal System 121 (2007 Supplement). Professor Meltzer expanded on this point during his address to the 2008 State Solicitors General and Appellate Chiefs Conference in Providence, Rhode Island. I am grateful for his insights and assistance.

67 *See Garrett,* 531 U.S. at 364; *Kimel*, 528 U.S. at 78; *Alden*, 527 U.S. at 748; *Florida Prepaid*, 527 U.S. at 636; *Seminole Tribe*, 517 U.S. at 72-73 (all holding that the States were immune from statutory claims that did not involve constitutional violations)

68 *Hibbs*, 538 U.S. at 740.

69 Fallon, Meltzer, & Shapiro, *supra* note 66, ¶ 121-22. Moreover, decisions concerning the scope of the States' surrender of sovereign immunity in the Plan of Convention are similarly limited. *Katz* did not hold that the States surrendered sovereign immunity for all bankruptcy claims, but only for bankruptcy claims "necessary to effectuate the in rem jurisdiction of the bankruptcy court." *Katz*, 546 U.S. at 378.

70 *Georgia*, 546 U.S. at 158-59.

71 *Lane*, 541 U.S. at 531.

72 *See* Fallon, Meltzer, & Shapiro, *supra* note 66, ¶ 121. However, *Georgia* does not cast doubt on the continued validity of the as-applied aspects of these cases.

73 *Georgia*, 546 U.S. at 158-59.

74 *Garrett*, 531 U.S. at 364.

75 *Georgia*, 546 U.S. at 158-59.

76 *Washington State Grange*, 128 S. Ct. at 1190.

77 *Sabri*, 541 U.S. at 608-09.

78 *Washington State Grange*, 128 S. Ct. at 1190-91 (citations omitted).

79 *Crawford*, 128 S. Ct. at 1622 (Stevens, J., joined by Roberts, C.J. & Kennedy, J., announcing the judgment of the Court).

80 *Washington State Grange*, 128 S. Ct at 1193-94 (citations omitted).

81 *Id.* at 1195.

82 *Id.* at 1191.

83 *Virginia Code* § 18.2-361.

84 McDonald v. Virginia, 274 Va. 249, 257, 645 S.E.2d 918, 922 (2007). Full Disclosure—I argued the case in the Supreme Court of Virginia.

85 In *McDonald*, the defendant attempted to bring a facial challenge alleging overbreadth to a statute regulating sexual conduct. Ultimately, the Supreme Court of Virginia found that the defendant had failed to preserve his overbreadth challenge.

86 *See* Utah v. Holm, 137 P.3d 736, 742-43 (Utah 2006) (citations omitted).

87 *See* Martin v. Ziherl, 269 Va. 35, 42, 607 S.E.2d 367, 370 (2005) (emphasis added).

In particular, *Lawrence* "explained that the liberty interest at issue was not a fundamental right to engage in certain conduct but was the right to enter and maintain a personal relationship without governmental interference." *Id.* at 40, 607 S.E.2d at 369 (emphasis added) (citation omitted). Full Disclosure—I co-authored Virginia's amicus brief in *Martin*.

88 Lofton v. Sec'y of Dep't of Children & Family Servs., 358 F.3d 804, 815-16 (11th Cir. 2004) (emphasis added). *See also Holm*, 137 P.3d at 742-43 ("Specifically, the Court takes pains to limit the opinion's reach to decriminalizing private and intimate acts engaged in by consenting adult gays and lesbians.").

89 *See* United States v. Bach, 400 F.3d 622, 628-29 (8th Cir.) *cert. denied*, 126 S. Ct. 243 (2005); *Holm*, 137 P.3d at 744. Indeed, the United States Supreme Court explicitly distinguished between sexual acts between consenting adults and sexual acts involving minors when it observed:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.

Lawrence, 539 U.S. at 578 (emphasis added).

90 *McDonald*, 274 Va. at 260, 645 S.E.2d at 924.

91 Singson v. Commonwealth, 46 Va. App. 724, 621 S.E.2d 682 (2005), *appeal denied*, Record No. 052529 (Va. 2006); Tjan v. Commonwealth, 46 Va. App. 698, 621 S.E.2d 669 (2005), *appeal dismissed*, Record No. 052535 (Va. 2006) (both holding that the Commonwealth may criminalize sexual conduct that occurs in public). Full Disclosure—I argued both cases in the Court of Appeals of Virginia.

92 *Washington State Grange*, 128 S. Ct. at 1190-91.

93 *Gonzales*, 127 S. Ct. at 1639.

94 *Id.*

95 William E. Thro, *Toward A Simpler Standard for Abrogating Sovereign Immunity*, 6 Engage: The Journal of the Federalist Society's Practice Groups 65 (October 2005).

96 *Georgia*, 546 U.S. at 158. To be sure, the Court was addressing only Congress' ability to abrogate and was not addressing Congress' ability to exact a waiver. However, although the power to abrogate and the power to exact a waiver depend upon different constitutional provisions, the Court has suggested that the powers are subject to the same limitations. *College Savings*, 527 U.S. at 683-84.

97 *Georgia*, 546 U.S. at 159.

98 *See* Klingler v. Director, Dep't of Revenue, 455 F.3d 888, 894 (8th Cir. 2006); Keef v. Nebraska Dep't of Motor Vehicles, 716 N.W.2d 58, 65-66 (Neb. 2006).

99 Bowers v. Nat'l Collegiate Athletic Ass'n, 475 F.3d 524, 555-56 (3d Cir. 2007) Toledo v. Sanchez, 454 F.3d 24, 40 (1st Cir. 2006).

100 Savage, *supra* note 25.

Free Speech and Election Law

The Supreme Court and Campaign Finance

*By Allison R. Hayward**

In few other areas of law does politics touch the Supreme Court more directly than in campaign finance. Litigants regularly ask the Court to undo the rules set by politicians to govern campaigns, or to adapt old interpretations to new circumstances. At present campaign finance law reflects the preferences of elected officials uncomfortably coupled with the constitutional theories and statutory interpretation of judges.

Not surprisingly, the resulting stew of rules is opaque, incoherent, and satisfactory to no one. Rather than providing a rulebook citizens could easily follow to run for office, American campaign finance has become the special province of experts; no more accessible to ordinary Americans than the regulations governing steel imports or pollution control.

At one point in history, the Court might have declined to enter this political thicket. Until the 1960s, the Court avoided cases deemed to present "political questions" and had been reluctant to say much about campaign finance law.[1] But the rise of modern campaign law and the increased willingness of the Court to adjudicate questions of policy occurred at roughly the same time. After the landmark *Baker v. Carr*[2] and *Reynolds v. Sims*[3] decisions, the Court would be hard pressed to step back from review of other political issues. The era of judicial activism was followed in short order by the era of campaign finance reform.

The basic set of rules governing federal (and many state) campaigns dates to the 1974 Federal Election Campaign Act amendments.[4] This statute crafted contribution and expenditure limits, instituted public funding of Presidential campaigns, enhanced disclosure, and set up an enforcement agency. The Court's 1976 decision in *Buckley v. Valeo* set aside the 1974 law's expenditure limits, kept in place its contribution limits, and rationalized this result with a new principle: expenditures were entitled to full First Amendment protection and strict scrutiny, but contributions were not.[5] For this holding to have meaning, the Court also construed "expenditures" to be only those communications containing "express advocacy" of the election or defeat of a candidate.[6]

To place *Buckley* in context, recall that Justice Stevens, appointed by President Richard Nixon, had just replaced Justice William O. Douglas on the bench. The Court, under Chief Justice Warren Burger, was sifting through the doctrinal revolution that occurred under Chief Justice Warren, who had left the bench in 1969. Specifically, the Burger Court, in 1976, was working on the application of the landmark decision *Roe v. Wade*.[7] It was evaluating the constitutionality of the death penalty, after having found state death penalty statutes unconstitutional two years before.[8] It was wrestling with school desegregation and integration.[9] It was pulling back from Warren Court decisions that flirted with treating wealth discrimination as unconstitutional.[10] It was sorting out First Amendment and free speech holdings related to the press and obscenity.[11]

Had *Buckley* been argued several years earlier, when Chief Justice Warren and Justice Douglas were still adjudicating cases, the result would have been much different. One can imagine a Warren Court opinion on the heels of *Harper v. Virginia Board of Elections*[12] and *Shapiro v. Thompson*[13] endorsing a legislative scheme to level the financial playing field—a goal the Burger Court expressly rejected in *Buckley*.[14] In that era, the Court might have endorsed both contribution *and* expenditure limits, and approved of Congress's broad discretion to enact political restrictions.[15] But by 1976, the Warren-era momentum had abated. From the first modern campaign finance cases, the Court's makeup has had real consequences in campaign finance regulation.

In subsequent decisions, the Court concluded that *Buckley's* "express advocacy" standard applied also to the law barring corporations and unions from making campaign "expenditures" with treasury funds.[16] The Court also held that the federal disclosure requirements unconstitutionally burdened certain unpopular political groups.[17] But as the Court has protected some activities, it has endorsed regulation of others. The resulting sea-saw in doctrine has greatly complicated campaign finance regulation.

One striking illustration of the Court's confounding effect on campaign regulation, and the odd interplay of activism and restraint in this field, is with the twin decisions in *Massachusetts Citizens for Life* ("*MCFL*") (1986)[18] and *Austin v. Michigan Chamber of Commerce* (1990).[19] Both cases presented the Court with one issue that has vexed campaign finance regulators for decades—to what extent can federal law limit the political activity of independent groups and entities?[20]

In *MCFL*, the Federal Election Commission (FEC) penalized a non-profit "right to life" group for using its general treasury funds to publish a "special edition" newsletter. That newsletter urged readers to vote pro-life and identified candidates who agreed with *MCFL* on the abortion issue. The FEC said that this was election advocacy—and because the group was incorporated, that the newsletter amounted to an illegal corporate "expenditure."[21] The Court agreed with the legal analysis, but in an opinion written by Justice Brennan, concluded that this type of group was not the corrupt kind of organization that the law should prevent from making expenditures. Brennan's opinion rejected Congress's discretion to treat all corporations alike, and created an exception for policy or political groups that incorporate, not to amass wealth or invest in business, but for more mundane liability and tax reasons. Justices Marshall, Powell, Scalia and O'Conner joined in most of Brennan's analysis. Justices Rehnquist, White, Blackmun and Stevens demurred on key points.

MCFL divided the court into two camps, but within these camps justices had no consensus view of the law. The

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first camp included justices who were either willing to take a hard look at legislation generally or were persuaded in this context that legislation should be suspect. The second consisted of Justices who wanted to defer to legislative judgments in campaign regulation—either out of restraint, or a belief that the legislation is good policy. In *MCFL*, we can observe how vastly different judicial philosophies nonetheless aligned, here to craft an exception to the federal ban on corporate political expenditures.

Ditto for the Court's decision in *Austin v. Michigan Chamber of Commerce*.[22] In *Austin*, a nonprofit Chamber of Commerce group asserted that its expenditures could not be barred under state law, citing the Court's *MCFL* decision for support. However, in an opinion authored by Justice Marshall, and joined by Rehnquist, Brennan, White, Blackmun and Stevens, a different coalition of justices, some hostile to corporate political activity and others deferential to legislatures, upheld the expenditure ban. Liberal justices feared the corruption of politics by corporations; and some conservative justices embraced restraint. Justices O'Conner, Scalia, and Kennedy dissented, expressing their view that independent political activity deserved greater protection, even when the source of funding has ties to "corporate wealth." Again, an odd Court coalition formed to impose yet another wrinkle onto the regulation of campaign finance. Now groups would have to argue their similarities with the Massachusetts group, and establish dissimilarity with the Michigan group, to avoid the corporate expenditure ban.

One observes similar coalition shifting in a more recent set of cases, *Nixon v. Shrink Missouri Government PAC*[23] and *Randall v. Sorrell*.[24] In both these cases, the Court was asked to consider whether a contribution limit could be so low as to unconstitutionally burden donors, candidates or parties. In the *Shrink Missouri* decision, Justice Souter (joined by Rehnquist, Stevens, O'Connor, Ginsburg and Breyer) declared for the Court that contribution limits need not be justified by specific evidence of corruption, and would only be scrutinized for constitutionality if they *prevented* candidates and committees from engaging in effective advocacy. Justices Scalia, Kennedy, and Thomas dissented, concluding instead that contribution limits should receive strict scrutiny, and that in this case the state's interest was insufficient to sustain them. Again, a coalition of justices who support such restrictions as good social policy joined with justices who called for restraint.

When *Randall*'s challenge to contribution limits came before the Court, Justice Breyer authored the main opinion (joined by Chief Justice Roberts and Justice Alito). Breyer concluded that Vermont's contribution limits *were* unconstitutionally restrictive. Breyer observed that the Vermont limits were very low, but also that the record contained "danger signs" that justified the Court's closer scrutiny of this law.[25] In addition, Breyer noted that the limits applied per election cycle, not per election, as is more typical, that the limits imposed on parties were also very low, and that other aspects of the law imposed extreme burdens on volunteers and parties. Justices Kennedy, Thomas, and Scalia concurred with the result, but would revisit Court's campaign finance rulings and show much less deference to Congress or legislatures. Justices Stevens, Souter, and Ginsburg dissented. Souter defended his deferential *Shrink Missouri* analysis and contended that this claim should meet a similar fate.

A final pair of decisions involves the treatment of independent issue advocacy in *McConnell v. FEC*[26] and in *Wisconsin Right to Life v. FEC*. In *McConnell*, Justices Stevens and O'Connor jointly authored the main opinion on the Bipartisan Campaign Reform Act's "electioneering communications" law,[27] joined by Justices Souter, Ginsburg, and Breyer. Among other conclusions, that opinion held that the "express advocacy" standard was statutory, not constitutional.[28] That is, the Court has to invent "express advocacy" only because the underlying law was too vague. Accordingly, Congress could impose restrictions on certain "issue" communications within thirty days of a primary or sixty days of an election, because this new law was sufficiently definitive to pass muster. The *McConnell* opinion moreover emphasized its "respect for legislative judgment" when regulating the activities of incorporated entities in politics.[29] The Court here had no trouble adopting Congress's regulatory justifications (and derogatory vocabulary) for restricting "so-called issue ads."[30] That vocabulary can be seen as betraying the Justices policy preferences for regulation, even as the Court's opinion is packaged as one about deference.

Four years later, the Court heard a challenge to a specific issue advertisement in *Wisconsin Right to Life v. FEC*.[31] But there, Chief Justice Roberts, staking out the middle ground and writing for himself and Justice Alito, concluded that the electioneering communications law could only apply to communications that contained express advocacy or its "functional equivalent."[32] No longer is the communication's content standard merely a matter of clarifying a vague statute. Justices Scalia, Kennedy, and Thomas joined in the result, but would have reversed the Court's *McConnell* holding as well.[33] Thus, five Justices found for the advocacy group; two attempted to scale the result within the *McConnell* precedent and three would reverse that precedent. Souter dissented, joined by Justices Stevens, Ginsburg, and Breyer, concluding in a tone reminiscent of *McConnell* that Congress should be allowed to regulate these political communications.[34]

The opinions of the various justices form a pattern over time that reflects something besides mere partisanship or ideology. At the outset of modern campaign finance law, a coalition of civil libertarians and classical liberals on the Court united to protect some political activity from regulation. Both camps seemed to respect the value of political participation even by entities the specific justices might not embrace. Accordingly, Justice Brennan joined the per curiam *Buckley* opinion and its "express advocacy" standard. Brennan authored the *MCFL* exception allowing political nonprofit corporations to make independent expenditures. Yet at the same time, a coalition of progressive justices and conservatives would defer to Congress's judgment in how to regulate campaign finance. Justices Rehnquist, Stevens, and White reliably deferred to legislative choices, Rehnquist for structural reasons, and Stevens and White because they liked Congress's policy preferences.

In the intervening years, many justices have left the bench, and have been replaced, yet the same interesting coalitions continue to form in these cases. Justice Souter and Stevens, both

Republican appointees (and generally liberal), are both highly critical of modern politics and very supporting of Congressional reform legislation.[35] Stevens's hostility to modern politics found voice most recently in his *Davis v. Federal Election Commission* dissent. There, he again invokes Justice White's support for greater campaign regulation, surmising that the quality of political debate would (somehow) *improve* if Congress could limit political expenditures.[36]

Justice Breyer's approach is more nuanced, and protective of some political activity especially when faced with laws restricting parties and candidates.[37] Breyer, however, is more critical of efforts by "outside" interest groups to fall outside the scope of regulation.[38] Breyer's willingness to explore rationales for saving some restrictions yet rejecting others is reminiscent of some of Justice Brennan's attempts to craft standards and exceptions. Whatever the intellectual appeal of their approaches for academics and Court-watchers, such efforts complicate the law, and encourage litigation.

Justices Kennedy, Scalia, and Thomas are plainly skeptical of the constitutionality of campaign laws. Chief Justice Roberts and Justice Alito were not on the bench for many of these cases, yet they have shown willingness to take a harder look at campaign finance laws than Justices Rehnquist and O'Connor, whom they replaced. Yet if *Wisconsin Right to Life* is an indicator, these two newest justices are less anxious to overturn precedent than their more skeptical colleagues.

If the recent *Davis* decision is another indicator, Roberts's and Alito's more aggressive scrutiny of these regulations will come through the inventive use of existing precedents. In *Davis*, for instance, Justice Alito's opinion concluded that the federal law increasing contribution limits for candidates facing self-funding "millionaire" opponents unconstitutionally burdened the self-funding candidate's freedom to spend his own money on his campaign.[39] The result required, in part, construing the law as a "spending limit" requiring strict scrutiny under *Buckley*.[40] The dissent in *Davis*, for its part, found no constitutional injury at all.[41]

Unfortunately, the present blend of court-crafted doctrine and Congress-crafted statute is complicated and irrational. Thus, attempting to scrutinize future cases within existing precedent will not help decrease the burden this conglomeration imposes on political activity. That complexity alone may raise a deeper legal question. Can complexity itself pose an unconstitutional burden on speech, association, or other protected activity? The inscrutability of the law has already provided an effective defense —the recent prosecution of a high profile campaign crime failed when the defendant persuaded his jury he *could not have known* that his activity was criminal.[42]

Now might be a good moment for justices to acknowledge the law's general failure to articulate clear standards that serve a rational state interest, due in part to the Court's decisions, and its substantial burden on communities and activists.

Whatever appealing qualities might attach to a justice's respect for precedent and restraint in ordinary circumstances, none are found here. It is vitally important that future justices appreciate the position the Court is in, and the power the Court has to improve the law. Rather than decry judicial activism, principled Court watchers need to allow for space for future justices to repair the mistakes of the past.

In campaign finance, once we acknowledge the conflict of interest with which Congress regulates politics, we should embrace the Court's close review of the laws politicians write to govern their own elections. In the end, Justice Burger, dissenting in *Buckley v. Valeo,* was right. Campaign finance regulation of any kind should be subject to strict scrutiny. The obvious favoritism incumbents bring to the process cries out for some other arbitrator (the Court) to evaluate closely their efforts. But in so doing, the Court should remember that ordinary Americans, not lawyers or consultants, must be able to understand the rules that result from the Court's analysis.

Endnotes

1 *See, e.g.,* Colegrove v. Green, 328 U.S. 549 (1946); United States v. CIO, 335 U.S. 106 (1948).

2 369 U.S. 186 (1962).

3 377 U.S. 1 (1964).

4 Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

5 424 U.S. 1 (1976) (per curiam). Chief Justice Burger dissented from the holding finding contribution limits constitutional. Id. at 241-42.

6 *Id.* at 41-44.

7 *See* Bigelow v. Virginia, 421 U.S. 809 (1975).

8 *See e.g.,* Gregg v. Georgia, 428 U.S. 153 (1976).

9 *See* Millikin v. Bradley, 418 U.S. 717 (1974).

10 Warth v. Seldin, 422 U.S. 490 (1975).

11 *See* Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975).

12 383 U.S. 663 (1966).

13 394 U.S. 618 (1969).

14 424 U.S. at 17-20.

15 Justice White, dissenting in *Buckley*, would have so held. *See* 424 U.S. at 259-67.

16 Massachusetts Citizens for Life v. FEC, 479 U.S. 238 (1986).

17 Brown v. Socialist Workers Committee, 459 U.S. 87 (1982).

18 479 U.S. 238 (1986).

19 494 U.S. 652 (1990).

20 *See* Alexander Heard, The Costs of Democracy 130-32 (1960).

21 2 U.S.C. 441b.

22 494 U.S. 652 (1990).

23 528 U.S. 377 (2000).

24 548 U.S. 230 (2006).

25 548 U.S. at 249.

26 540 U.S. 93 (2003).

27 Bipartisan Campaign Reform Act of 2002 (BCRA) 116 Stat. 81, Title II, codified at 2 U.S.C. 434(f).

28 540 U.S. at 193-94.

29 540 U.S. at 205.

30 540 U.S. at 128-29.

31 127 S. Ct. 2652 (2007).

32 *Id*. at 2663-70.

33 *Id*. at 2679-84.

34 *Id*. at 2687.

35 *See* Randall v. Sorrell, 548 U.S. 230, 280 (Stevens, J., dissenting) ("I am firmly persuaded that the Framers would have been appalled by the impact of modern fundraising practices on the ability of elected officials to perform their public responsibilities.")

36 *Davis*, 554 U.S. ___ (2008)(June 26, 2008) (Slip Op. at 3) (Stevens, J., concurring in part and dissenting in part).

37 *See* Randall v. Sorrell, 548 U.S. 230 (2006).

38 *See* Transcript of Oral Argument, FEC v. Wisconsin Right to Life, 127 S. Ct. 2652 (2007).

39 *Davis*, Slip Op. at 12 (Alito, J.)

40 *Id*. at 14.

41 *Id*. at 5 (Stevens, J., joined by Souter, Ginsberg and Breyer, dissenting).

42 *Ex-Kevorkian Lawyer Acquitted of Campaign Charges*, Associated Press, June 2, 2008.

The Future of Supreme Court Jurisprudence Concerning the Regulation of Elections in the Wake of *Crawford v. Marion County Election Board*

*By Charles H. Bell, Jr. & Jimmie E. Johnson**

Crawford v. Marion County Election Bd.[1] assumes an important place in election law jurisprudence, not only because it is the Supreme Court's most recent review of election laws, but also because the case had been singled out by many academic and non-academic commentators before it was decided as a kind of sequel to *Bush v. Gore*[2]—a litmus test of the current partisan divisions on the federal high court. A number of these commentators attacked the alleged partiality of the lower federal courts previously deciding the matter by emphasizing that the district court judge upholding the law was appointed by a Republican President, the Seventh Circuit Court of Appeals panel affirming the district court's decision was divided along partisan lines, and the subsequent full-circuit court decision denying en banc review of the panel's affirmation was likewise divided. Additional evidence of alleged partisan judging on the issue of voter photo identification laws was found in the 5-2 split decision of the Michigan Supreme Court, in which the court found the state's identification law valid—with all of the Republican justices upholding the requirement and both of the Democratic justices finding it unconstitutional.[3] The subtext of this commentary was that the Indiana photo voter identification statute should be invalidated by the Republican-appointed majority of the Supreme Court to demonstrate the independence and impartiality of the judicial branch of government.

Three elements of the *Crawford* decision were distressing to its critics. *First*, Justice John Paul Stevens, the author of the plurality opinion (actually a 3/3 v. 3 split decision in which six justices agreed that the facial challenge to the Indiana law had not been established), departed from his customary alliance with the Court's liberal side of the bench, and affirmed the Seventh Circuit's and district court's decisions. *Second*, seven of the nine justices (including traditionally liberal-leaning Justices Stevens and Stephen Breyer) rejected the claim that Indiana had not established a sufficiently compelling governmental interest to justify requiring an Indiana voter to produce a current, government-issued photo identification in order to vote at the polls—relying upon a bi-partisan recommendation of the Carter-Baker Commission on Federal Election Reform (hereinafter "the Carter-Baker report") co-chaired by Democratic former President Jimmy Carter. The Carter-Baker report determined that photo identification was, and should be employed as, a useful tool to protect the integrity of the American electoral process against potential voter fraud.[4] That President Carter, in most other instances liberal on matters of national and international policy, would be the vouchsafe of the photo voter ID movement continues to be a bitter pill for these commentators. *Third*, the *Crawford* plurality opinion rejected a facial challenge to the Indiana law and promoted a more restrained jurisprudence in favor of "as applied," and thus far narrower, challenges to election laws. The *Crawford* majority rejected the reasoning of *Harper v. Virginia State Bd. of Elections*[5] in which the Supreme Court earlier had struck down a state's poll tax as invidious discrimination under the Fourteenth Amendment, broadly rejecting the state's imposition of requirements for voting that went beyond the qualifications of voters. Justice William O. Douglas, writing for the majority, held

> To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant. In this context—that is, as a condition of obtaining a ballot—the requirement of fee paying causes an "invidious" discrimination runs afoul of the Equal Protection Clause.[6]

Future challenges seeking to overturn state statutes concerning elections may not be well-secured by the *Crawford* decision, but may instead still recieve less deferential treatment based upon Justice Douglas's broad brush rejection of state regulations in *Harper*.

I. The Indiana Voter ID Law

In 2005, the State of Indiana enacted Senate Enrolled Act No. 483, 2005 Ind. Acts p.2005 (hereinafter "the Indiana Law"). This law required those individuals voting in person at elections held within the State of Indiana to present photo identification prior to casting their vote. The provisions of the Indiana Law did not include a phase-in period, meaning those provisions took effect immediately upon the adoption of the statute.[7]

To be acceptable under the Indiana Law, identification must include the following: (1) a photograph of the individual to whom the "proof of identification" was issued; (2) the name of the individual to whom the document was issued, which "conforms to the name in the individual's voter registration record"; (3) an expiration date; (4) the identification must be current or have expired after the date of the most recent general election; and (5) the "proof of identification" must have been "issued by the United States or the state of Indiana."[8]

The photo ID requirement of the Indiana Law does not apply to everyone. Persons living and voting in a state-licensed facility, such as a nursing home, are not subject to the requirement.[9] Additionally, a voter who does not have photo identification due to indigency or a religious objection against being photographed may cast a provisional ballot.[10] The provisional ballot will be counted if that voter executes an appropriate affidavit before the circuit court clerk within 10 days following the election.[11] In the affidavit, the voter must affirm that he is the same individual who cast the provisional ballot on election day; and does not possess photo identification because either (1) he is indigent and unable to obtain proof of identification without paying a fee; or 2) has a religious objection to being photographed.[12]

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Similarly, if a voter posses photo identification but is unable to present that identification at the polls, that voter may also file a provisional ballot that will be counted if he produces the photo identification to the county circuit clerk's office within 10 days.[13]

Finally, if a voter casts a provisional ballot and later produces their photo identification or executes an affidavit of indigency or religious objection as set forth above, the election board is required to find the provisional ballot valid if the only current objection to the provisional ballot is the voter's failure to have produced photo identification at the polls.[14] However, the election board may still reject the vote if it determines that the voter is not a legitimately qualified, registered voter of the jurisdiction for other reasons.[15]

In conjunction with the Indiana Law, the State of Indiana also enacted legislation eliminating any fees associated with obtaining state-issued identification for individuals without a driver's license, who are at least 18 years of age and able to establish their residency and identity.[16] In order to establish their residency and identity, a voter must provide the following documents: (1) one "primary document,"[17] one "secondary document,"[18] and one "proof of Indiana residency;" or (2) two "primary documents" and one "proof of Indiana residency."[19]

II. The *Crawford v. Marion County Election Board* Litigation

A. The District Court Decision

Soon after the enactment of the Indiana Law, the Indiana Democratic Party and the Marion County Democratic Central Committee filed suit in the Federal District Court for the Southern District of Indiana against state officials charged with enforcing the law.[20] The complaint sought injunctive and declaratory relief against the Indiana Law, alleging that the law was facially unconstitutional pursuant to the First and Fourteenth Amendments to the United States Constitution.[21] This case was consolidated with a similar suit later filed by elected officials and nonprofit organizations representing groups of elderly, disabled, poor, and minority voters in Indiana.[22] The State of Indiana intervened in the matter as a defendant.[23] Judge Sarah Evans Barker presided over the case.[24]

The consolidated complaints alleged that the Indiana Law unconstitutionally burdens the right to vote.[25] Additionally, the complaints alleged that the law impermissibly discriminated between and among different classes of voters, disproportionately affects disadvantaged voters, is unconstitutionally vague, imposes a new and material requirement for voting in violation of the Indiana state constitution, and was not justified by existing circumstances or evidence.[26] In opposition, the State of Indiana and its co-defendants (hereinafter "State of Indiana") defended the Indiana Law as a justified legislative concern for preventing in-person voting fraud, and a reasonable exercise of the state's constitutional power to regulate the time, place, and manner of elections.[27]

The parties engaged in significant discovery in the matter. The discovery included an admission by the State of Indiana that "the State of Indiana is not aware of any incidents or person attempting vote, or voting, at a voting place with fraudulent or otherwise false identification."[28] The discovery further showed that no voter in Indiana history had ever been formally charged with any sort of crime related to impersonating someone else for purposes of voting.[29]

On the other hand, the discovery did include evidence of allegations and instances of in-person voter fraud in several other states, including a 1994 case in California; 14 dead people voting at the polls in a 2000 St. Louis, Missouri election; 19 ballots cast by dead voters, 6 double votes, and 77 votes unaccounted for in the State of Washington's 2004 gubernatorial elections; instances of persons voting twice by using fake names and addresses in the 2004 elections in Wisconsin; instances of citizens telling investigators that they did not vote in those same Wisconsin elections, even though the official elections report showed that someone voted in their names; and several others examples of voter identification fraud.[30] Additionally, the discovery included evidence of absentee voter fraud in Indiana itself, and that pervasive fraud regarding absentee balloting led the Indiana Supreme Court to vacate the results of a mayoral election in East Chicago.[31]

Besides voter fraud, the discovery revealed that Indiana's voter registration rolls were significantly inflated at the time, with at least 35,699 registered voters who were deceased and 233,519 potential duplicate voter registrations of the same person in different areas of the state.[32]

Finally, the discovery included several public opinion polls indicating voter concern about election fraud and support for photo identification requirements at the polls. Prior to the 2000 election, a Rasmussen Reports poll showed that 59% of voters believed there was "a lot" or "some" fraud in elections. Similarly, a Gallup Poll showed that after the 2000 elections 67% of adults nationally had only "some" or "very little" confidence in the way the votes are cast in our country. A Rasmussen Reports 2004 survey of 1000 likely voters indicated that 82% of respondents favored photo identification at the polls.[33]

One piece of discovery that was rejected by the district court was an expert analysis report prepared by Kimball W. Brace Election Data Services, Inc. which indicated that many voters would be disenfranchised by the Indiana Law.[34] The report was rejected for several analytical deficiencies.[35] To this end, no evidence was submitted into discovery exemplifying how any individual is unable to vote under the Indiana Law.[36] Likewise, the discovery did not include any statistics or aggregate data indicating particular groups who are unable to vote.[37]

After discovery, the parties filed cross-motions for summary judgment.[38] Focusing on the fact that the complainants had "not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of SEA 483 or who will have his or her right to vote unduly burdened by its requirements," and that "an estimated 99% of Indiana's voting age population already possesses the necessary photo identification to vote under the requirements of SEA 483," the district court judge found that the governmental interest in protecting against voter fraud outweighed any minimal infringements upon the right to vote.[39] The district court likewise rejected the other causes of action set forth by complainants, and granted summary judgment on behalf of the State of Indiana.[40]

B. The Seventh Circuit Decisions

The complainants appealed the district court decision to the federal Seventh Circuit Court of Appeals.[41] The appellate

court's majority opinion, written by Judge Richard A. Posner and joined by Judge Diane S. Sykes, affirmed the district court's order.[42] The majority opinion found that the importance of preventing voter fraud outweighed the negative result of a few instances of voters disenfranchising themselves by deciding not to satisfy the requirements of the new law.[43] In doing so, the appellate court accepted the district court's discounting of the expert analysis by Kimball W. Brace, and rationalized that the reason Indiana had no documented history of voter identification fraud was not necessarily the result of it not occurring, but rather the lack or difficulty of enforcement under the previous law which did not require photo identification.[44] The appellate court also summarily affirmed the district court's decision on the other causes of action.[45]

The full Seventh Circuit Court of Appeals later denied the complainants' petition for rehearing with suggestion for rehearing en banc.[46]

C. The United States Supreme Court Decision

The Supreme Court affirmed the decisions of the district and circuit courts in *Crawford v. Marion County Election Bd.*[47] The justices issued four separate opinions in the case. As evidenced below, seven of the nine justices found the governmental interest in preventing voter fraud at the polls sufficiently important to allow for some form of photo identification requirement. Of these seven, six justices determined that the Indiana Law itself was constitutional. However, these six justices split on the decision of whether the Indiana Law was constitutional in the abstract, or whether it was merely constitutional because the complainants had failed to provide sufficient evidence to convince them that the Indiana Law caused an unconstitutionally severe burden on the right to vote upon a substantial subgroup of the voting population—thus leaving open the opportunity for further litigation in this matter should such sufficient evidence later arise.

1. The Plurality Opinion of Justices Stevens and Kennedy and Chief Justice Roberts

The opinion of the Supreme Court was authored by Justice John Paul Stevens, and joined by Chief Justice John Roberts and Justice Anthony Kennedy (hereinafter "the plurality opinion"). The first issue confronted by the plurality opinion was the proper standard of judicial scrutiny. Reviewing past Supreme Court decisions in voting rights matters, the plurality opinion explained that restrictions on the right to vote were "invidious" and subject to the highest level of judicial scrutiny if the restrictions were unrelated to voter qualifications, i.e., poll taxes which related to a voter's affluence rather than their qualifications as a voter.[48] On the other hand, recognizing its precedent set forth in *Anderson v. Celebrezze,*[49] the plurality opinion noted that "evenhanded restrictions that protect the integrity and reliability of the electoral process itself" are not inherently invidious and pass constitutional muster if a court makes the "hard judgment" that the governmental justification for the restriction outweighs the burden imposed by the law.[50] "[A] court evaluating a constitutional challenge to an election regulation weigh[s] the asserted injury to the right to vote against the 'precise interests put forward by the State as justifications for the burden imposed by its rule.'"[51]

After applying the *Anderson* "balancing approach" to the matter, the plurality opinion reviewed three asserted interests proffered by the State of Indiana in defense of its law: 1) deterring and detecting voter fraud; 2) deterring fraud potentially arising from its inflated registration rolls; and 3) safeguarding voter confidence.[52] To the first of these interests, the plurality decision noted that the Carter-Baker report called for photo identification at polls as a means of preventing the real and potentially election-changing problem of voter fraud.[53] Despite the lack of evidence of actual voter identification fraud at the polls in Indiana, the plurality opinion relied upon the evidence of such fraud in other states, finding:

> There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear.[54]

As to the second interest of combating voter fraud potentially resulting from inflated voter registration lists, the plurality opinion decided that "[e]ven though Indiana's own negligence may have contributed to the serious inflation of its registration lists when SEA 483 was enacted, the fact of inflated voter rolls does provide a neutral and nondiscriminatory reason supporting the State's decision to require photo identification."[55] Finally, again referencing the Carter-Baker report, the plurality opinion found that the State of Indiana had a legitimate government interest in protecting public confidence in the integrity and legitimacy of elections by requiring photo identification from voters as such confidence "encourages citizen participation in the democratic process."[56]

Having identified the precise interests of the State of Indiana in requiring photo identification at the polls, the plurality opinion then reviewed two separate types of burdens upon the right to vote imposed by the Indiana Law. First, the plurality opinion reviewed the burden imposed upon those who possessed acceptable photo identification but could not produce such identification at the polls. The plurality opinion concluded that the minimal inconvenience of requiring such voter to cast a provisional ballot and subsequently file an affidavit at a later time did not outweigh the governmental interest of deterring and detecting voter fraud.[57]

> [A] voter may lose his photo identification, may have his wallet stolen on the way to the polls, or may not resemble the photo in the identification because he recently grew a beard. Burdens of that sort arising from life's vagaries, however, are neither so serious nor so frequent as to raise any question about the constitutionality of SEA 483; the availability of the right to cast a provisional ballot provides an adequate remedy for problems of that character.[58]

Next, the plurality opinion addressed the issue of voters who did not possess acceptable photo identification because of indigency, lack of mobility, or other issues. First, the plurality opinion noted that the law would be akin to a poll tax and unconstitutional if acceptable photo identification was not available free of charge.[59]

> The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save the statute under our reasoning in *Harper* [*v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966)], if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's BMV are also free. For most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting.[60]

The plurality opinion recognized that some individuals may have trouble securing the records necessary for attaining free photo identification under the Indiana Law.[61] However, the plurality opinion determined that any such burdens were adequately mitigated by the ability to cast a provisional ballot without photo identification.[62]

> The severity of that burden is, of course, mitigated by the fact that, if eligible, voters without photo identification may cast provisional ballots that will ultimately be counted. To do so, however, they must travel to the circuit court clerk's office within 10 days to execute the required affidavit. It is unlikely that such a requirement would pose a constitutional problem unless it is wholly unjustified. And even assuming that the burden may not be justified as to a few voters, that conclusion is by no means sufficient to establish petitioners' right to the relief they seek in this litigation.[63]

Nevertheless, despite finding that the State of Indiana had legitimate interests for imposing the photo identification requirement at the polls, and finding that any burdens imposed by the Indiana Law upon segments of the electorate who did not possess acceptable photo identification appeared to have been adequately mitigated by the provisional ballot provisions of the law, the plurality opinion left open the possibility that the law could be found unconstitutional in subsequent litigation should evidence later arise that those provisional ballot provisions did not adequately mitigate any resulting severe burdens.[64] The plurality opinion stated that, based on the record presented in the matter, the Court could only scrutinize the impact of the law on the general population rather than specific subgroups because there had been no evidence proffered regarding the quantity and quality of any extra burden imposed upon a subgroup of the population. Without any evidence of how many qualified voters do not possess acceptable photo identification, and without any evidence of the weight of the burden imposed upon that subgroup, the Court could not judge whether any alleged extra burden imposed upon that segment was "excessively burdensome" rendering the law unconstitutional.[65]

> Petitioners ask this Court, in effect, to perform a unique balancing analysis that looks specifically at a small number of voters who may experience a special burden under the statute and weighs their burdens against the State's broad interests in protecting election integrity. Petitioners urge us to ask whether the State's interests justify the burden imposed on voters who cannot afford or obtain a birth certificate and who must make a second trip to the circuit court clerk's office after voting. But on the basis of the evidence in the record it is not possible to quantify either the magnitude of the burden on this narrow class of voters or the portion of the burden imposed on them that is fully justified.
>
> First, the evidence in the record does not provide us with the number of registered voters without photo identification…. Further, the deposition evidence presented in the District Court does not provide any concrete evidence of the burden imposed on voters who currently lack photo identification.
>
> …
>
> In sum, on the basis of the record that has been made in this litigation, we cannot conclude that the statute imposes "excessively burdensome requirements" on any class of voters. A facial challenge must fail where the statute has a "'plainly legitimate sweep.'" When we consider only the statute's broad application to all Indiana voters we conclude that it "imposes only a limited burden on voters' rights." The "'precise interests'" advanced by the State are therefore sufficient to defeat petitioners' facial challenge to SEA 483.[66]

Finally, the plurality opinion noted that even should a future complainant provide evidence that the Indiana Law excessively burdened a substantial percentage of the voting population, such a complainant would also have to proffer sufficient reason why the entire law should be found unconstitutional as opposed to specific provisions or incorporating "as applied" exceptions.[67]

> Finally we note that petitioners have not demonstrated that the proper remedy-even assuming an unjustified burden on some voters-would be to invalidate the entire statute. When evaluating a neutral, nondiscriminatory regulation of voting procedure, we must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.[68]

2. The Concurring Opinion of Justices Scalia, Thomas, and Alito

Justice Antonin Scalia authored a concurring opinion, joined by Justices Clarence Thomas and Samuel Alito. Like the plurality opinion, the concurring opinion recognized that the proper standard for determining the level of judicial scrutiny stemmed from the *Anderson* opinion.[69] However, whereas the plurality opinion viewed the subsequent decision in *Burdick v. Takushi*[70] as merely re-affirming the balancing approach first articulated in *Anderson*, the concurring opinion viewed *Burdick* as newly determining that the severity of burdens imposed by voting regulations are to be determined only as they apply to all subjected voters, not individuals or sub-groups of that universe.[71]

> In the course of concluding that the Hawaii laws at issue in *Burdick* "impose[d] only a limited burden on voters' rights to make free choices and to associate politically through the vote," [citation], we considered the laws and their reasonably foreseeable effect on *voters generally*. We did not discuss whether the laws had a severe effect on Mr. Burdick's own right to vote, given his particular circumstances. That was essentially the approach of the *Burdick* dissenters, who would have applied strict scrutiny to the laws because of their effect on "some voters."[72]

In addition to scrutinizing the question pursuant to voting rights jurisprudence, the concurring opinion also rejected scrutinizing individual or sub-group burdens under equal protection precedent, finding that such precedent does not invalidate generally applicable laws with disparate impacts lacking discriminatory intent.[73]

> Insofar as our election-regulation cases rest upon the requirements of the Fourteenth Amendment, [citation], weighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal-protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.[74]

Finally, the concurring opinion rejected the notion of allowing "as applied" challenges to photo identification laws by individuals and subgroups incurring exceptional burdens unrealized by the general voting public, as then such laws would be subject to constant litigation.[75]

> This is an area where the dos and don'ts need to be known in advance of the election, and voter-by-voter examination of the burdens of voting regulations would prove especially disruptive. A case-by-case approach naturally encourages constant litigation. Very few new election regulations improve everyone's lot, so the potential allegations of severe burden are endless. A State reducing the number of polling places would be open to the complaint it has violated the rights of disabled voters who live near the closed stations. Indeed, it may even be the case that some laws already on the books are especially burdensome for some voters, and one can predict lawsuits demanding that a State adopt voting over the Internet or expand absentee balloting.[76]

Accordingly, finding the governmental interest sufficient, and citing the plurality opinion's own admission that "[f]or most voters who need them, the inconvenience of making a trip to the BMV, gathering the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote, or even represent a significant increase over the usual burdens of voting," the concurring opinion explained that it would find the Indiana Law constitutional upon that factual finding alone.[77]

3. Justice Breyer's Dissenting Opinion

Justice Stephen Breyer issued a dissenting opinion in *Crawford*. Like that of the plurality and concurring opinions, Justice Breyer agreed that the governmental interest in deterring and detecting voter fraud was sufficient to validate photo identification laws.[78] In doing so, Justice Breyer placed great weight on the Carter-Baker report coming to this same conclusion.

> I give weight to the fact that a national commission, chaired by former President Jimmy Carter and former Secretary of State James Baker, studied the issue and recommended that States should require voter photo IDs. See Report of the Commission on Federal Election Reform, Building Confidence in U.S. Elections § 2.5 (Sept.2005) (Carter-Baker Report), App. 136-144. Because the record does not discredit the Carter-Baker Report or suggest that Indiana is exceptional, I see nothing to prevent Indiana's Legislature (or a federal court considering the constitutionality of the statute) from taking account of the legislatively relevant facts the report sets forth and paying attention to its expert conclusions. Thus, I share the general view of the lead opinion insofar as it holds that the Constitution does not *automatically* forbid Indiana from enacting a photo ID requirement.[79]

However, Justice Breyer disagreed that the specific provisions of the Indiana Law did not substantially burden the right to vote beyond the acceptable limits of the United States Constitution.[80] Relying upon the Carter-Baker report's recommendation that acceptable photo identifications "be easily available and issued free of charge" and that the requirement be "phased in" over two federal election cycles to ease the transition, Justice Breyer found the underlying requirements for receiving a free photo identification overly burdensome to elderly, the indigent, and other disadvantaged groups.[81]

> For one thing, an Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles, particularly if he or she resides in one of the many Indiana counties lacking a public transportation system.… For another, many of these individuals may be uncertain about how to obtain the underlying documentation… upon which the statute insists. And some may find the costs associated with these documents unduly burdensome….[82]

Finally, Justice Breyer compared the Indiana Law to a similar law in Florida which allowed for a greater variety of acceptable photo identifications (e.g., employee badge, debit card, student ID, neighborhood association ID…), as well as to a similar law in Georgia which allowed for a greater variety of documents to qualify for a state-issued photo identification (e.g., paycheck stub, Social Security card, Medicare or Medicaid statement, school transcript ...).[83] "The record nowhere provides a convincing reason why Indiana's photo ID requirement must impose greater burdens than those of other States, or than the Carter-Baker Commission recommended nationwide."[84]

Accordingly, Justice Breyer dissented: "while the Constitution does not in general forbid Indiana from enacting a photo ID requirement, this statute imposes a disproportionate burden upon those without valid photo IDs."[85]

4. Justice Souter's Dissenting Opinion

Finally, Justice David Souter published a dissenting opinion, joined by Justice Ruth Bader Ginsberg. Agreeing with the plurality opinion, Justice Sourter found that a balancing analysis was appropriate, but emphasized that the State of Indiana bore the burden of factual proof that the burdens imposed by the voting regulation was outweighed by the importance of the governmental interest.[86]

> Under *Burdick*, 'the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights,' upon an assessment of the 'character and magnitude of the asserted [threatened] injury,' and an estimate of the number of voters likely to be affected.[87]

To this purpose, Justice Souter found the travel costs and fees involved in obtaining acceptable photo identification under the Indiana Law a severe burden.[88] Likewise, Justice Souter did not find the availability of a provisional ballot sufficiently mitigating, as voters employing provisional ballots were required to incur the travel costs of affirming the provisional ballot in every election.[89] Furthermore, Justice Souter rejected the provisional ballot option in the Indiana Law itself for the additional reason that it was only available to those willing to admit indigency or those who had a religious objection, rather than all persons without such identification.[90]

Next, accepting the district court's estimate that

approximately one percent of the qualified voters in Indiana likely do not have acceptable photo identification, Justice Souter found that the number of voters severely burdened by the Indiana Law was substantial.[91]

Given the aforementioned findings, in addition to the fact that the Indiana Law "is one of the most restrictive in the country," Justice Souter found that the proffered governmental interests should be subject to "more than a cursory examination."[92] In turn, while accepting that the government has an interest in detecting and deterring against voter fraud at the polls, Justice Souter discounted the weight of such interest as overriding the burdens imposed by the Indiana Law.[93] First, Justice Souter found the asserted interest in detecting voter fraud lacked significant weight as the Indiana Law

> leaves untouched the problems of absentee-ballot fraud…; of registered voters voting more than once (but maintaining their own identities) in different counties or in different States; of felons and other disqualified individuals voting in their own names; of vote buying; or, for that matter, of ballot-stuffing, ballot miscounting, voter intimidation, or any other type of corruption on the part of officials administering elections.[94]

Likewise, Justice Souter discounted the weight of interest in deterring in-person voter fraud due to the lack of any documentary evidence that such fraud occurs in Indiana.[95]

Justice Souter further seemed to take umbrage that there was no stated interest in phasing-in the photo identification requirement as recommended by the Carter-Baker report.[96] Additionally, Justice Souter found no governmental interest in requiring the provisional ballot affidavit be filed at a different location from the polls on a different date—in effect rejecting the Carter-Baker report's recommendation on that matter.[97]

Next, Justice Souter rejected the asserted interest that the inflated voter rolls of the State of Indiana presented a legitimate governmental interest for requiring photo identification.[98]

> The State is simply trying to take advantage of its own wrong: if it is true that the State's fear of in-person voter impersonation fraud arises from its bloated voter checklist, the answer to the problem is in the State's own hands. The claim that the State has an interest in addressing a symptom of the problem (alleged impersonation) rather than the problem itself (the negligently maintained bloated rolls) is thus self-defeating; it shows that the State has no justifiable need to burden the right to vote as it does, and it suggests that the State is not as serious about combating fraud as it claims to be.[99]

Finally, Justice Souter did not find a connection between public confidence in elections and a photo identification requirement absent documented evidence to the contrary.[100]

> It should go without saying that none of this is to deny States' legitimate interest in safeguarding public confidence…. But the force of the interest depends on the facts (or plausibility of the assumptions) said to justify invoking it. While we found in *Nixon* that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters," there is plenty of reason to be doubtful here, both about the reality and the perception. It is simply not plausible to assume here, with no evidence of in-person voter impersonation fraud in a State, and very little of it nationwide, that a public perception of such fraud is nevertheless "inherent" in an election system providing severe criminal penalties for fraud and mandating signature checks at the polls.[101]

Having found a substantial burden imposed upon the right to vote to a significant percentage of the population, and in comparison having found little factual evidence that the proffered governmental interests were substantially furthered by the regulations imposed, Justice Souter found the Indiana Law unconstitutional.[102]

III. The Future of Supreme Court Jurisprudence Concerning Election Regulations

While the 6-3 decision in *Crawford* seems to have secured state efforts to protect the integrity of the vote against voter fraud by rejecting facial challenges to photo ID laws, the direction of the courts on such issues remains uncertain. Changes in the composition of the Supreme Court might correspondingly alter the Court's jurisprudence with respect to photo voter ID requirements as well as the deference accorded states in fashioning election protection legislation.

With respect to the tenuous status of state photo ID legislation, litigants may take up the *Crawford* plurality opinion's challenge to prove that such laws indeed impose a substantial burden on the right to vote. In its current makeup, there appear to be only three justices of the Supreme Court who are prepared to validate any photo identification requirement so long as the regulations do not appear facially discriminatory—Justices Scalia, Thomas, and Alito. On the other hand, three justices are prepared to validate photo identification requirements only so long as those opposing such laws fail to proffer evidence that the laws actually impose severe burdens upon a substantial portion of the population—Chief Justice Roberts and Justices Stevens and Kennedy. Additionally, two of the current justices are prepared to invalidate photo identification requirements unless the propounding government proffers evidence that the regulations do not impose severe burdens upon a substantial portion of the population—Justices Souter and Ginsburg. Finally, Justice Breyer appears to require the government to prove that the regulations provide for photo identifications that are "easily available and issued free of charge."

Therefore, aside from Justices Scalia, Thomas, and Alito, the justices of the Supreme Court could be viewed as amenable to challenges to invalidate photo voter identification laws if the plaintiffs proffer evidence of actual severe burdens to a substantial portion of the population, however that is defined.

CONCLUSION

In *Crawford*, seven justices of the Court found that states have a legitimate interest in requiring photo identification at the polls to deter and detect voter fraud. State photo voter identification requirements can be crafted constitutionally under the federal Constitution as long as the particular regulations do not impose a severe burden upon a substantial portion of the population. While facial challenges to such regulations are disfavored, and narrower, "as applied" challenges will face significant hurdles in light of the *Crawford* opinions, *Crawford* is far from being settled precedent. The decision remains politically controversial and thus the fate of such laws

is likely to remain as unsettled as predictions of political winds and the Supreme Court's composition.

Endnotes

1 128 S.Ct. 1610 (2008).

2 531 U.S. 98 (2000).

3 *See* In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, Michigan Supreme Court Case No. 130588 (July 18, 2007).

4 The Carter-Baker report, "Building Confidence in U.S. Elections: Report of the Commission of Federal Election Reform, September 2005," played a significant role in the various opinions authored by the various Supreme Court justices in *Crawford*. Led by former President Jimmy Carter and former Secretary of State James A. Baker, III, the "Commission on Federal Election Reform" was organized by The Center for Democracy and Election Management at American University, in association with the James A. Baker III Institute for Public Policy at Rice University, The Carter Center, and electionline.org, a national clearinghouse of election reform information sponsored by The Pew Charitable Trusts.

The Commission issued its report on September 19, 2005, with 87 recommendations on how to improve the conduct of elections. Building Confidence in U.S. Elections Report of the Commission on Federal Election Reform September 2005, Center for Democracy and Election Management, American University, (September 19, 2005) (hereinafter "Carter-Baker Report"). Included within this report was the recommendation that states require individuals voting in person at polls to present photo identification prior to casting their vote. The Commission determined that this requirement not only provided a mechanism against voter fraud, but also improved the electorate's confidence in the election process.

> A good registration list will ensure that citizens are only registered in one place, but election officials still need to make sure that the person arriving at a polling site is the same one that is named on the registration list. In the old days and in small towns where everyone knows each other, voters did not need to identify themselves. But in the United States, where 40 million people move each year, and in urban areas where some people do not even know the people living in their own apartment building let alone their precinct, some form of identification is needed. There is no evidence of extensive fraud in U.S. elections or of multiple voting, but both occur, and it could affect the outcome of a close election. The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo IDs currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.

Carter-Baker Report, § 2.5.

After reviewing how more than half of the states in the country were in different stages of enacting laws requiring photo identification at polling places, the Commission rejected the argument that such laws prevent only an imaginary evil. As the Commission noted, undeniably some election identity fraud occurs, and in a close election even the smallest amount of such fraud could affect the outcome of an election. Additionally, the Commission determined that even if such fraud is wholly non-existent, the fact that people believe such fraud exists requires defense mechanisms in order to buttress public confidence.

> While the Commission is divided on the magnitude of voter fraud—with some believing the problem is widespread and others believing that it is minor—there is no doubt that it occurs. The problem, however, is not the magnitude of the fraud. In close or disputed elections, and there are many, a small amount of fraud could make the margin of difference. And second, the perception of possible fraud contributes to low confidence in the system. A good ID system could deter, detect, or eliminate several potential avenues of fraud—such as multiple voting or voting by individuals using the identities of others or those who are deceased—and thus it can enhance confidence.

Id.

In terms of the type of identification to use in elections, the Commission suggested the REAL ID card which was part of the REAL ID Act signed into law earlier that year. The REAL ID Act requires states by 2010 to verify an individual's full legal name, date of birth, address, Social Security number, and citizenship prior to issuing a driver's license or personal identification card. According to the Commission, "The REAL ID card adds two critical elements for voting—proof of citizenship and verification by using the full Social Security number." For those persons who do not have a driver's license, the Commission urged that "IDs should be easily available and issued free of charge." *Id.*

Finally, due to the phase-in period of the REAL ID card, the Commission advised a phase-in period of any photo identification requirement for voting as well. "For the next two federal elections, until January 1, 2010, in states that require voters to present ID at the polls, voters who fail to do so should nonetheless be allowed to cast a provisional ballot, and their ballot would count if their signature is verified." *Id.* After the phase-in period, the Commission determined that a vote cast by a person without photo identification should only be counted if the person returns to a designated official with photo identification soon after the election. "After the REAL ID is phased in, i.e., after January 1, 2010, voters without a valid photo ID, meaning a REAL ID or an EAC-template ID, could cast a provisional ballot, but they would have to return personally to the appropriate election office within 48 hours with a valid photo ID for their vote to be counted." *Id.*

5 383 U.S. 663 (1966).

6 *Id.* at 668 (internal quotations omitted).

7 Ind. Code § 3-5-2-40.5.

8 *Id.*

9 Ind. Code Ann. § 3-11-8-25.1, subd. (e).

10 Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5, subd. (c).

11 *Id.*

12 Ind. Code Ann. § 3-11-7.5-2.5, subd (c).

13 Ind. Code Ann. § 3-11.7-5-2.5, subd. (b).

14 Ind. Code Ann. § 3-11-7.5-2.5, subd. (d).

15 Ind. Code §§ 3-11.7-5-1; 3-11.7-5-2.5.

16 *See* 2005 Ind. Acts p.2017, § 18; § 9-24-16-10, subd. (b).

17 A "primary document" is defined under pertinent Indiana state law as an official document used to verify identity, date of birth, and citizenship, including a United States Birth Certificate with a stamp or seal, documents showing that the person was born abroad as an American citizen or is a naturalized citizen, a passport, or a U.S. military or merchant marine photo identification. Redman Deposition, Ex. 2.

18 A "secondary document" is defined to include a wide variety of documents, including official court, U.S. and state government agency documents, bank records and credit cards. The full listing is omitted but is contained in the Redman Deposition, Ex. 2.

19 A "proof of Indiana residency" requires that an applicant present some proof of a residential address, but not a post office box. Proof of residency documents include any primary or secondary document that contains the applicant's name and residential address as well as documents including, but not limited to: Child Support Check from the [Family and Social Services Administration] with name and address of the applicant attached; Change of Address Confirmation form (CNL 107) from U.S. Postal Service listing old and new address; current Bill or Benefit Statement (within 60 days of issuance); Indiana Driver's License, Identification Card or Permit with Photograph; Indiana Property Deed or Tax Assessment; Indiana Residency Affidavit; or Voter Registration Card. Redman Deposition, Ex. 2. Ind. Dem. Party v. Rokita, Case No. 1:05-CV-0634-SEB-VSS, Deposition of BMV Designee Carol Redman ("Redman Deposition") at 5, Ex. 2.

20 Ind. Dem. Party v. Rokita, Case No. 1:05-CV-0634-SEB-VSS (S.D.Ind).

21 Ind. Dem. Party v. Rokita, 458 F.Supp.2d 775, 783-84 (S.D.Ind. 2006).

22 *Id.* at 782-83, 796.

23 *Id.* at 783.

24 *Id.* at 782.

25 *Id.* at 783-84.

26 *Id.* at 784.

27 The State of Indiana also raised standing and inappropriate party objections which are not pertinent to this article. *Id.*

28 *Id*. at 792-93.

29 *Id*. at 793.

30 *Id*. at 793-94.

31 *Id*. at 793.

32 *Id*.

33 *Id*. at 794.

34 *Id*. at 803.

35 *Id*. at 803-07.

36 *Id*. at 822.

37 *Id*. at 822-823.

38 *Id*. at 784.

39 *Id*. at 783, 807, 830.

40 *Id*. at 830-45.

41 Crawford v. Marion County Election Bd. Case Nos. 06-2218, 06-2317 (7th Cir.).

42 *Crawford*, 472 F.3d 949, 954 (7th Cir. 2007).

43 *Id*. at 952-54.

44 *Id*. at 952-53.

45 *Id*. at 954.

46 *Crawford*, 484 F.3d 436, 437 (7th Cir. 2007).

47 128 S.Ct. 1610 (2008).

48 *Id*. at 1615-16.

49 460 U.S. 780, 788, fn. 9.

50 *Id*. at 1616.

51 *Id*.

52 *Id*. at 1617.

53 *Id*. at 1618.

54 *Id*. at 1619.

55 *Id*. at 1620.

56 *Id*.

57 *Id*.

58 *Id*.

59 *Id*. at 1620-21.

60 *Id*.

61 *Id*. at 1621.

62 *Id*.

63 *Id*.

64 *Id*. at 1621-23.

65 *Id*. at 1622-23.

66 *Id*. (internal quotations omitted).

67 *Id*. at 1623.

68 *Id*. (internal quotations omitted).

69 *Id*. at 1624.

70 504 U.S. 428.

71 *Id*. at 1624-26.

72 *Id*. at 1625 (internal quotations omitted).

73 *Id*. at 1626.

74 *Id*. (internal quotations omitted).

75 *Id*. at 1626-27.

76 *Id*. at 1626.

77 *Id*. at 1627.

78 *Id*. at 1643-44.

79 *Id*.

80 *Id*. at 1644.

81 *Id*.

82 *Id*.

83 *Id*. at 1644-45.

84 *Id*. at 1645.

85 *Id*.

86 *Id*. at 1628-31.

87 *Id*. at 1628 (internal quotations omitted).

88 *Id*. at 1629-1631.

89 *Id*. at. 1631-32.

90 *Id*. at 1632.

91 *Id*. at 1634.

92 *Id*. at 1634-35.

93 *Id*. at 1635-39.

94 *Id*. at 1636-37.

95 *Id*. at 1637-1639.

96 *Id*. at 1640.

97 *Id*. at 1640-41.

98 *Id*. at 1641-42.

99 *Id*.

100 *Id*. at 1642.

101 *Id*. (internal quotations omitted).

102 *Id*. at 1642-43.

Intellectual Property

Quanta and the Future of Supreme Court Patent Jurisprudence

*By F. Scott Kieff**

The Supreme Court's unanimous decision in *Quanta v. LG Electronics*[1] may make it significantly more difficult to structure transactions involving patents. While this decision does make a group of players into winners in the immediate term for existing patent deals (this group includes any customer who, like Quanta, buys patented parts without buying a patent license), almost everyone is likely to come out a loser going forward.

The Court in *Quanta* decided that a limited patent license that LG Electronics sold only to Intel (limited on its terms to exclude Intel's customers, like Quanta) would be treated by the Court as extending permission under the patent to those Intel customers. The legal "hook" on which the Court hung its decision is the patent law doctrine called "first sale" or "exhaustion."[2]

The *Quanta* decision is likely to have a serious negative effect on the nuts and bolts of patent licensing agreements. On one reading, it stands for little more than the unremarkable proposition that the actual patent license contract at issue was just badly written. But that would be a simple matter of applying state contract law to the underlying facts of the contract—not the type of issue that typically gains the Supreme Court's attention. So the real motivating force behind the Court's decision to take the case is probably something else. The extensive briefing and commentary, as well as the opinion's colorful dicta, all suggest that the true import of the case is the way it speaks about what patent contracting can be done—as a matter of Court-created policy for federal patent law.

If this view of *Quanta* is correct, then the decision may be remarkably important in several respects. It may greatly frustrate the ability of commercial parties to strike deals over patents. It may also stand as an example of a seemingly conservative Court acting in direct contravention of clear congressional action.

I. Business Background

While patent law, like many areas of law, is a specialized field with its own jargon, the underlying business impact of the *Quanta* decision is accessible to an audience with no special understanding of patent law or practice. The business deal at issue in *Quanta* can be seen as an ordinary sales transaction between a sophisticated seller and a sophisticated buyer, with subsequent downstream sales from the initial buyer to additional sophisticated buyers (where all relevant parties well understood the express terms of the relevant contract). Put differently, this is not a case that invokes the standard state contract law and policy problems of unfairly sharp bargaining across a huge differential in bargaining power (such as the infamous rent-to-own businesses operated in underprivileged neighborhoods), or of a mistake in signing onto hidden terms, and so on.

In this deal, all parties knew the contract was for the proverbial slice of bread (a limited patent license to one) not the whole loaf (a license to all). Nevertheless, and contrary to the contract's wording and the parties' intent, the Court decided this deal transferred the whole loaf.

To the extent the Court's decision is merely one of contract interpretation, suggesting that a better-written contract would have been respected by the Court, then the case is largely unremarkable. But what if the effect of the Court's decision is to render void any contract for a mere slice?

Sometimes a buyer and a seller want to strike a deal with each other for a slice of bread at a modest price, not a whole loaf at a much higher price. When the law makes such modest deals unenforceable, several bad outcomes are likely:

1. Neither side of a potential deal may get what it wants because it has to buy or sell more than it would like;
2. The deal may not get done because the parties can't muster the resources needed to match the high price;
3. The costs of structuring the deal may increase significantly as the parties attempt side agreements and other work-around deal structures to achieve their desired results while obscuring their true goal from the courts;
4. With the knowledge that their assets can simply be taken away by such a powerful legal rule, potential sellers of those assets may invest much less in them; or
5. The potential seller may engage in protective mechanisms that are both privately and socially costly but are designed to avoid leaving the asset vulnerable to free transfer.

The Court may not have intended these negative consequences—or to influence contract or patent law altogether—but they are the likely results of the high risk that clever lawyers and shrewd business people will try to exploit such an expansive reading in particular cases.

II. Legal Background

In this case, LG Electronics, the patentee, entered into a written contract with Intel, a large, sophisticated party, to settle a set of disputes about patent infringement by giving to Intel a limited license to the patents. The contract expressly limited the settlement's effect on third parties and was reached at a price that reflected these modest ambitions. It made sense for

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Intel to seek such a blanket settlement of intellectual property cases to buy freedom from suit for itself—but only itself—because the company might otherwise have been found guilty of inducing third parties to infringe when it sold its products.

Quanta and the other alleged infringers in this case are also large sophisticated commercial entities. They bought products from Intel with notice of the limited terms of Intel's license and the opportunity to negotiate a price in their sales contracts that reflected this limited reach of Intel's license. They paid for products they knew were not licensed in their hands and ended up receiving, through the Court's decision, a full license for free.

The crux of the infringers' argument, and the Court's opinion, is the patent law doctrine that goes by two names: "patent exhaustion" and "first sale." The doctrine has the effect of recognizing certain terms—such as a license under a patent to use a purchased product— that may reasonably be implied into a contract for sale of a patented article from the patentee.

In the case of a patentee's unrestricted sale of a patented product, the buyer presumably has paid the patentee not only for title to the physical product (a sale of product), but also for permission to use the product for its intended purpose (a license under the patent). In transactions like this, the first sale doctrine operates as a default rule, to recognize certain terms (such as a license under a patent to use a purchased product) that may reasonably be implied into a contract for sale of the patented article from the patentee.

Under well-established principles of law and equity, there are several routes to arriving at a conclusion about implied terms of a contract. Implied-in-fact terms may be found as a matter of interpretation from evidence of the parties' intent. Implied-in-law terms are imposed in the interest of fairness to ensure that both parties receive the rights for which they bargained. But, as courts have long recognized, the implied-in-law doctrine only provides a default rule, and differing terms in a sale—such as a sale accompanied by a promise to make only a single use of the patented article—will be enforceable as long as they do not violate some other rule of positive law. The logic of this view is straightforward: absent a direct conflict with positive law, there is no room for the law to imply terms when the parties themselves have provided their own agreed-to terms as a matter of their express and properly formed contract.

The Court's decision in *Quanta* seems to apply the doctrine more expansively and rigidly than it has long been applied. This expansive approach converts a deal involving express contracting over a limited license to one party into a blanket license to a host of other commercial parties, regardless of the efforts by all parties to contract for a more modest result at a lower price.

The central criticism of this essay is in no way directed at all efforts to explore arguments that might achieve the basic business result of patent license that was reached in this case. The essay would embrace any such arguments that are supported by the facts when made in accordance with long-recognized categories of legal doctrines, such as express license, implied-in-fact license (including by first sale), or license implied by equitable or legal estoppel. The central criticism of the essay is with the Court's decision to essentially convert the long-standing first sale doctrine into an über-immutable rule that an expressly limited license to one party will be deemed by the courts to also be a license to all those who are downstream in the market.

III. Some Key Legal Errors

Applying a seemingly common sense approach, much of the Court's opinion pays close attention to the question of whether the products at issue are substantially covered by each of the relevant patents. The Court decides that there is a close enough tie between each product and each patent that the first sale doctrine is triggered. The Court concludes that because the doctrine is triggered when the product is infringing, it also is triggered when the product is likely to be used by the end customer in a way that will substantially infringe. Out of fear that patentees might otherwise engage in strategic claim-drafting to include both product and process claims in each patent, the Court also concludes that because the doctrine is triggered for product patents it is also triggered for process patents. This all sounds reasonable, at first blush.

By following this approach, the Court is essentially making a guess about how questions of patent infringement might have played out in a hypothetical case in the past, and which transactions the parties would have made with each other against the backdrop of a final and non-appealable judgment in such a case. The Court does so using post hoc factual knowledge and with the certainty that it is the court of last resort.

When real parties have that degree of confidence in specific facts and legal outcomes, they can—and sometimes do—strike sales and patent license agreements that expressly or implicitly speak in terms of specific patent numbers and product model numbers or product lines. But what is well-known by any attorney involved in patent licensing, settlement negotiations around ongoing or potential patent litigation, or mediation of a patent dispute, is that what the potential infringer often wants is mere peace from future litigation risk (often called "freedom to operate").

Sometimes the potential infringer has such sufficient ties to its customers or input-providers that it wants to buy freedom for them as well—and is willing to pay a sufficient price. But sometimes, as in *Quanta*, the patentee and the potential infringer elect to strike a contract that buys peace only for that potential infringer, at a much lower price, leaving others to fend for themselves when and how they see fit. And while it might well be the case that key supplier companies such as Intel could endeavor to act as de facto coordinators, by passing along license costs to customers, the goal of the first sale doctrine has never been—and should never be—to mandate particular business models. One size rarely fits all,

especially in rapidly changing markets like those involving innovation. While the law should allow parties the option to do such all-up-front deals if they so desire, it should also leave them the option to strike more dynamic deals, such as those that let each customer get exactly the terms it prefers at the time it develops that preference.

Not only does the Court's focus on issues relating to the substantiality of infringement miss the parties' key business interests, it also leads the Court to write broad pronouncements about patent law that are analytically problematic in several respects. In so doing, the Court overlooks the basics of the U.S. patent regime, historical experience with such subjective approaches, express congressional action to jettison the problems created by that historical case law, and a host of practical problems created by the Court's ex cathedra rulings.

By using the term "patent exhaustion" instead of "first sale," the Court overlooks the very basics of the patent right itself. As Judge Giles S. Rich pointed out:

> "Patent exhaustion" is a misnomer. To think clearly about this fact, one must consider two things: (1) the meaning of "exhaustion"; and (2) the nature of the patent right. "Exhaustion" means the state of having been drained or used up completely. It assumes there was something there to begin with that could be used up. The patent right, as recognized by the Supreme Court in *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539 (1852), and as more recently defined in 35 U.S.C. § 154, is the right to exclude others from making, using, offering for sale, or selling the patented invention. When a patentee of a patented article sells the article, how is he in any way exercising his patent right to exclude others from doing so? Clearly he is not. If he is, therefore, not using it at all—let alone using it up—how can he be exhausting it?[3]

The distinction between these two terms is not merely a matter of which label is more descriptive. The terms steer the analysis in different directions. By treating the patent right as having been used up, the term "exhaustion" suggests an immutable state of affairs, leaving no opt-out possible. In contrast, the contractual nature of the first sale doctrine focuses attention on the actual terms of the initial sale that is said to give rise to the license. This encourages observers to determine whether the parties to that sale opted out of the default terms otherwise implied into such deals.

By focusing on how near a product is to a patent claim, the Court overlooks the long and bad experience we had in the United States during the first half of the 20th century, and the express response Congress enacted to correct that mess. During the early 1900s, courts routinely focused on which element of a patent claim was "key" or at the "heart of the invention" to determine questions of contributory infringement, induced infringement, patent misuse, and antitrust. The inquiry was so subjective that it became the plaything of the judiciary, with most courts in the early part of that period routinely ruling in favor of patentees on each issue, while most courts in the later part of the period routinely ruling against patentees. One of the two central motivating factors behind the congressional decision to promulgate the 1952 Patent Act—essentially our present patent statute—was to statutorily jettison this entire line of cases and create an objective framework for determining patent infringement and valid patent licenses.[4]

By imposing a strong mandatory rule, the Quanta Court interferes with the freedom of large commercial parties to strike the deals that are essential to avoiding and resolving disputes and that help them to better invest in new products and services. Such deals now may not materialize because the high price can't be paid, or will have to be structured in costly, confusing, and convoluted ways to avoid the blunt impact of such an immutable legal rule. For example, parties interested in contracting for a limited patent license may have to first initiate litigation and then strike deals labeled as settlement agreements instead of patent licenses, in the hopes of having courts see their contracts more as matters of state contract law and general federal policy in favor of settling litigation rather than matters of federal patent policy potentially controlled by the Quanta dicta.

The Court also may be endeavoring to force free transfers of portions of overall intellectual property value from owners who would like to have been able to sell or even give more limited licenses. If this is the case, then these parties may now make too little investments in such assets that they now know can be taken away. In addition, they may now have to engage in protective mechanisms that are both privately and socially costly but are designed to avoid leaving the asset vulnerable to free transfer. The risk is not imaginary. Soon after *Quanta* came down, a district court in California held that sales on eBay were allowed for limited-distribution promotional CDs that were loaned, for free, to a small set of industry insiders for pre-release review and clearly marked with express restrictions against sale or further distribution.[5]

IV. Some Red Herrings

The recent fashion among commentators—which seems to be popular with the Court as well—is to see the Court of Appeals for the Federal Circuit as creating new law rather than following Supreme Court precedent. But at least for the first sale doctrine, the Federal Circuit case law is required by the Supreme Court's jurisprudence, in addition to statute.

The Federal Circuit's first sale doctrine closely follows the long-standing precedents of the Court stemming as far back as *Adams v. Burke*, which held that "when the patentee . . . sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use."[6] Even the early cases in the Court's first sale jurisprudence made clear that the doctrine arises from the interaction between patent and contract law. For example, the Court focused on determining that the particular restrictions at issue in the Adams case were "not contemplated by the statute nor within the reason of the contract."[7] Similarly, in *Mitchell v. Hawley* the Court acknowledged the importance of the freedom of contract, re-emphasizing the ability to restrict contractually the otherwise implied-in-fact patent license at issue in that case.[8] The Court stated, "Sales of the kind may be

made by the patentee with or without conditions, as in other cases."[9] In effect, the Court treated the first sale doctrine as a default rule that parties could opt out of contractually.

The power to contract around the default first sale rule was clearly demonstrated in numerous cases over the ensuing years.[10] The view was also reaffirmed after the 1952 Patent Act in cases like *Aro Mfg. Co. v. Convertible Top Replacement Co.*, which pointed out that "it is fundamental that sale of a patented article by the patentee or under his authority carries with it an 'implied license to use.'"[11] The Federal Circuit has closely followed these precedents of the Court. For example, in *Mallinckrodt v. Medipart*, the court upheld a single-use restriction in a label license as long as the terms were not objectionable on grounds applicable to contracts in general—for example, if they violate a rule of positive contract law such as by being adhesionary or unconscionable.[12] Explaining a bit further, the court in *B. Braun Med., Inc. v. Abbott Labs.*, stated that the first sale doctrine

> does not apply to an expressly conditional sale or license. In such a transaction, it is more reasonable to infer that the parties negotiated a price that reflects only the value of the "use" rights conferred by the patentee. As a result, express conditions accompanying the sale or license of a patented product are generally upheld.[13]

The *Quanta* Court focuses a great deal on the decision in *United States v. Univis Lens Co*.[14] But that case simply does not support the broad sweep the *Quanta* opinion gives it. To the contrary, the most that *Univis* can be fairly understood to have accomplished is a slight expansion of the first sale doctrine to apply regardless of whether "the patented article [is sold] in its completed form or . . . before completion for the purpose of enabling the buyer to finish and sell it."[15] In addition, *Univis* must be understood as what it expressly purports to be: a government enforcement case brought under the Sherman Act to enjoin the enforcement of contract requirements to maintain certain resale prices that were determined to be illegal under then-prevailing views of antitrust and the related doctrine of patent misuse. Unlike in *Univis*, the contract terms at issue in *Quanta* have not been held to be illegal, and would not be today because prevailing antitrust jurisprudence now treats such vertical pricing restraints under the more permissive rule of reason analysis, instead of under the old per se illegality analysis.[16]

Indeed, as mentioned previously, the contract-based view of doctrines like first sale was a central animating principle behind the 1952 Patent Act, which remains the applicable set of patent statutes. As the Court has itself carefully recounted in the lengthy 1980 *Dawson* opinion reviewing this history, the '52 Act expressly revived contributory infringement by substantially narrowing patent misuse and statutorily overruled cases doctrinally related to *Univis*.[17] For many years before the '52 Act, patentees were severely limited in the exercise of the rights to sue or license those who induced or contributed to infringement by the too-often-applied doctrine of patent misuse, which stemmed largely from then-existing antitrust principles. Section 271 set forth express provisions for direct, induced, and contributory infringement, as well as an express provision that effectively allowed a patentee to sue, license, or even restrictively license anyone otherwise guilty of direct or indirect infringement without committing patent misuse.[18]

Ironically, the *Quanta* opinion's broad anti-contract reading of *Univis* is in conflict with the principles embodied in the '52 Act, as reaffirmed and extensively reviewed by the Court in *Dawson*. As a result, this approach more closely resembles those of the Warren Court in decisions like *Brulotte v. Thys Co.*,[19] than it does the reasoning of the Burger Court in decisions like *Dawson* and *Aronson v. Quick Point Pencil Co*.[20]

It also is fashionable to see cases like *Quanta* as highlighting the tension between two somewhat conflicting legal principles: one generally in favor of freedom of contract, and one generally in favor of freedom from unknown servitudes running with chattels. While the law is rightly skeptical toward restrictive servitudes, especially those that might run with the sale of ordinary chattels,[21] this policy it not so strong and far-reaching as to prevent the commonplace contractual restrictions at issue in limited patent licenses, which, it should be noted, are not even sales of chattels.

There is no need to overturn as an undue imposition on the freedom from servitudes, the long-standing first sale doctrine—which recognizes the enforceability of limited licenses because a number of existing companion doctrines already exist to protect legitimate interests of innocent third parties. As a result, it is possible for all parties to potential transactions to identify sensible categories of cases to which established principles of law or equity apply without resorting to case-by-case judgments of the social desirability of patents where none of the traditional grounds for intervention are present. But of central importance is the ability of parties to determine, *ex ante*, whether their case meets or fails the requirements of the legal tests that trigger these other doctrines when applied on their own terms. Put differently, it would be unfair and inefficient to bestow the protections provided by such doctrines without requiring a showing that all elements of their legal tests have been met. A broad reading of the *Quanta* decision would obliterate the nuances of existing legal principles that already accommodate appropriate concerns.

The types of contractual restrictions that implement a limited patent license are not foreign to property or contract law generally, are commonly used throughout consumer society, and are even more common in transactions among large commercial parties. Consider, for example, a typical lease for the rental of real or personal property containing a restriction against subleasing: Even the general view favoring the ability to assign and delegate rights and obligations in intangible assets like contracts fully respects the power of restrictive terms in an underlying contract governing whether or how such third-party rights in it can be created.

At the same time, courts have long recognized a host of legal and equitable doctrines to protect purchasers of patented goods from unfair surprise and charges of infringement, when

patentees have led the purchasers reasonably to think that no patent infringement will lie. Examples of these doctrines include implied-in-fact and implied-in-law licenses, equitable and legal estoppel, and the first sale doctrine itself. Also relevant are contract law doctrines governing contract formation, such as mistake, fraud, misrepresentation, duress, and both procedural and substantive unconscionability, among others.

The law has long recognized that patent law does not include a good-faith purchaser rule. Even an innocent infringer, without knowledge of a patent, who makes something covered by a valid patent claim with her own hands from materials gathered from land she and her ancestors have owned free and clear since time immemorial, is nonetheless liable for patent infringement. The infringement can be of patents that were in existence at the time the product was made. Subsequent patents also may be infringed. Absent a fully paid judgment from a victorious infringement lawsuit against a competitor to convert infringing products into licensed products, even innocent buyers who buy from an infringer can be sued for patent infringement. The Court and Congress have both expressly recognized that patentees may therefore face the daunting task of having to sue for infringement all customers who bought from their competitor and stepped in to help patentees by making available causes of action for indirect infringement (like those that motivated the underlying license at issue in this case):

> The court permitted the patentee to enforce his rights against the competitor who brought about the infringement, rather than requiring the patentee to undertake the almost insuperable task of finding and suing all the innocent purchasers who technically were responsible for completing the infringement.[22]

Indeed, the risk of widespread infringement across commercial transactions is so well-known that it has been expressly allocated as a matter of most states' commercial law to merchants regularly dealing in goods of the kind (who are by default required to warranty their buyers against infringement) and to buyers (who are by default required to warranty their sellers) if they provide their sellers with specifications for the goods.[23]

But this does not leave third parties unduly exposed because the doctrines of implied license by equitable estoppel and legal estoppel appropriately step in to fill needed gaps. Although the clearest grant of permission to engage in activities otherwise constituting patent infringement generally is an express grant from the patentee in a contractual license,[24] or even a settlement agreement following a suit for patent infringement,[25] courts have long recognized that the grant need not be express. In addition to the doctrine of first sale as an implied-in-fact contract, at least two distinct additional legal grounds exist to create authority by less than express contractual grant: (1) the doctrine of implied license by legal estoppel triggered when a patentee has licensed or assigned a right, received consideration, and then sought to derogate from the right granted; and (2) the doctrine of implied license by equitable estoppel triggered by a patentee's conduct that reasonably leads another to act in reliance in such a way that it would be unjust to allow the patentee to exclude the actions taken in reliance.

The doctrine of implied license by equitable estoppel illustrates the broad reach of these existing doctrines. Equitable estoppel arises in those cases in which the active conduct of a patentee leads some other party to reasonably believe that it has a right to practice the patented invention. For example, as the Federal Circuit wrote in *Wang Labs., Inc. v. Mitsubishi Electronics of America, Inc.*:

> The record shows that Wang tried to coax Mitsubishi into the SIMM [short for "Single In-line Memory Module"] market, that Wang provided designs, suggestions, and samples to Mitsubishi, and that Wang eventually purchased SIMMs from Mitsubishi, before accusing Mitsubishi years later of infringement. We hold, as a matter of law, that Mitsubishi properly inferred consent to its use of the invention of Wang's patents.[26]

The court noted that "[a]lthough judicially implied licenses are rare under any doctrine, Mitsubishi proved that the 'entire course of conduct' between the parties over a six-year period led Mitsubishi to infer consent to manufacture and sell the patented products."[27]

Importantly, the Federal Circuit has also made clear that the inference of license can be eroded by several factors including: (1) whether the price paid for the relevant product is more closely linked to alternative non-infringing uses than infringing uses, and (2) whether the party asserting the reasonable belief about the license was ever actually in contact with the patentee in a way that would suggest communications about a license had occurred.[28] At the same time, the court has admonished that efforts by patentees to ward off any impression that the grant of a license should be implied will be ineffective if made after the purchase of the underlying products.[29] Thus, whereas evidence of actual reasonable reliance can be essential to a claim of license under this doctrine, evidence designed to defeat reliance must have arisen at the appropriate time to support a claim of no license.

At bottom, that implied license by estoppel situations may be rare is not a reason to doubt the sense of the legal rule from cases like *Wang Labs*. It is a reflection of the sensible fact that in most high-value deals, the parties will negotiate adequate legal agreements for the benefit of all. Yet *Wang Labs* shows that the principles of equity will work as an important barrier against sharp conduct.

As with cases of laches, the particular applications of these doctrines of equitable and legal estoppel are likely to be fact-intensive, and their proper resolution necessarily requires the use of judicial discretion of the sort that the Federal Circuit applied in *Wang Labs*. But three points are worthy of notice. First, the use of the principles of discretion does not necessarily require a full trial. Some cases are clear enough for judgments as a matter of law. Second, the application of estoppel principles in no way upsets the balance of strong property rights needed for commercialization, as the patentee has it always within its power to avoid the conduct that, depending on the scope of the estoppel, leads to the loss of past damages, injunctive

relief, or both. Third, in some cases, the extent of the reliance and the nature of the course of dealing could justify protection against injunctive relief—an issue not explicitly addressed in *Wang Labs*. Indeed, relief by estoppel may even be prospective, as in real estate cases like *Holbrook v. Taylor*.[30]

CONCLUSION

The long-standing first sale doctrine has been a gap-filling default rule. It merely implies into contracts for sale of patented products from the patentee that are otherwise silent as to license some terms that reflect the parties' actual intent giving the buyer license to use the purchased products. The *Quanta* decision appears to upset this efficient and long-established landscape by doing violence to the expressed intent of even commercially sophisticated contracting parties—as reflected in their actual contract terms that are designed to create only a limited patent license. Such license restrictions should be enforceable as long as they comply with contract law and other applicable areas of law. This would help parties resolve and avoid litigation, thereby helping them bring new products and services to market. For all these reasons, let's all hope that *Quanta* will be limited to its facts—including the particular contract terms at issue—which the Court hopefully saw as having merely failed as a matter of ordinary contract law to achieve on their own terms the limited license that would ordinarily be enforced under the long-established first sale doctrine.

Endnotes

1 Quanta Computer, Inc. v. LG Elec., Inc., 555 U.S. __ , 128 S. Ct. 2109 (2008).

2 *Id.*, 128 S. Ct. at 2118, 21–22.

3 Judge Giles S. Rich, Address at Sixth Annual Conference on International Intellectual Property Law & Policy, Fordham University (April 16, 1998) (as quoted in F. Scott Kieff et al., Principles of Patent Law 1144 (4th ed. 2008)).

4 For a more detailed discussion, see F. Scott Kieff & Troy A. Paredes, *The Basics Matter: At the Periphery of Intellectual Property,* 73 Geo. Wash. L. Rev. 174 (2004).

5 UMG Recordings, Inc. v. Augusto, No. CV 07-03106 (AJWx), 2008 U.S. Dist. LEXIS 48689 (C.D. Cal. June 10, 2008).

6 84 U.S. 453, 456 (1873).

7 *Id.*

8 83 U.S. 544 (1872).

9 *Id.* at 548.

10 *See, e.g.,* Waterman v. Mackenzie, 138 U.S. 252, 255 (1891); Keeler v. Standard Folding-Bed Co., 157 U.S. 659, 662–63 (1895); Gen. Talking Pictures Corp. v. W. Elec. Co., 304 U.S. 175 (1938).

11 377 U.S. 476, 484 (1964) (quoting Adams v. Burke, 84 U.S. 453, 456 (1873)).

12 976 F.2d 700 (Fed. Cir. 1992). The Federal Circuit's view is also shared by prominent decisions in sister circuits. *See, e.g.,* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir.1996) (Easterbrook, J.) (non-commercial use restriction in shrink-wrap copyright license for computer program held valid and enforceable as a contractual limit on use).

13 124 F.3d 1419, 1426 (Fed. Cir. 1997).

14 316 U.S. 241 (1942).

15 *Id.* at 252.

16 *See* State Oil v. Khan, 522 U.S. 3 (1997); Leegin Creative Leather Prods., Inc., v. PSKS, Inc., 555 U.S. , 127 S. Ct. 2705 (2007).

17 *See* Dawson Chem. v. Rohm & Haas, 448 U.S. 176 (1980).

18 *See* 35 U.S.C. § 271(d). *See also* Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28 (2006) (holding that a patent does not support a presumption of market power and abrogating Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488 (1942), Int'l Salt Co. v. United States, 332 U.S. 392 (1947), United States v. Loew's Inc., 371 U.S. 38 (1962), and Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)).

19 379 U.S. 29 (1964) (Douglass, J.)

20 440 U.S. 257 (1979).

21 *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 18 & n.68 (2000) (pointing out that "American precedent is largely, if not quite exclusively, in accord" with the view that "one cannot create servitudes in personal property").

22 *Dawson*, 448 U.S. at 188 (citing Wallace v. Holmes, 29 F. Cas. 74, 80 (C.C.D. Conn. 1871)).

23 *See* U.C.C. § 2-312(c).

24 *See* McCoy v. Mitsubishi Cutlery, Inc., 67 F.3d 917 (Fed. Cir. 1995) (license is a contract governed by ordinary principles of state contract law).

25 *See* Gjerlov v. Schuyler Laboratories, Inc., 131 F.3d 1016 (Fed. Cir. 1997) (suit for breach of settlement agreement is matter of state contract law and treble damages under patent law are unavailable).

26 103 F.3d 1571, 1582 (Fed. Cir. 1997) (relying on De Forest Radio Tel. Co. v. United States, 273 U.S. 236, 241 (1927)).

27 *Id.* at 1581–82.

28 *See* Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903 (Fed. Cir. 1984).

29 *See* Met-Coil Sys. Corp. v. Korners Unlimited, Inc., 803 F.2d 684 (Fed. Cir. 1986).

30 532 S.W.2d 763 (Ky. 1976).

International Law & National Security

International or Foreign Law as an Interpretive Aid in Supreme Court Jurisprudence

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The Supreme Court's use of international and foreign law has garnered substantial commentary in recent years, but almost all of that commentary has focused on two constitutional cases: *Lawrence v. Texas*[1] and *Roper v. Simmons*.[2] This article attempts to put the Court's reliance on international law in those cases within the broader context of the Court's use of such material in other cases. Since the twenty-first century the Court has occasionally looked abroad to interpret the Constitution, federal statutes, treaties, and federal common law. Such reliance is rare and typically uncontroversial. But in a few instances the Court's reliance on international law has been highly contentious, particularly when it appears that the Court is usurping or unduly limiting the authority of the executive branch or expanding the role of the judicial branch.

I. CONSTITUTIONAL INTERPRETATION

If there is one big story regarding the Supreme Court's reliance on international law, it is the Court's brief flirtation with constitutional comparativism from 2002 to 2005. I say brief flirtation deliberately, because since 2005 the Court has shown little to no interest in relying on international and comparative law to interpret constitutional guarantees.

The movement toward aligning constitutional law with international human rights was not on the Court's radar screen ten years ago. For example, since the 1950s the Supreme Court has adopted an evolving standard to interpret the Eighth Amendment, and on rare occasion has made passing references to international experiences in applying that standard.[3] But the dispositive question was always our own national sense of what constituted cruel and unusual punishment. Indeed, in 1989 the Supreme Court underscored that "[i]n determining what standards have 'evolved,'… we have looked not to our own conceptions of decency, but to those of modern American society as a whole."[4] The Court emphasized that "it is *American* conceptions of decency that are dispositive, rejecting the contention of petitioners and various amici… that the sentencing practices of other countries are relevant."[5] This approach remained the status quo for over a dozen years.[6]

The first sign of a departure from this status quo came in 1999. In *Knight v. Florida*, Justice Breyer took the unusual step of dissenting from a denial of certiorari to argue that the Court should resolve the question of whether the "death row phenomenon" violated the Eighth Amendment. The central message of the dissent from certiorari was to challenge the status quo that had been established since 1989.[7] It was an inauspicious occasion for Justice Breyer to embrace constitutional comparativism, for it had all the signs of weakness: the Court had declined certiorari and not a single American court had adopted Justice Breyer's suggestion that the death row phenomenon constituted cruel and unusual punishment.[8] As Justice Thomas put it, "were there any such support in our own jurisprudence, it would be unnecessary for proponents of the claim to rely on the European Court of Human Rights, the Supreme Court of Zimbabwe, the Supreme Court of India, or the Privy Council."[9] Justice Thomas had a point. In the absence of *any* domestic support, it appeared that Justice Breyer was looking abroad in a desperate attempt to grasp for anything that would support the claim that prolonged periods on death row was cruel and unusual punishment. It was, Justice Breyer later conceded, a "tactical error."[10]

Three years later the Court offered tepid support for constitutional comparativism in the case of *Atkins v. Virginia,* which dealt with the death penalty for the mentally retarded. In the decision, the Court dropped a footnote relying on opinions of the "world community," together with opinion polls, and the consensus from various religious groups and psychological organizations, as "additional evidence" of a "much broader social and professional consensus."[11] These opinions, the Court reasoned, are "by no means dispositive," but they offer "further support to our conclusion that there is a consensus among those who have addressed the issue."[12] With *Atkins* the opinions of the international community were given a status equal to the opinions of religious groups, psychological organizations, and public opinion polls. If international and comparative experiences had remained in this lowly position, the Court's reliance on them would not be the source of controversy that it is today. But in the two subsequent cases of *Lawrence v. Texas*[13] and *Roper v. Simmons*,[14] the Court went much further in its embrace of constitutional comparativism.

In *Lawrence* the Court relied on decisions of the European Court of Human Rights (ECHR) to suggest that the historical analysis in the homosexual sodomy case of *Bowers v. Hardwick* was incomplete.[15] The Court also referenced ECHR decisions as evidence that "[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere."[16] The Court further observed that "[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent."[17]

With *Lawrence* the Court appeared to be moving away from the status quo by warmly embracing a new approach of constitutional comparativism. These references to comparative experiences in *Lawrence* were an outgrowth of the Court's substantive due process jurisprudence, which looks both to whether the fundamental right in question is deeply rooted

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in our own history and tradition and is implicit in ordered liberty.[18] While the former focuses on domestic experiences, the latter opens the door to comparative reference, for to ask what ordered liberty requires is to invite the question of what other developed countries have required.[19] Of course, international law is replete with claims of universality, and ordered societies structure themselves consistent with general notions of fairness and justice. Thus, *Lawrence's* reliance on ECHR decisions was an attempt to embrace natural law notions of fairness and justice by discounting the importance of our history and tradition and elevating the importance of countervailing experiences in other parts of the world.

Roper went even further than *Lawrence*. It presented a broader theory for why this interpretive methodology was beneficial. In *Roper* the Court was not simply deciding a case; it was defining and defending a movement that had the potential to change the course of constitutional law. The Court in *Roper* argued that international and comparative law should serve a confirmatory role. As the Court put it, "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[20] But of course the Court was doing much more than confirming a national consensus. It was borrowing from abroad to bolster "fundamental rights" that were not central to our own heritage of freedom. The Court's discovery of a national consensus against the death penalty for juveniles was extraordinarily weak, while the international consensus was extraordinarily strong. "When the objective indicators of a national consensus are weak, the strong global consensus fortifies the Court's independent judgment."[21]

These two decisions had the potential to revolutionize Supreme Court interpretation of constitutional guarantees. They suggested that international and comparative law should be added to the existing sources of text, structure, history, and national experience as part of the canon of constitutional interpretation. Not surprisingly, these cases created a groundswell of opposition. Academics repeatedly and loudly admonished the justices for being sloppy, selective, disingenuous, and anti-democratic.[22] Leaders from the judicial, executive, and political branches joined in the chorus of condemnation.[23] In confirmation hearings, Supreme Court nominees John Roberts and Samuel Alito both expressed their firm opposition to the interpretive approach.[24]

As a result of this backlash, the internationalists on the Court quietly retreated. Since *Roper* the Supreme Court has been conspicuously silent on the subject and has repeatedly rejected opportunities to rely on international and comparative material in constitutional cases. Despite deciding over fifty constitutional cases since *Roper,* the Supreme Court has not once relied on contemporary foreign or international law and practice to interpret constitutional provisions. This is notwithstanding the obvious opportunities to do so in contexts such as abortion,[25] free speech,[26] free exercise of religion,[27] due process,[28] equal protection,[29] and the death penalty.[30] The Supreme Court's silence on this issue has been deafening. The only notable examples of constitutional comparativism since *Roper* have been in the Second Amendment case of *District of Columbia v. Heller*[31] and the Guantanamo habeas corpus case of *Boumediene v. Bush*.[32] But in both of those cases the comparative approach that was adopted was of the variety Justice Scalia has advocated: historical comparisons used to understand the original meaning of constitutional text.[33]

One cannot underestimate the potential ramifications of the rise and fall of constitutional comparativism. If it had garnered sufficient support, it had the potential to dramatically reshape the content of constitutional guarantees. The movement could have reshaped our jurisprudence to align constitutional law with international law. That could mean moving in the direction of generic constitutionalism, in which any aberrant amount of protection, whether it be too much or too little, would be subject to correction. Where we were "lagging behind" the prevailing international consensus, as with the death penalty, the Court could have forced us to join the international mainstream. Where we afforded too much protection—as with free speech or the exclusionary rule—the Court could have forced us to scale back our guarantees. But with the Court's brief flirtation with constitutional comparativism and the strong backlash that it created, we can be almost certain that international and comparative law will not be included in the canon of sources the Court uses to interpret the Constitution. In the future the Court may politely nod in the direction of international law, but it is very unlikely to have any significant impact on constitutional jurisprudence.

II. STATUTORY INTERPRETATION

International law does not feature prominently in statutory interpretation. The vast majority of cases involving statutory interpretation do not advert to international or comparative experiences. Occasionally, however, the statute will have some foreign nexus, typically because it either purports to regulate conduct abroad or overlaps with international obligations. In those situations, the role of international law becomes relevant to the interpretation of federal statutes. Two rules of statutory construction, the *Charming Betsy* doctrine and the presumption against extraterritoriality, are particularly relevant in this regard.

Under the *Charming Betsy* doctrine, international law has been used as a tool to interpret federal statutes. It is a rule of statutory construction that occasionally has been used by the Court in construing the meaning of ambiguous statutory provisions. The doctrine, in its simplest formulation, provides that "an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains."[34] Although there is some debate as to the constitutional underpinnings of this doctrine, the strongest argument for the doctrine is premised on separation of powers. Whenever possible, courts will construe an ambiguous statute in light of the implications that an international law violation would have for the executive branch. Consistent with separation of powers concerns, the *Charming Betsy* doctrine reflects a "desire to interpret statutes to avoid inter-branch usurpations of power and carefully husbands the complex relationship of the federal branches in the international context."[35]

This doctrine has been applied in numerous cases.[36]

Perhaps the most significant examples in recent years have been in *Hamdi v. Rumsfeld*[37] and *Hamdan v. Rumsfeld*.[38] Both cases involved the limitation of executing authority based on the understanding that the statute in question incorporated the laws of war. The question in *Hamdi* was whether the executive had authority to detain American citizens who qualified as "enemy combatants" pursuant to congressional authorization to "use all necessary and appropriate force against those nations, organizations, or persons the Executive determines planned, authorized, committed, or aided the terrorist attacks."[39] Hamdi, an American citizen, objected to the indefinite detention, but the Court sub silentio applied *Charming Betsy* to conclude that the detention was authorized by Congress. A plurality of the Court found that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities" and "we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."[40] Two years later in *Hamdan* the Court again interpreted a federal statute as incorporating the laws of war. The Court reasoned that "[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."[41] Thus, both *Hamdi* and *Hamdan* represent important examples of statutory authority granted to the executive branch subject to implicit limitations imposed by international law.[42] This limitation is unusual if one presumes that the *Charming Betsy* doctrine has its foundation in concerns about separation of powers. But it is based on a congressional presumption that the executive branch would not wish to have implied authorization to violate international law and thereby foment international discord. Therefore, when a particular Administration does purport to exercise delegated authority inconsistent with international law, it does so without congressional authorization. Of course, Congress may wish to pass legislation that does violate international law, but any such statute that does so should be clear and explicit.

The executive branch, of course, frequently wishes to comply with international law, and the *Charming Betsy* doctrine promotes that desire by not imposing statutory obligations on the executive branch that violate international law unless the statute does so explicitly. One of the best recent examples of this was in the recent case of *Spector v. Norwegian Cruise Lines Ltd.* In *Spector* the question presented was whether foreign owned cruise ships operating in U.S. waters were required to comply with provisions of the Americans with Disabilities Act that arguably conflicted with international treaty obligations.[43] *Spector* involved a claim that barriers on foreign cruise ships should be removed to accommodate disabled passengers. Under the statute, remedial action was required only if it was "readily achievable," that is, if it could be accomplished without "much difficulty or expense."[44] Significantly, the Court adopted the position of the United States and interpreted "difficulty" to include considerations other than cost, finding that "a barrier removal requirement… that would bring a vessel into noncompliance with… any… international legal obligation would create serious difficulties for the vessel and would have a substantial impact on its operations."[45] Conflict with international law was thus imported into a statutory exception to eliminate its application to foreign vessels and thereby avoid the potential for international discord.[46]

International law has also been influential as a tool of statutory interpretation where the Court has concluded that the statute in question attempted to codify international law. This is the case with respect to the Foreign Sovereign Immunities Act (FSIA).[47] In the recent case of *Permanent Mission of India v. New York,* the Court recognized that one of the key purposes of the FSIA was to codify international law. Consequently, the Court looked to the Vienna Convention on Diplomatic Relations and case law from the Netherlands and the United Kingdom to interpret the FSIA.[48] Thus, in the easy case where the purpose of statute is to codify international law, it is hardly surprising that the Court would interpret the statute in reliance on that law.

The common thread that runs through all of these decisions is that statutes are interpreted consistent with international law not because of an explicit commitment to international law, but to avoid international discord out of deference to the political branches. But as *Hamdi and Hamdan* suggest, that does not always mean greater executive freedom. In one sense, *Charming Betsy* enhances executive freedom in the foreign affairs arena, presuming that Congress has not inadvertently required the executive to perform functions that would repudiate international obligations and generate international discord. However, the doctrine also curtails executive freedom by presuming that Congress has not inadvertently authorized the executive to perform functions that would violate international law and thereby undermine foreign relations. In both cases, the purpose of *Charming Betsy* is to interpret ambiguous statutes in a manner that avoids foreign relations difficulties for the United States.[49]

Closely related to the *Charming Betsy* doctrine is the rule of statutory construction that presumes statutes do not have extraterritorial effect. One of the most common applications of this rule applies in the antitrust context, in which our antitrust laws are enforced against foreign nationals whose conduct has a substantially negative effect on the United States. Such a scenario subjects congressional regulation to an international rule of reason, which incorporates concerns for international conflict.[50] As the Court in *F. Hoffman-La Roche Ltd. v. Empagran S.A* recently noted, "our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is… reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused."[51] *Charming Betsy* counsels that Congress intended to regulate foreign acts of foreign actors because such conduct imposes substantial harms on the domestic market. Doing so is a reasonable exercise of prescriptive jurisdiction,[52] but for structural reasons we impute no congressional intent to regulate foreign conduct that causes only foreign harm. That is unless the executive branch has reasoned that the public interest in enforcement overcomes considerations of foreign governmental sensibilities.[53] Foreign relations concerns help explain why the presumption against extraterritoriality protects

against exorbitant enforcement of our laws to police foreign harms. As the Court put it in *Hoffman-La Roche*, "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony."[54]

Of course, the presumption against extraterritoriality requires the Court to distinguish between "territory" and "extra-territory." In some cases it will be far from clear whether the conduct subject to regulation falls within one category or the other. That, in essence, was one of the central issues in the Court's recent decision in *Boumediene v. Bush.*[55] In determining the territorial reach of federal law, the Court adopted a new test of "de facto sovereignty."[56] In addressing whether detainees in Guantanamo Bay enjoyed the writ of habeas corpus, the Court concluded that although Cuba retained de jure sovereignty, "the United States, by virtue of its complete jurisdiction and control over the base, maintains de facto sovereignty over this territory."[57] *Boumediene* raises difficult questions of what constitutes "de facto" sovereignty. At one extreme it may mean all areas the United States physically occupies and controls. At the other extreme it may be something akin to Justice Brennan's notion of the "exercise of power" model in *Verdugo-Urquidez:* if the Constitution authorizes our Government to enforce our laws abroad, then when Government agents exercise this authority, the Constitution travels with them as an unavoidable correlative of the Government's power to enforce the law. De facto sovereignty may also mean something in between. An effective control model would posit that if the United States exercised effective control over a detention facility, such a facility would be within the United States's sovereignty authority.[58]

Reading statutes consistent with international law is both controversial and uncontroversial. It appears to garner little controversy when it authorizes the executive branch to move in a manner consistent with international law without implied congressional limitations. Nor is it controversial when the limitation on the executive branch is with respect to issues that are of insignificant national interest, such as antitrust regulation of foreign markets. But the interpretation of federal statutes consistent with international law in the realm of national security has been especially controversial. Indeed, *Hamdan* and *Boumediene* are among the most controversial decisions of the Court in recent years. Perhaps this is a reflection not so much on controversy about the presumption itself but on the state of international law. It is not surprising that the Court would presume to grant the executive branch authorization to use military force consistent with the laws of war. But when the content of the laws of war do not fit squarely with the current war on terror, the Court has rendered judgments that limit executive authority in ways that are at odds with its historic deference in the realm of national security.

III. TREATY INTERPRETATION

The Supreme Court has rarely addressed treaty interpretation in a systematic way. International law has well-established principles for the interpretation of treaties, as set forth in the Vienna Convention on the Law of Treaties.[59] The Court has never embraced this approach expressly, although it occasionally has interpreted treaties in a manner consistent with this approach. The Court interprets treaties with far less frequency than it does the Constitution or federal statutes, but in recent years it has rendered several important decisions that offer guidance on its approach to the interpretation of treaties.

Two of the most significant recent decisions by the Court in the realm of treaty interpretation are *Sanchez-Llamas v. Oregon*[60] and *Medellin v. Texas.*[61] Both cases address the interface between international tribunals and federal courts in interpreting binding federal laws. The Court's decision in *Sanchez-Llamas* is noteworthy, particularly in discussing the role of the Supreme Court in interpreting treaty obligations. The treaty at issue, the Vienna Convention on Consular Relations, had been interpreted by the International Court of Justice (ICJ) prior to the Supreme Court's decision in *Sanchez-Llamas.* The Court was thus required to analyze how much deference, if any, it should give to the ICJ's prior interpretation of the treaty. The Court ruled that the self-executing treaty was federal law and therefore the ICJ's prior interpretation was "entitled only to the 'respectful consideration' due an interpretation of an international agreement by an international court."[62] The Supreme Court's interpretation, however, must be dispositive. "If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law 'is emphatically the province and duty of the judicial department' headed by the 'one supreme Court' established by the Constitution."[63]

Medellin went further and reinforced *Sanchez-Llamas* conclusion, but did so in the context of a claim that, because Medellin's pending execution was at issue in the ICJ's *Avena* judgment, the ICJ's decision was binding on domestic courts. The Supreme Court concluded that this could be the case, provided federal law intended to give these decisions such effect.[64] But in the absence of implementing legislation or a self-executing treaty, the Court refused to accord decisions of international tribunals binding effect in domestic courts. As for whether the treaty in question was self-executing, the Court concluded that this determination must begin with the text and also examine the negotiation history and the post-ratification understanding of the signatory nations.[65] The Court also emphasized that the purpose of the treaty in establishing the International Court of Justice was also relevant.[66] Thus, without expressly relying on it, the Court adopted an approach that is quite similar to the Vienna Convention on the Law of Treaties. The Court's approach conflates Articles 31 and 32 of the Vienna Convention, and concludes that text, context, purpose, and drafting history are all essential ingredients in the interpretation of a treaty. The clear import of *Medellin* is that treaties are not binding on domestic courts unless there is a clear expressed intent that they have such effect. That intent must be discerned from the typical sources one applies in interpreting treaties.

Equally significant in *Medellin* was the Court's pronouncement regarding the domestic effect of non-self-executing treaties. The Court noted that a treaty is "self-executing" if it has automatic domestic effect as federal law

upon ratification. "Conversely, a 'non-self-executing' treaty does not by itself give rise to domestically enforceable federal law. Whether such a treaty has domestic effect depends upon implementing legislation passed by Congress."[67] This conclusion either means that non-self-executing treaties do not have any domestic effect as federal law, or that they do not have domestic effect as federal law enforceable in court. There is language in the opinion that supports both interpretations.[68] If it is the former, it would be difficult to square with the Supremacy Clause and would potentially raise questions as to whether non-self-executing treaties preempt contrary state law. If it is the latter, then it would impose obligations on the executive branch to ensure that the law is faithfully executed, but it would not incorporate any role for the judicial branch in the enforcement of that law.

IV. FEDERAL COMMON LAW INTERPRETATION

Although rarely the subject of Supreme Court consideration, the Court has occasionally relied on international and comparative law in the course of interpreting federal common law. The most important recent example of such reliance came in the maritime case of *Exxon Shipping Co. v. Baker*,[69] which involved a challenge to a 2.5 billion dollar punitive damage award arising from the Exxon Valdez oil spill. In determining the appropriateness of punitive damages in maritime law, the Court was not considering the constitutional limitations of any such award, but rather the "desirability of regulating them as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute."[70] In its role of creating federal common law, the Court concluded that "the common sense of justice would surely bar penalties that reasonable people would think excessive for the harm caused in the circumstances."[71] In fashioning maritime common law, the Court examined the history of punitive damages and the current application of punitive damages at home and abroad. In undertaking the comparative analysis, the Court analyzed the practices of other developed common law and civil law countries to support its finding that "punitive damages overall are higher and more frequent in the United States than they are anywhere else."[72]

The approach of interpreting federal maritime law in light of foreign and international experiences is uncontroversial. Federal courts, including the Supreme Court, have routinely relied on such experiences in creating maritime common law.[73] This stems in part from the nature of maritime law, which transcends national boundaries and cannot be dependent merely upon the practices or policies of one particular state. Moreover, to the extent Congress wishes to do so, it can modify maritime common law jurisprudence by statute.

If reliance on international and comparative experiences to interpret maritime law has been uncontroversial, the Court's landmark decision in *Sosa v. Alvarez-Machain*[74] has been anything but. At issue in *Sosa* was the application of the 1789 Alien Tort Statute, which had been interpreted by numerous lower federal courts to provide a cause of action for any violation of international law.[75] The statute had become the vehicle for a cottage industry of federal court litigation alleging violations of international human rights. Despite the fact that human rights litigation had been a major source of controversy (and academic commentary) since it exploded on the scene in 1980,[76] the Supreme Court had never interpreted the Alien Tort Statute.

If, as many expected, the Court held that the statute was only jurisdictional, then in a post-*Erie* world human rights victims would lack a statutory basis for a cause of action. If, on the other hand, the Court interpreted the ATS to include a statutory cause of action, then the Supreme Court would ratify almost twenty-five years of lower court human rights jurisprudence. But the Court did neither--or, rather, both. The Court held that the statute was only jurisdictional, but given the timing of the ATS's enactment, federal common law could provide the requisite cause of action. "Although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for… international law violations with a potential for personal liability at the time."[77] As such, federal courts now rely on international law as a common law source for a federal cause of action.

Whereas prior to *Sosa* one could argue that international law was used to interpret the content of a federal statute, since 2004 we find courts using international law to interpret the content of federal common law. Whatever doubts one might have had about the extent to which customary international law is part of our law, those doubts should be resolved after *Sosa*.[78] As a result, federal court interpretation of the content of customary international law will play a fundamental role in future understandings of the content of federal common law.

At one level *Sosa* is highly controversial, as it empowers federal courts to create federal common law causes of action based on ill-defined understandings of modern customary international law. As Justice Scalia put it, "American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private right of action for money damages in federal court."[79] Perhaps so, but it is also true that the Court explicitly invited Congress to provide statutory guidance and, if it so desired, "shut the door to the law of nations entirely."[80] Congress has not done so. Years have passed and neither the White House nor Congress has taken the Court up on this invitation, despite the fact that both Republicans and Democrats have controlled Congress since 2004.

CONCLUSION

International law rarely plays an important role as an interpretive aid in Supreme Court jurisprudence. It is most frequently used in the context of federal common law and treaty interpretation, but those areas of federal law are only occasionally the subject of Supreme Court review. Typically there are rules of statutory construction that reference international law, but they are applied only when there already is some international or foreign nexus to the case. And interpreting the Constitution in light of foreign or international law is the

subject of tremendous academic interest. But since 2005 the Court has stepped back from its brief foray into constitutional comparativism, and it does not appear to display any interest in reviving that approach.

Looking forward, the role of international law as an interpretive aid depends on the future composition of the Court. But it would be simplistic to conclude that reliance on international law is a left/right issue. It largely depends on the circumstances. For example, in *Baker* all four conservative justices joined a majority opinion that relied on international and comparative experiences. By contrast, in the constitutional cases of *Roper* and *Lawrence,* the statutory cases of *Spector, Hamdan,* and *Boumediene,* and the federal common law case of *Sosa,* all four liberals joined a majority opinion that relied on international and comparative experiences. In some cases, as with *Permanent Mission of India, Hoffmann-LaRoche* and *Hamdi*, both liberals and conservatives relied on international or foreign law. And in some cases, as with *Medellin* and *Sanchez,* both liberals and conservatives refused to give domestic effect to decisions of international tribunals. Thus, one cannot draw simple conclusions from complex cases to explain the past or anticipate the Court's future direction with respect to reliance on international law as an interpretive aid in Supreme Court jurisprudence.

Endnotes

1 Lawrence v. Texas, 539 U.S. 558 (2003).

2 Roper v. Simmons, 543 U.S. 551 (2005).

3 Thompson v. Knight, 487 U.S. 815, 830 n.10 (1988); Enmund v. Florida,, 458 U.S. 782, 796 n.22 (1982); Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977); Trop v. Dulles, 356 U.S. 86, 101-03 (1958).

4 Stanford v. Kentucky, 492 U.S. 361, 369 (1989).

5 *Id*. at 369 n.1.

6 Harold Hongju Koh, *Paying "Decent Respect" to World Opinion on the Death Penalty*, 35 U.C. Davis L. Rev. 1085, 1101-02 (2002) ("[a]fter *Stanford*, U.S death penalty jurisprudence has proceeded largely without reference to the opinions of mankind.").

7 Justice Breyer argued that a growing number of courts outside the United States have held that lengthy delay in administering a lawful death penalty renders the execution cruel and unusual. He argued that these courts "have considered roughly comparable questions under roughly comparable legal standards" and thus their views "are useful even though not binding." Knight v. Florida, 528 U.S. 990, 992 (Breyer, J., dissenting from denial of certiorari).

8 *Id*. at 990 (Thomas, J. concurring in the denial of certiorari).

9 *Id*.

10 *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 Int'l J. Const. L. 519, 528 (2005) ("I may have made what one might call a tactical error in referring to a case from Zimbabwe—not the human rights capital of the world. But that case, written by a good judge, Judge Gubbay, was interesting and from an earlier time.").

11 Atkins v. Virginia, 536 U.S. 304, 316 n. 21 (2002).

12 *Id*.

13 Lawrence v. Texas, 539 U.S. 558 (2003).

14 Roper v. Simmons, 543 U.S. 551 (2005).

15 *Lawrence*, 539 U.S. at 560.

16 *Id*.

17 *Id*. at 577.

18 Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

19 For a detailed discussion of "implicit ordered liberty", *see* Roger P. Alford, *In Search of a Theory for Constitutional Comparativism,* 52 UCLA L. Rev. 639, 659-73 (2005).

20 *Roper*, 543 U.S. at 554.

21 Roger P. Alford, *Roper v. Simmons and our Constitution in International Equipoise,* 53 UCLA L. Rev. 1, 16 (2005).

22 For a summary of these different concerns, *see* Roger Alford, *Four Mistakes in the Debate on "Outsourcing Authority,"* 69 Alb. L. rev. 653, 659-61 (2006).

23 *See e.g.,* Alberto R. Gonzalez, U.S. Attorney Gen., Prepared Remarks of Attorney General Alberto R. Gonzales at the University of Chicago Law School (Nov. 9, 2005), *available at* http://www.usdoj.gov/ag/speeches/2005/ag_speech_ 0511091.html; Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 Notre Dame L. Rev. 1893 (2005); *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer,* 3 Int'l J. Const. L. 519 (2005); S. Res. 92, 109th Cong. (2005) (proposed congressional resolution condemning the use of foreign precedents by the courts).

24 *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (arguing that if you use foreign law you can find anything you want); *see also Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (arguing that because the United States was one of the first and foremost to develop individuals rights, judges should only look to United States precedent in interpreting the Bill of Rights).

25 Gonzalez v. Carhart, 127 S. Ct. 1610 (2007).

26 Morse v. Fredrick, 127 S. Ct. 2618 (2007).

27 McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005).

28 Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007).

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

30 Kennedy v. Louisiana, 128 S.Ct. 2641 (2008); Baze v. Rees, 128 S.Ct. 1520 (2008).

31 District of Columbia v. Heller, 128 S.Ct. 2783 (2008).

32 Boumediene v. Bush, 128 S.Ct. 2229 (2008).

33 Alford, *supra* note 19, at 655 ("Whether interpreting a constitution, treaty or statute, Justice Scalia seeks to understand original meaning. Accordingly, in interpreting a modem treaty, Justice Scalia will not hesitate to examine contemporary judicial decisions in Britain and Australia because, in his view, "[f]oreign constructions are evidence of the original shared understanding of the contracting parties…'").

34 Murray v. Charming Betsy, 6 U.S. 64, 118 (1804).

35 Roger P. Alford, *Foreign Relations as a Matter of Interpretation: The Use and Abuse of Charming Betsy,* 67 Ohio St. L.J. 1339, 1352 (2006).

36 *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); F. Hoffman–La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004); McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003); INS v. St. Cyr, 533 U.S. 289 (2001).

37 Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality opinion).

38 548 U.S. 557 (2006).

39 *Hamdi*, 542 U.S. at 510.

40 *Id*. at 520-21.

41 548 U.S. at 603; *see also id*. at 599, n. 31 ("If nothing else, Article 21 of the UCMJ requires that the President comply with the law of war in his use of military commissions…. [T]he law of war permits trial only of offenses 'committed within the period of the war.'").

42 David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding,* 121 Harv. L. Rev. 689, 719, n. 85 (2008); *but see* Curtis A. Bradley, *The Federal Judicial Power and the International Legal Order,* 2006 Sup. Ct. Rev. 59, 84-85 (2006).

43 Spector v. Norwegian Cruise Line, Ltd., 545 U.S. 119 (2005).

44 *Id*. at 135-36.

45 *Id*.

46 *See id*. at 143-44 (Ginsburg, J., concurring in part and concurring in judgment) (describing the Court's interpretation as ensuring that the statute "will not provoke 'international discord' of the kind *Benz* and *McCulloch* sought to avoid."). The dissent did not disagree with the importance of avoiding international discord, simply finding that in the absence of a clear statement, the statute did not apply to foreign-flag vessels. "Even if the Court could, by an imaginative interpretation of Title III, demonstrate that in this particular instance there would be no conflict with the laws of other nations or with international treaties, it would remain true that a ship's structure is preeminently part of its internal order; and it would remain true that subjecting ship structure to multiple national requirements invites conflict." *Id*. at 149-50, 154 (Scalia, J., dissenting).

47 Permanent Mission of India to the United Nations v. City of New York, 127 S. Ct. 2352 (2007).

48 *Id*. at 2356-58.

49 Alford, *supra* note 35, at 1356-57.

50 Restatement (Third) of Foreign Relations, § 403(2).

51 F. Hoffman-La Roche Ltd. v. Empagran S.A., 124 S.Ct. 2359, 2366 (2004).

52 *Id*.

53 *Id*. at 2370 (distinguishing between private party and government enforcement of the Sherman Act based on the government's increased self-restraint and consideration of foreign governmental sensibilities).

54 *Id*. at 2366.

55 128 S. Ct. 2229 (2008).

56 *Id*. at 2252-53.

57 *Id*. at 2253.

58 Roger P. Alford, *What is De Facto Sovereignty?* Opinio Juris (June 15, 2008) *available at* http://opiniojuris.org/2008/06/15/what-is-de-facto-sovereignty/.

59 Article 31(1) of the Vienna Convention on the Law of Treaties provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 32 provides that "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties, art. 31, 32 (1969), 1155 UN Treaty Ser 331 (1980).

60 548 U.S. 331 (2008).

61 128 S. Ct. 1346 (2008).

62 *Sanchez-Llamas*, 548 U.S. at 355.

63 *Id*.

64 *Medellin*, 128 S. Ct. at 1366 (Congress knows how to accord domestic effect to international obligations when it desires such a result.).

65 *Id*. at 1357.

66 *Id*. at 1360 (the ICJ's "principal purpose" is said to be to "arbitrate particular disputes between national governments").

67 *Id*. at 1356 n.2.

68 *See, e.g., id.* at 1357 ("Because none of these treaty sources creates binding federal law in the absence of implementing legislation, and because it is uncontested that no such legislation exists, we conclude that the *Avena* judgment is not automatically binding domestic law."); *id*. at 1360 ("If ICJ judgments were instead regarded as automatically enforceable domestic law, they would be immediately and directly binding on state and federal courts pursuant to the Supremacy Clause."); *id*. at 1363 ("The point of a non-self-executing treaty is that it 'addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule of the Court.'"); *id*. at 1369 ("A non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force. That understanding precludes the assertion that Congress has implicitly authorized the President—acting on his own—to achieve precisely the same result.").

69 128 S. Ct. 2605 (2008).

70 *Id*. at 2626-27.

71 *Id*. at 2627.

72 *Id*. at 2623.

73 Brief of Professors David J. Bederman, Martin Davies, Jonathan Gutoff, Steven F. Friedell, John Paul Jones, David J. Sharpe and Steven Richard Swanson as Amici Curiae in Support of Petitioner, Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008), 2007 WL 2781072 ("More recently, this Court has derived one rule of general maritime law with reference to a consensus among the world's maritime nations….").

74 542 U.S. 692 (2004).

75 *Id*. at 694.

76 *See* Filártiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) (Determined that U.S. courts may punish non-U.S. citizens for acts committed outside the U.S. that violate any treaty to which the United States is a party.)

77 *Sosa*, 542 U.S. at 724 ("although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.").

78 For useful commentary on this issue, *compare* Curtis A. Bradley, Jack L. Goldsmith & David S. Moore, *Sosa, Customary International Law, and the Continuing Relevance of Erie,* 120 Harv. L. Rev. 869 (2007) *with* William S. Dodge, *Customary International and the Question of Legitimacy*, 120 Harv. L. Rev. 19 (2007).

79 *Sosa*, 542 U.S. at 751 (Scalia, J., concurring in part and dissenting in part).

80 *Id*. at 731.

Labor and Employment Law

Debunking the Myth of a Pro-Employer Supreme Court

By Daniel J. Davis

By any measure, the Court's recently completed term included a number of victories for employees. Among other decisions, the Court adopted a broad view of a discrimination charge and reduced procedural hurdles employees may face in seeking assistance from the EEOC (*Federal Express v. Holowecki*); determined that trial courts have discretion to admit "me, too" evidence of non-parties alleging discrimination by persons who played no role in the challenged adverse employment action (*Sprint v. Mendelsohn*); allowed a participant in an ERISA plan to bring an action to recover losses attributable to an individual account in a defined contribution plan (*LaRue v. DeWolff*); and recognized a retaliation claim both for Section 1981 actions and under the ADEA's provision regarding federal employees (*CBOCS v. Humphries* and *Gomez-Perez v. Potter*, respectively). The Court heard more employment cases than usual and many of those decisions were favorable to the employee.

A number of news sources, however, indicated that these victories for employees should be considered a surprise. "The term... included some *unanticipated* developments, like a string of victories for employees in workplace discrimination cases."[1] "The U.S. Supreme Court this year made a number of key rulings on workplace discrimination which, *unusually for the conservative court*, mostly favored workers over their bosses."[2]

These articles suggest that the current composition of the Supreme Court would automatically lead to a strong bias in favor of employers, resulting in a lopsided number of pro-employer rulings. Indeed, as victories in favor of the employee occurred during the course of the term, they were depicted as an aberration. "The Supreme Court during recent terms has relied on cramped legal analysis to deny fairness to workers and criminal defendants in several notable cases. Yesterday, the justices issued a decision remarkable for the fact that it was unanimous in handing victory to the proverbial 'little guy.'"[3] "The Supreme Court ruled last week that a group of employees suing for age discrimination should get their day in court even though they filed their complaint on the wrong form. The decision is noteworthy because it suggests that this court could be pulling back from what has often seemed like a knee-jerk inclination to rule for corporations over workers and consumers."[4] "Voters in this election year do not appear to favor the blind deference to corporate power that has been a theme of the last seven years."[5]

These sources present an entirely cramped and, as this article will seek to demonstrate, inaccurate view of the Court, especially in the area of employment law. This article will suggest that the notion that the current Court is pro-employer in employment cases does not withstand scrutiny. To do so, this article reviews a number of cases from the Court's employment discrimination jurisprudence over the past ten years, primarily cases under Title VII of the Civil Rights Act of 1964.

A review of those cases shows several trends. First, a significant number of cases reach a result that should be considered favorable to the employee. Second, a number of times the Court reversed a circuit court's pro-employer position or decided a case in favor of an employee against the majority view of the circuit courts that have ruled on the issue. These cases strongly refute the implication that the Court is generally pro-employer.

These cases instead demonstrate that an approach focused upon the text of the statute and, in some cases, stare decisis does not necessarily lead to results that generally favor the employer. The Court has indeed used these traditional jurisprudential tools on several occasions to overrule the courts of appeals and make significant rulings that favor the employee. A review of these cases does not necessarily mean, however, that the Court should be considered pro-employee. Instead, these cases demonstrate that, at least in employment cases involving statutory interpretation, the Court tends to focus on traditional legal tools instead of policy arguments regarding a particular outcome. Such a focus improves the Court's credibility and the legal grounding of its employment decisions. In some circumstances, that focus has led the Court to make rulings that provide significant certainty to both employer and employee regarding the meaning of a particular provision.

This article will describe particular cases in the Court's employment jurisprudence over the past ten years and in the process elaborate on the ways these cases refute the characterization of the Court as pro-employer.

I. Title VII Cases

Title VII of the Civil Rights Act of 1964 generally prohibits an employer from "discriminat[ing] 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."[6] Several Supreme Court cases over the past decade have given an expansive view of Title VII's provisions in favor of the employee bringing the suit.

Burlington Northern v. White. In June 2006, the Supreme Court rendered a significant decision regarding the scope of Title VII's anti-retaliation provision in *Burlington Northern and Santa Fe Railway Co. v. White*.[7] The anti-retaliation provision makes it "an unlawful employment practice" for an employer "to discriminate against any individual... because he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[8]

The relevant facts of *Burlington Northern* are straightforward. The plaintiff, Sheila White, alleged that her employer violated the anti-retaliation provision after she had brought a complaint against her supervisor by (1) changing her job responsibilities from forklift duty to the allegedly less desirable position of

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a track laborer; and (2) suspending her for thirty-seven days without pay for allegedly being insubordinate.[9]

The Court addressed two questions regarding the scope of Title VII's retaliation provision, "whether the challenged action has to be employment or workplace-related and... how harmful that action must be to constitute retaliation."[10] The Court answered both of those questions in a way that favored the employee. With respect to the first question, the Court ruled that "the scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory act and harm."[11] In reaching that conclusion, the Court primarily compared the differences in the text and purpose of Title VII's anti-discrimination and anti-retaliation provisions and found that those differences justified a broader scope for the anti-retaliation provision.[12]

With respect to the second question, the Court determined that a plaintiff could establish a retaliation claim by showing that "a reasonable employee would have found the challenged action materially adverse."[13] Applying these standards to the facts of the case, the Court found that both of White's complained retaliatory acts were retaliatory in nature and that a jury could find that the complained acts were materially adverse.[14]

The *Burlington Northern* decision does great damage to the view that the Court is pro-employer. First, the decision was unanimous in affirming the decision of the court of appeals, with only Justice Alito concurring in the judgment. Second, the decision took a broad view of the anti-retaliation provision that went against what a majority of the courts of appeals to consider the issue had ruled. Three courts of appeals, for example, had required that the retaliatory act must adversely affect the terms, conditions or benefits of employment.[15] Two other courts of appeals had limited the anti-retaliation provision to specific retaliatory acts such as hiring, granting leave, discharging, promoting, and compensating.[16] Third, the pro-employee decision may have a broad impact. No longer must employees tie a retaliation claim in a Title VII case directly to an employment-related action or demonstrate that the alleged retaliatory acts were coterminous with an underlying claim of discrimination. The plaintiff need only show that the retaliatory act could materially affect an employee's desire to participate in or assist with a discrimination claim. Because there are a number of federal and state statutory schemes with retaliation provisions, *Burlington Northern* may be used as a basis by future courts to expand the reach of those various retaliation provisions.

Desert Palace v. Costa. In 2003, the Court considered the "mixed-motive" provision of Title VII in *Desert Palace, Inc. v. Costa*.[17] Title VII allows an employee potential relief "when the complaining party demonstrates that race, color, religion, sex, or national origin was a *motivating factor* for any employment practice, even though other factors also motivated the practice."[18] In *Desert Palace*, the Court considered whether, in proving a mixed-motive claim under Title VII, an employee must provide direct evidence of discriminatory animus or whether circumstantial evidence will suffice.[19]

Four courts of appeals had ruled that direct evidence was required to demonstrate discrimination in a mixed-motive case and that circumstantial evidence was insufficient.[20] These cases relied primarily on Justice O'Connor's concurring opinion in *Price Waterhouse v. Hopkins*,[21] interpreting the predecessor provision to the current mixed-motive statute to require direct evidence of discrimination.[22] The Ninth Circuit, in the decision before the Court, had determined that either direct or circumstantial evidence could establish a mixed-motive claim.[23] The Ninth Circuit therefore upheld a jury instruction in a mixed-motive case when a female employee had provided evidence that "(1) she was singled out for 'intense stalking' by one of her supervisors, (2) she received harsher discipline than men for the same conduct, (3) she was treated less favorably than men in the assignment of overtime, and (4) supervisors repeatedly 'stalk[ed]' her disciplinary record and 'frequently used or tolerated' sex-based slurs against her."[24]

In a relatively short opinion, Justice Thomas—writing for a unanimous Court—sided with the Ninth Circuit and found that direct evidence was not the only type of evidence to establish a mixed-motive claim under Title VII. The Court relied heavily on the term "demonstrates" found in the mixed-motive statute and how that term, in Title VII and elsewhere, does not change the normal rule in civil litigation that direct or circumstantial evidence can be used to establish an element by the preponderance of the evidence.[25] Justice O'Connor concurred in the opinion, noting that the new statute "codified a new rule for mixed-motive cases arising under Title VII."[26] Thus, the Court, basing its analysis on the text of the statute, ruled in favor of the employee and against four of the five courts of appeals to consider the issue.

Although the win for the employee might not be as significant as that in *Burlington Northern*, it does bear noting that there are a large number of discrimination cases in which direct evidence of discrimination is not found. The Court's willingness in *Desert Palace* to entertain all types of evidence in a mixed-motive case certainly simplifies an employee's ability to establish a case of discrimination.

Amtrak v. Morgan. In *National Railroad Passenger Corporation (Amtrak) v. Morgan*,[27] the Court addressed the conditions under which a discrimination claim was filed timely under Title VII. That timing provision, in relevant part, states: "A charge under this section shall be filed within one hundred eighty days after the alleged unlawful employment practice occurred."[28] The *Morgan* Court considered under what circumstances acts that occurred outside the timeframe set forth under 42 U.S.C. § 2000e-5(e)(1) could still be considered part of an unlawful employment practice subject to a Title VII claim.[29]

The Court made two key holdings. First, a unanimous Court held that "discrete discriminatory acts [such as termination, failure to promote, denial or transfer, or refusal to hire] are not actionable if time barred, even when they are related to acts alleged in timely-filed charges."[30] Second, because a hostile work environment claim, unlike a claim based upon discrete retaliatory acts, "is composed of a series of separate acts that collectively constitute one 'unlawful unemployment practice,'"[31] a hostile work environment claim is timely if any part of that claim is filed within the limitations period.[32] Five members of the Court joined this holding.

Although *Morgan* cannot be characterized as a complete win for employees, it shows a commitment to text-based principles of interpretation in employment discrimination

cases and it did assist those employees bringing hostile work environment claims. The courts of appeals had adopted various tests for resolving the question, including determining whether the incidents "represent an ongoing unlawful employment practice"[33] or a multifactor test looking to whether the acts are recurring, of the same type, and have sufficient permanency put an employee on notice of the need to file a claim.[34] The Court did not adopt any of these tests, noting that although "the lower courts have offered reasonable, albeit divergent, solutions, none are compelled by the text of the statute."[35] The Court, looking to the key terms of the statute—"shall," "after... occurred," and "unlawful employment practice"—developed the test that created different results for claims based on discrete retaliatory acts versus hostile work environment claims.[36] *Morgan* therefore made the law clearer regarding the scope of Title VII's timeliness and provision—hence reducing the need for litigation over the meaning of the Court's holding—and easier for employees bringing hostile work environment claims within the time limits of Title VII.

Faragher v. City of Boca Raton/Burlington Industries v. Ellerth. *Burlington Industries, Inc. v. Ellerth*[37] and *Faragher v. City of Boca Raton*[38] were decided on the same day and both considered the circumstances under which an employer would be subject to vicarious liability for the harassing actions of supervisor pursuant to Title VII. The courts of appeals had adopted various strategies, all primarily based upon a statement in *Meritor Savings Bank, FSB v. Vinson*[39] that agency principles controlled the question regarding an employer's vicarious liability.[40]

The Eleventh Circuit in the 7-5 en banc decision under review in *Faragher*, held that "an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a nondelegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate."[41] The Seventh Circuit's en banc decision under review in *Ellerth* had produced eight separate opinions with no controlling rationale.[42] The other courts of appeals had similarly produced a wide range of standards regarding vicarious liability.[43]

The Court, in two 7-2 decisions,[44] produced a far simpler and employee-friendly standard regarding an employer's vicarious liability by adopting a general blanket rule in favor of vicarious liability: "An employer is subject to vicarious liability to a victimized employee for an actionable hostile work environment created by a supervisor with immediate (or successively higher) authority over the employee."[45] The Court ruled that an employer would have an affirmative defense to vicarious liability, but only when no "tangible employment action"—such as firing or failing to promote—was taken against the employee. The defense consists of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[46] The dissent would have required the employee to show that the employer was negligent in allowing the supervisor's conduct to occur.[47]

Faragher and *Ellerth* are different in kind from other Title VII decisions discussed in this article because those decisions did not rely on the statutory text. Rather, those cases considered a question for which the text provided little guidance and the Court therefore turned to agency principles to resolve an area that had generated a wide variety of opinions from the courts of appeals. The Court's holdings did not require an employee to show that a supervisor was acting within the scope of employment, or that there was an agency relationship between the supervisor and the employer. The Court also provided only a limited affirmative defense when the employee had not suffered a tangible employment action. The willingness of the Court to adopt a rule relatively favorable to the employee in a context with little statutory guidance and in which the courts of appeals had generally placed more burdens on the employee certainly does not appear to be the actions of a pro-employer Court.

Oncale v. Sundowner Offshore Services. The Court in *Oncale v. Sundowner Offshore Services, Inc.*[48] addressed whether Title VII allowed a cause of action for sex discrimination based upon same-sex sexual harassment.[49] Justice Scalia, writing for a unanimous Court, found that, because same-sex sexual harassment was "discrimat[ion]... because of... sex," 42 U.S.C. § 2000e-2(a)(1), it was actionable under Title VII.[50]

The decision, once again, went against the view of the majority of courts of appeals to consider the question. The Fifth Circuit had held that same-sex sexual harassment was never actionable under Title VII and the Fourth Circuit held that such claims were actionable only when a plaintiff can prove that the harasser was homosexual.[51] The Seventh Circuit had adopted a position similar to the Court in *Oncale*.[52] And, once again, the Court relied on the plain meaning of the text of the statute in reaching its decision. *Oncale* put forward a straightforward, easy-to-apply standard that expanded the scope of Title VII to same-sex discrimination.

Other Title VII Cases. The Court has ruled for the employee in a number of other Title VII cases as well. In *Arbaugh v. Y & H Co.*,[53] for example, the Court, in an 8-0 decision, found that Title VII's requirement that the Act to only employers with fifteen or more employees was not jurisdictional in nature.[54] The decision reversed the Fifth Circuit and removed a potential jurisdictional hurdle for some employees bringing Title VII claims. In *Edelman v. Lynchburg College*,[55] the Court, in a 7-0 decision reversing the Fourth Circuit, upheld the EEOC's relation-back provision,[56] which allowed a timely filer of a charge to verify the basis for a charge after the time for filing a charge had expired. Such a decision makes it easier for employees to be found to have filed timely charges. In *Swierkiewicz v. Sorema*,[57] a unanimous Court reversed the Second Circuit in holding that an employment discrimination complaint need not contain specific facts establishing a prima facie case of discrimination; rather, the complaint must contain a short and plain statement of the claim that the pleader is entitled to relief. The Court has also held that the EEOC has authority under Title VII to award compensatory against federal agencies in employment discrimination cases.[58] All of these cases can simplify an employee's ability to bring a successful Title VII claim.

II. Non-Title VII Cases

Pro-employee decisions are not found solely in the Court's Title VII docket. Cases brought under other discrimination statutes, such as the Age Discrimination in Employment Act (ADEA), have led to pro-employee holdings.

Federal Express v. Holowecki. The ADEA requires that "[n]o civil action... be commenced... until 60 days after a *charge* alleging unlawful discrimination has been filed with the [EEOC]."[59] The Court in *Federal Express Corp. v. Holowecki*[60] considered what the definition of "charge" meant under the statute. In *Holowecki*, the employee filed an intake questionnaire with the EEOC and attached with it a signed affidavit describing the alleged discriminatory employment practices. In a 7-2 decision, the Court found that a "charge"—as opposed to merely a request for information by an employee—must be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee, adopting the position taken by the EEOC in internal directives regarding what constitutes a charge. The Court viewed the "agency's interpretive position—the need-to-act requirement—[as] provid[ing] a reasonable alternative that is consistent with the statutory framework."[61]

The Court's decision in *Holowecki* lessened a procedural hurdle for employees to have their claims heard in court. As Justice Thomas noted in dissent, the form sent by Holowecki to the EEOC said it was for "pre-charge" counseling, strongly implying that the form should not be construed as a "charge" under the ADEA. Indeed, the EEOC did not consider Holowecki's submission a charge nor did it assign a charge number or encourage the parties to engage in conciliation, as the EEOC is required to do when it receives a charge.[62] Notwithstanding those deficiencies, the Court granted the EEOC, and in turn, the employee, significant procedural leeway in complying with the "charge" requirement. In so doing, the Court simplified the employee's task in invoking the assistance of both the EEOC and the courts in discrimination disputes.

Reeves v. Sanderson Plumbing Products. The Court considered in *Reeves v. Sanderson Plumbing Products, Inc.*[63] whether, under the ADEA, a jury could consider (1) a prima facie case and (2) evidence that the employer's proffered reason for engaging in the employment action against the employee was pretext would be sufficient for a finding of a violation of the ADEA, even if no independent evidence of discrimination was presented. Four of the courts of appeals had found that independent evidence of discrimination was necessary to create a jury issue, while seven courts of appeals had adopted a less stringent standard.[64] In reviewing the text and purpose of the statute, a unanimous Court rejected the minority view of the four courts of appeals and found that a prima facie case and evidence that the reason offered by the employer was pretext *could* be sufficient for a finding of intentional discrimination under the ADEA.[65] Once again, the Court's holding simplifies the task of the employee trying to prove discrimination, as a subset of employees will be able to prove only that the employer's proffered reason was pretext but not be able to prove that the employer had a discriminatory motive.

Oubre v. Entergy Operations. An employee is allowed to waive any claims under the ADEA, but only if the waiver is knowing and voluntary. The Older Workers Benefits Protection Act (OWBPA) provides a number of minimum requirements an ADEA waiver must contain in order to be knowing and voluntary.[66] Under common law principles, a faulty contract, though voidable, may be ratified as acceptable if, after the innocent party learns of the defect in the contract, the party refuses to tender back the consideration received from the contract. The question in *Oubre v. Entergy Operations, Inc.*[67] was whether a release that was defective under the OWBPA could be rendered operable by the departed employee's failure to tender back the consideration received as part of the release of claims. In a 6-3 decision reversing the court of appeals, the Court ruled for the employee, finding that "[t]he statutory comment is clear: An employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements."[68] Therefore, an employee who received consideration for signing a release may nevertheless sue the employer if one of the terms of the release did not meet the OWBPA's requirements.[69]

III. Discussion

A simple recitation of these cases should dispel the view that the Court has a knee-jerk reaction to rule for the employer. In a variety of cases and contexts, the Court has looked to the text, structure, and purpose of the statutory provision in question and has in many instances found that the analysis led to a result advanced by the employee. Even in cases in which the text of the statute invited a wide degree of latitude, such as *Faragher* and *Ellerth*, the Court's resolution went in favor of the employee. Also, a view that the Court favors employers does not square with the several significant cases—such as *Burlington Northern*, *Desert Palace*, *Faragher*, *Ellerth*, *Oncale*, and *Reeves*—in which the Court went against the prevailing, pro-employer view adopted by the courts of appeals.

The Court's employment docket, of course, is not entirely populated with rulings that favor the employee. A number of decisions have been to the benefit the employer as well or have been mixed in its implications. *Morgan*, for example, had one holding that favored employers (discrete discriminatory acts must fall within the filing time period to state a claim) and another holding that favored employees (a hostile work environment claim is timely if an act that constituted the hostile work environment claim fell within the filing period). In another case, the Court reversed the Ninth Circuit in a per curiam decision, finding that no reasonable person could believe that a single incident—in which a single remark was made in response to a sexually explicit comment on an application—constituted a sexual harassment claim, precluding a retaliation claim based upon the employee's complaints against the incident.[70] Several of the Court's decisions regarding the Americans with Disabilities Act adopted holdings regarding the text of that statute that favored the employer by adopting a narrow view of disability under the statute.[71]

Nor does the Court always adopt the minority view of courts of appeals in favor of the employee. Last term, the Court held that the later effects of past discrimination do not restart the clock for filing an EEOC charge.[72] Because the clock does not restart, a female employee's claim that she had

received significantly less pay over the course of her career because successive pay increases were less than those of her male colleagues was time barred.[73] The 5-4 decision reversed the Eleventh Circuit, which had taken the minority view among the courts of appeals regarding that question.[74]

The Court's body of work over the past ten years in employment discrimination cases, however, does not support the view that the Court has a knee-jerk reaction in favor of the employer. Indeed, several of the key cases have relied on the text and other tools of statutory interpretation to reach a conclusion that turned out to be favorable to the employee and went against the majority of courts of appeals to consider the issue. Any characterization of the Court as in the pocket of the employers therefore seems wholly inaccurate.

The view of the Court as pro-employer and of the most recent term's pro-employer decisions as an aberration does not withstand scrutiny. Instead, a more thorough review of the Court's employment discrimination jurisprudence over the past ten years reveals a Court that is perfectly willing to take the text and structure of the statute in a direction that favors the employee and not the employer. It may just be the case that, when the Court is considering an employment discrimination matter, the notions of a decision being pro-employee or pro-employer are the furthest things from the justices' minds.

The public may be better served if commentators on the Court's workings would refrain from using the labels of "pro-employee" or "pro-employer" and instead focus on the unique and difficult issues that can arise in the Court's cases. For example, *CBOCS West, Inc. v. Humphries*[75] involved two conflicting notions of statutory interpretation: whether the Court should either following the plain meaning of the text of the statute or adopt, on stare decisis grounds, the same interpretation of a similar statute. Neither of these approaches to statutory interpretation is inherently pro-employer or pro-employee.

In *CBOCS*, the Court considered these two principles in considering whether 42 U.S.C. § 1981, which gives "[a]ll persons... the same right... to make and enforce contracts... as is enjoyed by white persons," allows for a claim of retaliation. In a 7-2 decision, the Court held that Section 1981 included claims of retaliation, notwithstanding the admission "that the statute's language does not expressly refer to the claim of an individual (black or white) who suffers retaliation because he has tried to help a different individual, suffering direct racial discrimination, secure his §1981 rights."[76] Instead, the Court relied on two points: (1) Section 1981 and Section 1982 (which states that "[a]ll citizens... shall have the same right... as is enjoyed by white citizens... to inherit, purchase, lease, sell, hold, and convey real and personal property") had consistently been interpreted in a similar manner because of the provisions' common language, origin, and purposes; and (2) the Court had previously interpreted Section 1982 to include a retaliation claim.[77] Justice Thomas's dissent took the view that the lack of a textual basis for a retaliation claim in Section 1981, notwithstanding the stare decisis concerns going the other way, should have carried the day.[78]

Although *CBOCS* is a pro-employee decision because it gives employers another statute that includes a retaliation claim, the more useful analysis for the public would be how the case shows a resistance by the Court to jettison former statutory interpretation cases in light of a renewed emphasis on textual analysis. The public and attorneys in general would be better suited if these cases were thought of in terms of their impact on legal analysis of statutory interpretation questions rather than the simple notion whether the Court is trending more pro-employee or pro-employer.

CONCLUSION

The Court has always been difficult to classify. All labels of the Court have their shortcomings, and the designation of the Court as "pro-employee" or "pro-employer" is no exception. The portrayal of the Court as having a knee-jerk reaction in favor of the employer, however, is particularly weak given the Court's employment discrimination jurisprudence over the past ten years. The Court has consistently been willing to refute the prevailing pro-employer view of the courts of appeals when the text and structure of the statute so required. That many of the Court's opinions in the employment context rely primarily on the text and structure of the statutory provision in question should be a welcome development and one that should be conveyed to the public more often.

Endnotes

1 Linda Greenhouse, *On Court That Defied Labeling, Kennedy Made The Boldest Mark*, N.Y. Times (June 29, 2008) (emphasis added).

2 Fanny Carrier, *Workers' Rights Boosted By US Supreme Court*, Yahoo News (June 25, 2008) (emphasis added).

3 Wash. Post, *A Victory for Workers: The Supreme Court Allows Employees To Sue Their Retirement Plans*, A14 (February 21, 2008) (describing LaRue v. DeWolff, Boberg & Associates, Inc., which held that Section 502(a)(2) of ERISA allows for recovery of fiduciary breaches that impair the value of plan assets in a participant's account).

4 N.Y. Times, *A Verdict For Workers, For A Change* (March 2, 2008) (describing Federal Express v. Holowecki).

5 *Id.*

6 42 U.S.C. § 2000e-2(a)(1).

7 548 U.S. 53 (2006).

8 42 U.S.C. § 2000e-(3)(a).

9 *Burlington Northern*, 548 U.S. at 58-59.

10 *Id.* at 60.

11 *Id.* at 67.

12 *Id.* at 61-64.

13 *Id.* at 68.

14 *Id.* at 71-73.

15 *See id.* at 60 (citing White v. Burlington Northern and Santa Fe Railway Co., 364 F.3d 789, 795 (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 (3d Cir. 1997)).

16 *Burlington Northern*, 548 U.S. at 60 (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997); Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997)).

17 539 U.S. 90.

18 42 U.S.C. § 2000e-2(m) (emphasis added). An employer may limit the remedies available to an employee in a mixed-motive case if it demonstrates that it would have "taken the same action in the absence of the motivating factor." 42 U.S.C. § 2000e-5(g)(2)(B).

19 539 U.S. at 92.

20 *Id.* at 95 (citing Mohr v. Dustrol, Inc., 306 F.3d 636, 640-41 (8th Cir. 2002); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 580 (1st Cir. 1999); Trotter v. Board of Trustees of Univ. of Alab., 91 F.3d 1449, 1453-54 (11th Cir. 1996); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995)).

21 490 U.S. 228 (1989).

22 *Id.* at 276.

23 Costa v. Desert Palace, Inc., 299 F.3d 838, 853-54 (9th Cir. 2002) (en banc).

24 *Desert Palace*, 539 U.S. at 96.

25 *Id.* at 98-99.

26 *Id.* at 102.

27 536 U.S. 101 (2002).

28 42 U.S.C. § 2000e-5(e)(1). A charge must be filed 300 days after an unlawful employment practice occurred when an employee initiates proceedings before a state or local agency that can grant relief from an unlawful employment practice. 42 U.S.C. § 2000e-5(e)(1).

29 536 U.S. at 104.

30 *Id.* at 113.

31 *Id.* at 117 (quoting 42 U.S.C. § 2000e-5(e)(1)).

32 *Morgan*, 536 U.S. at 118.

33 Morgan v. Amtrak, 232 F.3d 1008, 1014 (9th Cir. 2000).

34 *See* Berry v. Board of Supervisors, 715 F.2d 971, 981 (5th Cir. 1983).

35 *Morgan*, 536 U.S. at 108.

36 *Id.* at 109-10.

37 524 U.S. 742 (1998).

38 524 U.S. 775 (1998).

39 477 U.S. 57 (1986).

40 *Id.* at 72.

41 111 F.3d 1530, 1534-35 (1997).

42 *See Ellerth*, 524 U.S. at 749-51 (describing the en banc decision).

43 *See Faragher*, 524 U.S. at 785-86 (listing decisions).

44 Justice Thomas and Justice Scalia dissented in both *Faragher* and *Ellerth*, while Justice Ginsburg concurred in the judgment in *Ellerth*.

45 *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

46 *Faragher*, 524. U.S. at 807; *Ellerth*, 524 U.S. at 765.

47 *See Ellerth*, 524 U.S. at 767 (Thomas, J., dissenting).

48 523 U.S. 75 (1998).

49 *Id.* at 76.

50 *Id.* at 82.

51 *Id.* at 79 (citing Garcia v. Elf Atochem North America, 28 F.3d 446, 451-52 (5th Cir. 1994); McWilliams v. Fairfax County Board of Supervisors, 72 F.3d 1191 (4th Cir. 1996); Wrightson v. Pizza Hut of America, 99 F.3d 138 (4th Cir. 1996)).

52 Doe v. Belleville, 119 F.3d 563 (7th Cir. 1997).

53 546 U.S. 500 (2006).

54 *Id.* at 516.

55 535 U.S. 106 (2002).

56 42 U.S.C. § 2000e-5.

57 534 U.S. 506 (2002).

58 West v. Gibson, 527 U.S. 212 (1999).

59 29 U.S.C. § 626(d) (emphasis added).

60 128 S. Ct. 1147 (2008).

61 *Id.* at 1157.

62 29 U.S.C. § 626(d).

63 530 U.S. 133 (2000).

64 *Id.* at 140-41 (identifying circuit split).

65 *Id.* at 143.

66 29 U.S.C. § 626(f).

67 522 U.S. 422 (1998).

68 *Id.* at 426-27.

69 The contract violated the OWBPA because it (1) gave the employee only 14 days (instead of 45) to consider the release; (2) did not give the employee 7 days to revoke the release; and (3) the release did not specifically mention the ADEA. *Id.* at 424-25.

70 Clark County School District v. Breeden, 532 U.S. 268 (2001).

71 *See, e.g.,* Albertson's, Inc. v. Kirkinburg, 527 U.S. 555 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Murphy v. UPS, 527 U.S. 516 (1999).

72 Ledbetter v. Goodyear Tire & Rubber Co., 127 S. Ct. 2162 (2007).

73 *Id.* at 2177-78.

74 *Id.*

75 128 S. Ct. 1951 (2008).

76 *Id.* at 1958.

77 *Id.* at 1958 (citing Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), and Jackson v. Birmingham Bd. of Ed., 544 U.S. 167 (2005)).

78 *CBOCS*, 128 S. Ct. at 1961-62.

Litigation

Getting Down to Business:

Early Observations on The Roberts Court's Business Cases

*By Allyson N. Ho**

In a review of what would prove the last term of the Rehnquist Court, Judge Richard Posner argued that "the more that constitutional law dominates the Court's docket," the more politicized the Court will become, as "the more that appointments to the Court focus on the candidate's likely position in constitutional cases rather than on competence in business law and other statutory fields."[1] Of course, "constitutional law" and "business law" are not mutually exclusive. And even "business law" or "statutory" cases can generate political controversy. But as other commentators have noted, the Supreme Court's business docket under Chief Justice John Roberts has been marked not only by greater consensus among the justices, but also by interesting lineups that cut across "political" or "ideological" lines.[2]

Of the thirty business cases decided in the October 2006 Term,[3] twenty-two were decided unanimously, or with only one or two dissenting votes. That trend continued in the October 2007 Term, with several of the most significant business cases decided by wide margins. Among the fifteen cases in which the U.S. Chamber of Commerce participated, for example, twelve were decided by margins of 7 to 2 or higher and five were unanimous. Two preemption cases were decided by margins of 8 to 1 and 7 to 2.[4] Two closely watched arbitration cases were decided 6 to 3 and 8 to 1.[5] And the Court decided a pair of employment discrimination cases dealing with retaliation claims by margins of 7 to 2 and 6 to 3.[6]

Not only does the Roberts Court's business docket produce greater consensus among the justices, but it also challenges conventional notions of individual justices as "conservative" or "liberal." For example, Justice Ginsburg authored a majority opinion favoring business and federal preemption,[7] while Justice Alito authored an opinion for the Court against business and in favor of an employment discrimination plaintiff.[8] Justice Thomas was the lone dissenter in one of the arbitration cases, reiterating his view that the Federal Arbitration Act does not apply in state-court proceedings,[9] while Justice Souter wrote for the Court in the blockbuster—and more closely divided—Exxon Valdez punitive damages case, in which a five-justice majority ordered a $2 billion reduction in a punitive damages award against Exxon that resulted from the 1989 Exxon Valdez oil spill.[10]

As the Exxon case shows, the Roberts Court's business docket is not all sweetness and light. In the October 2007 Term, for example, the Court deadlocked 4-4 in a high-profile preemption case.[11] And in a case hailed as the most important securities case in decades, the Court narrowly rejected by a 5-3 vote the so-called "scheme liability" theory, which would have permitted a company's accountants, banks, and vendors to be held liable as primary violators for securities fraud.[12] Indeed, the *Stoneridge* decision is notable as one of the few business cases that divided the Court along conventionally ideological lines. But it is the exception that proves the rule.

These are just early data points for the Roberts Court, to be sure. Nonetheless, it seems likely that the Court will continue to devote a significant portion of its docket to business cases,[13] and that those cases will continue, on the whole, to elicit greater consensus among the justices. In particular, there is every reason to expect that the Court's business decisions will continue to be animated by practical concerns about the costs and unpredictability of civil litigation—concerns that cut across ideological lines and defy conventional notions of individual justices as "conservative" or "liberal."

Punitive Damages

Over the last decade, the Supreme Court has issued a series of closely divided rulings establishing significant new constitutional rights for corporate defendants hit with large punitive damage awards. It began with the 1996 decision in *BMW v. Gore*[14] and continued in *State Farm v. Campbell*.[15] Justices Scalia and Thomas sharply dissented from these decisions, expressing no greater enthusiasm for developing innovative rights under the Due Process Clause for corporate defendants than for other litigants.[16] Justice Ginsburg also dissented in these cases.[17] In the 2006 Term, when the Court returned to the issue in *Philip Morris USA v. Williams*, all eyes were on Chief Justice Roberts and Justice Alito to see if they might join Justices Scalia, Thomas, and Ginsburg, and "flip" the Court on the issue of punitive damages.

In *Philip Morris*, the company had been hit with a $79.5 million punitive damage award by an Oregon jury in favor of the spouse of a deceased smoker. Philip Morris presented two arguments under the federal Due Process Clause. First, it argued that the $79.5 million award reflected a nearly 100:1 ratio between punitive and compensatory damages and was therefore unconstitutionally excessive under the *BMW v. Gore* and *State Farm* framework. Second, Philip Morris argued that the trial judge erred in failing to instruct the jury not to consider harm to non-parties—namely, millions of other Oregon smokers—in determining the size of the punitive damage award. In a 5-4 opinion authored by Justice Breyer—and joined by the Chief Justice and Justice Alito, along with Justices Kennedy and Souter—the Court accepted the second claim, and remanded on that basis alone; it did not rule on the first claim.[18] Justices Stevens, Scalia, Thomas, and Ginsburg dissented.

The *Philip Morris* decision may suggest a new trend in punitive damages jurisprudence—one in which the Court focuses more on establishing procedural protections against

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arbitrary punitive damage awards *before* they are imposed, such as through jury instructions and other procedural devices, and less on imposing substantive limitations on the size of jury verdicts after the fact.

The Court's most recent punitive damages decision, *Exxon Shipping Company v. Baker*, involved the legality of punitive damages under federal maritime law, not the federal Due Process Clause.[19] In its review of a $2.5 billion punitive damages award resulting from the Exxon Valdez oil spill in 1989, the Court considered three issues: (1) whether a ship owner may be liable for punitive damages without acquiescence in the actions causing harm; (2) whether punitive damages have been barred implicitly by federal statutory law making no provision for them; and (3) whether the award of $2.5 billion in that case is greater than maritime law should allow in the circumstances. With Justice Alito not participating, the Court was equally divided on the first question of derivative liability. As to the second question, the Court held unanimously that the silence of the Clean Water Act on the issue did not bar an award of punitive damages in addition to compensatory damages for economic loss. Finally, as a matter of federal maritime common law, the Court held 5 to 3 in an opinion authored by Justice Souter that the $2.5 billion punitive damages award was excessive and set an upper limit on such awards of a 1:1 punitive-to-compensatory damages ratio.

Writing for the majority, Justice Souter focused on the "stark unpredictability" of punitive damages awards that, in turn, suggest an intolerable unfairness within the civil justice system.[20] Seeking to address that unfairness, the Court tied punitive damages to compensatory damages using a concrete ratio—settling on a 1:1 rule after surveying various state provisions and common law rules. In reaching that conclusion, the Court emphasized that the compensatory damages in the *Exxon* case were already quite high, and that the defendant was more reckless than acting "primarily by a desire for gain."

Because two of the five votes in the *Exxon* majority came from Justices Scalia and Thomas, who do not interpret the Constitution to impose any limitations on state-law punitive damages awards, the Court's 1:1 ratio appears unlikely to gain traction as a matter of constitutional law. Only time will tell whether Justice Souter's *Exxon* opinion will provide broader guidance outside the relatively narrow context of federal maritime law on punitive damages awards more generally, but the comprehensiveness of the opinion may well lend itself to wider application—particularly in light of the Court's recognition of "the implication of unfairness that an eccentrically high punitive damages award causes."

Dormant Commerce Clause, Federal Preemption

As the punitive damages cases demonstrate, although some critics contend that the Court's voting patterns tend to fall uncomfortably along political or partisan lines, business appellate lawyers know better. Businesses often challenge state regulations either under the dormant Commerce Clause or as a matter of federal preemption—just as they challenge large punitive damage awards under the federal Due Process Clause. But when they do so, their lawyers do not primarily cite Justices Thomas and Scalia, because those justices in fact regularly vote against business in such cases. It is also worth noting that, in the areas of dormant Commerce Clause and federal preemption, Justice Alito seems to be charting a distinct course. He is voting for the dormant Commerce Clause, and for federal preemption—and, at times, against the new Chief Justice and Justices Scalia and Thomas.

In *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[21] petitioners challenged a New York law that all local trash must be processed at a local government facility, claiming that the rule restricts the free movement of items in interstate commerce and therefore violates the dormant Commerce Clause. The Chief Justice authored a plurality opinion upholding the law and expressing some skepticism about the dormant Commerce Clause, while Justices Thomas and Scalia authored concurring opinions reiterating their longstanding and outright hostility to the doctrine.[22] In contrast, Justice Alito dissented—and thereby demonstrated his willingness to use the dormant Commerce Clause to invalidate state regulations of interstate commerce.[23] Similarly, in *Department of Revenue of Kentucky v. Davis*,[24] Justice Alito (along with Justice Kennedy) parted company from the Chief Justice, Justice Thomas, and Justice Scalia in dissenting from the Court's decision that state tax schemes that tax income earned by out-of-state, but not in-state, bondholders do not violate the Dormant Commerce Clause.

A federal preemption case from the same Term reveals a similar pattern. In *Watters v. Wachovia Bank*,[25] the Court upheld by a 5-3 vote (with Justice Thomas not participating) a controversial 2001 federal regulation preempting state regulation of national banks. In doing so, the majority effectively undermined the ability of state governments to regulate predatory mortgage lending practices, to take one example. The Chief Justice and Justice Scalia dissented, however, joining the opinion of Justice Stevens.[26] Once again, Justice Alito departed from them, and joined Justice Ginsburg's majority opinion instead.

If *Watters* exemplifies the unconventional lineups produced by business cases, then *Riegel v. Medtronic* illustrates the occasionally surprising consensus they can create. In an opinion authored by Justice Scalia—one of the dissenters in *Watters*—the Court held 8-1 that federal law preempts state-law products liability claims challenging the design and labeling of medical devices that the federal Food and Drug Administration has found to be safe and effective.[27] In reaching that conclusion, Justice Scalia's opinion emphasized that federal preemption is, if anything, even more appropriate where state tort suits are concerned than state statutes or regulations, because they would presumably reflect at least some type of cost-benefit analysis, whereas juries only see harm without any corresponding benefit[28]—again, a reflection of the Court's ongoing concern about the vagaries of civil litigation. Interestingly enough, the lone dissent in *Riegel* was authored by Justice Ginsburg, who wrote for the Court in favor of preemption in the *Watters* case decided the previous Term.

In *Rowe v. New Hampshire Motor Transport Association*, the Supreme Court ruled unanimously that state-law regulation of tobacco shipments was preempted by the Federal Aviation Authorization Act's preemption of laws "related to a price, route,

or service of any motor carrier," 49 U.S.C. § 14501(c)(1).[29] The Court simply followed its earlier precedent broadly construing the statute's preemption provision, and concluded that not even the good intentions of state regulators—here, in attempting to combat underage smoking—can justify ignoring the plain command of the language chosen by Congress.[30]

Antitrust, Class Actions

The Roberts Court has decided a remarkable number of antitrust cases thus far, with October Term 2006 as the most active on that front since October Term 1992. There is also a common theme to this recent flurry of activity. During the October 2005 and 2006 Terms, the Court rejected the claims of antitrust plaintiffs by a combined 46-5 vote. Moreover, of the five dissenting votes, two came from Justice Thomas—arguably the Court's most "conservative" justice—while three came from Justices Stevens and Ginsburg—arguably the Court's most "liberal." That leaves a broad consensus in the middle of the Court generally hostile to broad antitrust liability—informed by skepticism about the ability of courts to distinguish anti-competitive from pro-competitive conduct and by concern about the serious consequences for litigants and markets alike when courts fail to do so.[31]

In *Weyerhaueser Co. v. Ross-Simmons Hardwood Lumber Co.*, for example, the Court unanimously reversed the Ninth Circuit on a predatory bidding claim.[32] The Court had previously expressed its skepticism of predatory pricing claims in its 1993 decision in *Brooke Group v. Brown & Williamson*.[33] *Brooke Group* established a two-part test that plaintiffs must meet in order to state a claim of predatory pricing. In *Weyerhaueser*, the Court applied the same two-part test to predation on the buy side of the market.

In *Credit Suisse First Boston v. Billing*,[34] the Court rejected an antitrust class action against ten leading investment banks for administering certain initial public offerings for technology companies with the blessing of the Securities and Exchange Commission. In an opinion authored by Justice Breyer, the Court granted implied antitrust immunity and recognized the need to allow federal officials to regulate the stock market without fear that their efforts will be undermined by litigation.[35]

In particular, Justice Breyer expressed concern that in the absence of immunity, "antitrust plaintiffs may bring lawsuits throughout the nation in dozens of different courts with different nonexpert judges and different nonexpert juries."[36] "In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible," Justice Breyer explained, "it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to assure that the different courts evaluate similar fact patterns consistently."[37] In the majority's view, such uncertainty is unacceptable not only from a rule of law standpoint, but also because of the chilling effect it would have on "a wide range... conduct that the securities law encourages."[38]

Similar concerns animated the majority opinion in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[39] which held that resale price agreements should be evaluated under the rule of reason to determine whether there is a violation of Section 1 of the Sherman Act—expressly overruling the 96-year-old rule of *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,[40] which provided that resale price maintenance agreements were per se unlawful. In overruling *Dr. Miles*, the Court made clear its concern that rigid per se rules might block competitive practices—noting that "economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance."[41] At the same time, the Court recognized that such agreements may have "anticompetitive effects" that should "not be ignored or underestimated."[42] But the Court nevertheless concluded that such anticompetitive effects could be appropriately addressed under the rule of reason, when applied in "a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones."[43]

The risk of allowing plaintiffs to capture pro-competitve behavior by casting too wide a net in their pleadings also animated the Court's decision in *Bell Atlantic v. Twombly*, which involved allegations that the "Baby Bell" telephone companies had conspired in violation of Section 1 of the Sherman Act.[44] In an opinion authored by Justice Souter, the Court reiterated that mere parallel conduct between competitors is not enough to state a Section 1 claim of conspiracy.[45] In *Twombly*, the Baby Bells could have easily engaged in the alleged conduct unilaterally and in their own self-interest. So it was not enough for the plaintiffs merely to allege the existence of an agreement. They were also required to allege facts about the agreement, sufficient to make it plausible, and not merely conceivable, that they could be entitled to relief.[46]

By rejecting the inadequately pled complaint in *Twombly*, the majority also demonstrated its concern with the high risks of expensive discovery and in terrorem settlements. The Court recognized that antitrust discovery, in particular, can be ruinously expensive—so much so that it can lead companies to settle even frivolous suits rather than incur such costs, which frequently amount to millions of dollars.[47] By requiring plaintiffs to plead facts that support a plausible theory of liability, frivolous antitrust claims can be defeated at the pleading stage, thereby avoiding the cost and expense of discovery and reducing the incentives for extortionate settlements—which are particularly great in the class-action context.[48] In *Twombly*, for example, the putative class included hundreds of millions of telephone consumers over a long period of time, so the potential liability was massive.[49]

In a decision animated by concern about the growing cost of discovery in antitrust cases, the Court reasoned that "only by taking care to require allegations that reach the level suggesting conspiracy... can [we] hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the discovery process will reveal relevant evidence."[50] Otherwise, "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings" because "[j]udges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves."[51]

That same concern about the potentially enormous costs of discovery and its role in leveraging in terrorem settlements

similarly animated the Court's decision in *Stoneridge*, hailed as the biggest securities case in a generation.[52] The issue in *Stoneridge* was whether shareholders of companies that commit securities fraud should be able to sue investment banks, accounting firms, lawyers, and other third parties that allegedly participated in the fraud, even if those entities never made fraudulent statements. That concept of expanding liability to third parties is commonly referred to as "scheme liability." The concept of scheme liability, in turn, was a response to the Supreme Court's holding in an earlier case, *Central Bank v. First International Bank*,[53] which rejected secondary liability for aiding and abetting in private securities litigation. Under a scheme liability theory, plaintiffs' lawyers argued that law firms, accounting firms, and banks could be held liable as primary violators under the securities laws.

In one of the few business decisions that has divided the Roberts Court along conventional ideological lines, the Supreme Court rejected that analysis in a 5-3 opinion (with Justice Breyer not participating), holding that such claims were properly dismissed because the investors did no rely on anything the third-party suppliers said or did when they decided to purchase the securities.[54] In an opinion authored by Justice Kennedy, the Court took very seriously the practical consequences of embracing the plaintiffs' approach to the securities laws. In prior cases interpreting the securities laws, the Court had already acknowledged the "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."[55] The *Stoneridge* Court observed that adopting the plaintiffs' approach would expose a new broader class of defendants to those risks, which could in turn increase the cost of doing business to protect against these threats.[56] "Overseas companies with no other exposure to this country's securities laws might also be deterred from doing business here."[57] Further, if broader potential liability made it more costly to be a publicly traded company in this country, securities offerings could shift away from domestic capital markets.[58]

The potential significance of *Stoneridge* is perhaps best exemplified by the sheer number of amicus or "friend of the court" briefs filed by various individuals and entities interested in the outcome of the case. All told, more than 100 separate individuals and entities filed briefs, with the Bush Administration, sixteen former Securities and Exchange Commission chairmen, commissioners, and officials, The New York Stock Exchange and NASDAQ, the American Bankers Association, the American Institute of Certified Public Accountants, and the U.S. Chamber of Commerce weighing in with briefs opposing scheme liability, while the Regents of the University of California, thirty-two states, and various state retirement systems filed briefs supporting the class-action plaintiffs.

The Court's decision in *Stoneridge* in no way prevents the Securities and Exchange Commission from using its enforcement authority to bring actions against third parties such as the *Stoneridge* defendants. What *Stoneridge* does prevent is an *expansion* of liability in a class-action system notorious for huge transaction costs. As in *Exxon* and *Twombly*, the Court's decision in *Stoneridge* appears "not so much pro-business as it is massively skeptical of civil litigation," as Kenneth Starr has characterized the Supreme Court generally.[59]

Arbitration

In October Term 2007, the Court decided two arbitration cases by wide margins, further reflecting broad consensus among the Justices. In *Preston v. Ferrer*, the Court held 8 to 1 that, when parties agree to arbitrate all issues arising under a contract, the Federal Arbitration Act (FAA) preempts a state law that vests primary jurisdiction in a state administrative agency.[60] In reaching that conclusion, the Court merely followed its precedents recognizing the FAA's preemptive force generally, and found no basis for adopting a different rule where state administrative (as opposed to judicial) proceedings are concerned.

In *Hall Street Associates v. Mattel, Inc.*, the Court held 6 to 3 that the FAA's statutory grounds for vacating arbitral awards cannot be expanded by private contract.[61] Although the Court acknowledged the competing policy arguments presented by the parties for their respective positions, it found the statutory text dispositive and thus left the policy considerations to Congress. The arbitration cases, like the business cases generally, thus reflect not only broad consensus among the Justices, but also deference to Congress's choices in weighing competing concerns and making policy judgments.

Employment Discrimination

In *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, the Court held in a 5 to 4 decision that the statutory 180-day deadline for filing a discrimination lawsuit cannot be stretched to allow employees to sue for a salary discrepancy today that arose from sex or race discrimination that occurred years ago.[62] Handed down at the close of the October 2006 Term, the *Ledbetter* case generated considerable controversy and led some to deride the Roberts Court as "pro business" at the expense of workers.

But in October Term 2007, the Supreme Court overwhelmingly ruled in favor of workers, and against companies, in a series of cases involving employee rights. As Patricia Millett—who served in the Office of the Solicitor General under both the Clinton and Bush administrations—recently testified before the Senate Judiciary Committee, those decisions "provide an important counter-balance to any claim that the Roberts Court is somehow innately hostile to employees or supportive of business at the expense of workers."[63]

For example, before the Court were a pair of cases involving whether two federal antidiscrimination laws—42 U.S.C. § 1981 and the Age Discrimination in Employment Act (ADEA)—contained an implied right of action for retaliation against employees who allege discrimination. The Court ruled in favor of the employee plaintiffs in both cases, holding that persons who are fired for complaining about age and race bias are protected under federal law. The first case, *Gomez-Perez v. Potter*,[64] involved a postal worker alleging that the U.S. Postal Service had illegally retaliated against her after she sued for age discrimination. The 6 to 3 decision, authored by Justice Alito, allows her lawsuit to continue. The second case, *CBOCS West v. Humphries*,[65] involved a supervisor at a Cracker Barrel restaurant who alleges he was fired after complaining about race discrimination. The Court held 7 to 2, in a decision by Justice

Breyer, that the lawsuit could proceed under Section 1981.

In *Meacham v. Knolls Atomic Power Laboratory*,[66] the Court held in an opinion authored by Justice Souter that an employer defending a disparate impact claim under the ADEA bears the burdens of both production and persuasion in showing that the employment decision was based on "reasonable factors other than age." Hailed as an important victory for age discrimination plaintiffs, *Meacham* was decided by a 7 to 1 vote, with Justice Breyer not participating.

In *Sprint/United Management Co. v. Mendelsohn*,[67] the Court addressed the admissibility of so-called "me, too" evidence regarding claims of discrimination by nonparties and unanimously held that such evidence cannot automatically be excluded, but "requires a fact-intensive, context-specific inquiry" to determine its admissibility. And in *Federal Express Corp. v. Holowecki*,[68] the Court held 7-2 that an age discrimination suit could go forward even though the employee plaintiffs filed their complaint with the EEOC on the wrong form.

These employment cases are "notable," as Patricia Millett has pointed out, "not only for their consistently employee-favorable outcomes, but more importantly for (i) the respect they demonstrate for Congress's leadership role in making the difficult yet critically important policy choices and balances that inhere in the regulation of workplace relationships, and (ii) the broad consensus on the Court in these cases."[69]

CONCLUSION

The broad consensus among the Justices reflected in the Supreme Court's business cases cannot be explained or understood merely by labeling the Roberts Court as "pro business." Indeed, last Term the Court issued a higher percentage of decisions favoring criminal defendants than companies, yet no one would accuse the Court of being "soft on crime."[70] Rather, the remarkable consensus among the Justices on the business cases appears to reflect, at least in part, shared concerns about the civil justice system that cut across ideological lines and defy conventional notions of individual justices as "conservative" or "liberal."

Endnotes

1 Richard A. Posner, *The Supreme Court, 2004 Term:Foreword: A Political Court*, 119 Harv. L. Rev. 31, 67 (2005). *See also The Roberts Court Gets Down To Business: The Business Cases*, 34 Pepp. L. Rev. 599, 601 (2007); Kenneth W. Starr, *The Roberts Court & The Business Cases*, 35 Pepp. L. Rev. 541 (2008).

2 *See*, *e.g.*, Michael S. Greve, *Does the Court Mean Business?*, Federalist Outlook No. 26, Am. Enterprise Inst. for Pub. Pol'y Res. (Sept. 2007); Peter B. Rutledge, *Looking Ahead: October Term 2006*, 2006 Cato Sup. Ct. Rev. 361.

3 The designation of cases that implicate "business" interests is necessarily imprecise. With that caveat, I have adopted the metric employed by the U.S. Chamber of Commerce in assessing cases that raise issues important to companies.

4 Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008); Chamber of Commerce v. Brown, 128 S. Ct. 2408 (2008).

5 Hall Street Associates, Inc. v. Mattel, Inc., 128 S. Ct. 1396 (2008); Preston v. Ferrer, 128 S. Ct. 978 (2008).

6 CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008); Gomez-Perez v. Potter, 128 S. Ct. 1931 (2008).

7 127 S. Ct. 1559 (2007).

8 CBOCS West, Inc. v. Humphries, 128 S. Ct. 1951 (2008).

9 Preston v. Ferrer, 128 S. Ct. 978 (2008).

10 Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008).

11 Warner-Lambert Co. v. Kent, 128 S. Ct. 1168 (2008) (mem.).

12 Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008).

13 According to the U.S. Chamber of Commerce, about 40 percent of the Court's docket during the October 2007 Term dealt with cases important to companies, which is similar to the prior term and up from 31 percent two years ago. *See* David G. Savage, *High court is good for business*, L.A. Times at A-1 (June 21, 2007) (available online at http://articles.latimes.com/2007/jun/21/nation/na-scotus21).

14 517 U.S. 559 (1996).

15 538 U.S. 408 (2003).

16 *See e.g.*, *Gore*, 517 U.S. at 598 (Scalia, J., dissenting); *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting);

17 *See*, *e.g.*, *Gore*, 517 U.S. at 607 (Ginsburg, J., dissenting).

18 *See* Philip Morris USA v. Williams, 549 U.S. 346, 127 S. Ct. (2007).

19 *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008). Exxon sought review of the punitive damages award under both federal maritime common law and the Due Process Clause, but the Supreme Court granted review only on the federal maritime law question.

20 *Id.* (quoting BMW of N. Am., Inc. v. Gore, 646 So. 2d 619, 626 (1994) (per curiam)).

21 127 S. Ct. 1786 (2007).

22 *Id.* at 1798 (Scalia, J., concurring in part); *id.* at 1799 (Thomas, J., concurring in the judgment).

23 *Id.* at 1803 (Alito, J., dissenting).

24 128 S. Ct. 1801 (2008).

25 127 S. Ct. 1559 (2007).

26 *Id.* at 1578 (Stevens, J. dissenting, joined by Roberts, C.J., and Scalia, J.).

27 Riegel v. Medtronic, Inc., 128 S. Ct. 999 (2008).

28 *Id.* at 1008.

29 128 S. Ct. 989 (2008).

30 As noted *supra*, the Court evenly divided on the question whether state laws pertaining to fraud in the approval of drugs by the FDA are preempted—and thus left standing a ruling against preemption by the Vermont Supreme Court. Warner-Lambert Co. v. Kent, 128 S. Ct. 1168 (2008) (mem.).

31 As Justice Breyer has explained, "the threat of antitrust mistakes... means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law encourages." Credit Suisse Sec. (USA), LLC v. Billing, 127 S. Ct. 2383, 2396 (2007).

32 549 U.S. 312, 127 S. Ct. 1069 (2007).

33 509 U.S. 209 (1993).

34 127 S. Ct. 2383 (2007).

35 *Id.* at 2395.

36 *Id.*

37 *Id.*

38 *Id.* at 2396.

39 127 S. Ct. 2705 (2007).

40 220 U.S. 373 (1911).

41 *Id.*

42 *Id.*

43 *Id.*

44 127 S. Ct. 1955 (2007).

45 *Id.* at 1961.

46 *Id.* at 1065-66.

47 *Id.* at 1967.

48 *Id.*

49 *Id.* at 1962 (respondents "represent a putative class consisting of all subscribers of local telephone and/or high speed internet services... from February 8, 1996 to present" (internal quotation marks and citation omitted).

50 *Id.* at 1967.

51 When the Court first announced its decision in *Twombly*, there was wide speculation that it may herald a brave new world in which all plaintiffs must plead with greater specificity. But the Court appeared to throw cold water on that theory just a few weeks later in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007) (per curiam). In *Erickson*, which reversed the dismissal of a pro-se prisoner's section 1983 claim, the Court cited *Twombly* for the proposition that complaints need not allege specific facts, so long as they provide fair notice to the defendant of the nature of the claim and the grounds on which it is based. *Id.* at 2198.

52 Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 128 S. Ct. 761 (2008).

53 511 U.S. 164 (1994).

54 *Id*. at 761, 766.

55 *Id.* at 772 (citing Blue Chip Stamps v. Manor Drug Stores, 431 U.S. 723, 740-41 (1975)). Although she dissented in *Stoneridge*, Justice Ginsburg has recently warned that "[p]rivate securities fraud actions... if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2504 (2007*).* Indeed, the Roberts Court has acted to rein in securities litigation generally. For example, in *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71 (2006), a unanimous Court held that the statutory bar against class actions alleging misrepresentation "in connection with the purchase or sale" of securities also barred class actions alleging fraud in connection with an investor's "holding" of securities.

56 *Stoneridge*, 128 S. Ct. at 772.

57 *Id.*

58 *Id.*

59 *See* Starr, *The Roberts Court & The Business Cases*, 35 Pepp. L. Rev. at 541. For an opposing view, *see* Jeffrey Rosen, *Supreme Court Inc.*, N.Y. Times Magazine (Mar. 16, 2008) (available online at http://www.nytimes.com/2008/03/16/magazine/16supreme-t.html). *See also* Eric Posner, *Is the Supreme Court Biased in Favor of Business?*, Slate: Convictions (Mar. 17, 2008) (available online at http://www.slate.com/blogs/blogs/convictions/archive/2008/03/17/is-the-supreme-court-biased-in-favor-of-business.aspx) (critiquing Rosen's argument that the Supreme Court is increasingly "pro-business").

60 128 S. Ct. 978 (2008).

61 128 S. Ct. 1396 (2008).

62 127 S. Ct. 2162 (2007).

63 *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, 110th Cong. 7-28 (2008) (statement of Patricia Ann Millett) (available at http://judiciary.senate.gov/testimony.cfm?id=3485&wit_id=7314). In Millett's view, "the Supreme Court's decisionmaking in business cases reflects broad consensus—a consensus that crosses traditional liberal/conservative lines—on deference to the laws that Congress writes and the policy judgments that the statutory text and Congress's actions and inaction reflect." *Id.*

64 128 S. Ct. 1931 (2008).

65 *Id*. at 1951.

66 *Id*. at 2395.

67 *Id*. at 1140.

68 *Id*. at 1147.

69 *Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, 110th Cong. 7-28 (2008) (statement of Patricia Ann Millett) (*available at* http://judiciary.senate.gov/testimony.cfm?id=3485&wit_id=7314).

70 *See Courting Big Business: The Supreme Court's Recent Decisions on Corporate Misconduct and Laws Regulating Corporations*, 110th Cong. 7-28 (2008) (statement of Patricia Ann Millett) (*available at* http://judiciary.senate.gov/testimony.cfm?id=3485&wit_id=7314).

Religious Liberties

The 2008 Presidential Election, the Supreme Court, and the Relationship of Church and State

*By Steffen N. Johnson & Adèle H. Auxier**

Religion and politics enjoy an uneasy relationship in American life, and the 2008 presidential election has proven to be no exception.[1] On one hand, Senator Obama and Senator McCain have come under intense scrutiny because of their association with controversial religious leaders Reverend Jeremiah Wright and Reverend John Hagee, respectively.[2] On the other hand, Pastor Rick Warren's widely praised "Civil Forum on the Presidency" demonstrated that many voters want to hear more, not less, about the candidates' moral values and religious worldviews—and how those views shape their political positions.[3]

"Pastor Rick" moderated the Civil Forum, but when it comes to the constitutionality of faith in the public square, the Supreme Court of the United States sets the terms of the debate. Many of the Court's decisions in this area—which runs the gamut from legislative prayer to school vouchers to animal sacrifice—have been closely divided.[4] The Court decided some fourteen free exercise and establishment cases in the period between 1994 and 2005, when no justice retired. With the recent replacement of Chief Justice William Rehnquist with Chief Justice John Roberts, and of Justice Sandra Day O'Connor with Justice Samuel Alito, there is no guarantee that the current constitutional balance on faith in public life will hold. The next President is likely to appoint at least one, if not two or three, new Supreme Court justices. Taken together, these changes on the Court could have a dramatic effect on issues affecting the religious liberty of millions of Americans.

God alone knows who will win the next presidential election, and precisely what sort of justices he will appoint.[5] Nor can anyone else predict with certainty the issues involving religion that will land on the Supreme Court's docket. In this article, however, we highlight certain issues that are more likely than most to come before the Court in the near future. These include the scope of the First Amendment "ministerial exception" to employment discrimination laws; the meaning of the "substantial burden" requirement of the Religious Land Use and Institutionalized Persons Act; under what circumstances, if any, religious schools have a constitutional right to participate in publicly funded voucher and scholarship programs; and the scope of the government's power to control the nature of religious monuments on public property. With issues such as these on the table, the President who appoints the next Supreme Court justice (or justices) will have a significant opportunity to shape the terms of the legal debate about faith in American public life.

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The Ministerial Exception to Employment Discrimination Laws

The relationship between employment discrimination laws and religious employers such as churches and faith-based charities has become something of a political football in this election. At the Saddleback Forum, Rick Warren asked Senator McCain the following question: "[T]he Civil Rights Act of 1964 allows religious organizations—not just churches, but faith-based organizations—to keep and hire the people that they believe share common beliefs…. Would you insist that faith-based organizations forfeit that right to access federal funds?"[6] Senator McCain responded: "Absolutely not. And if you did, it would mean a severe crippling of faith-based organizations and their abilities to do the things that they have done so successfully." Senator McCain's remarks undoubtedly resonated with the many religious believers who insist that protecting their choice of those who function as ministers is essential to religious liberty because it is necessary to preserve the integrity of their group's religious message and doctrine.

Others, however, insist with equal vigor that the ministerial exception amounts to favoritism of religion and gives religious groups a free pass to discriminate on the public's dime. Senator Obama, while making faith-based and community partnerships a part of his domestic policy, has taken care to address the concerns of those who object to giving federal money to groups that discriminate in hiring on the basis of religion. In a June speech announcing his new Council for Faith-Based and Neighborhood Partnerships, Senator Obama said:

> Now, make no mistake, as someone who used to teach constitutional law, I believe deeply in the separation of church and state, but I don't believe this partnership will endanger that idea—so long as we follow a few basic principles. First, if you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion. Second, federal dollars that go directly to churches, temples, and mosques can only be used on secular programs. And we'll also ensure that taxpayer dollars only go to those programs that actually work.[7]

The debate over the hiring practices of publicly funded faith-based service providers, of course, involves the scope of the government's power to attach conditions to funding as well as First Amendment questions. But given the different perspectives of the nation's presidential candidates, it is perhaps not surprising that one of the more significant religious liberty issues to have generated divergent approaches among the lower courts is the scope of the First Amendment's "ministerial exception" to generally applicable employment discrimination laws. Title VII and most state employment laws exempt religious institutions from the general prohibition on religious discrimination in

employment.[8] These statutory exemptions are generally limited to discrimination based on *religion*: for example, in the 1980 case *Equal Employment Opportunity Commission v. Mississippi College*, the Fifth Circuit held that a Baptist college could not be sued for discriminating against a female psychology professor on the basis of her religious views, but could be sued for sex discrimination.[9]

Starting in the 1970s, the federal courts recognized an additional "ministerial exception" to Title VII and other employment discrimination laws, holding that those laws do not apply at all to the relationship between ministers and religious employers.[10] In the leading case of *McClure v. Salvation Army*, the Fifth Circuit held in 1972 that it did not have jurisdiction to consider a Title VII sex discrimination claim brought by a minister against the Salvation Army, a church. Although there was no evidence that the specific employment practices at issue—which included allegations of disparate pay for men and women clergy—had an explicitly religious basis, the Fifth Circuit concluded that exercising jurisdiction would interfere with the Salvation Army's First Amendment right "to decide for itself, free from state interference, matters of church administration and government."[11] The court thus dismissed the case, and the ministerial exception was born.

The Supreme Court has recognized that regulating religious institutions and their employees raises free exercise and establishment issues.[12] As Justice William Brennan once observed: "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 … a means by which a religious community defines itself."[13] Accordingly, the Court has recognized the validity of legislative accommodations of religious organizations' hiring practices.[14] Moreover, the Court has held that the First Amendment protects the right of expressive private associations to discriminate in selecting leaders who bear responsibility for advocating the association's viewpoints.[15] The Court has not, however, taken the opportunity to explicitly address the ministerial exception.[16]

The Role-Based Approach to the Ministerial Exception

Over the past three decades, every circuit but the Federal Circuit has adopted the ministerial exception in some form.[17] The lower courts differ, however, on how broadly the exception should be applied. On one end of the spectrum are courts such as the First, Seventh, and Tenth Circuits, which have consistently held that the ministerial exception applies to virtually all civil suits between ministers and religious employers.[18] In *Tomic v. Catholic Diocese of Peoria*, for example, the Seventh Circuit held that the exception applies even when "the complaint is not based on and does not refer to religious doctrine or church management (as in most Title VII and other employment-discrimination suits) but it is apparent that a controversy over either may erupt in the course of adjudication."[19] This "role-based" approach holds that federal courts do not have authority to hear most employment disputes between ministers and their religious employers.[20] In an opinion by Judge Richard Posner, the Seventh Circuit set forth the rationale for such a broad ministerial exception:

> [T]he First Amendment concerns [with assuming jurisdiction in ecclesiastical cases] are two-fold. The first concern is that secular authorities would be involved in evaluating or interpreting religious doctrine. The second quite independent concern is that in investigating employment discrimination claims by ministers against their church, secular authorities would necessarily intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal.[21]

The court referred to this as the "internal-affairs doctrine" and emphasized that the reason for construing the ministerial exception broadly was to avoid state interference with church governance.[22] This version of the ministerial exception protects religious bodies by limiting the scope of the court's inquiry to the nature of the employment relationship, without requiring a religious employer to raise a specifically religious defense to each of the minister-plaintiff's claims.[23]

In *Bryce v. Episcopal Church in the Diocese of Colorado*, the Tenth Circuit took the ministerial exception a step further and adopted a broad "church autonomy doctrine," which it applied to dismiss a sexual harassment suit brought by a youth pastor and her lesbian partner against the pastor's church for allegedly harassing statements made during the course of congregational discussions about whether to continue the pastor's employment.[24] *Bryce* is noteworthy because the Tenth Circuit found that the church autonomy doctrine barred the claims made by the youth minister's partner as well as the youth minister herself. The ministerial exception ordinarily applies only to suits brought by ministers, not suits brought by third parties like the partner in this case. The Tenth Circuit found, however, that the allegedly harassing statements were made in the context of "a theological discussion about the church's doctrine and policy towards homosexuals."[25] "When a church makes a personnel decision based on religious doctrine, and holds meetings to discuss that decision and the ecclesiastical doctrine underlying it," the court explained, "the courts will not intervene."[26]

The Claim-Based Approach to the Ministerial Exception

There are recent signs, however, that the judicial consensus as to the validity of the ministerial exception does not extend to its scope. For example, the Third and Ninth Circuits have handed down opinions that significantly narrow the exception, while the Second Circuit has struggled to find a consistent approach.

The Third Circuit adopted the ministerial exception in *Petruska v. Gannon University* ("*Petruska II*"), after withdrawing a previous panel opinion that, if left standing, would have been the first to disavow the exception.[27] Still, *Petruska II* characterized its version of the exception as "limited," stating: "It does not apply to *all* employment decisions by religious institutions, nor does it apply to *all* claims by ministers. It applies only to claims involving a religious institution's choice as to who will perform spiritual functions."[28] This "claim-based" approach is slightly less deferential to religious institutions than the Seventh Circuit's "role-based" approach.[29] But it is far more in keeping with other federal decisions than was the prior opinion ("*Petruska I*"), which held that "where a church discriminates for reasons unrelated to religion … the Constitution does not foreclose Title VII suits," even when they are brought by "ministerial employees."[30]

In another relatively recent decision, *Elvig v. Calvin Presbyterian Church*, the Ninth Circuit held that a pastor's sexual harassment and retaliation claims against her church were not barred by the ministerial exception.[31] Although the panel concluded that the exception prevented it from evaluating the propriety of a church's decision to demote and fire an associate pastor, it held that the pastor could pursue her hostile work environment claim.[32] The church could only "invoke First Amendment protection from Title VII liability if it claimed doctrinal reasons for tolerating or failing to stop the sexual harassment."[33] The Ninth Circuit has limited its holding to sexual harassment cases, but its rationale is applicable to other kinds of employment discrimination suits as well.[34]

Further adding to the recent confusion among the lower courts, the Second Circuit has twice changed its mind about the ministerial exception. In 2006, the court held that the ministerial exception had been displaced by the Religious Freedom Restoration Act—the first holding to that effect.[35] But earlier this year, in *Reweyemamu v. Cote*, a different panel of the court expressed doubt about this prior holding and adopted the ministerial exception.[36] *Reweyemamu* expressly declined to rule on the exception's scope, so the breadth of the exception in the Second Circuit has yet to be determined.[37] But the case is illustrative of the lower courts' struggle with First Amendment doctrine in this area.

The existence of differing approaches among the lower courts does not guarantee that the Supreme Court will weigh in on the scope of the ministerial exception, of course, let alone whether and how it would enforce such an exception. Still, should the Court take up the issue, its past cases offer a few clues as to considerations that would likely guide its analysis. Employment discrimination laws are neutral laws of general applicability, and under *Employment Division v. Smith* the Free Exercise Clause does not generally exempt religious groups from complying with such laws—even if compliance substantially burdens their religious exercise.[38] On the other hand, the Court in *Smith* held that interference with free exercise, combined with interference with associational rights, might justify heightened scrutiny of the law at issue.[39] Thus, the Court's views on the scope of *Smith*—which are somewhat unknown, given the presence of two new justices and the possibility of more over the next four years[40]—could have a significant bearing on its approach to the assertion of a free exercise exemption from generally applicable employment discrimination laws.

The Court's view of the scope of "expressive association" rights likewise holds the potential to influence its perspective on the ministerial exception. In *Boy Scouts of America v. Dale*, the Court held that expressive associations such as the Scouts have a First Amendment right to an exemption from applications of public accommodations laws that would require them to retain leaders who advocate moral views contrary to those of the organization.[41] As the Court there put it, "the forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[42] Two justices (Rehnquist and O'Connor) in the *Dale* majority have since left the Court, so it remains to be seen how their successors will view the rule of *Dale*. There is no reason in principle why *Dale's* reasoning ought not apply to religious associations, which enjoy the protection of both the Free Speech and Free Exercise Clauses of the First Amendment. On the other hand, the Court's analysis in *Dale* seems more analogous to the claim-based approach than to the role-based approach.[43]

Finally, a number of Supreme Court decisions have recognized limits on the civil courts' ability to second-guess churches' decisions to remove a minister based on concern that the minister lacks the "fitness to serve."[44] As the Court observed in *Serbian Orthodox Diocese v. Milivojevich*, questions involving "the conformity of [ministers] of the church to the standard of morals required of them" are "strictly and purely ecclesiastical"—and thus beyond civil courts' jurisdiction.[45] These decisions, which involve the scope of "church autonomy" under the Religion Clauses, likewise speak to whether the Court would adopt the ministerial exception and, if so, how broadly it would interpret that exception. As Judge Posner emphasized in *Tomic*, ministerial employment suits draw the state into overseeing the internal affairs of religious bodies on issues that involve subjective spiritual judgments—issues that were simply not present in *Smith*, but have influenced the Court in many other cases involving the autonomy of religious associations.[46]

It remains to be seen whether the Court in coming years will adhere to some form of the ministerial exception, and if it does whether it will view the scope of that exception as including only those claims that directly raise religious questions (the claim-based exception), or hold instead that the special establishment and free exercise issues involved in the regulation of internal church governance deprive federal courts of jurisdiction to hear employment lawsuits brought by ministers against religious employers (the role-based exception). Because of its practical importance and the lack of directly controlling Supreme Court precedent, however, the scope of the ministerial exception is among the areas of religious liberty doctrine that may well come before the Court in coming years. And any Supreme Court appointments that follow the 2008 Presidential election could potentially affect the Court's resolution of the matter.

RLUIPA and the "Substantial Burden" Standard

The 2008 presidential election holds the potential to affect not only the Supreme Court's interpretation of the Religion Clauses of the First Amendment, but also its interpretation of statutes involving the relationship between church and state. One statutory issue with potential for Supreme Court review is the meaning of the phrase "substantial burden" in the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[47] Congress enacted RLUIPA after compiling evidence that the decisions of local zoning boards often interfere in practical ways with the religious exercise of churches and other houses of worship.[48] Consistent with free exercise doctrine prior to *Employment Division v. Smith*,[49] RLUIPA prohibits governments from making any land-use decision that imposes a "substantial burden" on religious exercise, unless that land-use decision is the "least restrictive means" of furthering a "compelling governmental interest."[50]

The federal appellate courts have adopted varied readings of RLUIPA's "substantial burden" requirement. For example, the Seventh Circuit holds that a "substantial burden" is one that renders religious practice "effectively impracticable," while the Eleventh Circuit and others have rejected this approach and adopted a less stringent definition of "substantial burden" based on Supreme Court decisions such as *Sherbert v. Verner*.[51] The definition of "substantial burden" has proven to be outcome-determinative in a number of RLUIPA cases, making this a potential issue for review on certiorari in an appropriate case in the years ahead.[52]

The "Effectively Impracticable" Standard

In *Civil Liberties for Urban Believers v. City of Chicago*, the Seventh Circuit held that a Chicago zoning ordinance requiring that churches seeking to use commercial property for public worship obtain a special use permit was not a "substantial burden" on religious exercise under RLUIPA.[53] There, a group of churches that had been denied permits to use commercial property for religious activities sued the City of Chicago under RLUIPA.[54] The Seventh Circuit rejected the claim, holding that "a land-use regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise—including the use of real property for the purpose thereof within the regulated jurisdiction generally—effectively impracticable."[55] The court reasoned that the difficulties that these churches experienced were no different from those faced by other land users in urban settings such as Chicago, and thus that the challenged ordinance did not violate RLUIPA.[56]

The Second Circuit has likewise adopted a narrow definition of "substantial burden." In *Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York*, the Second Circuit rejected the free exercise claim of a church that wished to replace a historic church administration building designated as a New York City Landmark with a high-rise office tower.[57] After the Landmarks Preservation Committee denied its application, the church brought suit.[58] Reasoning that "[t]he central question in identifying an unconstitutional burden is whether the claimant has been *denied the ability* to practice his religion or coerced in the nature of those practices,"[59] the court held that the city's landmark law did not substantially burden the church's religious exercise because the church could continue to use the old building for its programs and activities, albeit on a smaller scale.[60] Although *St. Bartholomew's* was decided under the Free Exercise Clause before RLUIPA became law, the Second Circuit has not backed away from this narrow definition of "substantial burden" in later cases brought under RLUIPA.[61]

The "Significant Pressure" Standard

The Eleventh and Ninth Circuits, by contrast, have both rejected the Seventh Circuit's definition of "substantial burden." In *Midrash Sephardi, Inc. v. Town of Surfside*, for example, the Eleventh Circuit held that a Florida town's zoning law substantially burdened the religious exercise of two Orthodox Jewish synagogues when it excluded places of worship from a downtown business district.[62] The court stated that

> a "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forgo religious precepts or from pressure that mandates religious conduct.[63]

The court in *Midrash Sephardi* rejected the Seventh Circuit's "effectively impracticable" standard because such a definition of "substantial burden" "would render [RLUIPA's] total exclusion prohibition meaningless."[64] RLUIPA's "total exclusion" prohibition states that "[n]o government shall impose or implement a land use regulation that … totally excludes religious assemblies from a jurisdiction; or … unreasonably limits religious assemblies, institutions, or structures within a jurisdiction."[65] In the Eleventh Circuit's view, the "effectively impracticable" standard is not meaningfully different from a prohibition on totally excluding religious assemblies.[66]

The Ninth Circuit has likewise rejected the Seventh Circuit's "substantial burden" standard. In *Guru Nanak Sikh Society of Yuba City v. County of Sutter*, the court held that Sutter County violated RLUIPA when it twice rejected the Guru Nanak Sikh Society's application for a conditional use permit to construct a building for religious assemblies.[67] "For a land use regulation to impose a 'substantial burden,'" the court explained, "it must be 'oppressive' to a 'significantly great' extent. That is, a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise."[68] The court found this standard more in keeping with RLUIPA than the Seventh Circuit's "effectively impracticable" standard, and held in favor of the Guru Nanak Sikh Society.[69]

If the Supreme Court were to take up the meaning of RLUIPA's "substantial burden" standard, how would it rule? Neither Justice Alito nor Chief Justice Roberts decided any RLUIPA or free exercise cases applying the "substantial burden" standard while they were serving on the courts of appeals, so one cannot look to their lower-court opinions for specific guidance on this question. Most federal appellate courts, however, have looked to the Supreme Court's free exercise jurisprudence to define "substantial burden,"[70] and two of the leading cases in this area, *Sherbert v. Verner* and *Thomas v. Review Board*, define "substantial burden" as follows:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[71]

Further, although RLUIPA does not expressly reference the courts' pre-*Smith* interpretation of the "substantial burden" requirement—which originated in cases arising under the Free Exercise Clause—the statute contains a "broad construction clause" that states: "[t]his chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[72] On the other hand, land use regulation is an area in which local governments customarily receive significant deference, and federal courts are reluctant to sit as "super zoning boards."[73] In all events, given the importance of the issue to churches and municipalities alike, the meaning of RLUIPA's "substantial

burden" standard may receive attention from the Court in the years ahead.

School Vouchers, Blaine Amendments, and the "Pervasively Sectarian" Doctrine

Another significant religious liberty issue that might well land on the Supreme Court's docket in the next few years is the status of state laws excluding "pervasively sectarian" schools from school voucher and scholarship programs. The "pervasively sectarian" doctrine set up an "irrebuttable presumption" that certain private religious schools (historically, Catholic schools) were so thoroughly religious that any government aid they received would necessarily be diverted to religious uses. The Supreme Court did not apply the doctrine consistently, however, prompting criticism from all quarters. As Senator Daniel Patrick Moynihan queried, after observing that the Court had approved books for religious schools but not maps: What would the Court do with an atlas—"a book of maps"?[74]

In *Mitchell v. Helms*, decided in 2000, the Supreme Court effectively abandoned the "pervasively sectarian" doctrine, holding that religious schools formerly excluded by the doctrine could receive secular government aid provided to other private schools.[75] Many states, however, still have laws in place that reflect the requirements of the doctrine and exclude religious schools from secular aid programs available to non-religious private schools.[76]

For example, thirty-seven states still have "Blaine Amendments," which ban state aid to "sectarian" institutions, and which arguably provide an adequate and independent state ground for continuing to exclude religious schools from government aid programs now that the federal constitutional barriers have been removed. Religious schools, parents, and students, however, have begun challenging Blaine Amendments and other exclusionary state laws on federal free exercise and equal protection grounds, and there is reason to think that one of these cases will eventually make its way to the Supreme Court—most likely in the form of a challenge to voucher programs that exclude all religious schools, or in a direct challenge to a state Blaine Amendment.[77]

School Vouchers

In 2002, just two years after rejecting the "pervasively sectarian" doctrine in *Mitchell*, the Supreme Court in *Zelman v. Simmons-Harris* rejected an Establishment Clause challenge to a school voucher program that allowed students to direct aid to private religious schools.[78] Then, in the 2004 case of *Locke v. Davey*, the Supreme Court considered the other side of the coin—whether a state could create a college scholarship program that students could use to fund any course of study at any school, religious or secular, except for programs in "devotional theology."[79] The Court reaffirmed that it would not violate the Establishment Clause to permit students to use their scholarship money to study "devotional theology" in preparation for becoming full-time religious workers.[80] But the Court also held that the Free Exercise Clause did not compel the State of Washington to fund the study of "devotional theology," at least when its basis for refusing to do so was not anti-religious animus but anti-establishment concerns about state tax dollars being spent on programs to train ministers.[81]

The Washington scholarship program at issue in *Locke* treated all schools the same, regardless of their religious affiliation. The Court's decision therefore did not address whether a state could choose to exclude only some or all religious schools from a neutral scholarship program that allowed students to apply state funds towards tuition at private schools. Since *Locke*, the Maine Supreme Judicial Court and the First Circuit have held that a tuition-aid program that excludes religious schools from a voucher program available to non-religious private schools does not violate the Free Exercise Clause.[82] By contrast, the Tenth Circuit recently struck down a Colorado scholarship program that excluded some religious schools but not others, based on whether the schools qualified as "pervasively sectarian" under a multi-part statutory test.[83]

In *Eulitt ex rel. Eulitt v. Maine, Department of Education*, the First Circuit rejected a free exercise and equal protection challenge to a program that allowed parents in school districts without a public high school to receive tuition assistance to send their children to non-sectarian private high schools but not to religious ones.[84] The court held that the program did not infringe free exercise because the program did not prevent parents from sending their children to religious schools using private funds.[85] Citing *Locke*, the Court reasoned that Maine was free to exclude religious schools from tuition assistance as long as it had a rational basis for doing so.[86] Since the parents conceded that their equal protection claims failed under a rational basis test, the First Circuit upheld the program.[87]

In *Anderson v. Town of Durham*, which involved the same program, the Supreme Judicial Court of Maine took the *Eulitt* analysis a step further, concluding that preventing "significant entanglement" between the state and religious schools was a rational basis for excluding religious schools from tuition assistance.[88] The court stated: "After *Zelman,* the State may be permitted to pass a statute authorizing some form of tuition payments to religious schools, but *Locke* and *Eulitt* hold that it is not compelled to do so."[89] The court described Maine's rational basis for excluding religious schools as follows:

> [I]t is possible to envision that there may be conflicts between state curriculum, record keeping and anti-discrimination requirements and religious teachings and religious practices in some schools. These conflicts could result in significant entanglement of State education officials in religious matters if religious schools were to begin to receive public tuition funds and the State moves to enforce its various compliance requirements on the religious schools.[90]

"Parental choice of the school," the court went on to hold, "does not sever the religion-state connection when payment is made by a public entity to the religious school and that payment subjects a school's educational and religious practices to state regulation."[91]

Anderson reflects the Maine court's apparent discomfort with ruling in favor of the parents when the religious schools that would be most directly affected by a change in the Maine program did not join the suit. The lack of a school as plaintiff also played a role in *Eulitt*, where the First Circuit held that the parents, whose children were not enrolled at a private religious school, did not have standing to bring a third-party equal protection claim on behalf of students and officials at

the excluded religious schools.[92] It remains to be seen whether religious schools will join the fray and, if so, whether they will fare any better than did the parents in *Eulitt* and *Anderson*.

In *Colorado Christian University v. Weaver* (*CCU*), by contrast, the Tenth Circuit distinguished *Eulitt* and applied *Davey* and *Mitchell* to strike down a Colorado statute that excluded some, but not all, religious colleges from state scholarship programs.[93] Unlike *Eulitt* and *Anderson*, the plaintiff in *CCU* was Colorado Christian University (CCU), one of the schools excluded by the state law. Under Colorado law, religious schools were evaluated on a case-by-case basis and were excluded from the scholarship programs if they were determined to be "pervasively sectarian" under a multi-part test that required state officials to evaluate various aspects of the schools' religious practices. The Colorado statute was passed in the early 1980s and was intended to conform to then-existing Establishment Clause doctrine.[94]

CCU challenged the validity of the scholarship program after it rejected CCU and a Buddhist university while accepting a Catholic university.[95] In an opinion authored by Judge Michael McConnell, the Tenth Circuit held that the program was unconstitutional because it discriminated among religions and because determining whether a school met the detailed statutory definition of "pervasively sectarian" led to excessive government entanglement with religion.[96] The court read *Davey* narrowly, noting that the majority in *Davey* commended Washington State's scholarship program for extending aid to religious and non-religious schools alike.[97] The court distinguished *Eulitt* because the Maine program excluded all religious schools, whereas the Colorado program required the state to distinguish between merely "sectarian" religious schools and those that were "pervasively sectarian."[98] In a footnote, moreover, the court expressed doubt that *Eulitt* was a proper interpretation of *Davey*.[99]

The Maine exclusion of religious schools at issue in *Anderson* and *Eulitt* is much broader than the Colorado exclusion at issue in *Colorado Christian University*. Thus, the cases do not technically create a circuit split. Still, *Anderson*, *Eulitt*, and *Colorado Christian* demonstrate the enduring effects of the "pervasively sectarian" doctrine on state policy—an issue that is likely to catch the Supreme Court's attention at some point. As the court in *Anderson* noted, when the Maine tuition program was altered to exclude religious schools in 1980s, state officials acted out of a reasonable fear that if they did not do so, they would be sued for violating the Establishment Clause.[100] Yet a post-*Zelman* legislative attempt to reintroduce religious schools to the Maine program failed.[101] Thus, although *Zelman* removed the federal constitutional barriers to restoring the pre-1980 tuition program, political pressure, institutional inertia, and residual anti-establishment concerns nonetheless combined to keep Maine's pre-*Zelman* policy intact. Similarly, Colorado's program continued to apply the "pervasively sectarian" standard, even though the Court's decision in *Mitchell* effectively abandoned it. Taken together, these cases point toward another issue that may, in an appropriate case, come before the Supreme Court in the next few years.

Blaine Amendments

The legal stigma once attached to "pervasively sectarian" schools also persists in the form of Blaine Amendments found in the constitutions of some thirty-seven states. Blaine Amendments ban all state aid to "sectarian schools," a phrase that was widely understood at the time of enactment to refer to Catholic schools. Writing for a four-Justice plurality in *Mitchell*, Justice Thomas observed that

> hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow.... Opposition to aid to "sectarian" schools acquired prominence in the 1870's with Congress' consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that "sectarian" was code for "Catholic." Notwithstanding its history, of course, "sectarian" could, on its face, describe the school of any religious sect, but the Court eliminated this possibility of confusion when, in *Hunt v. McNair*, it coined the term "pervasively sectarian"—a term which, at that time, could be applied almost exclusively to Catholic parochial schools and which even today's dissent exemplifies chiefly by reference to such schools.[102]

Writing in dissent in *Zelman*, Justice Breyer likewise acknowledged that historic anti-Catholicism "played a significant role in creating a movement that sought to amend several state constitutions … to make certain that government would not help pay for 'sectarian' (*i.e.,* Catholic) schooling for children."[103] And in *Locke*, Chief Justice Rehnquist observed that the Washington state constitution "contains a so-called 'Blaine Amendment,' which has been linked with anti-Catholicism."[104] Thus, although the Court's two newest justices (who are Roman Catholic) have not declared their views on the history of the "pervasively sectarian" doctrine or the Blaine Amendments in particular, justices of varying ideological stripes have acknowledged the nativist, anti-Catholic sentiments that originally motivated adoption of the Blaine Amendments.

In response to these justices' expressions of concern about this history, a group of parents whose children attended religious schools challenged South Dakota's Blaine Amendment when it was used to prevent public school busses from transporting their children.[105] The Eighth Circuit ultimately dismissed the suit, *Pucket v. Hot Springs School District No. 23-2*, on standing grounds, but given the presence of Blaine Amendments in so many other state constitutions, similar suits are likely to continue to arise.[106] The Court, which has effectively repudiated the "pervasively sectarian" doctrine and acknowledged the Blaine Amendments' discriminatory past, will ultimately be asked to decide their future.

Religious Displays on Public Property

A final area of religious liberty doctrine that the Court may consider afresh involves religious displays on government property. Although the Court issued two decisions on this topic in 2005, both were closely divided and one did not produce a majority opinion. In *Van Orden v. Perry*, the Court rejected an Establishment Clause challenge to a privately-erected Ten Commandments display on the grounds of the Texas state legislature.[107] *Van Orden* split 4-1-4, however, with Chief

Justice Rehnquist in the majority and Justice O'Connor in dissent (Justice Breyer wrote the controlling concurrence). *Van Orden*'s companion case, *McCreary County v. ACLU of Kentucky*, involved a display of historical documents, including a framed copy of the Ten Commandments, located in a Kentucky courthouse.[108] Justice Souter, writing for a majority that also included Justices O'Connor, Stevens, Ginsburg, and Breyer, held that the display was unconstitutional because its stormy history cast doubt on the government's claim that it had a secular purpose in hanging the display.[109] Now that Chief Justice Roberts and Justice Alito have joined the Court, the alliances that gave rise to the fractured opinions in *Van Orden* and *McCreary County* no longer exist.

Last Term, the Court granted certiorari in a free exercise case brought by a religious group seeking to erect its own religious monument in a Utah city park.[110] The case, *Pleasant Grove City v. Summum*, involves a small religious group that wishes to erect a monument containing the "Seven Aphorisms of Summum" in a city park that already includes a privately erected Ten Commandments monument identical to that considered in *Van Orden*.[111] The Tenth Circuit held that the city's decision to exclude the Summum monument—or, indeed, any private monument, religious or non-religious—is subject to strict scrutiny because public parks are traditional public forums.[112] As *Davey* was to *Zelman*, so *Summum* is to *Van Orden*—*Summum* involves a claim that the Free Exercise Clause requires what the Court earlier (and narrowly) said the Establishment Clause permitted. Time will tell whether the new Court uses *Summum* to clarify the meaning of its plurality opinion in *Van Orden*, or follows *Davey*'s lead, finding room for the city's regulations in the "play between the joints" of the Free Exercise and Establishment Clauses.

CONCLUSION

Our constitutional system of government provides for both short- and long-term change. In November, Americans will elect a President to serve for the next four years. But he, with the advice and consent of the elected Senate, will appoint federal judges—likely including Supreme Court justices—who will sit for life. And these federal judges will be called upon to make decisions that set the constitutional parameters for religious participation in public life for decades to come.

As we have noted, it is difficult to predict with any certainty which establishment and free exercise issues will catch the Supreme Court's attention over the next four years. Nonetheless, we have sought to identify a number of areas of religious liberty doctrine—the ministerial exception to employment discrimination laws, the meaning of the "substantial burden" requirement in free exercise cases involving land use, state aid to "pervasively sectarian" schools, and religious monuments on public property—in which there is a notable prospect of Supreme Court intervention. As the lower courts' varied approaches to these issues shows, religious individuals and groups seeking to participate in various ways in public life will continue to clash in the courts with those who find such participation unnecessary or even harmful.

Endnotes

1 Interest in a presidential candidate's religious views is nothing new in U.S. politics. In the 1800 Presidential election, Thomas Jefferson was criticized for being a "deist," while Jefferson's supporters "attacked the right of the clergy to talk about politics." Douglas Laycock, *The Many Meanings of Separation*, 70 U. Chi. L. Rev. 1667, 1677 (2003) (reviewing Philip Hamburger, Separation of Church and State (2002)).

2 Michael Powell & Jodi Kantor, *A Strained Wright—Obama Bond Finally Snaps*, N.Y. Times, May 1, 2008, at A1 (noting Reverend Wright's "latest explosive comments on race and America" and the disintegration of the relationship between Senator Obama and his former pastor); Neela Banerjee & Michael Luo, *McCain Cuts Tie to Pastors Whose Talks Drew Fire*, N.Y. Times, May 23, 2008, at A17 (quoting Senator McCain, who rejected Reverend Hagee's endorsement and distinguished his situation from that of Senator Obama, saying: "Reverend Hagee was not and is not my pastor or spiritual adviser, and I did not attend his church for 20 years.").

This is not the first presidential election in which controversial clerics have caused trouble for candidates. James Blaine's defeat in the 1884 Presidential election is often linked to anti-Catholic remarks by a Presbyterian minister at one of his campaign rallies, which was said to have alienated the Irish-American vote in the crucial swing state of New York. Peter H. Hanna, Note, *School Vouchers, State Constitutions, and Free Speech*, 25 Cardozo L. Rev. 2371 n.98 (2003); *see also* Edward T. O'Donnell, *F.Y.I., Pastors and Politics*, N.Y. Times, May 11, 2008, at CY2 (same); Mark V. Tushnet, *Decoding Television (and Law Review)*, 68 Tex. L. Rev. 1179 n.4 (1990) (noting that "a [Blaine] supporter's reference to the Democratic party offended Irish-Americans living in New York City, thus contributing to James Blaine's loss to Grover Cleveland in the 1884 presidential election").

3 *See, e.g.*, Michael Gerson, *McCain's New Hope: The Candidate Shines at Saddleback Forum*, Wash. Post, Aug. 18, 2008, at A11 ("What took place under Warren's precise and revealing questioning was the most important event so far of the 2008 campaign—a performance every voter should seek out on the Internet and watch.").

4 *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (5-4 vote sustaining the constitutionality of the participation of religious schools in Cleveland's voucher program); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819 (1995) (5-4 vote holding that the Free Speech Clause prohibits a public university from discriminating against student newspapers with a religious viewpoint in the university's distribution of student funding); Van Orden v. Perry, 545 U.S. 677 (2005) (5-4 vote sustaining the constitutionality of a privately-erected Ten Commandments display on the grounds of the Texas state legislature); McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (5-4 vote invalidating a Ten Commandments display in a county courthouse on the ground that it was erected without a legitimate government purpose).

5 The candidates have given some clues, however. During the Saddleback Civil Forum on the Presidency, Pastor Rick Warren asked each candidate which sitting Supreme Court Justice he would *not* have nominated. Senator Obama responded:

> I would not have nominated Clarence Thomas. I don't think that he was a strong enough jurist or legal thinker at the time for that elevation. Setting aside the fact that I profoundly disagree with his interpretations of a lot of the Constitution.
>
> I would not nominate Justice Scalia, although I don't think there's any doubt about his intellectual brilliance, because he and I just disagree.…
>
> John Roberts, I have to say, was a tougher question only because I find him to be a very compelling person… in conversation individually. He's clearly smart, very thoughtful. I will tell you that how I've seen him operate since he went to the bench confirms the suspicions that I had, and the reason that I voted against him…. One of the most important jobs of, I believe, the Supreme Court is to guard against the encroachment of the Executive Branch on the power of the other branches… [a]nd I think that he has been a little bit too willing and eager to give an administration, whether it's mine or George Bush's, more power than I think the Constitution originally intended.

The Saddleback Civil Forum on the Presidency (CNN television broadcast August 16, 2008), Certified Final Transcript at http://www.rickwarrennews.com/docs/Certified_Final_Transcript.pdf [hereinafter "Saddleback Forum"].

When Pastor Warren asked Senator McCain which justices he would not have nominated to the Supreme Court, he replied:

> With all due respect, Justice Ginsburg, Justice Breyer, Justice Souter and Justice Stevens…. I think that the president of the United States has incredible responsibility in nominating people to the United States Supreme Court. They are lifetime positions…. There will be two, maybe three vacancies. This nomination should be based on the criteria of proven record of strictly adhering to the Constitution of the United States of America and not legislating from the bench. Some of the worst damage has been done by legislating from the bench.
>
> And by the way, Justices Alito and Roberts are two of my most recent favorites…. They are very fine and I'm proud of President Bush for nominating them.

Id.

For Senator McCain's views on judicial philosophy, see The Federalist Society Online Debate Series, Presidential Candidates on Judicial Philosophy: Senator John McCain (Feb. 4, 2008), http://www.fed-soc.org/debates/dbtid.15/default.asp ("My judicial appointees will understand that the Federal government was intended to have limited scope, and that federal courts must respect the proper role of local and state governments…. My judicial appointees will understand that it is not their role to usurp the rightful functions and powers of the co-equal political branches. I will look for candidates who respect the lawmaking powers of Congress, and the powers of the President."). *See also* Senator John McCain, Remarks on Judicial Philosophy at Wake Forest University (May 6, 2008), http://www.johnmccain.com/informing/news/Speeches/5385b2dd-fc8f-4bc9-9fb0-da2e2f1d9f98.htm.

For Senator Obama's views on judicial philosophy, see *The Situation Room with Wolf Blitzer: Interview with Barak Obama* (CNN television broadcast May 8, 2008), at http://transcripts.cnn.com/TRANSCRIPTS/0805/08/sitroom.01.html (praising judicial perspectives which are "sympathetic … to those who are on the outside, those who are vulnerable, those who are powerless, those who can't have access to political power, and, as a consequence, can't protect themselves from being... dealt with sometimes unfairly."). Senator Obama's judicial appointment philosophy is also reflected in his remarks opposing the nomination of Janice Rogers Brown to the U.S. Court of Appeals for the D.C. Circuit. Senator Obama criticized Justice Brown because of her "judicial activism" and insensitivity to the rights of women and minorities. 151 Cong. Rec. S6178–80 (daily ed. June 8, 2005) (Remarks of U.S. Senator Barack Obama on the nomination of Justice Janice Rogers Brown), available at http://obama.senate.gov/speech/050608-remarks_of_us_senator_barack_o/.

6 Saddleback Forum, Certified Final Transcript at http://www.rickwarrennews.com/docs/Certified_Final_Transcript.pdf.

7 Sen. Barak Obama, Remarks on the Council for Faith-Based and Neighborhood Partnerships (July 1, 2008), http://www.barackobama.com/2008/07/01/remarks_of_senator_barack_obam_86.php. While this statement does not directly address the ministerial exception, it outlines Senator Obama's concern, shared by others, that faith-based groups that receive federal funds should not be allowed to consider religion in hiring.

8 *See, e.g.*, 42 U.S.C. § 2000e-1 (exempting from Title VII "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities"); Minnesota Human Rights Act, Minn. Stat. § 363A.26 (2004) (exempting "any religious association, religious corporation, or religious society that is not organized for private profit, or any institution organized for educational purposes that is operated, supervised, or controlled by a religious association, religious corporation" with respect to "limiting admission to or giving preference to persons of the same religion or denomination"); New York Human Rights Law, N.Y. Exec. Law § 296.11 (2008) (exempting "any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization from limiting employment … to persons of the same religion or denomination or from taking such action as is calculated by such organization to promote the religious principles for which it is established or maintained").

9 626 F.2d 477 (5th Cir. 1980).

10 McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972); *see also* Rweyemamu v. Cote, 520 F.3d 198, 206–07 (2d Cir. 2008).

11 McClure, 460 F.2d at 560. *See also* Tomic v. Catholic Diocese of Peoria, 442 F.3d 1036, 1042 (7th Cir. 2006) (stating that regulating the employment relationship between churches and clergy would likely violate both the Free Exercise Clause and the Establishment Clause by interfering with church governance and requiring courts to pass judgment on matters of doctrine).

12 *See* Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979) (declining to apply the National Labor Relations Act to Catholic schools because "[w]e see no escape from conflicts flowing from the [National Labor Relations] Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow").

13 *See* Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 342-43 (1987) (Brennan, J., concurring).

14 *See, e.g.,* Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (sustaining the constitutionality of the Title VII exemption of religious employers, even as to nonreligious positions).

15 Boy Scouts of America v. Dale, 530 U.S. 640, 648 (2000). For an analysis of *Dale* by one of the authors of this article, *see* Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 Minn. L. Rev. 1639 (2001).

16 *See* Nat'l Labor Relations Bd. v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979).

17 *See, e.g.*, *Rweyemamu*, 520 F.3d at 206–07 (Second Circuit); Hollins v. Methodist Healthcare, Inc., 474 F.3d 223, 224–25 (6th Cir. 2007); Petruska v. Gannon University, 462 F.3d 294 (3d Cir. 2006) ("*Petruska II*"); Elvig v. Calvin Presbyterian Church, 375 F.3d 951 (9th Cir. 2004); Alicea-Hernandez v. Catholic Bishop, 320 F.3d 698 (7th Cir. 2003); Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648 (10th Cir. 2002) ("church autonomy doctrine"); Equal Employment Opportunity Comm'n v. Roman Catholic Diocese of Raleigh, N.C.,, 213 F.3d 795 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, 203 F.3d 1299 (11th Cir. 2000); Combs v. Cent. Tex. Annual Conference of the United Methodist Church, 173 F.3d 343 (5th Cir. 1999); Equal Employment Opportunity Comm'n v. Catholic Univ. of Am., 83 F.3d 455 (D.C. Cir. 1996); Scharon v. St. Luke's Episcopal Presbyterian Hosp., 929 F.2d 360 (8th Cir. 1991); Natal v. Christian and Missionary Alliance, 878 F.2d 1575 (1st Cir. 1989). *See generally* Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 Harv. L. Rev. 1776, 1776 (2008) ("religious employers have consistently—and successfully—claimed an exemption from employment discrimination laws").

18 *Tomic*, 442 F.3d at 1039; Schleicher v. Salvation Army, 518 F.3d 472, 478 (7th Cir. 2008); Bryce, 289 F.3d 648; Natal, 878 F.2d 1575 (dismissing minister's suit, which alleged harm to property, breach of contract, and emotional distress, because "we deem it beyond peradventure that civil courts cannot adjudicate disputes turning on church policy and administration or on religious doctrine and practice"; holding that "[w]here, as here, a cleric's property dispute with his church is made to turn on the resolution ... of controversies over religious doctrine and practice, intervention comprises impermissible entanglement in the church's affairs" (internal citation and quotation omitted)).

19 *Tomic*, 442 F.3d at 1039.

20 This should be distinguished from the procedural question of whether the complaint should be dismissed for lack of subject matter jurisdiction. Some circuits applying the role-based approach have dismissed suits under Federal Rule of Civil Procedure 12(b)(1) (lack of subject matter jurisdiction), while others have applied the exception at summary judgment or on Rule 12(b)(6) motions. *See, e.g., Hollins,* 474 F.3d at 224–25 (Sixth Circuit case affirming the 12(b)1 dismissal of clergy member's ADA suit against a religious hospital); *Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d at 799–800, 805 (Fourth Circuit case affirming the 12(b)(1) dismissal of a lay music director's Title VII sex discrimination and retaliation claims against a Catholic diocese); *cf. Shaliehsabou*, 363 F.3d at 301 (Fourth Circuit case affirming summary judgment based on the ministerial exemption in an FSLA case brought by a kosher food inspector against a Jewish nursing home); *Gellington*, 203 F.3d at 1301–02 (Eleventh Circuit case affirming summary judgment based on the

ministerial exception in a retaliation and constructive discharge case brought by a pastor against church); *Combs*, 173 F.3d at 343–44 (Fifth Circuit case affirming summary judgment in a pregnancy and sex discrimination case brought by a pastor against a church).

21 *Id.* at 1039 (quoting *Combs*, 173 F.3d at 350 (internal citations omitted)).

22 *Id.* at 1042.

23 *See, e.g., Schleicher*, 518 F.3d at 477–78 (adopting "a presumption that clerical personnel are not covered by the Fair Labor Standards Act [29 U.S.C. § 201]," which "can be rebutted by proof that the church is a fake, the 'minister' a title arbitrarily applied to employees of the church even when they are solely engaged in commercial activities, or, less flagrantly, the minister's function entirely rather than incidentally commercial").

24 289 F.3d 648 (10th Cir. 2002).

25 *Id.* at 651.

26 *Id.* at 660. The Tenth Circuit also stated:

> The church autonomy doctrine is not without limits, however, and does not apply to purely secular decisions, even when made by churches. Before the church autonomy doctrine is implicated, a threshold inquiry is whether the alleged misconduct is rooted in religious belief … . Of course churches are not—and should not be—above the law. Like any other person or organization, they may be held liable for their torts and upon their valid contracts. Their employment decisions may be subject to Title VII scrutiny, where the decision does not involve the church's spiritual functions.

Id. at 656 (internal quotations and citations omitted). *Cf. Ogle v. Hocker*, No. 06-2236, 2008 WL 2224863 (6th Cir. May 29, 2008) (unpublished) (permitting one bishop to sue another bishop for defamation and intentional infliction of emotional distress based on remarks made in sermons about the first bishop's sexual orientation).

27 462 F.3d 294, 299 (3d Cir. 2006).

28 *Id.* at 307.

29 For example, the district court in *Petruska* found that the ministerial exception precluded it from exercising jurisdiction over any part of the suit, but the panel in *Petruska II* held that the plaintiff's contract claim survived the exception. *Cf.* Petruska v. Gannon University, 350 F. Supp. 2d 666, 682–84 (W.D. Pa. 2004), *with Petruska II*, 462 F.3d at 312.

30 448 F.3d 615, at para. 3 ("Petruska I"), *withdrawn and replaced by* 462 F.3d 294 (3d Cir. 2006) ("Petruska II"). The opinion in *Petruska I* was vacated because the authoring judge (Judge Edward Becker) passed away and another judge belatedly recused himself.

31 375 F.3d at 963.

32 *Id.* at 960.

33 *Id.*

34 *See, e.g.,* Werft v. Desert Southwest Annual Conference of United Methodist Church, 377 F.3d 1099, 1101 (9th Cir. 2004) ("We must decide whether the claim of a minister, seeking damages from his church for employment discrimination based on a failure to accommodate his disabilities, falls within either the ministerial exception first articulated in McClure v. Salvation Army, 460 F.2d 553 (5th Cir.1972), or the theory of Bollard v. California Province of the Society of Jesus, 196 F.3d 940 (9th Cir.1999) (sexual harassment claims fall outside ministerial exception).").

35 *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006). *Hankins* was an age discrimination case in which a panel of the court declined to adopt the ministerial exception and held that the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993) ("RFRA"), applied instead. This approach was sharply criticized by the Seventh Circuit in *Tomic*, 442 F.3d at 1042, which declined to follow *Hankins*' holding and stated that the ministerial exception (a constitutional doctrine) is "a long-established doctrine that gives greater protection to religious autonomy than RFRA," and that "a serious constitutional issue would be presented if Congress by stripping away the ministerial exception required federal courts to decide religious questions." *Id.*

36 *Reweyemamu*, 520 F.3d 198.

37 *Reweyemamu,* 520 F.3d at 209 ("We need not attempt to delineate the boundaries of the ministerial exception here, as we find that Father Justinian's Title VII claim easily falls within them."). The ministerial exception adopted in *Reweyemamu* has been interpreted narrowly by one district court, which denied a church's motion to dismiss under the ministerial exception. Rojas v. Roman Catholic Diocese of Rochester, 2008 WL 2097505, at *8-9 (W.D.N.Y. May 19, 2008) ("In the instant case, the Court has no idea why [the church] terminated Plaintiff's employment, and therefore it cannot determine whether an investigation into Plaintiff's dismissal from employment would involve any entanglement with religious doctrine. To the extent that Defendants are maintaining that a court may never inquire into a church's stated reasons for terminating a minister, that argument appears to have been rejected by *Rweyemamu.*" (internal footnotes omitted)).

38 494 U.S. 872, 884–85 (1990).

39 *Id*. at 882.

40 When Justice Alito was a member of the Third Circuit bench, he wrote an opinion interpreting *Smith* narrowly and holding that a police department was required to accommodate observant Muslim officers who needed to wear beards for religious reasons, so long as the department permitted other officers to wear beards for medical reasons. Fraternal Order of Police v. City of Newark, 170 F.3d 359 (3d Cir. 1999). To our knowledge, Chief Justice Roberts did not decide any Free Exercise Clause issues while a member of the D.C. Circuit bench. Since joining the Supreme Court, he authored the Court's decision in Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006), which unanimously held that U.S. members of a Brazilian-based Christian Spiritist Sect had a statutory right under RFRA to use a hallucinogenic tea called hoasca for religious purposes, notwithstanding the fact that hoasca is a Schedule I substance with no medical use. *Id.* at 425. This decision, however, involved statutory rather than constitutional free exercise analysis. *Id.* at 439.

41 Boy Scouts of America v. Dale, 530 U.S. 640 (2000). For an analysis of *Dale* by one of the authors of this article, *see* Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 Minn. L. Rev. 1639 (2001).

42 *Dale*, 530 U.S. at 648.

43 *See, e.g., id.* at 647 ("[W]e must determine whether the forced inclusion of Dale as an assistant scoutmaster would significantly affect the Boy Scouts' ability to advocate public or private viewpoints.").

44 Serbian Orthodox Diocese v. Milivojevich, 426 U.S. 696, 698, 702 (1976).

45 426 U.S. 696, 714 (1976).

46 *Tomic*, 442 F.3d at1039–40.

47 42 U.S.C. § 2000cc *et seq.*

48 146 Cong. Rec. S7774–75 (daily ed., July 27, 2000) (Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000) ("The right to assemble for worship is at the very core of the free exercise of religion. …The hearing record compiled massive evidence that this right is frequently violated. Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation. … Sometimes, zoning board members or neighborhood residents explicitly offer race or religion as the reason to exclude a proposed church, especially in cases of black churches and Jewish shuls and synagogues. More often, discrimination lurks behind such vague and universally applicable reasons as traffic, aesthetics, or 'not consistent with the city's land use plan.' Churches have been excluded from residential zones because they generate too much traffic, and from commercial zones because they don't generate enough traffic. Churches have been denied the right to meet in rented storefronts, in abandoned schools, in converted funeral homes, theaters, and skating rinks—in all sorts of buildings that were permitted when they generated traffic for secular purposes.").

49 494 U.S. 872 (1990) (holding that, in most free exercise cases, neutral laws of general applicability that incidentally burden religious exercise need not satisfy strict scrutiny).

50 42 U.S.C. § 2000cc ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the

government demonstrates that imposition of the burden on that person, assembly, or institution…is in furtherance of a compelling governmental interest; and…is the least restrictive means of furthering that compelling governmental interest.").

51 374 U.S. 398 (1963). *See* Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 761 (7th Cir. 2003) [hereinafter "CLUB"] (adopting the "effectively impracticable" standard); Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990) (stating, in a pre-RLUIPA free exercise case, that a "substantial burden" was one which denied the claimant the ability to practice his religion or coerced him to engage in a practice contrary to his religion). *Cf.* Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227–28 (11th Cir. 2004) ("We decline to adopt the Seventh Circuit's definition [of 'substantial burden,' but] we agree that 'substantial burden' requires something more than an incidental effect on religious exercise."); *see also* Guru Nanak Sikh Soc. of Yuba City v. County of Sutter, 456 F.3d 978, 988 & n.12 (9th Cir. 2006) (rejecting the Seventh Circuit's "effectively impracticable" standard and stating that under Ninth Circuit precedent "a 'substantial burden' on 'religious exercise' must impose a significantly great restriction or onus upon such exercise.").

52 *See, e.g., CLUB*, 342 F.3d at 761; *Midrash Sephardi*, 366 F.3d at 1227–28.

53 *CLUB*, 342 F.3d at 761–62.

54 *Id.* at 755.

55 *Id.* at 761.

56 *Id.* The Seventh Circuit backed away from the narrow definition of "substantial burden" in Sts. Constantine and Helen Greek Orthodox Church, Inc. v. City of New Berlin, 396 F.3d 895, 900 (7th Cir. 2005). The *Sts. Constantine and Helen* court stated that "[i]f a land-use decision, in this case the denial of a zoning variance, imposes a substantial burden on religious exercise… and the decision maker cannot justify it, the inference arises that hostility to religion, or more likely to a particular sect, influenced the decision." *Id.* at 901. The court held that the burden in that case was substantial, because, although "[t]he Church could have searched around for other parcels of land… or… continued filing applications with the City … in either case there would have been delay, uncertainty, and expense." The court concluded that the fact"[t]hat the burden would not be insuperable would not make it insubstantial." *Id.*

Despite this, the restrictive definition of "substantial burden" reappeared in Vision Church v. Village of Long Grove, 468 F.3d 975, 997 (7th Cir. 2006) (citing *CLUB* and the "effectively impracticable" standard). Another panel applied the more restrictive standard and distinguished *Sts. Constantine and Helen* on the basis that the church in that case had already purchased the property it sought to rezone, and because "[i]n that case the denial was so utterly groundless as to create an inference of religious discrimination, so that the case could equally have been decided under the 'less than equal terms' provision of RLUIPA, which does not require a showing of substantial burden." Petra Presbyterian Church v. Village of Northbrook, 489 F.3d 846, 851 (2007).

57 *St. Bartholomew's*, 914 F.2d at 351–52.

58 *Id.* at 352.

59 *Id.* at 355 (emphasis added).

60 *Id.* at 355–56.

61 *See, e.g.,* Westchester Day School v. Village of Mamaroneck, 386 F.3d 183, 189–90 (2d Cir. 2004) (dismissing a religious school's RLUIPA claim because the zoning board's decision was not a "complete denial" of the school's proposed renovations).

62 *See* 366 F.3d 1214, 1222 (11th Cir. 2004).

63 *Id.* at 1227.

64 *Id.*

65 42 U.S.C. § 2000cc(b)(3).

66 The court went on to rule in favor of the synagogues under RLUIPA's equal treatment provision. *Midrash Sephardi*, 366 F.3d at 1232&33 (applying 42 U.S.C. § 2000cc(b)(1)("[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.")).

67 456 F.3d at 981–85. Also of note is *Navajo Nation v. United States Forest Service*, 535 F.3d. 1058 (9th Cir. 2008). There, several Native American groups challenged the U.S. Forest Service's decision to permit the use of artificial snow in a ski area on a mountain the groups considered sacred. *Id.* at 1062–63. The Native American groups filed suit under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 (1993) ("RFRA"), and the Ninth Circuit held that permitting artificial snow did not "substantially burden" the Native Americans' religious practices under RFRA. The court stated:

Where, as here, there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no "substantial burden" on the exercise of their religion.

Id. at 1063. The court also rejected the Native American groups' effort to rely on RLUIPA caselaw, holding that RLUIPA applies to state and local regulation of private property, not Federal management of national park land. *Id.* at 1077 (noting that even under the "substantial burden" standard in the Ninth Circuit's RLUIPA cases, their claims would fail).

68 *Id.* at 988.

69 *Id.* at 988–90 & n.12, 992.

70 *See, e.g., Guru Nanak Sikh Society*, 456 F.3d at 988 ("The Supreme Court's free exercise jurisprudence is instructive in defining a substantial burden under RLUIPA."); *CLUB*, 342 F.3d at 760 ("Although the text of [RLUIPA] contains no … express definition of the term 'substantial burden,' RLUIPA's legislative history indicates that it is to be interpreted by reference to [the Religious Freedom Restoration Act] and First Amendment jurisprudence.") In contrast to RLUIPA, the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(b)(1), which applies only to the federal government, expressly references "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)."

71 *Thomas,* 450 U.S. 707, 717–18 (1981); *accord Sherbert,* 374 U.S. at 406 & n.6.

72 42 U.S.C. § 2000cc-3(g).

73 *See, e.g., Mikeska v. City of Galveston,* 451 F.3d 376, 382 (5th Cir. 2006) (noting that federal courts "are to resist becoming 'super zoning boards'" but concluding that "[w]e have plainly and consistently held that zoning decisions are to be reviewed by federal courts by the same constitutional standards that we employ to review statutes enacted by the state legislatures." (internal citation and quotations omitted)).

74 124 Cong. Rec. 25661 (1978).

75 530 U.S. 793, 828–29 (2000). Four Justices in *Mitchell* (Thomas, Rehnquist, Scalia, and Kennedy) expressed the view that the "pervasively sectarian" doctrine should be overruled. *Id.* Two Justices (O'Connor and Breyer) adopted reasoning that was narrower, but inconsistent with the doctrine. *Mitchell*, 530 U.S. at 851 (O'Connor, J., concurring in the judgment).

Since *Mitchell*, numerous federal agencies have stated that the doctrine is no longer good law. For example, the Department of Housing and Urban Development stated in 2004 that

> [T]he Supreme Court's "pervasively sectarian" doctrine—which held that there are certain religious institutions in which religion is so pervasive that no government aid may be provided to them, because their performance of even "secular" tasks will be infused with religious purpose—no longer enjoys the support of a majority of the Court. Four Justices expressly abandoned it in *Mitchell v. Helms*, 530 U.S. 793, 825[–]29 (2000) (plurality opinion), and Justice O'Connor's opinion in that case, joined by Justice Breyer, set forth reasoning that is inconsistent with its underlying premises. (*See id.* at 857[–]58 (O'Connor, J., concurring in judgment) (requiring proof of "actual diversion of public support to religious uses").) Thus, six members

Participation in HUD's Native American Programs by Religious Organizations; Providing for Equal Treatment of All Program Participants, Final Rule, 69 Fed. Reg. 62164, 62166 (October 22, 2004) (codified at 24 C.F.R. pts. 954, 1003); *see also* Participation in Department of Health and Human Services Programs by Religious Organizations; Providing for Equal Treatment of All Department of Health and Human Services Program Participants, Final Rule, 69 Fed. Reg. 42586, 42587–88 (July 16, 2004) (codified at 45 C.F.R. pts. 74, 87, 92, 96) (same).

76 *See, e.g.,* Colorado Christian University v. Weaver, 534 F.3d 1245 (10th Cir.2008) (striking down part of a Colorado law that incorporated the "pervasively sectarian" standard).

77 *Colorado Christian University*, 534 F.3d 1245; Pucket v. Hot Springs School District No. 23-2, 526 F. 3d 1151 (8th Cir. 2008).

78 536 U.S. 639 (2002). *Zelman* held that the Ohio primary and secondary school voucher program was constitutional because it was "entirely neutral with respect to religion," provided "benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district" and permitted "such individuals to exercise genuine choice among options public and private, secular and religious," making it a "program of true private choice." *Id.* at 662–63.

79 540 U.S. 712 (2004).

80 *Id.* at 719.

81 *Id.* at 724.

82 Anderson v. Town of Durham, 895 A.2d 944 (Me. 2006); Eulitt ex rel. Eulitt v. Maine, Department of Education , 386 F.3d 344 (1st Cir. 2004).

83 *Colorado Christian University*, 534 F.3d at 1250.

84 386 F.3d 344.

85 *Id.* at 354–55.

86 *Id.* at 356–57.

87 *Id.* at 356.

88 895 A.2d 944.

89 *Id.* at 961.

90 *Id.*

91 *Id.*

92 *Eulitt*, 386 F.3d at 252–53.

93 *Colorado Christian University*,534 F.3d at 1250..

94 *Id.* at 1250–51.

95 *Id.*

96 *Id.*

97 *Id.* at 1255–56.

98 *Id.* at1256.

99 *Id.* at n.4.

100 895 A.2d at 957–58.

101 *Id.* at 949.

102 *Mitchell*, 530 U.S. at 828–29.

103 536 U.S. at 721 (Breyer, J., dissenting) (joined by Justice Stevens and Justice Souter).

104 540 U.S. at 723 n.7.

105 Pucket v. Hot Springs School District No. 23-2, 526 F. 3d 1151, 1153 (8th Cir. 2008).

106 *Id.* at 1163.

107 545 U.S. 677 (2005); *cf.* McCreary County v. ACLU of Kentucky, 545 U.S. 844 (2005) (holding that a Ten Commandments display in a county courthouse was unconstitutional because it was erected without a legitimate government purpose).

108 545 U.S. 844 (2005).

109 *Id.* at 872–74, 881.

110 Pleasant Grove City, Utah v. Summum, 128 S.Ct. 1737 (2008). Oral argument is scheduled for November 12, 2008. Supreme Court of the United States, October Term 2008, Argument Calendar for the Session Beginning November 3,2008,

http://www.supremecourtus.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2008.htm.

111 Summum v. Pleasant Grove City, 483 F.3d 1044, 1047 (10th Cir. 2007).

112 *Id.* at 1050–52.

Telecommunications & Electronic Media

Charting A New Constitutional Jurisprudence for the Digital Age

*By Randolph J. May**

Communications law and policy would be very different today—and more suited to the now generally competitive and converging communications marketplace—if the Supreme Court's twentieth century jurisprudence had been different. As it was, the Court took an unduly restrictive view of First Amendment free speech rights and an overly broad view of the nondelegation doctrine. Thus, the Federal Communications Commission's (FCC) Fairness Doctrine, requiring broadcasters to present both sides of controversial public issues, along with much other program content regulation, was upheld against First Amendment attack. And the FCC, the administrative agency charged under the Communications Act with regulating broadcasters, common carriers, and other communications companies, was given what at times amounted to unbridled discretion to regulate "in the public interest." Arguably, at times the Court also took a somewhat overly narrow view of Fifth Amendment property rights of communications service providers.

Some of the key Supreme Court decisions that established the parameters of twentieth century communications law doctrine run contrary to fundamental tenets of our constitutional culture. This is especially so with respect to free speech rights, which are essential to the robust exchange of ideas in a democracy, and to separation of powers principles, which are necessary to maintain democratic accountability. In light of space considerations, it is the jurisprudence implicating these free speech and separation of powers concerns that will be the focus of this article. A persuasive case can be made that some of the key decisions discussed below ought to have been decided differently at the time as a matter of law. But in some ways, as a matter of communications policy, they at least reflected the tenor of the analog age times. Until the past decade or two, most segments of the communications marketplace generally were characterized as monopolistic or oligopolistic, regardless whether one considered the then-separate "broadcast," "telephone," or "cable" market segments.

But at least since the Telecommunications Act of 1996[1] amended the Communications Act of 1934,[2] the communications marketplace environment has been characterized by increasing competition among a variety of service providers and also by a convergence of the services offered by major service providers. Convergence has meant the blurring of formerly distinct service boundaries that were tied to what I have called "techno-functional constructs" because service classifications were based on technical characteristics or functional features.[3] It no longer makes sense to speak of the "telephone," "broadcast," "cable," or "cellphone" markets in the same way it did only a few short years ago. Telephone companies now provide video and Internet services in addition to voice, cable companies provide voice and Internet services, and wireless companies provide voice, video, and Internet services. Increasingly, people watch "television" programs on their "computer" screens, or even on their mobile devices.

The advent of competition and convergence is attributable in large part to the rapid technological developments accompanying the transition from analog to digital equipment and from narrowband to broadband services.[4] Much has been written about the marketplace transformation wrought by digital age competition and convergence. This is not the place to rehash the marketplace or technological developments which, in any event, often become outdated almost as soon as they are reported. Suffice it to say, for purposes of this essay, that the communications marketplace today bears little resemblance to that which existed at the time major communications law decisions of the twentieth century were rendered by the Supreme Court.

Next I am going to discuss some of these key decisions to show how they have shaped the existing jurisprudence defining the media's First Amendment rights and also the FCC's authority as industry overseer. Then I will suggest that, whatever the merits of these decisions at the time they were decided—and the merits are debatable—either through overruling or distinguishing them, the Court should find ways to chart new jurisprudential directions that will comport more comfortably with important constitutional values.

I. The Broadcast and Public Interest Models: Analog Era Regulatory Regimes

At the heart of twentieth century media regulation discussed here is the "broadcast model" which took firm root before the rise of successive newer media employing various technologies.[5] Under the traditional broadcast model, because the electromagnetic spectrum was considered to be a scare physical resource that could support only a limited number of users at one time, the Communications Act's framers subjected over the air broadcasting to a regime under which the FCC assigns frequencies to selected licensees to operate for limited periods of time in the "public interest, convenience, and necessity."[6] And after initial award, licenses may not be renewed or transferred to a third party without an FCC determination that such renewal or transfer serves the public interest.[7] Thus, as a practical matter, FCC approval is required for mergers or other combinations of communications companies in which the transfer of control of a spectrum license integral to the companies' business is involved.

With the delegation of "public interest" authority in hand, the FCC proceeded to adopt licensing criteria for broadcasters based in part on the content of programming.[8] For example, the agency required licensees to limit the amount of advertising material broadcast[9] and to limit network-produced programs broadcast during prime time.[10]

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There are other examples of broadcast content regulation. Perhaps the most notorious example is the FCC's now-defunct Fairness Doctrine. Over time, the Fairness Doctrine was subject to slightly different formulations, but this FCC statement from 1949 captures its essence as a component of broadcasters' public interest obligations:

> If, as we believe to be the case, the public interest is best served in a democracy through the ability of the people to hear expositions of the various positions taken by responsible groups and individuals on particular topics and to choose between them, it is evident that broadcast licensees have an affirmative duty generally to encourage and implement the broadcast of all sides of controversial public issues over their facilities.[11]

Thus, the Fairness Doctrine required broadcasters to cover controversial public issues and to do so in a balanced way. In the 1980s, the FCC began questioning whether, with the proliferation of additional media outlets, the doctrine was still in the "public interest." Ultimately, it concluded this government-mandated requirement of balanced programming exerted a chilling effect on broadcasters, creating incentives for licensees to broadcast less controversial public affairs programming than otherwise they would.[12] Although the Commission initially concluded only Congress or the courts could get rid of the doctrine, the D.C. Circuit disagreed.[13] With its authority clarified, the FCC acted shortly thereafter to jettison the Fairness Doctrine upon public interest grounds, and its decision was affirmed.[14]

Basing licensing decisions on programming content raises obvious First Amendment issues. But the Supreme Court early on adopted an approach permitting an intrusive government-supervised content regulatory regime applicable to broadcasters. In the landmark case of *National Broadcasting Co. v. United States* (1943),[15] the Supreme Court invoked spectrum scarcity in sanctioning a lesser degree of First Amendment protection for radio and television broadcasters. Upholding the first FCC regulations governing the relationship between new radio broadcasting networks and local affiliates, the Court declared: "Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation."[16] The FCC's "chain broadcasting" regulations prohibited certain practices that restricted the affiliate's discretion to broadcast a non-network supplied program.

Aside from rejecting the First Amendment claim on the basis of spectrum scarcity, the *NBC* case is also notable because Justice Frankfurter's majority opinion gave the FCC such wide berth to regulate "in the public interest." Referring to what he called the "dynamic nature" of the new field of broadcasting, Frankfurter declared the Communications Act's public interest delegation gives the agency "expansive powers."[17] And quoting from his earlier opinion in *FCC v. Pottsville Broadcasting Co.*, Justice Frankfurter proclaimed the public interest standard "is as concrete as the complicated factors for judgment in such a field of delegated authority permit."[18]

In 1969, in *Red Lion Broadcasting Co. v FCC*,[19] the Court employed the spectrum scarcity rationale used in *NBC* to affirm the constitutionality of the FCC's Fairness Doctrine. The FCC had determined that a radio broadcaster had violated the fairness mandate by refusing to provide broadcast time for someone claiming he had been personally attacked in the station's programming. Rejecting a challenge that the doctrine violated broadcasters' free speech rights, the Court responded:

> Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.… Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.[20]

With *NBC* and *Red Lion*, curtailment of broadcasters' free speech rights, justified on the basis of spectrum scarcity, was firmly embedded in constitutional jurisprudence. Despite some periodic teases, the Supreme Court has yet to overturn *Red Lion*,[21] even though today there are thousands more broadcasting stations on the air than in 1969, not to mention the proliferation of new media outlets that did not then exist, such as cable and satellite systems, with hundreds of channels of video and audio programming, and DVDs, iPods, mobile devices, and the Internet.

Although claimed spectrum scarcity has provided the primary justification for the broadcast model's free speech curtailment, it is worth noting that the Supreme Court has employed another rationale. In 1978, in *FCC v. Pacifica Foundation*,[22] the Court, split 5-4, upheld in a narrowly-drawn opinion the FCC's determination that it could sanction a radio station that broadcast George Carlin's "filthy words" monologue, which the agency determined to be "indecent."[23] In rejecting the broadcaster's First Amendment challenge, the Supreme Court, citing *Red Lion*, pointed out that "a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve 'the public interest, convenience, and necessity.'"[24] Then the Court offered two non-spectrum scarcity rationales. First, "the broadcast media have established a uniquely pervasive presence in the lives of all Americans…. Because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[25] Second, "broadcasting is uniquely accessible to children," unlike other forms of offensive expression that "may be withheld from the young without restricting expression at its source."[26]

Even with its emphasis on the "narrowness"[27] of the holding, one in which "context is all-important,"[28] *Pacifica* cemented the notion that broadcasters enjoyed—or suffered—diminished First Amendment rights. As the *Pacifica* Court concluded: "[O]f all the forms of communication, it is broadcasting that has received the most limited First Amendment protection."[29] There you have a concise summary of the twentieth century's jurisprudence under the "broadcast model."

Not much has changed from a jurisprudential perspective since Justice Jackson observed in *Kovacs v. Cooper* that each of the different communications media represents a "law unto itself."[30] On the one hand, any speech restrictions affecting the print media receive very strict scrutiny. In the leading case of *Miami Herald Publishing Co. v. Tornillo*, the Court unanimously held that a Florida statue requiring a newspaper to publish a reply to an editorial criticizing a political candidate violated the First Amendment.[31] So *Tornillo* constituted an unequivocal rejection of the assertion that a *Red Lion*-like "right of access" regime, a fairness doctrine, if you will, should be applied to newspapers in the interest of enhancing the speech rights of newspaper readers.

On the other hand, in *Turner Broadcasting System v. FCC* (1994), the Court sustained a "right of access" mandate against First Amendment challenge in a 5 to 4 decision.[32] Relying heavily on Congress's judgment that "free" over-the-air television service provided by local broadcast stations deserved special economic protection, the majority refused to invalidate, at least on its face, a law requiring cable operators to carry local broadcast signals. The Court acknowledged the "must carry" mandate directly implicated cable operators' free speech rights.[33] Nevertheless, applying an "intermediate level of scrutiny,"[34] and asserting cable operators' possessed a marketplace "bottleneck" that allowed them to play a "gatekeeper" role with respect to programming entering subscribers' homes,[35] the Court rejected the argument that the *Tornillo* print model should govern. It is important to note that in rejecting application of the print model, the Court did not place any reliance on the scarcity rationale at the heart of *Red Lion*, even though it did acknowledge that many communities were one newspaper towns.

Finally, thus far the Court has reviewed content-based restrictions applied to the Internet under a strict scrutiny standard. In the leading case, in *Reno v. ACLU* (1997), the Court struck down on First Amendment grounds a law regulating "indecent" communications on the Internet.[36] In doing so, the Court declared, "unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity."[37]

II. The Way Forward

A Constitutional Jurisprudence for the Digital Era

In today's competitive and converging digital environment, it is time for the Court finally to abandon the scarcity rationale used in *Red Lion* to justify limited First Amendment protection for radio and television broadcasters. In *Red Lion's* place, the Court should articulate a jurisprudence that generally affords the various forms of electronic media the same strict First Amendment protection that newspapers receive under *Tornillo* and that the Internet receives under *Reno*. There will always be special considerations presented by laws or regulations defended on the basis they are intended to protect children from harmful content, and the government's interest in this respect certainly is legitimate. But in today's digital environment, much more so than in the past, parents have available easy-to-use filtering and blocking tools to screen out offensive content, whether such content is delivered via broadcasting, cable, satellite, or the Internet. The widespread availability of such screening tools surely constitutes a "less restrictive alternative" to content regulation that should render *Pacifica's* pervasiveness and uniquely accessible to children rationales largely a historical relic. The *Pacifica* Court was wise at the time "to emphasize the narrowness" of its holding.[38]

B. The Public Interest Standard

Before elaborating more fully on the way forward for a new First Amendment jurisprudence for the electronic media, a word is in order concerning the public interest standard under which so much of the FCC's regulatory activity, including content regulation, takes place.[39] In the leading case of *J. W. Hampton, Jr. v. United States*, the Supreme Court, although rejecting a nondelegation doctrine challenge to a tariff statute, affirmed: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates be directed to conform, such legislative action is not a forbidden delegation of legislative power."[40] Although the Court has not held a statute unconstitutional on nondelegation doctrine grounds since 1935 (when it did so twice),[41] it has continued to maintain that in order not to violate fundamental separation of powers principles there must be an "intelligible principle" set forth in every statute delegating congressional authority.[42]

With respect to the Communications Act's "public interest" delegation, the Supreme Court's jurisprudence is incongruous and unsatisfactory. In *Mistretta v. United States*, Justice Scalia proclaimed in dissent: "It is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded: Except in a few areas constitutionally committed to the Executive Branch, the basic policy decisions governing society are to be made by the Legislature."[43] Nevertheless, he observed, without expressing disapproval, that the "vague" public interest standard has withstood constitutional challenge.[44] And in *Whitman*, now writing for the majority, Justice Scalia once again cited the public interest standard as an indication of how far the Court has been willing to go in sustaining vague delegations.[45]

The fact is that it is difficult, if not impossible, to square the indeterminate public interest standard with the "intelligible principle" requirement to which the Court continues to pay lip service. Shortly after the passage of the Federal Radio Act, upon which the Communications Act was modeled, the agency's first general counsel stated: "'Public interest, convenience, or necessity' means about as little as any phrase that the drafter of the Act could have used…."[46] Another way of expressing, accurately, the same thought is to say the standard means whatever a majority of the agency's commissioners say it means on any given day.

I have argued in a much more extensive treatment that the public interest delegation ought to be held unconstitutional as a violation of the nondelegation doctrine's requirement that Congress lay down an intelligible principle, and I refer the reader to that article.[47] Constitutional law scholar Gary Lawson has called the public interest standard "easy kill number one," as an example of a provision that should be

held unconstitutional on nondelegation grounds.[48] At its next opportunity, the Court should reconsider those cases that have held the public interest standard constitutional. Doing so would force Congress to provide more policy direction for a so-called independent regulatory agency increasingly at sea in the new digital environment. And, in furtherance of the separation of powers principles which underlay the nondelegation doctrine, doing so would make Congress more politically accountable for establishing—or, perhaps, failing to establish—sound communications policy direction.

C. Defining a New First Amendment Jurisprudence for the Electronic Media

Red Lion's scarcity rationale was suspect, in one sense, on the day it was rendered, and in another not long thereafter. As Ronald Coase explained in his famous article ten years before the decision, all resources, not just spectrum, "are limited in amount and scarce, in that people would like to use more than exists."[49] Indeed, the extent to which spectrum is more or less scarce is impacted greatly by the government's regulatory decisions in allocating frequencies. As Christopher Yoo puts it nicely, "because the amount of spectrum available at any moment is itself a product of regulation, any reliance on spectrum scarcity in effect allows the regulation to serve as a constitutional justification for other regulations."[50] As Coase and many other scholars have pointed out, the so-called spectrum scarcity problem underpinning the *NBC* and *Red Lion* decisions would not exist, at least in the way asserted, if Congress did not prohibit the emergence of an enforceable property rights regime. Under a property rights regime, claims concerning spectrum interference would be resolved through marketplace mechanisms or through litigation. Then the notion of spectrum scarcity as a justification for the government to regulate program content under the indeterminate public interest standard would be eviscerated.

Even putting aside the classical Coasian economic argument against spectrum scarcity,[51] the communications marketplace has changed so radically since *Red Lion* was decided that the scarcity rationale should be jettisoned as a justification for continued diminished First Amendment protection. The *Red Lion* Court itself acknowledged the pace of "technological advances," but thought it "unwise to speculate" as to how such advances might alter the scarcity calculus.[52] As a practical matter, however, the fact is that technological advances have rendered obsolete the notion of a scarcity of media outlets. We live in an age of media abundance, rather than an age of scarcity.

Without trying to paint a complete landscape here,[53] consider this. When *Red Lion* was decided in 1969, in addition to the daily newspaper and other print media, most Americans got their news and other information from the over-the-air broadcast stations affiliated with the then three major networks, ABC, CBS, and NBC, and a few other television and radio stations serving their communities. Today, over ninety percent of Americans subscribe to either multi-channel cable or satellite services, on average receiving over a hundred separate information and entertainment channels. There are over three hundred different national program networks from which cable and satellite subscribers may choose. In addition to cable and satellite television, there is now satellite radio, which offers hundreds of information and entertainment program channels. As the FCC said back in 2003, "We are moving to a system served by literally hundreds of networks serving all conceivable interests."[54] Since then, more networks have emerged. The switch-over to digital television will lead to still more over-the-air television program channels. And, of course, today's broadband Internet services are a key development in terms of further enhancing the age of information abundance.

The Roberts Court should seize the first opportunity to chart a new jurisprudential course that provides broadcasters, as well as other electronic media, including cable, satellite, wireless, and broadband Internet providers, with First Amendment protections that are on par with those traditionally enjoyed by the print media. In other words, government content restrictions applicable to the various electronic media, regardless of the technological platform used to deliver content, would be subject to the same strict scrutiny the Court employed in *Tornillo* in holding unconstitutional a newspaper "right of reply" mandate. This would mean, whether explicitly or in some less direct fashion, overturning *Red Lion* and *Turner Broadcasting*. And it would mean declaring that, with the availability of today's various parent-empowering blocking and filtering technologies,—including, for example, the V-chip embedded in every television set—*Pacifica's* "uniquely pervasive" and "uniquely accessible to children" rationales have outlived whatever jurisprudential utility they once may have had as a justification for content regulation.

A few times since *Red Lion*, the Court has indicated receptivity to revisiting the decision. For example, almost a quarter a century ago, in *FCC v. League of Women Voters*, the Court acknowledged, "[c]ritics, including the incumbent Chairman of the FCC, charge that with the advent of cable and satellite television technology, communities now have access to such a wide variety of stations that the scarcity doctrine is obsolete."[55] But on this and other occasions, while taking note of the doctrine's possible obsolescence, the Court has refused to bury it. It is time to do so. The Court could recognize that it erred at the time, and before, in not recognizing that spectrum, in an economic sense, is no scarcer than other resources. Or perhaps more palatably, it could acknowledge that advances have rendered obsolete the "technological scarcity" upon which *Red Lion* was premised. In either case, the Court would acknowledge that the scarcity rationale's obsolescence means that content regulation based on it cannot withstand First Amendment challenge.

And the opportunity to emphasize the limited continuing relevance, if not outright irrelevance, of *Pacifica* may be at hand. In March 2008, the Court granted certiorari to review the Second Circuit's decision holding that a new FCC policy sanctioning "fleeting expletives" is arbitrary and capricious under the Administrative Procedure Act for failure to articulate a reasoned basis for the change in policy.[56] While the court of appeals based its decision solely on administrative law grounds, the government asserts the Second Circuit's decision conflicts with the FCC's authority recognized in *Pacifica*. If the Court does reach the constitutional issue, which it may not, it should use the opportunity to further restrict *Pacifica's* already narrow holding.

As for cable operators, whatever *Turner Broadcasting's* merits when it was decided, cable (and satellite operators) now should receive full First Amendment protection. Recall the Court acknowledged cable operators' free speech rights were implicated by the "must carry" mandate, but nevertheless relied heavily on Congress's judgment that local stations providing "free" over-the-air television deserved special economic protection. Today, with many more media outlets available, and the Internet, the justification, if ever there were any, for providing special protection to local broadcasters at the expense of cable operators' First Amendment rights is even more problematic. In *Turner*, the Court viewed cable operators as possessing a control different in kind than the "monopoly status" position it conceded in *Tornillo* most newspapers enjoyed. The Court stated:

> [T]he physical connection between the television set and the cable network gives the cable operator bottleneck, or gatekeeper, control over most (if not all) of the television programming that is channeled into the subscriber's home. Hence, simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude.[57]

Although it is doubtful that by the mid-1990s cable operators continued to have such dominance as to justify the "bottleneck" or "gatekeeper" tag, it is simply not the case today that they can control the video programming which enters a subscriber's home. Cable competes vigorously with satellite operators providing hundreds of channels, and, increasingly and more ubiquitously, with "telephone" companies that now offer hundreds of channels of programming over high-capacity networks. And the Internet is the source of virtually unlimited information sources, including video, while more and more people watch the latest "television" programs on their "cellphones." *Turner* was a close 5-4 decision. When the occasion next arises, the Court should indicate, in light of the changed communications marketplace, the decision's rationale has been undermined and cable operators are entitled to enjoy the same First Amendment rights as newspapers.

With the revisiting of *Red Lion, Pacifica, and Turner* along the lines discussed above, the Court can establish a new First Amendment paradigm for the electronic media, one that, I would argue, is much more in keeping with the Founders' First Amendment vision. Perhaps it was predictable, maybe even likely, that the First Amendment's protections would be limited substantially during an analog age that tended towards a monopolistic or oligopolistic communications marketplace. But it should be considered predictable, and, yes, even likely, for the Court now to establish a new First Amendment jurisprudence befitting the media abundance of the digital age.

Endnotes

1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.)

2 Communications Act of 1934, ch. 652, § 602(a), 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.)

3 *See* Randolph J. May, *Why Stovepipe Regulation No Longer Works: An Essay on the Need for a New Market-Oriented Communications Policy*, 58 Fed. Comm. L. J. 103, 104-108 (2006).

4 *See id.* at 108-110. As for convergence, in 2004 the FCC explained how the greater bandwidth of broadband networks encourages the introduction of services "which may integrate voice, video, and data capabilities while maintaining high quality of service." IP-Enabled Services, Notice of Proposed Rulemaking, 19 F.C.C.R. 4863, at ¶16 (2004).

5 Other scholars have used this "broadcast model" terminology. For a particularly cogent recent exposition of the role of the "broadcast model," see Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 Geo. L. J. 245 (2003).

6 *See* 47 U.S.C. §§ 303, 307, 309. The literature describing the linkage between the theory of spectrum scarcity and the Communications Act's public interest standard is well nigh inexhaustible. For a good general introduction, with citation to many authorities, see Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcast Programming, AEI Press (1994) (*see especially* Chapters 2, 3, and 6). Two other good introductory articles concerning the theory of broadcast regulation arising from the claim of spectrum scarcity, each with ample citation of authorities, are Glen O. Robinson, "Title I, The Federal Communications Act: An Essay on Origins and Regulatory Purpose," *in* A Legislative History of the Communications Act of 1934, 3 (Max D. Paglin ed., 1989) and Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcasting Spectrum*, 33 J. L. & Econ. 133 (1990).

7 47 U.S.C. §§ 308, 310 (d).

8 *See* Krattenmaker & Powe, *supra* note 6. The entire book concerns the regulation of program content by the FCC. For a description of the comprehensive nature of the FCC's early efforts to regulate broadcast program content, see Federal Communications Commission, Public Service Responsibilities of Broadcast Licensees (1946).

9 Federal Communications Commission, Public Service Responsibilities of Broadcast Licensees 41 (1946)

10 Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in network Television Broadcasting, 23 F.C.C. 2d 382 (1970).

11 Editorializing by Broadcast Licensees, Report of the Commission, 13 F.C.C. 1246, 1251 (1949). See also The Handling of Public Issues Under the Fairness Doctrine and the Public Interest Standards of the Communications Act, Fairness Doctrine Report, 48 F.C.C. 2d 1 (1974). Krattenmaker & Powe, *supra* note 6, have extensive discussion throughout their book on the Fairness Doctrine, including all of Chapter 9 ("The Fairness Doctrine").

12 Inquiry into § 73.1910 of the Commission's Rules and Regulations Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 102 F.C.C. 2d 143 (1985).

13 Meredith Corp. v. FCC, 809 F. 2d 863 (D.C. Cir. 1987) (The Communications Act does not mandate the Fairness Doctrine.)

14 For a description of the doctrine, its impact on broadcasters, and a history of its demise, see Syracuse Peace Council, 2 F.C.C.R. 5043 (1987), *aff'd*, 867 F. 2d 654 (D.C.Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990).

15 NBC v. United States, 319 U.S. 190 (1943).

16 319 U.S. at 226.

17 *Id.* at 219.

18 *Id.* at 216, quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940).

19 395 U.S. 367 (1969).

20 *Id.* at 388, 390.

21 For an early hint that the scarcity rationale might be undermined in the future, see CBS v. Democratic National Committee, 412 U.S. 94, 102 (1973) ("The broadcast industry is dynamic in terms of technological change" so that "solutions adequate a decade ago are not necessarily so now, and those acceptable today may be outmoded 10 years hence." (plurality opinion) and ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*. It has been predicted that it may be possible within 10 years to provide television viewers 400 channels through the advances of cable television." *Id.* at 158, n.8 (Douglas, J., concurring in the judgment.) For a

later hint, see FCC v. League of Women Voters, 468 U.S. 364, 376 n.11 (1984) (We are not prepared… to reconsider our longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required.") See generally Yoo, *supra* note 5, at 245, 284-88 (2003).

22 438 U.S. 726 (1978).

23 For authority, the FCC relied on the statute that prohibits the use of "any obscene, indecent, or profane language by means of radio communications." 18 U.S.C. § 1464.

24 438 U.S. at 748.

25 438 U.S. at 748.

26 *Id*. at 749.

27 *Id*. at 750.

28 *Id*.

29 *Id*. at 748.

30 336 U.S. 77, 97 (1949) (concurring opinion).

31 418 U.S. 241 (1974).

32 512 U.S. 622 (1994).

33 *Id*. at 641.

34 This is not the place, nor is would there be space, to discuss the Court's tortured constitutional "standards" jurisprudence, even with respect to the First Amendment. Suffice it to say that in *Turner* a key to the employment of intermediate rather than strict scrutiny was Justice Kennedy's determination for the majority that the "must carry" requirement was content neutral. In dissent, Justice O'Connor argued the carriage requirement was in fact a content-based restriction because it was directed at "local" broadcast station content.

35 512 U.S. at 656.

36 521 U.S. 844 (1997).

37 *Id.* at 896.

38 438 U.S. at 750.

39 Congress has directed or authorized the FCC to act in the public interest in nearly one hundred separate statutory provisions. *See* Randolph J. May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional*, 53 Fed. Comm. L. J. 427, 429 and Appendix A (2001).

40 276 U.S. 394 (1928).

41 Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

42 See most recently, Whitman v. American Trucking Assn., 531 U.S. 457, 472 (2001).

43 488 U.S. 361, 415 (1989).

44 *Id*. at 416.

45 531 U.S. at 474.

46 Louis G. Caldwell, *The Standard of the Public Interest, Convenience or Necessity as Used in the Radio Act of 1927,* 1 Air L. Rev. 295, 296 (1930).

47 *See* May, *supra* note 39, at 443-452.

48 Gary Lawson, *Delegation and the Constitution*, 22 Reg., No. 2, 1999, at 23, 29.

49 R.H. Coase, *The Federal Communications Commission*, 2 J. L. & Econ. 1 (1959).

50 Yoo, *supra* note 5, at 251. *See also* Thomas W. Hazlett, *The Rationality of U.S. Regulation of the Broadcast Spectrum,* 33 J. L. & Econ. 133 (1990).

51 It is pertinent to point out here that the Court in *Red Lion* based its decision firmly on what it referred to as "a technological scarcity of frequencies," thus allowing it to avoid dealing with the "economic scarcity" argument. *See* 395 U.S. at 401, n. 28.

52 395 U.S. at 397.

53 There is simply not space to do so. The figures presented are well-known, and to the extent they are changing, it is in the direction of more, rather than fewer, media outlets and information sources.

54 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules, FCC 03-127, June 2, 2003, at 48-49.

55 468 U.S. 364, 376, n.11 (1984).

56 *See* Fox Television Stations, Inc. v. FCC, 489 F. 3d 444 (2nd Cir. 2007), *cert. granted*, 128 S. Ct. 1647 (2008).

57 512 U.S. at 656.

Book Reviews

The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom

By Robert A. Levy & William Mellor

*Reviewed by Edwin Meese III**

The authors of *The Dirty Dozen* are leaders of the freedom-based public-interest law movement, Robert Levy as Senior Fellow in Constitutional Studies at the Cato Institute and William Mellor as President and General Counsel of the Institute for Justice. This movement has developed over the past forty years to protect ordinary Americans—law-abiding citizens, property holders, taxpayers, small-business owners, and the like—from the oppression of government overregulation and the attacks of special-interest lawyers funded by the federal government at taxpayers' expense. This gives the two legal scholars a special credibility in the their evaluation of Supreme Court jurisprudence

The American people generally regard the Supreme Court and the justices who sit upon it with high esteem, compared to that with which they hold the political branches—Congress and the Presidency. Surveys, however, show that most citizens know distressingly little about the Court and its activities, save that it emerges from its marble crypt from time to time to intercede in high-profile issues like guns and abortion, often with fractious decisions that carry the weight of the Constitution and so are the law of the land. It is perhaps little surprise, then, that the more the Court and its justices are in the news, the less the public thinks of them. For example, the Court's decision in *Boumediene v. Bush*, dealing with the detention of enemy combatants, immediately preceded a drop in its favorability ratings. In short, when the Court strays beyond the bounds of the Constitution, its rulings are all but indistinguishable from the work of the political branches, and the American people, according to opinion polls, often take a dim view of politicians.

But if they only knew! The public's ignorance of the High Court—(that forty-three percent of American adults cannot name a single justice is a symptom of the failure of civics education)—indisputably shields it from much warranted criticism and disapproval. Most news media reporting on the Court strips the rule of law from the outcome of any case and focuses on the perceived political consequences of the decision. The relationship of judicial opinion to constitutional mandate is virtually ignored.

Fleeting despair gives way to optimism, however, upon reading Robert Levy and William Mellor's *The Dirty Dozen*. Through the recounting of twelve particularly regrettable cases, the book offers an engaging and accessible primer on constitutional law, both how it is and how it ought to be, and takes the Court to task for abdicating its duty to safeguard Americans' rights.

The book opens with *Helvering v. Davis*, in which the Court leaned on the General Welfare Clause of the Constitution to uphold President Franklin Roosevelt's Social Security scheme, a clear violation of the limitation inherent in the carefully enumerated powers of Article I, Section 8. This was not merely bad law, Levy and Mellor explain, but also bad policy. Americans are now saddled with a one-size-fits-nobody retirement scheme that, for so many workers' reliance on it, is all but impossible to shake off or modify in any significant way. It is both too big to fail and too unbalanced to survive in its current form, given lengthening lifespans. Perhaps the Framers had a point when they sought to limit the federal government's reach to those areas where it was likely to be competent, leaving the rest to the states and to the people.

If any doubt remained after *Helvering* that Congress's powers were no longer "few and defined," as the father of the Constitution put it, *Wickard v. Fillburn* dispelled it. According to the *Wickard* court, grain grown at home for personal consumption amounted to interstate commerce, and was therefore susceptible to Congress's regulation, for the effect that it could have on grain prices in the aggregate. For the fifty years following *Wickard*, not one federal law was struck down for exceeding Congress's Commerce Clause power. Only in 1995, in *U.S. v. Lopez* (a federal prosecution for possession of a gun in a local school), followed by *U.S. v. Morrison* (a federal cause of action for individual gender-motivated violence) in 2000, was there a glimmer of a "federalism revolution." But as the authors point out, in 2005's *Gonzales v. Raich*, the Court reverted to its *Wickard* theory, allowing Congress virtually unlimited power to legislate in any matter, no matter how little its national significance.

The Dirty Dozen goes on to give further examples of the Court ignoring constitutional limitation and allowing the vast expansion of governmental power, such as a state's impairing private contracts and the demise of the nondelegation doctrine, which created a whole new body of unelected lawmakers.

The book's focus then shifts from the expansion of government to the erosion of individual freedom, leading with the still-fresh *McConnell v. the Federal Election Commission*, which upheld the contribution limits and other regulations on political speech of the McCain-Feingold campaign finance legislation. This demonstrates the odd judicial logic that political speech should be far less protected than obscenity under current constitutional doctrine.

In an interesting twist of history, one of the book's dozen has already been rendered irrelevant due to the leadership of one of the authors. *U.S. v. Miller*, a 1939 case limiting the rights of gun owners, was pushed aside this year by *District of Columbia v. Heller*, which strongly affirmed the Second Amendment right of individuals to keep and bear arms. Robert Levy was the driving force in this victory, developing the strategy, overseeing the litigation, and directing the massive public information effort that accompanied it.

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Like *Miller*, the next case, *Korematsu*, is also a dead letter today. In *Korematsu v. U.S.*, the Court sanctioned a flagrant violation of civil liberties, declining to strike down the internment of 120,000 Japanese Americans, on the basis of plain legal and factual fictions concerning the orders by the government, the loyalty of those interred, and the "urgent need" of the government. The case stands today as a warning to any Court too inclined to ignore civil liberties in a time of war. I must disagree, however, with Levy and Mellor's invocation of *Korematsu* to protest the Bush Administration's prosecution of the war on terrorism and specifically the treatment of Jose Padilla, who, unlike those interred during World War II, was detained with individualized evidence of ties to hostile foreign powers. Despite the difficulties and complexities of the war against terrorism, the Bush Administration has largely succeeded in the constitutional balancing of civil liberties and security.

At this point, the book turns to the topic of the taking of private property by government, an area where William Mellor is the visionary. In a trio of cases, the authors lament government's Court-granted power to seize the property of the innocent, take homes to give the land away to developers, and destroy property value through regulation without providing any compensation. Particularly significant is *Kelo v. City of New London*, which has rejuvenated a political movement, largely due to the prowess of Mellor's Institute for Justice, which served as counsel and public relations for the plaintiff. The taking of a private home and giving the property to a private developer, supposedly to increase tax revenues, outraged the public and resulted in new legislation in many states to limit property takings to actual *public uses*, as the Fifth Amendment requires.

U.S. v. Carolene Products is another case concerning individual's economic rights. It illustrates how special interests are able to capture the legislative process and direct it from the general welfare to their own benefit, a particular concern of James Madison in crafting the Constitution. In *Carolene*, the Court gave its sanction to this mischief, with the result that today "special interest legislation and protectionist laws stifle or prohibit outright the pursuit of productive livelihoods in a vast array of occupations ranging from African hair braiders to casket retailers to taxicab drivers."

The last of the dirty dozen unfortunately sanctions government discrimination on the basis of race in the name of somehow furthering equal protection, another instance of the Court turning a clear constitutional mandate on its head. *Grutter v. Bollinger* concerned the use of racial preferences by a public university to advance "diversity." Levy and Mellor rightly label this reasoning "pure sophistry" to allow a *de facto* quota, thus authorizing a public institution to engage in racial discrimination.

So that's the twelve, and a well-chosen group it is, but is it *the* dirty dozen? Levy and Mellor are honest from the start that their approach to selecting cases is bounded, focusing on those that violated the principles of limited government and have an ongoing and negative social impact. The reader may well think of other cases that might have been included. This is a target-rich environment.

Certain cases are conspicuous by their absence. *Roe v. Wade*, for example, is tucked into an appendix. Though the decision is "wrongheaded," the authors do not count *Roe* among the worst cases because the Court's result "may well be the middle ground that many states would adopt." This is an unsettling conclusion that diminishes the importance of the rule of law and fidelity to the constitutional text across the board.

My minor criticisms do not detract from an excellent book that deserves, and I hope will receive, wide public attention and readership. And I hope as well that it will prompt others to consider their own "dirty dozen" lists and, in that way, be the first in a series that holds the promise to give our sometimes esoteric constitutional debates greater practical and public relevance.

The Rise of the Conservative Legal Movement: The Battle for Control of the Law

By Steven M. Teles

*Reviewed by Daniel H. Lowenstein**

In the penultimate chapter of this excellent book, Steven M. Teles contrasts the prevailing moods at two public interest law firms which he regards as among the top achievements of the conservative legal movement (or CLM, as I shall abbreviate it). At the Center for Individual Rights (CIR), the founders "d[o] not believe that history [i]s on their side," liberalism having "already corrupted the fundamental forms of law, politics, and society." This "dark, sardonic" mood contrasts markedly with the "sunny optimism" at the Institute for Justice (IJ).

Throughout the book, Teles seeks to cast the CLM as a success story, but some conservative readers may conclude that there is more of CIR's darkness than of IJ's sunshine in the big picture. True, Teles describes impressive, even remarkable achievements, but "The Battle for Control of the Law" is still a pretty one-sided affair.

Teles' determination to tell a success story may account for the sense that there are two books between these covers. The first, consisting primarily of the first two chapters, contains astute observations on changes in American policymaking processes, illustrated in Teles' illuminating description of the ascendancy of what the author calls the liberal legal network. The second provides an account of the failure of early conservative legal ventures in the 1970s, followed by with detailed descriptions of what Teles regards as the movement's greatest successes: the Law and Economics movement, the Federalist Society, and the aforementioned public interest law firms, CIR and IJ.

Teles intends to unify the book by showing, in the chapters describing these different aspects of the CLM, how conservatives responded to the strategic and tactical demands of the American political system, adapting the strategy and tactics of the liberal legal network to the conservatives' own situation. But he succeeds only partially, as long stretches go by with few or no

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references to the background strategic and tactical questions, so that it is difficult to glean a systematic sense of which of the challenges described in the first chapter were met by the CLM and which were not.

Why does this occur as a consequence of Teles' decision to cast the CLM as a success story? The book consists of four major parts: (1) the nature of the policymaking system, and the challenges for any movement seeking influence in that system; (2) an account of how the liberal legal network met these challenges and achieved predominance; (3) a description of the CLM's false start in the 1970s; and (4) the successes of the new approaches in the 1980s and 1990s. But these successes, though marked, were also limited. Many of the challenges the CLM could not overcome at all, and in very few areas did their achievements come close to matching those of the liberal legal network. Teles does not conceal these limitations, but keeping them in the background makes it difficult for him to make systematic connections with the more theoretical framework established in the first chapter and illustrated by the rise of the liberal legal network.

A good concluding chapter helps to mitigate this weakness in the book, which in any event is greatly outweighed by the strengths of each part of the book considered on its own merits. The first, more theoretical part should interest anyone interested in how groups have come to influence public policy in contemporary American government, even those with no particular interest in the conservative movement.

The most important background circumstance to this story was the "increasing importance of ideas and professional power [which] led to a decline in the power of elections to cause comprehensive change, especially in highly entrenched political domains." The fracturing of power made responsibility for policy "hard to affix," as the most effective forms of political participation were diverted into "particularistic, piecemeal forms." As elections declined in importance, influence increasingly came to depend on "expert opinion, issue framing, and professional networks." Political parties did not fade away, but much of their competition now occurs "in the realm of elite organizational mobilization." One consequence was that, although Republicans won most presidential election starting in 1968, conservatives saw little policy movement in their direction in many fields, including law.

These ideas are richly elaborated, especially in Teles' account of the rise of the liberal legal network. Space does not permit an adequate summary here, but Teles shows that a great many streams flowed into what became a surging river. Among these were: the development of a compelling liberal legal ideology, coming out of the legal realist movement of the mid-twentieth century and bolstered by a pervasive sense of idealism generated by certain decisions of the Warren Court, especially *Brown v. Board of Education*; the effective work of the NAACP Legal Defense Fund, the American Civil Liberties Union, and eventually a host of liberal litigating organizations; the conversion of professional organizations, especially the American Bar Association, from conservatism to liberalism; heightened attention to Legal Aid, culminating in the legal services program, which was the most effective and enduring of the programs associated with the War on Poverty; the eventual and nearly total predominance of liberalism and more extreme forms of leftism on law school faculties; and the massive intervention of liberal philanthropy, most importantly by the Ford Foundation.

Teles next describes the rise of regional, conservative "Legal Foundations," persuasively explaining that most of these initiatives failed because, among other reasons, they lacked a well-founded sense of mission. Conservatives had not yet developed ideas that could compete with the well-developed liberal jurisprudence that was, by then, prevalent. The donors to these early conservative public interest firms lacked sophistication. They included conservative foundations that understood the importance of influencing the course of law, but did not yet have the experience from which they could derive effective methods. Other important sources of funds presented particular difficulties. To appeal to individual donors in fundraising mailers, the organizations found it necessary to devote many of their resources to filing amicus briefs that usually had little influence but permitted the firms to claim that they were engaged in numerous cases. Corporate donors favored their short-term goals over basic principles shoring up the market system.

Teles finally turns to the success stories: Law and Economics, the Federalist Society, CIR, and IJ. Most readers, including those who have been closer to the events in question than the present reviewer, will learn a great deal from Teles' narratives. Nor are they merely descriptive. Although they are not as closely tied to the framework established in the early chapters as they might be, they are filled with illuminating analysis and insight.

Anyone, liberal or conservative, who reads these chapters is likely to admire the earnestness, resourcefulness, persistence, and prudence that characterized the pioneers of the Law and Economics movement, the Federalist Society, and the public interest firms. Teles rightly gives equal attention to the managers of conservative foundations who learned the lessons of experience and gave these pioneers indispensable encouragement and support. Law and Economics gave conservative lawyers and, especially, legal academics a solid ideological and analytical foundation. Its reputation has risen, partly through the remarkable efforts of Judge Richard A. Posner, from eccentric to still controversial but unquestionably respectable. The Federalist Society created intellectual ferment among conservative lawyers and law students, gave conservative legal perspectives respectability by reason of the intellectual integrity and balance of the exchanges the Society sponsored, and, not at all incidentally, catalyzed the creation of networks of conservative lawyers that would improve their ability to handle cases efficiently, boost morale, and facilitate recruitment of conservative lawyers for the judicial and executive branches of government when Republicans were elected. CIR and IJ litigated and won some notable cases and, occasionally, were able to imitate their liberal peers in turning even a litigation loss into an occasion for effective political action. *Kelo* is an important example.

These achievements more than justify Teles' title. But if we are to assess his subtitle dispassionately ("The Battle for Control of the Law"), we had best bear some facts in mind. The

median faculty member at nearly every American law school is a very liberal Democrat. The 40,000 student and lawyer members of the Federalist Society are dwarfed by the 410,000 members of the American Bar Association. The American Association for Justice (previously named the Association of Trial Lawyers of America, with 65,000 members) is a major source of Democratic Party campaign funds. If you dropped CIR and IJ into a pot containing all the liberal litigation groups, you would never find them again.

Teles is aware of these disparities, but his accentuation of the positive causes him to seek the causes of achievements much more than the causes of the limits to those achievements. True, he emphasizes from the beginning the particular difficulties that a "countermobilizing" movement encounters. In his concluding chapter he argues that skillful entrepreneurs, always in too-short supply to exploit political opportunities, are likely to leave "big bills left on the sidewalk." The CLM's second generation, particularly CIR and IJ—thanks in part to the intellectual and networking infrastructure created by Law and Economics and the Federalist Society—was able to scoop up bills left by the first generation, the regional legal foundations. But Teles' metaphor leaves open the question: Could the first generation have picked up pennies and the second generation dollar bills, while there are hundred-dollar bills on the sidewalk across the street? The structure of his book does not encourage him to pursue that important question.

It may be relevant here to mention the one significant substantive quarrel I have with Teles' book. In contrast to his two excellent chapters on Law and Economics, there is barely any mention of concepts such as originalism and textualism, ideas that loom large in conservative legal discourse. This is not by coincidence. More than once he remarks that one of the lessons learned by the successful second generation of the CLM was to abandon concepts such as "judicial restraint" and "strict construction." He equates pursuit of judicial restraint with passive defense of government, contrasted with libertarian-minded litigators aggressively contesting government action. These categories and contrasts greatly simplify very complex relationships, as Teles in effect acknowledges in passing when he concedes that IJ's litigation in defense of school choice was at once a defense of government action and pursuit of a libertarian objective.

Admittedly, I have been a strong believer in judicial restraint for the better part of four decades. It is one of the Federalist Society's best qualities that readers of this journal are sure to include partisans of judicial restraint and libertarians alike. But my personal preferences and yours apart, there are two reasons to regret Teles' one-sided account of the intellectual thrust of the CLM.

First, his claim that the CLM has rejected judicial restraint is simply not true. As mentioned, concepts such as originalism and textualism are basic terms of conservative discourse that have probably penetrated general legal thinking to a degree comparable to that of Law and Economics. A recent article in this journal opened with this pronouncement: "Judicial pragmatists have implicitly ceded the moral high ground to more restrained approaches to constitutional interpretation." (Raymond J. Tittmann, *Judicial Restraint and the Supreme Court: Phillip Morris USA v. Williams*, 8 Engage: The Journal of the Federalist Society Practice Groups 3, 109.) There followed a short but thoughtful discussion of the nature of judicial restraint and the degree to which various Supreme Court conservatives have lived up to it. Such a discussion is hardly unrepresentative of contemporary conservative legal discourse. Thanks in part to the efforts of judges like Antonin Scalia, Frank Easterbrook and numerous other scholars, no one, no matter how liberal—or, indeed, no matter how libertarian—can teach a course in constitutional law nowadays without devoting considerable attention to originalism—or, for that matter, a course in statutory interpretation without devoting even more attention to textualism.

Second, there are indications in Teles' book that libertarian ideas and even the libertarian temperament may make solving some of the CLM's problems especially difficult. In an interesting passage he notes that a "legal movement needs to have an informal division of labor, with a substantial pool of lawyers willing to engage in fairly routine but often labor-intensive trial work that applies existing precedents." The CLM, Teles says, has its share of generals—lawyers willing and able to bring the glamorous, visible case—but it is short on troops ready to follow up. One example evident to me as a faculty member at UCLA is the paucity of legal action to enforce Proposition 209, the anti-preferences initiative. If Proposition 209 were a liberal measure, the University of California would have had to triple its litigation budget. As Teles acknowledges, the CLM's problem "may be inseparable from the virtues of the more libertarian (as opposed to religious) side of conservatism: a belief system that does not celebrate an ethos of service, humility, or collective endeavor is likely to be hampered when movement activities call for just those attributes." Later, Teles observes that CIR and IJ have depended on what he calls a "new class" of conservative lawyers, motivated by ideological and cultural goals. Again, one may doubt whether Law and Economics will, by itself and in the long run, produce such a cadre in sufficient numbers. Contemporary conservatism is famously a "fusion" between libertarianism and what is inadequately called traditionalism. I do not know whether there are hundred-dollar bills on the sidewalk waiting for conservative legal entrepreneurs to find them, but if there are, I doubt they will be found by a movement that abandons half of its impetus.

The Rise of the Conservative Legal Movement can be criticized for certain omissions, namely full consideration of the CLM's non-libertarian modes and the limitations to its success. But in the interest of fairness and accuracy we had best conclude by heeding Oscar Hammerstein's advice, offered by him in the context of reflections on the exceptional nature of the human female: "It's a waste of time to worry over things that they have not, we're thankful for the things they got." Serious students of American politics, government, law, and conservatism will be thankful for the things Teles' book has got.

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