

# TEXAS LAW REVIEW

presents

**THE SPRING 2010 LAW JOURNAL  
WRITE-ON COMPETITION**



IT IS VERY IMPORTANT TO READ THESE INSTRUCTIONS BEFORE YOU BEGIN.

YES, ALL OF THEM.

NO REALLY, ALL OF THEM.

## A. SUBMITTING THE ESSAY

- **DEADLINE:** Your essay must be postmarked or submitted in person by **5:00 p.m., Wednesday, June 2, 2010**. You may hand-deliver or mail your essay to the offices of the TEXAS LAW REVIEW (Townes Hall, 4.138). Late papers will not be accepted. If you choose to mail in your essay, please mail to:

TEXAS LAW REVIEW  
Write-On Competition  
The University of Texas School of Law  
727 East Dean Keeton Street  
Austin, Texas 78705

- **COPIES:** Submit three copies of your essay to the TEXAS LAW REVIEW. Submit one additional for **each** of the other journals in which you are interested. All essays submitted will be considered by the TEXAS LAW REVIEW.
- **IDENTIFICATION:** Put (1) your University of Texas EID and (2) the year of law school that you just completed (first year or second year) **on a separate page stapled** to the front of **each** copy of the essay that you submit. **Do not** put your name anywhere other than on the forms that follow these instructions.
- **PREFERENCE SHEET:** Turn in your preference sheet with your essay. Do not include the TEXAS LAW REVIEW on your preference sheet. The TEXAS LAW REVIEW will extend an offer of membership to any candidate whose essay is chosen through its selection process. Accordingly, a candidate might receive an offer from the TEXAS LAW REVIEW and from other journals.
- **GPA RELEASE & CONTACT FORMS:** Turn in your TEXAS LAW REVIEW GPA Release Form and Contact Form with your essay. This form is the only link between your essay and you. Therefore, it is important that your information is accurate and **legible**. If you turn in your essay by hand, we will have separate boxes for essays and GPA Release Forms. If you mail in your essay, your GPA Release Form will be separated from your essay as soon as we open the envelope. **Do not** include your name or any other personal information anywhere else inside the envelope or on your essay. Please note that if you apply to the AMERICAN JOURNAL OF CRIMINAL LAW, the TEXAS ENVIRONMENTAL LAW JOURNAL, the TEXAS INTERNATIONAL LAW JOURNAL, the TEXAS JOURNAL ON CIVIL LIBERTIES AND CIVIL RIGHTS, or THE REVIEW OF LITIGATION, you need to fill out their GPA release forms as well.
- **OPTIONAL INFORMATION FORM:** As part of the application process, TEXAS LAW REVIEW collects **optional, anonymous** information about the individuals participating in the write-on process. If you turn in your essays by hand, we will

have a separate box for this information, which will not be connected with your application in any way. If you mail in your essay, please send us this form in a separate envelope to the address listed above.

- **EMERGENCIAS:** In the event of extraordinary circumstances, write-on candidates may call Omar Ochoa at the TEXAS LAW REVIEW office (512.232.1281) to negotiate *possible* extensions.

## B. HONOR CODE

- The Write-On Competition is conducted pursuant to the Honor Code. A student may be disqualified by a journal or expelled from the Law School (yes, it has happened before) for violating a rule of the Write-On Competition. Each journal may determine independently whether a candidate has violated a rule of the Write-On Competition.
- **THE ESSAY THAT YOU HAND IN MUST BE THE PRODUCT OF YOUR EFFORTS ALONE.** It is a violation of the Honor Code to solicit or use advice on how to write your essay. This includes help with structure, style, argument, or proofreading. It also includes reading essays from previous years, except for the sample answers provided on the TEXAS LAW REVIEW write-on web page. **Under no circumstances** may you discuss the contents of this packet with other students participating in the Write-On Competition.
- **NO ONE MAY CONDUCT ANY OUTSIDE RESEARCH. *Your essay should be based on the packet materials alone.*** You may make passing reference to history, current events, or other information not included in the packet. You may rely on basic legal knowledge acquired during the first year of law school to support your argument. However, your essay should focus on the packet sources. Treat the packet as a self-contained “universe of discourse.”
- You may consult dictionaries (including legal dictionaries), thesauri, and style manuals, as well as their electronic equivalents, such as a word processor’s spell-checker.
- If the packet mentions a case or source that is not included as a primary source within the packet, you may discuss it in your essay, but you may not investigate the actual source. If you cite a source that appears within another source, make clear in which packet source it appears.

## C. CITATION

- **REQUIRED FORM:** When citing an authority, refer to the author’s full name as given, title, packet page number, and column in which the material you are citing appears. These citation forms are simple and are intended to be so. Attempts at a more complicated or “correct” citation form will not be rewarded. Your ability to follow these citation instructions will be one basis for evaluating your essay. Use of the following citation forms is **mandatory**.

- **PLACEMENT:** You must cite authorities with footnotes. Do not place citations within the body of your essay. Footnotes should be formatted in 12 point font.
- **Id.:** You may—but are not expected or required to—use “*id.*” if you repeat the same citation. Be careful in your use of *id.*, as incorrect usage will hurt your essay score.
- **SAMPLE FORMATS:**
  - **Cases:** *Bush v. Gore*, at 2, col. 1.
    - Note: If, and only if, the case being cited appears in two different courts, provide the court name unabbreviated following the case name. For example: *Bush v. Gore*, Supreme Court of the United States, at 2, col. 1.
  - **Concurring/Dissenting Opinions:** *Johnson v. Myers* (Scalia, dissenting), at 2, col. 2.
  - **Statutes:** 17 U.S.C. § 1221, at 7, col. 1–2.
    - Note: With other statutes not in the United States Code, do not abbreviate the name of the code, and provide all given subdivisions. For example: Tamil Nadu Civil Code, Part X, art. 17, § 51, at 62, col. 1.
  - **Constitution:** U.S. CONST. art. I, § 8. U.S. CONST. amend. XIV § 1.
  - **Periodicals:** Alex Kozinski, *In Praise of Moot Court—Not!*, at 23, col. 1.
    - Note: Do not provide titles for authors, like judge, justice, or doctor.
  - **Dictionary:** BLACK’S LAW DICTIONARY, legal formalism, at 69, col. 1.
  - **Restatements:** RESTATEMENT (SECOND) OF PROPERTY § 39, at 75, col. 1–2.
    - Note: This sample shows how to cite a span of two columns on the same page.
  - **Federalist Papers:** FEDERALIST NO. 38, at 83, col. 1.
  - **Book:** RICHARD A. POSNER, HOW JUDGES THINK, at 56, col. 2–57, col. 1.
    - Note: This sample shows how to cite a span of two pages.
  - **Movie Quotation:** AGUIRRE, THE WRATH OF GOD, at 40, col. 1.
  - **Television Show Quotation:** GILMORE GIRLS, at 56, col. 1.
  - **Song:** Ramones, *Judy is a Punk*, at 73, col. 2. The The, *True Happiness This Way Lies*, at 27, col. 1.
  - **Quotation:** Richard A. Posner, at 95, col. 1.
  - **Other:** [Author’s Name], [*Title*], at 101, col. 2.
- **AUTHORS:** If an article has more than one author, cite them all: Carl Bernstein & Robert U. Woodward, *FBI Finds Nixon Aides Sabotaged Democrats*, at 14, col. 2. Huebert Huey Duck, Deuteronomy Dewey Duck & Louis Louie Duck, *Do Not Try Swimming in Pennies: Copper and Zinc Are Not Liquid at Room Temperature and Coinage Is Quite Filthy*, at 25 col. 1. Provide authors in the order presented in the title, not alphabetically.
- **TITLES:** If a title of an article is long and you wish to shorten it, feel free to do so. Do not cite the full title and use “[hereinafter]”—simply shorten the title as you wish in your first citation of the source and in all subsequent citations. You must remain consistent in your use of the shortened title. Likewise, reasonable abbreviations of individual words in titles and case names are perfectly fine—but, again, be consistent.

## D. AESTHETICS

- **LENGTH:** Your essay must not exceed eight (8) double-spaced pages. Shorter essays are perfectly acceptable.
- **FONT:** 12-point, Times New Roman font is required.
- **PAPER:** The copies of your essay must be submitted on white 8½" × 11" paper.
- **MARGINS:** Use one-inch margins on all sides. Page numbers should be centered at the bottom of each page and can fall within the bottom one-inch margin.

## E. APPROACHING THE ESSAY

- **THERE IS NO “QUESTION PRESENTED.” THERE ARE NO “RIGHT” ANSWERS.**
- The packet consists of a diverse collection of materials. We **do not** expect or encourage you to use all, or even most, of the materials in the packet. Attempts by previous candidates to incorporate the entire packet into the essay have been, on the whole, unsuccessful. Many of the best essays in previous write-ons have been narrowly focused, concentrating on only a few sources. If you have a strong argument about a single source, feel free to use only that source.
- These materials are intended to provoke critical thought; therefore, you should not simply summarize the cases. Your essay should reflect command of the materials you use, as well as very careful reasoning in the development of a thesis and supporting arguments. We repeat, there are no “right” answers! The packet is designed to encourage candidates to shape creative legal arguments.
- There is no significance to the order of the materials in the packet.
- Edit your essay. Organization and clarity of thought are crucial to a successful essay, as are good grammar and style.
- Do not feel hesitant about criticizing court decisions if you believe the court’s analysis is flawed. Remember that some of the court decisions and statutes in the packet may no longer be good law.
- The materials in the packet have been heavily edited. Most footnotes and case citations have been omitted without indication. Dissenting and concurring opinions have often been omitted without indication, as have portions of some majority opinions. You may not investigate or refer to omitted portions of these sources. We realize that the universe of materials that may be accessed is closed, so do not worry that there may be other materials that inform your argument. Make sound, creative, interesting **legal** arguments using the sources, and you will be fine.

- **Do not be intimidated by the length of the packet (or these instructions)!** We include a variety of materials in the packet so that you can write on a wide variety of issues. Do not feel compelled to read everything in the packet.

## F. NOTES ON THE TEXAS LAW REVIEW

- The Write-On Competition is a mandatory part of the membership selection process for the TEXAS LAW REVIEW. The TEXAS LAW REVIEW will extend ten offers of membership based **solely** on the strength of essay submissions. For the remaining candidates, the quality of the essay is often the deciding factor.
- Grading of the essays is completely anonymous; no grader will know your name or your grades. Further, all essays are graded by three independent graders, with the aim of reducing grading disparities. Essay scores and grades are tracked using an anonymous identification system until membership offerees are selected. Then and only then will identification numbers be matched up with names. TEXAS LAW REVIEW will only consider applicants that, as of the end of the Spring 2010 semester, have earned enough credit hours to be classified under the 2008–2010 UT Law School Catalog as “second-year” students or higher (29 semester hours of credit or more).
- Approximately fifty applicants will be offered membership on TEXAS LAW REVIEW. We will try to notify new members early in the second week of July. Those candidates who accept an offer of membership on the TEXAS LAW REVIEW will be required to attend a two-day orientation/training session on **August 28<sup>th</sup>–29<sup>th</sup>** (the Saturday and Sunday after Fall classes start), to attend a cite-checking session on either **September 4<sup>th</sup>** (Saturday) or **September 5<sup>th</sup>** (Sunday), and to fulfill all other obligations of membership.

## G. FINAL REMARKS

- The packet should contain 147 numbered pages exclusive of the instructions, the forms that follow them, and the Table of Contents. If your packet is missing any pages, please contact the offices of the TEXAS LAW REVIEW immediately. You may also [download](http://www.utexas.edu/law/journals/tlr/membership/writeon) the packet at <http://www.utexas.edu/law/journals/tlr/membership/writeon>.

**Good luck and  
have a wonderful summer!**

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## Journal Preference Sheet

Please place an “X” next to the journals that you would like to consider your application. You may select up to four journals, not including the TEXAS LAW REVIEW. Please keep in mind the following:

- **ALL entries will be considered for membership by the TEXAS LAW REVIEW**, regardless of the preferences below.
- Though each of the journals below specializes in a specific area of the law, you need not have specialized knowledge in the subject area, nor be planning a career in a given area, to participate.
- You must return this sheet with your essay if you wish to be considered for any journal other than TEXAS LAW REVIEW.
- You must submit an **extra copy** of your essay for each journal that you select below. For example, if you select two journals below, you should include five copies of your essay with your application—three copies for the TEXAS LAW REVIEW and one copy for each of the other two journals.

The TEXAS LAW REVIEW cannot begin extending offers for membership until all first-year grades have been returned. Other journals will have a two-day period following the extension of TEXAS LAW REVIEW offers during which they may extend but not accept offers. This lets you consider all of your options before accepting.

<b>Journal</b>	<b>Consider My Application</b>
AMERICAN JOURNAL OF CRIMINAL LAW	
TEXAS ENVIRONMENTAL LAW JOURNAL	
TEXAS HISPANIC JOURNAL OF LAW AND POLICY	
TEXAS INTELLECTUAL PROPERTY LAW JOURNAL	
TEXAS INTERNATIONAL LAW JOURNAL ( <i>rising 2Ls only</i> )	
TEXAS JOURNAL OF OIL, GAS, AND ENERGY LAW	
TEXAS JOURNAL OF WOMEN AND THE LAW	
TEXAS JOURNAL ON CIVIL LIBERTIES AND CIVIL RIGHTS	
TEXAS REVIEW OF ENTERTAINMENT AND SPORTS LAW	
THE REVIEW OF LITIGATION	
TEXAS REVIEW OF LAW AND POLITICS	

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**TEXAS LAW REVIEW**  
**GPA Release Form**

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Last Name	First Name	MI	UT EID	1L Section
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Address	City	State
Phone number		

I authorize The University of Texas School of Law to release my overall GPA to the TEXAS LAW REVIEW.

I understand that unless I specify otherwise, this information may be kept as a permanent record on file with the TEXAS LAW REVIEW.

---

Signature

Date



Please mark here if you do **NOT** want to be considered for **TEXAS LAW REVIEW membership.**

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# TEXAS LAW REVIEW

## Contact Sheet

So that TEXAS LAW REVIEW is able to timely contact students selected for membership, please provide us as much contact information as you can. If available, please provide: (1) a phone number where you can be reached from July 1–12, (2) a phone number where you can be reached from July 13–20, (3) your cell phone number, (4) your permanent (e.g., parents' home) phone number, and (5) your email address. It is **essential** that you provide TEXAS LAW REVIEW with as many alternative numbers as possible so that we can promptly extend offers of membership. Also, by filling out and submitting this sheet, you give TLR permission to share this information with the other journals. Finally, if you are a transfer, indicate this by writing "transfer" above the request for "1L Section."

---

Last Name	First Name	MI
-----------	------------	----

---

1L Section (if you are rising 2L)

Total credit hours earned  
upon completing the Spring  
2009 semester

### Phone Numbers

(1) \_\_\_\_\_ (July 1–12) (2) \_\_\_\_\_ (July 13–20)

(3) \_\_\_\_\_ (Cell) (4) \_\_\_\_\_ (Permanent)

### Email Address

(5) \_\_\_\_\_ (email)

### Mailing Addresses

Summer Address:

\_\_\_\_\_  
\_\_\_\_\_

Austin Address:  
(for Fall 2009)

\_\_\_\_\_  
\_\_\_\_\_

Date of return to Austin:

\_\_\_\_\_

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# TEXAS LAW REVIEW

## Optional Information Form

As part of our application process, the TEXAS LAW REVIEW collects **anonymous** information about its applicants. Providing this information is **optional** and will not be connected with your application in any way. We encourage your participation in this information gathering effort, as it will be used to continue improving our selection process. To submit this information, please answer the questions below. If you turn in your essays by hand, please submit this form in the specifically designated box. **If you mail us your packet, please include only this form in a separate envelope**, addressed to:

TEXAS LAW REVIEW  
Write-On Competition  
The University of Texas School of Law  
727 East Dean Keeton Street  
Austin, Texas 78705

### **Ethnicity/Race:**

- African American
- American Indian
- Asian
- Caucasian
- Hispanic
- Middle Eastern
- Other: \_\_\_\_\_

### **Gender:**

- Male
- Female

### **Student Activities:**

- American Constitution Society
- Asian Law Students Association
- Chicano/Hispanic Law Students Ass'n
- Environmental Law Society
- Human Rights Law Society
- Intellectual Property Law Society
- Middle Eastern Law Students Ass'n
- OUTLaw
- Public Interest Law Association
- South Asian Law Students Association
- Street Law
- Student Bar Association
- Texas Federalist Society
- Thurgood Marshall Legal Society
- Women's Law Caucus

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**THE REVIEW OF LITIGATION**

**GPA Release Form**

I, \_\_\_\_\_, hereby authorize the University of Texas School of Law to release my cumulative law school grade point average to THE REVIEW OF LITIGATION for consideration in the Spring Write-On Competition.

Signed,

\_\_\_\_\_

(Signature)

\_\_\_\_\_

(Date)

\_\_\_\_\_

(Print Name)

\_\_\_\_\_

(UT EID)

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**TEXAS INTERNATIONAL LAW JOURNAL**  
**GPA Release & Application Form**

In evaluating prospective members, the TEXAS INTERNATIONAL LAW JOURNAL considers an applicant's writing ability, language proficiency, and GPA. Please print the following information:

**GPA Release**

Last Name	First Name	MI	UT EID	1L Section
Address		City	State	
Phone number				

I authorize The University of Texas School of Law to release my overall GPA to the TEXAS INTERNATIONAL LAW JOURNAL. I understand that unless I specify otherwise, this information may be kept as a permanent record on file with the TEXAS INTERNATIONAL LAW JOURNAL.

Signature	Date
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**Language Ability**

As an international law journal, we are interested in your foreign language skills. Please list any foreign language(s) that you know, and circle the number that most closely corresponds to your level of proficiency. If you have experience in more than three languages, please list those languages and your skill level in each as well.

- 1=Fluent (able to speak and read at a sophisticated, scholarly level)
- 2=Conversational (able to speak and read at a moderate level with a general vocabulary)
- 3=Basic (have rudimentary speaking and/or reading skills)

Language 1	<u>1</u> <u>2</u> <u>3</u> Level of ability
Language 2	<u>1</u> <u>2</u> <u>3</u> Level of ability
Language 3	<u>1</u> <u>2</u> <u>3</u> Level of ability

**Contact Information**

\_\_\_\_\_ (cell phone)      \_\_\_\_\_ (permanent)

\_\_\_\_\_ (email)

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## TEXAS INTELLECTUAL PROPERTY LAW JOURNAL

### Application Statement of Interest

If you are applying to the TEXAS INTELLECTUAL PROPERTY LAW JOURNAL, please write a statement of interest. In no more than one page, please state

(1) your experience or interest in the area of intellectual property, including activities in and outside of law school, and

(2) your relevant experience or special skills that would be of particular interest to TIPLJ (i.e. with event planning, fund raising, publishing, editing, writing, computers, etc.).

The statement of interest must be anonymous—do not include personal details in the text— and it **must be the cover page for the copy of your essay that you submit.**

The cover page should be titled: “TEXAS INTELLECTUAL PROPERTY LAW JOURNAL Statement of Interest.”

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## TEXAS JOURNAL OF WOMEN AND THE LAW

### Application Statement of Interest

If you are applying to the TEXAS JOURNAL OF WOMEN AND THE LAW, please attach a brief statement of interest explaining your interest in the journal, any experiences with gender studies, and other relevant experiences, such as volunteer work.

The statement of interest must be anonymous—do not include personal details in the text—and it **must be the cover page of the extra copy of your essay that you submit.**

The cover page should be titled: “TEXAS JOURNAL OF WOMEN AND THE LAW Statement of Interest.”

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## APPLICATION INSTRUCTIONS

The *National Black Law Journal* (NBLJ) has been committed to scholarly discourse exploring the intersection of race and law for over 35 years. Started by 5 African-American law students and 2 African-American law professors, the Journal was the first of its kind in the country. Our long history has made *NBLJ* one of the nation's most respected forums for the discussion of issues involving race and the law. *NBLJ* publishes articles that address the social features, policy implications and political dimensions of legal issues relating to race, civil rights and minorities generally. Although the Journal seeks to publish articles that represent broad perspectives, our goal is that these articles inspire original thought, explore new alternatives and contribute meaningfully to current jurisprudential stances. Past contributors to the Journal include Kimberle Crenshaw, Kendall Thomas, Randall Kennedy, Patricia Williams, Jack Greenberg, Derrick Bell, and William Julius Wilson.

### Application Requirements

The application deadline is June 1, 2010 and applicants will be notified of their acceptance on the Journal by July 8, 2010. If you accept your place on the Journal you may also accept invitations to other journals, however it is not recommended.

### Materials Needed:

1. UT Journal Write-On paper, Moot Court Brief argument section, or Legal Research Memo.
2. A personal statement (1-2 pages) describing your interest in the *National Black Law Journal* and any relevant experiences that you feel may assist us in evaluating your application.
3. Your current resume.

Submit applications to: Michelle Harris at [harrisi2011@lawnet.ucla.edu](mailto:harrisi2011@lawnet.ucla.edu) **and**  
Jessica Schibler at [schibler2011@lawnet.ucla.edu](mailto:schibler2011@lawnet.ucla.edu).

### Selection Criteria

The Journal will consider performance on the writing competition or strength of the other writing sample, personal statement, and resume in the selection process. Because we follow no strict calculus, all students with an interest in *NBLJ* are strongly encouraged to apply.

**THE SPRING 2010 LAW JOURNAL  
WRITE-ON COMPETITION**

**Source Packet**

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## THE LORD OF THE RINGS

J.R.R. Tolkien

One ring to rule them all, One ring to find  
them,  
One ring to bring them all and in the  
darkness bind them

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### *Stare Decisis*

William O. Douglas (1949)

Most lawyers, by training and practice, are all too apt to turn their interests and their talents toward the finding not the creating of precedents. This lawyerly search is for moorings where clients can be safely anchored. But the search has, as well, a deeper, more personal impetus. For the lawyer himself shares the yearning for security that is common to all people everywhere. And this yearning grows as the world seems to grow more *insecure*. We live in an age of doubt and confusion. Rules that once seemed fixed and certain today seem beclouded. Principles of law have been challenged and judges asked to refashion them. Many raised their voices in protest. Some were special pleaders with a stake in existing law. Others had a sincere belief that the foremost function of law in these days of stress and strain is to remain steady and stable so as to promote security. Thus judges have been admonished to hold steadfast to ancient precedents lest the courts themselves add fresh doubt, confusion, and concern over the strength of our institutions.

This search for a static security—in the law or elsewhere—is misguided. The fact is that

security can only be achieved through constant change, through the wise discarding of old ideas that have outlived their usefulness, and through the adapting of others to current facts. There is only an illusion of safety in a Maginot Line. Social forces like armies can sweep around a fixed position and make it untenable. A position that can be shifted to meet such forces and at least partly absorb them alone gives hope of security.

I speak here of long-term swings in the law. I do not suggest that *stare decisis* is so fragile a thing as to bow before every wind. The law is not properly susceptible to whim or caprice. It must have the sturdy qualities required of every framework that is designed for substantial structures. Moreover, it must have uniformity when applied to the daily affairs of men.

Uniformity and continuity in law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities is impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon. *Stare decisis* provides some moorings so that men may trade and arrange their affairs with confidence. *Stare decisis* serves to take the capricious element out of law and to give stability to a society. It is a strong tie which the future has to the past.

It is easy, however, to overemphasize *stare decisis* as a principle in the lives of men. Even for the experts law is only a prediction of what judges will do under a given set of

facts—a prediction that makes rules of law and decisions not logical deductions but functions of human behavior. There are usually plenty of precedents to go around; and with the accumulation of decisions, it is no great problem for the lawyer to find legal authority for most propositions. The difficulty is to estimate what effect a slightly different shade of facts will have and to predict the speed of the current in a changing stream of the law. The predictions and prophecies that lawyers make are indeed appraisals of a host of imponderables. The decisions of yesterday or of the last century are only the starting points.

As for laymen, their conception of the rules of law that govern their conduct is so nebulous that in one sense, as Gray said, the law in its application to their normal affairs is to a very considerable extent *ex post facto*.

The place of *stare decisis* in constitutional law is even more tenuous. A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembers above all else that it is the Constitution which he swore to support and defend, not the gloss which his predecessors may have put on it. So he comes to formulate his own views, rejecting some earlier ones as false and embracing others. He cannot do otherwise unless he lets men long dead and unaware of the problems of the age in which he lives do his thinking for him.

This reexamination of precedent in constitutional law is a personal matter for

each judge who comes along. When only one new judge is appointed during a short period, the unsettling effect in constitutional law may not be great. But when a majority of a Court is suddenly reconstituted, there is likely to be substantial unsettlement. There will be unsettlement until the new judges have taken their positions on constitutional doctrine. During that time—which may extend a decade or more—constitutional law will be in flux. That is the necessary consequence of our system and to my mind a healthy one. The alternative is to let the Constitution freeze in the pattern which one generation gave it. But the Constitution was designed for the vicissitudes of time. It must never become a code which carries the overtones of one period that may be hostile to another.

So far as constitutional law is concerned *stare decisis* must give way before the dynamic component of history. Once it does, the cycle starts again. Today's new and startling decision quickly becomes a coveted anchorage for new vested interests. The former proponents of change acquire an acute conservatism in their new *status quo*. It will then take an oncoming group from a new generation to catch the broader vision which may require an undoing of the work of our present and their past.

Much of what courts do is little understood by laymen. Very few portions of the press undertake to show the social, economic, or political significance of the work of the judiciary or to educate the public on long-term trends. Lawyers often do not see the broader view which is exposed by the

narrow and intensely personal efforts of a client to vindicate a position or gain an advantage. Yet the work of a court may send a whole economy in one direction or help shape the manifest destiny of an era. Two illustrations from different periods of our history will indicate what I mean.

For at least a decade or more it was commonly assumed that the Fourteenth Amendment was adopted to protect negroes in their newly won rights. Other interests had sought to creep under its wing. Thus corporations claimed they were persons within the meaning of the equal protection clause. Woods (then circuit judge) thought the language of the Amendment and its history too clear to admit of doubt on the point. In 1870 he rejected the contention in *Insurance Co. v. New Orleans*. Sixteen years passed. Woods was now a member of the Court of which Waite was Chief Justice. A railroad company pressed its claim that California's tax assessment against it violated the Equal Protection Clause of the Fourteenth Amendment. Before the point was even argued, Waite announced from the bench that the Court did not care to hear argument on the question whether the clause applied to corporations. "We are all of opinion that it does," he said. Thus without argument or opinion on the point the *Santa Clara* case became one of the most momentous of all our decisions. It was not long before the same constitutional doctrine was extended to the Due Process Clause. Again the decision was cryptic and oracular, without exposition or explanation.

These decisions, whether right or wrong, sound or unsound, may have changed the course of our industrial history. Corporations were now armed with constitutional prerogatives. And so armed, they proceeded to the development and exploitation of a continent in a manner never equalled before or since. Some think these decisions helped give corporations what Parrington has called "the freedom of buccaneers." They doubtless did release some of the dynamic quality of the drive that built industrial America in a brilliant (albeit ruthless) way.

A half century passed and the Court made another decision whose impact on industrial America was almost as profound.

In 1918 the Court in the *Dagenhart* case had decided that Congress had no power to regulate the production of goods for commerce where the goods themselves were harmless. It thus struck down a child labor law. A process of erosion soon set in. Distinctions and qualifications were made in a long line of decisions. Finally in 1941 in a case involving the constitutionality of the Fair Labor Standards Act, a unanimous Court overruled the earlier five-to-four decision. Stone's exposition of the Commerce Clause in the *Darby* case was undoubtedly more faithful to Marshall's conception of it than that espoused by a bare majority of the Court in the *Dagenhart* case. However that may be, the *Darby* case gave sanction to a new centralized force in American industrial and social life.

Some have thought that but for the philosophy which it represents and the power of the Federal Government which it sanctions, the nation would not have been able to marshal all the strength and to develop all the ingenuity and resourcefulness necessary to deal with the increasingly national problems of the age.

The decision of the Court in the *Santa Clara* case protected the forces of free enterprise that were building America. We can never know how much the spectre of socialism and the fear of assaults on capitalism contributed to the decision. But the end result is plain: the Court itself became part of the dynamic component of history. It did not live aloof from the turbulence of the times. It was part of the life of the community, absorbed from it the dominant attitudes and feelings of the day, and moved with the impetus of the era.

The Court in the *Darby* case was likewise extremely sensitive to the critical problems of another day. The whole of the democratic world had long been reexamining the conditions that had produced the misery of depressions. It is a soul-searching decision when one is asked to deny the existence of the power of government to correct a social evil. The unanimity of the Court in the *Darby* case indicated how high experience had piled since *Dagenhart* was decided.

Neither the Court in the *Santa Clara* case nor the Court in the *Darby* case was insensitive to the implications of the decisions. Precedents are made or unmade not on logic and history alone. The choices

left by the generality of a constitution relate to policy. That is why laymen and lawyers alike must look widely and diversely for understanding. The problem of the judge is to keep personal predilections from dictating the choice and to be as faithful as possible to the architectural scheme. We can get from those who preceded a sense of the continuity of a society. We can draw from their learning a feel for the durability of a doctrine and a sense of the origins of principles. But we have experience that they never knew. Our vision may be shorter or longer. But it is ours. It is better that we make our own history than be governed by the dead. We too must be dynamic components of history if our institutions are to be vital, directive forces in the life of our age. One can respect the policy decision both in the *Santa Clara* case and in the *Darby* case. But whatever the view on the merits all will agree, I think, that the recent Court was more faithful to the democratic tradition. It wrote in words that all could understand why it did what it did. That is vital to the integrity of the judicial process.

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#### SEINFELD

**George:** It all became very clear to me sitting out there today, that every decision I've ever made in my entire life has been wrong. My life is the complete opposite of everything I want it to be. Every instinct I have in every aspect of life, be it something to wear, something to eat . . . it's often wrong.

**Waitress:** Tuna on toast, coleslaw, cup of coffee.

**George:** Yeah. No, no, no, wait a minute, I always have tuna on toast. Nothing's ever worked out for me with tuna on toast. I want the complete opposite of tuna on toast. Chicken salad, on rye, untoasted . . . and a cup of tea.

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**Hammer**  
v.  
**Dagenhart**

Supreme Court of the United States (1918)

Mr. Justice DAY delivered the opinion of the Court.

A bill was filed in the United States District Court for the Western District of North Carolina by a father in his own behalf and as next friend of his two minor sons, one under the age of fourteen years and the other between the ages of fourteen and sixteen years, employees in a cotton mill at Charlotte, North Carolina, to enjoin the enforcement of the act of Congress intended to prevent interstate commerce in the products of child labor.

The District Court held the act unconstitutional and entered a decree enjoining its enforcement. This appeal brings the case here.

The attack upon the act rests upon three propositions: First: It is not a regulation of interstate and foreign commerce; second: It contravenes the Tenth Amendment to the Constitution; third: It conflicts with the Fifth Amendment to the Constitution.

The controlling question for decision is: Is it within the authority of Congress in

regulating commerce among the states to prohibit the transportation in interstate commerce of manufactured goods, the product of a factory in which, within thirty days prior to their removal therefrom, children under the age of fourteen have been employed or permitted to work, or children between the ages of fourteen and sixteen years have been employed or permitted to work more than eight hours in any day, or more than six days in any week, or after the hour of 7 o'clock p. m., or before the hour of 6 o'clock a. m.?

The power essential to the passage of this act, the government contends, is found in the commerce clause of the Constitution which authorizes Congress to regulate commerce with foreign nations and among the states.

In *Gibbons v. Ogden*, Chief Justice Marshall, speaking for this court, and defining the extent and nature of the commerce power, said, 'It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.' In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority,

state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate.

The first of these cases is *Champion v. Ames*, the so-called Lottery Case, in which it was held that Congress might pass a law having the effect to keep the channels of commerce free from use in the transportation of tickets used in the promotion of lottery schemes. In *Hipolite Egg Co. v. United States*, this court sustained the power of Congress to pass the Pure Food and Drug Act, which prohibited the introduction into the states by means of interstate commerce of impure foods and drugs. In *Hoke v. United States*, this court sustained the constitutionality of the so-called 'White Slave Traffic Act, whereby the transportation of a woman in interstate commerce for the purpose of prostitution was forbidden. In that case we said, having reference to the authority of Congress, under the regulatory power, to protect the channels of interstate commerce:

'If the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to, and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.'

\* \* \*

In each of these instances the use of interstate transportation was necessary to the accomplishment of harmful results. In other

words, although the power over interstate transportation was to regulate, that could only be accomplished by prohibiting the use of the facilities of interstate commerce to effect the evil intended.

This element is wanting in the present case. The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to federal control under the commerce power.

Commerce "consists of intercourse and traffic and includes the transportation of persons and property, as well as the purchase, sale and exchange of commodities." The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof.

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles, intended for interstate commerce, is a matter of local regulation. "When the commerce

begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state.” This principle has been recognized often in this court and cases cited. If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the States.

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of childmade goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition, thus engendered, may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over

others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women, in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power of Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the Tenth Amendment to the Constitution.

\* \* \*

That there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare, all will admit. That such employment is generally deemed to require regulation is shown by the fact that the brief of counsel states that every state in the Union has a law upon the subject, limiting the right to thus employ children. In North

Carolina, the state wherein is located the factory in which the employment was had in the present case, no child under twelve years of age is permitted to work.

It may be desirable that such laws be uniform, but our federal government is one of enumerated powers; ‘this principle,’ declared Chief Justice Marshall in *McCulloch v. Maryland*, “is universally admitted.”

A statute must be judged by its natural and reasonable effect. The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution. The maintenance of the authority of the states over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the nation by the federal Constitution.

In interpreting the Constitution it must never be forgotten that the nation is made up of states to which are entrusted the powers of local government. And to them and to the people the powers not expressly delegated to the national government are reserved. The power of the states to regulate their purely internal affairs by such laws as seem wise to the local authority is inherent and has never been surrendered to the general government. To sustain this statute would not be in our judgment a recognition of the lawful exertion of congressional authority over interstate commerce, but would sanction an invasion by the federal power of the control of a matter purely local in its character, and over which no authority has been delegated

to Congress in conferring the power to regulate commerce among the states.

We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the states. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority federal and state to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution.

In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities to regulate the hours of labor of children in factories and mines within the states, a purely state authority. Thus the act in a two-fold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend. The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.

For these reasons we hold that this law exceeds the constitutional authority of

Congress. It follows that the decree of the District Court must be

Affirmed.

Mr. Justice HOLMES, dissenting.

The single question in this case is whether Congress has power to prohibit the shipment in interstate or foreign commerce of any product of a cotton mill situated in the United States, in which within thirty days before the removal of the product children under fourteen have been employed, or children between fourteen and sixteen have been employed more than eight hours in a day, or more than six days in any week, or between seven in the evening and six in the morning. The objection urged against the power is that the States have exclusive control over their methods of production and that Congress cannot meddle with them, and taking the proposition in the sense of direct intermeddling I agree to it and suppose that no one denies it. But if an act is within the powers specifically conferred upon Congress, it seems to me that it is not made any less constitutional because of the indirect effects that it may have, however obvious it may be that it will have those effects, and that we are not at liberty upon such grounds to hold it void.

The first step in my argument is to make plain what no one is likely to dispute—that the statute in question is within the power expressly given to Congress if considered only as to its immediate effects and that if invalid it is so only upon some collateral ground. The statute confines itself to prohibiting the carriage of certain goods in interstate or foreign commerce. Congress is

given power to regulate such commerce in unqualified terms. It would not be argued today that the power to regulate does not include the power to prohibit. Regulation means the prohibition of something, and when interstate commerce is the matter to be regulated I cannot doubt that the regulation may prohibit any part of such commerce that Congress sees fit to forbid. At all events it is established by the Lottery Case and others that have followed it that a law is not beyond the regulative power of Congress merely because it prohibits certain transportation out and out. So I repeat that this statute in its immediate operation is clearly within the Congress's constitutional power.

The question then is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitutional because of its possible reaction upon the conduct of the States in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this Court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any State.

The manufacture of oleomargarine is as much a matter of State regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and

sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which apart from that purpose was within the power of Congress.

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The Pure Food and Drug Act which was sustained in *Hipolite Egg Co. v. United States*, with the intimation that ‘no trade can be carried on between the States to which it [the power of Congress to regulate commerce] does not extend,’ applies not merely to articles that the changing opinions of the time condemn as intrinsically harmful but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. It is quoted with seeming approval to the effect that “a subject matter which has been confided exclusively to Congress by the Constitution is not within the jurisdiction of the police power of the State unless placed there by congressional action.” I see no reason for that proposition not applying here.

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed—far more unanimously than they have with regard to intoxicants and some

other matters over which this country is now emotionally aroused—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where is my opinion they do not belong, this was preeminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone and that this Court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this Court to pronounce when prohibition is necessary to regulation if it ever may be necessary—to say that it is permissible as against strong drink but not as against the product of ruined lives.

The Act does not meddle with anything belonging to the States. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the State line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the States but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. Instead of being encountered by a prohibitive tariff at her boundaries the State encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the

nation as a whole. If, as has been the case within the memory of men still living, a State should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the State's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking State. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

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**United States**

**v.**

**Darby**

Supreme Court of the United States (1941)

Mr. Justice STONE delivered the opinion of the Court.

The two principal questions raised by the record in this case are, first, whether Congress has constitutional power to prohibit the shipment in interstate commerce of lumber manufactured by employees whose wages are less than a prescribed minimum or whose weekly hours of labor at that wage are greater than a prescribed maximum, and, second, whether it has power to prohibit the employment of workmen in the production of goods 'for

interstate commerce' at other than prescribed wages and hours.

Appellee demurred to an indictment found in the district court for southern Georgia charging him with violation of section 15(a)(1)(2) and (5) of the Fair Labor Standards Act of 1938. The district court sustained the demurrer and quashed the indictment and the case comes here on direct appeal under section 238 of the Judicial Code as amended, which authorizes an appeal to this Court when the judgment sustaining the demurrer 'is based upon the invalidity, or construction of the statute upon which the indictment is founded'.

The Fair Labor Standards Act set up a comprehensive legislative scheme for preventing the shipment in interstate commerce of certain products and commodities produced in the United States under labor conditions as respects wages and hours which fail to conform to standards set up by the Act. Its purpose, as we judicially know from the declaration of policy in section 2(a) of the Act, and the reports of Congressional committees proposing the legislation, is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standards of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced, and as the means of spreading and perpetuating such substandard labor conditions among the workers of the several states. The Act also sets up an

administrative procedure whereby those standards may from time to time be modified generally as to industries subject to the Act or within an industry in accordance with specified standards, by an administrator acting in collaboration with 'Industry Committees' appointed by him.

\* \* \*

The indictment charges that appellee is engaged, in the state of Georgia, in the business of acquiring raw materials, which he manufactures into finished lumber with the intent, when manufactured, to ship it in interstate commerce to customers outside the state, and that he does in fact so ship a large part of the lumber so produced. There are numerous counts charging appellee with the shipment in interstate commerce from Georgia to points outside the state of lumber in the production of which, for interstate commerce, appellee has employed workmen at less than the prescribed minimum wage or more than the prescribed maximum hours without payment to them of any wage for overtime. Other counts charge the employment by appellee of workmen in the production of lumber for interstate commerce at wages of less than 25 cents an hour or for more than the maximum hours per week without payment to them of the prescribed overtime wage. Still another count charges appellee with failure to keep records showing the hours worked each day a week by each of his employees as required by section 11(c), and also that appellee unlawfully failed to keep such records of employees engaged 'in the production and manufacture of goods, to-wit lumber, for interstate commerce'.

The demurrer, so far as now relevant to the appeal, challenged the validity of the Fair Labor Standards Act under the Commerce Clause and the Fifth and Tenth Amendments. The district court quashed the indictment in its entirety upon the broad grounds that the Act, which it interpreted as a regulation of manufacture within the states, is unconstitutional. It declared that manufacture is not interstate commerce and that the regulation by the Fair Labor Standards Act of wages and hours of employment of those engaged in the manufacture of goods which it is intended at the time of production "may or will be" after production "sold in interstate commerce in part or in whole" is not within the congressional power to regulate interstate commerce.

The effect of the court's decision and judgment are thus to deny the power of Congress to prohibit shipment in interstate commerce of lumber produced for interstate commerce under the proscribed substandard labor conditions of wages and hours, its power to penalize the employer for his failure to conform to the wage and hour provisions in the case of employees engaged in the production of lumber which he intends thereafter to ship in interstate commerce in part or in whole according to the normal course of his business and its power to compel him to keep records of hours of employment as required by the statute and the regulations of the administrator.

\* \* \*

The prohibition of shipment of the proscribed goods in interstate commerce.

Section 15(a)(1) prohibits, and the indictment charges, the shipment in interstate commerce, of goods produced for interstate commerce by employees whose wages and hours of employment do not conform to the requirements of the Act. Since this section is not violated unless the commodity shipped has been produced under labor conditions prohibited by s 6 and s 7, the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them.

While manufacture is not of itself interstate commerce the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power to prescribe the rule by which commerce is to be governed. It extends not only to those regulations which aid, foster and protect the commerce, but embraces those which prohibit it. It is conceded that the power of Congress to prohibit transportation in interstate commerce includes noxious articles stolen articles, kidnapped persons, and articles such as intoxicating liquor or convict made goods, traffic in which is forbidden or restricted by the laws of the state of destination.

But it is said that the present prohibition falls within the scope of none of these categories; that while the prohibition is nominally a regulation of the commerce its motive or purpose is regulation of wages and hours of persons engaged in manufacture, the control of which has been reserved to the states and upon which

Georgia and some of the states of destination have placed no restriction; that the effect of the present statute is not to exclude the prescribed articles from interstate commerce in aid of state regulation, but instead, under the guise of a regulation of interstate commerce, it undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated.

The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed by the constitution." That power can neither be enlarged nor diminished by the exercise or non-exercise of state power. Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use.

Such regulation is not a forbidden invasion of state power merely because either its motive or its consequence is to restrict the use of articles of commerce within the states of destination and is not prohibited unless by other Constitutional provisions. It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states.

The motive and purpose of the present regulation are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control. Whatever their motive and purpose, regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause. Subject only to that limitation, presently to be considered, we conclude that the prohibition of the shipment interstate of goods produced under the forbidden substandard labor conditions is within the constitutional authority of Congress.

In the more than a century which has elapsed since the decision of *Gibbons v. Ogden*, these principles of constitutional interpretation have been so long and repeatedly recognized by this Court as applicable to the Commerce Clause, that there would be little occasion for repeating them now were it not for the decision of this Court twenty-two years ago in *Hammer v. Dagenhart*. In that case it was held by a bare majority of the Court over the powerful and now classic dissent of Mr. Justice Holmes setting forth the fundamental issues involved, that Congress was without power to exclude the products of child labor from

interstate commerce. The reasoning and conclusion of the Court's opinion there cannot be reconciled with the conclusion which we have reached, that the power of Congress under the Commerce Clause is plenary to exclude any article from interstate commerce subject only to the specific prohibitions of the Constitution.

*Hammer v. Dagenhart* has not been followed. The distinction on which the decision was rested that Congressional power to prohibit interstate commerce is limited to articles which in themselves have some harmful or deleterious property—a distinction which was novel when made and unsupported by any provision of the Constitution—has long since been abandoned. The thesis of the opinion that the motive of the prohibition or its effect to control in some measure the use or production within the states of the article thus excluded from the commerce can operate to deprive the regulation of its constitutional authority has long since ceased to have force. And finally we have declared “The authority of the Federal Government over interstate commerce does not differ in extent or character from that retained by the states over intrastate commerce.”

The conclusion is inescapable that *Hammer v. Dagenhart*, was a departure from the principles which have prevailed in the interpretation of the commerce clause both before and since the decision and that such vitality, as a precedent, as it then had has long since been exhausted. It should be and now is overruled.

A DICTIONARY OF MODERN USAGE  
(2d. ed. 1995)

**Unintentional; involuntary.** There is an important distinction between these two words, for one may commit a voluntary act that has unintentional consequences. An involuntary act is one outside the control of the will, such as a sneeze . . . . Voluntariness therefore generally refers to the cause, and intentionality to the effect.

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*Myth of the Twinkie Defense*

Carol Pogash (2003)

Ask anyone who's heard of Dan White—and there are fewer and fewer people who have—how it was that the clean-cut, conservative San Francisco supervisor received such a light sentence in the shooting deaths of progressive San Francisco Mayor George Moscone and gay Supervisor Harvey Milk twenty-five years ago, and it brings an automatic response: the “Twinkie defense.” The impressionable jury, they'll say, swallowed the defense contention that Dan White gobbled Twinkies, which blasted sugar through his arteries and drove him into a murderous frenzy. About as simple as: “Eat a Twinkie, commit a murder.”

As Thursday's 25th anniversary of the killings approaches, what survives is a shared understanding of the gross miscarriage of justice: that an angry young man many thought should have received the death penalty instead was convicted of

voluntary manslaughter and got a meager sentence of less than eight years (with time off for good behavior, he would end up serving only five years, one month and nine days).

The “Twinkie defense” is so ingrained in our culture that it appears in law dictionaries, in sociology textbooks, in college exams and in more than 2,800 references on Google. Only a few of them call it what it is: a myth.

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The main focus of the defense's case in May 1979 was diminished capacity—that White had suffered from periodic bouts of depression, amounting to “a major mental illness.” That, along with “the machinations of dirty politics at City Hall,” White's co-counsel Stephen Scherr said in a recent interview, “drove him 'round the bend.”

During his day on the stand, [expert witness] Blinder, a former mayor of San Anselmo and a onetime teacher at UCSF's medical school and at Hastings College of the Law, characterized White as his family's black sheep, a man with rigid values and locked-up emotions. In a recent interview, Blinder said his intent was to explore, “What is it that makes a good man kill?”

In his daylong accounting of how White's life “unraveled,” one small aspect of something Blinder said—“two minutes of a greater part of the day on the stand”—was later turned into the irrational explanation for everything that came after. “Studies show,” he said recently, “that if you have a general predisposition to bipolar mood

swings, things you ingest can play a part.” In the days leading up to the killings, the psychiatrist told the jury, White cast aside his normal habits and grew slovenly, quit working, shunned his wife, grew a stubble beard and rather than eat his healthful diet, indulged in Twinkies and Coke—all symptoms, Blinder testified, of depression. The junk food, he said, only made White more depressed, which caused him to binge even more.

Today, a still-angry Blinder says, “It’s preposterous to think that twelve middle class homeowner jurors would give a killer even a partial pass on the basis of what he ate the night before.” He blames the press for perpetuating the myth. “If I found a cure for cancer,” he said, “they’d still say I was the guy who invented ‘The Twinkie defense.’”

“It drives me crazy,” said co-counsel Scherr, who suspects the simplistic explanation provides cover for those who want to minimize and trivialize what happened. If he ever strangles one of the people who says “Twinkie Defense” to him, Scherr said, it won’t be because he’s just eaten a Twinkie.

\* \* \*

In his 24-page closing argument, defense attorney Schmidt acknowledged that White was “guilty.”

“The only issue,” he told jurors “is the degree of responsibility.” His client “was a good man, a man with a fine background,” Schmidt declared, but “there was something wrong with that man.” Schmidt said psychiatrists had found that White was

incapable of “deliberation”—one of the requirements for a first degree murder conviction. He claimed that White had suffered from “diminished capacity” and in that state had acted in “the heat of passion . . . which fogs judgment.”

In two lukewarm paragraphs, Schmidt let the jury nibble on the snack food explanation: “Whether or not ingestion of food stuffs with preservatives and sugar in high content causes you to alter your personality somehow, or causes you to act in an aggressive manner, I don’t know. I’m not going to suggest to you for a minute that that occurs. But there is a minority opinion in psychiatric fields that there is some connection . . . .”

“It wasn’t a big deal, not in the overall context of depression,” recalled former Chronicle reporter Duffy Jennings, who covered the trial for this newspaper.

But over time, the media found it convenient to adopt a snappy nickname. “It’s not as sexy to call it a depression case,” Jennings said.

During the trial, no one but well-known satirist Paul Krassner—who may have coined the phrase “Twinkie defense”—played up that angle.

Several weeks later, Newsweek spread the term. And by September, barely four months later, outrage had spilled over into the Legislature. There, politicians debated the diminished-capacity defense, eventually abolishing it, in large part because of the White trial. In the course of the debate, conservative Democrat Alister McAlister,

anxious to make his point, waved a Twinkie in the air. Within two years, the phrase had slipped into popular lingo. Newspapers across the country, including *The Chronicle*, were tossing around the “Twinkie defense” as if it were synonymous with diminished capacity.

\* \* \*

The debate still rages over how White could have been found guilty of only two counts of voluntary manslaughter when it seemed clear he had committed premeditated murder. He’d shown up at City Hall with a loaded revolver determined to meet with the mayor and, after killing him, reloaded before going to kill Milk. As former newspaperman Jennings said, “It seemed like a slam dunk.”

But faced with a death penalty case, prospective jurors were asked if they supported capital punishment, a requirement that former DA Joseph Freitas, Jr., says made them more conservative than the natural pool of San Francisco jurors. That, he said, was the first step toward a “miscarriage of justice” in the case.

These “everyday working people,” Jennings said, “didn’t care much for liberal politicians.” When the jury listened to Dan White’s confession, some of them wept.

“A lot of people share this view that the trial was lost in the jury selection,” said Moscone’s former press secretary and family friend, Corey Busch. But Busch argues there was more to it than that. He’s still angered by what he calls the defense’s “very cynical approach.” Although he was not in the courtroom, Busch contends the

defense portrayed White as a victim of the city’s cultural and political change. The diminished capacity argument, he believes, was no more than “a hook the jury was able to hang its hat on.”

Yet, all that many people remember about the case that still engenders such anger and passion is that jurors succumbed to the defense claim that a politician ate Twinkies and then executed the mayor and a fellow supervisor.

“America loves labels,” said Dr. Alan Dundes, UC Berkeley professor of anthropology and folklore. He compares our belief in the “Twinkie defense” to the conviction that George Washington cut down the cherry tree. He didn’t. Folklore trumps history.

“I don’t care if the ‘Twinkie defense’ has any validity or not,” he said. “People think it was a factor. And thinking makes it so.”

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**People**

v.

**White**

California Court of Appeals, First District  
(1981)

On November 10, 1978, defendant [Daniel James White] resigned from his position as a supervisor for the City and County of San Francisco. Several days later, he asked to be reinstated. Mayor George Moscone was responsible for filling the vacancies on the board. Initially, he assured defendant he would be reappointed. Later, the mayor wrote defendant, informing him that he had

made no commitment of any kind to reappoint him. Supervisor Harvey Milk opposed defendant's reappointment.

The mayor scheduled a press conference on Monday, November 27, at 11:30 a.m., to announce the new supervisor. On Sunday, November 26, sometime between 10 and 11 p. m., a reporter telephoned defendant and informed him that he was not going to be reinstated. At approximately 10 a.m. on the following morning, defendant telephoned his aide and asked for a ride to City Hall. The aide picked up defendant at his home and delivered him to the front entrance to City Hall on Polk Street. Instead of entering the building at the regular entrance, where he would be required to pass through a metal detector, defendant went to the McAllister Street side of City Hall and entered the building through a basement window. Defendant went up to the mayor's office on the second floor and asked the appointment secretary if he could see the mayor. Defendant was admitted to the mayor's office at 10:40 a.m. After a few minutes, the appointment secretary heard defendant's raised voice in the mayor's office and a series of dull thuds. The mayor's deputy then saw defendant running down the corridor, outside of the mayor's office. The deputy entered the mayor's private sitting room and found the mayor's body. An autopsy revealed that the mayor had been shot four times: twice in the body and twice in the head. The wounds to the head were delivered after the mayor was lying on the floor, incapacitated by the body wounds, and were fired from a distance of one foot from the head. The slugs were from semi-jacketed .38 caliber bullets.

Shortly before 11 a.m., defendant ran down a corridor from the east side of City Hall where the mayor's office is located and used his key to enter a door leading to the supervisors' offices on the west side of the building. Defendant entered Supervisor Harvey Milk's office and, in a normal tone of voice, asked to speak with Supervisor Milk. Defendant and Milk went across the hall to defendant's office. Approximately 15 seconds later, shots were heard in defendant's office. Defendant left his office and rushed down the corridor. Supervisor Milk's body was found in defendant's office. An autopsy revealed that Supervisor Milk had been shot five times: three times in the body and twice in the back of the head. The head wounds were delivered while Supervisor Milk was on the floor, incapacitated by the body wounds. The slugs were from semi-jacketed .38 caliber bullets.

Sometime after 11 a.m., defendant ran into his aide's office and yelled to her to give him her car key. After receiving the key, he ran out. Later, defendant called his wife and asked her to meet him at a cathedral. After meeting, they walked together to a police station where defendant surrendered himself to the police. The police removed a .38 caliber Smith and Wesson Chief Special revolver from a holster on defendant's right hip. The shots that killed Mayor Moscone and Supervisor Milk were fired from defendant's gun.

Shortly after his arrest, having been advised of his Miranda rights, defendant gave a statement to the police. He stated that he had been under pressure financially, politically, and at home. He had resigned from the

board of supervisors to relieve some of the pressure. However, because of family support, he changed his mind and asked to be reappointed. Initially, he was assured by the mayor that he would be reappointed. Later, he discovered that Supervisor Milk was working against his reappointment and that he was being used as a political “scapegoat.”

Defendant stated that, since he never heard from the mayor personally, he went to City Hall on November 27 to ask the mayor about the reappointment. Before leaving home, he armed himself with a revolver. When he met the mayor and was told that he would not be reappointed, he got “fuzzy” and there was “a roaring in his ears.” He thought about the effect his not being reappointed would have on his family and about how the mayor was going to lie to everybody about him not being a good supervisor, so he “just shot him.” “(O)ut of instinct” he then reloaded his gun with extra shells from his pocket before leaving the mayor’s office. Defendant stated that he then left the mayor’s office and saw Supervisor Milk’s aide in the corridor. He thought how Supervisor Milk had worked against him and decided he would “go talk to him.” When they met, Supervisor Milk “smirked” at him. He “got all flushed” and shot Milk.

At the trial, defendant presented a diminished capacity defense.

It was the opinion of Dr. Jerry Jones, a psychiatrist, that defendant was suffering from severe depression; that he had the capacity to premeditate, to intend to kill, and to know that he should not act in a base and anti-

social manner; however, he lacked the capacity to deliberate.

As a result of his examination, Dr. Martin Blinder, a psychiatrist, concluded that defendant was suffering from depression and intense pressure and that the pressure that he was suffering circumvented the mental processes necessary for premeditation, malice and intent.

Dr. George Solmon, a psychiatrist, found that defendant was suffering from recurrent bouts of unipolar depression (i. e., subject to recurrent bouts of depression to a major degree). He concluded that defendant lacked the mental capacity to meaningfully premeditate and deliberate; that he was in a disassociated state of mind and blocked out all awareness of his duty not to kill.

Dr. Donald Lunde, a psychiatrist, concluded that defendant was suffering from severe depression and that on November 27 he did not premeditate or deliberate, nor was he capable of mature, meaningful reflection.

Dr. Richard Delman, a psychologist, performed three psychological tests on defendant and, on the basis of such testing, concluded that defendant’s ability to deliberate and premeditate was impaired; that on the day of the shooting he lacked the capacity to weigh considerations and rationally decide on a course of action; also, that defendant lacked the capacity to harbor malice and to appreciate his duty not to do wrong.

In response to such evidence, the district attorney offered testimony of Dr. Roland Levy, a psychiatrist, who, at the time of his

examination of defendant on the evening of the shooting, found him to be moderately depressed but lacking any sign of clinical depression. He concluded that defendant had the capacity to deliberate and premeditate. Dr. Levy had reviewed the opinions of the defense psychiatrists and had found nothing to cause him to revise his opinion.

The balance of evidence offered by the defense consisted of testimony by friends, acquaintances and relatives. In substance, that evidence tended to show defendant as a man who enjoyed an honorable reputation in the community, but a person given to moods of frustration and deep depression. Defendant did not testify.

The jury found defendant guilty of two counts of voluntary manslaughter, a lesser included offense of the crime of murder. The jury also found, as true, charges that, in the commission of the two offenses, defendant was armed with and used a firearm.

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**Cal. Penal Code § 25(a)**  
(1982)

The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

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***Old Wine in Old Bottles: California Mental Defenses at the Dawn of the 21st Century***

Walter L. Gordon III (2003)

IV. The Scope of Mental State Evidence

After all the changes, the question remains as to whether psychiatric evidence is admissible in the guilt phase of a trial when specific intent crimes are charged. The current state of the law is stated most succinctly in California Jury Instructions Criminal (hereinafter "CALJIC") 3.32, which informs the jury that it may consider psychiatric or other mental state evidence to determine if the accused actually had the forbidden mental state at the time of the crime.

Three recent California Supreme Court cases indicate there is still wide leeway for the presentation of psychiatric evidence without violating the strictures of Penal Code sections 28 and 29. In *People v. Smithey* three defense experts testified that tests indicated the defendant "had organic brain damage, generally diffuse brain dysfunction, and mild mental retardation." The testimony indicated he was a chronic methamphetamine user and suffered from amphetamine psychosis syndrome, which may cause impaired judgment, loss of emotional control, and memory impairment. The experts testified that the defendant had amnesia, his mental disorders caused him to be totally out of control, and absent these disorders, he would not have committed the particular crime.

In *People v. Ervin* a defense psychiatrist testified that "defendant's past heavy cocaine and heroin use amounted to a

‘substance use disorder’ that could have ‘impaired’ his ability to reason and make sound judgments and could have resulted in impulsive, erratic behavior.” Defense counsel argued that defendant’s drug abuse prevented him from premeditating or deliberating a homicide.

In *People v. Coddington* the Supreme Court noted that an expert’s opinion that a defendant had a form of mental illness tending to lead to impulsive behavior is admissible because it is relevant on the issue of the existence of the mental states of premeditation and deliberation in a murder case.

There are numerous appellate court decisions that make the same point. These cases hold that a defendant can present lengthy testimony describing his mental state and its effect on his conduct. Furthermore, the cases illustrate there is wide latitude for expert testimony concerning the defendant’s mental illness, defect, or disease in the guilt phase of a trial. This wide scope, however, is not unlimited.

#### V. Limits on Mental State Evidence

The main limitation on the scope of expert testimony at the guilt phase of a criminal trial is contained in section 29 of the Penal Code, which prohibits an expert from testifying as to “whether the defendant had or did not have the required mental states.” This rule, often called the “ultimate issue rule,” was not the law in California before the enactment of section 29. Experts were allowed to offer an opinion on the ultimate issue in the trial. Penal Code section 29 is constitutional and does not deprive a

defendant of the right to present a defense or violate the Fifth, Sixth, Eight, and Fourteenth Amendments to the United States Constitution.

In practice the courts have followed two different approaches to the application of section 29. One approach excludes expert opinions couched in the statutory language. For example, the court would not allow an expert to testify whether the defendant had the capacity to form a specific intent or whether he had the specific intent for an offense. The second approach takes a broader view of the prohibition and does not focus on the statutory language but instead focuses on the intent of section 29. Under this approach the court will not allow the expert to testify to facts that might lead to an inference that the defendant did not have the required intent.

A hypothetical will illustrate the point. Assume that a mother on trial for the murder of her son thought she was killing Satan. She asserts she did not have either the intent to kill her son or malice aforethought. A psychiatrist who concluded that the mother truly mistook her victim’s identity could state his opinion three ways: (1) the mother believed she was killing Satan; (2) she did not understand she was killing her son; or (3) she did not have the intent to kill her son or have malice aforethought. Each formulation expresses the same belief. A court applying section 29, however, might react differently to the testimony. Clearly the direct testimony on intent and malice aforethought would run afoul of the both the narrow and expansive interpretations of section 29 since the testimony is couched in

the forbidden statutory language. The other two formulations might pass muster depending on the judge's approach. A court applying the broadest interpretation of section 29 might not allow any of the formulations on the ground that the belief she was killing Satan raised an inference that she did not have the intent to kill her son, and thus was indirectly testimony on intent.

In effect, there is great judicial discretion in the application of section 29 and the admissibility of expert testimony often turns on the approach of the judge making the decision. This inconsistency in application of the ultimate issue rule was one of the reasons it was eliminated as a restriction on expert testimony generally. It also makes it difficult to predict what expert testimony the court will admit in a particular case.

## VI. Conclusion

California has witnessed a struggle between the Legislature and the judiciary over the appropriate scope of psychiatric evidence in criminal trials. Twice in the 20th century the Legislature sought to either eliminate or severely restrict the role of medical experts and testimony in the trial's guilt phase. Both legislative efforts were made in response to outside political forces that contended defendants were abusing the trial process by using mental state evidence to confuse the issues and mislead fact finders. The first legislative effort took place in the late 1920s, while the second occurred in the 1970s. Neither effort was completely successful. In both cases the judiciary intervened to protect the constitutional right to a fair trial. The due process provisions of

the U.S. Constitution protect a defendant's right to present witnesses on the issue of guilt. If mental state evidence is relevant on the issue of specific intent, the court must admit it, no matter how restricted by statutory barriers.

Underlying the California Supreme Court's point of view was the recognition that psychiatric evidence had an empirical basis and mental health professionals have made advances in describing and detecting mental illnesses, defects, and disorders. Moreover, the court was aware these advances had relevance for traditional legal issues such as criminal responsibility. The effort to systematize this knowledge has resulted in DSM-IV and its progenitors. The California Supreme Court has cited the DSM-IV with approval. Criminal lawyers should also utilize the DSM-IV as a tool for the defense in criminal cases.

Specific intent crimes require that an accused have intact cognitive capacity. The person must understand the nature, consequences, and wrongfulness of his behavior. The DSM-IV classifies and describes numerous mental ailments that disrupt cognition. If a defendant's cognitive ability is impaired this has implications for his ability to actually form criminal intent. Recent insights by neurologists suggest that, in reality, emotion and cognition are interwoven and inseparable. Persons with mental disorders that distort or disable appropriate emotional responses would also have damaged cognition. Competent trial counsel, in short, has a duty to know the potential defense material in the DSM-IV and to use it when relevant. As the case law

makes clear, the passage of Penal Code sections 28 and 29 did not obviate this responsibility.

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**DEXTER**

**Yoga Instructor:** We are all strong warriors, all of us.

**Dexter:** *[voiceover]* This is absolutely, without a doubt, the worst moment of my life.

**Yoga Instructor:** Now, let's go into a little free-form yoga. Just let yourself dance.

**Dexter:** *[voiceover]* I was wrong. This is.

**Yoga Instructor:** See the dust dancing against the sunlight. Be as beautiful as the golden flakes of dust, Dexter.

**Dexter:** *[voiceover]* I could probably kill her before anyone realized what happened.

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**FIGHT CLUB**

Chuck Palahniuk (1996)

I ask if he knows the name Tyler Durden.

The bartender grins with his chin stuck out above the top of the white neck brace and asks, "Is this a test?"

Yeah, I say, it's a test. Has he ever met Tyler Durden?

"You stopped in last week, Mr. Durden," he says. "Don't you remember?"

Tyler was here.

"You were here sir."

I've never been in here before tonight.

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**CONSTITUTION OF THE UNITED STATES OF AMERICA**

**Amendment V**

No person . . . shall be compelled in any criminal case to be a witness against himself.

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**United States**

**v.**

**White**

Supreme Court of the United States (1944)

The only issue in this case relates to the nature and scope of the constitutional privilege against self-incrimination. We are not concerned here with a complete delineation of the legal status of unincorporated labor unions. We express no opinion as to the legality or desirability of incorporating such unions or as to the necessity of considering them as separate entities apart from their members for purposes other than the one posed by the narrow issue in this case. Nor do we question the obvious fact that business corporations, by virtue of their creation by the state and because of the nature and purpose of their activities, differ in many significant respects from unions, religious bodies, trade associations, social clubs and other types of organizations, and accordingly owe different obligations to the federal and state governments. Our attention is directed solely to the right of an officer of a union to claim the privilege against self-

incrimination under the circumstances here presented.

Respondent contends that an officer of an unincorporated labor union possesses a constitutional right to refuse to produce, in compliance with a subpoena duces tecum, records of the union which are in his custody and which might tend to incriminate him. He relies upon the 'unreasonable search and seizure' clause of the Fourth Amendment and the explicit guarantee of the Fifth Amendment that no person shall be compelled in any criminal case to be a witness against himself. We hold, however, that neither the Fourth nor the Fifth Amendment, both of which are directed primarily to the protection of individual and personal rights, requires the recognition of a privilege against self-incrimination under the circumstances of this case.

The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality. It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided. The prosecutors are forced to search for independent evidence instead of relying upon proof extracted from

individuals by force of law. The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of crime. While the privilege is subject to abuse and misuse, it is firmly embedded in our constitutional and legal frameworks as a bulwark against iniquitous methods of prosecution. It protects the individual from any disclosure, in the form of oral testimony, documents or chattels, sought by legal process against him as a witness.

Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation. Moreover, the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity. But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organization that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally. Such records and papers are not the private records of the individual

members or officers of the organization. Usually, if not always, they are open to inspection by the members and this right may be enforced on appropriate occasions by available legal procedures. They therefore embody no element of personal privacy and carry with them no claim of personal privilege.

The reason underlying the restriction of this constitutional privilege to natural individuals acting in their own private capacity is clear. The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitutional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations.

The fact that the state charters corporations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. But the absence of that

fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective, nor does it confer upon such an organization the purely personal privilege against self-incrimination. Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws, with the privilege against self-incrimination being limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records.

It follows that labor unions, as well as their officers and agents acting in their official capacity, cannot invoke this personal privilege. This conclusion is not reached by any mechanical comparison of unions with corporations or with other entities nor by any determination of whether unions technically may be regarded as legal personalities for any or all purposes. The test, rather, is whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only. If so, the privilege cannot be invoked on behalf of the organization or its representatives in their official capacity. Labor unions-national or local, incorporated or unincorporated-clearly meet that test.

Structurally and functionally, a labor union is an institution which involves more than the private or personal interests of its members. It represents organized, institutional activity as contrasted with wholly individual activity. This difference is as well defined as that existing between individual members of the union. The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation, not being dependent upon the life of any member. It normally operates under its own constitution, rules and by-laws which, in controversies between member and union, are often enforced by the courts. The union engages in a multitude of business and other official concerted activities, none of which can be said to be the private undertakings of the members. Duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do; nor have they authority to act for the members in matters affecting only the individual rights of such members. The union owns separate real and personal property, even though the title may nominally be in the names of its members or trustees. The official union books and records are distinct from the personal books and records of the individuals, in the same manner as the union treasury exists apart from the private and personal funds of the members. And no member or officer has the right to use them for criminal purposes or for his purely private affairs. The actions of one individual member no more bind the union than they bind another individual member unless there is proof that the union authorized or ratified the acts in question. At

the same time, the members are not subject to either criminal or civil liability for the acts of the union or its officers as such unless it is shown that they personally authorized or participated in the particular acts.

Both common law rules and legislative enactments have granted many substantive rights to labor unions as separate functioning institutions. This Court has pointed out that 'the growth and necessities of these great labor organizations have brought affirmative legal recognition of their existence and usefulness and provisions for their protection, which their members have found necessary. Their right to maintain strikes when they do not violate law or the rights of others, has been declared. The embezzlement of funds by their officers has been especially denounced as a crime. The so-called union label, which is a quasi trademark to indicate the origin of manufactured product in union labor, has been protected against pirating and deceptive use by the statutes of most of the states, and in many states authority to sue to enjoin its use has been conferred on unions. They have been given distinct and separate representation and the right to appear to represent union interests in statutory arbitrations, and before official labor boards.' Even greater substantive rights have been granted labor unions by federal and state legislation subsequent to the statutes enumerated in the opinion in that case.

These various considerations compel the conclusion that respondent could not claim the personal privilege against self-incrimination under these circumstances.

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**2 U.S.C. § 441b(a)**  
(2009)

(a) In general

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

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**Citizens United**  
v.  
**Fed. Election Comm'n**

Justice KENNEDY delivered the opinion of the Court.

III.

The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under § 441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form

PACs does not alleviate the First Amendment problems with § 441b. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

And that is just the beginning. PACs must file detailed monthly reports with the FEC, which are due at different times depending on the type of election that is about to occur.

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Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process. If § 441b applied to individuals, no one would believe that it is merely a time, place, or manner restriction on speech. Its purpose and effect are to silence entities whose voices the Government deems to be suspect.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "has its fullest and most urgent application to speech uttered during a campaign for political office."

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest." While it might be maintained that political speech simply cannot be banned or restricted as a categorical matter the quoted language from *WRTL* provides a sufficient framework for protecting the relevant First Amendment interests in this case. We shall employ it here.

\* \* \*

A.

1.

The Court has recognized that First Amendment protection extends to corporations.

At least since the latter part of the 19th century, the laws of some States and of the United States imposed a ban on corporate

direct contributions to candidates. Yet not until 1947 did Congress first prohibit independent expenditures by corporations and labor unions in § 304 of the Labor Management Relations Act. In passing this Act Congress overrode the veto of President Truman, who warned that the expenditure ban was a “dangerous intrusion on free speech.”

For almost three decades thereafter, the Court did not reach the question whether restrictions on corporate and union expenditures are constitutional.

#### B.

The Court is thus confronted with conflicting lines of precedent: a pre-Austin line that forbids restrictions on political speech based on the speaker’s corporate identity and a post- Austin line that permits them. No case before Austin had held that Congress could prohibit independent expenditures for political speech based on the speaker’s corporate identity. Before Austin Congress had enacted legislation for this purpose, and the Government urged the same proposition before this Court.

In its defense of the corporate-speech restrictions in § 441b, the Government notes the antidistortion rationale on which Austin and its progeny rest in part, yet it all but abandons reliance upon it. It argues instead that two other compelling interests support Austin’s holding that corporate expenditure restrictions are constitutional: an anticorruption interest and a shareholder-

protection interest. We consider the three points in turn.

As for Austin’s antidistortion rationale, the Government does little to defend it. And with good reason, for the rationale cannot support § 441b.

If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech. If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that Austin permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If Austin were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds “that the FEC has never applied this statute to a book,” and if it did, “there would be quite [a] good as-applied challenge.” This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure.

Political speech is “indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.” This protection for speech is inconsistent with Austin’s antidistortion rationale. Austin

sought to defend the antidistortion rationale as a means to prevent corporations from obtaining “an unfair advantage in the political marketplace by using resources amassed in the economic marketplace.” But *Buckley* rejected the premise that the Government has an interest “in equalizing the relative ability of individuals and groups to influence the outcome of elections.” *Buckley* was specific in stating that “the skyrocketing cost of political campaigns” could not sustain the governmental prohibition. The First Amendment’s protections do not depend on the speaker’s “financial ability to engage in public discussion.”

The Court reaffirmed these conclusions when it invalidated the BCRA provision that increased the cap on contributions to one candidate if the opponent made certain expenditures from personal funds. The rule that political speech cannot be limited based on a speaker’s wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker’s identity.

Either as support for its antidistortion rationale or as a further argument, the Austin majority undertook to distinguish wealthy individuals from corporations on the ground that “[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.” 494 U.S., at 658-659, 110 S.Ct. 1391. This does not suffice, however, to allow laws prohibiting speech. “It is rudimentary that

the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.”

It is irrelevant for purposes of the First Amendment that corporate funds may “have little or no correlation to the public’s support for the corporation’s political ideas.” All speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker’s ideas.

Austin’s antidistortion rationale would produce the dangerous, and unacceptable, consequence that Congress could ban political speech of media corporations. Media corporations are now exempt from § 441b’s ban on corporate expenditures. Yet media corporations accumulate wealth with the help of the corporate form, the largest media corporations have “immense aggregations of wealth,” and the views expressed by media corporations often “have little or no correlation to the public’s support” for those views. Thus, under the Government’s reasoning, wealthy media corporations could have their voices diminished to put them on par with other media entities. There is no precedent for permitting this under the First Amendment.

The media exemption discloses further difficulties with the law now under consideration. There is no precedent supporting laws that attempt to distinguish between corporations which are deemed to

be exempt as media corporations and those which are not. “We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.

The law’s exception for media corporations is, on its own terms, all but an admission of the invalidity of the antidistortion rationale. And the exemption results in a further, separate reason for finding this law invalid: Again by its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views. The exemption applies to media corporations owned or controlled by corporations that have diverse and substantial investments and participate in endeavors other than news. So even assuming the most doubtful proposition that a news organization has a right to speak when others do not, the exemption would allow a conglomerate that owns both a media business and an unrelated business to influence or control the media in order to advance its overall business interest. At the same time, some other corporation, with an identical business interest but no media outlet in its ownership structure, would be forbidden to speak or inform the public about the same issue. This differential treatment cannot be squared with the First Amendment.

There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations. The Framers may not have anticipated modern business and media corporations. Yet television networks and major newspapers owned by media corporations have become the most important means of mass communication in modern times. The First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media. It was understood as a response to the repression of speech and the press that had existed in England and the heavy taxes on the press that were imposed in the colonies. The great debates between the Federalists and the Anti-Federalists over our founding document were published and expressed in the most important means of mass communication of that era—newspapers owned by individuals. At the founding, speech was open, comprehensive, and vital to society’s definition of itself; there were no limits on the sources of speech and knowledge. The Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.

*Austin* interferes with the “open marketplace” of ideas protected by the First Amendment. It permits the Government to ban the political speech of millions of

associations of citizens. Most of these are small corporations without large amounts of wealth. This fact belies the Government's argument that the statute is justified on the ground that it prevents the "distorting effects of immense aggregations of wealth." It is not even aimed at amassed wealth.

The censorship we now confront is vast in its reach. The Government has "muffle[d] the voices that best represent the most significant segments of the economy." And "the electorate [has been] deprived of information, knowledge and opinion vital to its function." By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests. Factions will necessarily form in our Republic, but the remedy of "destroying the liberty" of some factions is "worse than the disease." Factions should be checked by permitting them all to speak and by entrusting the people to judge what is true and what is false.

The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes Austin's antidistortion rationale all the more an aberration. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." Corporate executives and employees counsel Members of Congress and Presidential administrations on many issues, as a matter of routine and often in private. An amici

brief filed on behalf of Montana and 25 other States notes that lobbying and corporate communications with elected officials occur on a regular basis. When that phenomenon is coupled with § 441b, the result is that smaller or nonprofit corporations cannot raise a voice to object when other corporations, including those with vast wealth, are cooperating with the Government. That cooperation may sometimes be voluntary, or it may be at the demand of a Government official who uses his or her authority, influence, and power to threaten corporations to support the Government's policies. Those kinds of interactions are often un-known and unseen. The speech that § 441b forbids, though, is public, and all can judge its content and purpose. References to massive corporate treasuries should not mask the real operation of this law. Rhetoric ought not obscure reality.

Even if § 441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to

control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

2.

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the antidistortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. In *Buckley*, the Court found this interest “sufficiently important” to allow limits on contributions but did not extend that reasoning to expenditure limits. When *Buckley* examined an expenditure ban, it found “that the governmental interest in preventing corruption and the appearance of corruption [was] inadequate to justify [the ban] on independent expenditures.”

With regard to large direct contributions, *Buckley* reasoned that they could be given “to secure a political quid pro quo,” and that “the scope of such pernicious practices can never be reliably ascertained.” The practices *Buckley* noted would be covered by bribery laws if a quid pro quo arrangement were proved. The Court, in consequence, has noted that restrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements. The *Buckley* Court, nevertheless, sustained limits on direct contributions in order to ensure against the reality or appearance of corruption. That case did not extend this rationale to

independent expenditures, and the Court does not do so here.

“The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” Limits on independent expenditures, such as § 441b, have a chilling effect extending well beyond the Government’s interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The Government does not claim that these expenditures have corrupted the political process in those States.

A single footnote in Bellotti purported to leave open the possibility that corporate independent expenditures could be shown to cause corruption. For the reasons explained above, we now conclude that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption. Dicta in Bellotti’s footnote suggested that “a corporation’s right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office.” Citing the portion of *Buckley* that invalidated the federal independent expenditure ban and a law review student

comment, *Bellotti* surmised that “Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections.” *Buckley*, however, struck down a ban on independent expenditures to support candidates that covered corporations and explained that “the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.” *Bellotti*’s dictum is thus supported only by a law review student comment, which misinterpreted *Buckley*.

Seizing on this aside in *Bellotti*’s footnote, the Court in *NRWC* did say there is a “sufficient” governmental interest in “ensur[ing] that substantial aggregations of wealth amassed” by corporations would not “be used to incur political debts from legislators who are aided by the contributions.” *NRWC*, however, has little relevance here. *NRWC* decided no more than that a restriction on a corporation’s ability to solicit funds for its segregated PAC, which made direct contributions to candidates, did not violate the First Amendment. *NRWC* thus involved contribution limits, which, unlike limits on independent expenditures, have been an accepted means to prevent quid pro quo corruption. *Citizens United* has not made direct contributions to candidates, and it has not suggested that the Court should reconsider whether contribution limits should be subjected to rigorous First Amendment scrutiny.

When *Buckley* identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption. The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt:

“Favoritism and influence are not . . . avoidable in representative politics. It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.”

Reliance on a “generic favoritism or influence theory . . . is at odds with standard First Amendment analyses because it is unbounded and susceptible to no limiting principle.”

The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate. The fact that a corporation, or any other speaker, is willing to spend money to try to persuade voters presupposes that the people have the ultimate influence over elected officials. This is inconsistent with any suggestion that

the electorate will refuse “to take part in democratic governance” because of additional political speech made by a corporation or any other speaker.

*Caperton v. A.T. Massey Coal Co.*, is not to the contrary. *Caperton* held that a judge was required to recuse himself “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.” The remedy of recusal was based on a litigant’s due process right to a fair trial before an unbiased judge. *Caperton*’s holding was limited to the rule that the judge must be recused, not that the litigant’s political speech could be banned.

The *McConnell* record was “over 100,000 pages” long, yet it “does not have any direct examples of votes being ex-changed for . . . expenditures.” This confirms *Buckley*’s reasoning that independent expenditures do not lead to, or create the appearance of, quid pro quo corruption. In fact, there is only scant evidence that independent expenditures even ingratiate. Ingratiation and access, in any event, are not corruption. The BCRA record establishes that certain donations to political parties, called “soft money,” were made to gain access to elected officials. This case, however, is about independent expenditures, not soft money. When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from

independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing quid pro quo corruption.

3.

The Government contends further that corporate independent expenditures can be limited because of its interest in protecting dissenting shareholders from being compelled to fund corporate political speech. This asserted interest, like Austin’s antidistortion rationale, would allow the Government to ban the political speech even of media corporations. Assume, for example, that a shareholder of a corporation that owns a newspaper disagrees with the political views the newspaper expresses. Under the Government’s view, that potential disagreement could give the Government the authority to restrict the media corporation’s political speech. The First Amendment does not allow that power. There is, furthermore, little evidence of abuse that cannot be corrected by shareholders “through the procedures of corporate democracy.”

Those reasons are sufficient to reject this shareholder-protection interest; and, moreover, the statute is both underinclusive and overinclusive. As to the first, if Congress had been seeking to protect dissenting shareholders, it would not have banned corporate speech in only certain media within 30 or 60 days before an election. A dissenting shareholder's interests would be implicated by speech in any media at any time. As to the second, the statute is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders. As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.

\* \* \*

Chief Justice ROBERTS, with whom Justice ALITO joins, concurring

## II.

The text and purpose of the First Amendment point in the same direction: Congress may not prohibit political speech, even if the speaker is a corporation or union. What makes this case difficult is the need to confront our prior decision in *Austin*.

This is the first case in which we have been asked to overrule *Austin*, and thus it is also the first in which we have had reason to consider how much weight to give *stare*

*decisis* in assessing its continued validity. The dissent erroneously declares that the Court “reaffirmed” *Austin*’s holding in subsequent cases. Not so. Not a single party in any of those cases asked us to overrule *Austin*, and as the dissent points out, the Court generally does not consider constitutional arguments that have not properly been raised. *Austin*’s validity was therefore not directly at issue in the cases the dissent cites. The Court’s unwillingness to overturn *Austin* in those cases cannot be understood as a *reaffirmation* of that decision.

A

Fidelity to precedent—the policy of *stare decisis*—is vital to the proper exercise of the judicial function. “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” For these reasons, we have long recognized that departures from precedent are inappropriate in the absence of a “special justification.”

At the same time, *stare decisis* is neither an “inexorable command,” nor “a mechanical formula of adherence to the latest decision,” especially in constitutional cases. If it were, segregation would be legal, minimum wage laws would be unconstitutional, and the Government could wiretap ordinary criminal suspects without first obtaining warrants. As the dissent properly notes, none of us has viewed *stare decisis* in such absolute terms.

*Stare decisis* is instead a “principle of policy.” When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*. As Justice Jackson explained, this requires a “sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.”

In conducting this balancing, we must keep in mind that *stare decisis* is not an end in itself. It is instead “the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.” Its greatest purpose is to serve a constitutional ideal—the rule of law. It follows that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.

Thus, for example, if the precedent under consideration itself departed from the Court’s jurisprudence, returning to the “intrinsically sounder” doctrine established in prior cases may “better serv[e] the values of *stare decisis* than would following [the] more recently decided case inconsistent with the decisions that came before it.” Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law’s coherence and curtail the precedent’s disruptive effects.

Likewise, if adherence to a precedent actually impedes the stable and orderly adjudication of future cases, its *stare decisis* effect is also diminished. This can happen in a number of circumstances, such as when the precedent’s validity is so hotly contested that it cannot reliably function as a basis for decision in future cases, when its rationale threatens to upend our settled jurisprudence in related areas of law, and when the precedent’s underlying reasoning has become so discredited that the Court cannot keep the precedent alive without jury-rigging new and different justifications to shore up the original mistake.

#### B.

These considerations weigh against retaining our decision in *Austin*. First, as the majority explains, that decision was an “aberration” insofar as it departed from the robust protections we had granted political speech in our earlier cases. *Austin* undermined the careful line that *Buckley* drew to distinguish limits on contributions to candidates from limits on independent expenditures on speech. *Buckley* rejected the asserted government interest in regulating independent expenditures, concluding that “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.” *Austin*, however, allowed the Government to prohibit these same expenditures out of concern for “the corrosive and distorting effects of immense aggregations of wealth” in the marketplace of ideas. *Austin*’s reasoning was—and remains—inconsistent with *Buckley*’s

explicit repudiation of any government interest in “equalizing the relative ability of individuals and groups to influence the outcome of elections.”

*Austin* was also inconsistent with *Bellotti*’s clear rejection of the idea that “speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation.” The dissent correctly points out that *Bellotti* involved a referendum rather than a candidate election, and that *Bellotti* itself noted this factual distinction. But this distinction does not explain why corporations may be subject to prohibitions on speech in candidate elections when individuals may not.

Second, the validity of *Austin*’s rationale— itself adopted over two “spirited dissents”— has proved to be the consistent subject of dispute among Members of this Court ever since. The simple fact that one of our decisions remains controversial is, of course, insufficient to justify overruling it. But it does undermine the precedent’s ability to contribute to the stable and orderly development of the law. In such circumstances, it is entirely appropriate for the Court—which in this case is squarely asked to reconsider *Austin*’s validity for the first time—to address the matter with a greater willingness to consider new approaches capable of restoring our doctrine to sounder footing.

Third, the *Austin* decision is uniquely destabilizing because it threatens to subvert our Court’s decisions even outside the

particular context of corporate express advocacy. The First Amendment theory underlying *Austin*’s holding is extraordinarily broad. *Austin*’s logic would authorize government prohibition of political speech by a category of speakers in the name of equality—a point that most scholars acknowledge (and many celebrate), but that the dissent denies.

It should not be surprising, then, that Members of the Court have relied on *Austin*’s expansive logic to justify greater incursions on the First Amendment, even outside the original context of corporate advocacy on behalf of candidates running for office. The dissent in this case succumbs to the same temptation, suggesting that *Austin* justifies prohibiting corporate speech because such speech might unduly influence “the market for legislation.” The dissent reads *Austin* to permit restrictions on corporate speech based on nothing more than the fact that the corporate form may help individuals coordinate and present their views more effectively. A speaker’s ability to persuade, however, provides no basis for government regulation of free and open public debate on what the laws should be.

If taken seriously, *Austin*’s logic would apply most directly to newspapers and other media corporations. They have a more profound impact on public discourse than most other speakers. These corporate entities are, for the time being, not subject to § 441b’s otherwise generally applicable prohibitions on corporate political speech. But this is simply a matter of legislative grace. The fact that the law currently grants

a favored position to media corporations is no reason to overlook the danger inherent in accepting a theory that would allow government restrictions on their political speech.

These readings of *Austin* do no more than carry that decision's reasoning to its logical endpoint. In doing so, they highlight the threat *Austin* poses to First Amendment rights generally, even outside its specific factual context of corporate express advocacy. Because *Austin* is so difficult to confine to its facts—and because its logic threatens to undermine our First Amendment jurisprudence and the nature of public discourse more broadly—the costs of giving it *stare decisis* effect are unusually high.

Finally and most importantly, the Government's own effort to defend *Austin*—or, more accurately, to defend something that is not quite *Austin*—underscores its weakness as a precedent of the Court. The Government concedes that *Austin* “is not the most lucid opinion,” yet asks us to reaffirm its holding. But while invoking *stare decisis* to support this position, the Government never once even *mentions* the compelling interest that *Austin* relied upon in the first place: the need to diminish “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.”

Instead of endorsing *Austin* on its own terms, the Government urges us to reaffirm

*Austin*'s specific holding on the basis of two new and potentially expansive interests—the need to prevent actual or apparent *quid pro quo* corruption, and the need to protect corporate shareholders. Those interests may or may not support the *result* in *Austin*, but they were plainly not part of the *reasoning* on which *Austin* relied.

To its credit, the Government forthrightly concedes that *Austin* did not embrace either of the new rationales it now urges upon us.

To be clear: The Court in *Austin* nowhere relied upon the only arguments the Government now raises to support that decision. In fact, the only opinion in *Austin* endorsing the Government's argument based on the threat of *quid pro quo* corruption was Justice Stevens's concurrence. The Court itself did not do so, despite the fact that the concurrence highlighted the argument. Moreover, the Court's only discussion of shareholder protection in *Austin* appeared in a section of the opinion that sought merely to distinguish *Austin*'s facts from those of *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.* Nowhere did *Austin* suggest that the goal of protecting shareholders is itself a compelling interest authorizing restrictions on First Amendment rights.

To the extent that the Government's case for reaffirming *Austin* depends on radically reconceptualizing its reasoning, that argument is at odds with itself. *Stare decisis* is a doctrine of preservation, not transformation. It counsels deference to past mistakes, but provides no justification for

making new ones. There is therefore no basis for the Court to give precedential sway to reasoning that it has never accepted, simply because that reasoning happens to support a conclusion reached on different grounds that have since been abandoned or discredited.

Doing so would undermine the rule-of-law values that justify *stare decisis* in the first place. It would effectively license the Court to invent and adopt new principles of constitutional law solely for the purpose of rationalizing its past errors, without a proper analysis of whether those principles have merit on their own. This approach would allow the Court's past missteps to spawn future mistakes, undercutting the very rule-of-law values that *stare decisis* is designed to protect.

None of this is to say that the Government is barred from making new arguments to support the outcome in *Austin*. On the contrary, it is free to do so. And of course the Court is free to accept them. But the Government's new arguments must stand or fall on their own; they are not entitled to receive the special deference we accord to precedent. They are, as grounds to support *Austin*, literally *unprecedented*. Moreover, to the extent the Government relies on new arguments—and declines to defend *Austin* on its own terms—we may reasonably infer that it lacks confidence in that decision's original justification.

Because continued adherence to *Austin* threatens to subvert the “principled and intelligible” development of our First

Amendment jurisprudence, I support the Court's determination to overrule that decision.

\* \* \*

Justice STEVENS, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, concurring in part and dissenting in part

## II.

The final principle of judicial process that the majority violates is the most transparent: *stare decisis*. I am not an absolutist when it comes to *stare decisis*, in the campaign finance area or in any other. No one is. But if this principle is to do any meaningful work in supporting the rule of law, it must at least demand a significant justification, beyond the preferences of five Justices, for overturning settled doctrine. “[A] decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.” No such justification exists in this case, and to the contrary there are powerful prudential reasons to keep faith with our precedents.

The Court's central argument for why *stare decisis* ought to be trumped is that it does not like *Austin*. The opinion “was not well reasoned,” our colleagues assert, and it conflicts with First Amendment principles. This, of course, is the Court's merits argument, the many defects in which we will soon consider. I am perfectly willing to concede that if one of our precedents were dead wrong in its reasoning or irreconcilable

with the rest of our doctrine, there would be a compelling basis for revisiting it. But neither is true of *Austin*, and restating a merits argument with additional vigor does not give it extra weight in the *stare decisis* calculus.

Perhaps in recognition of this point, the Court supplements its merits case with a smattering of assertions. The Court proclaims that “*Austin* is undermined by experience since its announcement.” This is a curious claim to make in a case that lacks a developed record. The majority has no empirical evidence with which to substantiate the claim; we just have its *ipse dixit* that the real world has not been kind to *Austin*. Nor does the majority bother to specify in what sense *Austin* has been “undermined.” Instead it treats the reader to a string of non sequiturs: “Our Nation’s speech dynamic is changing,” “[s]peakers have become adept at presenting citizens with sound bites, talking points, and scripted messages,” “[c]orporations . . . do not have monolithic views.” How any of these ruminations weakens the force of *stare decisis*, escapes my comprehension.

The majority also contends that the Government’s hesitation to rely on *Austin*’s antidistortion rationale “diminishe[s]” “the principle of adhering to that precedent.” Why it diminishes the value of *stare decisis* is left unexplained. We have never thought fit to overrule a precedent because a litigant has taken any particular tack. Nor should we. Our decisions can often be defended on multiple grounds, and a litigant may have strategic or case-specific reasons for

emphasizing only a subset of them. Members of the public, moreover, often rely on our bottom-line holdings far more than our precise legal arguments; surely this is true for the legislatures that have been regulating corporate electioneering since *Austin*. The task of evaluating the continued viability of precedents falls to this Court, not to the parties.

Although the majority opinion spends several pages making these surprising arguments, it says almost nothing about the standard considerations we have used to determine *stare decisis* value, such as the antiquity of the precedent, the workability of its legal rule, and the reliance interests at stake. It is also conspicuously silent about *McConnell*, even though the *McConnell* Court’s decision to uphold BCRA § 203 relied not only on the antidistortion logic of *Austin* but also on the statute’s historical pedigree and the need to preserve the integrity of federal campaigns.

We have recognized that “[s]*tare decisis* has special force when legislators or citizens have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.” *Stare decisis* protects not only personal rights involving property or contract but also the ability of the elected branches to shape their laws in an effective and coherent fashion. Today’s decision takes away a power that we have long permitted these branches to exercise. State legislatures have relied on their authority to regulate corporate electioneering, confirmed in

*Austin*, for more than a century. The Federal Congress has relied on this authority for a comparable stretch of time, and it specifically relied on *Austin* throughout the years it spent developing and debating BCRA. The total record it compiled was *100,000 pages* long. Pulling out the rug beneath Congress after affirming the constitutionality of § 203 six years ago shows great disrespect for a coequal branch.

By removing one of its central components, today's ruling makes a hash out of BCRA's "delicate and interconnected regulatory scheme." Consider just one example of the distortions that will follow: Political parties are barred under BCRA from soliciting or spending "soft money," funds that are not subject to the statute's disclosure requirements or its source and amount limitations. Going forward, corporations and unions will be free to spend as much general treasury money as they wish on ads that support or attack specific candidates, whereas national parties will not be able to spend a dime of soft money on ads of any kind. The Court's ruling thus dramatically enhances the role of corporations and unions-and the narrow interests they represent-vis-à-vis the role of political parties-and the broad coalitions they represent-in determining who will hold public office.

Beyond the reliance interests at stake, the other *stare decisis* factors also cut against the Court. Considerations of antiquity are significant for similar reasons. *McConnell* is only six years old, but *Austin* has been on the books for two decades, and many of the

statutes called into question by today's opinion have been on the books for a half-century or more. The Court points to no intervening change in circumstances that warrants revisiting *Austin*. Certainly nothing relevant has changed since we decided *WRTL* two Terms ago. And the Court gives no reason to think that *Austin* and *McConnell* are unworkable.

In fact, no one has argued to us that *Austin*'s rule has proved impracticable, and not a single for-profit corporation, union, or State has asked us to overrule it. Quite to the contrary, leading groups representing the business community, organized labor, and the nonprofit sector, together with more than half of the States, urge that we preserve *Austin*. As for *McConnell*, the portions of BCRA it upheld may be prolix, but all three branches of Government have worked to make § 203 as user-friendly as possible. For instance, Congress established a special mechanism for expedited review of constitutional challenges; the FEC has established a standardized process, with clearly defined safe harbors, for corporations to claim that a particular electioneering communication is permissible under *WRTL*; and, as noted above, THE CHIEF JUSTICE crafted his controlling opinion in *WRTL* with the express goal of maximizing clarity and administrability. The case for *stare decisis* may be bolstered, we have said, when subsequent rulings "have reduced the impact" of a precedent "while reaffirming the decision's core ruling."

In the end, the Court's rejection of *Austin* and *McConnell* comes down to nothing

more than its disagreement with their results. Virtually every one of its arguments was made and rejected in those cases, and the majority opinion is essentially an amalgamation of resuscitated dissents. The only relevant thing that has changed since *Austin* and *McConnell* is the composition of this Court. Today's ruling thus strikes at the vitals of *stare decisis*, "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion" that "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals."

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***Senate Democrats to Weigh Limits on Campaign Spending***

Jonathan D. Salant  
(2010)

Senate Democrats said they may try to limit election spending by government contractors and U.S. units of foreign companies after last month's Supreme Court decision that lifted restrictions on corporate political money.

Other proposals include boosting requirements to disclose corporate campaign spending and requiring shareholders' approval for the expenditures.

The high court's 5-4 ruling on Jan. 21 reversed decades of congressional efforts to limit corporate cash in political campaigns. The majority, invoking the Constitution's free-speech clause, said companies and unions can use their general treasury funds

to buy ads supporting or opposing candidates.

"This terrible decision deserves as robust a response as possible," Senator Russell Feingold said today at a Senate Rules Committee hearing in Washington. The Wisconsin Democrat co-wrote a 2002 campaign-finance law that was partially overturned by the decision.

Senator Bob Bennett of Utah, the top Republican on the rules panel, applauded the court's ruling. "All Americans know they're free to speak their minds without having to get permission from the government," he said.

Committee Chairman Charles Schumer, a New York Democrat, said he is drafting legislation to try to limit the decision's impact.

"If Congress fails to act, our country will be faced with big, moneyed interests spending, or threatening to spend, millions on ads against those who dare to stand up to them," Schumer said.

**Constitutional Amendment**

Democratic senators John Kerry of Massachusetts, the party's 2004 presidential nominee, and Tom Udall of New Mexico called for a constitutional amendment to overturn the court's ruling. Two House Democrats, Judiciary Chairman John Conyers of Michigan and Representative Donna Edwards of Maryland, introduced a constitutional amendment in that chamber.

U.S. subsidiaries of foreign companies are allowed to form political action committees, as long as they are funded solely through donations of U.S. employees and foreign nationals don't decide how to spend the money.

"The U.S. operations of companies headquartered abroad should not be painted with a foreign brush given that they employ 5½ million Americans," said Nancy McLernon, president of the Organization for International Investment. The Washington-based trade group represents U.S. subsidiaries of companies including London-based AstraZeneca PLC and Toyota Motor Corp., based in Toyota City, Japan.

### **Disclosure Rules**

Yale Law School Professor Heather Gerken said corporate spending might be limited if companies had to disclose all political contributions they make, including those to trade groups like the U.S. Chamber of Commerce or other nonprofit organizations. While the organizations must disclose their own spending, they don't have to reveal the sources of their money.

Allison Hayward, a professor at George Mason University's law school in Arlington, Virginia, suggested that Congress wait to see how corporations respond to the ruling before acting.

"Judicial review of any burdens on independent spending will demand evidence of a compelling governmental interest behind the restriction," said Hayward. She is

a board member of the Alexandria, Virginia-based Center for Competitive Politics, a group opposing campaign finance limits.

Bennett said that even if companies buy ads, they may not spend their money wisely. "Can anybody say New Coke?" he said.

Montana Attorney General Steve Bullock expressed concern that corporations would swamp state elections with spending.

Montana banned corporate campaign spending in 1912 to ensure "the voices of our candidates, and those of the natural persons that support and vote for them, are not displaced by the treasuries of corporations," Bullock said. "The Supreme Court has challenged all of us to find new ways to keep those voices heard."

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### ***Stampede Towards Democracy***

Jan Witold Baran (2010)

In just seven years, the Supreme Court has declared most of the fabled McCain-Feingold law unconstitutional. The court has struck down the law's bans on contributions by minors, on independent spending by political parties and on issue ads within 30 days of a primary or 60 days of a general election, as well as restrictions on "millionaire" candidates. With last week's ruling in *Citizens United v. Federal Election Commission*, the court has now declared that corporations and unions may spend money on political advertising that urges the election or defeat of a candidate for public office.

The reaction was swift and intense. Conservatives and libertarians praised the ruling's preservation of the First Amendment and freedom of speech. Liberals and reformers expressed horror. President Obama predicted a "stampede of special-interest money in our politics" and declared, "I can't think of anything more devastating to the public interest."

One would think from all this that corporations and unions are now free to buy candidates on the open market. But what, if anything, will be different in our elections? Will corporations and unions be able to give money to candidates or political parties? No. Federal law, which regulates campaigns for president, the Senate and the House, prohibits such contributions. The ban was left untouched by the Supreme Court.

Can corporations spend money in cahoots with candidates and political parties? No. The Supreme Court decision addressed only "independent expenditures," which are, by definition, "not coordinated with a candidate." Monies spent in collaboration with candidates or parties are treated as contributions — and are still banned.

Perhaps all of this corporate spending will be secret? Wrong again. The Supreme Court upheld the laws that require any corporate or union spender to file reports with the Federal Election Commission within 24 hours of spending the first dime.

What about the "stampede of special-interest money"? The president's comment implies

there must not have been any corporate or union spending before Citizens United. In fact, in the final days of the Massachusetts special election for senator, corporations and unions spent at least \$2.7 million on television and radio advertising. How do we know? Those reports were filed with the F.E.C. And while this was a good deal of spending, it was not unusual.

So what will actually occur as a result of the Citizens United case? The answer is at once mundane and momentous.

Since the 1970s, Congress has passed an assortment of laws that banned anyone from spending money on independent ads—laws that were uniformly declared unconstitutional when they restricted spending by individuals, political action committees and political parties. But in a 1990 decision, *Austin v. Michigan Chamber of Commerce*, the court upheld a ban on corporate spending to expressly advocate the election or defeat of a candidate.

Because of the 1990 ruling, corporations and unions have been limited to so-called issue ads, which usually end with statements like "call Candidate Jones and tell her"—take your choice—to stop raising taxes/ support health care reform/ support alternative energy sources." Now that Citizens United has overturned *Austin*, corporations and unions can run independent ads that contain words of express advocacy. So instead of "Call Candidate Jones and demand that she not raise taxes," it can be: "Vote for Candidate Smith because Candidate Jones wants to raise taxes."

There is also no factual basis to predict that there will be a “stampede” of additional spending. As the court noted, 26 states and the District of Columbia already permit independent corporate and union campaign spending. There have been no stampedes in those states’ elections. Having a constitutional right is not the same as requiring one to exercise it, and there are many reasons businesses and unions may not spend much more on politics than they already do. As such, the effect of Citizens United on the 2010 campaigns is debatable. However, the effect of Citizens United on further legislative meddling with campaign speech is clear. In recent years, Congress interpreted its power to regulate campaigns as a license to limit, restrict, burden and confuse anyone who wished to engage in political campaigns.

But the court has reminded us that the First Amendment is not a license to regulate—it is a limitation on Congress. As the court said in its ruling, “The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day.”

While this may be disheartening to Washington lawyers and lawmakers, it should be a breath of fresh air to everyone else. The greatest benefit of Citizens United is that it will restrain Congress from flooding us with arcane, burdensome, convoluted campaign laws that discourage political participation.

The history of campaign finance reform is the history of incumbent politicians seeking to muzzle speakers, any speakers, particularly those who might publicly criticize them and their legislation. It is a lot easier to legislate against unions, gun owners, “fat cat” bankers, health insurance companies and any other industry or “special interest” group when they can’t talk back.

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### ***Why Socialism?***

Albert Einstein  
(1949)

Private capital tends to become concentrated in a few hands, partly because of competition among the capitalists, and partly because technological development and the increasing division of labor encourage the formation of larger units of production at the expense of the smaller ones. The result of these developments is an oligarchy of private capital the enormous power of which cannot be effectively checked even by a democratically organized political society. This is true since the members of the legislative bodies are selected by political parties, largely financed or otherwise influenced by private capitalists who, for all practical purposes, separate the electorate from the legislature. The consequence is that the representatives of the people do not in fact sufficiently protect the interests of the underprivileged sections of the population. Moreover, under existing conditions, private capitalists inevitably control, directly or indirectly, the main sources of information

(press, radio, education). It is thus extremely difficult, and indeed in most cases quite impossible, for the individual citizen to come to objective conclusions and to make intelligent use of his political rights.

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### **Chinese Proverb**

He who cannot agree with his enemies is controlled by them.

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### ***Do Dead Have Interests? Policy Issues for Research After Life***

Dorothy Nelkin  
(1998)

Albert Einstein died of a ruptured abdominal aortic aneurysm on April 18, 1955, and his body was cremated. The scattering of ashes took place at a location and time that was not publicized because Einstein had indicated he did not want a shrine, memorial, statue or museum. He used to say, "I want to be cremated so that people won't come to worship at my bones." Nor did he want to be studied. Einstein's family assumed that his entire body had been cremated, but his wishes had not been respected. Dr. Thomas Stoltz Harvey, the pathologist at Princeton Hospital who conducted Einstein's autopsy, removed and kept his brain. Without any previous consent from Einstein, he arranged for it to be sliced and embedded in celloidin, so that he could examine the pieces under the microscope. Harvey stored the sections in cardboard boxes and larger pieces in glass jars. He controlled access to the brain

tissue, giving pieces to about twelve scientists who hoped to discover its unique qualities. Einstein's brain yielded little interesting scientific information, but the way it was handled yielded many questions about informed consent, respect for preferences and the control over tissue samples.

Would Einstein have consented to the study of his brain? Harvey insists that, "He being the scientist that he was, I think he would have agreed to the study of his brain." But there is much evidence to dispute this contention. Einstein's papers contain no mention of a desire to donate his brain for research. He did not choose to donate his body to science, as others such as Bentham and Sir William Osler had done. Instead he chose to have his body cremated, which would preclude scientific study. He took elaborate precautions to protect his image, bequeathing the right to license it to Hebrew University. If he had wanted his brain used, it is likely he would have taken similar precautions to assure that its uses coincided with his wishes. Harvey's claim to know what Einstein would have wanted is particularly weak, given that he had ample opportunity to obtain consent. He had personally collected and analyzed Einstein's blood during his lifetime, yet did not get permission to study his brain.

Although Harvey took Einstein's brain for research purposes, he possessed it for over forty years without using it for meaningful research. In the 1980s, Marian Diamond, a neuroanatomist at the University of California at Berkeley, saw a picture in a

science magazine of Einstein's brain tissue in a cardboard box next to Harvey's desk and, after some difficulty, convinced Harvey to give her some tissue to study. He sent her the tissue in a mayonnaise jar. Diamond found that Einstein's brain had a greater glial/neuron ratio than did eleven controls, and published a study, including Harvey as a co-author as a courtesy for providing the tissue. But Diamond was quick to point out her study's limitations, including the small sample size and the fact that she had no other geniuses' brains for comparative examination.

Finally, in 1996, forty-one years after he had taken the brain, Harvey published an article about it. Along with co-author Britt Anderson of the University of Alabama Department of Neurology, he asserted that, "[s]tudying the brain of a genius can play a small and titillating role in the quest to identify these neurobiological features [that affect intelligence]." They compared Einstein's brain to five controls and concluded that Einstein's brain was within the average range in weight, but below the mean for men his age.

Neither Diamond's nor Harvey's research had sufficient controls or measures to determine whether Einstein's particular brain morphology was related to his intellectual capability. In fact, other researchers questioned the appropriateness of trying to learn about genius through a physical study of the brain. Dr. Janice Stevens of the neuropsychiatry branch of the National Institute of Mental Health pointed out, "Many idiots have big brains loaded

with glial cells." Physicist Banesh Hoffman, Einstein's biographer and former assistant, also criticized the idea of studying the physical brain. So too did Robert Schulman, director of the Einstein papers at Princeton University: "He'd think it was ridiculous that people were chopping up his mind to see where his power came from."

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**Moore**

v.

**Regents of the University of California**

Supreme Court of California

(1990)

PANELLI, Justice.

We granted review in this case to determine whether plaintiff has stated a cause of action against his physician and other defendants for using his cells in potentially lucrative medical research without his permission. Plaintiff alleges that his physician failed to disclose preexisting research and economic interests in the cells before obtaining consent to the medical procedures by which they were extracted. The superior court sustained all defendants' demurrers to the third amended complaint, and the Court of Appeal reversed. We hold that the complaint states a cause of action for breach of the physician's disclosure obligations, but not for conversion.

The plaintiff is John Moore (Moore), who underwent treatment for hairy-cell leukemia at the Medical Center of the University of California at Los Angeles (UCLA Medical Center). The five defendants are: (1) Dr.

David W. Golde (Golde), a physician who attended Moore at UCLA Medical Center; (2) the Regents of the University of California (Regents), who own and operate the university; (3) Shirley G. Quan, a researcher employed by the Regents; (4) Genetics Institute, Inc. (Genetics Institute); and (5) Sandoz Pharmaceuticals Corporation and related entities (collectively Sandoz).

Moore first visited UCLA Medical Center on October 5, 1976, shortly after he learned that he had hairy-cell leukemia. After hospitalizing Moore and “withdr[awing] extensive amounts of blood, bone marrow aspirate, and other bodily substances,” Golde confirmed that diagnosis. At this time all defendants, including Golde, were aware that “certain blood products and blood components were of great value in a number of commercial and scientific efforts” and that access to a patient whose blood contained these substances would provide “competitive, commercial, and scientific advantages.”

On October 8, 1976, Golde recommended that Moore’s spleen be removed. Golde informed Moore “that he had reason to fear for his life, and that the proposed splenectomy operation . . . was necessary to slow down the progress of his disease.” Based upon Golde’s representations, Moore signed a written consent form authorizing the splenectomy.

Before the operation, Golde and Quan “formed the intent and made arrangements to obtain portions of [Moore’s] spleen following its removal” and to take them to a

separate research unit. Golde gave written instructions to this effect on October 18 and 19, 1976. These research activities “were not intended to have . . . any relation to [Moore’s] medical . . . care.” However, neither Golde nor Quan informed Moore of their plans to conduct this research or requested his permission. Surgeons at UCLA Medical Center, whom the complaint does not name as defendants, removed Moore’s spleen on October 20, 1976.

Moore returned to the UCLA Medical Center several times between November 1976 and September 1983. He did so at Golde’s direction and based upon representations “that such visits were necessary and required for his health and well-being, and based upon the trust inherent in and by virtue of the physician-patient relationship. . . .” On each of these visits Golde withdrew additional samples of “blood, blood serum, skin, bone marrow aspirate, and sperm.” On each occasion Moore travelled to the UCLA Medical Center from his home in Seattle because he had been told that the procedures were to be performed only there and only under Golde’s direction.

“In fact, [however,] throughout the period of time that [Moore] was under [Golde’s] care and treatment, . . . the defendants were actively involved in a number of activities which they concealed from [Moore]. . . .” Specifically, defendants were conducting research on Moore’s cells and planned to “benefit financially and competitively . . . [by exploiting the cells] and [their] exclusive access to [the cells] by virtue of [Golde’s]

on-going physician-patient relationship . . .  
.”

Sometime before August 1979, Golde established a cell line from Moore’s T-lymphocytes. On January 30, 1981, the Regents applied for a patent on the cell line, listing Golde and Quan as inventors. “[B]y virtue of an established policy . . . , [the] Regents, Golde, and Quan would share in any royalties or profits . . . arising out of [the] patent.” The patent issued on March 20, 1984, naming Golde and Quan as the inventors of the cell line and the Regents as the assignee of the patent.

The Regent’s patent also covers various methods for using the cell line to produce lymphokines. Moore admits in his complaint that “the true clinical potential of each of the lymphokines . . . [is] difficult to predict, [but] . . . competing commercial firms in these relevant fields have published reports in biotechnology industry periodicals predicting a potential market of approximately \$3.01 Billion Dollars by the year 1990 for a whole range of [such lymphokines] . . . .”

With the Regents’ assistance, Golde negotiated agreements for commercial development of the cell line and products to be derived from it. Under an agreement with Genetics Institute, Golde “became a paid consultant” and “acquired the rights to 75,000 shares of common stock.” Genetics Institute also agreed to pay Golde and the Regents “at least \$330,000 over three years, including a pro-rata share of [Golde’s] salary and fringe benefits, in exchange for . .

. exclusive access to the materials and research performed” on the cell line and products derived from it. On June 4, 1982, Sandoz “was added to the agreement,” and compensation payable to Golde and the Regents was increased by \$110,000. “[T]hroughout this period, . . . Quan spent as much as 70 [percent] of her time working for [the] Regents on research” related to the cell line.

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“To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession . . . . Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.”

Since Moore clearly did not expect to retain possession of his cells following their removal, to sue for their conversion he must have retained an ownership interest in them. But there are several reasons to doubt that he did retain any such interest. First, no reported judicial decision supports Moore’s claim, either directly or by close analogy. Second, California statutory law drastically limits any continuing interest of a patient in excised cells. Third, the subject matters of the Regents’ patent—the patented cell line and the products derived from it—cannot be Moore’s property.

Neither the Court of Appeal’s opinion, the parties’ briefs, nor our research discloses a case holding that a person retains a sufficient interest in excised cells to support

a cause of action for conversion. We do not find this surprising, since the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property. It is these specialized statutes, not the law of conversion, to which courts ordinarily should and do look for guidance on the disposition of human biological materials.

Lacking direct authority for importing the law of conversion into this context, Moore relies, as did the Court of Appeal, primarily on decisions addressing privacy rights. One line of cases involves unwanted publicity. These opinions hold that every person has a proprietary interest in his own likeness and that unauthorized, business use of a likeness is redressible as a tort. But in neither opinion did the authoring court expressly base its holding on property law. Each court stated, following Prosser, that it was “pointless” to debate the proper characterization of the proprietary interest in a likeness. For purposes of determining whether the tort of conversion lies, however, the characterization of the right in question is far from pointless. Only property can be converted.

Not only are the wrongful-publicity cases irrelevant to the issue of conversion, but the analogy to them seriously misconceives the nature of the genetic materials and research involved in this case. Moore, adopting the analogy originally advanced by the Court of

Appeal, argues that “[i]f the courts have found a sufficient proprietary interest in one’s persona, how could one not have a right in one’s own genetic material, something far more profoundly the essence of one’s human uniqueness than a name or a face?” However, as the defendants’ patent makes clear—and the complaint, too, if read with an understanding of the scientific terms which it has borrowed from the patent—the goal and result of defendants’ efforts has been to manufacture lymphokines. Lymphokines, unlike a name or a face, have the same molecular structure in every human being and the same, important functions in every human being’s immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.

Another privacy case offered by analogy to support Moore’s claim establishes only that patients have a right to refuse medical treatment. In this context the court in *Bouvia* wrote that “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .” Relying on this language to support the proposition that a patient has a continuing right to control the use of excised cells, the Court of Appeal in this case concluded that “[a] patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of

human privacy and dignity in the name of medical progress.” Yet one may earnestly wish to protect privacy and dignity without accepting the extremely problematic conclusion that interference with those interests amounts to a conversion of personal property. Nor is it necessary to force the round pegs of “privacy” and “dignity” into the square hole of “property” in order to protect the patient, since the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure.

The next consideration that makes Moore’s claim of ownership problematic is California statutory law, which drastically limits a patient’s control over excised cells. Pursuant to Health and Safety Code section 7054.4, “[n]otwithstanding any other provision of law, recognizable anatomical parts, human tissues, anatomical human remains, or infectious waste following conclusion of scientific use shall be disposed of by interment, incineration, or any other method determined by the state department [of health services] to protect the public health and safety.” Clearly the Legislature did not specifically intend this statute to resolve the question of whether a patient is entitled to compensation for the nonconsensual use of excised cells. A primary object of the statute is to ensure the safe handling of potentially hazardous biological waste materials. Yet one cannot escape the conclusion that the statute’s practical effect is to limit, drastically, a patient’s control over excised cells. By restricting how excised cells may be used and requiring their eventual destruction, the statute eliminates so many

of the rights ordinarily attached to property that one cannot simply assume that what is left amounts to “property” or “ownership” for purposes of conversion law.

It may be that some limited right to control the use of excised cells does survive the operation of this statute. There is, for example, no need to read the statute to permit “scientific use” contrary to the patient’s expressed wish. A fully informed patient may always withhold consent to treatment by a physician whose research plans the patient does not approve. That right, however, as already discussed, is protected by the fiduciary-duty and informed-consent theories.

Finally, the subject matter of the Regents’ patent—the patented cell line and the products derived from it—cannot be Moore’s property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore’s body. Federal law permits the patenting of organisms that represent the product of “human ingenuity,” but not naturally occurring organisms. Human cell lines are patentable because “[l]ong-term adaptation and growth of human tissues and cells in culture is difficult—often considered an art ...,” and the probability of success is low. It is this inventive effort that patent law rewards, not the discovery of naturally occurring raw materials. Thus, Moore’s allegations that he owns the cell line and the products derived from it are inconsistent with the patent, which constitutes an authoritative determination that the cell line is the product of invention. Since such

allegations are nothing more than arguments or conclusions of law, they of course do not bind us.

For these reasons, we hold that the allegations of Moore's third amended complaint state a cause of action for breach of fiduciary duty or lack of informed consent, but not conversion.

\* \* \*

BROUSSARD, Justice, concurring and dissenting.

In analyzing the conversion issue, the majority properly begins with the established requirements of a common law conversion action, explaining that a plaintiff is required to demonstrate an actual interference with his "ownership or right of possession" in the property in question. Although the majority opinion, at several points, appears to suggest that a removed body part, by its nature, may never constitute "property" for purposes of a conversion action there is no reason to think that the majority opinion actually intends to embrace such a broad or dubious proposition. If, for example, another medical center or drug company had stolen all of the cells in question from the UCLA Medical Center laboratory and had used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie against the thief, and the majority opinion does not suggest otherwise. Thus, the majority's analysis cannot rest on the broad proposition that a removed body part is not property, but rather rests on the

proposition that a patient retains no ownership interest in a body part once the body part has been removed from his or her body.

The majority opinion fails to recognize, however, that, in light of the allegations of the present complaint, the pertinent inquiry is not whether a patient generally retains an ownership interest in a body part after its removal from his body, but rather whether a patient has a right to determine, before a body part is removed, the use to which the part will be put after removal. Although the majority opinion suggests that there are "reasons to doubt" that a patient retains "any" ownership interest in his organs or cells after removal the opinion fails to identify any statutory provision or common law authority that indicates that a patient does not generally have the right, before a body part is removed, to choose among the permissible uses to which the part may be put after removal. On the contrary, the most closely related statutory scheme—the Uniform Anatomical Gift Act—makes it quite clear that a patient does have this right.

The Uniform Anatomical Gift Act is a comprehensive statutory scheme that was initially adopted in California in 1970 and most recently revised in 1988. Although that legislation, by its terms, applies only to a donation of all or part of a human body which is "to take effect upon or after [the] death [of the donor]"—and thus is not directly applicable to the present case which involves a living donor—the act is nonetheless instructive with regard to this state's general policy concerning an

individual's authority to control the use of a donated body part. The act, which authorizes an anatomical gift to be made, *inter alia*, to "[a] hospital [or a] physician [,] . . . for transplantation, therapy, medical or dental education, research or advancement of medical or dental science" expressly provides that such a gift "may be made to a designated donee or without designating a donee" and also that the donor may make such a gift "for any of the purposes [specified in the statute or may] limit an anatomical gift to one or more of those purposes . . . ." Thus, the act clearly recognizes that it is the donor of the body part, rather than the hospital or physician who receives the part, who has the authority to designate, within the parameters of the statutorily authorized uses, the particular use to which the part may be put.

Although, as noted, the Uniform Anatomical Gift Act applies only to anatomical gifts that take effect on or after the death of the donor, the general principle of "donor control" which the act embodies is clearly not limited to that setting. In the transplantation context, for example, it is common for a living donor to designate the specific donee—often a relative—who is to receive a donated organ. If a hospital, after removing an organ from such a donor, decided on its own to give the organ to a different donee, no one would deny that the hospital had violated the legal right of the donor by its unauthorized use of the donated organ. Accordingly, it is clear under California law that a patient has the right, prior to the removal of an organ, to control the use to which the organ will be put after removal.

It is also clear, under traditional common law principles, that this right of a patient to control the future use of his organ is protected by the law of conversion. As a general matter, the tort of conversion protects an individual not only against improper interference with the right of possession of his property but also against unauthorized use of his property or improper interference with his right to control the use of his property. Sections 227 and 228 of the Restatement Second of Torts specifically provide in this regard that "[o]ne who uses a chattel in a manner which is a serious violation of the right of another to control its use is subject to liability to the other for conversion" and that "[o]ne who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated." California cases have also long recognized that "unauthorized use" of property can give rise to a conversion action.

The application of these principles to the present case is evident. If defendants had informed plaintiff, prior to removal, of the possible uses to which his body part could be put and plaintiff had authorized one particular use, it is clear under the foregoing authorities that defendants would be liable for conversion if they disregarded plaintiff's decision and used the body part in an unauthorized manner for their own economic benefit. Although in this case defendants did not disregard a specific directive from plaintiff with regard to the

future use of his body part, the complaint alleges that, before the body part was removed, defendants intentionally withheld material information that they were under an obligation to disclose to plaintiff and that was necessary for his exercise of control over the body part; the complaint also alleges that defendants withheld such information in order to appropriate the control over the future use of such body part for their own economic benefit. If these allegations are true, defendants clearly improperly interfered with plaintiff's right in his body part at a time when he had the authority to determine the future use of such part, thereby misappropriating plaintiff's right of control for their own advantage. Under these circumstances, the complaint fully satisfies the established requirements of a conversion cause of action.

As already noted, the majority maintains that there are a number of "reasons to doubt" that a patient retains any legally protectible interest in his organs after removal but none of these reasons withstands scrutiny. The majority first relies on the fact that "no reported judicial decision supports Moore's claim, either directly or by close analogy." By the same token, however, there is no reported judicial decision that rejects such a claim. This is simply a case of first impression. And while the majority goes on to emphasize that it is the "specialized statutes" dealing with human biological materials to which the court should look for guidance in determining whether a patient has any legal rights with respect to an organ after removal the majority fails to recognize that the Uniform Anatomical Gift Act, as we

have seen, expressly confirms a patient's right to designate, prior to removal, the use to which a body part will be put.

The majority next relies on the provisions of section 7054.4, a statute that addresses the potential health hazards posed by the improper disposal of human body parts, reasoning that this statute "drastically limits a patient's control over excised cells." While I agree with the majority that section 7054.4 should reasonably be interpreted to apply to body parts removed from a living patient as well as from dead bodies, the statute nonetheless provides absolutely no support for the majority's conclusion. Although section 7054.4 limits a patient's control over an excised body part in the sense that it prohibits him from taking the removed part to his home and keeping it on his mantel, the statute certainly does not suggest that a patient does not have the right to choose among the legally permissible uses of his organ. Similarly, there is nothing in section 7054.4 which indicates that a doctor or medical facility that removes a patient's organ possesses any greater right than the patient himself to choose the further use to which the removed organ will be put. Since the majority does not suggest that the provisions of section 7054.4 should be interpreted to prohibit the research or commercial activities at issue in this case—and I agree that the statute cannot reasonably be interpreted to prohibit such use—I cannot understand how section 7054.4 provides any assistance to the majority's argument.

Finally, the majority maintains that plaintiff's conversion action is not viable because "the subject matter of the Regents' patent—the patented cell line and the products derived from it—cannot be Moore's property." Even if this is an accurate statement of federal patent law, it does not explain why plaintiff may not maintain a conversion action for defendants' unauthorized use of his own body parts, blood, blood serum, bone marrow, and sperm. Although the damages which plaintiff may recover in a conversion action may not include the value of the patent and the derivative products, the fact that plaintiff may not be entitled to all of the damages which his complaint seeks does not justify denying his right to maintain any conversion action at all. Similarly, although the question whether plaintiff's cells are "unique" may well affect the amount of damages plaintiff will be able to recover in a conversion action, the question of uniqueness has no proper bearing on plaintiff's basic right to maintain a conversion action; ordinary property, as well as unique property, is, of course, protected against conversion.

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***Wonder Woman: The Life, Death, and Life  
After Death of Henrietta Lacks, Unwitting  
Heroine of Modern Medicine***  
Van Smith (2002)

On Feb. 1, 1951, Henrietta Lacks—mother of five, native of rural southern Virginia, resident of the Turner Station neighborhood in Dundalk—went to Johns Hopkins Hospital with a worrisome symptom: spotting on her underwear. She was quickly

diagnosed with cervical cancer. Eight months later, despite surgery and radiation treatment, the Sparrows Point shipyard worker's wife died at age 31 as she lay in the hospital's segregated ward for blacks.

Not all of Henrietta Lacks died that October morning, though. She unwittingly left behind a piece of herself that still lives today.

While she was in Hopkins' care, researchers took a fragment of Lacks' tumor and sliced it into little cubes, which they bathed in nutrients and placed in an incubator. The cells, dubbed "HeLa" for Henrietta Lacks, multiplied as no other cells outside the human body had before, doubling their numbers daily. Their dogged growth spawned a breakthrough in cell research; never before could investigators reliably experiment on such cell cultures because they would weaken and die before meaningful results could be obtained. On the day of Henrietta's death, the head of Hopkins' tissue-culture research lab, Dr. George Gey, went before TV cameras, held up a tube of HeLa cells, and announced that a new age of medical research had begun—one that, someday, could produce a cure for cancer.

When he discovered HeLa could survive even shipping via U.S. mail, Gey sent his prize culture to colleagues around the country. They allowed HeLa to grow a little, and then sent some to *their* colleagues. Demand quickly rose, so the cells were put into mass production and traveled around the globe—even into space, on an unmanned

satellite to determine whether human tissues could survive zero gravity.

\* \* \*

In the half-century since Henrietta Lacks' death, her tumor cells—whose combined mass is probably much larger than Lacks was when she was alive—have continually been used for research into cancer, AIDS, the effects of radiation and toxic substances, gene mapping, and countless other scientific pursuits. Dr. Jonas Salk used HeLa to help develop his polio vaccine in the early '50s. The cells are so hardy that they took over other tissue cultures, researchers discovered in the 1970s, leading to reforms in how such cultures are handled. In the biomedical world, HeLa cells are as famous as lab rats and petri dishes.

Yet Henrietta Lacks herself remains shrouded in obscurity. Gey, of course, knew HeLa's origins, but he believed confidentiality was paramount—so for years, Henrietta's family didn't know her cells still lived, much less how important they had become. After Gey died in 1970, the secret came out. But it was not until 1975, when a scientifically savvy fellow dinner-party guest asked family members if they were related to the mother of the HeLa cell, that Lacks' descendants came to understand her critical role in medical research.

The concept was mind-blowing—in a sense, it seemed to Lacks' family, she was being kept alive in the service of science. “It just kills me,” says Henrietta's daughter, Deborah Lacks-Pullum, now 52 and still living in Baltimore, “to know my mother's cells are all over the world.”

Lacks-Pullum is bitter about this. “We never knew they took her cells, and people done got filthy rich [from HeLa-based research], but we don't get a dime,” she says. The family can't afford a reputable lawyer to press its case for some financial stake in the work. She says she has appealed to Hopkins for help, and “all they do is pat me on my shoulder and put me out the door.”

Hopkins spokesperson Gary Stephenson is quick to point out that Hopkins never sold HeLa, so it didn't make money from Henrietta's contribution. Still, he says, “there are people here who would like something done, and I'm hoping that at some point something will be done in a formal way to note her very, very important contribution.”

Lacks-Pullum shares those hopes, but she is pessimistic. “Hopkins,” she says, “they don't care.”

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### WHY SOCIETIES NEED DISSENT

Cass R. Sunstein (2003)

When one or more people in a group are confident that they know the right answer to a factual question, the group might well shift in the direction of accuracy. Suppose that the question is how many people were on the earth in 1940, or the number of home runs hit by Hank Aaron, or the distance between Paris and Madrid. Suppose too that one or a few people know the right answer.

If so, there is a good chance that the group will not polarize but will instead converge on that answer. The reason is simple: The person who is confident that he knows the answer will speak with assurance and authority. If one member of the group is certain that Hank Aaron hit 755 home runs (as he did) and other members are uncertain, then the group might well end up agreeing that he hit 755 home runs.

Of course, agreement on the truth is not inevitable. Asch's conformity experiments show that social pressures can lead people to blunder on the simplest factual issues. An impressive study demonstrates that majority pressures can be powerful even for factual questions on which people know the right answer. The study involved 1,200 people, forming groups of six, five, and four members. Individuals were asked true-false questions involving art, poetry, public opinion, geography, economics, and politics. They were then asked to assemble into groups that would discuss questions and produce answers. The majority played a big role in determining the group's answers. The truth played a role, too, but a lesser one. If a majority of individuals in the group gave the right answer, the group moved toward the majority in 79 percent of the cases. If a majority of individuals in the group gave the wrong answer, the group decision moved toward the errant majority in 56 percent of cases. Hence, the truth did have an influence—79 percent is higher than 56 percent—but the majority's judgment was the dominant influence. And because the majority was influential even when wrong, the average group decision was right only

slightly more than the average individual decision (66 percent v. 62 percent).

This demonstrates that groups often err even when some of their members know the truth. In many situations, however, group members who are ignorant will be tentative, and members who are informed will speak confidently. This is enough to promote convergence on truth rather than polarization. Here is a link between what prevents polarization and what shatters social cascades, in which people follow others and fail to disclose what they actually know: a person who is confident that he knows, and is seen to know, the truth.

\* \* \*

Many of the Constitution's rights and institutions reduce the risk of harmful consequences from conformity, cascades, and group polarization. Freedom of speech is the simplest example, providing a check on bad cascades and unjustified extremism. At a minimum, a system of free expression forbids government from restricting any point of view. We have also seen the importance of ensuring that people are exposed to a range of positions and do not self-select into narrow communities of their own devising. By creating public forums open to all, a system of free speech shows its affirmative side. In a well-functioning democracy, the right to free speech certainly protects dissenters, but it cannot do what it is supposed to do unless listeners are willing to give dissenters a respectful hearing.

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CONSTITUTION OF THE UNITED STATES OF  
AMERICA

**Amendment I**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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**ANNIE HALL**

Alvy Singer: I'm so tired of spending evenings making fake insights with people who work for "Dysentery."

Robin: "Commentary."

Alvy: Oh really? I had heard that "Commentary" and "Dissent" had merged and formed "Dysentery."

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**Pacific Gas and Elec. Co.**

v.

**Public Utilities Comm'n of California**

Supreme Court of the United States (1986)

Justice POWELL announced the judgment of the Court.

The question in this case is whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees.

I.

For the past 62 years, appellant Pacific Gas and Electric Company has distributed a newsletter in its monthly billing envelope. Appellant's newsletter, called *Progress*, reaches over three million customers. It has included political editorials, feature stories on matters of public interest, tips on energy conservation, and straightforward information about utility services and bills.

In 1980, appellee Toward Utility Rate Normalization (TURN), an intervenor in a ratemaking proceeding before California's Public Utilities Commission, another appellee, urged the Commission to forbid appellant to use the billing envelopes to distribute political editorials, on the ground that appellant's customers should not bear the expense of appellant's own political speech. The Commission decided that the envelope space that appellant had used to disseminate *Progress* is the property of the ratepayers. This "extra space" was defined as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost."

In an effort to apportion this "extra space" between appellant and its customers, the Commission permitted TURN to use the "extra space" four times a year for the next two years. During these months, appellant may use any space not used by TURN, and it may include additional materials if it pays any extra postage. The Commission found that TURN has represented the interests of "a significant group" of appellant's

residential customers and has aided the Commission in performing its regulatory function. Consequently, the Commission determined that ratepayers would benefit from permitting TURN to use the extra space in the billing envelopes to raise funds and to communicate with ratepayers: “Our goal . . . is to change the present system to one which uses the extra space more efficiently for the ratepayers’ benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG & E.” The Commission concluded that appellant could have no interest in excluding TURN’s message from the billing envelope since appellant does not own the space that message would fill. The Commission placed no limitations on what TURN or appellant could say in the envelope, except that TURN is required to state that its messages are not those of appellant. The Commission reserved the right to grant other groups access to the envelopes in the future.

Appellant appealed the Commission’s order to the California Supreme Court, arguing that it has a First Amendment right not to help spread a message with which it disagrees and that the Commission’s order infringes that right. The California Supreme Court denied discretionary review. We noted probable jurisdiction and now reverse.

## II.

The constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker’s interest in self-expression. By protecting those who wish to

enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information. The identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster. Thus, in *Bellotti*, we invalidated a state prohibition aimed at speech by corporations that sought to influence the outcome of a state referendum. Similarly, in *Consolidated Edison Co. v. Public Service Comm’n of N.Y.*, we invalidated a state order prohibiting a privately owned utility company from discussing controversial political issues in its billing envelopes. In both cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed.

There is no doubt that under these principles appellant’s newsletter *Progress* receives the full protection of the First Amendment. In appearance no different from a small newspaper, *Progress*’ contents range from energy-saving tips to stories about wildlife conservation, and from billing information to recipes. *Progress* thus extends well beyond speech that proposes a business transaction and includes the kind of discussion of “matters of public concern” that the First Amendment both fully protects and implicitly encourages.

The Commission recognized as much, but concluded that requiring appellant to disseminate TURN’s views did not infringe upon First Amendment rights. It reasoned that appellant remains free to mail its own newsletter except for the four months in which TURN is given access. The Commission’s conclusion necessarily rests on one of two premises: (i) compelling appellant to grant TURN access to a hitherto private forum does not infringe appellant’s right to speak; or (ii) appellant has no property interest in the relevant forum and therefore has no constitutionally protected right in restricting access to it. We now examine those propositions.

### III.

Compelled access like that ordered in this case both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set. These impermissible effects are not remedied by the Commission’s definition of the relevant property rights.

#### A.

This Court has previously considered the question whether compelling a private corporation to provide a forum for views other than its own may infringe the corporation’s freedom of speech. *Tornillo* involved a challenge to Florida’s right-of-reply statute. The Florida law provided that, if a newspaper assailed a candidate’s character or record, the candidate could

demand that the newspaper print a reply of equal prominence and space.

We found that the right-of-reply statute directly interfered with the newspaper’s right to speak in two ways. First, the newspaper’s expression of a particular viewpoint triggered an obligation to permit other speakers, with whom the newspaper disagreed, to use the newspaper’s facilities to spread their own message. The statute purported to advance free discussion, but its effect was to deter newspapers from speaking out in the first instance: by forcing the newspaper to disseminate opponents’ views, the statute penalized the newspaper’s own expression. We therefore concluded that a government-enforced right of access *inescapably* dampens the vigor and limits the variety of public debate.

Second, we noted that the newspaper’s “treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment.” Florida’s statute interfered with this “editorial control and judgment” by forcing the newspaper to tailor its speech to an opponent’s agenda, and to respond to candidates’ arguments where the newspaper might prefer to be silent. Since *all* speech inherently involves choices of what to say and what to leave unsaid, this effect was impermissible. As we stated last Term: “The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas . . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same

ultimate end as freedom of speech in its affirmative aspect.”

\* \* \*

The concerns that caused us to invalidate the compelled access rule in *Tornillo* apply to appellant as well as to the institutional press. Just as the State is not free to “tell a newspaper in advance what it can print and what it cannot,” the State is not free either to restrict appellant’s speech to certain topics or views or to force appellant to respond to views that others may hold. Under *Tornillo* a forced access rule that would accomplish these purposes indirectly is similarly forbidden.

V.

We conclude that the Commission’s order impermissibly burdens appellant’s First Amendment rights because it forces appellant to associate with the views of other speakers, and because it selects the other speakers on the basis of their viewpoints. The order is not a narrowly tailored means of furthering a compelling state interest, and it is not a valid time, place, or manner regulation.

\* \* \*

The Court’s decision in *PruneYard Shopping Center v. Robins* is not to the contrary. In *PruneYard*, a shopping center owner sought to deny access to a group of students who wished to hand out pamphlets in the shopping center’s common area. The California Supreme Court held that the students’ access was protected by the State Constitution; the shopping center owner argued that this ruling violated *his* First Amendment rights. This Court held that the shopping center did not have a constitutionally protected right to exclude the pamphleteers from the area open to the public at large. Notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner’s exercise of his own right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content based. *PruneYard* thus does not undercut the proposition that forced associations that burden protected speech are impermissible.

Justice REHNQUIST, with whom Justice WHITE and Justice STEVENS join as to Part I, dissenting.

The plurality concludes that a state-created, limited right of access to the extra space in a utility’s billing envelopes unconstitutionally burdens the utility’s right to speak if the utility has used the space itself to express political views to its customers. This is so even though the extra envelope space belongs to the customers as a matter of state property law. The plurality justifies its conclusion on grounds that the right of access may (1) deter the utility from saying things that might trigger an adverse response, or (2) induce it to respond to subjects about which it might prefer to remain silent, in violation of the principles established in *Miami Herald Publishing Co. v. Tornillo* and *Wooley v. Maynard*. I do not believe that the right of access here will

have any noticeable deterrent effect. Nor do I believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally. I believe that the right of access here is constitutionally indistinguishable from the right of access approved in *PruneYard* and therefore I dissent.

### I.

This Court established in *Bellotti* that the First Amendment prohibits the government from *directly* suppressing the affirmative speech of corporations. A newspaper publishing corporation's right to express itself freely is also implicated by governmental action that penalizes speech because the deterrent effect of a penalty is very much like direct suppression. Our cases cannot be squared, however, with the view that the First Amendment prohibits governmental action that only *indirectly* and *remotely* affects a speaker's contribution to the overall mix of information available to society.

Several cases illustrate this point. In *Buckley v. Valeo*, the Court upheld limits on political campaign contributions despite the argument that their likely effect would be "to mute the voices of affluent persons and groups in the election process and thereby to equalize the relative ability of all citizens to affect the outcome of elections." The Court explained that the potential effect on affluent speech of limiting access to this one forum was constitutionally insignificant because of the availability of other forums and that the

limitation protected the integrity of our representative democracy by limiting political *quid pro quos* and the appearance of corruption. The Court also upheld a provision granting different levels of subsidies for Presidential campaigns depending upon whether the party receiving the subsidy is a major, minor, or new party. The Court reasoned that the effect of the provision was "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion." Similarly, in *Regan v. Taxation With Representation of Washington*, the Court upheld a governmental decision to grant a subsidy to certain expressive groups yet deny it to others, depending on whether the groups served the statutory definition of public interest, even though this had the undeniable effect of enhancing the speech of some groups over the speech of others. The Court explained that Congress is free to subsidize some but not all speech.

*PruneYard* illustrates the point in a case that is very similar to the one decided today. The State of California interpreted its own Constitution to afford a right of access to private shopping centers for the reasonable exercise of speech and petitioning. While acknowledging that the First Amendment does not itself grant a right of access to private forums, the Court upheld the state-created right against a First Amendment challenge. It reasoned that *Wooley v. Maynard*, does not prohibit such a right of access because the views of those taking advantage of the right would not likely be identified with those of the owners, the State was not dictating any specific message, and

the owners were free to disavow any connection to the message by posting disclaimers. The Court similarly distinguished *West Virginia Board of Education v. Barnette*, stating that the right of access did not compel the owners to affirm their belief in government orthodoxy, and left them free to publicly dissociate themselves from the views of the speakers. Finally, it distinguished *Miami Herald Publishing Co. v. Tornillo*, on the ground that the right of access did not constitute a content-based penalty that would “damp[e]n the vigor and limi[t] the variety of public debate.”

Of course, the First Amendment does prohibit governmental action affecting the mix of information available to the public if the effect of the action approximates that of direct content-based suppression of speech. Thus, while the Court in *Buckley v. Valeo* upheld limits on campaign contributions and allowed disparate governmental subsidies to various political parties, it struck down limitations on campaign expenditures because such limits “impose far greater restraints on the freedom of speech and association.” The Court reasoned that the Government’s interest in equalizing the relative influence of individuals over election outcomes could not overcome the First Amendment, which was designed to encourage the widest dissemination of diverse views. Similarly, the Court suggested in *Regan v. Taxation With Representation of Washington*, that governmental subsidies aimed at the suppression of dangerous ideas might not pass constitutional muster.

*Miami Herald Publishing Co. v. Tornillo* held that a governmentally imposed “penalty” for the exercise of protected speech is sufficiently like direct suppression to trigger heightened First Amendment scrutiny. The Court in *Tornillo* struck down a statute granting political candidates a right to reply any time a private newspaper criticized them. The Court reasoned that the statute violated the First Amendment because it “exact[ed] a penalty on the basis of the content of a newspaper” that would likely have the effect of “damp[ing] the vigor and limi[ting] the variety of public debate.”

Although the plurality draws its deterrence rationale from *Tornillo*, it does not even attempt to characterize the right of access as a “penalty”; indeed, such a Procrustean effort would be doomed to failure. Instead, the plurality stretches *Tornillo* to stand for the general proposition that the First Amendment prohibits any regulation that deters a corporation from engaging in some expressive behavior. But the deterrent effect of any statute is an empirical question of degree. When the potential deterrent effect of a particular state law is remote and speculative, the law simply is not subject to heightened First Amendment scrutiny. The plurality does not adequately explain how the potential deterrent effect of the right of access here is sufficiently immediate and direct to warrant strict scrutiny. While a statutory penalty, like the right-of-reply statute in *Tornillo*, may sufficiently deter speech to trigger such heightened First Amendment scrutiny, the right of access

here will not have such an effect on PG & E's incentives to speak.

The record does not support the inference that PUC issued its order to penalize PG & E because of the content of its inserts or because PG & E included the inserts in its billing envelopes in the first place. The order does not prevent PG & E from using the billing envelopes in the future to distribute inserts whenever it wishes. Nor does its vitality depend on whether PG & E includes inserts in any future billing envelopes. Moreover, the central reason for the access order—to provide for an effective ratepayer voice—would not vary in importance if PG & E had never distributed the inserts or ceased distributing them tomorrow. The most that can be said about the connection between the inserts and the order is that the existence of the inserts quite probably brought to TURN's attention the possibility of requesting access.

Nor does the access order create any cognizable risk of deterring PG & E from expressing its views in the most candid fashion. Unlike the reply statute in *Tornillo*, which conditioned access upon discrete instances of certain expression, the right of access here bears no relationship to PG & E's future conduct. PG & E cannot prevent the access by remaining silent or avoiding discussion of controversial subjects. The plurality suggests, however, that the possibility of minimizing the undesirable content of TURN's speech **may** induce PG & E to adopt a strategy of avoiding certain topics in hopes that TURN will not think to address them on its own. But this is

an extremely implausible prediction. The success of such a strategy would depend on any group given access being little more than a reactive organization. TURN or any other group eventually given access will likely address the controversial subjects in spite of PG & E's silence. I therefore believe that PG & E will have no incentive to adopt the conservative strategy. Accordingly, the right of access should not be held to trigger heightened First Amendment scrutiny on the ground that it somehow might deter PG & E's right to speak.

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### **Open Letter**

Gary Larson

TO WHOM IT MAY CONCERN:

I'm walking a fine line here.

On the one hand, I confess to finding it quite flattering that some of my fans have created web sites displaying and/or distributing my work on the Internet. And, on the other, I'm struggling to find the words that convincingly but sensitively persuade these Far Side enthusiasts to "cease and desist" before they have to read these words from some lawyer.

What impact this unauthorized use has had (and is having) in tangible terms is, naturally, of great concern to my publishers and therefore to me—but it's not the focus of this letter. My effort here is to try and speak to the intangible impact, the emotional cost to me, personally, of seeing my work

collected, digitized, and offered up in cyberspace beyond my control.

Years ago I was having lunch one day with the cartoonist Richard Guindon, and the subject came up how neither one of us ever solicited or accepted ideas from others. But, until Richard summed it up quite neatly, I never really understood my own aversions to doing this: “It’s like having someone else write in your diary,” he said. And how true that statement rang with me . In effect, we drew cartoons that we hoped would be entertaining or, at the very least, not boring; but regardless, they would always come from an intensely personal, and therefore original perspective.

To attempt to be “funny” is a very scary, risk-laden proposition. (Ask any stand-up comic who has ever “bombed” on stage.) But if there was ever an axiom to follow in this business, it would be this: be honest to yourself and—most important—respect your audience.

So, in a nutshell (probably an unfortunate choice of words for me), I only ask that this respect be returned, and the way for anyone to do that is to please, please refrain from putting The Far Side out on the Internet. These cartoons are my “children,” of sorts, and like a parent, I’m concerned about where they go at night without telling me. And, seeing them at someone’s web site is like getting the call at 2:00 a.m. that goes, “Uh, Dad, you’re not going to like this much, but guess where I am.”

I hope my explanation helps you to understand the importance this has for me, personally, and why I’m making this request.

Please send my “kids” home. I’ll be eternally grateful.

Most respectfully,  
Gary Larson

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**Wojnarowicz**  
v.  
**American Family Ass’n**  
Southern District of New York (1990)

OPINION AND ORDER

WILLIAM C. CONNER, District Judge:

Multimedia artist David Wojnarowicz brings this action to enjoin the publication of a pamphlet by defendants American Family Association (“AFA”) and Donald E. Wildmon, Executive Director of AFA, and for damages based upon claims of copyright infringement, defamation, and violations of the Lanham Act and the New York Artists’ Authorship Rights Act.

FINDINGS OF FACT

Defendant AFA, formerly known as the National Federation For Decency, was founded in 1977 as a not-for-profit corporation by Donald E. Wildmon. Incorporated under the laws of the state of Mississippi, and headquartered in Tupelo, Mississippi, the AFA has over 60,000

members and approximately 500 local chapters nationwide, including a number in the state of New York. It is chartered for the declared purposes, *inter alia*, of promoting decency in the American society and advancing the Judeo-Christian ethic in America. Defendant Donald E. Wildmon, Executive Director of the AFA, is a citizen of the United States, residing in Tupelo, Mississippi. Since May 1989, the AFA has been actively campaigning against what it characterizes as the subsidization of “offensive” and “blasphemous” art by the National Endowment for the Arts (the “NEA”). Through contributions, it raised \$5.2 million dollars in 1989.

Plaintiff, a citizen of the United States, residing in New York, New York, is a multimedia artist, whose work includes paintings, photographs, collages, sculptures, installations, video tapes, films, essays and public performances. A professional artist, plaintiff earns his living by selling his art works, many of which are assertedly directed at bringing attention to the devastation wrought upon the homosexual community by the AIDS epidemic. Plaintiff attempts through his work to expose what he views as the failure of the United States government and public to confront the AIDS epidemic in any meaningful way. To this end, plaintiff’s art at times incorporates sexually explicit images for the avowed purpose of shaping community attitudes towards sexuality. As a result, his works have been the subject of controversy and public debate concerning government funding of non-traditional art.

Plaintiff’s art works frequently employ groupings of images which are assertedly intended to convey composite messages. The works have received a measure of critical acclaim and have been featured in a number of museum and gallery exhibitions. Plaintiff earned approximately \$15,000 from the sale of his art works in 1988, approximately \$34,000 in 1989 and \$17,000 to date this year.

From January 23, 1990 through March 4, 1990, the University Galleries at Illinois State University, Normal, Illinois, presented a comprehensive exhibition of plaintiff’s work, entitled “Tongues of Flame” (the “exhibit”), and published a 128-page catalog (the “catalog”) which contained reproductions of over sixty of plaintiff’s works, as well as essays by plaintiff and others. The NEA awarded the University Galleries \$15,000 to help pay for the exhibit and the catalog.

Plaintiff is the owner of the copyrights to all of the works displayed in the exhibit and of all of the reproductions of his work that appear in the catalog.

On or about April 12, 1990, the AFA and Wildmon published and distributed throughout the United States, including the Southern District of New York, the AFA pamphlet (the “pamphlet”) in an effort to stop public funding by the NEA of art works such as plaintiff’s. The pamphlet was mailed to 523 members of Congress, 3,230 Christian leaders, 947 Christian radio stations and 1,578 newspapers, at least twenty-eight of which were located in this district. Without plaintiff’s authorization,

Wildmon photographically copied fourteen fragments of plaintiff's works which he believed most offensive to the public and reproduced these fragments in the AFA pamphlet. These fourteen images, with three exceptions, explicitly depict sexual acts. The other three images portray Christ with a hypodermic needle inserted in his arm, and two ambiguous scenes which plaintiff represents as respectively depicting an African purification ritual and two men dancing together.

Wildmon wrote the text of the pamphlet, which is entitled "Your Tax Dollars Helped Pay For These 'Works of Art.'" It states in the introductory sentence that "the photographs appearing on this sheet were part of the David Wajnarowicz [sic] 'Tongues of Flame' exhibit catalog." The envelope in which the AFA pamphlet was mailed states that the "[p]hotos enclosed in this envelope were taken from the catalog of the 'Tongues of Flame' exhibit" and is marked "Caution-Contains Extremely Offensive Material."

\* \* \*

### *I. New York's Artists' Authorship Rights Act*

New York's Artists' Authorship Rights Act, N.Y. Cultural Affairs Law Section 14.03, provides, in relevant part, that:

1. [N]o person other than the artist or a person acting with the artist's consent shall knowingly display in a place accessible to the public or publish a work of fine art or limited edition multiple of not more than

three hundred copies by that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist, or under circumstances which would reasonable be regarded as being the work of the artist, and damage to the artist's reputation is reasonably likely to result therefrom . . . .

2. (b) The rights created by this subdivision shall exist in addition to any other rights and duties which may now or in the future be applicable.

3. (e) The provisions of this section shall apply only to works of fine art or limited edition multiples of not more than three hundred copies knowingly displayed in a place accessible to the public, published or reproduced in this state.

4. (a) An artist aggrieved under subdivision one or subdivision two of this section shall have a cause of action for legal and injunctive relief.

\* \* \*

### *B. Scope of Act*

Defendants next argue that the distribution of a photocopy of cropped images extracted from plaintiff's work is not a violation of the statute because it did not alter, deface, mutilate or modify plaintiff's original work. This Court does not agree. A literal reading of section 14.03(1) of the Authorship Rights Act clearly demonstrates that the statute

guards against alterations of reproductions as well as of the original works.

Sections 14.03(1) and 14.03(3)(b), read together, suggest that deliberate alterations (such as selective cropping), as distinguished from those that ordinarily result from the reproduction process (such as reduction in overall size or loss of detail), would constitute violations.

Defendants maintain that the statute's legislative history supports their contention that the display or publication envisioned is the altered original or limited edition multiple by a subsequent owner. The New York State Assembly Memorandum in Support of Legislation submitted to the legislature in accordance with Assembly Rules, addressed the purpose of the Act, stating:

#### JUSTIFICATION

When a work of fine art is sold in New York, the author loses all rights to that work. There are cases where a work has been altered, mutilated or defaced by the owner without consulting with the creator. This is happening with more frequency, or the fact of occurrence is becoming more publicized, as an increasing number of artworks are in the public eye through publications, art being in public places, and exhibitions. While many civil law countries, such as France, Germany and Italy recognize the artist's lasting attachment to the work, our federal government does not. Only one state, California, acknowledges an artist's authorship rights. American courts, thus far,

have rarely ruled in favor of the artist stating in decisions that there is no guidance from state or federal laws.

This bill would give New York artists grounds to go into court to allow the courts to decide whether the artists' reputation has been damaged when a work is intentionally defaced or mutilated by the owner. It would remedy for New York what John Merryman, a legal scholar who has written comprehensively on the subject, calls an "unworthy and intolerable hiatus in our law."

Assembly Memorandum on Assembly Bill 5052-B. It is evident that the statute was intended to protect the integrity of the original artworks and the artist's limited edition multiples after they were sold or transferred to new owners. The statute prevents the new owner from displaying or publishing and attributing to the creator an altered version of that creator's work. However, nothing in the legislative history suggests that the New York legislature intended to limit the Act's protection to that scenario. To the contrary, because the intent of the bill was to protect not only the integrity of the artwork, but the reputation of the artist, the spirit of the statute is best served by prohibiting the attribution to an artist of a published or publicly displayed altered reproduction of his original artwork. From a photographic reproduction, it cannot be seen whether the alteration was effected on the original or the copy, and both may cause the same harm to the artist's reputation when the altered version is published with attribution to him. In fact, the

mass mailing of an altered photographic reproduction is likely to reach a far greater audience and cause greater harm to the artist than the display of an altered original, which may reach only a limited audience. While this situation may not have been expressly contemplated by the drafters, the wording of the statute literally covers it, and the spirit of the statute would be contravened by it.

Second, this Court rejects defendants' claim that the reproduction and publication of minor, unrepresentative segments of larger works, printed wholly without context, does not constitute an alteration, defacement, mutilation or modification of plaintiff's artworks. By excising and reproducing only small portions of plaintiff's work, defendants have largely reduced plaintiff's multi-imaged works of art to solely sexual images, devoid of any political and artistic context. Extracting fragmentary images from complex, multi-imaged collages clearly alters and modifies such work.

\* \* \*

Defendants next claim that plaintiff has failed to demonstrate that the alteration, modification, defacement or mutilation has caused or is reasonably likely to result in damage to his reputation. Defendants urge that plaintiff's reputation has not been diminished in the eyes of his peers or gallery directors, dealers and potential buyers who determine his livelihood but, to the contrary, the increased exposure and publicity has enhanced his reputation. However, the trial testimony of Philip Yenawine, an expert on contemporary art, employed by the Modern

Museum of Art in New York, established that there is a reasonable likelihood that defendants' actions have jeopardized the monetary value of plaintiff's works and impaired plaintiff's professional and personal reputation.

Yenawine testified that because the details in the pamphlet imply that plaintiff's work consists primarily of explicit images of homosexual sex activity, plaintiff's name will be "anathema" to museums. Museums unfamiliar with plaintiff's work, believing the pamphlet to be representative of his work, may fail to review his work, even though many of plaintiff's art works do not contain sexual images. Even museums familiar with plaintiff's work may be reluctant to show his work due to his perceived association with pornography.

Yenawine stated that this self-censorship will have an adverse impact on the value of plaintiff's work; individuals will be less likely to purchase plaintiff's art without the pedigree of museum shows and accompanying reviews. Similarly, defendants' misrepresentation of plaintiff's work may deter persons from attending his shows, which may, in turn, reduce the incentive for galleries and museums to include plaintiff's work in future shows. Additionally, the public may associate plaintiff with only the sexually explicit images which were taken out of his intended political and artistic context, resulting in a reasonable likelihood of harm to his reputation and to the market for his work. Yenawine further testified that although corporations would not have been likely to

purchase those works of plaintiff's which contain sexual images, "a great number of [plaintiff's] images . . . have no sexual representations whatsoever and deal with all sorts of other kinds of images . . . ."

When comparing the situation of plaintiff with that of either Robert Mapplethorpe or Andre Serrano, whose works have risen in value despite similar controversies, Yenawine testified that the works of Mapplethorpe and Serrano were presented in their entirety so that viewers could judge for themselves the merit of the works, unlike the works of plaintiff which were presented in fragments so that readers of the pamphlet could not fairly judge his works. Yenawine also noted that the reputations of both Mapplethorpe and Serrano were better able to withstand the outcry concerning their work because the controversies arose when, unlike plaintiff, they were well-established as artists and supported by investors who had substantial interest in protecting the value of their investments.

Defendants next assert that where the speech involves matters of public concern allegedly injuring the reputation of a public figure, actual malice must be proven to defeat First Amendment protection. While agreeing with the quotations submitted by defendants eloquently extolling the virtues of the First Amendment, this Court cannot agree that the alteration, defacement, mutilation or modification of artwork is protected speech, entitling defendants to immunity where they acted without actual malice. Clearly, the pamphlet contained protectable speech, namely, the protest against the subsidy of

"obscene" art, which is entitled to the utmost First Amendment protection as the "unfettered interchange of ideas for the bringing about of political and social changes deserved by the people." The public display of an altered artwork, falsely attributed to the original artist, however, is not the type of speech or activity that demands protection, because such deception serves no socially useful purpose. The New York Statute does not impede truthful speech, but rather prevents false attribution, requiring only accurate labeling to permit dissemination of the desired message. Such labeling in no way diminishes the force of the message. Defendants remain free to criticize and condemn plaintiff's work if they so choose. They may present incomplete reproductions labeled as such or, alternatively, without attribution of such images to plaintiff. However, they may not present as complete works by plaintiff, selectively cropped versions of his originals.

Defendants also charge that the statute is unconstitutional (1) as applied, (2) on its face and (3) under the New York State Constitution. For the following reasons, the Court cannot agree. As stated above, the Artists' Authorship Rights Act does not address a category of speech which is presumptively protected under the First Amendment. The First Amendment does not protect the public display of altered artwork, falsely attributed to the original artist. The public display of an altered reproduction for the purpose of expressing a grievance against the government or simply for the purpose of denouncing a social attitude in which there is no express or reasonably

implied attribution to the original artist is altogether unlike the public attribution of an altered reproduction of a work of art to its original artist. While the former is protected speech, the latter is not. Accordingly, the First Amendment does not foreclose application of this statute to defendants' pamphlet. Similarly, narrowly tailored injunctive relief preventing only the false attribution to plaintiff of altered reproductions of his work does not constitute an unlawful prior restraint of protected speech.

\* \* \*

By attributing the modified images contained in the pamphlet to plaintiff as his works of art, defendants have created a likelihood of damage to his reputation as a serious artist and to his earning potential, and have thereby violated New York's Artists' Authorship Rights Act.

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### **Berne Convention for the Protection of Literary and Artistic Works**

#### **Article 6bis**

Independent of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to the said work, which would be prejudicial to the author's honor or reputation.

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#### ***What Are Moral Rights?***

Gil Zvulony (2010)

The [Canadian] courts have elaborated on the right to the integrity of the work on a number of occasions. In *Snow v. The Eaton Centre Ltd.*, Michael Snow, the artist who created the "flight stop" sculpture in Toronto's Eaton Centre featuring 60 geese sued the shopping mall after ribbons had been placed around the neck of each goose in time for a Christmas display. The artist argued that the integrity of "flight stop" as a naturalistic composition was infringed by the "ridiculous" addition of the ribbons, and sought an injunction for the removal of the ribbons.

Justice O'Brien of the Ontario High Court of Justice held that the words "prejudicial to [the author's] honour and reputation," in section 28.2(1) involves a certain subjective element or judgment on the part of the author, so long as it is reasonably arrived at. In other words, the author's concern for the integrity of the work must be reasonable. Snow was well-respected within the international artistic community, and the Court weighed his opinion together with opinions of other artists who were knowledgeable in this field, to find that the concern for Snow's reputation was reasonable. The Court held that the addition of the ribbons prejudiced the author's honour and reputation, and amounted to moral rights infringement. The Court granted the injunction.

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### **Canadian Copyright Act**

**Section 28.2(1)**

The author’s right to the integrity of a work is infringed only if the work is, to the prejudice of the honour or reputation of the author,

(a) distorted, mutilated or otherwise modified; or

(b) used in association with a product, service, cause or institution.

(2) In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work.

(3) For the purposes of this section,

(a) a change in the location of a work, the physical means by which a work is exposed or the physical structure containing a work, or

(b) steps taken in good faith to restore or preserve the work

shall not, by that act alone, constitute a distortion, mutilation or other modification of the work.

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**Statement to the Senate Subcommittee on Patents, Copyrights and Trademarks**

Professor Edward Damich (1989)

The artistically creative act is a communication to the public of the personality of the artist. Not only should she

have the right to control the time, manner, and circumstances of this communication, but also, since it is a continuing communication, the artist has a right that it be authentic and that it be identified as her communication. Distorting this communication may cause people to think less of the artist, but even if they think better of her, the artist has sustained an injury to her personality.

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***Matter of Restaino (State Comm’n on Judicial Conduct)***

Court of Appeals of New York (2008)

Per Curiam.

At petitioner’s request, we review a determination of the State Commission on Judicial Conduct which, with one member dissenting as to sanction, sustained a charge of misconduct and recommended that petitioner be removed from office. In seeking review, petitioner concedes the facts as alleged, and challenges only the Commission’s recommendation.

Based on the evidence adduced at the three-day hearing before a designated Referee, the Commission found as follows. Petitioner has been a Niagara Falls City Court Judge since 1996 and, as relevant, presided weekly over the Domestic Violence Part from 1999 until March 11, 2005, the date of the conduct in question. The domestic violence court handles cases of defendants who, after arraignment on domestic violence charges, are screened and determined eligible for a court-supervised, 26-week program of counseling and education. Defendants in the

program are required to avoid substance use, undergo counseling and periodic testing, and to report weekly as a way of monitoring their progress. Absent a violation of an imposed condition for which they face potential sanctions (including revocation of release and imposition of bail), defendants are released each week on their own recognizance. Following their appearance and unless permitted to leave, the practice in petitioner's court was to require defendants to remain in the courtroom until the completion of all scheduled proceedings that day.

On the morning of March 11, 2005, petitioner began his day by presiding over the first set of about seventy cases scheduled for their weekly hearings. The record shows that the courtroom was full and that, in addition to defendants awaiting their individual appearances, others were present, including defense attorneys and prosecutors, court personnel and security officers, as well as representatives from counseling programs. Additionally, the courtroom was open for those entering and leaving, including members of the public, relatives and other interested persons.

During the first hour of scheduled appearances, petitioner handled the cases of over thirty defendants in routine fashion. Of these, petitioner released eleven on their own recognizance and directed that they remain in court until all proceedings were concluded. At approximately 10:00 a.m., a cell phone or other similar device rang in the back of the courtroom. Addressing all defendants present, petitioner stated: "Now, whoever owns the instrument that is ringing,

bring it to me now or everybody could take a week in jail and please don't tell me I'm the only one that heard that." After a fruitless inquiry of two defendants about the device, petitioner issued a second warning: "Everyone is going to jail; every single person is going to jail in this courtroom unless I get that instrument now. If anybody believes I'm kidding, ask some of the folks that have been here for a while. You are all going." Following these warnings, petitioner recessed for five minutes, directed court officers to locate the ringing device and instructed them that no one was permitted to leave the courtroom. As petitioner testified, during his recess, he did not reconsider withdrawing his threats. Upon returning, petitioner learned from a court officer that the device had not been discovered.

When the device rang at the back of the courtroom, a defendant was standing before petitioner at a podium prepared to issue his status report. Petitioner queried whether defendant knew who owned the device, to which defendant responded, "No. I was up here." Without equivocation and consideration of the proper legal bases for doing so and notwithstanding his knowledge that defendant, who was standing before him, did not own or otherwise possess the device—petitioner revoked defendant's recognizance and set bail at \$1,500.

Petitioner proceeded to summon each subsequent defendant remaining on the calendar—thirty-four in all—and questioned each about their knowledge and/or ownership of the device. Dissatisfied with their responses, petitioner revoked or denied recognizance release and set bail. For two

previously on release, petitioner increased bail. After summarily disposing of the remaining calendared cases, petitioner recalled eleven defendants whom he had previously released before the device rang and, after similarly questioning them about the device, revoked their recognizance release and imposed bail. In total, petitioner committed forty-six defendants into custody. Of these, five had their release revoked; for three, it was their first appearance; the remaining had appeared on prior occasions. Of those committed, only one had an attorney present.

Based on petitioner's comments made while questioning certain defendants, it is clear that he was disturbed by the breach of courtroom decorum caused by the ringing device. The following are examples of petitioner's unsettling comments:

"You know, for some of you folks, this hurts me more than any of you imagine because someone in this courtroom has no consideration for you, no consideration for me and just doesn't care. . . .

"[W]hat I am really, really having a hard time with [is] that someone in this courtroom . . . is so self-absorbed, so concerned only for their own well-being, they kind of figure they're going to be able to establish the bail and it won't matter so screw all of the rest of you people. Some of you people may not be in the [same] economic situation [as] this selfish person is . . . [who] put[s] their interests above everybody else's. They don't care what happens to anybody. . . .

"I hope [each of you is] watching every one of these people walk up here and deal with the reassessment of bail simply because they don't want to deal with the obvious . . . . It's that [phones are] not permitted in the courtroom. . . . [I]f you don't want to give me the instrument, now you're compounding something that is so simple and because you don't have a backbone and you don't want to be responsible for it."

Several defendants, when questioned about the instrument, tried to appeal to petitioner's better reason and, in some cases, pleaded with him for mercy. One defendant, for example, exhorted petitioner to rethink his approach to an otherwise legitimate courtroom concern that could be handled differently, stating: "I think the more people you send to jail, [the] less likely [the] culprit is to come forward," to which petitioner responded: "he'll go right to jail with everybody else." In other instances, one defendant pleaded that he had a doctor's appointment he would miss if jailed; others pleaded that they would lose their new jobs, that they did not have the resources to post bail. Others pleaded for simple fairness, exclaiming that "this ain't right," to which petitioner acknowledged: "You're right, it ain't right. Ain't right at all." Another had a scheduled appointment for counseling pursuant to an imposed condition, while another had his mother "in surgery [that] morning." Finally, another pleaded that he had a biweekly scheduled visit with his "little girl" that he would miss if jailed. These pleas fell on deaf ears.

At one point, petitioner commented that defendants' collective conduct resembled "a

mob movie,” referring to their perceived unwillingness to come forward with the offending device, stating:

“I got to tell you something, you’re all pretty good when you come up to this microphone, and if you saw somebody got [sic] shot or killed, you would say, ‘I didn’t see nothing [sic]. I heard shots.’ And if a body dropped right in front of you, you would say . . . ‘I didn’t see a thing.’ “

Upon commitment to the custody of the Niagara Falls Police Department, the 46 defendants were transported to the city jail, booked, searched and their property confiscated and placed into overcrowded holding cells. Following several hours of detention, thirty-two defendants posted bail; the remaining fourteen could not, however, and-shackled, with their wrists handcuffed to a lock box attached to a waist chain-they were subsequently transferred to the Niagara County Sheriff’s custody and transported by bus to the county jail thirty minutes away, arriving at approximately 3:15.

Following the proceedings, petitioner left the bench and attended a scheduled tour of an Erie County juvenile detention facility. During the tour, petitioner received a page from his clerk who informed him that the press had inquired about his actions that morning. In response, petitioner instructed his clerk to have all paperwork necessary for defendants’ release ready upon his return for him to execute release orders. Petitioner returned to the courthouse at around 3:00 p.m. Approximately one hour later, he ordered the fourteen defendants released, but they were not provided with transportation back to Niagara Falls.

By formal written complaint in June 2006, the Commission served petitioner with one charge alleging that he violated several of the Rules Governing Judicial Conduct, specifically 22 NYCRR 100.1, 100.2 (A), and 100.3 (B) (1), (3) and (6), by arbitrarily revoking or denying the recognizance release status of the forty-six individuals in violation of CPL 510.30 and, consequently, depriving them of their liberty.

Following a three-day hearing, the Honorable Edgar C. NeMoyer, as Referee, determined that the Commission established its factual allegations. In sum and substance, petitioner testified that he was experiencing deep-seated difficulties in his marriage, such as a lack of communication and intimacy. Petitioner explained that his way of dealing with them was to “bury” himself into his work and suppress the marital strains he was experiencing. With regard to ringing devices in the courtroom, petitioner testified that ordinarily court officers would go “about the business of locating it and either retrieving it or somehow addressing the issue right there” and he would continue with the court’s business. Petitioner explained his skewed response of March 11 thusly:

“I was attempting to locate the instrument and [was] frustrated by the fact that that wasn’t working and that I had indicated to all of the folks that were in the courtroom . . . , many of whom had been with me for some time and were aware of . . . the [parameters] of the program and I certainly know that when I said that, that’s what was going on in my mind. I read [the transcript of the incident] today and I know that . . . [I]

certainly [did] not exercis[e] good judgment  
. . . .

“I can only say to you that . . . [my reaction was] a function of . . . letting my own difficulties . . . bleed into the courtroom.”

Petitioner added that he is cognizant of the gravity of his conduct, and that it would not recur: “I’ve learned that suppressing the kinds of things that occur in one’s life isn’t the healthiest way of addressing them.”

Among others, two psychiatrists petitioner consulted after the incident also testified. Dr. Joseph opined that petitioner was experiencing “a somewhat anxious crisis state of mind” due to a strained marriage, as described by petitioner. Dr. Joseph explained the events of March 11, 2005 as petitioner becoming “very frustrated with his marital situation and for reasons which I don’t know, why on that particular day he erupted in an odd and peculiar manner,” he tried to displace his frustrations about his wife’s failure to communicate with him by having “people . . . listen to him” in the courtroom. Dr. Joseph characterized petitioner’s eruption as “the last straw” of a suppressed frustration, but opined that petitioner is unlikely to repeat his conduct of March 11. Dr. Cooley, a psychologist, agreed with Dr. Joseph’s conclusion, opining that the ringing cell phone was “the straw that broke the camel’s back,” that marital stressors “had been building up at home,” and that petitioner placed a “great deal of time into his work” and neglected to address, head on, the problems he was facing.

The Referee concluded that petitioner violated the Rules Governing Judicial Conduct as charged. He acknowledged petitioner’s “expressed remorse,” which “appeared to be sincere.” The Referee also considered the “persuasive testimony” of Drs. Cooley and Joseph, and concluded that petitioner “had been an efficient and competent judge outside of this incident and is well regarded in the community.”

Following oral argument, the Commission recommended, by a vote of nine to one, that petitioner be removed from the bench. The Commission concluded that petitioner’s actions “exceeded all measure of acceptable judicial conduct, bringing the judiciary into disrepute and irreparably damaging public confidence in his ability to serve as a judge.” The Commission opined that, in depriving 46 individuals of “their liberty out of pique and frustration,” petitioner “abandoned his role as a reasonable, fair jurist.” The Commission further noted that in the face of numerous opportunities petitioner failed to reconsider the “enormity” of his actions and that, “[i]n summarily committing the defendants into custody, [he] acted without any semblance of a lawful basis, disregarding the statutory criteria for bail or contempt of court.” Finally, the Commission rejected petitioner’s proffered mitigating circumstance, among others, that his conduct was the product of psychological stressors, concluding that his explanation was inexcusable and insufficient under the circumstances.

Commissioner Felder dissented and voted to censure petitioner, concluding that, in light of petitioner’s otherwise lengthy,

distinguished career, his “two hours of inexplicable madness” should not result in removal. Commissioner Emery concurred with the majority and, in response to Commissioner Felder’s dissent, opined that Blackburne controlled.

### **Discussion**

On review to this Court, petitioner limits his argument to the issue of sanction, arguing that removal is unwarranted in light of the proffered psychological evidence (which he claims the Commission ignored) and that his conduct was an aberration in an otherwise unblemished judicial career. He argues that, under the circumstances, such evidence, though not excusing his conduct, explains it and enables this Court to adequately determine his fitness to continue serving on the bench. Additionally, petitioner points to other mitigating factors, including remorse and contrition, an acknowledgment of the impropriety of his conduct and the assurance that it will not be repeated. In short, petitioner argues that in reviewing the Commission’s recommendation, our goal is “to attempt to assess [his] fitness based on his prior record.” Notwithstanding petitioner’s sincerity, we agree with and accept the Commission’s recommendation.

Petitioner cannot dispute that “[p]unishing people by setting exorbitant bail . . . demonstrates a callousness both to the law and to the rights of criminal defendants.” Admittedly, bail-setting and recognizance release determinations are generally “matters of discretion rather than law.” But when such tools of judicial administration are abused as punitive instruments to deprive a person of his or her liberty—a

right of the most fundamental order—such conduct is inexcusable and does violence to the court’s integrity and the inviolable public trust. This is especially true where, as here, defendants were guilty of no wrongdoing. We have no reason to disbelieve petitioner’s assertion that he was simply attempting to uphold the integrity of his court. His method, however—an overreaction to a “minuscule matter”—was no less egregious, no less skewed, and no less damaging to the institution, generally, and to defendants’ right to due process of law, specifically.

Petitioner insists that he remains fit to serve on the bench, pointing to his prior record of exemplary service, his remorse and contrition, and the evidence that his conduct was the product of psychological stressors. In this arena, however, weighty competing interests abound, and we must take care to carefully balance them. Thus, we have long defined the purpose of a judicial disciplinary proceeding not in terms of punishment for its own sake, “but [for] the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents.”

Indeed, the rules under which petitioner was charged reflect this concern. As petitioner correctly notes, we have repeatedly stated that the ultimate sanction should be reserved for “truly egregious circumstances” that extend beyond the limits of “even extremely poor judgment.” It is also true, however, “that the ‘truly egregious’ standard is measured with due regard” to the higher standard of conduct to which judges are held, and in our view, petitioner’s conduct qualifies as “truly egregious.”

While we duly note petitioner’s mitigating factors—particularly his service record—we have never defined fitness as resting solely on technical competence and have specifically rejected “any numerical yardstick for determining unfitness.” Of ultimate importance in that calculus must be the nature and gravity of the proven wrongdoing. Thus, we have previously stated that in rare cases “no amount of [mitigation] will override inexcusable conduct” sufficient to restore the public’s trust in the judge’s ability to faithfully execute his or her duties. “[A] cornerstone of our democracy” is the integrity of our judiciary, and judges must be mindful that their actions “reflect, whether designedly or not, upon the prestige of the judiciary.”

Here, the public which petitioner serves has, we think, irretrievably lost “confidence in his ability to properly carry out his” constitutionally-mandated responsibilities in a fair and just manner. By indiscriminately committing into custody 46 defendants, petitioner deprived them of their liberty without due process, exhibited insensitivity, indifference and a callousness so reproachable that his continued presence on the bench cannot be tolerated. We cannot overstate that the public must be able to “continue to rely upon the impartiality of those who have been chosen to pass judgment on legal matters involving their lives, liberty and property.” And here, we have serious doubts that this breach in trust is reparable given petitioner’s conduct. As the Commission opined, it is ironic that petitioner displayed the very attributes by which he accused and summarily punished each defendant. Significantly, petitioner had

more than 46 chances to correct himself and failed to do so.

Accordingly, the determined sanction should be accepted, without costs, and Robert M. Restaino removed from office.

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### **N.Y. Jud. Law § 750**

#### **Power of Courts to Punish for Criminal Contempts**

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.
3. Wilful disobedience to its lawful mandate.
4. Resistance wilfully offered to its lawful mandate.
5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.
6. Publication of a false, or grossly inaccurate report of its proceedings. But a court can not punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the judiciary law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein, or subjection of an employee to discharge or penalty on account of his absence from employment by reason of jury or subpoenaed witness service in violation of this chapter or section 215.11 of the penal law. Applications to punish the accused for a contempt specified in this subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the supreme court at which contested motions are heard, or of the county court if the supreme court is not in session.

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***No Charge: In Civil-Contempt Cases, Jail Time Can Stretch On for Years***

Ashby Jones (2009)

One can spend a long time in jail in the U.S. without ever being charged with a crime.

It happened to H. Beatty Chadwick, a former Philadelphia-area lawyer, who has been behind bars for nearly 14 years without being charged.

Businessman Manuel Osete spent nearly three years in an Arizona jail without ever receiving a criminal charge. And investment manager Martin Armstrong faced a similar situation when he was held for more than six years in a Manhattan jail.

All three men were jailed for civil contempt, a murky legal concept. Some scholars say it is too often abused by judges, to the detriment of those charged and their due-process rights. “These results of too many civil-contempt confinements are flatly outrageous and often unconstitutional,” says Jayne Ressler, a professor at Brooklyn Law School.

In some contexts, the federal system limits civil-contempt confinement to 18 months. Some states have similar limits. But in other states, judges face few restrictions on how long someone can be held in civil contempt.

A judge generally can issue either a civil or criminal contempt charge whenever he or she feels that a party has disobeyed an order or has disrupted a proceeding.

In a criminal contempt charge, which is aimed at punishing bad behavior, a defendant is afforded the due-process safeguards of the criminal system, including a possible jury trial.

Civil contempt charges, on the other hand, are meant to be coercive, issued to force behavior such as making a witness testify, compelling a journalist to reveal sources or strong-arming a parent into paying child support. Because civil “contemnors” hold the key to their own freedom—after all, complying will spring them—they aren’t given the same due-process rights as criminal defendants.

If someone held for civil contempt can’t meet the judge’s order, theoretically, the

confinement should end. And while long-term civil confinements are unusual, problems arise when a court doesn't believe the person. With the party and judge at loggerheads over, say, the availability of funds, it is often the contemnor who loses, forced to remain behind bars at the mercy of a skeptical judge. That has sparked cries for reform.

Consider Mr. Chadwick's case. In 1994, during divorce proceedings, a Delaware County judge held Mr. Chadwick in civil contempt for failing to put \$2.5 million in a court-controlled account. He says he lost the money in bad investments; his wife's attorney claimed he had hidden it offshore. In April 1995, Mr. Chadwick was arrested and detained. Nearly 14 years later, Mr. Chadwick, who suffers from non-Hodgkin's lymphoma, is still in jail—even after a retired judge was hired to help locate the money, and failed.

"The money is gone," says Mr. Chadwick's lawyer, Michael Malloy. "The coercive effect of this order is gone; it has turned into a life sentence."

The judge who held Mr. Chadwick in contempt in 1994 couldn't be reached for comment, but he has said publicly that he doesn't believe Mr. Chadwick lacks the funds.

Few argue that civil-contempt confinement should be abandoned altogether. "The threat of jail is sometimes the only thing that will make a person comply with a court order,"

says Adam Winkler, a professor at UCLA law school.

For some, including Albert Momjian, the lawyer for Mr. Chadwick's ex-wife, the theory still holds. "There's no doubt in my mind that he has the money and could walk out of jail next week if he wanted to," says Mr. Momjian.

Critics question why the burden rests with contemnors such as Mr. Chadwick to prove they don't have the money, rather than with a prosecutor to prove they do. "It runs counter to our entire system to say 'It's your burden to prove a negative,'" says Brooklyn Law School's Ms. Ressler.

Another concern: While those sent to jail for civil contempt may appeal their confinements, appellate judges often will overturn lower-court rulings only if they find an "abuse of discretion," a standard that offers trial judges wide latitude.

Reformers hope that more states enact laws limiting the terms of civil confinement, as Congress did in 1970, when it passed a statute limiting the length of civil-contempt confinement to 18 months for those who refuse to testify in federal court or to a federal grand jury. After that, if civil confinement hasn't coerced a certain behavior, the burden would fall to the government to bring criminal charges.

"As a matter of due process, I think 18 months is enough in most cases," says Thomas Sjoblom, the lawyer for Martin Armstrong. Mr. Sjoblom argued

unsuccessfully that the 1970 law should have extended to the situation involving his client, who failed to produce \$15 million in gold and antiquities in a civil suit alleging securities fraud. “After that, let the government prove a criminal case.” Mr. Armstrong is currently serving a five-year sentence for criminal conspiracy.

Of course, such a limit might give contemnors an incentive to wait, knowing that eventually they will be reunited with their riches.

Nonetheless, some states are modifying their laws. In the midst of the situation involving Mr. Osete, who was detained in Arizona from late 2002 to late 2005 for refusing to hand over more than \$800,000 in alimony and interest payments, which he said he didn’t have, the Arizona Supreme Court changed its rules. Now, Arizona courts must hold hearings every 35 days for those held in civil contempt on family-law issues, and judges must find that a contemnor has the ability to comply with the order.

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## THE ODYSSEY

Homer

Friends, since it is not right for one or two of us only to know the divinations that Circe, bright among goddesses, gave me, so I will tell you, and knowing all we may either die, or turn aside from death and escape destruction. First of all she tells us to keep away from the magical Sirens and their singing and their flowery meadow, but only I, she said, was to listen to them, but you

must tie me hard in hurtful bonds, to hold me fast in position upright against the mast, with the ropes’ ends fastened around it; but if I supplicate you and implore you to set me free, then you must tie me fast with even more lashings . . . . [T]hey then bound me hand and foot in the fast ship, standing upright against the mast with the ropes’ ends lashed around it, and sitting then to row they dashed their oars in the gray sea. But when we were as far from land as a voice shouting carries, lightly plying, the swift ship as it drew nearer was seen by the Sirens, and they directed their sweet song toward us.

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## Appeals Court to Hear Arguments Over Forum Shopping

Michelle Massey (2008)

The U.S. Fifth Circuit Court of Appeals is scheduled to rehear arguments over its previous decision *In re VW IIb*, which established the “100-mile threshold” for venues in product liability cases.

The court vacated its previous decision pending the en banc proceedings scheduled for May 23 in New Orleans.

The arguments arise out of an automobile accident that occurred within the Dallas division of the Northern District of Texas. The victim’s family filed a product liability suit against Volkswagen in the Marshall Division of the Eastern District.

Volkswagen sought to change the venue to Dallas because the witnesses and plaintiffs reside in Dallas, the car at issue was purchased in Dallas, the accident occurred in

Dallas, medical care was obtained in Dallas, and no parties or witnesses reside in Marshall.

District Judge John Ward denied the transfer motion stating, “The plaintiff’s choice of forum is a paramount consideration in any determination of a transfer request and that choice should not be light distributed.” After Judge Ward denied a motion for reconsideration regarding the transfer, Volkswagen appealed the decision to the Fifth Circuit.

Initially, the appeals court upheld the lower court’s decision. However, at a rare oral argument for reconsideration, the Fifth Circuit agreed with Volkswagen that the district court abused its discretion by applying the wrong legal standard and not properly weighing interest factors.

The vacated opinion asserts a 100-mile threshold between the existing location and the proposed location. The court found that “the factor of inconvenience to witnesses increases in direct relationship to the additional distance traveled.”

The court remanded the case to the lower court with instructions to transfer to the Dallas Division. The ruling was viewed as giving parties seeking transfer of a product liability case a slight advantage. The Fifth Circuit granted the plaintiff’s petition to review the previous appellate decision.

If the panel agrees with the “100-mile” threshold, East Texas judges will be forced to transfer more cases out of the district. However, the case will not affect other

forms of litigation unless the appeals court applies it appropriately.

With what many see as a plaintiff-friendly venue, the Eastern District of Texas is considered an attractive forum for intellectual property litigation. And the district is also considered to have a “rocket docket”—a speedy time to trial—which also attracts litigation.

The American Intellectual Property Law Association (AIPLA) filed an amicus brief, urging the appeals court to prevent the continued forum shopping that is occurring in the Eastern District of Texas.

In the interest of justice, the brief states, courts are supposed to transfer cases “for the convenience of parties and witnesses.” The AIPLA argues the Eastern District of Texas has “misapplied the transfer statute” by giving “undue difference” to the plaintiff’s venue choice, not properly weighing the convenience to parties and witnesses, by requiring “unrealistically high degree of specificity” demonstrating a more convenient forum, and overstating the district’s public interesting in retaining a case.

The AIPLA is also a supporter of the Patent Reform Act of 2007, patent reform legislation that, among other factors, will limit forum-shopping, limit the amount infringement damages and clearly defines willful infringement. The House passed the Act but Senate Majority Leader Harry Reid pulled the bill from the floor schedule as it has stalled in committee.

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***In Defense of Mandatory Binding  
Arbitration (If Imposed on the Company)***

Jean R. Sternlight (2008)

I. Introduction

I have spent much of my academic career battling mandatory arbitration. As a junior law professor, horrified by the Supreme Court's 1995 decision permitting the practice in *Allied-Bruce Terminix Cos. v. Dobson*, I drafted an article arguing on policy grounds that companies ought not to be able to deprive "little guys" of the opportunity to litigate their disputes. In subsequent articles I continued to attack the phenomenon of mandatory arbitration from a variety of policy, statutory, and constitutional perspectives. In addition to writing about mandatory arbitration, I have also given numerous talks on the subject and participated in many panel discussions and debates on the pros and cons of the practice. After a while, the participants' punches and counterpunches become predictable.

Attack: Critics like me attack mandatory arbitration as coerced and unfair, often citing anecdotes showing the practice in its worst light.

Defense: In response, defenders typically argue that while consumers/employees may not like the sound or feel or actuality of mandatory arbitration, such arbitration is nonetheless better for both them and society than is the alternative of litigation. Specifically, defenders often assert that

arbitration is quicker and cheaper than litigation and overall just as fair or fairer. Or, defenders assert that the money companies save through imposing mandatory arbitration is passed on to consumers/employees, who thereby benefit overall.

Attack: In response, critics like me state that if arbitration is so quick, cheap, and fair, there is no need to impose it on a mandatory basis. Let disputants select this wonderful dispute resolution process voluntarily, we say.

Defense: And then the defenders have responded that it is not practical to make arbitration available only on a voluntary post-dispute basis because disputants have a different set of incentives post-dispute. It is said that consumers and employees (or their lawyers?) would not want to arbitrate the good big \$ cases, and companies would not want to arbitrate the weak low \$ cases so in the end, nothing would be arbitrated. Thus, say the advocates, better to allow companies to compel consumers/employees to arbitrate all cases, pre-dispute.

In the past, my own typical response at this point in the argument has essentially been a combination of "no it ain't" and "that's not fair." Specifically, I have questioned the premise that voluntary post-dispute arbitration will not work, assuming that the proposed arbitration is fair. I have also urged that even if privately mandating arbitration is the only way to ensure that disputes are arbitrated rather than litigated, that does not justify the imposition of

mandatory arbitration on “little guys.” Thus, I have supported and continue vigorously to endorse measures that would preclude companies from using adhesive contracts to require their consumers and employees to resolve disputes through binding arbitration rather than in court. One such measure is the Arbitration Fairness Act of 2007, recently introduced in both the House of Representatives and Senate.

Here I discuss an alternative response: make arbitration mandatory for the company, but not the “little guy.” That is, assuming only for the sake of argument, that defenders of mandatory arbitration are correct that companies and “little guys” won’t agree to arbitration post-dispute, in the same cases, and further assuming only for the sake of argument that arbitration is socially more desirable than litigation in many cases, perhaps we should impose arbitration on companies in certain cases, rather than on consumers and employees? As I will explain *infra*, I believe it is more justifiable from a policy standpoint to impose arbitration only on companies, rather than on “little guys” alone or on both companies and “little guys.”

To try to minimize confusion, I will now offer two new terms to this discussion. I will use the phrase “private mandatory arbitration” to describe the kind of privately imposed arbitration that currently exists in the United States. I will use the phrase “governmental mandatory arbitration” to describe the new form of mandatory arbitration that I am discussing in this Article. Also, note that I will only be

discussing the possibility of requiring arbitration in lieu of a lawsuit to resolve a civil dispute, and not, for example, the imposition of so-called “interest arbitration” in which arbitrators dictate contract terms to which labor and management could not voluntarily agree.

The remainder of this Article will explore three aspects of this deliberately radical proposal for governmental mandatory arbitration: (1) What is my idea?; (2) Is such a proposal desirable from a policy perspective?; and (3) Is such a proposal feasible from a legal perspective, given existing constitutional and other constraints?

## II. What Would It Mean to Impose Mandatory Arbitration on the Company?

At minimum the idea of mandating arbitration on the company is delicious from a rhetorical perspective. Having battled with certain able foes over the years, regarding the fairness and legal legitimacy of private mandatory arbitration, I frankly look forward to the possibility of turning the tables. For example, I imagine that Alan Kaplinsky, a banking lawyer who has vigorously defended the imposition of binding arbitration on consumers, will be far less enthralled at the prospect of the government forcing binding arbitration on his own clients, banks, and credit card issuers.

The gist of my idea is that “little guys” (consumers and certain lower level employees) would be provided, by statute, with an opportunity to take their disputes to

binding arbitration rather than litigation. If the “little guys” chose arbitration over litigation, post-dispute, companies would have to agree to such arbitration, and the results of the arbitration would then be binding on both “little guy” and company. If on the other hand the “little guys” preferred to litigate their disputes, they would reserve that right.

I will now try to spell out this very basic idea in a bit more detail. In essence, my idea is that Congress would choose certain categories of disputes to be eligible for this governmental mandatory arbitration program. For example, Congress might provide that all “consumer” claims against companies for breach of contract or fraud, or all company claims against consumers be eligible for arbitration, at the consumer’s option. With respect to employees, Congress might decide that all employees earning less than a certain amount be permitted to arbitrate claims against their employer pertaining to unpaid wages or benefits, breach of contract, or discrimination. Congress would decide how to draw these lines based on its sense of the category of claims in which arbitration might be preferable from a societal perspective, but in which the company might nonetheless refuse to arbitrate such claims. As well, Congress would need to consider the constitutional constraints that will be examined below.

With respect to how the arbitration would look, I can imagine four possible variants of this basic proposal.

Option 1: Congress could establish and fund an arbitration process much as it establishes and funds administrative law judges in a variety of areas. In this option, the arbitrators would be government employees, paid a salary by the government, and statutes and rules would define the nature of the arbitration. This sort of publicly-funded arbitration is used in a number of other countries. The advantage of Option 1 is that Congress would have maximum control over the arbitration and be able to ensure that the process is one that Congress approves. One downside of Option 1 is that Congress would then have to appropriate funds to administer and pay for these arbitrations. A second downside of Option 1 is that it would be difficult either to specify a set of rules that would work for all disputes or to allow for enough flexibility to make such accommodations.

Option 2: Congress could design an arbitration process that companies would be required to offer to certain consumers, employees, or other “little guys.” In this variation, Congress would need to spell out, in some detail, various features of the arbitration. An advantage of Option 2 is that Congress would not need to commit to funding the arbitration process. A second advantage is that while Congress would need to spell out certain mandatory features of the arbitration, it could leave other design aspects to the disputants. However, one disadvantage of Option 2, from disputants’ perspective, is that individuals and companies would be paying for the arbitration rather than receiving this service free of charge from the government. A

second potential disadvantage is that as Congress would not be spelling out all the details of the process, companies might devise a process that would not be desirable to “little guys.”

Option 3: Rather than designing an arbitration process Congress could, instead, provide some basic constraints and allow companies to devise an arbitration scheme so long as it fell within constraints. This approach would be somewhat similar to the current adoption of “due process protocols” by a number of private providers. Such protocols spell out certain fair features of arbitration but, outside those limits, allow companies to design the arbitration as they wish. An advantage of Option 3 is that it would preserve maximum flexibility to companies that might therefore devise the most appropriate form of arbitration for the dispute at hand. But, as with Option 2, there is a risk that companies would try, within the limits, to design a process that would be either undesirable or unfair to the “little guy.”

Option 4: Under this approach Congress would not impose any constraints but would instead allow the company complete flexibility to design the proposed arbitration process. The company could then offer the process to the consumer/employee who could either accept or reject the process. However, while offering the advantage of minimal governmental intrusion and lower regulatory costs, this approach seems flawed in that a company that did not want to arbitrate a particular

dispute could just provide an obviously skewed or costly process.

### III. Policy Implications of Imposing Mandating Arbitration on the Company

Why might a staunch opponent of mandatory binding arbitration potentially seek to impose binding arbitration of certain disputes on companies? Or, why might what is bad for the goose be good for the gander? And, if it is justifiable to impose arbitration on companies, why is it not equally justifiable to impose arbitration on “little guys”?

First, as the defenders of private mandatory binding arbitration have argued for years, I do recognize that American-style litigation is neither feasible nor desirable for all claims. At least as structured in the United States, litigation is often so expensive and time consuming that many potential claimants are foreclosed from seeking relief for alleged legal violations. Defendants, as well, are harmed by a system that costs them substantial time and money, even when they are ultimately found not liable.

Second, I also agree with defenders of traditional binding arbitration that arbitration can potentially be a better venue, from either or both disputants’ perspective, for resolving certain kinds of claims. One particularly appealing aspect of arbitration is that its procedures can be custom-tailored to the dispute at hand. Such customization can potentially be beneficial to the “little guy,” as well as to the larger company. Unfortunately, empirical evidence on how

mandatory private arbitration works out in practice is quite scant and is likely to continue to be limited. For business reasons, to protect disputant confidentiality, or perhaps even to cover up questionable practices, arbitration providers have for the most part not been willing to open their files to researchers. Moreover, those few studies that have been done leave many open questions. Yet, I am certainly ready to believe that in particular situations arbitration can be better for consumers, employees, and other “little guys” than litigation. We know, at least anecdotally, that consumers and employees do sometimes elect to proceed voluntarily through arbitration.

Third, I also agree with some commentators’ point that although arbitration may sometimes be better for both parties, if analyzed pre-dispute, that post dispute one or both parties may elect litigation. This could happen because arbitration may be attractive as a general matter but not for a particular dispute that may arise. Also, it may be true that arbitration is actually better for both disputants, post-dispute, but that one or both nonetheless fails to see such benefits and thus selects litigation.

Fourth, I also recognize that one must separately analyze whether a particular dispute resolution process is better than alternatives for the disputants, and whether it is better than alternatives for society-at-large. Thus, even if two fully informed disputants might, in a given dispute, prefer to litigate, it is conceivable that an arbitral or

other resolution might better serve the needs of the society-at-large.

Lest any may think I have entirely lost my bearings, of course I am not claiming that binding arbitration is necessarily better for “little guys” than is litigation. My own belief remains that denying “little guys” their litigation option and forcing them into arbitration, designed by the company, can often be harmful to the “little guys.” When the company has the opportunity to design arbitration in any way it wants (subject only to occasional expensive court challenge) the company has the incentive to skew the arbitration process in its favor.

Nor do I believe that any potential benefits to society justify companies in imposing mandatory arbitration on their customers, employees, or other “little guys.” Private companies are not the appropriate entity to determine whether individual “little guys” should be disadvantaged, purportedly in the interest of the greater good. Further, in many instances the “little guys” may have constitutional or statutory rights to litigate that should not be eliminated through privately imposed arbitration.

Yet, I find myself wondering whether notwithstanding these concerns mandatory arbitration might be fair and appropriate if imposed by the government on the company. Why the distinction between private and governmental imposition of mandatory arbitration? First, I am far less worried that companies will be taken advantage of, through governmental mandatory arbitration, than that “little guys”

might be disadvantaged in private mandatory arbitration. If arbitration is governmentally imposed, the government will presumably also design the arbitration itself, adopt rules on the design of the arbitration, or provide the company with the opportunity to design the process. Under any of these variations, the company will receive far greater protections from a potentially unfair process than “little guys” currently receive when the process is designed and run by the companies. Second, from a democratic standpoint I am more comfortable with dispute resolution procedures imposed by an elected Congress than by a single powerful company on its far less powerful customers or employees. Presumably Congress would only adopt a governmental mandatory arbitration program if it truly thought such a program would be fair and just for the disputants and for society as a whole. We cannot be sure that privately imposed mandatory arbitration would be fair and just for all.

If Congress is to impose arbitration, why not impose it even-handedly, rather than provide “little guys” with an opt out? For me, the opt out is a critical feature of the plan because it ensures that any arbitration scheme that is created will be fair for the “little guys.” If Congress or companies design an unfair program, the “little guys” will consistently opt out of such a program. Thus, even if companies are given a fair bit of discretion to design the arbitration program, the “free market” of the opt out will limit companies’ ability to design a program that benefits themselves at little guys’ expense. Companies do not need such an opt out

because they will likely play a greater role in designing the program and because in general they are more knowledgeable and sophisticated and more capable of representing their interests in any dispute resolution process.

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**Jones**

**v.**

**Halliburton**

United States Court of Appeals,

Fifth Circuit

(2009)

RHESA HAWKINS BARKSDALE, Circuit Judge:

This interlocutory appeal from a partial refusal to compel arbitration concerns the arbitrability *vel non* of tort claims by an employee who, while working at an overseas location, was allegedly gang-raped by her co-workers in her bedroom in employer-provided housing. Halliburton Company/Kellogg Brown & Root, and various affiliates, contest the denial, in part, of their motion to compel arbitration of Jamie Leigh Jones’ claims concerning her alleged rape by Halliburton/KBR employees, while she was stationed at a company facility in Baghdad, Iraq. All of her claims were deemed arbitrable except for: (1) assault and battery; (2) intentional infliction of emotional distress arising out of the alleged assault; (3) negligent hiring, retention, and supervision of employees involved in the alleged assault; and (4) false imprisonment.

At issue is whether those four claims found non-arbitrable are, for purposes of Jones' employment contract, "related to [her] employment" or constitute personal injury "arising in the workplace." That contract incorporated Halliburton/KBR's dispute resolution program (DRP), which required her to arbitrate all claims brought against the company falling within the scope of related-to or workplace language. In the alternative, should the alleged rape be deemed covered by the arbitration clause, at issue is whether the doctrine of unclean hands precludes granting equitable relief of specific enforcement of that clause.

#### I.

Jones began working for Halliburton/KBR in 2004 as an administrative assistant in Houston, Texas. She alleges: while so employed, she was sexually harassed by her supervisor; and, because of this, she demanded to be moved to another department.

On 21 July 2005, Jones signed a contract with Defendant Overseas Administrative Services (OAS), a foreign, wholly-owned subsidiary of Halliburton/KBR, to be employed as clerical worker for the company in Baghdad. Paragraph 26 of this contract provided, in pertinent part:

You . . . agree that you will be bound by and accept as a condition of your employment the terms of the Halliburton Dispute Resolution Program which are herein incorporated by reference. You understand

that the Dispute Resolution Program requires, as its last step, that any and all claims that you might have against Employer *related to your employment*, including your termination, and any and all *personal injury claim[s] arising in the workplace*, you have against other parent or affiliate of Employer, must be submitted to binding arbitration instead of to the court system.

The incorporated DRP, in turn, provides:

"Dispute" means all legal and equitable claims, demands, and controversies, of whatever nature or kind, whether in contract, tort, under statute or regulation, or some other law, between persons bound by the Plan or by an agreement to resolve Disputes under the Plan . . . including, but not limited to, any matters with respect to . . . any *personal injury allegedly incurred in or about a Company workplace*.

Jones' job assignment placed her in the United States Army's Central Command Area of Operations, located in the "Green Zone", a well-known area of Baghdad. The Green Zone is a ten-square-kilometer area that was initially the center of the Coalition Provisional Authority after the Iraqi invasion, and continues to remain the center of the international presence in the city.

Four days after signing her employment contract, Jones arrived in the Green Zone on 25 July 2005 and began working at Camp Hope, which she alleges was under the direct control and authority, collectively, of the United States Departments of State and

Defense, and Halliburton/KBR. Housing was provided for her as a term of her employment contract. Although she had initially requested, and claims she was promised, a private billeting area to be shared only with women, she was instead housed in a barracks, some distance from her workplace, occupied predominantly by male employees.

Jones alleges she was subjected to unwanted sexual harassment almost immediately. On 27 July, two days after arriving in Iraq, Jones complained to several Halliburton/KBR managers about her sexually-hostile living environment, and requested that she be housed in a safer location. She contends: no action was taken; and she was, instead, advised to “go to the spa”.

The next evening, on 28 July, Jones alleges that, following a social gathering outside her barracks, at which alcohol had been consumed, she was drugged, beaten, and gang-raped by several Halliburton/KBR employees in her barracks bedroom. Allegedly, when she awoke the next morning, naked and severely bruised, she discovered one of the alleged perpetrators lying in the lower bunk in her bedroom. At that time, he allegedly admitted to having unprotected sex with her. Jones received several serious injuries as a result of the alleged incident, including torn pectoral muscles, which would later require reconstructive surgery.

Jones reported the rape to another employee and was taken to see Halliburton/KBR

medical personnel. A rape kit was administered at a United States Army-run hospital. Jones alleges Halliburton/KBR subsequently mishandled the rape kit. She further alleges: after her rape-kit procedure was performed, she was placed under armed guard in a container and not permitted to leave; and, despite repeated requests to be allowed to do so, she was denied access to a telephone to contact her family, until she convinced one of her guards to allow her to telephone her father.

Additionally, Jones alleges she met with Halliburton’s human resources personnel and her direct supervisor following her physical examination, where she was interrogated for several hours. She contends her KBR supervisors gave her two options: to stay and “get over it”; or to return home without the “guarantee” of a job on return. Jones’ father was eventually able to enlist Congressional assistance to secure her return to the United States.

Initially, Jones filed a complaint with the Equal Employment Opportunity Commission. It conducted an investigation and determined: she had been sexually assaulted by one or more employees; physical trauma was apparent; and Halliburton/KBR’s investigation had been inadequate.

In February 2006, Jones filed a demand for arbitration against Halliburton/KBR, claiming: negligence, negligent undertaking, and gross negligence in relation to the claimed sexual harassment and assault. She later amended the demand to include claims

under Title VII and the Texas Labor Code. Additionally, she filed for, and received, workers' compensation benefits under the Defense Base Act.

Upon retaining new counsel, Jones filed the instant action, based on the same claims, in district court in May 2007 against: Halliburton/KBR and its various affiliates; the United States; and individual defendants, including her first supervisor in Houston, the alleged perpetrator she found lying in her bedroom, and several "John Doe Rapists".

Jones' Fourth Amended Complaint asserted claims for: negligence (which encompassed the above-described claim, that the district court deemed non-arbitrable, for the negligent hiring, retention, and supervision of the employees involved in the alleged assault); negligent undertaking; sexual harassment and hostile work environment under Title VII; retaliation; breach of contract; fraud in the inducement to enter the employment contract; fraud in the inducement to agree to arbitration; assault and battery; intentional infliction of emotional distress; and false imprisonment.

In November 2007, Halliburton/KBR moved to compel arbitration of Jones' claims and stay the proceedings. In March 2008, the district court heard oral argument on that motion.

That May, in a thorough and well-reasoned opinion and order, the district court granted in part and denied in part Halliburton/KBR's motion. For the reasons that follow, it compelled arbitration for all claims, except:

(1) assault and battery; (2) intentional infliction of emotional distress arising out of the alleged assault; (3) negligent hiring, retention, and supervision of employees involved in the alleged assault; and (4) false imprisonment.

In so holding, the district court concluded there was a valid agreement to arbitrate, rejecting Jones' contentions that: there was no meeting of the minds; the arbitration clause was fraudulently induced; the provision was contrary to public policy; and enforcing the agreement would be unconscionable. It also rejected Jones' alternative contention that, pursuant to the equitable doctrine of unclean hands, the arbitration agreement should not be enforced.

Having decided the arbitration agreement is valid, the district court turned to whether Jones' claims fell outside the agreement's scope. After determining the public policy expressed in the Texas Arbitration Act did not govern the question of scope (as Jones had urged), the district court found that certain claims fell outside the scope of the provision. Recognizing that the arbitration provision at issue is broad, it held the four above-listed claims related to the alleged rape (assault and battery; intentional infliction of emotional distress; negligent hiring, retention, and supervision of the employees involved; and false imprisonment) "fall beyond the outer limits of even a broad arbitration provision" and were "not related to Ms. Jones' employment

While noting that overseas, remote employment, such as Jones', has led to a liberal interpretation in the case law of the "scope of employment" for purposes of workers' compensation, the district court concluded: liberal construction could not "be incorporated wholesale into the interpretation of an arbitration provision"; and, as such, the alleged rape could not be considered related to her employment for purposes of arbitration simply because it might be considered within the scope of employment for workers' compensation purposes.

Finally, the district court held: although the arbitration provision extended to personal-injury claims "arising in the workplace", the court "[did] not believe [Jones'] bedroom should be considered the workplace, even though her housing was provided by her employer".

The district court ordered litigation of the four non-arbitrable claims stayed until arbitration is completed on the other claims. Those other claims were ordered to be arbitrated. This interlocutory appeal was filed in June 2008.

## II.

As is well established, pursuant to the Federal Arbitration Act (FAA), our court has jurisdiction over a district court's refusal to compel arbitration. The denial of a motion to compel arbitration is reviewed *de novo*.

A two-step analysis is employed to determine whether a party may be compelled to arbitrate. First, whether the party has agreed to arbitrate the dispute is examined. This question itself is further subdivided; to determine whether the party has agreed to arbitrate a dispute, our court must ask: "(1) is there a valid agreement to arbitrate the claims and (2) does the dispute in question fall within the scope of that arbitration agreement." If both questions are answered in the affirmative, our court then asks whether "any federal statute or policy renders the claims nonarbitrable."

Neither party contends that a federal statute or policy would bar arbitration; accordingly, our analysis is restricted to the first step. Further, the district court held, and neither party disputes on appeal-with the exception of Jones' alternative unclean-hands contention-that there was a valid and enforceable agreement to arbitrate. As such, our inquiry focuses on the question of scope: whether the dispute in question-the alleged rape-falls within the scope of the arbitration agreement.

\* \* \*

The one consensus emerging from this analysis is that it is fact-specific, and concerns an issue about which courts disagree. When deciding whether a claim falls within the scope of an arbitration agreement, courts "focus on factual allegations in the complaint rather than the legal causes of action asserted". Here, the allegations are as follows: (1) Jones was sexually assaulted by several

Halliburton/KBR employees *in her bedroom, after-hours*, (2) while she was *off-duty*, (3) following a social gathering outside of her barracks, (4) which was some distance from where she worked, (5) at which social gathering several co-workers had been drinking (which, notably, at the time was only allowed in “non-work” spaces).

Of further note, the record is unclear regarding both how free Jones was to travel in the Green Zone and whether non-Halliburton employees were allowed in Camp Hope, where the alleged incident occurred. If Jones was not restricted to Camp Hope, but was able to travel in the wider Green Zone area, Halliburton’s contention that the nature of her employment was pervasive and all-encompassing, such that most aspects of her life were “related to” it, would be weakened. The Green Zone housed a multitude of civilian workers in a wide range of occupations, and was the situs of many potential recreational and other social outlets that arguably could not be said to relate to Jones’ employment.

Moreover, if non-Halliburton/KBR employees were allowed in the area where the alleged assault occurred and Halliburton/KBR employees had assaulted such a non-employee, that person obviously would have an actionable claim. That Jones was the victim in the alleged assault, and that she happened to be a co-worker of the alleged perpetrators, should not, and does not, change the calculus.

In so noting, we do not make a statement on Jones’ freedom of movement, or that of non-employees of Halliburton/KBR, within the Green Zone. This was both unclear from the record and disputed by counsel in the briefing and at oral argument. The facts that can be definitively gleaned from the record are sufficient to support our decision; the above suppositions, however, provide further reason why what allegedly occurred would not be “related to” Jones’ employment, were the record more clear.

Under these circumstances, the outer limits of the “related to” language of the arbitration provision have been tested, and breached. Halliburton/KBR essentially asks this court to read the arbitration provision so broadly as to encompass any claim related to Jones’ *employer*, or any incident that happened *during her employment*, but that is not the language of the contract. We do not hold that, as a matter of law, sexual-assault allegations can never “relate to” someone’s employment. For this action, however, Jones’ allegations do not “touch matters” related to her employment, let alone have a “significant relationship” to her employment contract.

\* \* \*

2.

Having decided that Jones’ claims are not “related to” her employment for purposes of the arbitration clause, at issue is Halliburton/KBR’s second contention regarding the language in that clause: Jones’ claims fall within the scope of the arbitration

agreement because the DRP—incorporated by reference into Jones’ employment contract—defined covered disputes even more broadly, specifically including as an example of an arbitrable claim “any personal injury allegedly incurred *in or about the workplace*.” It asserts that, at the very least, the alleged personal injury (rape), which allegedly took place in Jones’ barracks bedroom, occurred “in or about the workplace”.

Jones counters: Halliburton/KBR is raising the “*in or about the workplace*” language for the first time on appeal; her employment contract includes only personal injuries “arising in the workplace”. Halliburton/KBR replies that it did raise this broad DRP language in district court when it cited the DRP in its motion to compel arbitration.

Regardless of whether we are interpreting “in,” or “in or about,” the workplace, neither phrase encompasses Jones’ claims. As noted, the district court concluded, and we agree, that “Plaintiff’s bedroom should [not] be considered the workplace, even though her housing was provided by her employer”. Halliburton/KBR provided Jones’ housing, and Jones did not pay rent to live there. Nonetheless, just as we held that the incident was not “related to” her employment for purposes of arbitration because she lived in employer-provided housing, we also hold that this fact does not establish the incident occurred “in or about the workplace”.

As the district court noted, the barracks were some distance from where Jones worked, and there is no indication Jones or anyone

else performed any job duties at the barracks. Further, as stated in the affidavit of a Halliburton/KBR Human Resources supervisor in Iraq: prior to the incident at issue, drinking was allowed in off-duty hours and *non-work spaces*. As noted, Jones and her co-workers had been drinking in the public space outside of her barracks before the alleged sexual assault. For purposes of deciding the scope of the arbitration provision, this is very persuasive that Halliburton/KBR did not consider the barracks to be a “workplace”.

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***Doping Control, Mandatory Arbitration,  
and Process Dangers for Accused Athletes  
in International Sports***

Maureen A. Weston (2009)

**B. Mandatory Arbitration for Athletes in the  
Court of Arbitration for Sport**

Considering that thousands of athletes from over 200 countries participate in the Olympics and international sporting competition, litigation involving sports-related disputes could conceivably span the globe. After more than a few highly contentious, costly, and negatively publicized judicial lawsuits and interventions, IOC President Juan Antonio Samaranch conceived of the idea of a single arbitral authority and tribunal for international sports-related disputes. In the early 1980s, the IOC voted to create and approve the Court of Arbitration for Sport to serve as the exclusive arbitral tribunal for the binding adjudication of disputes by members of the Olympic Movement. As of

1995, the Olympic Charter provides that “any dispute arising on the occasion of or in connection with the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport.” As a condition of participating in the Olympics, athletes must sign a Court of Arbitration for Sport Waiver form and thereby waive rights to their national courts and attendant laws and procedures. Arbitration clauses are incorporated into the statutes of each of the sport federations, associations or sport bodies, and athletes are required to consent to arbitration.

### 1. CAS Operations

CAS was originally financed exclusively by the IOC, and its membership largely comprised IOC appointments. In response to a judicial decision by the Swiss Supreme Court, which questioned CAS independence in light of the numerous links between the IOC and CAS, the International Court of Arbitration for Sport (ICAS) was established to manage and finance CAS independent of the IOC. In the Paris Agreement in 1994, over thirty-one international sports federations signed an agreement to constitute and recognize ICAS. CAS jurisdiction is now recognized by all international federations and national Olympic committees, whose bylaws, statutes, and contracts provide for CAS arbitration.

CAS is a private international arbitration tribunal based in Switzerland, with additional offices in Sydney, Australia and New York City. Absent the consent of the parties otherwise, CAS operates under Swiss law and in accordance with the Code of

Sports-Related Arbitration (CAS Code). CAS is structured into three divisions: (1) the Olympic Division, or Ad Hoc Division, first used in the 1996 Atlanta Games, is on-site to resolve any disputes arising during the Games within a twenty-four hour time period; (2) the “Ordinary Arbitration Division” handles primarily commercial contract disputes arising from legal relations between parties who have agreed to dispute resolution before CAS; and (3) the “Appeals Arbitration Division,” which adjudicates disputes resulting from final-instance decisions taken by tribunals within CAS or the sporting federations or other sports bodies. CAS also may issue Advisory Opinions, at the request of the IOCs, the IFs, NOCs, or associations recognized by the IOC, about any legal issue with respect to the practice of development of sport.

### 2. CAS Arbitrators and Selection Process

Although ICAS formally selects arbitrators, arbitrators eligible to serve on a CAS panel are initially proposed by the IOC, IFs, and NOCs. ICAS is also to select one-fifth of the CAS roster “after appropriate consultation with a view to safeguarding the interests of the athletes.” Organizations representing athletes, however, are not provided official participation in this process. CAS arbitrators are to have legal training and recognized competence in sports law. The arbitrators are guided by the CAS Code for procedural rules, including obligations to carry out their functions with objectivity and independence. Once approved by ICAS, CAS arbitrators are appointed for a renewable four-year term and included on a roster of CAS arbitrators.

In 2007, the list of CAS arbitrators included 275 persons from seven countries. The roster of available CAS arbitrators is sizeable, but in practice, the pool of arbitrators selected by parties is relatively small. Unlike public judges who work full-time as judges, CAS arbitrators serve when appointed and otherwise engage in other professional work. Thus, arbitrators with the requisite experience in sport may also have work that includes representing and counseling clients in the sport industry. Until a policy change effective January 2010, CAS rules did not prohibit members of its arbitral pool from acting as advocates in representing clients before other CAS panels. Notwithstanding, the rules do require arbitrator independence from the parties and disclosure of circumstances that might likely affect the arbitrator's independence.

### 3. CAS Appeals Arbitration for Disciplinary Case

Disciplinary cases, including doping, and those concerning athlete eligibility and field-of-play issues, are submitted to CAS Appeals Arbitration. Athletes have the option to seek a first-instance arbitration before a domestic panel of CAS where available or to go directly to final arbitration before CAS. Both the athlete and the prosecuting authority have the option to appeal the domestic CAS ruling by filing a request for final arbitration to CAS within twenty-one days from the date of the domestic ruling. If seeking a Panel of three arbitrators, the athlete must designate his arbitrator in his statement of appeal, due within ten days after the time limit for

appeal expires. The respondent designates its appointed arbitrator, and the Appeals Division President appoints a third arbitrator who serves as President of the Panel. The Panel makes a de novo review of the facts and the law and conducts a hearing in which the parties, witnesses, and any experts needed are heard. In “the absence of a majority,” the President of the Panel is to decide the case alone. The Panel prepares a reasoned, written award, which is final and binding upon the parties. Arbitrations under the appeals procedure do not require confidentiality, and CAS may publish the awards, unless the parties stipulate otherwise. The seat of CAS arbitrations is Lausanne, Switzerland. This is significant because, regardless of where the physical arbitration takes place, it is considered to occur in Switzerland. Thus, Swiss arbitration law governs.

### 4. Judicial Review and Enforcement of CAS Awards

The ability to vacate or seek judicial review of CAS awards is limited. A former version of Rule 59 expressly allowed for challenges on “[a]n extremely limited number of grounds” if raised within thirty days of the award and the “only court of appeal is the Swiss Federal Tribunal.” As amended, Rule 59 now altogether omits references to challenges to the CAS awards and expressly states that:

The award . . . shall be final and binding upon the parties. It may not be challenged by way of an action for setting aside to the extent that the parties have no domicile, habitual residence, or business establishment

in Switzerland and that they have expressly excluded all setting aside proceedings in the arbitration agreement or in an agreement entered into subsequently, in particular at the outset of the arbitration.

The expectation of finality of CAS awards under the CAS Code, however, does not eliminate the operation of the New York Convention or the Swiss arbitration law, which govern enforcement of foreign and Swiss arbitral awards, respectively. These statutes provide that a court may deny enforcement of an award where a party was under some incapacity, the arbitration was not valid or violated due process, the award is beyond the scope of the arbitration agreement, the procedure was not in accordance with the parties' agreement, or where enforcement is deemed contrary to public policy. Because the CAS Code situates the seat of CAS arbitration in Switzerland, only Swiss courts have jurisdiction to review CAS awards, unless otherwise provided. Even if a U.S. or other foreign court were to assert jurisdiction to vacate a CAS award under the New York Convention (or even the Federal Arbitration Act), the viability of a court remedy is questionable. For example, international sporting federations may be outside the reach of a U.S. court's personal jurisdiction, and thus not abide by a U.S. court's vacatur.

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*Allied-Bruce Terminix Cos.*

v.

*Dobson*

United States Supreme Court (1995)

Justice BREYER delivered the opinion of the Court.

This case concerns the reach of § 2 of the Federal Arbitration Act. That section makes enforceable a written arbitration provision in “a contract *evidencing* a transaction *involving* commerce.” Should we read this phrase broadly, extending the Act’s reach to the limits of Congress’ Commerce Clause power? Or, do the two italicized words—”involving” and “evidencing”—significantly restrict the Act’s application? We conclude that the broader reading of the Act is the correct one, and we reverse a State Supreme Court judgment to the contrary.

I.

In August 1987, Steven Gwin, a respondent who owned a house in Birmingham, Alabama, bought a lifetime “Termite Protection Plan” (Plan) from the local office of Allied-Bruce Terminix Companies, a franchise of Terminix International Company. In the Plan, Allied-Bruce promised “to protect” Gwin’s house “against the attack of subterranean termites,” to reinspect periodically, to provide any “further treatment found necessary,” and to repair, up to \$100,000, damage caused by new termite infestations. Terminix International “guarantee[d] the fulfillment of the terms” of the Plan. The Plan’s contract document provided in writing that

“*any controversy or claim . . . arising out of or relating to the interpretation, performance*

or breach of any provision of this agreement shall be settled exclusively by arbitration.”

In the spring of 1991, Mr. and Mrs. Gwin, wishing to sell their house to Mr. and Mrs. Dobson, had Allied-Bruce reinspect the house. They obtained a clean bill of health. But no sooner had they sold the house and transferred the Plan to Mr. and Mrs. Dobson than the Dobsons found the house swarming with termites. Allied-Bruce attempted to treat and repair the house, but the Dobsons found Allied-Bruce’s efforts inadequate. They therefore sued the Gwins, and (along with the Gwins, who cross-claimed) also sued Allied-Bruce and Terminix in Alabama state court. Allied-Bruce and Terminix, pointing to the Plan’s arbitration clause and § 2 of the Federal Arbitration Act, immediately asked the court for a stay, to allow arbitration to proceed. The court denied the stay. Allied-Bruce and Terminix appealed.

The Supreme Court of Alabama upheld the denial of the stay on the basis of a state statute making written, predispute arbitration agreements invalid and “unenforceable.” To reach this conclusion, the court had to find that the Federal Arbitration Act, which pre-empts conflicting state law, did not apply to the termite contract. It made just that finding. The court considered the federal Act inapplicable because the connection between the termite contract and interstate commerce was too slight. In the court’s view, the Act applies to a contract only if “at the time [the parties entered into the contract] and accepted the arbitration clause, they *contemplated*

substantial interstate activity.” Despite some interstate activities (*e.g.*, Allied-Bruce, like Terminix, is a multistate firm and shipped treatment and repair material from out of state), the court found that the parties “contemplated” a transaction that was primarily local and not “substantially” interstate.

Several state courts and Federal District Courts, like the Supreme Court of Alabama, have interpreted the Act’s language as requiring the parties to a contract to have “contemplated” an interstate commerce connection. Several federal appellate courts, however, have interpreted the same language differently, as reaching to the limits of Congress’ Commerce Clause power. We granted certiorari to resolve this conflict and, as we said, we conclude that the broader reading of the statute is the right one.

## II.

Before we can reach the main issues in this case, we must set forth three items of legal background.

First, the basic purpose of the Federal Arbitration Act is to overcome courts’ refusals to enforce agreements to arbitrate. The origins of those refusals apparently lie in “ancient times,” when the English courts fought “for extension of jurisdiction—All of them being opposed to anything that would altogether deprive every one of them of jurisdiction.” American courts initially followed English practice, perhaps just “stand[ing] . . . upon the antiquity of the

rule” prohibiting arbitration clause enforcement, rather than “upon its excellence or reason.” Regardless, when Congress passed the Arbitration Act in 1925, it was “motivated, first and foremost, by a . . . desire” to change this antiarbitration rule. It intended courts to “enforce [arbitration] agreements into which parties had entered” and to “place such agreements ‘upon the same footing as other contracts.’”

Second, some initially assumed that the Federal Arbitration Act represented an exercise of Congress’ Article III power to “ordain and establish” federal courts. In 1967, however, this Court held that the Act “is based upon and confined to the incontestable federal foundations of control over interstate commerce and over admiralty.” The Court considered the following complicated argument: (1) The Act’s provisions (about contract remedies) are important and often outcome determinative, and thus amount to “substantive,” not “procedural,” provisions of law; (2) *Erie R. Co. v. Tompkins*, made clear that federal courts must apply *state* substantive law in diversity cases; therefore (3) federal courts must not apply the Federal Arbitration Act in diversity cases. This Court responded by agreeing that the Act set forth substantive law, but concluding that, nonetheless, the Act applied in diversity cases because Congress had so intended. The Court wrote: “Congress may prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.”

Third, the holding in *Prima Paint* led to a further question. Did Congress intend the Act also to apply in state courts? Did the Federal Arbitration Act pre-empt conflicting state antiarbitration law, or could state courts apply their antiarbitration rules in cases before them, thereby reaching results different from those reached in otherwise similar federal diversity cases? In *Southland Corp. v. Keating*, this Court decided that Congress would not have wanted state and federal courts to reach different outcomes about the validity of arbitration in similar cases. The Court concluded that the Federal Arbitration Act pre-empts state law; and it held that state courts cannot apply state statutes that invalidate arbitration agreements.

We have set forth this background because respondents, supported by 20 state attorneys general, now ask us to overrule *Southland* and thereby to permit Alabama to apply its antiarbitration statute in this case irrespective of the proper interpretation of § 2. The *Southland* Court, however, recognized that the pre-emption issue was a difficult one, and it considered the basic arguments that respondents and *amici* now raise (even though those issues were not thoroughly briefed at the time). Nothing significant has changed in the 10 years subsequent to *Southland*; no later cases have eroded *Southland*’s authority; and no unforeseen practical problems have arisen. Moreover, in the interim, private parties have likely written contracts relying upon *Southland* as authority. Further, Congress, both before and after *Southland*, has enacted legislation extending, not retracting, the

scope of arbitration. For these reasons, we find it inappropriate to reconsider what is by now well-established law.

We therefore proceed to the basic interpretive questions aware that we are interpreting an Act that seeks broadly to overcome judicial hostility to arbitration agreements and that applies in both federal and state courts. We must decide in this case whether that Act used language about interstate commerce that nonetheless limits the Act's application, thereby carving out an important statutory niche in which a State remains free to apply its antiarbitration law or policy. We conclude that it does not.

### III.

The Federal Arbitration Act, § 2, provides that a “written provision in any maritime transaction or *a 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.”

The initial interpretive question focuses upon the words “involving commerce.” These words are broader than the often-found words of art “in commerce.” They therefore cover more than “only persons or activities *within the flow* of interstate commerce.” But how far beyond the flow of commerce does the word “involving” reach? Is “involving” the functional equivalent of the word “affecting?” That phrase—“affecting commerce”—normally signals

Congress' intent to exercise its Commerce Clause powers to the full. We cannot look to other statutes for guidance for the parties tell us that this is the only federal statute that uses the word “involving” to describe an interstate commerce relation.

After examining the statute's language, background, and structure, we conclude that the word “involving” is broad and is indeed the functional equivalent of “affecting.” For one thing, such an interpretation, linguistically speaking, is permissible. The dictionary finds instances in which “involve” and “affect” sometimes can mean about the same thing. For another, the Act's legislative history, to the extent that it is informative, indicates an expansive congressional intent.

Further, this Court has previously described the Act's reach expansively as coinciding with that of the Commerce Clause.

Finally, a broad interpretation of this language is consistent with the Act's basic purpose, to put arbitration provisions on “the same footing” as a contract's other terms. Conversely, a narrower interpretation is not consistent with the Act's purpose, for (unless unreasonably narrowed to the flow of commerce) such an interpretation would create a new, unfamiliar test lying somewhere in a no man's land between “in commerce” and “affecting commerce,” thereby unnecessarily complicating the law and breeding litigation from a statute that seeks to avoid it.

We recognize arguments to the contrary: The pre-New Deal Congress that passed the

Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case. But, it is not unusual for this Court in similar circumstances to ask whether the scope of a statute should expand along with the expansion of the Commerce Clause power itself, and to answer the question affirmatively-as, for the reasons set forth above, we do here.

Further, the Gwins and Dobsons point to two cases containing what they believe to be favorable language. In *Mine Workers v. Coronado Coal Co.*, and then again in *Leather Workers v. Herkert & Meisel Trunk Co.*, they say, this Court said that one might draw a distinction between, on the one hand, cases that “*involve* interstate commerce intrinsically,” and, on the other hand, cases “*affecting* interstate commerce so directly as to be within the federal regulatory power.” One could read these cases as driving a wedge between “involve” and “affecting.” Yet, in these cases, the Court was not construing a statute containing the words “involving commerce.” Furthermore, nothing suggests the drafters of the Act looked to these cases as a source. And, these cases themselves use the phrase “involve . . . intrinsically,” not the word “involving” alone. In sum, these cases do not support respondents’ position.

The Gwins and Dobsons, with far better reason, point to a different case, *Bernhardt v. Polygraphic Co. of America, Inc.*. In that case, Bernhardt, a New York resident, had entered into an employment contract (containing an arbitration clause) in New

York with Polygraphic, a New York corporation. But, Bernhardt “was to perform” that contract after he “later became a resident of Vermont.” This Court was faced with the question whether, in light of *Erie*, a federal court should apply the Federal Arbitration Act in a diversity case when faced with state law hostile to arbitration. The Court did not reach that question, however, for it decided that the contract itself did not “involv[e]” interstate commerce and therefore fell outside the Act. Since Congress, constitutionally speaking, *could* have applied the Act to Bernhardt’s contract, say the parties, how then can we say that the Act’s word “involving” reaches as far as the Commerce Clause itself?

The best response to this argument is to point to the way in which the Court reasoned in *Bernhardt*, and to what the Court said. It said that the *reason* the Act did not apply to Bernhardt’s contract was that there was

“*no showing that petitioner while performing his duties under the employment contract was working ‘in’ commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.*”

Thus, the Court interpreted the words “involving commerce” as broadly as the words “affecting commerce”; and, as we have said, these latter words normally mean a full exercise of constitutional power. At the same time, the Court’s opinion does not discuss the implications of the “interstate” facts to which the respondents now point. For these reasons, *Bernhardt* does not

require us to narrow the scope of the word “involving.” And, we conclude that the word “involving,” like “affecting,” signals an intent to exercise Congress’ commerce power to the full.

#### IV.

Section 2 applies where there is “a contract *evidencing a transaction* involving commerce,” (emphasis added). The second interpretive question focuses on the italicized words. Does “evidencing a transaction” mean only that the transaction (that the contract “evidences”) must turn out, *in fact*, to have involved interstate commerce? Or, does it mean more?

Many years ago, Second Circuit Chief Judge Lumbard said that the phrase meant considerably more. He wrote:

“The significant question . . . is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, *at the time they entered into it* and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic. . . the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated.”

The Supreme Court of Alabama and several other courts have followed this view, known as the “contemplation of the parties” test.

We find the interpretive choice difficult, but for several reasons we conclude that the first interpretation (“commerce in fact”) is more faithful to the statute than the second (“contemplation of the parties”). First, the “contemplation of the parties” interpretation, when viewed in terms of the statute’s basic purpose, seems anomalous. That interpretation invites litigation about what was, or was not, “contemplated.” Why would Congress intend a test that risks the very kind of costs and delay through litigation (about the circumstances of contract formation) that Congress wrote the Act to help the parties avoid?

Moreover, that interpretation too often would turn the validity of an arbitration clause on what, from the perspective of the statute’s basic purpose, seems happenstance, namely, whether the parties happened to think to insert a reference to interstate commerce in the document or happened to mention it in an initial conversation. After all, parties to a sales contract with an arbitration clause might naturally think about the goods sold, or about arbitration, but why should they naturally think about an interstate commerce connection?

Further, that interpretation fits awkwardly with the rest of § 2. That section, for example, permits parties to agree to submit to arbitration “an existing controversy arising out of” a contract made earlier. Why would Congress want to risk

nonenforceability of this *later* arbitration agreement (even if fully connected with interstate commerce) simply because the parties did not properly “contemplate” (or write about) the interstate aspects of the earlier contract? The first interpretation, requiring only that the “transaction” *in fact* involve interstate commerce, avoids this anomaly, as it avoids the other anomalous effects growing out of the “contemplation of the parties” test.

Second, the statute’s language permits the “commerce in fact” interpretation. That interpretation, we concede, leaves little work for the word “evidencing” (in the phrase “a contract evidencing a transaction”) to perform, for every contract evidences some transaction. But, perhaps Congress did not want that word to perform much work. The Act’s history, to the extent informative, indicates that the Act’s supporters saw the Act as part of an effort to make arbitration agreements universally enforceable. They wanted to “get a Federal law” that would “cover” areas where the Constitution authorized Congress to legislate, namely, “interstate and foreign commerce and admiralty.” They urged Congress to model the Act after a New York statute that made enforceable a written arbitration provision “in a written contract.” Early drafts made enforceable a written arbitration provision “in *any contract* or maritime transaction *or* transaction involving commerce.” Members of Congress, looking at that phrase, might have thought the words “any contract” standing alone went beyond Congress’ constitutional authority. And, if so, they might have simply connected those words

with the later words “transaction involving commerce,” thereby creating the phrase that became law. Nothing in the Act’s history suggests any other, more limiting, task for the language.

Third, the basic practical argument underlying the “contemplation of the parties” test was, in Chief Judge Lumbard’s words, the need to “be cautious in construing the act lest we excessively encroach on the powers which Congressional policy, if not the Constitution, would reserve to the states.” The practical force of this argument has diminished in light of this Court’s later holdings that the Act does displace state law to the contrary.

Finally, we note that an *amicus curiae* argues for an “objective” (“reasonable person” oriented) version of the “contemplation of the parties” test on the ground that such an interpretation would better protect consumers asked to sign form contracts by businesses. We agree that Congress, when enacting this law, had the needs of consumers, as well as others, in mind. Indeed, arbitration’s advantages often would seem helpful to individuals, say, complaining about a product, who need a less expensive alternative to litigation. And, according to the American Arbitration Association (also an *amicus* here), more than one-third of its claims involve amounts below \$10,000, while another third involve claims of \$10,000 to \$50,000 (with an average processing time of less than six months).

We are uncertain, however, just how the “objective” version of the “contemplation” test would help consumers. Sometimes, of course, it would permit, say, a consumer with potentially large damages claims to disavow a contract’s arbitration provision and proceed in court. But, if so, it would equally permit, say, local business entities to disavow a contract’s arbitration provisions, thereby leaving the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set) without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery.

In any event, § 2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause “upon such grounds as exist at law or in equity for the revocation of *any* contract.” What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.

For these reasons, we accept the “commerce in fact” interpretation, reading the Act’s language as insisting that the “transaction” in fact “involv[e]” interstate commerce,

even if the parties did not contemplate an interstate commerce connection.

## V.

The parties do not contest that the transaction in this case, in fact, involved interstate commerce. In addition to the multistate nature of Terminix and Allied-Bruce, the termite-treating and house-repairing material used by Allied-Bruce in its (allegedly inadequate) efforts to carry out the terms of the Plan, came from outside Alabama.

Consequently, the judgment of the Supreme Court of Alabama is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

\* \* \*

Justice SCALIA, dissenting.

I have previously joined two judgments of this Court that rested upon the holding of *Southland Corp. v. Keating*. In neither of those cases, however, did any party ask that *Southland* be overruled, and it was therefore not necessary to consider the question. In the present case, by contrast, one of respondents’ central arguments is that *Southland* was wrongly decided, and their request for its overruling has been supported by an *amicus* brief signed by the attorneys general of 20 States. For the reasons set forth in Justice Thomas’ opinion, which I join, I agree with the respondents (and belatedly with Justice O’Connor) that

*Southland* clearly misconstrued the Federal Arbitration Act.

I do not believe that proper application of *stare decisis* prevents correction of the mistake. Adhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. Abandoning it does not impair reliance interests to a degree that justifies this evil. Primary behavior is not affected: No rule of conduct is retroactively changed, but only (perhaps) the forum in which violation is to be determined and remedied. I doubt that many contracts with arbitration clauses would have been forgone, or entered into only for significantly higher remuneration, absent the *Southland* guarantee. Where, moreover, reliance on *Southland* did make a significant difference, rescission of the contract for mistake of law would often be available

I shall not in the future dissent from judgments that rest on *Southland*. I will, however, stand ready to join four other Justices in overruling it, since *Southland* will not become more correct over time, the course of future lawmaking seems unlikely to be affected by its existence and the accumulated private reliance will not likely increase beyond the level it has already achieved (few contracts not terminable at will have more than a 5-year term).

For these reasons, I respectfully dissent from the judgment of the Court.

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9 U.S.C. § 2

### **Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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### **Department of Defense Appropriations Act (2010)**

§ 8116. (a) None of the funds appropriated or otherwise made available by this Act may be expended for any Federal contract for an amount in excess of \$1,000,000 that is awarded more than 60 days after the effective date of this Act, unless the contractor agrees not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of

emotional distress, false imprisonment, or negligent hiring, supervision, or retention; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates that the employee or independent contractor resolve through arbitration any claim under title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision, or retention.

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**In re Volkswagen of America, Inc.**

United States Court of Appeals, Fifth Circuit  
(2008)

Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas.

The overarching question before the *en banc* Court is whether a writ of mandamus should issue directing the transfer of this case from the Marshall Division of the Eastern District of Texas—which has no connection to the parties, the witnesses, or the facts of this case—to the Dallas Division of the Northern District of Texas—which has extensive connections to the parties, the witnesses, and the facts of this case. We grant the petition and direct the district court to transfer this case to the Dallas Division.

I.

A.

On the morning of May 21, 2005, a Volkswagen Golf automobile traveling on a freeway in Dallas, Texas, was struck from behind and propelled rear-first into a flat-bed trailer parked on the shoulder of the freeway. Ruth Singleton was driving the Volkswagen Golf. Richard Singleton was a passenger. And Mariana Singleton, Richard and Ruth Singleton's seven-year-old granddaughter, was also a passenger. Richard Singleton was seriously injured in the accident. Mariana Singleton was also seriously injured in the accident, and she later died as a result of her injuries.

Richard Singleton, Ruth Singleton, and Amy Singleton (Mariana's mother) filed suit against Volkswagen AG and Volkswagen of America, Inc., in the Marshall Division of the Eastern District of Texas, alleging that design defects in the Volkswagen Golf caused Richard's injuries and Mariana's death.

In response to the Singletons' suit, Volkswagen filed a third-party complaint against the driver of the automobile that struck the Singletons, alleging that the Singletons had the ability to sue him but did not and that his negligence was the only proximate cause of the damages.

B.

Pursuant to 28 U.S.C. § 1404(a), Volkswagen moved to transfer venue to the Dallas Division. Volkswagen asserted that a transfer was warranted as the Volkswagen Golf was purchased in Dallas County, Texas; the accident occurred on a freeway in Dallas, Texas; Dallas residents witnessed the accident; Dallas police and paramedics

responded and took action; a Dallas doctor performed the autopsy; the third-party defendant lives in Dallas County, Texas; none of the plaintiffs live in the Marshall Division; no known party or non-party witness lives in the Marshall Division; no known source of proof is located in the Marshall Division; and none of the facts giving rise to this suit occurred in the Marshall Division. These facts are undisputed.

The district court denied Volkswagen's transfer motion. Volkswagen then filed a motion for reconsideration, arguing that the district court gave inordinate weight to the plaintiffs' choice of venue and, to state Volkswagen's arguments generally, that the district court failed meaningfully to weigh the venue transfer factors. The district court also denied Volkswagen's motion for reconsideration, and for the same reasons presented in its denial of Volkswagen's transfer motion.

### C.

Volkswagen then petitioned this Court for a writ of mandamus. In a *per curiam* opinion, a divided panel of this Court denied the petition and declined to issue a writ. *In re Volkswagen I*. The panel majority held that the district court did not clearly abuse its discretion in denying Volkswagen's transfer motion. Judge Garza wrote a dissenting opinion and in it noted that "[t]he only connection between this case and the Eastern District of Texas is plaintiffs' choice to file there; *all* other factors relevant to transfer of venue weigh overwhelmingly in favor of the Northern District of Texas."

Volkswagen then filed a petition for rehearing *en banc*. The original panel interpreted the petition for rehearing *en banc* as a petition for panel rehearing, granted it, withdrew its decision, and directed the Clerk's Office to schedule the petition for oral argument. A second panel of this Court then heard oral argument on the issues raised for review. The second panel granted Volkswagen's petition and issued a writ directing the district court to transfer this case to the Dallas Division.

The Singletons then filed a petition for rehearing *en banc*, which the Court granted.

### II.

In this opinion, we will first address whether mandamus is an appropriate means to test a district court's ruling on a venue transfer motion. Citing our precedents and the precedents of the other courts of appeals, we hold that mandamus is appropriate when there is a clear abuse of discretion. We note that the Supreme Court has set out three requirements for the issuance of the writ. Of these, we address first whether Volkswagen has established a clear and indisputable right to the writ. We begin by observing that the only factor that favors keeping the case in Marshall, Texas, is the plaintiffs' choice of venue. We discuss this privilege granted under 28 U.S.C. § 1391, and how the privilege is tempered by the considerations of inconvenience under § 1404(a). We demonstrate that a plaintiff's choice of forum under the *forum non conveniens* doctrine is weightier than a plaintiff's choice of venue under §1404(a) because the former involves the outright dismissal of a case, and the latter involves only a transfer of venue

within the same federal forum. After determining the correct standards to apply in the § 1404(a) analysis, we then consider the showing of inconvenience that Volkswagen has made. We review the district court's ruling and conclude that the district court abused its discretion in denying the transfer. But that does not resolve the case. The question next becomes whether the district court's ruling was a clear abuse of discretion that qualifies for mandamus relief. Concluding that the district court gave undue weight to the plaintiffs' choice of venue, ignored our precedents, misapplied the law, and misapprehended the relevant facts, we hold that the district court reached a patently erroneous result and clearly abused its discretion in denying the transfer. Further finding that the showing satisfies the other requirements of the Supreme Court for mandamus, we conclude that a writ is appropriate under the circumstances of this case. We now begin this discussion.

### III.

Because some suggestion is made that mandamus is an inappropriate means to test the district court's discretion in ruling on venue transfers, we will first turn our attention to this subject.

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Although the Supreme Court has never decided mandamus in the context of § 1404(a), the Supreme Court holds that mandamus is an appropriate remedy for "exceptional circumstances amounting to a judicial usurpation of power or a clear abuse of discretion." *Cheney v. U.S. Dist Ct.*, 542 U.S. 367, 380 (2004). Thus, the specific

standard that we apply here is that mandamus will be granted upon a determination that there has been a clear abuse of discretion.

The Supreme Court also has said, however, that courts reviewing petitions for mandamus "must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Will v. United States*, 389 U.S. 90, 98 n. 6 (1967). This admonition distinguishes the standard of our appellate review from that of our mandamus review. The admonition warns that we are not to issue a writ to correct a mere abuse of discretion, even though such might be reversible on a normal appeal. The inverse of the admonition, of course, is that a writ is appropriate to correct a clear abuse of discretion.

Admittedly, the distinction between an abuse of discretion and a clear abuse of discretion cannot be sharply defined for all cases. As a general matter, a court's exercise of its discretion is not unbounded; that is, a court must exercise its discretion within the bounds set by relevant statutes and relevant, binding precedents. A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts. On mandamus review, we review for these types of errors, but we only will grant mandamus relief when such errors produce a patently erroneous result.

Thus, as to the suggestion that mandamus is an inappropriate means to test the district court's discretion in ruling on venue transfers, the precedents are clear that mandamus is entirely appropriate to review for an abuse of discretion that clearly exceeds the bounds of judicial discretion.

#### IV.

Because the writ is an extraordinary remedy, the Supreme Court has established three requirements that must be met before a writ may issue: (1) “the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires—a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process”; (2) “the petitioner must satisfy the burden of showing that [his] right to issuance of the writ is clear and indisputable”; and (3) “even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.” *Cheney*, 542 U.S. at 380–81. “These hurdles, however demanding, are not insuperable.” *Id.* at 381.

#### A.

The second requirement is that the petitioner must have a clear and indisputable right to issuance of the writ. If the district court clearly abused its discretion (the standard enunciated by the Supreme Court in *Cheney*) in denying Volkswagen's transfer motion, then Volkswagen's right to issuance of the writ is necessarily clear and indisputable.

There can be no question but that the district courts have broad discretion in deciding

whether to order a transfer. But this discretion has limitations imposed by the text of § 1404(a) and by the precedents of the Supreme Court and of this Court that interpret and apply the text of § 1404(a).

To determine whether a district court clearly abused its discretion in ruling on a transfer motion, some petitions for mandamus relief that are presented to us require that we review carefully the circumstances presented to and the decision making process of the district court. Others can be summarily decided. But—and we stress—in no case will we replace a district court's exercise of discretion with our own; we review only for clear abuses of discretion that produce patently erroneous results. We therefore turn to examine the district court's exercise of its discretion in denying Volkswagen's transfer motion.

#### 1.

The preliminary question under § 1404(a) is whether a civil action “might have been brought” in the destination venue. Volkswagen seeks to transfer this case to the Dallas Division of the Northern District of Texas. All agree that this civil action originally could have been filed in the Dallas Division.

#### 2.

Beyond this preliminary and undisputed question, the parties sharply disagree. The first disputed issue is whether the district court, by applying the *forum non conveniens* dismissal standard, erred by giving inordinate weight to the plaintiffs' choice of venue. We have noted earlier that there is

nothing that ties this case to the Marshall Division except plaintiffs' choice of venue. It has indeed been suggested that this statutorily granted choice is inviolable. A principal disputed question, then, is what role does a plaintiff's choice of venue have in the venue transfer analysis. We now turn to address this question.

(a)

When no special, restrictive venue statute applies, the general venue statute, 28 U.S.C. § 1391, controls a plaintiff's choice of venue. Under § 1391(a)(1), a diversity action may be brought in "a judicial district where any defendant resides, if all defendants reside in the same State." Under § 1391(c), when a suit is filed in a multi-district state, like Texas, a corporation is "deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State." Because large corporations, like Volkswagen, often have sufficient contacts to satisfy the requirement of § 1391(c) for most, if not all, federal venues, the general venue statute has the effect of nearly eliminating venue restrictions in suits against corporations. Because of the liberal, general venue statute, many venue disputes now are litigated as motions to transfer venue under § 1404.

Congress, however, has tempered the effects of this general venue statute by enacting the venue transfer statute, 28 U.S.C. § 1404. The underlying premise of § 1404(a) is that courts should prevent plaintiffs from abusing their privilege under § 1391 by subjecting defendants to venues that are inconvenient under the terms of § 1404(a).

Thus, while a plaintiff has the privilege of filing his claims in any judicial division appropriate under the general venue statute, § 1404(a) tempers the effects of the exercise of this privilege.

(b)

With this understanding of the competing statutory interests, we turn to the legal precedents. We first turn to *Gilbert* because of its historic and precedential importance to § 1404(a), even today.

In 1947, in *Gilbert*, the Supreme Court firmly established in the federal courts the common-law doctrine of *forum non conveniens*. The essence of the *forum non conveniens* doctrine is that a court may decline jurisdiction and may actually dismiss a case, even when the case is properly before the court, if the case more conveniently could be tried in another forum.

Shortly after the *Gilbert* decision, in 1948, the venue transfer statute became effective. The essential difference between the *forum non conveniens* doctrine and § 1404(a) is that under § 1404(a) a court does not have authority to dismiss the case; the remedy under the statute is simply a transfer of the case within the federal system to another federal venue more convenient to the parties, the witnesses, and the trial of the case. Thus, Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience.

That § 1404(a) venue transfers may be granted “upon a lesser showing of inconvenience” than *forum non conveniens* dismissals, however, does not imply that the relevant factors from the *forum non conveniens* context have changed or that the plaintiff’s choice of [venue] is not to be considered. But it does imply that the burden that a moving party must meet to justify a venue transfer is less demanding than that a moving party must meet to warrant a *forum non conveniens* dismissal. The heavy burden traditionally imposed upon defendants by the *forum non conveniens* doctrine—dismissal permitted only in favor of a substantially more convenient alternative—was dropped in the § 1404(a) context. The statute requires only that the transfer be “[f]or the convenience of the parties, in the interest of justice. Thus, the district court, in requiring Volkswagen to show that the § 1404(a) factors must substantially outweigh the plaintiffs’ choice of venue, erred by applying the stricter *forum non conveniens* dismissal standard and thus giving inordinate weight to the plaintiffs’ choice of venue.

As to the appropriate standard, in *Humble Oil* we noted that the avoidance of dismissal through § 1404(a) lessens the weight to be given to the plaintiff’s choice of venue and that, consequently, he who seeks the transfer must show good cause. This “good cause” burden reflects the appropriate deference to which the plaintiff’s choice of venue is entitled. When viewed in the context of § 1404(a), to show good cause means that a moving party, in order to support its claim for a transfer, must satisfy the statutory requirements and clearly demonstrate that a

transfer is “[f]or the convenience of parties and witnesses, in the interest of justice.” Thus, when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff’s choice should be respected. When the movant demonstrates that the transferee venue is clearly more convenient, however, it has shown good cause and the district court should therefore grant the transfer.

3.

We thus turn to examine the showing that Volkswagen made under § 1404(a) and the district court’s response.

The private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.

Although the *Gilbert* factors are appropriate for most transfer cases, they are not necessarily exhaustive or exclusive. Moreover, we have noted that none can be said to be of dispositive weight.

(a)

Before the district court, Volkswagen asserted that a transfer was warranted because: (1) the relative ease of access to sources of proof favors transfer as all of the documents and physical evidence relating to the accident are located in the Dallas Division, as is the collision site; (2) the availability of compulsory process favors transfer as the Marshall Division does not have absolute subpoena power over the non-party witnesses; (3) the cost of attendance for willing witnesses factor favors transfer as the Dallas Division is more convenient for all relevant witnesses; and (4) the local interest in having localized interests decided at home favors transfer as the Volkswagen Golf was purchased in Dallas County, Texas; the accident occurred on a freeway in Dallas, Texas; Dallas residents witnessed the accident; Dallas police and paramedics responded and took action; a Dallas doctor performed the autopsy; the third-party defendant lives in Dallas County, Texas; none of the plaintiffs live in the Marshall Division; no known party or non-party witness lives in the Marshall Division; no known source of proof is located in the Marshall Division; and none of the facts giving rise to this suit occurred in the Marshall Division.

(b)

Applying the *Gilbert* factors, however, the district court concluded that: (1) the relative ease of access to sources of proof is neutral because of advances in copying technology and information storage; (2) the availability of compulsory process is neutral because, despite its lack of absolute subpoena power, the district court could deny any motion to

quash and ultimately compel the attendance of third-party witnesses found in Texas; (3) the cost of attendance for willing witnesses is neutral because Volkswagen did not designate “key” witnesses and because, given the proximity of Dallas to the Marshall Division, the cost of having witnesses attend a trial in Marshall would be minimal; and (4) the local interest in having localized interests decided at home factor is neutral because, although the accident occurred in Dallas, Texas, the citizens of Marshall, Texas, “would be interested to know whether there are defective products offered for sale in close proximity to the Marshall Division.” Based on this analysis, the district court concluded that Volkswagen “has not satisfied its burden of showing that the balance of convenience and justice weighs in favor of transfer.”

(c)

We consider first the private interest factor concerning the relative ease of access to sources of proof. Here, the district court’s approach reads the sources of proof requirement out of the § 1404(a) analysis, and this despite the fact that this Court has recently reiterated that the sources of proof requirement is a meaningful factor in the analysis. *See In re Volkswagen I*. That access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous. All of the documents and physical evidence relating to the accident are located in the Dallas Division, as is the collision site. Thus, the district court erred in applying this factor because it does weigh in favor of transfer.

The second private interest factor is the availability of compulsory process to secure the attendance of witnesses. As in *In re Volkswagen I*, the non-party witnesses located in the city where the collision occurred “are outside the Eastern District’s subpoena power for deposition,” and any “trial subpoenas for these witnesses to travel more than 100 miles would be subject to motions to quash under Fed.R.Civ.P. 45(c)(3). Moreover, a proper venue that does enjoy *absolute* subpoena power for both depositions and trial—the Dallas Division—is available. As we noted above, the venue transfer analysis is concerned with convenience, and that a district court can deny any motions to quash does not address concerns regarding the convenience of parties and witnesses. Thus, the district court erred in applying this factor because it also weighs in favor of transfer.

The third private interest factor is the cost of attendance for willing witnesses. Volkswagen has submitted a list of potential witnesses that included the third-party defendant, accident witnesses, accident investigators, treating medical personnel, and the medical examiner—all of whom reside in Dallas County or in the Dallas area. Volkswagen also has submitted two affidavits, one from an accident witness and the other from the accident investigator, that stated that traveling to the Marshall Division would be inconvenient. Volkswagen also asserts that the testimony of these witnesses, including an accident witness and an accident investigator, is critical to determining causation and liability in this case.

In *In re Volkswagen I* we set a 100-mile threshold as follows: “When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.” We said, further, that it is an “obvious conclusion” that it is more convenient for witnesses to testify at home and that “[a]dditional distance means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment.” The district court disregarded our precedent relating to the 100-mile rule. As to the witnesses identified by Volkswagen, it is apparent that it would be more convenient for them if this case is tried in the Dallas Division, as the Marshall Division is 155 miles from Dallas. Witnesses not only suffer monetary costs, but also the personal costs associated with being away from work, family, and community. Moreover, the plaintiffs, Richard Singleton and Ruth Singleton, also currently reside in the Dallas Division (Amy Singleton resides in Kansas). The Singletons have not argued that a trial in the Dallas Division would be inconvenient to them; they actually have conceded that the Dallas Division would be a convenient venue. The district court erred in applying this factor as it also weighs in favor of transfer.

The only contested public interest factor is the local interest in having localized interests decided at home. Here, the district court’s reasoning again disregarded our

precedent in *In re Volkswagen I*. There, under virtually indistinguishable facts, we held that this factor weighed heavily in favor of transfer. Here again, this factor weighs heavily in favor of transfer: the accident occurred in the Dallas Division, the witnesses to the accident live and are employed in the Dallas Division, Dallas police and paramedics responded and took action, the Volkswagen Golf was purchased in Dallas County, the wreckage and all other evidence are located in Dallas County, two of the three plaintiffs live in the Dallas Division (the third lives in Kansas), not one of the plaintiffs has ever lived in the Marshall Division, and the third-party defendant lives in the Dallas Division. In short, there is no relevant factual connection to the Marshall Division.

Furthermore, the district court's provided rationale—that the citizens of Marshall have an interest in this product liability case because the product is available in Marshall, and that for this reason jury duty would be no burden—stretches logic in a manner that eviscerates the public interest that this factor attempts to capture. The district court's provided rationale could apply virtually to any judicial district or division in the United States; it leaves no room for consideration of those actually affected—directly and indirectly—by the controversies and events giving rise to a case. That the residents of the Marshall Division “would be interested to know” whether a defective product is available does not imply that they have an interest—that is, a stake—in the resolution of this controversy. Indeed, they do not, as they are not in any relevant way connected to the events that gave rise to this suit. In

contrast, the residents of the Dallas Division have extensive connections with the events that gave rise to this suit. Thus, the district court erred in applying this factor as it also weighs in favor of transfer.

4.

The reader will remember that we began our discussion by addressing the three requirements set out by the Supreme Court in *Cheney* for the issuance of the writ of mandamus. Up until this point, all of our discussion has focused upon the second requirement: that the right to mandamus is clear and indisputable. The remaining question as to this second requirement is whether the errors we have noted warrant mandamus relief; that is, whether the district court clearly abused its discretion in denying Volkswagen's transfer motion. The errors of the district court—applying the stricter *forum non conveniens* dismissal standard, misconstruing the weight of the plaintiffs' choice of venue, treating choice of venue as a § 1404(a) factor, misapplying the *Gilbert* factors, disregarding the specific precedents of this Court and glossing over the fact that not a single relevant factor favors the Singletons' chosen venue—were extraordinary errors.

In the light of the above, we hold that the district court's errors resulted in a patently erroneous result. Thus, Volkswagen's right to issuance of the writ is clear and indisputable, and the second requirement, under *Cheney*, for granting a petition for a writ of mandamus is therefore satisfied.

B.

We now return to the first and the third requirements for determining whether a writ should issue, as provided by the Supreme Court in *Cheney*.

The first requirement—that the petitioner must have no other adequate means to attain relief—is certainly satisfied here. As Judge Posner has noted, a petitioner “would not have an adequate remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because [the petitioner] would not be able to show that it would have won the case had it been tried in a convenient [venue].” Moreover, interlocutory review of transfer orders under 28 U.S.C. § 1292(b) is unavailable. And the harm—inconvenience to witnesses, parties and other—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle. Thus, the writ is not here used as a substitute for an appeal, as an appeal will provide no remedy for a patently erroneous failure to transfer venue.

As to the third requirement for granting a petition for a writ of mandamus, we must assure ourselves that it is appropriate in this case. We have addressed most of the reasons outlined above. The district court clearly abused its discretion and reached a patently erroneous result. And it is indisputable that Volkswagen has no other adequate remedy that would provide it with relief. Further, writs of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case. Because venue transfer decisions are rarely reviewed, the district

courts have developed their own tests, and they have applied these tests with too little regard for consistency of outcomes. Thus, here it is further appropriate to grant mandamus relief, as the issues presented and decided above have an importance beyond this case. And, finally, we are aware of nothing that would render the exercise of our discretion to issue the writ inappropriate.

We therefore conclude that all three of the *Cheney* requirements for mandamus relief are met in this case.

#### V.

Thus, for the reasons assigned above, we grant Volkswagen’s petition for a writ of mandamus. The Clerk of this Court shall therefore issue a writ of mandamus directing the district court to transfer this case to the United States District Court for the Northern District of Texas, Dallas Division.

MANDAMUS GRANTED;

King, Circuit Judge, dissenting:

In order to grant mandamus here, the majority proceeds by plucking the standard “clear abuse of discretion” out of the narrow context provided by the Supreme Court’s mandamus precedent and then confecting a case-not the case presented to the district court-to satisfy its new standard. Notwithstanding almost two hundred years of Supreme Court precedent to the contrary, the majority utilizes mandamus to effect an interlocutory review of a nonappealable order committed to the district court’s discretion. I respectfully dissent.

Before getting into the majority's analysis and its flaws, it is important to describe the case actually presented to the district court. The majority notes briefly that this is a products liability case, but its entire opinion proceeds as if this were simply a case in which the victims of a Dallas traffic accident were suing the driver of the offending car. That is not this case. The Singletons' Volkswagen Golf was indeed hit on its left rear panel by Colin Little, spun around, and slid rear-first into a flat-bed trailer parked by the side of the road. Emergency personnel found an unconscious Richard Singleton in his fully reclined passenger seat with Mariana Singleton (who was seated directly behind him) trapped underneath. Mariana later died from the head trauma she received from the seat, and Richard was left paraplegic. The Singletons sued Volkswagen, alleging that the seat adjustment mechanism of Richard's seat was defectively designed, resulting in a collapse of the seat during the accident. Thus, the case before the district court is first and foremost a products liability, design defect case that will depend heavily on expert testimony from both the plaintiffs and Volkswagen. No claim is made by Volkswagen that any of its experts is Dallas-based, and whether this case is tried in Marshall or Dallas will make little, if any, difference—Volkswagen will be able to get its experts (from Germany or elsewhere) to trial regardless. The Dallas connections with the original accident become relevant if there is a finding of a design defect and the court turns to the third party action by Volkswagen against Colin Little, raising issues of causation and damages. Pretrial

discovery and the trial itself will have to address those issues, but they are not the only, or even the primary, focus of this case. Finally, Little, the other party to the accident, has explicitly stated that the Eastern District is not an inconvenient forum for him.

The majority has correctly identified the three requirements for the issuance of a writ: (1) the party seeking issuance of the writ must have no other adequate means to attain the relief he desires; (2) the petitioner must satisfy the burden of showing that his right to issuance of the writ is clear and indisputable; and (3) the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. Where we differ is in the application of *Cheney's* three requirements. In particular, as I explain below, the majority fundamentally misconstrues *Cheney's* second requirement, which strictly limits mandamus to a "clear abuse of discretion or usurpation of judicial power." This case involved no such "clear abuse of discretion" or "usurpation of judicial power," and even the majority does not contend that the district court exceeded its power or authority under § 1404(a). Whether we agree with the district court's decision not to transfer this case is not controlling. There is no question that, when the district court acts within its power and authority, mandamus is inappropriate to challenge the district court's decision.

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The district court first allegedly erred because it assigned too much weight to the plaintiffs' choice of venue by applying the

*forum non conveniens* dismissal standard. The majority reaches this conclusion by completely mischaracterizing the district court's order. Essentially, the majority rests its conclusion on the fact that the district court's order denying transfer states that the movant "must show that the balance of convenience and justice substantially weighs in favor of transfer." For the majority, the district court's use of the word "substantially" indicates that it was requiring Volkswagen to make the showing necessary to obtain a *forum non conveniens* dismissal. But that is simply not the case. The explanation for the lower court's use of "substantially" becomes apparent when it is considered in the complete context of the transfer denial and the denial of reconsideration—that is, after a "careful review," which the majority does not make. In denying the transfer motion, the district court described the movant's burden in a variety of ways: that the balance of convenience and justice must "substantially" weigh in favor of transfer; that "[t]he plaintiff's choice of forum will not be disturbed unless it is clearly outweighed by other factors"; and that the plaintiffs' "choice should not be lightly disturbed." In denying Volkswagen's motion for reconsideration, the district court explained that "decisive weight" was not given to the plaintiffs' choice; it was simply one factor among many. Thus, the district court drew upon several formulations common to the venue transfer context to describe the unremarkable notion that the party seeking transfer bears some heightened burden in demonstrating that a transfer is warranted. It

did not apply the *forum non conveniens* dismissal standard.

Additionally under the plaintiff's choice analysis, the majority distorts the relationship between § 1391 and 1404. Congress has afforded plaintiffs a broad venue privilege in 1391. And although aspersions are often cast on plaintiffs' "forum shopping," frequently by defendants also "forum shopping," we have explicitly stated that a plaintiff's motive for choosing a forum is ordinarily of no moment: a court may be selected because its docket moves rapidly, its discovery procedures are liberal, its jurors are generous, the rules of law applied are more favorable, or the judge who presides in that forum is thought more likely to rule in the litigant's favor. 1404(a) does temper plaintiffs' broad statutory right in venue selection, but how Congress went about doing so is telling. Congress did not restrict the range of permissible venues available to plaintiffs—that is, it did not give defendants the right to be sued only in certain forums, such as the most convenient. Rather, § 1404(a) vests a district court with the authority to transfer a case in its discretion. Section 1404(a), therefore, is not the mandatory tool to "prevent plaintiffs from abusing their privilege under §1391" that the majority describes; it is a discretionary tool to be applied by a district court "[f]or the convenience of parties and witnesses, in the interest of justice." The majority's review of the plaintiffs' choice, then, is both misleading as to the facts and wrong on the law.

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I now turn to the majority's take on the four remaining §1404(a) factors. The majority would have us believe that since this case involves only a Dallas traffic accident, Dallas is the only convenient location for the Singletons' suit. But, while the convenience inquiry may begin with listing this case's Dallas connections, it does not end there. First for the Dallas documents: the district court's reasoning, where it "note[d] that this factor has become less significant" and concluded that "[a]ny documents or evidence can be easily transported to Marshall," hardly "reads the sources of proof requirement out of the" transfer analysis. Instead, the district court considered the reality that the Northern and Eastern Districts have required ECF (electronic case filing) for a long time and that all the courtrooms are electronic. This means that the documents will be converted to electronic form, and whether they are displayed on monitors in Dallas or Marshall makes no difference to their availability. Secondly, the court's subpoena power runs throughout the state, and an experienced district court can properly discount the likelihood of an avalanche of motions to quash. The majority's novel notion of "absolute subpoena power" results in only the most marginal of convenience gains, if any. Thirdly, the Dallas witnesses will not likely be inconvenienced because (as Volkswagen recognizes) discovery will be, in all likelihood, conducted in Dallas. Additionally, witnesses necessary to establish damages for Mariana's wrongful death—her teachers, neighbors, and friends—all reside in the Eastern District (where the Singletons resided at the time of the

accident). And the majority's "100-mile rule" is no proxy for considering the realistic costs and inconvenience for witnesses that will attend the trial, particularly in a state as expansive as Texas. As for the two non-party fact witnesses who submitted identical affidavits asserting inconvenience, if the case goes to trial and if they end up testifying (two very big "ifs," the district court was no doubt aware), the court could reasonably conclude that traveling 150 miles, or two hours on a four-lane interstate (I-20), each way is only minimally inconvenient. And finally, with regard to the local interests factor, the majority's assertion that Eastern District residents "are not in any relevant way connected to the events that gave rise to this suit" overstates the case and glosses over the fact that this is a products liability suit. A Dallas traffic accident may have triggered the events that revealed a possibly defective product, but that does not change the nature of this suit. Drivers in the Eastern District could be connected to the actual issues in this case as they may be interested to learn of a possibly defective product that they may be driving or that is on their roads. Thus, the majority's "careful review" under the § 1404(a) transfer factors is both erroneous as to its method and misleading as to the facts.

Having identified five "errors" in the district court's § 1404(a) analysis, the majority moves on to declare the sum of these errors as a "clear abuse" justifying the writ (as distinguished from "mere abuse" which wouldn't) by labeling the errors "extraordinary errors" and concluding that those "errors resulted in a patently erroneous result." "Thus, Volkswagen's right to the

issuance of the writ is clear and indisputable, and the second requirement, under *Cheney* . . . is therefore satisfied.”

The majority moves on to *Cheney*’s remaining requirements. The first requirement, that the petitioner “have no other adequate means to attain relief,” is “certainly satisfied here.” This must be so because a petitioner “would not be able to show that it would have won the case had it been tried in a convenient [venue].” We are told, then, that direct appeal is effectively unavailable to address a possible error in a § 1404(a) transfer decision. That is flat wrong. Direct appeal is available to review a transfer decision. That such an appeal may have limited success due to the harmless error rule, does not mean—here or anywhere else that I know of—that direct appeal is “unavailable.” But it is telling that a refusal to transfer from Marshall to Dallas is unlikely, in the majority’s view, to affect Volkswagen’s substantial rights: if Volkswagen’s substantial rights will not likely be affected, how can this case satisfy the admittedly different, but even more stringent, requirements for mandamus?

\* \* \*

In order to enable the majority to correct the district court’s “errors” in applying § 1404(a), the majority misapplies the “clear abuse of discretion” standard provided by the Supreme Court by divorcing the standard from the context that gave it meaning. The Court held that “clear abuse of discretion” does not involve a district court’s possibly erroneous exercise of its conceded authority; rather, clear abuse occurs when the district

court lacks the judicial power or authority to make the decision that it did.

\* \* \*

This is not such a case.

For the Court, no “clear abuse of discretion” occurred because there was no question that the district court had the power or authority to do what it purported to do—transfer a case from an improper venue to a proper venue—and the petitioner’s sole argument regarding a possibly erroneous interlocutory order did not involve a “clear abuse of discretion.” That is, for the purposes of mandamus, a “clear abuse of discretion” occurs when the district court has acted outside the scope of its power or authority. It is therefore a mistake to equate the kind of ordinary error that might be labeled an “abuse of discretion” on appeal with the kind of error that justifies mandamus, as the majority does. Our inquiry on mandamus should center on reviewing errors that implicate a district court’s power to act as it did. There is no claim here that the district court did not have the judicial power to deny the transfer motion. The claim is that it erred in the judgment that it made when it exercised the power that it concededly has. That is not the basis for a writ.

The Court has also been explicit in prohibiting the use of mandamus to correct the alleged errors of a district court in a decision committed to its discretion. “Where a matter is committed to discretion, it cannot be said that a litigant’s right to a particular result is clear and indisputable.” Where, as the majority does here, an appellate court reviews the district court’s analysis of the

venue transfer factors and reweighs each factor as it feels appropriate, it is doing nothing less than controlling the district court's decision, and thus enlarging mandamus in the precise fashion that the Court warned against.

In sum, as this court has held for decades, on application for mandamus to direct a § 1404(a) transfer, when the district court has properly construed the statute and considered all necessary facts and factors, we should “not attempt to recite the facts nor to weigh and balance the factors which the District Court was required to consider in reaching its decision.”

*Cheney* describes mandamus as a “drastic and extraordinary” remedy “reserved for really extraordinary causes.” To say the least, this is anything but a “really extraordinary cause.” Volkswagen seeks no more than to transfer this case 150 miles from the Eastern District of Texas to the Northern District of Texas. The bottom line is that how one assesses the § 1404(a) transfer factors in this case is essentially a matter of judgment. The district court's judgment, informed by years of trial experience in cases like this, differs from that of the majority, and in my view the district court's take on this case is more faithful to the actual case before it than is the majority's take. But even if I, sitting as a district judge, would have granted the motion to transfer, that kind of difference in judgment, particularly in a matter committed to the district court's discretion, does not justify an extraordinary writ.

## **In re TS Tech USA Corporation**

United States Court of Appeals, Federal  
Circuit (2008)

Rader, Circuit Judge.

TS Tech USA Corporation, TS Tech North America, Inc. and TS Tech Canada, Inc. (TS Tech) petition for a writ of mandamus to direct the United States District Court for the Eastern District of Texas to vacate its September 10, 2008 order denying TS Tech's motion to transfer venue, and to direct the Texas district court to transfer the case to the United States District Court for the Southern District of Ohio. Lear Corporation opposes. TS Tech moves for leave to file a reply, with reply attached. Lear opposes. The court holds that the district court clearly abused its discretion in denying TS Tech's motion to transfer venue pursuant to 28 U.S.C. § 1404(a). Accordingly, we grant TS Tech's petition for a writ of mandamus.

### I.

On September 14, 2007, Lear filed suit in the District Court for the Eastern District of Texas against TS Tech for infringement of Lear's patent relating to pivotally attached vehicle headrest assemblies. Lear's complaint alleged that TS Tech had been making and selling infringing pivotal headrest assemblies to Honda Motor Co. Lear further asserted that TS Tech knowingly and intentionally induced Honda to infringe the patent by selling the headrest assemblies in their vehicles throughout the

United States, including in the Eastern District of Texas.

On December 27, 2007, TS Tech filed a motion pursuant to 1404(a) to transfer venue of the case to the Southern District of Ohio. TS Tech argued that the Southern District of Ohio was a far more convenient venue to try the case because the physical and documentary evidence was mainly located in Ohio and the key witnesses all lived in Ohio, Michigan, and Canada. TS Tech further argued that because none of the parties were incorporated in Texas or had offices located in the Eastern District of Texas, there was no meaningful connection between the venue and this case. Lear opposed transfer, contending that the Eastern District of Texas was the proper venue considering that several Honda vehicles containing the allegedly infringing headrest assembly had been sold in Texas.

On September 10, 2008, the Texas district court sided with Lear and denied transfer. The district court found that TS Tech had failed to demonstrate that the inconvenience to the parties and witnesses clearly outweighed the deference entitled to Lear's choice of bringing suit in the Eastern District of Texas. The court further found that because several vehicles with TS Tech's allegedly infringing headrest assembly had been sold in the venue, the citizens of the Eastern District of Texas had a "substantial interest" in having the case tried locally.

TS Tech then filed this petition for a writ of mandamus. TS Tech contends that the district court ignored precedent and clearly abused its discretion by refusing to transfer the case despite no connection between the

case and the Eastern District of Texas except Lear's decision to file this suit in that venue.

## II.

### A.

The writ of mandamus is available in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power. A party seeking a writ bears the burden of proving that it has no other means of obtaining the relief desired and that the right to issuance of the writ is "clear and indisputable." Because this petition does not involve substantive issues of patent law, this court applies the laws of the regional circuit in which the district court sits, in this case the Fifth Circuit.

### B.

#### Transfer of Venue Pursuant to 28 U.S.C. § 1404(a).

Change of venue in patent cases, like other civil cases, is governed by 28 U.S.C. § 1404(a). Pursuant to § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to another district court or division where it might have been brought." Under Fifth Circuit law, a motion to transfer venue should be granted upon a showing that the transferee venue is "clearly more convenient" than the venue chosen by the plaintiff.

The Fifth Circuit applies the "public" and "private" factors for determining forum *non conveniens* when deciding a § 1404(a) venue transfer question. The "private" interest factors include: (1) the relative ease of

access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make a trial easy, expeditious and inexpensive. The “public” interest factors to be considered are: “(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflicts of laws [or in] the application of foreign law.”

If this case were before the court as an ordinary appeal, we would review the district court’s denial of transfer under the “abuse of discretion” standard, taking into consideration whether the court relied on clearly erroneous factual findings, made erroneous conclusions of law, or misapplied the law to the facts. However, because TS Tech is requesting extraordinary relief in the form of a petition for a writ of mandamus, it must meet an even higher burden of demonstrating that the denial was a “clear” abuse of discretion such that refusing transfer produced a “patently erroneous result.”

#### Application of the Factors

Turning to the facts of this case, we initially note that TS Tech’s extensive contacts in the Southern District of Ohio indisputably make it a venue in which the patent infringement suit could have been brought. We also note that several of the *forum non conveniens* factors that the district court afforded no weight in its § 1404(a) analysis were indeed

neutral on the facts presented. The court was correct in giving no weight to the availability of compulsory process factor and was also correct that the possibility of delay and prejudice in granting transfer was neutral here. In addition, the court was correct that administrative difficulties due to court congestion was a neutral factor in deciding whether to transfer under § 1404(a). The district court was further correct in concluding that it was in no better position than the Southern District of Ohio in deciding this patent case. As the district court noted, “[p]atent claims are governed by federal law,” and as such “both [courts are] capable of applying patent law to infringement claims.”

Despite correctly applying some of the factors, the district court’s § 1404(a) analysis contained several key errors. First, the district court gave too much weight to Lear’s choice of venue under Fifth Circuit law. While the plaintiff’s choice of venue is accorded deference, Fifth Circuit precedent clearly forbids treating the plaintiff’s choice of venue as a distinct factor in the § 1404(a) analysis. Rather, the plaintiff’s choice of venue corresponds to the burden that a moving party must meet in order to demonstrate that the transferee venue is a clearly more convenient venue. Here, the district court weighed the plaintiff’s choice as a “factor” against transfer and afforded Lear’s choice of venue considerable deference. In doing so, the court erred in giving inordinate weight to the plaintiff’s choice of venue.

Second, the district court ignored Fifth Circuit precedent in assessing the cost of

attendance for witnesses. It goes without saying that “[a]dditional distance [from home] means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment.” Because it generally becomes more inconvenient and costly for witnesses to attend trial the further they are away from home, the Fifth Circuit established in *Volkswagen I* a “100-mile” rule, which requires that “[w]hen the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled.”

The district court’s order here completely disregarded the 100-mile rule. All of the identified key witnesses in this case are in Ohio, Michigan, and Canada. Thus, the witnesses would need to travel approximately 900 more miles to attend trial in Texas than in Ohio. Despite this distance and added cost to the witnesses, the district court “was not persuaded to give great weight” to this inconvenience. The district court’s disregard of the 100-mile rule constitutes clear error. Furthermore, because the identified witnesses would need to travel a significantly further distance from home to attend trial in Texas than Ohio, the district court’s refusal to considerably weigh this factor in favor of transfer was erroneous.

Third, the district court erred by reading out of the § 1404(a) analysis the factor

regarding the relative ease of access to sources of proof. As acknowledged in the district court’s order, the vast majority of physical and documentary evidence relevant to this case will be found in Ohio, Michigan, and Canada, and none of the evidence is located in Texas. Concluding that this factor was neutral as to transfer, the district court explained that since many of the documents were stored electronically, “the increased ease of storage and transportation” makes this factor “much less significant.” However, as the Fifth Circuit explained in *Volkswagen II* the fact “that access to some sources of proof presents a lesser inconvenience now than it might have absent recent developments does not render this factor superfluous.” Because all of the physical evidence, including the headrests and the documentary evidence, are far more conveniently located near the Ohio venue, the district court erred in not weighing this factor in favor of transfer.

Finally, the district court disregarded Fifth Circuit precedent in analyzing the public interest in having localized interests decided at home. As in *Volkswagen I* and *Volkswagen II* there is no relevant connection between the actions giving rise to this case and the Eastern District of Texas except that certain vehicles containing TS Tech’s headrest assembly have been sold in the venue. None of the companies have an office in the Eastern District of Texas; no identified witnesses reside in the Eastern District of Texas; and no evidence is located within the venue. Instead, the vast majority of identified witnesses, evidence, and events leading to this case involve Ohio or its neighboring state of Michigan. Nevertheless,

the district court concluded, in direct contradiction of Fifth Circuit precedent, that this factor weighed against transfer.

The district court's reason for concluding that the public interest factor disfavored transfer—that the citizens of the Eastern District of Texas had a “substantial interest” in having the case tried locally because several of the vehicles were sold in that venue—was unequivocally rejected by the Fifth Circuit in *Volkswagen I* and *Volkswagen II*. Here, the vehicles containing TS Tech's allegedly infringing headrest assemblies were sold throughout the United States, and thus the citizens of the Eastern District of Texas have no more or less of a meaningful connection to this case than any other venue. The fact that this is a patent case as opposed to another type of civil case does not in any way make the district court's rationale more logical or make the factor weigh against transfer. Therefore, the district court erred by weighing this factor against transfer.

#### “Patently Erroneous Result”

There is no easy-to-draw line separating a “clear” abuse of discretion from a “mere” abuse of discretion in all cases. Nevertheless, we conclude that TS Tech has met its difficult burden of demonstrating a clear and indisputable right to a writ. As in *Volkswagen II* the district court clearly abused its discretion in denying transfer from a venue with no meaningful ties to the case. In granting mandamus, the en banc Fifth Circuit found that the court's denial of transfer was a clear abuse of discretion because it (1) applied too strict of a standard to demonstrate transfer, (2) misconstrued the

weight of the plaintiff's choice of venue, (3) treated choice of venue as a § 1404(a) factor, (4) misapplied the *forum non conveniens* factors, (5) disregarded Fifth Circuit precedent, including the 100-mile rule, and (6) glossed over the fact that not a single relevant factor favored the plaintiff's chosen venue. Because the district court's errors here are essentially identical, we hold that TS Tech has demonstrated a clear and indisputable right to a writ.

#### C.

Lear contends that TS Tech cannot demonstrate that it had no other means of obtaining its request for relief because TS Tech did not ask the district court to reconsider its motion denying transfer after the Fifth Circuit issued its en banc decision in *Volkswagen II*. We disagree. First, TS Tech had no reasonable expectation that seeking reconsideration of the order would have produced a different result. This is because the Fifth Circuit's recent en banc decision did not change any aspect of the law regarding the trial court's § 1404(a) analysis, but instead confirmed that mandamus is an appropriate means to review a district court's ruling on a venue transfer motion.

Second, the “no other means” requirement is not intended to ensure that TS Tech exhaust every possible avenue of relief at the district court before seeking mandamus relief. \*\*\* Reconsideration can be sought, of course, to bring to the attention of the trial court precedent that might have been overlooked. However, if reconsideration should always

be sought, we might be unable to entertain a mandamus petition even where there is a clear usurpation of judicial power. Rather, the purpose of the “no other means” requirement as explained by the Supreme Court is to “ensure that the writ will not be used as a substitute for the regular appeals process.”

Third, it is clear under Fifth Circuit law that a party seeking mandamus for a denial of transfer clearly meets the “no other means” requirement. Interlocutory review of a transfer order is unavailable. Moreover, as explained in *Volkswagen II* “a petitioner would not have an adequate remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because [the petitioner] would not be able to show that it would have won the case had it been tried in a convenient [venue].” Thus, we reject Lear’s argument.

### III.

Because TS Tech has met its difficult burden of establishing that the district court clearly abused its discretion in denying transfer of venue to the Southern District of Ohio, and because we determine that mandamus relief is appropriate in this case, we grant TS Tech’s petition for a writ of mandamus.

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**Piper Aircraft Company**

**v.**

**Reyno**

Supreme Court of the United States (1981)

Justice MARSHALL delivered the opinion of the Court.

These cases arise out of an air crash that took place in Scotland. Respondent, acting as representative of the estates of several Scottish citizens killed in the accident, brought wrongful-death actions against petitioners that were ultimately transferred to the United States District Court for the Middle District of Pennsylvania. Petitioners moved to dismiss on the ground of *forum non conveniens*. After noting that an alternative forum existed in Scotland, the District Court granted their motions. The United States Court of Appeals for the Third Circuit reversed. The Court of Appeals based its decision, at least in part, on the ground that dismissal is automatically barred where the law of the alternative forum is less favorable to the plaintiff than the law of the forum chosen by the plaintiff. Because we conclude that the possibility of an unfavorable change in law should not, by itself, bar dismissal, and because we conclude that the District Court did not otherwise abuse its discretion, we reverse.

I

A

In July 1976, a small commercial aircraft crashed in the Scottish highlands during the course of a charter flight from Blackpool to Perth. The pilot and five passengers were killed instantly. The decedents were all Scottish subjects and residents, as are their heirs and next of kin. There were no eyewitnesses to the accident. At the time of the crash the plane was subject to Scottish air traffic control.

The aircraft, a twin-engine Piper Aztec, was manufactured in Pennsylvania by petitioner Piper Aircraft Co. (Piper). The propellers were manufactured in Ohio by petitioner Hartzell Propeller, Inc. (Hartzell). At the time of the crash the aircraft was registered in Great Britain and was owned and maintained by Air Navigation and Trading Co., Ltd. (Air Navigation). It was operated by McDonald Aviation, Ltd. (McDonald), a Scottish air taxi service. Both Air Navigation and McDonald were organized in the United Kingdom. The wreckage of the plane is now in a hangar in Farnborough, England.

The British Department of Trade investigated the accident shortly after it occurred. A preliminary report found that the plane crashed after developing a spin, and suggested that mechanical failure in the plane or the propeller was responsible. At Hartzell's request, this report was reviewed by a three-member Review Board, which held a 9-day adversary hearing attended by all interested parties. The Review Board found no evidence of defective equipment and indicated that pilot error may have contributed to the accident. The pilot, who had obtained his commercial pilot's license only three months earlier, was flying over high ground at an altitude considerably lower than the minimum height required by his company's operations manual.

In July 1977, a California probate court appointed respondent Gaynell Reyno administratrix of the estates of the five passengers. Reyno is not related to and does not know any of the decedents or their survivors; she was a legal secretary to the

attorney who filed this lawsuit. Several days after her appointment, Reyno commenced separate wrongful-death actions against Piper and Hartzell in the Superior Court of California, claiming negligence and strict liability. Air Navigation, McDonald, and the estate of the pilot are not parties to this litigation. The survivors of the five passengers whose estates are represented by Reyno filed a separate action in the United Kingdom against Air Navigation, McDonald, and the pilot's estate. Reyno candidly admits that the action against Piper and Hartzell was filed in the United States because its laws regarding liability, capacity to sue, and damages are more favorable to her position than are those of Scotland. Scottish law does not recognize strict liability in tort. Moreover, it permits wrongful-death actions only when brought by a decedent's relatives. The relatives may sue only for "loss of support and society."

On petitioners' motion, the suit was removed to the United States District Court for the Central District of California. Piper then moved for transfer to the United States District Court for the Middle District of Pennsylvania, pursuant to 28 U.S.C. 1404(a). Hartzell moved to dismiss for lack of personal jurisdiction, or in the alternative, to transfer. In December 1977, the District Court quashed service on Hartzell and transferred the case to the Middle District of Pennsylvania. Respondent then properly served process on Hartzell.

## B

In May 1978, after the suit had been transferred, both Hartzell and Piper moved to dismiss the action on the ground of *forum*

*non conveniens*. The District Court granted these motions in October 1979. It relied on the balancing test set forth by this Court in *Gulf Oil Corp. v. Gilbert* and its companion case, *Koster v. Lumbermens Mut. Cas.* In those decisions, the Court stated that a plaintiff's choice of forum should rarely be disturbed. However, when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would "establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case. To guide trial court discretion, the Court provided a list of "private interest factors" affecting the convenience of the litigants, and a list of "public interest factors" affecting the convenience of the forum.

After describing our decisions in *Gilbert* and *Koster*, the District Court analyzed the facts of these cases. It began by observing that an alternative forum existed in Scotland; Piper and Hartzell had agreed to submit to the jurisdiction of the Scottish courts and to waive any statute of limitations defense that might be available. It then stated that plaintiff's choice of forum was entitled to little weight. The court recognized that a plaintiff's choice ordinarily deserves substantial deference. It noted, however, that Reyno "is a representative of foreign citizens and residents seeking a forum in the United States because of the more liberal rules concerning products liability law," and that "the courts have been less solicitous

when the plaintiff is not an American citizen or resident, and particularly when the foreign citizens seek to benefit from the more liberal tort rules provided for the protection of citizens and residents of the United States."

The District Court next examined several factors relating to the private interests of the litigants, and determined that these factors strongly pointed towards Scotland as the appropriate forum. Although evidence concerning the design, manufacture, and testing of the plane and propeller is located in the United States, the connections with Scotland are otherwise "overwhelming." The real parties in interest are citizens of Scotland, as were all the decedents. Witnesses who could testify regarding the maintenance of the aircraft, the training of the pilot, and the investigation of the accident—all essential to the defense—are in Great Britain. Moreover, all witnesses to damages are located in Scotland. Trial would be aided by familiarity with Scottish topography, and by easy access to the wreckage.

The District Court reasoned that because crucial witnesses and evidence were beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants, it would be "unfair to make Piper and Hartzell proceed to trial in this forum." The survivors had brought separate actions in Scotland against the pilot, McDonald, and Air Navigation. "[I]t would be fairer to all parties and less costly if the entire case was presented to one jury with available testimony from all relevant

witnesses.” Although the court recognized that if trial were held in the United States, Piper and Hartzell could file indemnity or contribution actions against the Scottish defendants, it believed that there was a significant risk of inconsistent verdicts.

The District Court concluded that the relevant public interests also pointed strongly towards dismissal. The court determined that Pennsylvania law would apply to Piper and Scottish law to Hartzell if the case were tried in the Middle District of Pennsylvania. As a result, “trial in this forum would be hopelessly complex and confusing for a jury.” *Id.* at 734. In addition, the court noted that it was unfamiliar with Scottish law and thus would have to rely upon experts from that country. The court also found that the trial would be enormously costly and time-consuming; that it would be unfair to burden citizens with jury duty when the Middle District of Pennsylvania has little connection with the controversy; and that Scotland has a substantial interest in the outcome of the litigation.

In opposing the motions to dismiss, respondent contended that dismissal would be unfair because Scottish law was less favorable. The District Court explicitly rejected this claim. It reasoned that the possibility that dismissal might lead to an unfavorable change in the law did not deserve significant weight; any deficiency in the foreign law was a “matter to be dealt with in the foreign forum.”

C.

On appeal, the United States Court of Appeals for the Third Circuit reversed and remanded for trial. The decision to reverse appears to be based on two alternative grounds. First, the Court held that the District Court abused its discretion in conducting the *Gilbert* analysis. Second, the Court held that dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff.

The Court of Appeals began its review of the District Court’s *Gilbert* analysis by noting that the plaintiff’s choice of forum deserved substantial weight, even though the real parties in interest are nonresidents. It then rejected the District Court’s balancing of the private interests. It found that Piper and Hartzell had failed adequately to support their claim that key witnesses would be unavailable if trial were held in the United States: they had never specified the witnesses they would call and the testimony these witnesses would provide. The Court of Appeals gave little weight to the fact that Piper and Hartzell would not be able to implead potential Scottish third-party defendants, reasoning that this difficulty would be “burdensome” but not “unfair.” Finally, the court stated that resolution of the suit would not be significantly aided by familiarity with Scottish topography, or by viewing the wreckage.

The Court of Appeals also rejected the District Court’s analysis of the public interest factors. It found that the District Court gave undue emphasis to the application of Scottish law: “the mere fact that the court is called upon to determine and apply foreign law does not present a

legal problem of the sort which would justify the dismissal of a case otherwise properly before the court.” In any event, it believed that Scottish law need not be applied. After conducting its own choice-of-law analysis, the Court of Appeals determined that American law would govern the actions against both Piper and Hartzell. The same choice-of-law analysis apparently led it to conclude that Pennsylvania and Ohio, rather than Scotland, are the jurisdictions with the greatest policy interests in the dispute, and that all other public interest factors favored trial in the United States.

The Court of Appeals concluded as part of its choice-of-law analysis that the United States had the greatest policy interest in the dispute. It apparently believed that this conclusion necessarily implied that the *forum non conveniens* public interest factors pointed toward trial in the United States.

In any event, it appears that the Court of Appeals would have reversed even if the District Court had properly balanced the public and private interests. The court stated:

“[I]t is apparent that the dismissal would work a change in the applicable law so that the plaintiff’s strict liability claim would be eliminated from the case. But . . . a dismissal for *forum non conveniens*, like a statutory transfer, ‘should not, despite its convenience, result in a change in the applicable law.’ Only when American law is not applicable, or when the foreign jurisdiction would, as a matter of its own choice of law, give the plaintiff the benefit

of the claim to which she is entitled here, would dismissal be justified.”

In other words, the court decided that dismissal is automatically barred if it would lead to a change in the applicable law unfavorable to the plaintiff.

We granted certiorari in these cases to consider the questions they raise concerning the proper application of the doctrine of *forum non conveniens*.

In this opinion, we begin by considering whether the Court of Appeals properly held that the possibility of an unfavorable change in law automatically bars dismissal. Since we conclude that the Court of Appeals erred, we then consider its review of the District Court’s *Gilbert* analysis to determine whether dismissal was otherwise appropriate. We believe that it is necessary to discuss the *Gilbert* analysis in order to properly dispose of the cases.

The questions on which certiorari was granted are sufficiently broad to justify our discussion of the District Court’s *Gilbert* analysis. However, even if the issues we discuss in Part III are not within the bounds of the questions with respect to which certiorari was granted, our consideration of these issues is not inappropriate. An order limiting the grant of certiorari does not operate as a jurisdictional bar. We may consider questions outside the scope of the limited order when resolution of those questions is necessary for the proper disposition of the case.

## II.

The Court of Appeals erred in holding that plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied in the alternative forum is less favorable to the plaintiffs than that of the present forum. The possibility of a change in substantive law should ordinarily not be given conclusive or even substantial weight in the *forum non conveniens* inquiry.

We expressly rejected the position adopted by the Court of Appeals in our decision in *Canada Malting Co. v. Paterson Steamships*, 285 U.S. 413 (1932). That case arose out of a collision between two vessels in American waters. The Canadian owners of cargo lost in the accident sued the Canadian owners of one of the vessels in Federal District Court. The cargo owners chose an American court in large part because the relevant American liability rules were more favorable than the Canadian rules. The District Court dismissed on grounds of *forum non conveniens*. The plaintiffs argued that dismissal was inappropriate because Canadian laws were less favorable to them. This Court nonetheless affirmed:

“We have no occasion to enquire by what law the rights of the parties are governed, as we are of the opinion that, under any view of that question, it lay within the discretion of the District Court to decline to assume jurisdiction over the controversy . . . . [T]he court will not take cognizance of the case if justice would be as well done by remitting the parties to their home forum.”

The Court further stated that “[t]here was no basis for the contention that the District Court abused its discretion.”

It is true that *Canada Malting* was decided before *Gilbert*, and that the doctrine of *forum non conveniens* was not fully crystallized until our decision in that case. However, *Gilbert* in no way affects the validity of *Canada Malting*. Indeed, by holding that the central focus of the *forum non conveniens* inquiry is convenience, *Gilbert* implicitly recognized that dismissal may not be barred solely because of the possibility of an unfavorable change in law. Under *Gilbert*, dismissal will ordinarily be appropriate where trial in the plaintiff’s chosen forum imposes a heavy burden on the defendant or the court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. If substantial weight were given to the possibility of an unfavorable change in law, however, dismissal might be barred even where trial in the chosen forum was plainly inconvenient.

The Court of Appeals’ decision is inconsistent with this Court’s earlier *forum non conveniens* decisions in another respect. Those decisions have repeatedly emphasized the need to retain flexibility. In *Gilbert*, the Court refused to identify specific circumstances “which will justify or require either grant or denial of remedy.” Similarly, in *Koster*, the Court rejected the contention that where a trial would involve inquiry into the internal affairs of a foreign corporation, dismissal was always appropriate. “That is one, but only one, factor which may show convenience.” And in *Williams v. Green Bay*

& *Western R. Co.*, we stated that we would not lay down a rigid rule to govern discretion, and that “[e]ach case turns on its facts.” If central emphasis were placed on any one factor, the *forum non conveniens* doctrine would lose much of the very flexibility that makes it so valuable.

In fact, if conclusive or substantial weight were given to the possibility of a change in law, the *forum non conveniens* doctrine would become virtually useless. Jurisdiction and venue requirements are often easily satisfied. As a result, many plaintiffs are able to choose from among several forums. Ordinarily, these plaintiffs will select that forum whose choice-of-law rules are most advantageous. Thus, if the possibility of an unfavorable change in substantive law is given substantial weight in the *forum non conveniens* inquiry, dismissal would rarely be proper.

Except for the court below, every Federal Court of Appeals that has considered this question after *Gilbert* has held that dismissal on grounds of *forum non conveniens* may be granted even though the law applicable in the alternative forum is less favorable to the plaintiff’s chance of recovery. Several courts have relied expressly on *Canada Malting* to hold that the possibility of an unfavorable change of law should not, by itself, bar dismissal.

The Court of Appeals’ approach is not only inconsistent with the purpose of the *forum non conveniens* doctrine, but also poses substantial practical problems. If the possibility of a change in law were given substantial weight, deciding motions to dismiss on the ground of *forum non*

*conveniens* would become quite difficult. Choice-of-law analysis would become extremely important, and the courts would frequently be required to interpret the law of foreign jurisdictions. First, the trial court would have to determine what law would apply if the case were tried in the chosen forum, and what law would apply if the case were tried in the alternative forum. It would then have to compare the rights, remedies, and procedures available under the law that would be applied in each forum. Dismissal would be appropriate only if the court concluded that the law applied by the alternative forum is as favorable to the plaintiff as that of the chosen forum. The doctrine of *forum non conveniens*, however, is designed in part to help courts avoid conducting complex exercises in comparative law. As we stated in *Gilbert*, the public interest factors point towards dismissal where the court would be required to “untangle problems in conflict of laws, and in law foreign to itself.”

Upholding the decision of the Court of Appeals would result in other practical problems. At least where the foreign plaintiff named an American manufacturer as defendant, a court could not dismiss the case on grounds of *forum non conveniens* where dismissal might lead to an unfavorable change in law. The American courts, which are already extremely attractive to foreign plaintiffs, would become even more attractive. The flow of litigation into the United States would increase and further congest already crowded courts.

The Court of Appeals based its decision, at least in part, on an analogy between dismissals on grounds of *forum non conveniens* and transfers between federal courts pursuant to § 1404(a). In *Van Dusen v. Barrack*, this Court ruled that a § 1404(a) transfer should not result in a change in the applicable law. Relying on dictum in an earlier Third Circuit opinion interpreting *Van Dusen*, the court below held that that principle is also applicable to a dismissal on *forum non conveniens* grounds. However, § 1404(a) transfers are different than dismissals on the ground of *forum non conveniens*.

Congress enacted § 1404(a) to permit change of venue between federal courts. Although the statute was drafted in accordance with the doctrine of *forum non conveniens*, it was intended to be a revision rather than a codification of the common law. District courts were given more discretion to transfer under § 1404(a) than they had to dismiss on grounds of *forum non conveniens*.

The reasoning employed in *Van Dusen v. Barrack* is simply inapplicable to dismissals on grounds of *forum non conveniens*. That case did not discuss the common-law doctrine. Rather, it focused on “the construction and application” of § 1404(a). Emphasizing the remedial purpose of the statute, *Barrack* concluded that Congress could not have intended a transfer to be accompanied by a change in law. The statute was designed as a “federal housekeeping measure,” allowing easy change of venue within a unified federal system. The Court feared that if a change in venue were

accompanied by a change in law, forum-shopping parties would take unfair advantage of the relaxed standards for transfer. The rule was necessary to ensure the just and efficient operation of the statute.

We do not hold that the possibility of an unfavorable change in law should *never* be a relevant consideration in a *forum non conveniens* inquiry. Of course, if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice. In these cases, however, the remedies that would be provided by the Scottish courts do not fall within this category. Although the relatives of the decedents may not be able to rely on a strict liability theory, and although their potential damages award may be smaller, there is no danger that they will be deprived of any remedy or treated unfairly.

### III.

The Court of Appeals also erred in rejecting the District Court’s *Gilbert* analysis. The Court of Appeals stated that more weight should have been given to the plaintiff’s choice of forum, and criticized the District Court’s analysis of the private and public interests. However, the District Court’s decision regarding the deference due plaintiff’s choice of forum was appropriate. Furthermore, we do not believe that the District Court abused its discretion in weighing the private and public interests.

#### A.

The District Court acknowledged that there is ordinarily a strong presumption in favor of the plaintiff's choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum. It held, however, that the presumption applies with less force when the plaintiff or real parties in interest are foreign.

The District Court's distinction between resident or citizen plaintiffs and foreign plaintiffs is fully justified. In *Koster*, the Court indicated that a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum. When the home forum has been chosen, it is reasonable to assume that this choice is convenient. When the plaintiff is foreign, however, this assumption is much less reasonable. Because the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.

As the District Court correctly noted in its opinion, the lower federal courts have routinely given less weight to a foreign plaintiff's choice of forum.

\* \* \*

A citizen's forum choice should not be given dispositive weight, however. Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily

burdensome for the defendant or the court, dismissal is proper.

Respondent argues that since plaintiffs will ordinarily file suit in the jurisdiction that offers the most favorable law, establishing a strong presumption in favor of both home and foreign plaintiffs will ensure that defendants will always be held to the highest possible standard of accountability for their purported wrongdoing. However, the deference accorded a plaintiff's choice of forum has never been intended to guarantee that the plaintiff will be able to select the law that will govern the case.

#### B.

The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. *Gilbert*, 330 U.S. at 844. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.

#### (1)

In analyzing the private interest factors, the District Court stated that the connections with Scotland are "overwhelming." This characterization may be somewhat

exaggerated. Particularly with respect to the question of relative ease of access to sources of proof, the private interests point in both directions. As respondent emphasizes, records concerning the design, manufacture, and testing of the propeller and plane are located in the United States. She would have greater access to sources of proof relevant to her strict liability and negligence theories if trial were held here. However, the District Court did not act unreasonably in concluding that fewer evidentiary problems would be posed if the trial were held in Scotland. A large proportion of the relevant evidence is located in Great Britain.

The Court of Appeals found that the problems of proof could not be given any weight because Piper and Hartzell failed to describe with specificity the evidence they would not be able to obtain if trial were held in the United States. It suggested that defendants seeking *forum non conveniens* dismissal must submit affidavits identifying the witnesses they would call and the testimony these witnesses would provide if the trial were held in the alternative forum. Such detail is not necessary. Piper and Hartzell have moved for dismissal precisely because many crucial witnesses are located beyond the reach of compulsory process, and thus are difficult to identify or interview. Requiring extensive investigation would defeat the purpose of their motion. Of course, defendants must provide enough information to enable the District Court to balance the parties' interests. Our examination of the record convinces us that sufficient information was provided here. Both Piper and Hartzell submitted affidavits describing the evidentiary problems they

would face if the trial were held in the United States.

The Court of Appeals apparently relied on an analogy to motions to transfer under 28 U.S. § 1404(a). As we have explained, however, dismissals on grounds of *forum non conveniens* and § 1404(a) transfers are not directly comparable

The District Court correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland. Joinder of the pilot's estate, Air Navigation, and McDonald is crucial to the presentation of petitioners' defense. If Piper and Hartzell can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. It is true, of course, that if Hartzell and Piper were found liable after a trial in the United States, they could institute an action for indemnity or contribution against these parties in Scotland. It would be far more convenient, however, to resolve all claims in one trial. The Court of Appeals rejected this argument. Forcing petitioners to rely on actions for indemnity or contributions would be "burdensome" but not "unfair." Finding that trial in the plaintiff's chosen forum would be burdensome, however, is sufficient to support dismissal on grounds of *forum non conveniens*.

(2)

The District Court's review of the factors relating to the public interest was also reasonable. On the basis of its choice-of-law

analysis, it concluded that if the case were tried in the Middle District of Pennsylvania, Pennsylvania law would apply to Piper and Scottish law to Hartzell. It stated that a trial involving two sets of laws would be confusing to the jury. It also noted its own lack of familiarity with Scottish law. Consideration of these problems was clearly appropriate under *Gilbert*; in that case we explicitly held that the need to apply foreign law pointed towards dismissal. The Court of Appeals found that the District Court's choice-of-law analysis was incorrect, and that American law would apply to both Hartzell and Piper. Thus, lack of familiarity with foreign law would not be a problem. Even if the Court of Appeals' conclusion is correct, however, all other public interest factors favored trial in Scotland.

Scotland has a very strong interest in this litigation. The accident occurred in its airspace. All of the decedents were Scottish. Apart from Piper and Hartzell, all potential plaintiffs and defendants are either Scottish or English. As we stated in *Gilbert*, there is "a local interest in having localized controversies decided at home." 330 U.S. at 509. Respondent argues that American citizens have an interest in ensuring that American manufacturers are deterred from producing defective products, and that additional deterrence might be obtained if Piper and Hartzell were tried in the United States, where they could be sued on the basis of both negligence and strict liability. However, the incremental deterrence that would be gained if this trial were held in an American court is likely to be insignificant. The American interest in this accident is simply not sufficient to justify the enormous

commitment of judicial time and resources that would inevitably be required if the case were to be tried here.

#### IV.

The Court of Appeals erred in holding that the possibility of an unfavorable change in law bars dismissal on the ground of *forum non conveniens*. It also erred in rejecting the District Court's *Gilbert* analysis. The District Court properly decided that the presumption in favor of the respondent's forum choice applied with less than maximum force because the real parties in interest are foreign. It did not act unreasonably in deciding that the private interests pointed towards trial in Scotland. Nor did it act unreasonably in deciding that the public interests favored trial in Scotland. Thus, the judgment of the Court of Appeals is

*Reversed.*

\* \* \*

Justice STEVENS, with whom Justice BRENNAN joins, dissenting.

In No. 80-848, only one question is presented for review to this Court:

"Whether, in an action in federal district court brought by foreign plaintiffs against American defendants, the plaintiffs may defeat a motion to dismiss on the ground of *forum non conveniens* merely by showing that the substantive law that would be applied if the case were litigated in the district court is more favorable to them than the law that would be applied by the courts of their own nation."

In No. 80-883, the Court limited its grant of certiorari to the same question:

“Must a motion to dismiss on grounds of *forum non conveniens* be denied whenever the law of the alternate forum is less favorable to recovery than that which would be applied by the district court?”

I agree that this question should be answered in the negative. Having decided that question, I would simply remand the case to the Court of Appeals for further consideration of the question whether the District Court correctly decided that Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania.

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**28 U.S.C. § 1404**

(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c) A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) As used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

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**28 U.S.C. § 139**

Venue generally

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in

(1) a judicial district where any defendant resides, if all defendants reside in the same State,

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

(b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in

(1) a judicial district where any defendant resides, if all defendants reside in the same State,

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

(c) For purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced. In a State which has more than one judicial district and in which a defendant that is a corporation is subject to personal jurisdiction at the time an action is commenced, such corporation shall be deemed to reside in any district in that State within which its contacts would be sufficient to subject it to personal jurisdiction if that district were a separate State, and, if there is no such district, the corporation shall be deemed to reside in the district within which it has the most significant contacts.

(d) An alien may be sued in any district.

(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which

(1) a defendant in the action resides,

(2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or

(3) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure and with such other venue requirements as would be applicable if the United States or one of its officers, employees, or agencies were not a party.

The summons and complaint in such an action shall be served as provided by the Federal Rules of Civil Procedure except that the delivery of the summons and complaint to the officer or agency as required by the rules may be made by certified mail beyond the territorial limits of the district in which the action is brought.

(f) A civil action against a foreign state as defined in section 1603(a) of this title may be brought—

(1) in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated;

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is

brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

(g) A civil action in which jurisdiction of the district court is based upon section 1369 of this title may be brought in any district in which any defendant resides or in which a substantial part of the accident giving rise to the action took place.

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**Restatement (Third) of Torts: Liability  
for Physical and Emotional Harm  
(2009)**

§ 17. Res Ipsa Loquitur

The factfinder may infer that the defendant has been negligent when the accident causing the plaintiff's harm is a type of accident that ordinarily happens as a result of the negligence of a class of actors of which the defendant is the relevant member.

\* \* \*

*Comment b. Alternative Formulations*

There are two other methods for articulating the test for *res ipsa loquitur*. A number of courts adopt a two-step inquiry: step one asks whether the accident is of a type that usually happens because of negligence, while step two asks whether the "instrumentality" inflicting the harm was under the "exclusive control" of the

defendant. This formulation, with its emphasis on exclusive control, is unsatisfactory for at least two reasons. One is that the test is sometimes indeterminate, since there may be several instruments that could be deemed the cause of the plaintiff's injury. Another objection is more basic. In one well-known early *res ipsa loquitur* case, a barrel fell out of the window of the defendant's business premises, injuring a pedestrian below. In such a case, exclusive control is an effective proxy for the underlying question of which party was probably negligent; the party with the exclusive control of the barrel at the time of the incident is, in all likelihood, the one whose negligence caused the barrel to fall. In fact, the exclusive-control criterion is often effective in identifying the negligent party, and in these cases exclusive control plays a vital role in *res ipsa loquitur* evaluations. Yet frequently exclusive control functions poorly as such a proxy. Consider, for example, the consumer who buys a new car; a day after the purchase, the car's brakes fail, and the car strikes a pedestrian who is in a crosswalk. Undeniably, the motorist has exclusive control of the car at the time of the accident. Yet there is no reason to believe that the consumer is the negligent party, and adequate reason to believe that the negligence belongs to the car manufacturer (or, more precisely, that the latter has manufactured a defective product). Accordingly, the injured pedestrian should not have a *res ipsa loquitur* claim against the consumer, despite the latter's exclusive control; furthermore, the pedestrian might have a res-ipsa-like

claim against the manufacturer, despite the latter's lack of exclusive control.

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***Forum Fodder: Dealer Accidentally Remote Starts Customer's Mustang Right Into a Pond?***

Jonathan Ramsey (March 25, 2010)

Ready to play armchair Johnny Cochran? Here's a story about a horse that got led to water and then dove in. A Mustang Forum member, luckydawg003 (LD), took his manual-tranny 2007 Mustang GT in for warranty repair to Brandon Ford in Tampa, Florida. When he went to pick it up, the service manager departed to retrieve his car, then came back ten minutes later to say he had some bad news. According to LD, someone left the car in gear without the parking brake on, and when the service manager pressed the remote start button twice to start the car; it leaped to life and drove out of the dealer's lot, through a chain link fence and into a pond, getting completely submerged.

Other twists to the tale: LD had an aftermarket remote starter that bypassed the clutch and would start the car even if it weren't in neutral. A forum poster going by the handle Tylus linked to the posts wherein LD asks for advice on how to achieve the particular bypass he was after. Some folks think it's the dealership's fault, saying the 'Stang was in their possession and the service manager didn't need to use an aftermarket remote starter to retrieve the car. Some feel it's LD's fault, having left a jerry-rigged system in someone else's car. And

some say there's enough blame for everyone. Question is, what is LD left to do about his scuba-diving Mustang?

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**GROUNDINGS OF LIABILITY**

Alan White (1985)

[T]he law, like everyday thought, usually confines the notion of involuntary to that subclass of cases which involve purely physical, physiological, or psychological movements of our limbs, like reflexes and convulsions, movements in sleep, during sleepwalking, or under hypnosis, or due to some disease of the brain, lunacy, or automatism.

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**Barker  
v. Clark**

Arkansas Supreme Court (2000)

DONALD L. CORBIN, Justice.

The record reflects that on the evening of July 21, 1996, a two-by-four piece of plexiglass flew off of Appellee's truck's camper shell and struck Appellant's vehicle, breaking the windshield and damaging the body of the vehicle. Both parties pulled to the side of the road, where Appellant told Appellee what had happened. Appellee denied owning any plexiglass, and stated that he did not know how the plexiglass came to rest on top of his truck's camper shell. Appellee explained that he lived right off the highway, next to a gas station and lumber yard, and that it was possible that the plexiglass had fallen off of a passing truck and had then been tossed on top of his truck.

Police responded to the scene of the accident, and Appellee presented Officer Screeton with a Texas driver's license. No traffic citations were issued. Appellee ultimately left the scene of the accident with the piece of plexiglass.

\* \* \*

## II. Res Ipsa Loquitur

For his second point on appeal, Appellant contends that the trial court erred in refusing to submit a jury instruction on the theory of *res ipsa loquitur*.

In order for the doctrine of *res ipsa loquitur* to be applicable, there are four essential elements that must be established: (1) the defendant owes a duty to the plaintiff to use due care; (2) the accident is caused by the thing or instrumentality under the control of the defendant; (3) the accident that caused the injury is one that, in the ordinary course of things, would not occur if those having control and management of the instrumentality used proper care; and (4) there is absence of evidence to the contrary.

In describing the doctrine of *res ipsa loquitur*, this court has stated:

The doctrine of *res ipsa loquitur* was developed to assist in the proof of negligence where the cause of an unusual happening connected with some instrumentality in the exclusive possession and control of the defendant could not be readily established by the plaintiff. The theory was that since the instrumentality was in the possession of the defendant, justice required that the defendant be compelled to

offer an explanation of the event or be burdened with a presumption of negligence.

This presumption is limited to situations where the defendant's negligence has been substantially proven. In fact, there, this court said: "To make certain that the injury has not been caused by somebody else, through some intervening negligence, it is ordinarily required that the instrumentality causing injury have been in defendant's exclusive possession and control up to the time of the plaintiff's injury."

The proffered instruction in the instant action argued that both the truck's camper shell and the sheet of plexiglass were under Appellee's exclusive control. There is no doubt that the truck's camper shell was under the exclusive control of Appellee at the time of the accident. There was no proof, however, that the plexiglass, which was the instrumentality in this case, was under the exclusive control of Appellee. In denying the proposed instruction, the trial court stated that the doctrine was not applicable, as the element of exclusive control was missing here. The trial court explained that there were other reasonable theories that could take the plexiglass out of Appellee's control.

This court has held that it will not apply the doctrine of *res ipsa loquitur* when all other responsible causes, such as the conduct of the plaintiff or third persons, are not sufficiently eliminated. In other words, this court has consistently held that the element of exclusive control is essential to proving a case under a theory of *res ipsa loquitur*.

Finally, we are unpersuaded by Appellant's contention that the element of exclusive control is not essential to this doctrine. Appellant's reliance on this court's decision in *Stalter v. Coca-Cola Bottling Co. of Ark.* to support his contention is misleading. He cites *Stalter* for the proposition that the control requirement is not always equivalent to exclusive control. At issue in that case, however, was the negligence of multiple defendants. In that opinion, this court noted that when there are multiple defendants, no one defendant will maintain exclusive control, but that fact does not preclude a theory of *res ipsa loquitur*. Based on a review of this court's prior treatment of the doctrine of *res ipsa loquitur*, it appears that the trial court correctly denied Appellant's proffered instruction.

\* \* \*

RAY THORNTON, Justice, dissenting.

In my view, the majority opinion is erroneous, and I respectfully dissent from the majority's view. This case turns on the question of whether the trial court erred in refusing to submit to the jury a requested instruction on the doctrine of *res ipsa loquitur* allowing the jury to infer negligence on the part of Charles Clark, the owner and operator of a pickup truck and camper shell. The accident in question occurred when a sheet of plexiglass, approximately three-feet wide by four-feet long, sailed from the top of Clark's camper and hit the windshield of appellant Barker's following vehicle, causing substantial damage. Both vehicles pulled over, and, after a police investigation, Clark put the plexiglass back in his truck and drove away.

Accepting Clark's contention that he did not know that the plexiglass was on top of his camper, a defense that raises a fact question appropriate for consideration by the jury, the trial court ruled that the doctrine of *res ipsa loquitur* was not applicable and that the instruction allowing the jury to decide whether an inference of negligence might be drawn from the circumstances of the accident was not required.

The doctrine of *res ipsa loquitur* is well established in Arkansas and other jurisdictions. It represents an application of the ordinary rules pertaining to circumstantial evidence in negligence cases stemming from accidents having particular characteristics. When the doctrine is invoked, an inference of negligence may be drawn solely from the happening of the accident upon the theory that certain occurrences contain within themselves a sufficient basis for an inference of negligence. The rule simply recognizes what we know from our everyday experience: that some accidents, by their very nature, would ordinarily not happen without negligence. *Res ipsa loquitur* does not create a presumption in favor of the plaintiff, but merely permits the inference of negligence to be drawn from the circumstances of the occurrence. The rule has the effect of creating a prima facie case of negligence sufficient for submission to the jury, and the jury may—but is not required to—draw the permissible inference.

\* \* \*

The trial court declined to give the requested instruction because it resolved the question of fact as to how the plexiglass got on top of

the camper in favor of Clark's speculative conjecture that an unknown person might have placed it there. Based upon this self-serving declaration by Clark, the trial court did not pose the question to the jury, ruling that, as a matter of law, the plaintiff had failed to show "exclusive control" of the plexiglass by Clark. In my view the trial court committed reversible error in not presenting the question to the jury.

Exclusive control is a concept with a much broader scope than that urged by appellant or the majority, and does no more than eliminate, within reason, all explanations for the injurious event other than the defendant's negligence. Courts do not generally apply this requirement as it is literally stated, or as a fixed, mechanical, or rigid rule. Indeed, the Restatement (Second) of Torts, § 328D, on *res ipsa loquitur*, requires only that other reasonably probable causes be sufficiently eliminated by the evidence. Comment (g) to § 328D adds that: "[e]xclusive control is merely one fact which establishes the responsibility of the defendant; and if can be established otherwise, exclusive control is not essential to a *res ipsa loquitur* case." We note further that neither the Restatement nor the other authorities or jurisdictions limit the broad treatment of "exclusive control" to those cases involving multiple defendants, as the majority here seeks to do.

Other authorities agree that, when used in the *res ipsa loquitur* context, the term "control" does not require actual physical dominion over an object. To establish exclusive control, the plaintiff need not eliminate with certainty all other possible

inferences and causes, but must show only that the likelihood of other causes is so reduced "that the greater probability lies at the defendant's door." Requiring a plaintiff to foreclose entirely the possibility of all causes attributable to anyone other than the defendant would "emasculate the doctrine

The general rule that the exclusive control and management of the appliance or thing causing the injury must be shown to have been in the defendant is not applicable in all circumstances and is subject to exceptions where the purpose of the doctrine of *res ipsa loquitur* would otherwise be defeated. It has been held that the matter of control is only one of the numerous factors to be considered in determining whether or not the doctrine is applicable to a particular accident, and that control by the defendant is no longer an absolute requirement, provided that the other factors usually required are present, chiefly absence of knowledge on the part of injured party concerning the cause of the incident and superior ability of the defendant to explain the occurrence. It has also been held that where a defendant does not have exclusive control of an instrumentality which causes injury, but the plaintiff reasonably eliminates other causes than the defendant's negligence, exclusive control is not necessarily a prerequisite to application of the doctrine. A defendant's knowledge of the incident's cause often would exceed, if not indeed supersede, that of the plaintiff.

In sum, where the proof is conflicting or subject to different inferences, some of which are in favor of and others against the applicability of *res ipsa loquitur*, the question must be left to the jury. The trial

court's error came in placing reliance upon the defendant's proffered alternatives and determining, as a matter of law, that exclusive control did not exist. The nature and degree of control must be such that the reasonable possibilities point to the defendant and support an inference that he was the negligent party. As the majority notes, this court reviews such decisions de novo, and our review of the facts of the case suggests that the alternative explanations offered by the defendant, that some unknown person came along in the two hours that his truck was unattended outside his home and placed this sheet of plexiglass on the top of his truck, is not sufficiently reasonable to take the evidentiary theory of *res ipsa loquitur* from the jury's consideration.

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### ***The Rhetoric of the Judicial Opinion***

Sanford Levinson (1996)

No sensible judge can believe that the world is composed only of persons who await their orders and will thereafter move with alacrity to comply with them. The judge must therefore always be sensitive to the task of eliciting cooperation from those who would otherwise prefer to go their own way. Only an awareness of intended audience—and an appreciation for the de facto limited power of courts—enables us to understand what is surely one of the most famous judicial opinions of the twentieth century, Chief Justice Warren's opinion for a unanimous Court in *Brown v. Board of Education*. There are many things one might say about

that opinion, which was much criticized at the time and thereafter. I confess that I find it remarkably unilluminating about the history of American racial relations. There is fleeting reference to discrimination against African Americans, but none whatsoever to who were the discriminators and how a sociopolitical regime had been constructed on the premise of what has been termed a *herrenvolk* democracy. If one role of the Supreme Court is truly to educate its audience about the background circumstances of a case and the relation of those circumstances to the outcome, the *Brown* must be pronounced a failure. It is difficult to teach *Brown* to a generation of students who no longer have a specific understanding of the political context that enables them to read between the lines of an otherwise bland opinion.

But the central point is that Chief Justice Warren made a deliberate decision to write the way he did. Why did he reject the opportunity to try to educate the public about the ravages of racial segregation or to arouse a truly righteous anger against the oppression that had characterized, at that time, well over three centuries of American history? The answer is provided by Warren himself, who wrote his colleagues, on May 7, 1954, that “the opinions [in *Brown* and in the companion case of *Bolling v. Sharpe*] should be short, readable by the lay public, non-rhetorical, unemotional and, above all, non-accusatory.” According to Barrett Prettyman, who was clerking for Robert Jackson during that fateful term and who had been asked by Jackson what he thought of the opinion, Warren succeeded admirably. Although Prettyman indicated

that he wished the opinion “had more law in it,” he praised its “genius” in being “so simple and unobtrusive. [Warren] had come from political life and had a keen sense of what you could say in this opinion without getting everybody’s back up. His opinion took the sting off the decision, it wasn’t accusatory, and it didn’t pretend that the Fourteenth Amendment was more helpful than the history suggested.”

It is, I think, not at all irrelevant that Warren was a remarkably successful politician, three times governor of California and a vice presidential candidate in the race that Thomas Dewey was supposed to win in 1948. He knew the importance of not getting everybody’s back up when embarking on important political campaigns, even if the cost was a certain candor or cogency of argument. He was concerned, altogether properly, not to antagonize needlessly the editorial writers of the great Southern newspapers, who would have to translate the decision for their readers, and the politicians, who would presumably have to take the lead in advising compliance with the decision (whatever that would turn out to mean).

Warren was properly concerned as well with a very different audience—his fellow Justices, from whom he sought a unanimous vote. The marginal cost of even one dissent was, no doubt., perceived as extremely high. Imagine the headlines throughout the South had the Kentuckian Justice Reed, a former solicitor general of the United States, adopted the tone of the contemporary Antonin Scalia or, less anachronistically but equally dangerously, the tone of Reed’s

predecessors, like Holmes and Stone, who relentlessly pointed out that courts ought not deem themselves uniquely equipped to govern the United States. That would have been unequivocal disaster.

Reed was none too happy with the decision, according to his law clerk, although “[f]or the good of country, he put aside his own basis for dissent.” But this was not a freewill offering by Reed. According to the clerk, he extracted from Warren a pledge that implementation of the decision would be slow enough to allow the gradual dismantling of segregation rather than a too-rapid wrenching of traditional Southern mores. And, no doubt, he would not have tolerated an “accusatory” opinion.

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**Interview with Professor Jeffery Rosen**  
Robert Siegel (NPR September 2, 2005)

SIEGEL: So can a senator on the Judiciary Committee put a question to Judge Roberts next week, saying, ‘In the matter of *Roe vs. Wade*, do you believe in *stare decisis*?’

Prof. ROSEN: They can, and I imagine they will. And you’ve phrased it more economically than perhaps they will. The problem is and the truth is that Judge Roberts probably hasn’t had an occasion to develop a well-worked-out theory of *stare decisis*. As a lower court judge, he didn’t need one. He was obliged to follow Supreme Court precedents whether he agreed with them or not. But the central question, getting an honest answer to that question of what he

thinks about stare decisis, may be one that's very difficult to actually discern.

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**Quotation**

Carl Mays (1919)

Control without stuff is far better than stuff without control. Whenever you hear it said that such and such a pitcher didn't have a thing, you can bet he had control if he didn't have anything else.

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***Carl Mays Recalls Tragic Pitch***

Jack Murphy (1971)

It was Aug. 17, 1920 when Ray Chapman crumpled after being struck by one of [pitcher Carl] Mays' submarine fast balls. He died that night in a hospital and there was speculation the tragedy would shatter Mays. Ban Johnson, the league president, predicted Mays would never throw another pitch.

He did, though. He pitched in turn and did his job so effectively he won 26 games for the New York Yankees that year. The following season, 1921, his record was 27-9.

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**Quotation**

Mario Andretti

If everything seems under control, you're just not going fast enough.

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***People Got A Lotta Nerve***

Neko Case

As the saying says "an elephant never forgets"

Standing in the concrete cave  
Swaying sad and insane

They walked over the ocean in their dreams  
they dream awake

Until the light grew dim

Until the cop cars came

Everybody tells me this is crazy yes, I know  
it

I'm a man-man-man, man-man-man-eater  
And still you're surprised when I eat you

---

***Desolation Row***

Bob Dylan

Now Ophelia, she's 'neath the window

For her I feel so afraid

On her twenty-second birthday

She already is an old maid

To her, death is quite romantic

She wears an iron vest

Her profession's her religion

Her sin is her lifelessness

And though her eyes are fixed upon

Noah's great rainbow

She spends her time peeking

Into Desolation Row

Einstein, disguised as Robin Hood

With his memories in a trunk

Passed this way an hour ago

With his friend, a jealous monk

He looked so immaculately frightful

As he bummed a cigarette  
Then he went off sniffing drainpipes  
And reciting the alphabet  
Now you would not think to look at him  
But he was famous long ago  
For playing the electric violin  
On Desolation Row

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***Hit 'Em Up Style (Oops!)***

Blu Cantrell

All of the dreams you sold  
left me out in the cold  
What happened to the days when we used to  
trust each other  
And all of the things I sold  
Will take you until you get old  
To get 'em back without me  
Cause revenge is better than money you'll  
see

Hey Ladies,  
when your man wanna get buck wild  
just go back and hit 'em up style  
put your hands on his cash and  
spend it to the last dime for all the hard  
times

oh  
when your cold and everything goes  
from the crib, to the ride and the clothes  
so you better let him know that  
if you mess up  
you gotta hit 'em up

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**THE WIRE**

**Omar:** I'm not much for cards, but I think these .45's beat a full house.

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**THE SOPRANOS**

**Tony:** A wrong decision is better than indecision.

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**SEINFELD**

**Noelle:** I . . . am breaking up . . . with you!

**George:** You can't break up with me. I've got hand.

**Noelle:** And you're going to need it.