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Section 6: Civil Rights

Institute of Bill of Rights Law, William & Mary Law School

CIVIL RIGHTS

In This Section:

Looking Ahead: Affirmative Action; *Grutter v. Bollinger*

01-1118 Scheidler v. NOW
01-1119 Operation Rescue v. NOW

Ruling Below: (NOW, Inc. v. Scheidler and Operation Rescue, 7th Cir., 267 F.3d 687, 2001 U.S. App. Lexis 21295)

The court held that private individuals may seek injunctive relief against another party in violation of RICO. The court also found that the violent conduct of the protestors was not protected by the First Amendment. Finally, the court found the injunction granted against the protestors was not vague and overbroad, but struck the proper balance and avoided the risk of curtailing protected activities.

Questions Presented: (1) May injunctive relief be given in a private civil action for treble damages brought under the Racketeer Influenced and Corrupt Organizations Act (RICO)? (2) Does the Hobbs Act, which makes it crime to obstruct, delay, or affect interstate commerce "by robbery or extortion," and which defines "extortion" as "the obtaining of property from another, with [the owner's] consent," when such consent is "induced by the wrongful use of actual or threatened force, violence, or fear," 18 U.S.C. @ 1951(b)(2), apply to intangible property and may the Hobbes act be violated without the defendant either seeking or receiving money or anything else?

NATIONAL ORGANIZATION FOR WOMEN, Inc.; Delaware Women's Health Organization, Inc., and Summit Women's Health Organization, Inc., Plaintiffs-Appellees,

v.

Joseph M. SCHEIDLER, Pro-Life Action League, Inc., Andrew D. Scholberg, Timothy Murphy, and OPERATION RESCUE, Defendants-Appellants.

United States Court of Appeals
For the Seventh Circuit

Decided October 2, 2001

WOOD, Circuit Judge:

This case is in its fifteenth year of contentious litigation. The defendants are anti-abortion activists who employ a protest tactic they call "rescues," in which they and other activists physically block access to abortion clinics so that the patients and staff cannot get in or out of the buildings. Plaintiffs use words less benign than "rescue" to describe the defendants' activities. We will refer to them as "protest missions," in the hopes that this will be understood as a neutral term. The defendants' goal is frankly to prevent abortions from taking place. Participants in the protest missions engage in a substantial amount of protected speech, including efforts to persuade clinic patients not to have abortions and to persuade clinic doctors and staff to quit performing abortions. Unfortunately, the protest missions also involve illegal conduct: protesters do everything from sitting or lying in clinic doorways and waiting to be arrested to engaging in more

egregious conduct such as entering the clinics and destroying medical equipment and chaining their bodies to operating tables to prevent the tables from being used. In a few instances, protesters apparently have physically assaulted clinic staff and patients. In addition to staging these protests, the defendants have issued letters and statements to other clinics threatening to stage missions at those clinics unless they voluntarily shut down.

The plaintiffs, the National Organization for Women (NOW) and two clinics that were the targets of protest missions, brought this class action alleging, among other things, that the defendants' conduct amounted to a pattern of extortion which violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (RICO)... After a trip through this court to the Supreme Court of the United States during which many of the legal issues in the case were clarified or resolved, the case was remanded to the district court for trial of the plaintiffs' RICO claims. A jury found for the plaintiffs and awarded damages to the two named clinics, and the district court issued a permanent nationwide injunction prohibiting the defendants from conducting blockades, trespassing, damaging property, or committing acts of violence at the class clinics. The defendants have appealed a wide range of issues relating to the conduct of the trial and the issuance of the injunction. We find that the district court navigated its way through this complex and difficult case with care and sensitivity and affirm its judgment in all respects.

I

* * *

The defendants [are] organizers of the Pro-Life Action Network (PLAN), which is a loose national organization of groups that engage in protest missions and other aggressive anti-abortion tactics. Beginning in the mid-1980's, PLAN held annual conventions, organized in part by the defendants here, which included seminars on protest strategies. Those conventions concluded with protest missions being staged in the convention city. PLAN also sent a newsletter to its members and coordinated a hotline that potential protesters could call to get information about upcoming missions. The plaintiffs alleged, and at trial the jury found, that PLAN was an "organization or enterprise" for purposes of RICO liability.

* * *

During the course of the seven-week trial, the plaintiffs introduced evidence of hundreds of acts committed by the defendants or others acting in concert with PLAN which, the plaintiffs contended, constituted predicate acts under RICO. The alleged predicate acts included violations of federal extortion law (the Hobbs Act, 18 U.S.C. § 1951), state extortion law, the federal Travel Act, 18 U.S.C. § 1952, and conspiracy to violate these laws...

* * *

Based on this and other evidence in the voluminous record that was created at the trial, the jury found in response to special interrogatories that the defendants or others associated with PLAN committed 21 violations of the Hobbs Act, 25 violations of state extortion law, 25 acts of conspiracy to violate federal or state extortion law, four acts or threats of physical violence, 23 violations of the Travel Act, and 23 attempts to commit one of these crimes. The jury awarded damages to both clinics; once the damages

were trebled, as RICO requires, the awards totaled over $ 163,000 to Summit Women's Health Organization, and over $ 94,000 to Delaware Women's Health Organization.

* * *

II

Initially, we must consider the defendants' contention that RICO does not permit private plaintiffs to seek injunctive relief. The only court of appeals to have addressed this issue directly, the Ninth Circuit, concluded in 1986 that private plaintiffs cannot seek injunctions under RICO, relying largely on the court's reading of the statute's legislative history. See *Religious Tech. Ctr. v Wollersheim*, 796 F.2d 1076 (9th Cir. 1986). The other courts of appeals that have addressed the point in *dicta* are split.

* * *

Our study of Supreme Court decisions since the 1986 *Wollersheim* opinion convinces us that the approach of the Ninth Circuit (which relied almost exclusively on the legislative history of RICO to reach its result, as opposed to the actual language of the statute) no longer conforms to the Court's present jurisprudence...

* * *

Both parties have offered interpretations of this text that support their positions. The plaintiffs read the statute in a straightforward manner. Section 1964(a), they contend, grants the district courts jurisdiction to hear RICO claims and also sets out general remedies, including injunctive relief, that all plaintiffs authorized to bring suit may seek. Section 1964(b) makes it clear that the statute is to be publicly enforced by the Attorney General and it specifies additional remedies, all in the nature of interim relief, that the government may seek. Section 1964(c) similarly adds to the scope of § 1964(a), but this time for private plaintiffs. Those private plaintiffs who have been injured in their business or property by reason of a RICO violation are given a right to sue for treble damages. As the plaintiffs note, this reading of the statute gives the words their natural meaning and gives effect to every provision in the statute.

The defendants argue for a less intuitive interpretation. Relying on *Wollersheim*, they argue that § 1964(a) is purely a jurisdictional provision authorizing the district court to hear RICO claims and to grant injunctions to parties authorized by other provisions of the law to seek that form of relief. Section 1964(b), in the defendants' view, allows the Attorney General to institute RICO proceedings and authorizes the government to seek not only the relief described in that subsection, but also the relief described in § 1964(a). Section 1964(c) then provides a limited right of action for private parties. They read the two clauses of § 1964(c), however, as tightly linked provisions, under which private plaintiffs may sue *only* for monetary damages. The mention of this type of relief in the second clause must mean, the defendants argue, that by implication no other remedies, particularly injunctive remedies, are available. We cannot agree that this is a reasonable reading of the statute.

* * *

[W]e cannot agree with the defendants' contention that § 1964(a) is a purely "jurisdictional" statute... § 1964(a) is strikingly similar to the statute the

Supreme Court construed in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998). The statute at issue in Steel Co. provided that "the district court shall have jurisdiction in actions brought under subsection (a) of this section against an owner or operator of a facility to enforce the requirement concerned and to impose any civil penalty provided for violation of that requirement." *Id.*, quoting 42 U.S.C. § 11046(c). Noting that "'jurisdiction' . . . is a word of many, too many, meanings," the Court held that it would be "unreasonable to read [the statute] as making all the elements of the cause of action under subsection (a) jurisdictional, rather than as merely specifying the remedial *powers* of the court, viz., to enforce the violated requirement and to impose civil penalties." *Id.* This part of the *Steel Co.* holding supersedes any rationale to the contrary that the courts of appeals may have followed in earlier years. We find that it is applicable to RICO and that § 1964(a) both confers jurisdiction on the district courts and specifies certain remedial powers that the courts will have in cases brought before them.

* * *

Perhaps realizing that the plain text of the statute strongly suggests that private plaintiffs can seek injunctions, the *Wollersheim* court relied heavily in its decision on two pieces of legislative history. First, the court noted that, during the floor debate on the bill in the House, Representative Steiger, the House sponsor of the bill, introduced an amendment that would have, among other things, made private plaintiffs' right to seek injunctive relief explicit. The amendment was withdrawn after another representative described it on the House floor as creating "an additional civil remedy." See *Wollersheim*, 796 F.2d at 1085-86. Second, the court noted that one year after the bill's passage, Congress failed to pass a bill introduced in the Senate with the same language as the Steiger amendment. See id. at 1086...

Again, with respect, we cannot agree with the Ninth Circuit that these snippets of legislative history amount to the kind of "'clearly expressed legislative intent to the contrary'" that we would require to cast doubt on unambiguous statutory language. *NOW I*, 510 U.S. at 261. Even these excerpts do not unequivocally indicate that Congress intended private plaintiffs to be limited to damages remedies. As the *Wollersheim* decision itself notes, there are indications in the legislative history to the contrary. 796 F.2d at 1085. More importantly, however, although the *Wollersheim* court may well have made a reasonable decision in 1986 to rely on Congress's refusal to enact amendments to the statute, recent Supreme Court precedent teaches that this type of legislative history is a particularly thin reed on which to rest the interpretation of a statute.

* * *

III

With this much established, we may turn to the defendants' First Amendment arguments. All parties acknowledge that the defendants engaged in a substantial amount of protected speech during the protest missions and other anti-abortion activities, including picketing on public sidewalks in front of clinics and verbally urging patients not to have abortions. We entirely agree with the defendants that liability cannot constitutionally be imposed on them for this portion of their conduct. But the record is replete with evidence of instances in which their conduct crossed the line from protected

speech into illegal acts, including acts of violence, and it is equally clear that the First Amendment does not protect such acts...

The defendants' First Amendment arguments fall into two categories. First, they argue broadly that imposing liability on them on the basis of their protest activities violates the First Amendment. Second, they argue that, even assuming they could constitutionally be held liable for their alleged conduct, the jury instructions and verdict form in this case did not contain necessary First Amendment safeguards...

* * *

A.

Protection of politically controversial speech is at the core of the First Amendment, and no one disputes that the defendants' speech labeling abortion as murder, urging the clinics to get out of the abortion business, and urging clinic patients not to seek abortions is fully protected by the First Amendment...

In this case, the plaintiffs presented ample evidence that the individual defendants and others associated with PLAN engaged in illegal conduct that directly threatened an important governmental interest. The evidence presented at trial showed that, at PLAN-sponsored events, protesters trespassed on clinic property and blocked access to clinics with their bodies, including at times chaining themselves in the doorways of clinics or to operating tables. At other times, protesters destroyed clinic property, including putting glue in clinic door locks and destroying medical equipment used to perform abortions. On still other occasions, protesters physically assaulted clinic staff and patients. In addition, defendant Scheidler, on behalf of defendants PLAL and PLAN, sent letters to class clinics threatening that they would be subjected to similar attacks if they did not cease performing abortions. In light of the protesters' conduct at other PLAN events, the district court correctly concluded that these letters were not protected political speech but constituted true threats outside the protection of the First Amendment.

* * *

At this point, the defendants shift their argument to a more personal one: maybe someone associated with PLAN was engaged in unprotected conduct, but the evidence did not establish that the defendants themselves were involved. [Our reading of Supreme Court decisions suggests that] in order to impose liability on an individual based on that individual's association with an organization, a plaintiff must show both that the organization itself, rather than just isolated members, possessed unlawful goals and that the individual defendant held a specific intent to further those illegal aims. *Id.* at 920.

* * *

Even though this is an exacting test, once again the record shows that the plaintiffs satisfied it in this case... The plaintiffs put into evidence numerous letters, newsletters, and other publications authored by defendant Joseph Scheidler, executive director of PLAL, and by Randall Terry, executive director of Operation Rescue, detailing the activities planned for upcoming PLAN events. The activities detailed in these letters included blocking access to clinics and entering clinics to block passageways...

* * *

B.

Turning to the defendants' narrower First Amendment argument, the defendants contend that, regardless of whether there was sufficient evidence from which the jury could have found that they engaged in unprotected activities, the jury instructions and verdict form used by the trial court allowed the jury to find the defendants liable based solely on the defendants' protected speech. The verdict form that the district court used asked [if PLAN is associated for a common purpose, if they are associated with the defendants and if any defendant or member of PLAN committed any of the illegal acts.]

* * *

Our review of jury instructions is deferential, and we consider only whether the instructions, taken as a whole, adequately informed the jury of the applicable law. *Molnar v Booth,* 229 F.3d 593, 602 (7th Cir. 2000). We are confident that these instructions did so. This jury could not have found the defendants liable without finding that the defendants themselves specifically intended to further PLAN's illegal aims. Jury Instruction 30 made this requirement explicit, and absent any indication to the contrary, we presume that jurors follow the instructions they are given. *Miksis v Howard,* 106 F.3d 754, 763 (7th Cir. 1997)...

IV

The last serious contention we must address is the defendants' argument that the injunction in this case is vague and overbroad...

* * *

We are satisfied that the injunction drafted by the district court here has struck the proper balance and has avoided any risk of curtailing protected activities. By its terms, the injunction prohibits only illegal conduct -- trespassing, obstructing access to clinics, damaging property, using violence or threats of violence, or aiding, abetting, inducing, directing, or inciting any of these acts. We do not find any ambiguity in the terms the district court used to describe the prohibited conduct, and as discussed above, none of this conduct is protected by the First Amendment.

* * *

Nor do we find that the injunction impermissibly holds the defendants responsible for the actions of persons beyond their control... [T]o the extent the injunction reaches the conduct of individuals not named in this lawsuit, the order enjoins those individuals from violating its mandates. If individuals acting in concert with the defendants or PLAN violate the injunction, without inducement or direction by the defendants, the violators, not the defendants, would be in contempt of the court's order. Nothing in the order purports to hold the defendants liable for actions they do not direct, incite, or control.

* * *

V

[The court noted that the defendants "have raised a hodgepodge of other challenges," including whether certain allegations are precluded by res judicata, whether the court properly allowed amendments to a complaint and whether NOW and the named clinics are adequate class representatives. After briefly

addressing each issue, the court concluded that these arguments lacked merit.]

The defendants have also argued that the conduct in which they engaged is not prohibited by RICO for a number of reasons. First, the plaintiffs alleged as predicate acts numerous violations of the federal extortion statute, the Hobbs Act, 18 U.S.C. § 1951, and the defendants argue that the Hobbs Act does not apply to their conduct. The defendants' primary contention on this point is that the Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear," and that the things the plaintiffs claim were taken here -- the class women's rights to seek medical services from the clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to provide medical services and otherwise conduct their businesses -- cannot be considered "property" for purposes of the Hobbs Act. However, this circuit has repeatedly held that intangible property such as the right to conduct a business can be considered "property" under the Hobbs Act, see, *e.g.*, *United States v Anderson*, 716 F.2d 446, 450 (7th Cir. 1983), and we will not revisit that holding here...

We have considered all of the defendants' remaining contentions, but find none that requires comment. For the foregoing reasons, the judgment of the district court is Affirmed in all respects.

Abortion Clinic Protest Rules Face Review; Supreme Court: Justices Will Decide Whether a Law Targeting Mobsters Can Apply to Actions Meant to Halt Providers.

Los Angeles Times

April 23, 2002

David G. Savage

The Supreme Court, taking up an appeal from militant antiabortion activists, said Monday it will decide whether medical clinics can use the federal racketeering law against protesters who conspire to shut down businesses that perform abortions.

The case, to be heard in the fall, does not concern the right to demonstrate peacefully. The justices turned away Operation Rescue's claim that its clinic invasions were protected as free speech under the 1st Amendment.

However, the court agreed to hear the claim that abortion opponents did not use the kind of force and threats that would constitute racketeering activity. At issue again is the reach of the Racketeer Influenced and Corrupt Organizations Act of 1970, better known as RICO.

Congress passed this broadly worded measure as a weapon against organized crime. Mobsters who preyed on legitimate businesses could be prosecuted in federal court or sued by private lawyers. Violators could be ordered to stay away from these businesses and forced to pay for losses they caused.

But the law was used widely during the 1980s, and the Supreme Court has said it extends well beyond mob cases.

In their latest appeal, however, lawyers for Operation Rescue argue that RICO does not apply to its activists because they were not seeking to "obtain property" through the use of force and threats, citing a clause from the federal "extortion" law.

RICO is unusual in that it incorporates many other laws. For example, an arsonist could be charged with violating arson law, and a "pattern" of violations could trigger a RICO case as well.

Lawyers for the National Organization for Women brought a civil RICO suit against Operation Rescue and alleged that the group had engaged in a national campaign of violence and intimidation targeting health clinics that performed abortions.

Their lawsuit cited dozens of incidents: In Chico, Calif., clinic staff members were shoved against a glass door and injured. In Pensacola, Fla., several staff members were pushed down stairs, their offices were trashed and their medical equipment damaged. In Los Angeles, a patient who had undergone surgery was hit over the head with a sign and left bleeding on the sidewalk.

The suit said the antiabortion leaders who were behind these incidents violated the anti-extortion statute known as the Hobbs Act. This measure makes it a federal offense to "obstruct commerce" or "obtain property" through the "wrongful use of actual or threatened force, violence or fear." Repeated violations of the Hobbs Act make for a "pattern of racketeering activity" that comes under RICO.

But in the appeal, lawyers for Operation Rescue argued its members did not violate the Hobbs Act because they did not obtain property.

The decision to hear the appeal was unexpected, since the justices rejected a similar claim arising from the same case eight years ago.

At one point, a U.S. appeals court in Chicago threw out NOW's suit on the grounds that Operation Rescue was acting for moral reasons, not an "economic motive." Unlike mobsters, they were not seeking money from the businesses they targeted, the court said.

But the Supreme Court in 1994 unanimously reversed that ruling and cleared the way for the suit to proceed. Chief Justice William H. Rehnquist said at the time that RICO covers a "pattern of racketeering activity" such as robbery, murder and assaults, but it does not require that money be the motivation.

The case went to trial in Chicago, and NOW prevailed. A jury found dozens of examples in which the protesters used force, human blockades and violence against clinics. The plaintiffs were awarded $258,000 in damages, and the trial judge issued a nationwide order that forbids the protesters from trespassing at clinics, damaging property or interfering with their operation for 10 years. Violators can be charged with a crime.

"The injunction has been enormously effective in stopping clinic violence," said Fay Clayton, the Chicago lawyer who represents NOW.

The U.S. Court of Appeals in Chicago also upheld the injunction and the damages verdict last year. But lawyers for antiabortion activist Joseph Scheidler and Operation Rescue appealed to the high court.

The court granted both appeals Monday. Scheidler vs. NOW, 01-1118, and Operation Rescue vs. NOW, 01-1119. The move suggests the justices, or at least some of them, are interested in reconsidering the broad use of RICO.

Jay Sekulow, who represents Operation Rescue, said he was heartened. "A federal statute designed for drug dealers and organized crime has been misapplied to silence the pro-life message."

And Liberty for Some; Switching Sides on Free Speech

The New York Times

April 26, 1998

Neil A. Lewis

WHEN a Chicago jury ruled last week that a group of abortion opponents had violated a Federal anti-racketeering statute, officials of the National Organization for Women cheered: A law intended to hobble the mafia had been used successfully to punish aggressive protesters.

But officials at another group that, like NOW, supports the abortion rights movement were dismayed. The American Civil Liberties Union had argued that using the Racketeer Influenced and Corrupt Organizations Act, known as RICO, against abortion protestors set a dangerous precedent. "We have always been afraid of using the racketeering law this way," said Nadine Strossen, the A.C.L.U.'s president and a professor at New York Law School. "This now could theoretically be used against any kind of protest movement."

And the penalties are harsh. The winner may collect triple the amount of actual damages from the loser.

Guessing Wrong

"The problem with RICO is that it's often hard to draw the line between acceptable protest and the kind of conspiracy which the law punishes," Ms. Strossen said. "The threat of having to pay such huge civil damages if you guess wrong as to the outer boundaries of free speech is far too harsh."

To many this is no mere intramural conflict. It is an element in a larger battle about free speech and the shape of American civil liberties doctrine at the end of the 20th century, a conflict in which liberals and conservatives, in many important ways, seem to have changed places.

Liberals, having used freedom of expression to achieve many of their goals over the last few decades, like legal equality for minorities, may no longer see the need for free speech as much as they once did. Universities, for example, where liberals have achieved supremacy, have been hotbeds of efforts to limit free expression with codes that prohibit racist comments or speech that could be construed as offensive to some group.

At the same time, it is the corporations and the wealthy who are arguing for unrestricted use of their assets to publicly press their agendas. Steve Forbes, for one, objects to any restrictions on spending his family publishing fortune to further his Presidential ambitions. Tobacco companies insist that Congress may not restrict their freedom to advertise without running afoul of the First Amendment.

"I think what is happening now is part of the wheel of history turning," said Burt Neuborne, a law professor at New York University and a former legal director of the A.C.L.U. "The fact that we've been fairly successful in the last 10 or 20 years in insuring the effective protection of

speech has led some people to think they can can tinker with the First Amendment without risking its overall structure," he said.

Moreover, the last period of intense censorship and suppression occurred more than 40 years ago when the nation was frightened by the threat of domestic Communism. "People believe that having freedom of expression is a natural phenomenon," Mr. Neuborne said. "It's not. It's the result of intense care and vigilance."

But Mr. Neuborne himself embodies both sides of the debate. He is wary of tinkering with freedom of expression yet he wrote a brief in the abortion clinic case in Chicago arguing that the use of the racketeering statute was acceptable.

"I believed the use of RICO was okay because it involved an effort to curb violence against the clinics," he said. "But I understand why the A.C.L.U. and others are nervous about it."

The difficulty, of course, is allowing the Government to decide which issues are so important, so urgent, that a measured curtailment of civil liberties may be acceptable. That's what occurred during World War II when Japanese-Americans were interned, and what happened during the Communist scare of the 1950's, both actions now widely believed to have been excessive.

Professor Cass Sunstein of the University of Chicago Law School is a leader in advocating the notion that it is possible to carve out exceptions to traditional ideas about free speech without harming the basic principles of civil liberties.

"Just invoking the First Amendment often has the effect of ending debate about policy questions which are real and are difficult," he said. In many instances, he argued, there should be a balancing between freedom of expression and greater benefits for the community.

That conflict is at the center of the movement to prohibit cigarette advertising as part of a nationwide settlement in which the tobacco industry would be given immunity from lawsuits brought by smokers.

A similar conflict underlies a new debate over whether the Supreme Court should reverse itself and allow more restrictions on campaign spending. Again it is largely liberals who argue against the Court's 1976 opinion in Buckley v. Valeo, which relied on a free-speech argument to throw out some spending restrictions. They say the decision allowed corporations to use their wealth to dominate the political process.

Mr. Neuborne, the former A.C.L.U. official, said he is a pragmatist on the issue. He believes that additional restrictions on large political donations are troubling. But, he said, "campaign finance is in such a crisis, it's worth the risk."

Attacking Incivility

The other great influence in the debate over civil liberties at the end of the century, many feel, is a growing public intolerance for the incivility of modern life.

Professor William Van Alstyne of the Duke University Law School said in an interview that there is a troubling willingness to suppress civil liberties deemed destructive to community values.

"This is occurring not just in the free speech area, but in the growth of

variations on Megan's law," the notion that a neighborhood should be informed if a sex offender moves in.

Delaware recently enacted a law requiring sex offenders to be so identified on their driver's licenses. "All of this means that society believes it's acceptable to treat such people as so beyond the pale, they have no right to live undisturbed," he lamented.

And the United States Court of Appeals in San Francisco is expected to rule soon on a case involving an extension of Federal child pornography laws. Courts have previously upheld laws prohibiting the possession of child pornography on the basis that it provided a market that exploits children.

But the amendment goes further by prohibiting the possession of computer-generated sexual images of children, that is, not even real children.

To Professor Van Alstyne this is unthinkable suppression. To Professor Sunstein, it's just fine.

Behavior Modification; Illegal Conduct No Longer Tolerates

Chicago Tribune

May 1, 1998

Gina Raith and Jennifer Koehler

Since a federal jury last week returned a verdict in favor of the plaintiffs in the case of National Organization for Women vs. Scheidler, some have voiced legitimate confusion about its potential impact on free speech and the 1st Amendment. Others have cried the sky is falling, intentionally blurring the line between protected civil disobedience and illegal acts of violence--implying that overzealous protesters will now be characterized as racketeers and non-profit organizations with noble intentions will be vulnerable to hefty monetary penalties.

Free speech advocates and civil disobedients need not be alarmed. The jury rightly saw the difference between illegal conduct, such as arson and bombing--or the threat of those acts--and protected free speech. Any concerns involving the 1st Amendment are well taken by NOW and the health care clinic plaintiffs. The point is not lost on us that women, or for that matter, any other marginalized segment of our society, would be powerless without the 1st Amendment. NOW feels the defendants were shameless in their attempt to pervert the 1st Amendment. Our right of free speech, certainly one of our most treasured rights, does not exist in a vacuum. Instead, our freedom of speech co-exists with other fundamental rights, including our property rights and our right to reproductive health care. Reason and the Constitution tell us that every right and privilege we possess has its limits.

When an anti-abortion extremists, like Joseph Scheidler, of the Pro-Life Action League, uses words to make clinic workers fear for their safety and women fear keeping their doctor appointments, he exceeds the boundaries of free speech. While sidewalk counseling, leafleting and protests are protected free speech--threats, intimidation and the advocacy of arson and bombing are not.

None of the peaceful protest strategies just mentioned were at issue with NOW vs. Scheidler and, accordingly, none have been jeopardized by the jury's decision. The reason the lawsuit was brought is that the defendants refused to confine themselves to these lawful acts which do not trample on the rights of women to freely make reproductive health care choices.

And a national injunction is not only necessary, it is long overdue. Violence at clinics has been ongoing since the passage of the Freedom of Access to Clinic Entrances Act in 1994. One out of four clinics still experiences violence, and the level of the violent acts has escalated from physical blockades, harassment and intimidation to acid attacks and murders. Last year, an off-duty police officer was killed in a bombing incident at an Alabama clinic.

The campaign against reproductive freedom, as pronounced by Joseph Scheidler, was one of fear and pain and now he, and the co-defendants, Operation

Rescue, the Pro-Life Action League and others must pay the price for an illegal, nationwide conspiracy and campaign of violence.

Lastly, some have criticized the use of the federal Racketeer Influenced and Corrupt Organizations Act as egregious though the U.S. Supreme Court ruled unanimously that the law could be applied against the defendants in this case. RICO allows private plaintiffs to seek monetary damages from groups engaged in a pattern of criminal activity, which is defined as only two or more felony crimes.

Courts and juries are given the responsibility to make certain that the alleged activities rise to the level of crimes required by RICO, namely serious felonies as opposed to orderly protest activities. The jury found, after a seven week trial, that the defendant had committed more than three dozen acts of physical extortion, based on threats or actual force, to deprive clinic doctors and patients of their right to engage in lawful business and to seek medical services.

Lead attorney Faye Clayton had the duty to zealously represent NOW to the best of her ability and she did so brilliantly by using all the tools available and best suited for achieving our goal. While ultimately a matter of legal strategy, judging by the plaintiff's complete victory in this case, the attorneys involved clearly made the right choice in using RICO.

With this verdict, NOW wins a permanent injunction against the defendants' blockades, extortion, force and violence. RICO allows clinics to petition for triple damages and women are guaranteed to their constitutional right to control an abortion. Justice prevailed, and it will continue to do so on a case by case basis in a society that is quite capable of discerning the difference between civil disobedience and intolerable illegal conduct.

Gina Raith and Jennifer Koehler, both lawyers, are board members of the Chicago chapter of the National Organization for Women

Antiabortion Racketeers?

The Washington Post

June 6, 1998

Nat Hentoff

Robyn Blumner -- a former ACLU official and now a syndicated columnist at the St. Petersburg Times -- is the most consistent civil libertarian I know and ardently pro-choice. When a federal jury in Chicago recently convicted antiabortion organizers of violating federal racketeering laws (RICO), Blumner wrote:

"I've been on the front lines of the abortion war. I know how ugly it gets when escorts have to crowd around a patient so she doesn't have to endure the pictures of mangled fetuses thrust in her face. . . . I have even had an elderly scarecrow of a man with 'God is Pro-Life' tattooed across his knuckles, wrapped around my legs reciting Scripture and trying to crawl past me. He didn't get past. He got arrested."

Blumner, however, is not celebrating the victory of the National Organization for Women, which brought the RICO suit in Chicago against the pro-lifers. "I am not willing," Blumner says, "to sacrifice the First Amendment to silence these abortion opponents." RICO -- Racketeer Influenced and Corrupt Organizations Act -- became law in 1970 and was aimed at mobsters who use violence, intimidation and other forms of extortion to take over businesses and otherwise increase Mafia profits.

The law was drafted by G. Robert Blakey, now a Notre Dame law professor. He says the bill was never intended to apply to social or political movements, particularly after he tried to narrow its language following a strong concern by Sen. Ted Kennedy (D-Mass.). Kennedy feared that President Nixon might use RICO against anti-Vietnam war demonstrators -- and activists in other social causes.

But now that a federal grand jury has extended RICO to pro-lifers, Sen. Kennedy -- being vigorously pro-choice -- is silent about the verdict in Chicago.

Through the years, RICO, it should be noted, increasingly took on expanded and vague meanings as the courts tried to interpret the statute, which was becoming more and more slippery. At one point, Supreme Court Justice Antonin Scalia complained about the "meager guidance" the court itself had been able to derive from the law.

Robyn Blumner notes that RICO is "too potently punitive; and with its loosely drawn definition of a criminal enterprise, too easily fits political advocacy organizations whose leaders and followers engage in occasional law violations in furtherance of a cause."

In the Chicago lawsuit, NOW claimed that the pro-lifers' illegal actions -- such as blockading an abortion clinic -- were forms of extortion through threats of violence, and some actual violence.

But as Prof. Blakey emphasizes in the National Law Journal, with the NOW victory opening the way for future RICO suits against diverse demonstrators, it will "unconstitutionally chill social protest --

of all types, not just antiabortion demonstrations. The verdict establishes no bright line for distinguishing 'picketing' from 'pushing' or 'yelling' from 'threatening.' "

As the Chicago Sun-Times said in an editorial, peace and civil rights groups have sometimes used illegal tactics, but there are specific laws against those tactics, laws that should be enforced rather than having the Godzilla of punitive statutes imposed: RICO, with its triple damages and huge cumulative lawyers' fees during the long, serpentine course of trial and appeals. (This NOW case started 12 years ago.)

As for illegal acts against abortion clinics and their workers, there is in place a 1994 statute that makes it a federal crime "to use force or physical obstruction to interfere with a woman seeking to obtain reproductive health" -- it is called the Freedom of Access to Clinic Entrances Act (FACE). The penalties are stiff. With FACE on hand, there is no need for RICO terror tactics against any demonstrators.

As Robyn Blumner points out: "With this win, NOW and other pro-choice groups have the tool they need to bankrupt their most ardent and indefatigable antiabortion rivals. . . . And corporate farms have the tool they need to bankrupt the United Farmworkers Union."

One of the defense attorneys at the Chicago trial tells me that Judge David Coar, who is black, and was involved in the historic civil rights movement, said during a break in the trial that RICO, if it had existed then, could probably have been used against civil rights activists.

Consider the black students, sitting in at segregated southern lunch counters, preventing whites from using those facilities -- and also preventing the white business owners from the use of their property. Those students were insisting on integration through, in RICO's term, "extortion."

[Nat Hentoff is a nationally syndicated columnist.

01-1437 Branch v. Smith
01-1596 Smith v. Branch

Ruling Below: (Smith v. Clark, S.D. Miss.., 189 F. Supp. 2d 548, 2002 U.S. Dist. Lexis 3386)

The court held that no enactment passed by the Mississippi Legislature (including grants of jurisdiction over equity) gave the District Court in question the power to redistrict the state for congressional elections. Furthermore, without such an enactment, Article I, section 4 of the U.S. Constitutional precludes a court form assuming such authority.

Questions Presented: (1) Whether Article I, §4 of the U.S. Constitution deprives state courts of general jurisdiction of all power in congressional redistricting cases in the many states where no state statute explicitly speaks of such power?
(2) Does any enactment of the Mississippi legislature grant the power to chancery courts to redistrict the State of Mississippi for congressional elections?

John Robert SMITH, et al., Plaintiffs
v.
Erick CLARK, Secretary of State of Mississippi, et al., Defendants

United States District Court
For the Southern District of Mississippi, Jackson Division

Decided February 26, 2002

JOLLY, Circuit Judge; WINGATE, District Judge; BRAMLETTE, District Judge:

Today we have enjoined the defendants from implementing the congressional redistricting plan for the 2002 primary and general election that was adopted by the Hinds County, Mississippi chancery court. We have ordered the defendants to conduct said congressional elections based on this court's plan issued on February 4, 2002. The basis for this injunction and order is reflected in our opinion of February 19, that is, the failure of the timely preclearance under § 5 of the Voting Rights Act of the Hinds County Chancery Court's plan. The opinion that follows, holding that the adoption of the state court's plan is unconstitutional, for the reason that it violates Article I, Section 4 of the United States Constitution, is this court's alternative holding, in the event that on appeal it is determined that we erred in our February 19 ruling. Furthermore, inasmuch as the Interveners are presently seeking a stay of this court's orders, it is expedient and efficient that the Supreme Court have before it the case as a whole, instead of truncated sub-parts.[1]

I

Our order entered on January 15, 2002, and our opinion filed on February 19,

[1] We have jurisdiction to address this question pursuant to 28 U.S.C. § 2284(a) ("[a] district court of three judges shall be convened ... when an action is filed challenging the constitutionality of the apportionment of congressional districts").

2002, contain the facts and procedural history of the case before us, and we refer to those documents for the background of this case. As we noted in our opinion of February 19 (footnote 7 on page 43), there remain, however, other constitutional questions raised by the plaintiffs as to the chancery court plan, that have remained dormant awaiting preclearance. Primarily, the plaintiffs have contended from the beginning of this lawsuit that under the United States Constitution, a state court may not constitutionally redistrict a state for United States congressional elections; that under the Constitution only the legislature can do so.

The United States Constitution specifically provides in Article I, Section 4: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof." (Emphasis supplied.) No case -- or any other authority -- has ever expressed doubt that this constitutional provision applies to congressional redistricting. Consequently, this provision is indisputably applicable to congressional redistricting in the state of Mississippi in 2002. Because the issue is squarely presented by the plaintiffs, we cannot -- nor can any other court or any other party to the case before us -- sidestep this express provision of the United States Constitution. The specific question we must confront is: What is the practical meaning of this constitutional provision, and how it is to be applied here, where the state chancery court -- not the legislature - prescribed the "Places and Manner of holding Elections for ... Representatives ..."

In determining this question, we have looked to the plain meaning of the easily understood words of this section, and applied it to the facts before us. We have then looked to case authority, including authorities of the Supreme Court of the United States, the lower federal courts, and the state courts that have addressed this particular section of the Constitution. This review of authorities leads us to this conclusion: Although the constitutional provision may not require the state legislature itself to enact the congressional redistricting plan, the state authority that produces the redistricting plan must, in order to comply with Article I, Section 4 of the United States Constitution, find the source of its power to redistrict in some act of the legislature.

This predicate conclusion raises the next question that we must resolve: whether any enactment of the Mississippi legislature grants to the chancery court the power to redistrict the State of Mississippi for congressional elections. We find no such statute. Furthermore, no case of the Mississippi Supreme Court has ever indicated there is such a statute. We thus come to the final conclusion that the redistricting plan for congressional elections in 2002 produced by the Hinds County Chancery Court transgresses Article I, Section 4 of the United States Constitution, is therefore unconstitutional, and is consequently a nullity. We order it enjoined and direct that the said 2002 elections be conducted on the basis of the plan described in and attached to our February 4, 2002 order.

II

The Meaning of the Term "Legislature"

We turn now to investigate and resolve the meaning of the term "Legislature" as used in Article I, Section 4, to consider whether the chancery court can fall within the meaning of that term and to provide the appropriate remedy.

A

The Constitutional Clause

To begin, we turn our attention specifically to the words of Article I, Section 4: Reviewing the plain language, the provision provides that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof." Applying these words to the facts before us, everyone agrees that the legislature has not enacted a redistricting plan. Instead of the legislature, the chancery court has chosen the "Places and Manner" of conducting the congressional elections in Mississippi. It would surely seem, on the basis of the plain constitutional language, that the chancery court's order implementing its plan constitutes a violation of Article I, Section 4. But, the answer is not quite so simple. We therefore turn now to consider the cases that have considered the meaning of "Legislature."

B

Cases Considering the Term "Legislature"

[Only three cases have construed this constitutional term and all of them] have made clear that the reference to "Legislature" in Article I, Section 4 is to the law-making body and processes of the state. These cases suggest that congressional redistricting must be done within the perimeters of the legislative processes, whether the redistricting is done by the legislature itself or pursuant to the valid delegation of legislative power. We have found no cases that support a contrary conclusion.[2]

[2] While we recognize that there have been a number of cases in which state courts have exercised the power to redistrict congressional seats, none of these cases has addressed the Article I, Section 4 question.

In California, on two occasions the Supreme Court of the state has reapportioned congressional districts. Legislature v. Reinecke, 10 Cal.3d 396, 401, 110 Cal. Rptr. 718, 516 P.2d 6 (Cal. 1973) (In Bank); Wilson v. Eu, 1 Cal.4th 707, 823 P.2d 545 (Cal. 1992) (In Bank). In both cases, the California Supreme Court acted under its original mandate jurisdiction, as granted to the court in the state constitution, which of course provides a source of law for the state. See Cal. Const. Art. VI, § 10. The Article I, Section 4 issue was not raised.

[Cases in New York, Texas and New Jersey were similarly distinguished.]

C

Growe v. Emison

The Intervenors understandably rely on Growe v. Emison, 507 U.S. 25, 122 L. Ed. 2d 388, 113 S. Ct. 1075 (1993) and argue that it trumps all cases we have discussed respecting Article I, Section 4 in redistricting matters. At the outset, we should note our agreement with the Intervenors that Growe seems to stand for the proposition that the role of state courts in redistricting, generally, must be fully respected by the federal courts. We should further note that if Growe stood alone as the authority on the issue before us -- that is, if we could disregard Article I, Section 4 and the cases we have referred to earlier -- we would dismiss the plaintiffs' claim forthwith. However, we cannot ignore the Constitution and other Supreme Court authority, so we turn now to examine Growe and to determine if, indeed, it is contrary to or requires us to disregard our earlier conclusion that there must be a source of legislative authority for congressional redistricting.

In Growe, a number of plaintiffs filed suit in state court, challenging the existing legislative and congressional districts in

Minnesota under the 14th Amendment to the United States Constitution and the Minnesota Constitution Article 4, Section 2, i.e., the one person-one vote principle, in the light of the new census. The parties stipulated that the existing districts were unconstitutional, and the Minnesota Supreme Court appointed a Special Redistricting Panel, consisting of one appellate judge and two district judges, to preside over the case. Id. at 28. The Minnesota Supreme Court did so because "the Chief Justice has authority to appoint a special redistricting panel under Minn. Stat. §§ 2.724 and 480.16."[3] Cotlow v. Growe, 622 N.W.2d 561, 562 (Minn. 2001). Meanwhile, two suits were filed in federal court and a federal three-judge panel was convened to hear the consolidated cases. Growe, 507 U.S. at 28. After a period of deferral to allow the state legislature to act, the federal court stayed the proceedings in state court, which had developed a redistricting plan, proceedings and ultimately adopted its own federal plan for state legislative and for congressional redistricting plans. Id. at 30-31. The Supreme Court held that the district court erred in not deferring to the state court's timely consideration of legislative and congressional reapportionment. Id. at 36-37.

The Supreme Court in Growe indicated that state courts have a significant role in redistricting. Growe declares:

In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself. . . .

The Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. See U.S. Const., Art. I, § 2. 'We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.' Chapman v. Meier, 420 U.S. 1, 27, 42 L. Ed. 2d 766, 95 S. Ct. 751 (1975).

507 U.S. at 34. To place the holding of the Supreme Court in context, we start with the pivotal observation that the Article I, Section 4 issue was not discussed or even raised in Growe because -- unlike this case -- the parties did not dispute the constitutional jurisdiction of the state court. See id. at 32. (See also Texas v. Cobb, 532 U.S. 162, 168, 149 L. Ed. 2d 321, 121 S. Ct. 1335 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue.")) Without objection from any party, the Minnesota Supreme Court relied on its specific authority under the statutes of Minnesota to assign judges to hear cases "where need therefor exists," and appointed a three-judge panel. We also note that Chapman, relied on by the Court in Growe, involved only the reapportionment of the state legislature, not congressional districts, and therefore no Article I, Section 4 question could have been implicated.

It is certainly true that the Supreme Court chastised the federal court in Growe for dismissing the role of the state court in the redistricting process. Nevertheless, we cannot conclude that Growe stands for the proposition that we may disregard Article I, Section 4, or these previously cited Supreme Court authorities. This

[3] Minn. Stat. § 2.724 provides in relevant part: "When public convenience and necessity require it, the chief justice of the supreme court may assign any judge of any court to serve and discharge the duties of judge of any court in a judicial district not that judge's own at such times as the chief justice may determine."

conclusion is undergirded by the facts that: Article I, Section 4 was not raised in Growe; the earlier Supreme Court cases addressing Article I, § 4 were not referred to, much less overruled, see United States v. Hatter, 532 U.S. 557, 567 (2001) ("it is [the Supreme] Court's prerogative alone to overrule one of its precedents") (internal quotation marks and citations omitted)); the Chapman case relied upon in Growe involved only a state court redistricting the state legislature, not congressional redistricting; and, finally, there was some, albeit tenuous, legislative authority for the Minnesota Supreme Court's action in Growe.

Thus, based on our understanding of the constitutional provision in the light of its plain language and the case authority when considered as a whole, we hold: Article I, § 4 requires a state to adopt a congressional redistricting plan in a manner that comports with legislative authority as defined by state law.

III

Authority of the Chancery Court

In the case before us, we can find no legislative act upon which to base the chancery court's authority to act in congressional redistricting. Unlike in Minnesota and California, the Mississippi Supreme Court has appellate jurisdiction only. While the Mississippi legislature has empowered other state bodies to redistrict a number of state electoral districts, it has not authorized any other state body, including the chancery court, to redistrict congressional districts. For example, the state constitution grants the Mississippi Supreme Court the authority to redistrict circuit and chancery court districts in the State of Mississippi when the legislature fails to do so. See Miss. Const. Art. 6, § 152. In another instance, the legislature has provided that if it is unsuccessful in redistricting state legislative districts, a five-member commission will redistrict the state. Miss. Const. Art. 13, § 254. This commission consists of the chief justice of the Mississippi Supreme Court as chairman, and the attorney general, secretary of state, speaker of the house of representatives, and president pro tempore of the senate. Id. There is no similar legislative grant for redistricting congressional districts. Further, there is no statutory authority in Mississippi for Supreme Court judges to assign individual judges to hear cases when the public necessity requires, unlike in Minnesota.

The intervenors argue that the Mississippi chancery courts have jurisdiction over "all matters in equity," Miss. Const. Art. 6, § 159, and that this constitutes the authority for the Hinds County Chancery Court to redistrict the state for congressional elections. However, the Mississippi Supreme Court has specifically held, in the past, that the state chancery courts have no jurisdiction over a complaint that sought to enjoin congressional elections on the ground that a congressional redistricting statute adopted by the state legislature violated a federal statute which required congressional districts to contain "as nearly as practicable an equal number of inhabitants." See Brumfield v. Brock, 169 Miss. 784, 142 So. 745, 746 (Miss. 1932). "By a long line of decisions this court has held that courts of equity deal alone with civil and property rights and not with political rights." Id. In 1994, the Mississippi Supreme Court stated: "Chancery courts in this state do not have the jurisdiction to enjoin elections or to otherwise interfere with political and electoral matters which are not within the traditional reach of equity jurisdiction." In re McMillin, 642 So.2d 1336, 1339 (Miss. 1994).

It is true, of course, that in In re Mauldin, No. 2001-M-01891 (Miss. Sup. Ct., Dec. 13, 2001), the Mississippi Supreme Court held that this Hinds County Chancery Court did have jurisdiction over the state lawsuit brought in the instant case. The court did not provide any basis for its holding, did not refer to its earlier cases to the contrary, and did not point to any legislative authority that authorized the chancery court to act.

In sum, we can only conclude that the requirements of Article I, Section 4 were not met in this case, as there has been no indication that the chancery court had any legislative authority to draw the state's congressional districts. Indeed, the Mississippi Supreme Court has specifically held that such matters do not fall within the equity jurisdiction of the chancery courts. Therefore, irrespective of whether the chancery court plan is precleared, the chancery court plan cannot be implemented by the State of Mississippi, because the chancery court's adoption of it, in the absence of any state legislative authority, violates Article I, Section 4.

IV

Remedy

The precise question of an appropriate remedy for an Article I, Section 4 violation has not been addressed before. However, under established principles, this court has the authority to order the use of its own congressional redistricting plan in place of a state's plan if we find a constitutional violation in the state's plan. [Citations omitted.]

V

Conclusion

In the light of the foregoing analysis, the congressional redistricting plan adopted by the chancery court is declared unconstitutional, and the state's implementation of the chancery court plan is enjoined, as per our Final Judgment entered today.

Supreme Court to Rule on Drawing Congress Boundaries

Financial Times

June 11, 2002

Deborah McGregor

The Supreme Court yesterday agreed to review a congressional boundary dispute in Mississippi, in a case likely to set an important precedent for future contests determining control of Congress.

Wading for the first time into the jurisdictional brambles arising from latest census data, the Court will weigh arguments concerning who has the final say in redrawing congressional maps.

States must redraw boundaries for congressional districts every 10 years to reflect population shifts found in the census. In the Mississippi case, the dispute centers on two court-drawn plans. One, that favors the Republicans, was drawn by a federal three-judge panel. The other, favoring Democrats, was drawn by a state judge.

The federal panel ruled that the state judge did not have a constitutional right to get involved in the congressional boundary challenge.

Yesterday's Supreme Court decision was viewed as a victory for Democrats, who had protested that the new map helped Republicans. While it did not come in time to affect this year's congressional elections, it will set a significant precedent for future challenges.

The redrawing had wound up in the courts after Mississippi's Democrat-controlled legislature failed to agree how to reshape the boundaries.

In the absence of consensus, a group of Democrats asked a state judge to settle the matter; Republicans went to federal court.

Lawyers for both sides used the Supreme Court's 2000 ruling in Bush v Gore, which threw the presidential election to George W. Bush, to plead their case.

Because of slow population growth in the 1990s, Mississippi is losing one of its five congressional seats. The disputed district is already home to an unusually bitter clash between two congressmen, thrown together as a result of the downsizing. Republican "Chip" Pickering, whose father's federal judicial nomination was blocked by Senate Democrats, is squaring off against Democrat Ronnie Shows.

The court's ruling had been eagerly awaited by officials in both parties. Partisan sentiments have been inflamed by the high stakes in this year's congressional elections. Democrats need to pick up six net seats to gain the House majority.

"Redistricting" already means more incumbents in Congress will lose this year than in either of the past two House elections. Other states where incumbents of opposite parties are vying for the same seat are Connecticut, Illinois and Pennsylvania.

Fight Over Political Map Centers on Race

The New York Times

February 21, 2002

David E. Rosenbaum

The Bush administration Justice Department is using its authority under the Voting Rights Act to block a redistricting plan for Congressional seats in Mississippi that was drawn by a black state judge and is supported by blacks and Democrats here.

The department questions whether a lower-court state judge should have the authority to draft a Congressional district map for the entire state. Because of the department's action, the plan likely to be imposed on the state is one written by a panel of white Republican-appointed federal judges and is favorable to Republican candidates.

Bitter redistricting battles involving bare-knuckle politics are being waged all over the country as states revise their Congressional district maps to take account of population changes reported in the 2000 Census. The outcome of these battles could determine which party controls the House of Representatives after the November election.

Nowhere is the fight more byzantine than in Mississippi.

Experts on the Voting Rights Act from both parties said in interviews today that they could not recall another instance when the Justice Department had blocked a redistricting plan that was clearly favorable to blacks. The act, one of the landmark civil rights laws of the 1960's, was intended to prevent discrimination against minority voters.

Dan Nelson, a spokesman for the department, said the move was not motivated by partisan considerations. "The question," Mr. Nelson said, "is not just whether this plan is fair to minority voters but whether the process is fair in this case and in future rounds of redistricting."

The main issue, he said, was whether it was proper for a state judge elected in one district to write a redistricting plan for the entire state, a procedure the Mississippi Supreme Court has upheld. Some day, he said, a white judge might draw a map that was disadvantageous to blacks.

The fight over redistricting involves several odd twists.

The Republican congressman who stands to benefit if the state judge's plan is blocked, Representative Charles W. Pickering Jr., is the son of the federal judge whose nomination by President Bush to the federal court of appeals is being thwarted by Democrats in the Senate.

The panel whose redistricting map is likely to be imposed is comprised of two federal trial judges who are colleagues of Judge Pickering and one who sits on the United States Court of Appeals for the Fifth Circuit, which he wants to join.

The governor here is a Democrat, and both houses of the Legislature are controlled by Democrats, a situation that should have guaranteed an unfavorable

outcome for the Republicans. But the Democratic Party is so riven by internal rivalries and sectional disputes that the politicians were paralyzed.

Normally in legal disputes, Republicans advocate states' rights and Democrats strive to get matters into federal court. But in this case the roles are reversed.

Democrats on the House Judiciary Committee, led by Representative John Conyers Jr. of Michigan, the senior member of the Congressional Black Caucus, wrote to President Bush last week to complain that the Justice Department action "turns the Voting Rights Act on its head."

Representative Pickering, on the other hand, said justice was being done because the federal court map has compact districts. The Democrats, he said, "want to gerrymander the state in a way that has never been done before."

Mr. Pickering said his father's confirmation as an appeals judge had become caught up in the redistricting fight. The Democratic strategy, he said, was to demonize the Pickering name and to hold his father's confirmation hostage for a redistricting outcome favorable to Democrats.

Judge Pickering seems to enjoy strong support from blacks in Laurel, Miss., his hometown, but that backing does not extend to the state's black political leaders. In Washington, Democratic senators have criticized his stands on civil rights matters on and off the bench.

Mississippi now has five seats in the House of Representatives, two held by white Democrats, two by white Republicans and one by a black Democrat. The state lost a seat as a result of the 2000 census, a reflection of the slow population growth here in the 1990's.

The Legislature spent last year trying to draw a new four-district map, but no agreement could be reached. The only consensus was that the state's most junior congressmen, Mr. Pickering and Ronnie Shows (rhymes with cows), a white Democrat who enjoys strong support from blacks, would be pitted against each other in a new district.

With the Legislature stymied, Democrats took the matter to the state chancery court, a trial court that handles civil cases. On Dec. 21, Judge Patricia Wise approved a map that would have Mr. Pickering and Mr. Shows compete in a district in which 37.5 percent of the voting-age population would be black.

The racial composition of districts is crucial in Mississippi because nearly all blacks vote Democratic and a large percentage of whites vote Republican.

Some of the districts on Judge Wise's map would be oddly shaped. Republicans derided it as the "tornado plan" because a district in the northern part of the state would swoop down like a funnel into the center of the state to pick up some of the Jackson suburbs.

Chancery court judges do not run with party labels, but Judge Wise is black and was elected from a heavily Democratic district.

Because of Mississippi's history of discrimination, the Voting Rights Act requires the Justice Department to certify that changes in the state's election laws and procedures do not discriminate against voters from minority groups. The certification process is known as preclearance.

So on Dec. 26, the state attorney general, Mike Moore, sent the plan and supporting documents to the department in Washington.

Under the law, the Justice Department has 60 days to review a plan. Mr. Moore asked the department to act quickly because the filing deadline for Congressional races in Mississippi is March 1.

But the state did not hear from Washington until last Thursday when it received a five-page list of detailed questions that the department said needed to be answered before it could give preclearance. None of the questions implied that the state court plan was discriminatory, but they centered on the question of the authority of Judge Wise.

Mr. Moore's office worked on the questions through the weekend and sent the replies to Washington on Tuesday night. Theoretically, the Justice Department has another 60 days to review the replies, and if it uses that time, the plan could not be in place by the filing deadline.

During the long hiatus, Republicans took the matter to federal court. Last week, a panel consisting of Judge E. Grady Jolly of the United States Court of Appeals and Judges David C. Bramlette and Henry T. Wingate of Federal District Court, all white and all put on the bench by Republican presidents, put forward a redistricting map in which 30.4 percent of the voting-age population would be black, a plan more advantageous to Representative Pickering.

On Tuesday, the panel announced that it would unilaterally impose its plan if the Justice Department did not grant preclearance to the state plan by next Monday. Redistricting plans drawn by federal courts do not require Justice Department certification.

Mr. Nelson, the Justice Department spokesman, said he did not know if the department could act one way or the other by Monday. The review has taken a long time, he said, because it is a complicated case.

"As with all voting changes," Mr. Nelson said, "the department will render its decision based on the facts before it and the relevant law and will do so in a consistent and principled fashion."

Robert B. McDuff, a lawyer for the Democrats, filed an emergency appeal today to the United States Supreme Court seeking to stop the federal plan. He conceded that winning the appeal was a long shot.

Mr. Shows is furious.

"The deck is stacked against me," he said. "The Justice Department is sticking it to me because of pure partisan politics."

Race Takes Back Seat as States Prepare to Redistrict

The New York Times

February 4, 2001

Robert Pear

State officials say that recent court decisions on voting rights have created confusion, uncertainty and immense new difficulties as they prepare to redraw the boundaries of Congressional districts and state legislative districts.

The court decisions have made clear that states must take race into account, but must not give it too much weight, or else their plans can be thrown out as unconstitutional. Thus, state officials said, they will focus less on race than in the last round of redistricting 10 years ago, and they will pay more attention to other factors -- what the courts have described as "race-neutral principles" like creating compact districts and protecting incumbents.

Asked to describe the impact of the rulings, State Senator Hob Bryan of Mississippi, a Democrat, said: "We've got to figure out what they mean. I'm not sure the court decisions are clear enough to know. Can you send me a synopsis of the law?"

Mr. Bryan is chairman of the Senate Elections Committee and vice chairman of the panel that will draw new Congressional and state legislative districts in Mississippi.

Others are in the same quandary. "Supreme Court decisions in the 90's raised as many questions as they answered," said Tim Storey, a policy analyst at the National Conference of State Legislatures.

In New York, Assemblyman William L. Parment, a Democrat who is co-chairman of the legislative task force on redistricting, said: "The court decisions have removed some of the certainty of the rules that were employed after the 1990 census. It's much less clear what it is you have to do to meet the requirements of various statutes and court cases."

In view of those court decisions, state and local officials said, they now have a heavier burden to justify the creation of additional districts in which black or Hispanic voters are in the majority.

Jon A. Boller, a staff lawyer for the New Mexico Legislature, said: "We must satisfy the requirements of Section 2 of the Voting Rights Act, which says you must take race into account on some level. But at the same time, we cannot make race the primary factor."

In 1991, under pressure from the Justice Department, many states tried to maximize the number of districts controlled by black or Hispanic voters. The Supreme Court later said that was not required. This year many state legislators say their goal is simply to prevent a reduction in the number of minority-controlled districts. "We don't have to maximize the number of minority districts, as we felt we had to in 1991," said State Representative Bob Hanner of Georgia, a Democrat.

At the national level, both parties look to redistricting to increase their numbers in

the United States House of Representatives, where Republicans now have 221 seats, just 10 more than the Democrats.

Republicans appear to be in a stronger position today than in the last round of redistricting. They control both chambers of the legislature in 18 states, up from 6 in 1991. Democrats control both chambers in 16 states, down from 30 a decade ago.

But Democrats said that population shifts favored them. Hispanics account for much of the population growth in states like Arizona, Colorado and Texas, which are gaining seats in Congress. Hispanic voters favored the Democrat over the Republican by a ratio of more than two to one in each of the last four presidential elections.

The legal standards for redistricting have become more important than ever. Most states expect to be sued over the plans they adopt, so courts will probably end up determining the boundaries in many crucial states. After the 1990 census, more than 130 suits were filed in 40 states, some challenging the states' overall plans, some contesting individual districts. New York had cases in four federal courts and three state courts. "You know you're going to be sued," said Linda Meggers, director of reapportionment services for the Georgia Legislature.

From the passage of the Voting Rights Act in 1965 until the early 1990's, state officials felt pressure from the Justice Department and the courts to help blacks and other minorities elect candidates of their choice. In practice, that meant that state legislators often tried to create districts in which blacks or other minorities accounted for more than 50 percent of the voting-age population.

But in a series of landmark decisions starting with Shaw v. Reno in 1993, the Supreme Court struck down districting plans on the ground that state legislators had given too much weight to race as a factor in drawing the lines.

In March, the Census Bureau will provide detailed data to the states, showing total population and voting-age population, by race and by Hispanic origin. The bureau will decide late this month whether the data should be adjusted for a potential undercount or overcount.

Mark A. Packman, a lawyer who advises many state and local governments, said they "must use computerized census data and maps to take race into account in redistricting decisions," and may be required to create black-majority districts where voting tends to follow racial lines. But, Mr. Packman said, "The very actions that state and local governments take to avoid liability under the Voting Rights Act expose them to liability under recent Supreme Court decisions."

In Texas, State Senator Jeff Wentworth, a Republican who is chairman of the Senate Redistricting Committee, summarized the situation this way: "Race can be a factor, but it cannot be the dominant factor in drawing boundary lines. We still have to protect minority districts, and we will. But you can't have very unusually shaped districts, as we did last time."

Antonia Hernandez, president of the Mexican American Legal Defense and Educational Fund, said, "The Supreme Court has said, in effect, that it's O.K. to go back to your old system of gerrymandering, at times to the detriment of minorities."

Still, Ms. Hernandez, said: "I believe the interest of the Latino community will be

protected. In the California Legislature, for example, Latinos are a powerful force, and if united they can shut down the legislative process."

Legislatures Suit Up for Battle over Boundaries of Districts; Census Data Will Mean New Maps, with Lawmakers' Political Careers at Stake

St. Louis Post-Dispatch

March 19, 2001

Karen Branch-Brioso

Forget abortion. Forget gun control. Forget budgets.

The most divisive war of all is about to begin in state legislatures across the nation. And the pressing issue is? Lawmakers' own political careers.

The once-a-decade battle over redrawing the maps for congressional and legislative seats is getting under way, as the states receive detailed population data this month from the 2000 census. The lofty constitutional reason is to ensure that each district represents roughly the same amount of people as the rest -- the "one man, one vote" argument. In reality, population equality is the legal nuisance in a political game that often places as much emphasis on voter registration numbers and voter performance as census numbers. Thirty-eight states give their legislatures the authority to draw their own districts and congressional seats, too.

Illinois is among them. This is the state assembly that was so at odds over its legislative boundaries that in 1964, it ended up with no boundaries at all. Every member of the Legislature ran statewide on a ballot so long it was dubbed the "bed sheet ballot."

After a 1980 musical-chairs nightmare for Missouri, when 10 congressional incumbents tried to fit into nine congressional seats, the Legislature tried to get out of the redistricting business altogether. It proposed a constitutional amendment to hand over its congressional mapping duties to a bipartisan committee similar to those that have drawn state House and Senate seats for decades.

The voters' response: an uninterested no go.

"Not too many people here in the United States seem to pay attention to redistricting," said Laura Handley, president of Frontier International Electoral Consulting in Washington and an academic expert on redistricting.

"In the other long-standing democracies, the public is much more politically aware. The United States is one of the few countries that actually have left redistricting in the hands of their legislators," Handley said.

Just seven states have ceded both congressional and legislative mapping duties to a commission: Alaska, Arizona, Hawaii, Idaho, Montana, New Jersey and Washington.

In each of those states, except Alaska, majority and minority party leaders appoint an equal number of the commission members.

Arizona voters last fall wrested control of redistricting from the hands of their legislature with a constitutional amendment. Now a five-member commission, two Republicans and two Democrats with an independent as the

chairman, will draw the maps. The self-described citizens advocacy group Common Cause and the League of Women Voters led thecharge.

Common Cause also has started or backed similar efforts to change the systems in Florida, Rhode Island and Delaware. Don Simon, the group's outside general counsel, says it is fundamentally wrong for politicians to be drawing the boundaries of their districts.

"It really is an enormous conflict of interest," Simon said. "You're talking about how safe a seat will be, whether incumbents will be paired. These are inherently political calculations and to have the legislators themselves making these judgments about their own future and the future of their own colleagues really results in a very distorting process."

Some redistricting commissions are still inherently political. In Arkansas, for example, congressional seats are drawn by a panel of three: the governor, the secretary of state and the attorney general, all partisan elected officials.

In Alaska, all members of the legislative redistricting panel were appointed by the governor until this year. Thanks to a 1998 constitutional amendment, the governor gets two picks, and the House speaker, Senate president and Supreme Court chief justice get one each.

The system also adds an insurance policy against self-interest playing a role, says Alaska Supreme Court Chief Justice Dana Fabe: "a one-term prohibition from running in the general election" after the plan is adopted. Hawaii and Arizona impose a two-term ban on members running for the seats they draw.

But in the never-ending battles for control by the two major political parties, some party loyalists believe the idea of giving control to a commission is downright un-American. The panels are often composed of nonofficeholders with no party getting the upper hand.

"What commissions do is allow state legislatures to abdicate responsibi lity for tough issues," said one national GOP source, who spoke on the condition of anonymity. "We would prefer to draw the lines in all 50 states. The Democrats would prefer to draw the lines in all 50 states. We'd both rather see a commission than the other side draw the lines."

Jeffrey M. Wice, a lawyer working with national Democratic redistricting efforts in legislatures across the nation, also is skeptical that the commissions do any better.

"One political party is going to gain or lose, and commissions don't make that much of a difference in the end," Wice said. "One party will end up winning."

Yet redistricting doesn't leave the bickering along partisan lines alone. In congressional redistricting, where states lose or gain seats depending on how their population changed in respect to the rest of the nation, the battles can pit members of the same party against each other.

In Missouri, the final map drawn after the 1980 census left Republican Rep. Wendell Bailey's hometown of Willow Springs in the district where fellow GOP Rep. Bill Emerson planned to run. Bailey moved to less familiar territory to challenge Democratic Rep. Ike Skelton instead and lost.

Two St. Louis Democrats, House Minority Leader Richard A. Gephardt and

Rep. William Lacy Clay Jr., may face a similar dilemma this year, even though Missouri won't lose any congressional districts. The two share the predominantly Democratic population in the city of St. Louis, which lost almost 50,000 people in the last decade. Each district will have to reach further into more politically conservative suburbia to reach the 622,000 population target.

Darrell Jackson, who supervises the redistricting staff in the Missouri House, said just one likely will get the bulk of the city's black po pulation to maintain the state's only "majority-minority" district, now held by Clay. The Voting Rights Act of 1965 and years of Supreme Court rulings since have deemed that districts should not dilute minority voting strength, if minority communities are compact enough to be included in the same district.

"In congressional redistricting, that's not terribly complex, because there's only one place in the state that's compact enough to make a (minority) district, and that's St. Louis," Jackson said.

It will be a dilemma that the Legislature will have to settle or, as often occurs across the nation, a three-judge panel of federal judges. The political impasses are so frequent that the courts often end up drawing the maps themselves.

In 1971 and 1981, the courts drew Missouri's congressional maps, but the Legislature finally reached agreement in 1991 after state voters refused to let them off the hook.

Things weren't as rosy in Illinois nor have they been for decades.

After the infamous "bed sheet ballot" of 1964, a new Constitution adopted in 1970 created a back-up commission of four nonlegislators, two from each party, to draw legislative districts when the Legislature couldn't agree by a deadline.

The Legislature couldn't work it out in 1971, 1981 and 1991. The commission drew the maps in 1971 but had to resort to a "tie-breaker" fifth member in the next two decades before it could settle on a final plan.

01-1067 United States v. White Mountain Apache Tribe
01-1375 United States v. Navajo Nation

Ruling Below: (White Mountain Apache Tribe v. United States, Fed. Cir., 249 F.3d 1364, 2001 U.S. App. Lexis 9330)

The court held that Pub. L. No. 86-392, 74 Stat. 8 (1960) provided the Indian tribe with jurisdiction to bring the claim, it created the trust relationship, and provided a fiduciary relationship. The statute authorized the government to use the Indian tribe's trust property for governmental purposes, and subjected the government to trustee liability for the failure to maintain the trust property. The government was liable for money damages resulting from its breach of fiduciary duties in allowing the buildings to deteriorate.

Question Presented: Whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) obligates the United States to maintain or restore certain property and buildings held by the United States in trust for the White Mountain Apache Tribe so that the Tribe can maintain a suit for damages in the Court of Federal Claims?

WHITE MOUNTAIN APACHE TRIBE, Plaintiff-Appellant,
v.
UNITED STATES, Defendant-Appellee.

United States Court of Appeals
For the Federal Circuit

Decided May 16, 2001.

DYK, Circuit Judge

This case presents the question of whether a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) (the "1960 Act"), obligates the United States to maintain or restore certain property and buildings held by the United States in trust for the White Mountain Apache Tribe (the "Tribe")[1] so that the Tribe can maintain a suit for damages in the Court of Federal Claims. We hold that it does, though the obligation created is narrower than that claimed by the Tribe. We accordingly reverse and remand the decision of the Court of Federal Claims in White Mountain Apache Tribe v. United States, 46 Fed. Cl. 20 (1999), for further proceedings consistent with this opinion.

FACTUAL BACKGROUND

In 1870, the United States Army established a military post known as "Fort Apache" on approximately 7,500 acres of land within the borders of what later became the White Mountain Apache Tribe's reservation in Arizona. The Army operated Fort Apache as a military post until 1922, when Congress transferred control of the Fort to the Secretary of the Interior, and designated approximately 400 acres of the Fort for use as a boarding school for Native American children to

[1] The Tribe is a federally recognized Native American tribe organized under section 16 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 476.

fulfill certain unspecified treaty obligations of the United States. See 25 U.S.C. § 277 (1994).

In 1960, Congress passed the 1960 Act which declared the Fort to be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Pub. L. No. 86-392, 74 Stat. 8 (1960). Pursuant to that statute, the government allegedly controls and has the ability to use approximately thirty-five buildings on the site...

At issue in this appeal is the government's obligation as trustee to maintain and restore those buildings, which include, inter alia, barracks constructed by the United States Army, the Native American boarding school and student dormitories, and various administrative buildings constructed by the Department of the Interior.

According to the Tribe, the government has had exclusive access to and control over those buildings and has allowed many of them to fall into disrepair...

On March 19, 1999, the Tribe commenced a breach of trust action in the Court of Federal Claims seeking $ 14 million dollars in damages for the government's alleged breach of "its fiduciary duty to maintain, protect, repair and preserve the Tribe's trust corpus." The Tribe alleged that its claim arose under the 1960 Act, as well as the Snyder Act (codified at 25 U.S.C. § 13), the National Historic Preservation Act of 1966 (codified at 16 U.S.C. § 470 et seq.) and a variety of other federal statutes and regulations.

The government filed a motion to dismiss for failure to state a claim upon which relief may be granted and for lack of subject matter jurisdiction...

* * *

DISCUSSION

I

The question before us is whether the Court of Federal Claims erred in dismissing this breach of trust claim against the United States for failure to state a claim upon which relief may be granted. We review that decision without deference. First Hartford Corp. Pension Plan & Trust v. United States, 194 F.3d 1279, 1286-87 (Fed. Cir. 1999). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3) (1994).

II

The Tucker Act gives the Court of Federal Claims jurisdiction over broad categories of claims against the United States and constitutes a waiver of sovereign immunity as to those claims. 28 U.S.C. § 1491 (1994); Mitchell II, 463 U.S. at 212. A companion statute, the Indian Tucker Act, further confers jurisdiction on the Court of Federal Claims to hear any claim brought by a Native American tribe against the United States that "is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe." 28 U.S.C. § 1505. Although the Tribe premised jurisdiction in the Court of Federal Claims upon both statutes, it is § 1505 that primarily confers jurisdiction over this action.

* * *

III

Before the Court of Federal Claims and on this appeal, the Tribe argued that a variety of statutes and regulations, other than the 1960 Act, impose fiduciary obligations upon the United States. We disagree.

* * *

Accordingly, we turn our attention to the 1960 Act.

IV

* * *

Both the Tribe and the United States in their briefs agree that the 1960 Act creates a "trust... "[2]

However, the mere fact that the 1960 Act creates a trust relationship does not end the inquiry. We must also determine whether there is a fiduciary obligation created by the 1960 Act or merely a "bare trust." Mitchell II, 463 U.S. at 224. If there is no fiduciary obligation, then there is no claim for money damages for the alleged breach of that obligation.

In Mitchell I, the Supreme Court held that federal statutes and regulations that create only a "limited trust relationship" between the United States and Native American tribes do not impose fiduciary obligations that give rise to claims for money damages. 445 U.S. at 542...

* * *

[2] Inexplicably, at oral argument the government reversed its position by arguing that a beneficial interest in the property had not yet passed to the Tribe. But for the reasons stated in the text, we find that the 1960 Act creates a "trust."

In Mitchell II, the Supreme Court agreed that the allottees had properly stated a claim against the United States for breach of trust, reasoning that:

In [Mitchell I], this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. . . . In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

Mitchell II, 463 U.S. at 224 (emphasis added). In reaching this conclusion, the Court first noted (with regard to the timber management statutes) that "virtually every stage of the process is under federal control," and that "the Department [of the Interior] exercises comparable control over grants of rights-of-way on Indian lands held in trust." Id. at 222-23. The Court further observed that "the language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship." Id. at 224.

* * *

On this appeal, the government urges that the Mitchell cases, read together, impose a fiduciary obligation only when the pertinent statute or other authorizing document creating the trust relationship also directs the United States to manage the trust corpus for the benefit of the beneficiaries, i.e., the Native Americans. It is undisputed that the 1960 Act contains no such requirement, and the government

accordingly argues that the statute cannot serve as a basis for the imposition of fiduciary obligations on the United States. We do not agree.

To be sure, Mitchell II, which found a fiduciary obligation, involved a situation where the government not only controlled the trust corpus, but also had an obligation to manage it for the benefit of the Indians. But the language of Mitchell II makes quite clear that control alone is sufficient to create a fiduciary relationship.

* * *

In the present case, the 1960 Act authorizes the government to use the Tribe's trust property for governmental purposes. Pub. L. No. 86-392, 74 Stat. 8 (1960) (creating trust "subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes . . . ."). We think that, to the extent that the government has actively used any part of the Tribe's trust property, and has done so in a manner where its control over the buildings it occupies is essentially exclusive, the portions of the property that have been so used can no longer be classified as being held in merely a "bare trust" under Mitchell I. Rather, the government's decision to use such trust property for its own purposes carries a responsibility to act as a fiduciary. Although neither the 1960 Act nor any pertinent regulation sets forth clear guidelines as to how the government must manage the trust property, we think it is reasonable to infer that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee...

* * *

To the extent that the federal government has, indeed, used buildings to the exclusion of the Tribe, we think the federal government does owe a fiduciary duty. Where such use and control was absent, the government owes no such duty. On remand the Court of Federal Claims must determine which portions of the trust property were under exclusive United States control and thus the subject of a fiduciary obligation.[3]

V

We must next determine whether the complaint here states a claim enforceable in a present suit for money damages with respect to the property controlled by the United States. It is undisputed that the 1960 Act does not explicitly define the government's obligations. Once we have determined that a fiduciary obligation exists by virtue of the governing statute or regulations, it is well established that we then look to the common law of trusts, particularly as reflected in the Restatement (Second) of Trusts, for assistance in defining the nature of that obligation...

Under the common law of trusts, it is indisputable that a trustee has an affirmative duty to act reasonably to preserve the trust property. As the Restatement makes clear, "the trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." Restatement (Second) of Trusts § 176 (1959). Comment (b) to this provision makes clear that this obligation extends to the protection of the trust property from loss or damage: "It is the duty of the trustee to use reasonable care

[3] If any of the buildings was constructed after the creation of the trust in 1960, the government's obligation with respect to those buildings may be quite different.

to protect the trust property from loss or damage."

* * *

While we look to the law of trusts for the general principles that govern the obligations of the United States as trustee, in each case we must also examine the particular statute, treaty, "or other fundamental document," Mitchell II, 463 U.S. at 225, that creates the trust relationship in order to determine the nature of that relationship and whether the general law of trusts has been altered in any particular way, either by the imposition of additional obligations or by the modification of existing obligations. Here, we believe that the 1960 Act establishes several important principles.

First, the right of the United States to use the trust property is expressly limited to use for "administrative or school purposes." Pub. L. No. 86-392, 74 Stat. 8 (1960)...

Second, the reasonableness of the government's actions are to be measured by the potential loss of economic value to the Tribe unless the Tribe can establish that the United States, when it passed the 1960 Act, undertook an obligation to maintain the property for other purposes...

Third, the obligation of the United States to maintain the property for eventual transfer to the Tribe must be defined in light of the anticipated duration of the United States' use of the trust property at the time the 1960 Act was passed; the possible need of the United States to modify or demolish existing structures in order to make use of the property during the period of United States occupancy; and the economic value of the property at the time of the alleged breach...

Finally, in addition to an obligation to maintain and repair the property, the United States may be obligated to restore the property upon transfer to the Tribe if the United States has violated its maintenance obligations during the term of the trust or if it has (properly) modified the property to suit its own needs during the term of the trust...

* * *

VII

We conclude that the 1960 Act creates an enforceable fiduciary relationship between the United States and the Tribe, the breach of which may give rise to a cognizable claim for money damages. On remand, however, the Court of Federal Claims may determine that the suit is premature as to buildings that the United States continues to use for administrative or school purposes. See note 15, supra. On remand, the Court of Federal Claims must further determine which portions of the property were under United States control. Even as to the property that was so controlled, we recognize that the existence of this "general fiduciary relationship does not mean that any and every claim . . . necessarily states a proper claim for breach of the trust a claim which must be fully tried" in the Court of Federal Claims. Pawnee v. United States, 830 F.2d 187, 191 (Fed. Cir. 1987), cert. denied, 486 U.S. 1032, 100 L. Ed. 2d 602, 108 S. Ct. 2014 (1988). The merits of the Tribe's claim will be accordingly determined on remand in the light of this decision.

* * *

MAYER, Chief Judge, dissenting:

* * *

In this case, the 1960 Act, which created the trust, reserved to the government the right to use any part of the land and improvements for administrative or school purposes for as long as they are needed for those purposes. This provision limits the government's obligation to the Tribe and creates a bare trust relationship similar to the General Allotment Act considered in Mitchell I...

* * *

The government argued that the Tribe's future interest was contingent and that the common law of property as reflected in sections 188, 189, and 195 of the Restatement (First) of the Law of Property bars the Tribe's claim for monetary damages. The court does not disagree that money damages would be barred if the Tribe's future interest were contingent; it merely asserts that it is not. Therein lies the error. As the court said,

Section 188 provides: "When a present estate for life precedes a future interest in fee simple which is subject to a condition precedent, or which is vested but defeasible either in whole or in part upon an event the occurrence of which is not improbable, then the owner of such future interest, in a judicial proceeding brought solely in his behalf, cannot recover damages immediately payable to himself for any act or omission of the owner of the estate for life." Restatement (First) of Law of Property § 188 (1936).

White Mountain Apache Tribe, ante at 24 n.14. The court goes on to note that there must be an uncertainty as to the future interest for this rule to apply, and makes the conclusory statement that there is "no 'uncertainty as to the future interest' of the Tribe in the trust property." Id. Contrary to this assertion, there is a condition precedent to the vesting of the Tribe's future interest, namely that the government no longer needs to use the property for school or administrative purposes. Until the Secretary of the Interior determines that the property is no longer needed for school or administrative purposes, the condition precedent will not occur, and the Tribe's interest will not vest. Because there is nothing in the 1960 Act that prevents the government from continuing to use the property for school or administrative purposes indefinitely, there is no guarantee that the condition precedent will ever be met and the Tribe's future interest will ever vest. This precludes its claim for money damages and is an independent ground on which to affirm the judgment of the Court of Federal Claims.

Ruling Below: (Navajo Nation v. United States, Fed. Cir., 263 F.3d 1325; 2001 U.S. App. Lexis 18190, 150 Oil & Gas Rep. 28, 32 ELR 20028)

The court held that it could not be reasonably disputed that the United States breached its fiduciary duties to the tribe, since the United States' actions were clearly in the mining company's interest and contrary to the tribe's interest. Further, by statute the United States was granted the pervasive authorization, supervision, and control of the tribe's mineral leasing activities, and the United States thus had an obligation to maximize the benefit to the tribe. Therefore, a trust relationship existed between the United States and the tribe, and monetary damages were available for the United States' breach of trust.

Question Presented: Whether the United States had a fiduciary duty under a 1960 Act of Congress, Pub. L. No. 86-392, 74 Stat. 8 (1960) to maintain or restore certain property held by the United States in trust for the Navajo Nation, and whether the United States breached that fiduciary duty by urging the tribe to renegotiate the lease of tribal lands to a coal mining company, resulting in a low royalty rate, when a higher rate had already been upheld by the government?

NAVAJO NATION, Plaintiff-Appellant,
v.
UNITED STATES, Defendant-Appellee.

United States Court of Appeals
For the Federal Circuit

Decided August 10, 2001.

NEWMAN, Circuit Judge.

The Navajo Nation appeals the decision of the United States Court of Federal Claims, dismissing its complaint against the United States for breach of trust and breach of contract. The court ruled that although the United States had breached its fiduciary obligations to the Navajo Nation, this breach was not actionable because the United States did not have a trust relationship with the Navajo Nation and monetary relief was not available. However, a trust relationship indeed existed and exists with the Navajo Nation, and monetary damages are an available remedy for breach of this trust.

BACKGROUND

The United States, through the Secretary of the Interior and the Interior Department's Bureau of Indian Affairs (BIA), supervises and regulates the development and sale of mineral resources on Indian reservation lands, pursuant to the Indian Mineral Leasing Act of 1938, 25 U.S.C. § 396 *et seq.*, the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108, and implementing regulations.

In 1964 the Navajo Nation entered into a lease agreement with the Sentry Royalty Company (predecessor in interest to the Peabody Coal Company) for the mining of coal deposits on Navajo lands. The agreement provided for payment of a

royalty not to exceed 37.5 cents per ton, and authorized the Secretary of the Interior or his delegate to readjust the royalty rate to a "reasonable" level on the twentieth anniversary of the lease. As that anniversary approached, due to increases in the market price of coal the rate of 37.5 cents per ton was equivalent to about 2% of gross proceeds. It is not disputed that this was well below then-prevailing royalty rates.

Negotiations proceeded between the Navajo and Peabody. No agreement was reached, and the Navajo asked the Department of the Interior to resolve the issue, in accordance with statute, and to set the royalty at a fair market rate. The BIA Area Real Property Management Officer issued an Initial Decision to increase the royalty rate to 20%, based on an analysis by the Bureau of Mines. The BIA's Navajo Area Director adopted this decision, and so notified Peabody. Peabody appealed to the Deputy Assistant Secretary for Indian Affairs John Fritz, acting as both Commissioner of Indian Affairs and the Assistant ecretary for Indian Affairs, an appellate path provided by the regulations. See 25 C.F.R. §§ 2, 3. The Deputy Assistant Secretary for Indian Affairs considered the matter and reached a decision affirming the 20% rate. However, this decision was withdrawn at the instruction of the Secretary of the Interior. The Appendix to the decision of the Court of Federal Claims contains a memorandum from Secretary Hodel to John Fritz, Deputy Assistant Secretary for Indian Affairs, stating "I suggest that you inform the involved parties that a decision on this appeal is not imminent and urge them to continue with efforts to resolve this matter in a mutually agreeable fashion." 46 Fed. Cl. at 237. Mr. Fritz complied with this instruction.

The record before the Court of Federal Claims reports numerous contacts during this period, on behalf of Peabody, with Interior officials including the Secretary. The Navajo were not told that a decision on Peabody's appeal had been made in their favor. Facing severe economic pressures, the Navajo eventually agreed to a royalty rate of 12.5%.

It can not be reasonably disputed that the Secretary's actions were in Peabody's interest and contrary to the Navajo's interest. The Court of Federal Claims found that the government's actions "violated the most fundamental fiduciary duties of care, loyalty and candor." 46 Fed. Cl. at 227. However, the court also held that there was no trust relationship between the agency and the Navajo with respect to these events, and thus that no monetary relief was available.

DISCUSSION

The Fiduciary Relationship

* * *

The fiduciary relationship between the United States and the Indian tribes is manifested in various ways. For example, with respect to Indian reservation lands, precedent recognizes a distinction between the laws whereby the United States has only a limited trust relationship with the Indian tribes who occupy the land, and the laws giving rise to a full fiduciary duty toward the Indians. The difference lies in the level of control the United States exercises in its management of the land and its resources for the benefit of the Indians. When the United States controls the Indian resources, the duty is that of a fiduciary; when the Indians control their own resources, the

duty of the United States is lessened appropriately.

* * *

The Indian Mineral Leasing Act and its regulations are similar to those governing timber resources that were the subject of Mitchell II, insofar as federal authority is retained. The Mineral Leasing Act starts with the provision that no mining lease may be entered unless approved by the Secretary of the Interior.

* * *

The statute and its implementing regulations give the Secretary the final authority on all matters of any significance in the leasing of Indian lands for mineral development. The statute assigns to the Secretary the broad and unqualified obligation to "protect[] the interests of the Indians," and includes the power to "perform any and all acts and to make such rules and regulations not inconsistent with this section as may be necessary and proper for the protection of the interests of the Indians and for the purpose of carrying the provisions of this section into full force and effect." 25 U.S.C. § 399. Thus the statute explicitly requires that the Secretary must act in the best interests of the Indian tribes.

* * *

The statutory purpose is to protect the natural resources of the Indians and manage them in a manner that maximizes their benefit to the Indians. The Court has consistently resolved ambiguity in favor of the Indian tribes.

* * *

In addition to violation of common law fiduciary duties, the Secretary also violated statutory fiduciary duties, in acting to benefit Peabody to the detriment of the Navajo. By suppressing the royalty decision of Interior's Deputy Assistant Secretary for Indian Affairs the Secretary acted in direct contravention of the Act's charge to the Secretary to obtain for the Indians the maximum return for their minerals. In failing to act in the best interests of the Navajo, the government violated its fiduciary responsibilities. Although the government argued, at the hearing of this appeal, that the Secretary's actions were justified in that they reflected a balance of national interests, it is hornbook law that a trustee's competing interests do not excuse a breach of fiduciary duty.

* * *

SCHALL, Circuit Judge, concurring-in-part and dissenting-in-part:

* * *

I agree with the majority that IMLA and the regulations at 25 C.F.R. part 211 create a scheme under which the government plays a major role in mineral leasing on Indian land and that, therefore, there exists a general fiduciary relationship between the Nation and the government regarding coal leases, such as the 1964 Lease at issue here.

It is at this point, however, that I part company with the majority. A court first must decide whether a general fiduciary relationship exists in a particular area between Indians and the government. Then, it must determine whether, in the context of that relationship, the government has breached any specific fiduciary responsibilities. It makes this determination by considering the government conduct at issue in light of the requirements of the statutes and

regulations that create the general fiduciary relationship in the first place... In this case, the majority properly undertakes the first step of the analysis but not the second. After concluding that a general fiduciary relationship exists between the government and Indians with respect to the mining of coal on Indian lands, the majority, focusing exclusively on Secretary Hodel's actions relating to BIA's royalty decision, fails to properly conduct the required second step of the analysis. I believe the majority errs in two respects: first, it fails to find a breach of a specific fiduciary responsibility that falls within the scope of the statutes and regulations that establish the general fiduciary relationship; second, it only considers one aspect (Secretary Hodel's actions relating to BIA's royalty decision) of the overall government conduct that is at issue.

IV.

In my view, the only government action in this case that implicated a specific fiduciary responsibility to the Nation was DOI's approval of the Agreement. The Nation and Peabody submitted the Agreement to DOI for review. DOI indicated, in an internal report, that it was reviewing the Agreement pursuant to DOI's powers of lease approval under 25 U.S.C. § 396a and the regulations under 25 C.F.R. part 211, sources of law that establish a fiduciary relationship between the Nation and the government. Thereafter, when DOI approved the Agreement, it invoked its approval powers under 25 U.S.C. § 396a and 25 C.F.R. § 211.2, both of which subject the leasing of mineral rights on Indian land to DOI approval. The government's obligation under 25 U.S.C. § 396a and 25 C.F.R. § 211.2 is to either approve, or disapprove, a lease, or lease amendment, and since this obligation falls within "the contours of the United States' fiduciary responsibilities," Mitchell II, 463 U.S. at 224, the government must make its approval decision with the reasonable care and skill demanded of a trustee, White Mountain Apache Tribe, 249 F.3d at 1378-79. It is undisputed that, when deciding whether to approve the amendment of the 1964 Lease, DOI failed to perform any economic analysis regarding the lease amendments. In my view, this failure constituted a breach of a fiduciary obligation owed to the Nation... I do not believe, however, that any of the other breaches that are alleged by the Nation implicate a fiduciary obligation on the part of the government so as to give rise to a claim for monetary damages against the United States.

Initially, the Nation alleges general violations of the common trust obligations of care, candor, and loyalty. In making this allegation, the Nation points to the ex parte communications between Secretary Hodel and Peabody and DOI's failure to secure a 20% royalty rate. While these duties, based on the common law of trust, are relevant to determining the government's obligations, White Mountain Apache Tribe, 249 F.3d at 1377-78, the scope and extent to which these obligations apply to governmental action is governed by the statutes and regulations that create the fiduciary relationship, id. at 1380. See also Mitchell II, 463 U.S. at 224; Brown, 86 F.3d at 1563. The Nation must explain how DOI's actions, which may demonstrate disloyalty to the Nation in a vacuum, fall within the boundaries of a specific fiduciary obligation. That it has not done.

The Nation also alleges violations based on internal agency policy, expressed in BIA Manuals, 54 BIAM § 604.5 for example, and DOI manuals, 130 DM 10.5 for example. Neither of these manuals, or

general agency policy, can support a claim for monetary damages because a substantive right to monetary relief must be found "in some . . . source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department. '" Mitchell II, 463 U.S. at 216 (citing 28 U.S.C. § 1491). The Nation fails to show how these manuals "can be fairly interpreted to create a substantive right to monetary compensation from the United States," Hamlet v. United States, 63 F.3d 1097, 1102 (Fed. Cir. 1995).

* * *

I would remand the case to the Court of Federal Claims for the limited purpose of determining what damages, if any, the Nation suffered as the results [of the DOI's failure to perform an economic analysis on the Agreement between Peabody and the Nation]. Otherwise, I would, in all respects, affirm the decision of the Court of Federal Claims.

For the foregoing reasons, I respectfully concur-in-part and dissent-in-part.

Supreme Court Agrees to Consider Damage Awards to Navajo Nation

Associated Press

June 3, 2002

The Supreme Court agreed Monday to consider the government's case in a $600 million contract disagreement with the Navajo Nation.

Justices will decide if an appeals court wrongly opened the government to liability from the Navajo Nation -- and potentially many other tribal governments in future cases.

At issue is whether a federal agency failed to protect the tribe's interest in mining leases on reservation land and must pay for it.

The Navajo claim that former Interior Secretary Donald Hodel secretly conspired with Peabody Coal Co. to undermine tribal contract negotiations with the company in the 1980s. The tribe leases mining rights to Peabody for two strip mines -- the Black Mesa Mine and the Kayenta Mine -- in northeastern Arizona.

"Any Indian tribe that believes, with the benefit of hindsight, that it could have negotiated a better mineral lease deal may seek to obtain damages," Solicitor General Theodore Olson told justices in court papers. "At a minimum, such a development will subject the United States to costly litigation over such matters."

Paul E. Frye, attorney for the tribe, said the government instead of protecting Indians from unfair transactions as the law requires actively worked to hurt the tribe.

The Federal Circuit Court of Appeals ordered a lower court to award damages. The Navajo are seeking $600 million.

The Supreme Court will consider the case along with another tribal case in the term that begins in the fall. The court announced in April that it would decide if the government can be sued for allowing buildings on Indian land to fall into disrepair.

The cases are United States v. Navajo Nation, 01-1375, and United States v. White Mountain Apache Tribe, 01-1067.

Court to Rule on Indian Buildings' Repair

The Seattle Times

April 23, 2002

The Associated Press

The Supreme Court said yesterday it would decide if the government can be sued for allowing buildings on Indian land to fall into disrepair.

The decision could be far-reaching, because the United States has millions of acres in trust for Indian tribes. Justices will review a case involving the White Mountain Apache Tribe, which wants the government to spend $14 million repairing buildings at Fort Apache in Arizona.

The Bush administration argues that the government never promised to keep up the buildings.

Fort Apache was built by the Army in 1870. Since 1960, the Interior Department has controlled the land, which includes a school and more than 30 other buildings. Some of the buildings have been condemned.

The United States Court of Appeals for the Federal Circuit said the government could be sued for breach of trust under the 1960 law that put the land under the Interior Department.

Solicitor General Theodore Olson told the Supreme Court that the government's protection from "money damages is a matter of bedrock importance."

"The broad reasoning of the court of appeals could subject the United States to large money-damages claims in Indian breach-of-trust litigation," Olson wrote in the government filing.

The case is United States v. White Mountain Apache Tribe, 01-1067.

Bush Wants Navajo Ruling Reversed

truthout

March 27, 2002

The Bush administration has asked the Supreme Court to overturn a landmark $600 million trust fund claim won by the Navajo Nation for fear other tribes will file similar challenges.

Charging that "significant" resources are at stake, the Department of Justice this month called on the nation's highest court to throw out an August 2001 ruling made in the tribe's favor. Unless the lower decision is reversed, the Bush administration says the government could face "adverse consequences."

"The decision below will encourage the filing of damages claims against the United States for breach of trust," Solicitor General Ted Olson writes in his March 15 brief. "At a minimum, such a development will subject the United States to costly litigation."

At issue are Navajo tribal leases with Peabody Coal, which has mined Navajo and Hopi lands since the 1960s. All sides in the dispute, including the Department of Interior, agree a 12.5 percent royalty rate contained in the agreements is far below accepted market value for the coal.

But the Bush administration disputes the notion that it has a trust responsibility to ensure better returns. The Navajo Nation cannot point to any specific law which imposes such a higher duty, Olson claims.

In arguing the case in the lower courts, the tribe has countered that underhanded dealings of the Reagan administration show the government has violated its obligations. Specifically, the tribe points out then-Secretary Paul Hodel in 1985 held secret meetings with a Peabody lobbyist, Stanley Hulett, who happened to be a personal friend.

Without knowledge of the discussions, the tribe was subsequently encouraged to work with the company to come to a resolution. Additionally, it was never disclosed that the Bureau of Indian Affairs approved more favorable 37.5 percent rate after a standard internal appeals process.

As a result of the "suppressing and concealing" by government officials, the tribe was forced to accept the lower rate "facing economic pressure," wrote the Federal Circuit Court of Appeals in a 2-1 decision. The appeals panel said a lower court must determine exactly how much the tribe is owed.

A dissenting voice, however, said the tribe could only be awarded limited damages. Unlike Olson, all three judges agreed a trust relationship existed but U.S. District Judge Lawrence M. Baskir said it doesn't "mandate monetary relief."

Coupled with a case involving the White Mountain Apache Tribe, the request for the Supreme Court's intervention represents the Bush administration's attempt clarify what it considers the federal circuit's departure from trust law. The appeals court has issued decisions which could force payouts in addition to the Cobell class action affecting individual Indians.

For the Navajo Nation, the case has represented victory after nearly a decade of litigation, including an initial negative decision by a federal judge. With the presence of former Reagan appointees, including Ross Swimmer and Deputy Secretary J. Steven Griles, in the current administration, the dispute has gained added fire among tribal officials who have vehemently opposed Secretary Gale Norton's proposal to reorganize Indian trust duties.

The Navajo Nation's attorney will be filing a response, due April 18, to the government's petition for writ of certiorari.

[truthout is an alternative online newsletter and website, available at http://www.truthout.org.]

Navajo Lawsuits Contend U.S. Government Failed the Tribe in Mining Royalty Deals

The New York Times

July 18, 1999

Barry Meier

John W. Fritz, an Interior Department official during the Reagan Administration, has long wondered why his decision to sharply increase the coal mining fees paid to the Navajo Indians was blocked.

He may now have his answer. On the eve of his 1985 ruling, the Peabody Coal Company started a high-stakes lobbying effort aimed at his boss, Donald P. Hodel, then Secretary of the Interior, papers recently filed in a Federal court in Washington show. Company lawyers even drafted a memo, issued by Mr. Hodel, that told Mr. Fritz to withhold his ruling, those records indicate. "All of sudden I got this thing flat out of the blue," said Mr. Fritz, who now works in Wazata, Minn., as a consultant to Indian tribes. "It was the first time we had ever been specifically instructed not to go ahead with the decision-making process."

Mr. Fritz's stillborn decision is at the heart of two legal actions brought by the Navajos, including a civil lawsuit disclosed last month against Peabody Group, the parent of Peabody Coal, and others. That action claims that Peabody Coal and two utilities unfairly influenced Federal officials to derail Mr. Fritz's report, a decision the tribe says cost it $600 million in lost mining royalties.

Businesses and interest groups lobby Federal officials all the time and the Government, the Peabody Group and the two utilities, the Southern California Edison Company and the Salt River Project, said they did nothing wrong.

For his part, Mr. Hodel, now an energy consultant in Longmont, Colo., said he did not recall the Navajo coal episode but that he had always acted in the best interest of the tribes.

The Navajo lawsuit, like several other actions brought by tribes in recent years, accuses the Interior Department and the Bureau of Indian Affairs of failing to fulfill their mandate to act as trustees to get tribes the best possible return on valuable assets like natural resources and land leases. In 1993, the Navajos sued the Government in the United States Court of Federal Claims in Washington, claiming that it had breached that trust in dealing with the same lease at issue in the Peabody Coal case.

Typically, the Government's role is limited to approving leases negotiated between tribes and mining companies. In the case of the Navajos' Peabody Coal lease, however, a provision in the original 1964 contract allowed the Government to adjust the royalty rate after 20 years.

Whether the Government or the companies named in the latest lawsuit owe the Navajos anything remains to be decided. But documents disclosed as part of the suit against the Government and Peabody Coal offer a picture of corporate efforts to sway Interior Department

officials, whose principal duty is supposed to be Indian welfare, not company profits.

On Friday, lawyers for the Peabody Group filed a motion in the Court of Federal Claims accusing the Navajos of improperly disclosing company documents as part of the tribe's lawsuit against the coal producer. The lawyers asked the court for sanctions against the tribe and its lawyers and to dismiss the Navajo claim against the company. Steven J. Bloxham, assistant attorney general for the Navajo Department of Justice, said he had not had the opportunity to review the Peabody filing and so could not comment on it.

Robert A. Williams, a law professor at the University of Arizona in Tucson, said lawsuits like the one brought by the Navajos against Peabody Coal reflect a belief by tribes that the Government allowed companies to harvest their natural resources at rock-bottom rates.

"Indian tribes have their lawyers looking at decades of mismanagement, and there is a gold mine in Government accountability," Mr. Williams said.

In perhaps the most sweeping case, a Federal judge in Washington ruled last month that a class-action lawsuit brought on behalf of 300,000 Indians nationwide could go forward against the Interior Department. That lawsuit charges that the Government failed to properly manage trust accounts for decades containing billions of dollars due those individuals from land lease payments and natural resource royalties.

Robert A. Porter, a law professor at the University of Kansas in Lawrence, said the Indian suits have had a mixed record of success.

Since 1964, Peabody Coal has operated the Black Mesa and Kayenta mines on Navajo and Hopi lands in northeastern Arizona. Peabody Group, the nation's largest coal mining company, is owned by Lehman Merchant Banking Partners II Fund and operates 35 coal mines worldwide. The Hopi tribe had a separate lease and is not involved in the lawsuit.

Vic Svec, a spokesman for Peabody Group, said the mining company had dealt fairly with the Navajo tribe, paying it standard fees. Mr. Svec added that the company did nothing wrong when it presented its case to Mr. Hodel.

"We believe it is the fundamental right of every person and organization to petition their Government and that is what we were doing," Mr. Svec said.

One 1985 document written by a Peabody Coal lawyer reveals executives' concerns that their efforts to lobby Mr. Hodel while the royalty issue was under review might run afoul of complex Government rules that limit undisclosed contacts between Federal officials and parties to a dispute. But the company, the document shows, decided to forge ahead and hired Stanley W. Hulett, a former Interior Department official and a longtime friend of Mr. Hodel's, to lobby the Secretary.

That memo also indicates that two company lawyers "drafted in large part" the directive sent by Mr. Hodel to Mr. Fritz instructing him to withhold his decision so that Peabody Coal and the Navajos could negotiate a new deal.

"I have been informed that that memo was delivered to Mr. Fritz's office," a company lawyer, Edward L. Sullivan, stated in the document.

Mr. Fritz's ruling would have been the Government's position on the royalty issue, though the companies could have challenged it in court. It would have upheld an earlier Bureau of Indian Affairs finding that the Navajos should receive a 20 percent royalty on coal profits. Instead, the tribe negotiated a 12.5 percent fee with the mining company in 1987.

In their suit, the Navajos contend that they did not know why Mr. Fritz's decision was never issued, and argue that they would have received more money if it had been. The $600 million they are seeking from the Government and the corporate defendants represents the difference between a 20 percent royalty rate from mining operations since 1984 and the 12.5 percent rate they collected.

"The Navajo Nation knew nothing about what was going on on the other side of the table," said Kelsey A. Begaye, president of the Navajo Nation.

Mr. Hulett, the lobbyist, said neither he nor Peabody Coal did anything wrong.

"What they wanted to do was negotiate a deal with the tribe without the interference of the Bureau of Indian Affairs or Washington," said Mr. Hulett, now an energy consultant in San Francisco.

He added that Mr. Fritz, who was then the Interior Department's deputy assistant secretary for Indian affairs, had to know that the coal company was lobbying Mr. Hodel because he had told him.

Mr. Fritz said that while he might have known about Mr. Hulett's efforts, he had no idea that the company had a hand in Mr. Hodel's directive. "For years, everyone was denying that they had anything to do with it," he said.

The roots of the Navajo royalty dispute stretch back to at least 1984 when the Navajos and Peabody Coal were renegotiating the 1964 lease. Under that agreement, the Navajos, who derive about 25 percent of their income from coal, received a fee of 20 cents to 37.5 cents a ton, an amount that equaled a 2 percent royalty over the life of the term, according to court papers.

That was far lower than the 12.5 percent fee that the Government had established in the mid-1970's as the minimum royalty for mining on both Federal and Indian lands. In the early 1980's, court papers indicate, the Navajos and Peabody Coal tried to strike a new deal, but the talks broke down.

In 1984, an Interior Department official reported that the delay was costing the Navajos, one of the nation's largest and poorest tribes, $50,000 daily in lost royalties. Based on a Bureau of Mines report, a regional director for the Bureau of Indian Affairs concluded that same year that Peabody Coal could pay a 20 percent royalty to the Navajos and still turn a sizable profit.

The mining company and the two utilities that use its coal to generate power, Southern California Edison and the Salt River Project, appealed the finding, saying that a 20 percent fee would make mining unprofitable and sharply increase electricity costs to consumers in Los Angeles, Las Vegas, Nev., and Phoenix.

In a letter, Mr. Fritz urged Peabody Coal to submit financial data supporting its position, and a copy of the letter soon made its way to Southern California Edison.

"Perhaps I misjudge the tone of the letter," an outside lawyer for Southern

California Edison wrote to the utility in 1985, "but I think that the train is coming down the track and the department is preparing to support the decision of the area director."

By July 1985, Mr. Fritz's office had prepared draft documents upholding the 20 percent ruling, court papers show. "I was frankly just waiting for odds and ends," Mr. Fritz said.

Both the companies and the Navajos were aware that Mr. Fritz's ruling was imminent and would favor the tribe, court documents indicate. But by then, the mining company had also begun to lobby Mr. Hodel, urging that the royalties be negotiated by the company and the tribe.

Mr. Hulett met privately with the Interior Secretary, who soon signed the memo apparently drafted by the coal company lawyers. It instructed Mr. Fritz "not to make an untimely decision" so the Navajos and the Peabody Coal would negotiate, documents show.

Navajo lawyers say that while they take exception to Mr. Hodel's actions, they have found nothing to suggest that he benefited personally.

"I was acutely aware of the trust responsibility that I had," Mr. Hodel, who until recently headed the Christian Coalition, said in an interview.

Mr. Fritz, who reported to Mr. Hodel, said the memo effectively put the matter into his boss's hands, and that is where it stayed. The Navajos said that they were unaware that Mr. Fritz's decision had been put on hold.
The Interior Department would maintain that position for two years, though court papers indicate that Navajo officials were told in 1985 that Mr. Hodel wanted them to negotiate a deal with Peabody Coal. They finally did so in 1987.

Mr. Begaye said the Navajos accepted the deal because they were losing millions of dollars since they were still collecting a 2 percent royalty. Mr. Svec, the Peabody Group spokesman, said the new deal for 12.5 percent, which was retroactive to 1984, was consistent with the industry standard and that the tribe agreed to the same rate in negotiations last year. He also said that the tribe in the mid-1980's had plenty of advocates to press its case with Federal officials.

"If anyone was the outsider in this case," he said, "it was us."

Others may not be so sure. At a May hearing in the Government case, the presiding Federal judge, Lawrence M. Baskir, said he was disturbed by the undisclosed 1985 meeting between Mr. Hulett and Mr. Hodel and its potential to "infect" the Secretary's "fiduciary decision."

A Justice Department lawyer, R. Anthony Rodgers, said at that hearing that the meeting and the memo that followed may have meant little for the eventual outcome of the royalty issue. Mr. Hodel might have made the same decision without Mr. Hulett's lobbying, the lawyer said. But Mr. Rodgers also indicated that he would have preferred that the meeting never occurred.

"It is not a practice that should be encouraged," he said.

Fort Apache History

White Mountain Apache Tribe

In 1869 *Brevet Col. John Green* marched from Fort Thomas with a small expeditionary force. He was given authority to destroy village crops, food stock and people. He burned more than 100 acres of corn. Yet the White Mountain Apache remained friendly. This is not what he expected. Instead of hostility, Green found a peaceful tribe living on their ancestral lands. Because of the abundance of timber, water game and farm land, Green recommended a fort be built at the confluence of the *North and East forks of the Whiteriver*

Col. John Green recommended the reservation incorporate lands occupied by the White Mountain Apache, and Carrizo bands and also, incorporate a four company army post to protect peaceful Apaches from involvement with hostile bands and the invasion of the white men looking for mineral deposits, timbers and arable land.

1870-1886 Apache War

On May 16, 1870 an army post was established by the 1st Cavalry near the present town of Whiteriver. The post was named Camp Ord. August 1, 1870 the name was changed to Camp Mogollon, then to Camp Thomas.

In 1871, *Lt. Col. George Crook* was assigned to command the Department of Arizona. On February 2, 1871, the name changed again, to Camp Apache. Captain John G. Bourke arrived at Camp Apache with Lt. Col. George Crook. It was not until April 5, 1879 the post became *Fort Apache.*

In the summer of 1871, Crook enlisted 44 White Mountain and Cibecue Apaches in the army and organized the *Indian Scout.* In 1872 Quarters were primitive, consisting of rows of log "squad" huts and tents.

* * *

1872-1873 Crook's Tonto Basin Campaign.

In 1873 Crook promoted a Brigadier General for his successful campaign.

On February 1, 1877 *Fort Apache Military Reservation* was established by executive order. The original Apache reservation extended roughly from the Gila River to the Mogollon Rim, from Cherry Creek to the New Mexico border.

Geronimo's Return

January 1880 Geronimo returns to San Carlos. In 1881, Indian Agent John Clum initiated the relocation of all Western Apache to the San Carlos Agency. Many Tonto, White Mountain, Cibecue and Chiricahua Apaches were forcibly moved to San Carlos where they lived under concentration camp conditions.

August 30 , 1881 *Battle of Cibecue.* Military authorities ordered the Cavalry to arrest a medicine man named Noch-Ay-del-Klinne whom white settlers had accused of "stirring up unrest". In the *Battle of Cibecue* that followed the arrest, the medicine man, some of his followers and eight troopers were killed. Seeking retribution, mounted Apache warriors attacked Fort Apache, but were driven back. It was the only instance of the Fort

being attacked. July 17, 1882 *Battle of Big Dry Wash.*

March 1884, Geronimo surrenders, is sent to Turkey Creek near Fort Apache. On May 17, 1885 - Geronimo, Naches, Chihuahua, Nana, Mangus and about 40 warriors and 90 women and children bolt from Fort Apache. On March 25, 1886 At Canon de los Embudos, General Crook confers with Geronimo.

March 27, 1886 Geronimo surrenders. It is said on March 28, 1886 Geronimo got drunk and changed his mind about surrendering.

On April 1, 1886 *General Crook is reassigned.* Brigadier General Nelson A. Miles replaces Crook. September 4, 1886 Geronimo surrenders to General Miles at Skeleton Canyon. On September 8, 1886 - Geronimo and his followers are shipped by rail to Florida.

This is The End of the Apache War.

Today visitors may stroll through fort Apache with the aid of a self-guided tour or with an Apache Tribal guide. Over twenty buildings dating from 1870 to the 1930's comprise the 288 acre site. Located on the Fort premises are Ancient artifacts, petroglyphs, the old military cemetery, a recreated Apache village, and the Apache Cultural Center and Museum.

Available at:
http://www.wmat.nsn.us/wmahistory.shtml

01-1120 Meyer v. Holley

Ruling Below: (Holley v. Crank, 9th Cir. 258 F.3d 1127, 2001 U.S. App. Lexis 17031, 2001 Cal. Daily Op. Service 6433, 2001 Daily Journal DAR 7915)

The court held that, as a matter of law, the president of a corporation could be held liable for failure to ensure the corporation's compliance with the Fair Housing Act (FHA) when one of the corporation's agents allegedly violates the FHA.

Question Presented: Whether owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act?

Emma Mary Ellen HOLLEY; David Holley; Michael HOLLEY, a minor; Brooks BAUER, individually and on behalf of the general public, Plaintiffs-Appellants,

v.

DAVID MEYER, individually and in his capacity as President and designated officer/broker of Triad, Inc., et al., Defendant-Appellee.

United States Court of Appeals
For the Ninth Circuit

Decided July 31, 2001

HUG, Circuit Judge:

In this case we must decide whether owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act (FHA). We conclude that they can. Although under general principles of tort law corporate shareholders and officers usually are not held vicariously liable for an employee's action, the criteria for the Fair Housing Act is different as liability is specified for those who direct or control or have the right to direct or control the conduct of another with respect to the sale of or provision of brokerage services to the sale of a dwelling. The decision of the district court is reversed.

BACKGROUND

Emma Mary Ellen Holley is African American, her husband David Holley, is Caucasian and their son, Michael Holley is African American. The Holleys allege that in October 1996, they visited Triad Realty's office in Twenty-Nine Palms, California where they met with Triad agent Grove Crank and inquired about listings for new houses in the range of $ 100,000 to $ 150,000. The Holleys allege that Crank showed them four houses in the area, all above $ 150,000. In mid-November 1996, the Holleys located a home on their own that happened to be listed by Triad. In response to the Holleys' inquiry about the home, Triad agent Terry Stump informed them that the asking price for the house was $ 145,000. The Holleys expressed interest in purchasing the home and offered to pay the asking price and to put $ 5,000 in escrow for the builder to hold the house until April or May 1997 when they closed escrow on their existing home.

Stump told the Holleys that their offer seemed fair, as did the builder, Brooks Bauer, when Mrs. Holley called him with the same offer. Bauer did express, however, that the offer would have to go through Triad. Later, Stump called Mrs. Holley to tell her that more experienced agents in the office, one of whom was later identified as Grove Crank, felt that $ 5,000 was insufficient to get the builder to hold the house for six months. The Holleys decided not to raise their offer and Triad never presented the original offer to Bauer. One week later, Bauer inquired at Triad about the status of the Holleys' offer. Crank then allegedly used racial invectives in referring to the Holleys, telling Bauer that he did not want to deal with those "n -" and called them a "salt and pepper team." The Holleys eventually hired a builder to construct a house for them and Bauer later sold his house for approximately $ 20,000 less than the Holleys had offered.

Bauer and the Holleys filed a complaint on November 14, 1997, alleging that Crank and Triad violated federal and state fair housing laws. They later filed a separate action against David Meyer as officer/broker, president and owner of Triad, covering the same allegations and adding several new claims. The district court consolidated the two cases. The district judge, ruling on a Federal Rule of Civil Procedure 12(b)(6) motion, dismissed all of the claims except the FHA claim, on the grounds that they were barred by the applicable statutes of limitation. Plaintiffs have not appealed this ruling. With regard to the FHA claim, the district court granted the motion to dismiss Meyer in his capacity as an officer of Triad stating that any liability of Meyer as an officer of Triad would attach to Triad in that Plaintiffs have not urged theories that would justify reaching Meyer individually. Meyer than moved for summary judgment on the remaining FHA claim. The district court granted Meyer summary judgment on that claim, finding that, during the relevant time, the real estate license was issued to Triad, with Meyer as the designated corporate officer of Triad. Thus, the district court concluded that Crank's discriminatory acts could be imputed to Triad, but not to Meyer as an individual. The district court entered a Rule 54(b) certification of that judgment as final to allow this appeal, and stayed all remaining proceedings against Triad and Crank.

ANALYSIS

Title VIII of the Civil Rights Act of 1968, commonly known as the Fair Housing Act of 1968 (FHA), broadly prohibits discrimination in housing. 42 U.S.C. § 3601 et seq. An examination of the Act reveals a "broad legislative plan to eliminate all traces of discrimination within the housing field." Marr v. Rife, 503 F.2d 735, 740 (6th Cir. 1974). The FHA itself, however, does not limit or define who can be sued for discriminatory housing practices. The Department of Housing and Urban Development (HUD), the federal agency primarily assigned to implement and administer Title VIII, has developed regulations and guidelines, which this Court affords considerable deference, interpreting when liability attaches under the FHA. See Harris v. Itzhaki, 183 F.3d 1043, 1054 (9th Cir. 1999). Historically, HUD's regulations for administrative complaints have provided, in relevant part:

A complaint may also be filed against any person who directs or controls, or has the right to direct or control, the conduct of another person with respect to any aspect of the sale . . . of dwellings or the provision of brokerage services relating to the sale[]of dwellings if that other person,

acting within the scope of his or her authority as employee or agent of the directing or controlling person, is engaged, has engaged, or is about to engage, in a discriminatory housing practice.

24 C.F.R. § 103.20 (1999)[1] (emphasis added).

* * *

The district court found that as a matter of law Meyer could not be vicariously liable based on his position as president and officer/broker of Triad. We disagree[2] Considering the relevant HUD regulation quoted above, Meyer bears potential liability in his capacity as owner, president, and officer/broker of the corporation [...] While we recognize that holding a corporation and its officers responsible even though the acts of subordinate employees were neither directed nor authorized seems harsh punishment of an otherwise innocent employer, we agree with our sister Circuits in finding that preferable to leaving the burden on the innocent victim who felt the direct harm of the discrimination. See City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, 1096-97 (7th Cir. 1992); Walker v. Crigler, 976 F.2d 900, 904-905 (4th Cir. 1992). The overriding societal priority of the FHA indicates that the owner has the power to control the acts of the agent and so must act to compensate the injured party and to ensure that similar harm will not occur again. When one of two innocent people must suffer, the one whose acts permitted the wrong to occur is the one to bear the burden. See Walker, 976 F.2d at 904.

Meyer's Liability as Sole Owner and Officer of Triad

* * *

The duty to obey the laws relating to racial discrimination under the FHA is non-delegable. Phiffer, 648 F.2d at 552. In Phiffer, this court concluded that the owner of the Proud Parrot Motor Hotel Corporation was liable for the discriminatory conduct of his desk clerk even absent any evidence that the clerk acted under management's instruction. Id. Although Phiffer involved an owner of a motel rather than a real estate corporation, the same rule is compelling here. Triad was directly and immediately involved in the sale of real estate involving the alleged violation. As the real estate agency that allegedly committed the unlawfully discriminatory acts in providing brokerage services for the sale of the property, Triad is connected to the discrimination even more directly than the hotel corporation owner in Phiffer...

In so ruling, we follow the lead of other federal circuit courts. The Seventh Circuit held a realty corporation and its sole shareholder vicariously liable for compensatory damages resulting from individual sales agents' FHA violations even though the sole shareholder had specifically instructed the agents not to discriminate and had not personally joined in any discriminatory acts. Matchmaker,

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[1] The current version of this regulation replaces this language with an apparently more user-friendly provision instructing that a person should notify HUD for assistance in filing a claim if they believe there has been discrimination against them in any activity related to housing because of race, color, religion, national origin, sex, disability, or the presence of children under the age of 18 in a household. 24 C.F. R. § 103.10-20. Absent any indication that HUD intended to narrow liability under the new regulations, we find the previous language instructive regarding the potential scope of liability.

[2] Our decision applies only to vicarious liability for compensatory damages. We do not address vicarious liability for punitive damages as the issue is not before us.

982 F.2d at 1096-98. Noting Walker's policy discussion, the Seventh Circuit agreed with the Fourth Circuit that "'we must hold those who benefit from the sale and rental of property to the public to the specific mandates of anti-discrimination law if the goal of equal housing opportunity is to be reached.'" Id. at 1096 (quoting Walker, 976 F.2d at 905). We also agree with this policy.

Matchmaker concluded that as the sole owner of the corporation, the chief executive officer and the supervisor of the day-to-day operations of the corporation and its agents, the defendant should be personally liable for compensatory damages. 982 F.2d at 1098. We adopt this reasoning and, thus, remand to the district court to allow the Holleys the opportunity to try the issue of Meyer's ownership of Triad at the time of the alleged violations. We agree with the Seventh Circuit that a principal cannot free itself of liability by delegating to an agent the duty not to discriminate. See id. at 1096.[3]

While the evidence does not indicate that Crank acted with the approval or at the direction of Meyer, such a finding is not necessary to hold Meyer liable as the sole owner of Triad for breach of a non-delegable duty to comply with the FHA. See Marr v. Rife, 503 F.2d at 742. If Meyer solely owned the agency, he had at least the authority to control the acts of his salespersons, particularly in light of his position as president and officer/broker of Triad...

Perhaps more so than in his capacity as sole owner of the company, as an officer of the company he actually did direct or control, or had the right to direct or control, the conduct of the salespersons who allegedly discriminated against the Holleys with respect to the sale of real estate. While we recognize that corporate officers and shareholders are generally shielded from personal liability, we agree with the Seventh Circuit that "where common ownership and management exists, corporate formalities must not be rigidly adhered to when inquiry is made of civil rights violations." Matchmaker, 982 F.2d at 1098. Thus, under relevant HUD regulatory history, and because the duty not to discriminate is a non-delegable one, we join other courts in holding that officers can be individually liable for discriminatory acts of corporate employees under their management and control. See e.g., Tropic Seas, 887 F. Supp. at 1365; Northside, 605 F.2d at 1354 (holding president and vice-president of real estate corporation accountable for discriminatory acts of their agents, "whether or not the officers directed or authorized the particular discriminatory acts that occurred").

Our decision recognizes the duty under the FHA as non-delegable, furthering the purposes of the FHA. Moreover, as discussed below, Meyer may have neglected his duties to supervise salespeople in their real estate transactions, which included his responsibility to ensure that they follow federal and state anti-discrimination laws.

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[3] The Sixth Circuit also held that a real estate agency owner should be vicariously liable for compensatory damages resulting from salespersons' FHA violations even though there was no evidence that the agent acted with the approval or at the direction of the owner. The court reasoned that the owner of the agency had at least the power to control the acts of his salespersons. Marr v. Rife, 503 F.2d 735, 742 (6th Cir. 1974).

Meyer's Responsibilities as Designated Officer/Broker of Triad

As designated officer/broker of the company, Meyer was responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees in the performance of acts for which a real estate license is required. Cal. Bus. & Prof. Code § 10159.2(a). Under California law, a real estate broker is required to exercise reasonable supervision over the activities of his or her salespersons, including familiarizing salespersons with the requirements of federal and state laws relating to the prohibition of discrimination. 10 Cal. Code Reg. § 2725(f). His failure to do so also bolsters the contention that he should be held personally liable for unlawful discriminatory acts of Triad's salespersons.

Although federal law governs the issue of agency under the FHA, the California licensing scheme is instructive here in discerning Meyer's supervision and control over Triad sales activity. California law provides that "no acts for which a real estate license is required may be performed for, or in the name of, a corporation" unless the corporation has designated an officer of the corporation to serve as the officer/broker of the company. Cal. Bus. & Prof. Code §§ 10158 & 10211; 10 Cal. Code Reg. § 2740. As a real estate salesperson for Triad, acting under the corporate license, Crank sold real estate under the supervision of the designated officer/broker. Cal. Bus. & Prof. Code § 10159.2(a). Technically, the licensed broker is the corporation, however, as designated broker, under California law, Meyer was personally responsible for this supervision.

The district court interpreted this to mean that Meyer could be personally liable only if Crank operated under a license that Meyer held in his personal capacity rather than as an officer of Triad. Based on the analysis and policy discussed above and the California real estate licensing requirements, we disagree. The designated officer/broker of a real estate corporation in California is responsible for the "supervision and control of the activities conducted on behalf of the corporation by its officers and employees . . . including the supervision of salespersons licensed to the corporation in the performance of acts for which a real estate license is required." Cal. Bus. & Prof. Code § 10159.2(a). The state regulations implementing these real estate licensing laws require that a broker exercise "reasonable supervision" over the activities of salespersons.

* * *

Meyer's undisputed responsibility to supervise Triad's salespersons in real estate transactions places him squarely within HUD's regulatory history allowing complaints against any person who has the right to direct or control the conduct of another in any aspect of the sale of or provision of brokerage services to the sale of a dwelling. See 24 C.F.R. § 103.20 (1999). Meyer argues that this regulation is irrelevant here as it applies to administrative complaints rather than civil actions. The Supreme Court, however, has interpreted the statute authorizing an administrative proceeding and that authorizing the filing of a civil action as providing parallel remedies to the same prospective plaintiffs. Gladstone, 441 U.S. at 105-08. The Court inferred the congressional intent to provide all victims of Title VIII violations two alternative mechanisms to "seek redress: immediate suit in federal district court or a simple, inexpensive, informal conciliation

procedure, to be followed by litigation should conciliation efforts fail." Id. at 104. This judicial interpretation of the two statutes renders the regulation for administrative complaints highly relevant to the instant civil action.

Although the federal courts have declined to allow state law to control rulings on agency for purposes of FHA violations, consideration of the state licensing scheme is appropriate here to determine Meyer's involvement or omissions in the alleged discriminatory acts...[4]

[Meyer's] responsibilities as designated officer/broker under Triad's corporate license, by mandate of state law, required him to direct and control the conduct of Triad salespersons with respect to the sale of homes and the provision of brokerage services relating to the sale of homes. If Meyer was indeed an officer of the corporation and the designated officer/broker of Triad Realty at the time of the alleged conduct, it is difficult to see how he could be excused from the obligation imposed by the FHA to prohibit discrimination in the housing field.

CONCLUSION

In light of the evidence that Meyer was (1) an officer of Triad Realty at the time of the alleged discriminatory acts; (2) the designated broker of the corporation who enabled it to engage in the business of selling real estate; and (3) the sole shareholder of the corporation at the time of the alleged discrimination, we disagree with the district court's conclusion that as a matter of law Meyer cannot be individually liable for damages resulting from the alleged FHA violations. Accordingly, we **reverse** and **remand** this case to the District Court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

[4] Meyer argues that the California real estate licensing law is irrelevant here as California courts have interpreted it as extending a disciplinary scheme rather than creating a private right of action against a designated broker. Appellants here do not attempt to bring a private action under the California statute, rather they argue that the statute is relevant to determining Meyer's responsibilities of supervision in a claim brought under the FHA.

Supreme Court to Hear Real Estate Discrimination Case; Housing: Jurists Will Consider Whether a Firm's Owner May Be Liable for an Agent's Bias

Los Angeles Times

May 21, 2002

David G. Savage and Daryl Strickland

The Supreme Court, taking up an appeal backed by California's real estate industry, agreed Monday to decide whether the owner of a small real estate firm can be forced to pay a damages verdict out of his own pocket if one of his agents discriminates against a prospective buyer or renter.

"What sane individual would take on that responsibility" of owning or managing a real estate business if they are "going to be personally liable for the acts of all of the agents?" asked Douglas G. Benedon, a Woodland Hills attorney, in his appeal to the high court.

He is representing David Meyer, the owner of a now-defunct real estate company that sold homes in the Twentynine Palms area of Southern California. He was sued for racial discrimination after one of his agents allegedly turned away a mixed-race couple and referred to them as a "salt-and-pepper team." The couple, Emma and David Holley, offered $145,000 for a house in October 1996, but the seller's agent, Grover Crank of Triad Realty, never presented the offer. The owner later sold his house for $20,000 less.

The Holleys and the seller joined a race-bias suit against Crank, the Triad firm and its owner and broker, Meyer.

The case has never gone to trial. It reached the Supreme Court on the question of who can be held liable for discrimination under the landmark Fair Housing Act of 1968.

Initially, U.S. District Judge William Matthew Byrne Jr. dismissed Meyer from the case, ruling that the plaintiffs could sue only Crank and Triad.

Since the agent and the company had little in the way of insurance or assets, the lawyers for the bias victims appealed to the U.S. 9th Circuit Court of Appeals. Last year, its judges gave the civil rights law a broad sweep, saying that liability extends to all who "direct or control" real estate sales and rentals.

"Owners and officers of corporations may be held vicariously liable for an employee's violations of the Fair Housing Act," said Judge Procter Hug Jr.

The court said the plaintiffs did not have to prove that Meyer knew of or condoned the alleged discrimination. Instead, they needed to show only that he supervised the agent.

That ruling sent a jolt through the real estate industry, said June Barlow, general counsel for the California Assn. of Realtors, based in Los Angeles.

"We don't have a problem with holding the firm liable. This went beyond that to say the owner can be personally liable, and without any finding of wrongdoing on his part," Barlow said.

The California Realtors group and the Chicago-based National Assn. of Realtors joined Meyer's appeal to the high court. They said the entire real estate industry faced "much upheaval" if the personal assets of "innocent" owners and directors could be put at risk in a lawsuit.

A lawyer for the bias victims said the Realtors groups are exaggerating the effect of the ruling.

"This has been the law for decades. If you are licensed by the state and you are in control [of a real estate operation], with that control comes the responsibility to assure that the agents comply with the law," said Christopher Brancart of Pescadero.

Arguments in Meyer vs. Holley, 01-1120, will be heard in the fall.

Experts in housing discrimination say it is hard to gauge whether blatant bias persists in the real estate industry.

"It's not the norm, but it's not uncommon either," said Raphael Bostic, a professor at USC and an expert on home lending practices. "It wouldn't be a big surprise to come across Realtors and brokers that use this kind of approach, but at the same time a lot of reputable Realtors don't do this."

Marlene Garza, chief executive of the Housing Rights Center, which handles litigation complaints for the city and county of Los Angeles and 28 other cities, said testers continue to see stark disparities in the treatment accorded whites and racial minorities. In a recent test, the group found that a person of color was handed brochures and showed a Web site by brokers at a Pasadena agency, while a white person of similar income and housing needs got a personal tour of neighborhoods.

But lawsuits are relatively rare.

"We don't have a rampant number of [discrimination] cases because a lot of it goes undetected," said Gary Rhoades, litigation director for the Housing Rights Center.

The National Fair Housing Alliance, a Washington group that supports equal housing opportunity, estimated in a study issued last month that only 1% of discrimination by agents is reported.

The outcome in the Supreme Court case could make it harder to combat persistent bias in the sale and rental markets, Garza said.

01-7662: Miller-El, Thomas J. v. Cockrell, Dir. TX DCJ

Ruling Below: (Miller-El v. Johnson, 5th Cir., 261 F.3d 445, 2001 U.S. App. Lexis 17635)

The court denied the requested Certificate of Appealability pursuant to the Antiterrorism and Effective Death Penalty Act and held that petitioner had not made a substantial showing of the denial of a constitutional right. The state court's detailed factual finding established that each of the challenged African-American jurors were stricken on race-neutral grounds. Petitioner failed to generate real, substantial and legitimate doubt concerning his mental competence. Petitioner's association with paramilitary group was supported by the evidence and was probative as an indicator of future dangerousness.

Questions presented: (1) Is the court required to ignore uncontested evidence of a pattern and practice of racial discrimination, and evidence of contemporaneous instances of discrimination, when assessing the genuineness of a prosecutor's proffered race-neutral reason for exercising a peremptory challenge?
(2) Did the court of appeals incorrectly conclude that 28 U.S.C. 2254(d)(2) and 2254(e)(1) require a habeas corpus petitioner to rebut state court determinations of fact by proving them "unreasonable" by "clear and convincing evidence"?

Thomas Joe MILLER-EL, Petitioner-Appellant,
v.
Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee

United States Court of Appeals
For the Fifth Circuit

Decided August 7, 2001

DeMOSS, Circuit Judge:

Petitioner Thomas Joe Miller-El ("Miller-El"), who was convicted of capital murder in Texas state court and who was sentenced to death therefor, and whose petition for habeas corpus relief and request for a Certificate of Appealability ("COA") therefrom were both denied by the federal district court below, now seeks from this Court a COA pursuant to 28 U.S.C. § 2253 (c)(2). For all of the reasons set forth below, we DENY the request for a COA.

I. BACKGROUND

In 1985, Miller-El's wife, Dorothy Miller-El, was employed as a night maid for the lobby area of the Holiday Inn South. She arranged for a religious convention for the Moorish Science Temple's Feast on November 8-10, 1985. Her husband was among the attendees. After the convention, Dorothy did not return to work. Shortly before midnight on November 15, 1985, Dorothy returned to the Holiday Inn claiming that she was there to pick up her paycheck. She was given access to the office area near the vault.

During this time period, four hotel employees were working, Doug Walker, Donald Hall, Anthony Motari, and Mohamed Ali Karimijoji. Hall, the chief auditor, was training Mohamed regarding the hotel's daily closing procedures. Hall instructed Mohamed to close out the cash registers, a process which would take one-half hour. Mohamed encountered a woman who claimed that she needed accompanying while she waited for her ride. Mohamed sent her to the front desk area without leaving the locked area he was in.

At the front desk, a man later identified as Miller-El appeared and requested a room from Hall. Witnesses identified Miller-El from having seen him at the Moorish Feast convention the previous week. A younger man, later identified as Kenneth Flowers and dressed in army fatigues and a headset, peered around the corner as Hall was giving Miller-El his room key, and once spotted by Hall, he also approached the counter. Miller-El told Hall that he would be needing two beds. Seconds later, Miller-El and Flowers pulled out weapons. Miller-El brandished a semi-automatic "tech" nine millimeter machine gun, with a flash suppressor for night use. Flowers had a .45 caliber hand gun.

Hall complied with Miller-El's instructions to empty the cash drawer and place the money on the counter. Miller-El then ordered Hall to bring any other people in the back out front. Hall instructed Walker to come out. Flowers jumped over the counter and the two men instructed Hall and Walker to lay on the floor. The two men led Hall and Walker to the bellman's closet which they ordered opened. Once the two men removed all of the valuables from the closet and took Walker's and Hall's wallets, Miller-El tied Walker's hands behind his back, tied his legs together, and gagged him with strips of fabric. Flowers did the same to Hall. Walker was laid on his face and Hall was laid on his side.

Miler-El asked Flowers if he was going to "do it" and Flowers responded that he couldn't. Flowers then left. Miller-El stood at Walker's feet, removed his glasses and then shot Walker in the back two times. Hall closed his eyes after the first shot. He heard two more shots and realized that he had also been wounded. Hall tried to talk to Walker but only heard him choking. When he heard familiar voices outside, Hall screamed for help.

Several days after the robbery-murder, Officer Cagle was on surveillance of an apartment complex believed to be Dorothy Miller-El's. He spotted Dorothy and Flowers. With the assistance of back-up units, he stopped their vehicle and arrested them both. Search warrants were executed for the residence, and "walkie-talkie" headsets were found. When Miller-El was later arrested, found in his possession was an arsenal of weapons including the "tech" nine millimeter murder weapon.

[Procedural history omitted.]

III. DISCUSSION

Miller-El seeks from this Court a COA on each of the following issues: (1) whether the district court erred in overruling his challenges of improper peremptory juror strikes; (2) whether the state court erred in failing to conduct a *sua sponte* evidentiary hearing regarding his competency to stand trial and in finding that he was competent to stand trial in 1986; (3) whether the district court likewise erred in failing to conduct a hearing regarding his competency; and (4) whether the district court erred finding that his First and Fourteenth Amendment rights were not violated by admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple.

Miller-El's petition for writ of habeas corpus was filed on June 17, 1997, and is thus governed by the provisions of the

Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Lindh v Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 2068, 138 L. Ed. 2d 481 (1997); *United States v Carter*, 117 F.3d 262 (5th Cir. 1997). Under AEDPA, before an appeal from the dismissal or denial of a § 2254 habeas petition can proceed, the petitioner must first obtain a COA, which will issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253 (c)(2)...

* * *

A.

Miller-El first contends that he is entitled to a COA regarding his challenge to the prosecution's alleged improper use of peremptory strikes to exclude African-Americans from his jury. Miller-El argues that the Supreme Court's decision in *Swain v Alabama*, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), is still the applicable law regarding challenges to improper peremptory strikes when evidenced by data indicating historic, systematic discrimination against African-Americans. However, during the pendency of Miller-El's direct appeal, the Supreme Court decided *Batson v Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), in which it stated that "to the extent that anything in *Swain v Alabama* is contrary to the principles we articulate today, that decision is overruled." *Batson*, 106 S. Ct. at 1725. Yet Miller-El contends that *Batson* only overruled one part of *Swain*. According to Miller-El, while under *Batson*, a defendant is no longer required to establish a prima facie case of racial discrimination based upon proof of historical, consistent, and systematic exclusion of African-Americans from juries, if racial discrimination is proffered, nevertheless, under *Swain*, then *either* the *Swain* or *Batson* evidentiary formulations apply. Miller-El argues that the evidentiary formulation of *Swain* is, thus, applicable to his claim of systematic exclusion. The government contends that the *Batson* evidentiary formulation overruled the *Swain* formulation on which Miller-El relies.

* * *

In *Batson*, the Supreme Court, recognizing the "crippling burden of proof" which *Swain* created, replaced the *Swain* evidentiary formulation with the new *Batson* standard. That new standard involves the following three steps:

First: A defendant can establish his prima facie case of purposeful discriminatory petit jury selection solely upon evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Alternatively, the defendant can make a prima facie case by proving historic, systematic discrimination;
Second: If a defendant makes a prima facie showing, the burden then shifts to the government to provide a race-neutral explanation for challenging the excluded jurors;

Third: The trial court must then determine if the defendant has established purposeful discrimination, and the trial court's determination is a finding fact entitled to the applicable level of deference on appellate review.

See Batson, 106 S. Ct. at 1723-24.

* * *

Miller-El contends that the state court's adjudication was an unreasonable application of *Batson* and that the court's findings were also unreasonable in light of his prima facie showing. His primary challenge is to the district court's alleged failure to give proper weight and credit to the evidence which he presented regarding the historical data

evidencing exclusion of African-American jurors.

The state court findings in this case on the issue of discriminatory intent, despite Miller-El's protestations to the contrary, are entitled to great deference. *See Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395 (1991). As an appellate court reviewing a federal habeas petition, we are required by § 2254(d)(2) to presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented. And the unreasonableness, if any, must be established by clear and convincing evidence. *See* 28 U.S.C. § 2254 (e)(1).

The detailed factual findings made by the state trial court establish that each of the challenged African-American jurors was stricken on race-neutral grounds. Miller-El has addressed the peremptory challenge of six of the ten *Batson* jurors in his request for a COA. We have now conducted an independent review of the findings of the state court and of the evidence presented by Miller-El in his application. Suffice it to say, and without commenting on each of the challenged jurors and the reasons proffered for their being excluded, we find that the state court's findings are not unreasonable and that Miller-El has failed to present clear and convincing evidence to the contrary. The findings of the state court that there was no disparate questioning of the *Batson* jurors and that the prosecution's reasons for striking the jurors was due to their reluctance to assess and/or their reservations concerning the death penalty are fully supported by the record.

Having determined that the state court's adjudication neither resulted in a decision that was unreasonable in light of the evidence presented nor resulted in a decision contrary to clearly established federal law as determined by the Supreme Court, we conclude that this issue would not be debatable among jurists of reason, that courts could not resolve the issues in a different manner, and that the issue does not deserve encouragement to proceed further. Miller-El has thus failed to make a substantial showing of the denial of a constitutional right. Accordingly, we deny Miller-El's request for a COA on this issue.

B.

Miller-El's second issue consists of two parts that revolve around his claim that he was incompetent to stand trial. He first claims that the state trial court erred in failing to provide him with a *sua sponte* evidentiary hearing pursuant to *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). Second, he challenges his conviction as infirm under *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960), on the basis that he was incompetent, in fact, at the time of his trial. Before analyzing these claims, a brief review of some additional facts is necessary.

Miller-El was tried some eight weeks following his arrest. Incident to his arrest, Miller-El was wounded by a gunshot. During the months following his arrest, Miller-El underwent surgical treatment for his injuries, and he experienced complications such as weight loss. On three separate occasions during his trial, Miller-El was evaluated by a doctor at the direction of the trial court. First, during jury selection, he experienced chest pains, chills, and a fever. He was diagnosed with pneumonia and was treated and discharged the same day. Nine days later, still during jury selection, Miller-El complained of delays in receiving medication. The trial court ordered a second evaluation to determine if Miller-El needed more medication. The doctor determined that he did not. Two days before jury selection concluded, Miller-El was taken to the hospital for treatment of a chest abscess. During his trial, Miller-El complained of pain in his ribs and asked to see a doctor. And finally, on the evening of the day he was

found guilty, the trial judge ordered a medical evaluation to determine if Miller-El would be able to sit through court after complaining of nausea and colostomy bag complications. He was kept overnight in the hospital and was released the next day when the punishment phase of his trial began.

* * *

First, with respect to whether Miller-El was entitled to a hearing, the relevant inquiry is whether the district court received information "which, if objectively considered, should reasonably have raised a doubt about the defendant's competency and alerted it to the possibility that the defendant could neither understand the proceedings or appreciate their significance, nor rationally aid his attorney in his defense." *Lokos*, 625 F.2d at 1261. In this case, the trial court specifically found that Miller-El was competent to stand trial, both at the trial and again on state habeas review...

* * *

Our independent review of the record evidence convinces us that the district court's finding that Miller-El was not entitled to a hearing is not unreasonable, and Miller-El has failed to present clear and convincing evidence to the contrary.

With respect to whether Miller-El was, in fact, incompetent, we find that the district court's conclusion that he was not, is reasonable, and likewise, we find that the state court's decision does not represent an unreasonable application of federal law. Thus, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right, and we deny Miller-El's request for a COA on this issue.

C.

In his third issue, Miller-El claims that he is entitled to a COA because the federal district court erred in refusing to conduct an evidentiary hearing *nunc pro tunc* to determine whether he was competent to stand trial in 1986. Having concluded above that Miller-El has failed to establish a bona fide doubt as to his competency at trial under *Pate* and that the state court's determination of competence was reasonable, we need not readdress this issue.

* * *

D.

In his fourth and final issue, Miller-El argues that he is entitled to a COA on his claim that his First and Fourteenth Amendment rights were violated by the admission of evidence, during the punishment phase of his trial, relating to his affiliation with the Moorish Science Temple faith [...]

Here the state habeas court concluded that Miller-El's association with the Moorish Science Temple was inextricably intertwined with his conviction and sentence. Evidence was entered in the guilt phase regarding his membership as part of testimony regarding witnesses' ability to identify him through his participation in the Moorish Temple Feast at the murder scene the week before the robbery-murder. Thus, introduction of this evidence during the guilt phase was relevant to other matters.

* * *

IV. CONCLUSION

Having carefully reviewed the record, we conclude that Miller-El has failed to make a substantial showing of the denial of a constitutional right with respect to any of the issues raised in his request for COA, and accordingly, we DENY his request for COA on all issues raised therein.

Execution Is Stayed in a Case With Race Issues

The New York Times

February 16, 2002

Linda Greenhouse

The Supreme Court gave a Texas death row inmate a stay of execution today and agreed to use his case to decide an important question of how a defendant can prove that the jury selection process was unconstitutionally tainted by racial discrimination.

The inmate, Thomas Miller-El, was to be executed next Thursday for the 1985 murder of a hotel clerk during a robbery at a Holiday Inn in Arlington, Tex., near the Dallas-Fort Worth airport. His conviction and death sentence were upheld by the state courts, by the Federal District Court in Dallas, and last year by the United States Court of Appeals for the Fifth Circuit, which rejected his petition for a writ of habeas corpus. During his trial in 1986, prosecutors struck 10 of 11 black prospective jurors, accepting only one who expressed strong support for the death penalty and volunteered the comment that murderers should be tortured. Mr. Miller-El, who is now 50, is black.

Under the Supreme Court precedents then in effect, racial discrimination in jury selection was unconstitutional but was very difficult to prove under rules that required evidence that the prosecution had selected jurors on the basis of race "consistently and systematically."

Weeks after Mr. Miller-El's conviction, however, the Supreme Court simplified the process in a decision called Batson v. Kentucky, which was applied retroactively to cases still on appeal, including Mr. Miller-El's.

The Batson decision set up a three-stage process. First, the defendant had only to show that the prosecution had used its jury challenges in a way that raised an inference of discrimination. Then at the second stage, the prosecution had the burden of showing that there was a neutral nondiscriminatory reason for the challenges. Then in the final stage, the trial judge was to evaluate the evidence and decide whether racial discrimination had occurred.

The case the court accepted today, Miller-El v. Cockrell, No. 01-7662, concerns the operation of the final stage, a subject the justices have not explored in the 16 years since the Batson decision and one that is causing considerable confusion in the lower courts.

How broad a context can the judge use in evaluating the evidence? Is the judge limited to considering the plausibility of the prosecution's particular explanations, or can the judge consider evidence the defense might have offered, back at the initial stage, of a wider pattern of discriminatory jury selection throughout the jurisdiction?

In contrast to most other appeals courts, the Fifth Circuit has refused to consider the broader context, which in Mr. Miller-El's case included undisputed evidence that at least until the early 1980's, Dallas prosecutors had pursued an official policy, expressed in a training manual, of removing as many black jurors as possible from trials of black defendants.

Jim Marcus, a lawyer with the Texas Defender Service in Houston, which has represented Mr. Miller-El in his federal appeal, said in an interview today that the Fifth Circuit's

interpretation of the Batson decision made discrimination claims harder rather than easier to prove for cases like this one, where the broader context was important for understanding what actually occurred in the courtroom.

The case, which will be argued next October or November, also raises other questions about the extent to which federal courts, in reviewing state criminal convictions, must defer to factual finding by the state courts. Like the Batson issue these questions, technical but of grea practical significance, are not limited to death penalty cases.

In Dallas, Dismissal of Black Jurors Leads to Appeal by Death Row Inmate

The New York Times

February 13, 2002

Sara Rimer

Carol Boggess says she was "eager and willing to serve" on the jury in the 1986 capital murder trial of Thomas Miller-El in Dallas. When questioned by prosecutors, Ms. Boggess, an occupational therapist, said she strongly supported capital punishment and "had no doubt at all" that she could sentence a person to death.

Wayman Kennedy, a Sunday school teacher and church deacon, also wanted to be on the jury and told prosecutors he felt confident of his ability to impose a death penalty. So did Billy Jean Fields, a postal worker. Mr. Miller-El is black. He was charged with shooting two white hotel clerks, one of them fatally, during a robbery in November 1985.

Ms. Fields, Mr. Kennedy and Ms. Boggess are also black. All were excluded from the jury panel by Dallas County prosecutors, as were seven of eight other blacks interviewed as prospective jurors.

The jury the prosecutors accepted was composed of nine whites, one Filipino, one Hispanic and one black man who told prosecutors that he thought that execution was too easy, and that the appropriate punishment for murderers was to "pour some honey on them and stake them out over an ant bed."

Mr. Miller-El, 50, is scheduled to be executed by the state of Texas on Feb. 21, but his lawyers say the jury that convicted him was selected according to longstanding racially discriminatory standards of the Dallas County district attorney's office.

His lawyers have asked the Texas Board of Pardons and Paroles to commute Mr. Miller-El's sentence and have appealed his case to the United States Supreme Court. The court decides this week whether to take the case. Mr. Miller-El's lawyers say his case highlights the continuing exclusion of minorities from juries across the country.

"What's at stake in this case is the fundamental right of citizens of all races to participate in the justice system," said his lawyer, Jim Marcus, the executive director of the Texas Defender Service.

The Dallas County district attorney's office has contested the plea for clemency and opposes review by the Supreme Court. "There's no evidence showing that there was any racial discrimination," said Lori Ordiway, chief of the appellate division of the district attorney's office. Ms. Ordiway said the blacks had been struck for "race-neutral reasons."

The federal Constitution has long prohibited race discrimination in the selection of juries, but until 1986 the standard that a defendant had to meet to prove such discrimination was extremely high, requiring that a pattern of discrimination be proved.

The Supreme Court recognized this when it lowered the standard, in its landmark 1986 ruling in Batson v. Kentucky. Before Batson, neither the prosecution nor the defense had to provide reasons for its use of peremptory strikes in excluding prospective jurors.

Batson held that if the defense was able to show that it appeared the prosecution was

using its strikes to exclude minorities, the trial judge would require the prosecutor to explain the peremptory strikes. Moreover, the reasons could not be based on race. The Batson ruling is relied upon by defense lawyers across the country during jury selection.

Mr. Miller-El was convicted and sentenced one month before the Batson ruling came down. Because his case was still on appeal when Batson was decided, however, the decision applied to his case retroactively. Even so, state and federal courts have upheld Mr. Miller-El's death sentence, finding that no intentional racial discrimination occurred during jury selection.

Mr. Miller-El's lawyers contend that the appeals courts have failed to apply the Batson ruling correctly. They argue that the courts looked only at the number of prosecutorial strikes -- 10 of 11 black prospective jurors -- and accepted the explanations given by the prosecution as nonracial. And they say the courts failed to consider historical evidence that Dallas County prosecutors had systematically excluded blacks from juries for years.

"The case is important not as an historic artifact, but as an ongoing problem that demands the court's attention," said Elisabeth Semel, director of the death penalty clinic at the Hastings School of Law at the University of California at Berkeley, and one of the lawyers who wrote an amicus brief in support of Mr. Miller-El's Supreme Court petition.

Mr. Miller-El's clemency petition contains testimony from four former prosecutors whose time in the Dallas County office collectively covered the period from 1977 to 1989. The four said the office had an unofficial policy to exclude blacks from juries.

One of the four, Larry Baraka, who was a prosecutor in the late 1970's and who became a trial judge in 1981, said: "The policy in a nutshell was to try to get an all-white jury of old white men." Mr. Baraka is black.

Statements from several black prospective jurors who were struck from the Miller-El trial are included in the clemency petition, along with a 1986 article in The Dallas Morning News citing a 1963 internal memo in the district attorney's office advising prosecutors who were picking juries: "Do not take Jews, Negroes, Dagos, Mexicans or a member of any minority race on a jury, no matter how rich or how well educated."

That language was later dropped, but in the early 1970's the office used a training manual that included a memo from a Dallas County prosecutor, Jon Sparling, containing advice on jury selection: "You are not looking for any member of a minority group which may subject him to oppression -- they almost always empathize with the accused."

Mr. Sparling, 60, has since retired. "It's not something I'd want the world to see," Mr.Sparling said in an interview, referring to his memo, which he said he was asked to write informally for other prosecutors. "I wrote it very quickly. I wasn't careful with my words. I'm not making any excuses for it."

"Everything has changed since then," he added.

The training manual was in use at least until 1980, Mr. Marcus said, and the practices it recommended were routinely followed by prosecutors when Mr. Miller-El was tried.

Ms. Ordiway of the dirtict attorney's office said she was neither authorized nor qualified "to talk about what happened in the 1960's," but she said that there was no racial discrimination in jury selection in the 1980's, or since.

In 1986, The Dallas Morning News examined the 15 Dallas County capital murder trials

from 1980 through 1986, including that of Mr. Miller-El, and found that prosecutors excluded 90 percent of blacks who qualified for jury selection. The newspaper concluded that in capital murder cases during that period "prosecutors got what they wanted: the death penalty, and overwhelmingly white juries."

Paul Macaluso, the assistant district attorney who picked the jury in Mr. Miller-El's case, said he had struck the 10 black jurors for reasons that had nothing to do with race. He said that he was trying to assemble the best possible jury and that some of them seemed to waffle on imposing the death penalty. His former office had not had a policy of racial discrimination in the selection of jurors, he said.

"Things don't operate that way," said Mr. Macaluso, 59, who is now a federal prosecutor in Dallas. "I wouldn't put up with it."

Mr. Macaluso was one of two prosecutors who selected the jury in the 1985 trial of Ronald Curtis Chambers, a black whose murder victim was white, and who was sentenced to death. In 1989, the Texas Court of Criminal Appeals reversed Mr. Chambers' conviction after finding that the state had engaged in racial discrimination in its use of peremptory challenges.

Mr. Macaluso said that the appellate court had been wrong in the Chambers case and that he had never engaged in racial discrimination in selecting jurors.

Grutter v. Bollinger

Ruling Below: (Grutter v. Bollinger, 6th Cir., 137 F. Supp. 2d 821, 2001 U.S. Dist. Lexis 3256 (E.D. Mich. 2001).)

The court held law school's consideration of race and ethnicity in its admission decisions violated the Equal Protection Clause of U.S. Const. amend. XIV and Title VI of the Civil Rights Act of 1964.

Question Presented: Whether a law school that individually evaluates each application may provide substantial consideration to race and ethnicity in its admission decisions in order to achieve a diverse student body?

BARBARA GRUTTER, Plaintiff-Appellee,
v.
LEE BOLLINGER, et al., Defendants-Appellants , KIMBERLY JAMES, et al., Intervening Defendants-Appellants.

United States Court Of Appeals
For the Sixth Circuit

Decided May 14, 2002

MARTIN, JR., Circuit Judge:

For the reasons set forth below, we REVERSE the judgment of the district court.

I. Adopted by the full faculty in 1992, the policy states that the Law School's "goal is to admit a group of students who individually and collectively are among the most capable students applying to American law schools in a given year." It further provides that the Law School "seeks a mix of students with varying backgrounds and experiences who will respect and learn from each other." As part of the Law School's policy of evaluating each applicant individually, its officials read each application and factor all of the accompanying information into their decision.

* * *

[T]he Law School sometimes admits students with relatively low index scores. Its admissions policy describes two general varieties of students who may be admitted with such scores (1) "students for whom [there is] good reason to be skeptical of an index score based prediction" (e.g., a student with a track record of poor standardized test performance, but who has an outstanding academic record) and (2) students who "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."

Reflecting the Law School's goal of enrolling a diverse class, its admissions policy describes "a commitment to racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics

and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." Professor Richard Lempert, the chair of the faculty committee that drafted the admissions policy, explained that the Law School's commitment to such diversity was not intended as a remedy for past discrimination, but as a means of including students who may bring a different perspective to the Law School.

The Law School does, however, consider the number of under-represented minority students, and ultimately seeks to enroll a meaningful number, or a "critical mass," of under-represented minority students. Dean Lehman equated "critical mass" with sufficient numbers to ensure under-represented minority students do not feel isolated or like spokespersons for their race, and do not feel uncomfortable discussing issues freely based on their personal experiences.

II. To survive constitutional review, the Law School's consideration of race must (1) serve a compelling state interest and (2) be narrowly tailored to achieve that interest. *See Adarand v Pena, 515 U.S. 200, 227, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995).*

A. To determine whether the Law School's interest in achieving a diverse student body is compelling, we turn to *Bakke.* [Because *Bakke* is a plurality opinion we will treat the narrowest concurring opinion to be controlling. *See Marks v United States, 430 U.S. 188, 193 (1977).* Because Justice Powell's opinion in *Bakke* would permit the most limited consideration of race it is the narrowest rationale and thus provides the governing standard.]

2. Under the Harvard plan, Harvard College justified its race-conscious admissions policy solely on the basis of its efforts to achieve a diverse student body. *See* [Bakke] *at 316.* [B]y indicating that the Harvard plan could be constitutional under its approach, the Brennan concurrence implicitly - but unequivocally signaled its agreement with Justice Powell's conclusion that achieving a diverse student body is a constitutionally permissible goal.

* * *

B. In endorsing the Harvard plan, Justice Powell accepted that a university could not provide "a truly heterogeneous environment [...] without some attention to numbers." *Id. at 323.*
In Justice Powell's view, a "plus" program unlike a quota -lacked a "facial intent to discriminate." *Id. at 318.* Justice Powell added that "a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system." *Id.*

Justice Powell's opinion sets forth two guidelines regarding race-conscious admissions policies (1) segregated, dual-track admissions systems utilizing quotas for under-represented minorities are unconstitutional; and (2) an admissions policy modeled on the Harvard plan, where race and ethnicity are considered a "plus," does not offend the Equal Protection Clause. Neither party questions the applicability of Justice Powell's opinion regarding the narrowly tailored component of strict scrutiny, and it is our view that whether the Law School's admissions policy passes constitutional muster turns on Justice Powell's opinion.

1. Drafted to comply with *Bakke*, the Law School's consideration of race and ethnicity does not use quotas and closely tracks the Harvard plan. Race and ethnicity, along with a range of other factors, are potential "plus" factors in a particular applicant's file, but they do not insulate an under-represented minority applicant from competition or act to foreclose competition

from non-minority applicants. As part of its policy of evaluating each applicant individually, the Law School's officials read each application and factor all of the accompanying information into their decision. The Law School, like Harvard, attends to the numbers and distribution of under-represented minority applicants in an effort to ensure all of its students obtain the benefits of an academically diverse student body.

Because race and ethnicity are a "plus," they undoubtedly "tip the balance" in some applicants' favor. Importantly, however, the Law School's consideration of race and ethnicity does not operate to insulate any prospective student from competition with any other applicants.

* * *

2. As a matter of definition, we are satisfied that the Law School's [pursuit of a] "critical mass" [of underrepresented minority students] is not the equivalent of a quota, because unlike Davis's reservation of sixteen spots for minority candidates, the Law School has no fixed goal or target. That the Law School's pursuit of a "critical mass" has resulted in an approximate range of under-represented minority enrollment does not transform "critical mass" into a quota. Because *Bakke* allows institutions of higher education to pay some attention to the numbers and distribution of under-represented minority students, *see 438 U.S. at 316-17*, over time, reliance on *Bakke* will always produce some percentage range of minority enrollment. These results are the logical consequence of reliance on *Bakke* and establishment of an admissions policy, like the Harvard plan, that attends to the numbers and distribution of under-represented minority students. As such, they cannot serve as the basis for a charge that the Law School's admissions policy is unconstitutional.

* * *

[3.] Although not addressed in *Bakke*, subsequent Supreme Court opinions suggest consideration of race-neutral means is necessary to satisfy the narrowly tailored component of strict scrutiny. *E.g., Croson, 488 U.S. at 507* ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.") (quoting *United States v Paradise, 480 U.S. 149, 171, 107 S. Ct. 1053, 94 L. Ed. 2d 203 (1987)).*

Upon examination, however, the record does indicate the Law School considered and ultimately rejected various race-neutral alternatives to the consideration of race and ethnicity. [T]he Law School engaged in both pre- and post- admission recruiting activities but ... such activities were not enough to enroll a "critical mass" of under-represented minority students. Additionally, Professor Lempert testified regarding the lottery system, in which the Law School would lower its admissions standards, establish a numerical cut-off for "qualified" applicants, and then select randomly from among those applicants. Given the Law School's consideration of race-neutral alternatives and the evidence that "under-represented minority students cannot be enrolled in significant numbers unless their race is explicitly considered in the admissions process," we find that the Law School has adequately considered race-neutral alternatives.

Lastly, we note that we do not read *Bakke* and the Supreme Court's subsequent decisions to require the Law School to choose between meaningful racial and ethnic diversity and academic selectivity. Thus, in applying strict scrutiny we cannot ignore the educational judgment and expertise of the Law School's faculty and admissions personnel regarding the efficacy of race-neutral alternatives. Mindful of both our constitutional obligations and our practical limitations, we also assume - along the lines suggested by Justice Powell that

the Law School acts in good faith in exercising its educational judgment and expertise. *See Bakke, 438 U.S. at 318-19.*

* * *

[The concurring opinion of Judge Moore, objecting and responding to the inclusion of the procedural annex in Judge Bogg's dissenting opinion is omitted.]

CLAY, Circuit Judge, concurring:

I concur in Chief Judge Martin's majority opinion, finding it correct and insightful in all respects. I write separately, however, for the purpose of speaking to the misrepresentations made by Judge Boggs in his dissenting opinion which unjustifiably distort and seek to cast doubt upon the majority opinion.

* * *

B. The Evidence Supports Diversity as a Compelling Governmental Interest

The dissent's claim that it considers the arguments on both sides is suspect because conspicuously absent from its consideration of the benefits of a diverse student body is any meaningful recognition of the wealth of legal scholarship including a study involving students at the University of Michigan speaking of, as well as documenting through empirical data, the positive impact of diversity in education, not just for the student throughout the educational journey but for years after the educational process is completed.

Specifically, the major study conducted by University of Michigan Professor of Psychology and Women's Studies Patricia Gurin, encompassed a wide scale analysis of the effects of a diverse learning environment, particularly that at the University of Michigan, on a student's overall development, and included data from the Michigan Student Study, the study of Intergroup Relations, Conflict, and Community Program at the University of Michigan, and the 4-year and 9-year data on a large national sample of institutions and students from the Cooperative Institutional Research Program. *See* Patricia Gurin, *Reports submitted on behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 Mich. J. Race & Law 363, 364 (1999). [Professor Gurin's conclusions have been omitted.]

In light of Gurin's study and, perhaps more importantly, the data and empirical evidence backing her findings on the value of a diverse student body, those who like the dissent are skeptical of characterizing diversity as a compelling governmental interest because "diversity" is not defined or because they believe it to be a nebulous concept based on anecdotal evidence, find themselves standing on ill footings. *See* John Friedl, *Making a Compelling Case for Diversity in College Admissions, 61 U. Pitt. L. Rev. 1, 29-32 (1999)* (noting that "to date, almost all of the evidence in support of diversity in higher education is anecdotal in nature[.]").

[I]f the purportedly objective merit criteria embraced by opponents of affirmative action were in fact dispositive, nearly one in every six white applicants actually accepted were arguably not 'qualified' in the traditional sense." *See id.* at 1321 n.100. Accordingly, for these white applicants, something more than merit was considered in the admissions process, just as something more is considered in a program designed to promote diversity. *See id.*

[I]t is naive to believe that because an African American lives in an affluent neighborhood, he or she has not known or been the victim of discrimination such that he or she cannot relate the same life experiences as the impoverished black person. A well dressed black woman of wealthy means shopping at Neiman Marcus or in an affluent shopping center may very

well be treated with the same suspect eye and bigotry as the poorly dressed black woman of limited means shopping at Target. [citation omitted].

As scholar['s have] recently illustrated, the idea that an admissions policy which provides minority applicants with an advantage does so at the expense of white applicants is simply a myth. [citation omitted].

Using 1989 data from a representative sample of selective schools, former university presidents William Bowen and Derek Bok showed in their 1998 book, "The Shape of the River," that eliminating racial preferences would have increased the likelihood of admission for white undergraduate applicants from 25 percent to only 26.5 percent. Because the number of black applicants to selective institutions is relatively small, admitting them a[t] higher rates does not significantly lower the chance of admission for the average individual in the relatively large sea of white applicants. *Id.* (emphasis added).

* * *

C. The Law School's Policy is Narrowly Tailored

Claiming that the term "critical mass" is simply a phrase used to disguise what is actually an impermissible quota system, the dissent relies heavily upon the fact that the numbers of minorities admitted over the years has varied only sightly. [O]n the record of this case, there are at least as many reasons to presume that there is not a quota as there are to presume that there is one, and the balance certainly tips in favor of the law school's representation that it does not employ a quota in the absence of any evidence to the contrary.

* * *

DISSENT:

BOGGS, Circuit Judge, dissenting.:

This case involves a straightforward instance of racial discrimination by a state institution.

* * *

Our inquiry must address at least one open question of law: can achieving diversity be a compelling state interest? On this open question, I have no argument to which to respond, as the majority never explains why "diversity" *should* be a compelling state interest, except to say that the conclusion is demanded by *Bakke*. After considering the arguments on both sides, I conclude that the state's interest in a diverse student body, at least as articulated by the Law School, cannot constitute a compelling state interest sufficient to satisfy strict scrutiny.

[M]y answer to whether the engineering of a racially diverse student body is a compelling state interest is not necessary to the resolution of the case before this court. Even if student diversity were a compelling state interest, the Law School's admissions scheme could not be considered narrowly tailored to that interest.

* * *

[The dissent concludes that Justice Powell's discussion of diversity was not controlling for several reasons, including] [t]he holding/dicta distinction[, which] demands that we consider binding only that which was necessary to resolve the question before the Court. At most, the question before the Court in *Bakke* was whether race could ever be used in admissions decisions. To resolve that question, the Court only needed to answer that race could potentially be used. Any speculation regarding the circumstances under which race could be used was little more than an advisory opinion, as those circumstances were not before the court and need not be validated

to overturn an injunction barring any use of race, to the extent one was in place.

D. Intervening Supreme Court Precedent

Taking together the Court's overturning of the standard used to uphold the use of race to encourage diversity in *Metro Broadcasting* (thereby calling into question the permissibility of using race for diversity purposes) and its statement in *Croson* that race should only be used for remedial settings, the district court held that the only permissible use of race under strict scrutiny is to "remedy carefully documented effects of past discrimination," and that since the diversity rationale proffered by the Law School was not tied to remedying past discrimination, it is an impermissible basis for the use of race. *Grutter, 137 F. Supp. 2d at 849.*

While the district court's reading of [*Adarand* & *Croson*] is far from clearly wrong, it is also not required. A better approach is simply to address the diversity rationale on the merits.

II. On the Merits

Even if a racial classification is designed to achieve a compelling state interest, it must be narrowly tailored to that interest. The Law School's efforts to achieve a "critical mass" are functionally indistinguishable from a numerical quota.

A. Is Developing a Diverse Student Body a Compelling State Interest?

1. The Nature of "Diversity"

[T]he Law School rests its claim to the benefits of a diverse student body on the unique experiences that students from under-represented groups will be able to share with their fellow students. Closely related, the Law School implies that a student body diverse with regard to race is one diverse with regard to viewpoint, experience, and opinion.

Mentioning status as an under-represented minority in the same breath, the Law School generalizes, in the abstract, that it would also give a preference to an applicant with "an Olympic gold medal, a Ph.D in physics, the attainment of age 50 in a class otherwise lacking anyone over 30, or the experience of having been a Vietnamese boat person." *Admissions Policies*, University of Michigan Law School, April 22, 1992, JA at 4240. Yet to equate bare racial status with the experiential gains of these generally remarkable (and exceedingly rare) achievements demonstrates that the Law School's desired diversity is unrelated to the experiences of its applicants.

Perhaps the one unifying feature of the minority groups that the Law School heavily prefers in admissions is that they all, *on average*, have had some experience with being the object of racial discrimination.

The possibility of an experientially based admissions system and the Law School's apparent disinterest in such a system, indicate that the Law School grants preference to race, not as a proxy for a unique set of experiences, but as *a proxy for race itself.*

2. No Logical Limitation

The Supreme Court has consistently rejected those purposes that lack a "logical stopping point." [citation omitted].

If policies like the Law School's are permitted, the adverse effect on "over-represented" minorities will only grow more grave because such policies inexorably drive toward a philosophy in which admissions are parceled out roughly in proportion to representation in the general population. [...]

B. Is the Law School's Admissions Policy Narrowly Tailored?

1. The True Magnitude of the Law School's Racial Preference

It is clear from the Law School's statistics that under-represented minority students are nearly automatically admitted in zones where white or Asian students with the same credentials are nearly automatically rejected. Indeed, the Law School concedes that its racial preference is sufficiently heavy that 3 out of 4 under-represented minority students would not be admitted if all students were truly considered without regard to race. JA at 6047.

2. Differentiating a "Critical Mass," a "Plus" and a "Quota"

The results of the Law School's system to produce a "critical *mass*" reassure us that the Law School really seeks to enroll a critical *number* of minority students. Between 1995 and 1998, the last four years for which we have data, the Law School consistently enrolled a number of under-represented minorities constituting 13.5 to 13.7 percent of the class enrolled. University of Michigan Law School's Report to the ABA, JA at 643.

The range, as I have demonstrated, is remarkably tight. Admittedly, it is not identical from year to year - but the lack of identity does not seem enough to demonstrate that the Law School does not have an exceedingly precise numerical target in mind when admitting its students.

Law School officials testified that they vigorously monitor the acceptance data with regard to race on a daily basis, *see* Depo. of Dennis Shields, JA at 2219-20, perhaps to admit minorities that it otherwise would not have or perhaps to admit minorities on the waiting list.

The combination of the Law School's thinly veiled references to such a target, its "critical mass," and relatively consistent results in achieving a particular enrollment percentage, should convince us that the Law School's admissions scheme is functionally, and even nominally, indistinguishable from a quota system.

3. Achieving the Benefits of a Diverse Educational Environment

The Law School never provided any evidence that the existence of the "critical mass" would in fact contribute to classroom dialogue or would lessen feelings of isolation or alienation. The only evidence at all bearing on this is from the Gurin Report.

The Gurin report is questionable science, was created expressly for litigation, and its conclusions do not even support the Law School's case. The "study" suffers from profound empirical and methodological defects that lead me to doubt its probative value. And certainly neither the trial court as finder of fact nor the majority opinion take the report's conclusions as fact.

The relationship between a "critical mass" and the values of diversity would depend on contingencies nearly impossible to predict. The Law School's definition seems to depend wholly on the psychological makeup of the people involved, whether labeled as majority or minority. Certainly history is replete with examples of members of minority groups, from Frederick Douglass to Martin Luther King to Thomas Sowell, who have said their piece and stood for what they believed in without regard to whether others thought them to be a "representative."

4. Potential Race-Neutral Means

The Supreme Court has made clear that courts must determine whether a state's racial classification is necessary with reference to the efficacy of race-neutral alternatives. *See, e.g., Croson, 488 U.S. at 507; United States v. Paradise, 480 U.S. 149, 171, 94 L. Ed. 2d 203, 107 S. Ct. 1053*

(1987); Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000).

Consider some of the race-neutral alternatives available in this case. Swamped with the children of wealthy suburbanites, the Law School could seek out applicants who were raised amidst relative poverty, who attended under-funded or failing schools, who walked to school past warehouses instead of coffeehouses, who experienced but conquered extreme emotional trauma, like the loss of a parent, who prevailed over a profound childhood illness, who have dedicated years to helping the poor in the Jesuit Volunteer Corps, or, even less stirringly, who have a strong accounting background among a raft of history majors. If it really is a diversity of experiences and viewpoints that the Law School seeks, why cannot the Law School just seek those experiences and viewpoints? I am willing to take the Law School at its word, and believe that it is fully capable of undertaking this searching review of individual experience.

III Many commentators have observed that America is still a society in which "race [as well as ethnicity, religion and other ancestral characteristics] matters." But we can not simply suspend the Equal Protection Clause until race no longer matters.

* * *

[The dissenting opinion of Judge Siler is omitted.] [The dissenting opinion of Judge Batchelder is omitted.]

GILMAN, Circuit Judge, dissenting:

[T]here are aspects of both [the majority and dissenting] opinions with which I do not agree.

The facts of the present case, in my opinion, eliminate the need to decide whether or not this court is bound by Justice Powell's conclusion in *Regents of the University of California v. Bakke, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978)*, that educational diversity is a compelling government interest. No one disputes, however, that *Bakke* stands for the proposition that an admissions policy designed to further the interest of educational diversity is not narrowly tailored if it creates a two-track system for evaluating prospective students, where minorities are effectively insulated from competition with other applicants. *Id. at 319-20.*

* * *

Based on the record presented, I am convinced that the Law School's admissions policy that results in a *de facto* quota in favor of minority students is far closer to the rigid set-aside squarely prohibited by *Bakke* than it is to the "plus among equals" that I believe would be clearly constitutional. I respectfully dissent.

Court Says Law School May Consider Race in Admissions

The New York Times

May 15, 2002

Jacques Steinberg

A federal appeals court ruled yesterday that the Constitution permits colleges and graduate schools to seek a "critical mass" of black and Hispanic students in assembling their entering classes each year, as long as those rough targets do not harden into precise quotas.

Voting 5 to 4 in a closely watched case, the United States Court of Appeals for the Sixth Circuit in Cincinnati overturned a ruling by a federal judge in Detroit and upheld the admissions policies of the University of Michigan Law School. The university has said its policies were intended to assemble a class diverse in both its racial and ethnic makeup and its intellectual perspectives. In its decision, the court subscribed to Justice Lewis F. Powell Jr.'s pivotal, 24-year-old Supreme Court opinion in the landmark Bakke case, which has been used to justify race-conscious admissions policies at public universities as well as private colleges.

The ruling yesterday, which bitterly divided the full nine-judge court, is expected to be appealed to the Supreme Court by the lead plaintiff, Barbara Grutter, a Michigan woman who argued that she had been rejected by the law school in 1996 because she was white.
The law school case and a second University of Michigan case involving the admission of undergraduates have been closely followed by supporters and opponents of affirmative action because they are the only cases that are in close range of being appealed to the Supreme Court.

Should the Supreme Court agree to hear either or both of the cases, it would have an opportunity to clarify its position on an issue that it has not confronted directly since 1978 in Bakke. At that time, the court struck down a separate policy for minority applicants at the medical school of the University of California at Davis but appeared to support the idea that race could be factored in as a plus in deciding whether to admit a student.

In recent years, federal courts in several states, including those with jurisdiction over the Universities of Georgia, Texas and Washington, have issued often contradictory rulings on the issue. Those cases have either expired or been sent back to lower courts.

The two Michigan cases have also been somewhat at odds. Last year, a federal judge in Detroit ruled that the Michigan law school policy was unconstitutional, because, he said, it appeared to set quotas for minority applicants. But ruling in a separate case, a different federal judge upheld Michigan's admissions policy for undergraduates, which automatically awards 20 points on a 150-point scale to black and Hispanic applicants and to underprivileged white applicants.

The same court that issued yesterday's decision is expected to rule in the coming weeks on a challenge to the undergraduate policy brought by several rejected white applicants, and whichever side loses has suggested that it, too, would appeal to the Supreme Court. The ruling in yesterday's

case does not necessarily foreshadow a decision to uphold the undergraduate admissions policy, since a specific point system was not used in the law school policy.

Much of the confusion over the court's position on race-conscious admissions can be traced back to the Bakke ruling, which was composed of six separate opinions. In his opinion, Justice Powell wrote that the assembly of a diverse student body was of compelling interest to the state because it benefited not only minority applicants, but also the white classmates who might learn from them. It has never been entirely clear, however, how many of the justices agreed with Justice Powell's particular argument in defense of diversity, although his opinion has been used to underpin admissions policies ever since.

In writing for the five-member majority yesterday, Judge Boyce F. Martin Jr., an appointee of President [Jimmy Carter] who is the chief judge of the appeals court, wrote that the Michigan policy was consistent with Justice Powell's argument, and thus constitutional.

Judge Martin, echoing statements made by the dean of the law school, defined "critical mass" not as a fixed quota but as a rough number sufficient "to ensure under-represented minority students do not feel isolated or like spokespersons for their race, and do not feel uncomfortable discussing issues freely based on their personal experiences."

From 1987 to 1994, Judge Martin said, the percentage of minority students in the university's entering law school class has ranged from 12 percent to 20 percent. Assessing that range, Judge Martin concluded: "the law school does not employ a quota or otherwise reserve seats for under-represented minority applicants."

Writing for the four-member minority, Judge Danny J. Boggs, a Reagan appointee, sided with the lower court judge, saying that seeking a "critical mass" of minority students was the equivalent of a quota, and "involves a straightforward instance of racial discrimination by a state institution."

Judge Boggs cited figures more current than Judge Martin's, saying that from 1995 to 1998, the percentage of minorities admitted to the law school barely wavered, from 13.5 percent to 13.7 percent.

The federal court decisions on race-conscious admissions policies in recent years have left different parts of the country subject to different policies.

Rice University, for example, a private college in Houston, has adhered since 1996 to the the so-called Hopwood decision. In that case, a federal appeals court ruled that preferences given to minority applicants to the University of Texas Law School were unconstitutional, in part, the judges held, because it could not be proved that a majority of Justice Powell's colleagues endorsed his argument for diversity.

"We are not allowed to consider race either for admission or financial aid," said Ann Wright, the vice president for enrollment at Rice. "Most of our competitors are not restrained that way."

"Now," Ms. Wright added, "I think there will be a Supreme Court decision that will settle the inconsistency."

Rolling Bakke

The Wall Street Journal

May 17, 2002

Bob Zelnick

Proponents of public universities giving broad admissions preferences to selected racial minorities won a battle Tuesday as the Sixth Circuit Court of Appeals reversed a lower court ruling and upheld the admissions practices of the University of Michigan Law School. But the majority was slender -- 5-4 -- and the ruling narrow. The majority opinion disdained all but token consideration of the merits of the case, instead hiding behind the Supreme Court's quirky 1978 Bakke case, declaring simply that Justice Lewis Powell's lone opinion "remains the law until the Supreme Court instructs otherwise."

Opponents of racial preferences can take heart not only because the dissent in the case, Grutter v. Bollinger, was far more impressive than the majority opinion, but because the decision virtually forces the Supreme Court to review discriminatory practices in higher education for the first time since Bakke, if only to resolve a hopeless split among the various federal circuits. As matters now stand:

-- The Fifth Circuit has held that racially discriminatory admissions policies designed to promote diversity flunk the test of constitutionality, thereby tossing aside a central contention of Justice Powell, the swing vote in Bakke.

-- The Sixth and Ninth Circuits have held themselves bound by Bakke.

-- The 11th Circuit has held that race is not a proxy for diversity, thus skirting the issue of whether state universities have a compelling interest in diversity.

That Bakke has staggered along for nearly a quarter-century is truly remarkable. Brought by a rejected white applicant for the University of California, Davis Medical School, the suit challenged a quota system that allocated 16% of places in each entering class to favored minority students. Four justices held the quotas a violation of the Civil Rights Act of 1964. Four others argued that the "benign" use of racial categories designed to redress past discrimination should not have to meet a strict "compelling interest" standard of judicial review.

Justice Powell held that the strict standard was appropriate and that the quota system was unconstitutional. But he suggested that as a matter of academic freedom, universities have an implied First Amendment right to promote a diverse student body through "a properly devised admissions program involving the competitive consideration of race and ethnic origin."

Not a single colleague joined Justice Powell's constitutional frolic, and in a series of cases involving state contracting, federal contracting, and congressional redistricting, the Supreme Court has rejected the consideration of race unless narrowly tailored to redress specific acts of past discrimination.

In their scramble to gain the protection of Bakke, some of the nation's leading public universities have contrived admissions practices that offend both the Constitution and admittedly quaint notions of academic integrity. Until Proposition 209 got in the way, for example, the University of California, Berkeley tinkered with a "non quota" matrix system that magically produced nearly identical percentages of black and Hispanic students year after year. Until stopped by the courts, the University of Texas Law School had color-coded applicant files considered by separate committees applying different standards.

The University of Michigan Law School method involved admitting a "critical mass" of favored minorities, defined as the number necessary to "enable minority students to contribute to classroom dialogue and not feel isolated." The school's dean testified that no quota system was intended, but the numbers speak otherwise. From 1995 to 1998, the law school admitted 46, 44, 46 and 47 minority applicants, respectively, in each case between 13.5% and 13.7% of the entering class. Minority students were often dozens, sometimes hundreds, of times more likely to be admitted than white applicants with similar grades and LSAT scores. University officials acknowledged that had race not been given weight, minorities would have comprised 4% or less of each class.

As the Michigan case moves toward the Supreme Court, the Bush administration will have to choose between principle and interest group politics. Those fearing another steel tariffs type retreat note that, last October, Solicitor General Theodore B. Olson asked the Supreme Court to reject a challenge to the affirmative action provisions of the Transportation Equity Act. But then, Mr. Olson was entering a case well advanced at the time of his confirmation, and one where the government could plausibly argue that its regulations limited preferences to situations where discrimination had been documented.

Even a Supreme Court decision disowning Bakke and rejecting Michigan's admissions policy is unlikely to end the struggle over race preferences. Like Sampson, quota supporters are willing to bring down the temple rather than see enemies prevail. Already, assaults on objective admissions criteria -- such as the LSAT -- are in the works. Other jurisdictions are turning to guaranteed admission for those who achieve a threshold class standing of, say, the top 10%, a standard that ignores great differences in school quality. Those committed both to quality education and equality under the law must stay the course, as they did to combat die-hard segregationists a generation ago.

Mr. Zelnick, chairman of Boston University's journalism department and a research fellow at the Hoover Institution, is the author of "Backfire: A Reporter's Look at Affirmative Action."

Learning From Diversity

The New York Times

May 16, 2002

Jeffrey S. Lehman

On Tuesday, the Sixth Circuit Court of Appeals upheld the University of Michigan Law School's admissions policy, in which race is one of the many factors that can influence a decision. The ruling leaves in place a policy that is as cautious a form of affirmative action as one may find in higher education.

When 361 students enrolled at our law school this past fall, only 26 were African-American. That is 7 percent of the class in a nation where 13 percent of the citizens are black. A more aggressive affirmative action policy could easily have admitted many more black students, yet our policy led us to reject 70 percent of black applicants. (We rejected a lower percentage of white applicants.) Some critics have called our admissions policy insufficiently attentive to the cause of racial justice. They find it shameful that we enroll so few black students and turn away so many. But our policy was not designed to compensate for segregation and discrimination in American society, past or present. It was designed to enroll a group of highly talented students who will, after three years of study, be as well prepared as possible for the modern legal profession. (We pursue other important values as well; our desire to sustain a continuity of identity for the law school leads us to favor Michigan residents and children of alumni.)

How does a school enroll a class that will end up as competent as possible at graduation? It is a matter of predictive judgment, not science. We consider each applicant's analytic ability and work ethic as revealed by grades, test scores, work experience, essays and letters of recommendation. Since legal education depends on intense interactions among students and teachers, we also consider what difference an applicant's presence would make to the mix.

Enrolling students who have studied abroad or served as interns on Capitol Hill contributes to lively and sophisticated classroom dialogue. So does enrolling a racially integrated class. And students who learn at integrated campuses are better prepared to succeed in the courthouses and companies of America in 2002.

Some critics have argued that our admissions policy should not consider race at all. They contend that in light of the damage done by race consciousness throughout history, the law school should be rigidly colorblind, setting an example that will lead society in that same direction. This suggestion is wishfully utopian, as attractive as the ideal of colorblindness may be. Admissions policies like ours did not create race consciousness, nor are they the linchpin that keeps it in place. Race consciousness is every bit as strong in California and Texas today as it was before affirmative action was banned from their public universities.

Our policy follows the guidelines for the appropriate consideration of race in university admissions established by the Supreme Court in the Bakke case 24 years

ago. It is both realistic and pragmatic. That is why Secretary of State Colin Powell and former President Gerald Ford have spoken out in support of our admissions policy, as have General Motors, 3M and 30 other major corporations. The court decision maintains a sensible balance. Colorblindness is an ideal, not an idol, and the Constitution does not require us to sacrifice effective education and integration in its name.

Jeffrey S. Lehman is the dean of the University of Michigan Law School.

Suit Tests Race's Role in College Admissions

USA TODAY

January 15, 2001

Dennis Cauchon

ANN ARBOR, Mich. -- Without affirmative action, Marcela Sanchez would not be a star student at the University of Michigan Law School. She wouldn't be editor of the school's law review. She wouldn't have a job waiting as a law clerk for a federal judge.

It's not that Sanchez was an academic slouch. She graduated second in her high school class in Los Cruces, N.M. She earned a 3.8 grade-point average at New Mexico State University, ranked in the top fifth of those taking the standardized law school entrance exam and had outstanding recommendations.

But those impressive credentials are usually not enough to get into top-ranked law schools, such as the University of Michigan, if you are Caucasian. Among Caucasian applicants, Ivy League degrees and high GPAs are common.

"When I first got here, it struck me as odd that people would talk about going to Yale as casually as going to the grocery store," Sanchez says. "It wasn't until this year that I realized people came here with a greater expanse of knowledge and experience than I had."

Barbara Grutter, a white woman with similar credentials, was turned down by the law school one year before Sanchez was admitted. Grutter sued, charging racial discrimination.

The case comes to trial Tuesday in federal district court in Detroit, and many expect the case -- along with a similar one challenging the use of race in undergraduate admissions -- to determine the future of affirmative action in higher education.

Both sides believe the cases have a good chance of reaching the Supreme Court in what *Time* magazine calls "the Alamo of affirmative action."

The Supreme Court has limited race as a factor in hiring, government contracting, drawing voting districts, integrating schools and other areas. But nearly every university in the USA still uses race as a factor in admissions.

The Supreme Court has not considered the issue since it banned quotas in a murky 5-4 decision in *University of California Regents vs. Bakke* in 1978.

As one of the last outposts of affirmative action, admission policies are under fire in the courts and from voters.

In 1996, a federal appeals court ruled that the University of Texas law school could not consider race. The Supreme Court declined to hear the case. But on Dec. 4, another appeals court ruled that the University of Washington law school could consider race. (Voters stopped the practice after the case was filed.)

Then, last Dec. 13, a federal judge ruled that the University of Michigan's admission policy had discriminated on the basis of race between 1995 and 1998, when the undergraduate lawsuits were filed. But, he said, the university's current use of race in undergraduate admissions is constitutional.

Voters in California also have banned race in college admissions. Since the passage of Proposition 209, the number of blacks and Hispanics at the University of California-Berkeley and its law schools has fallen by half.

Now, with the law unsettled and the Supreme Court divided, a decision could hinge on whether George W. Bush gets to appoint a Supreme Court justice.

The University of Michigan case is important, in part, because big business has rallied behind its defense of affirmative action.

Twenty-one major corporations have filed supportive legal briefs.

The University of Michigan has spent $ 4.3 million so far on legal fees alone, plus money for expert witnesses and other costs. "We didn't choose to be sued, but, having been sued on an issue that goes to the heart of our educational mission, we're going to defend ourselves well," says Elizabeth Barry, the school's top lawyer on the case.

The university argues that having a critical mass of minority students is crucial to providing a quality education for all students. This argument -- racial diversity is necessary for a good education -- meets the legal test created in the Bakke decision, the school says, and may allow affirmative action to survive in college admissions if nowhere else.

"Law school does something different than preschool or elementary school," says Jeffrey Lehman, dean of the University of Michigan law school.

Race has weight in nearly every area of the law, from employment law to criminal law. "If you want to have a really good discussion of crack cocaine sentencing, you don't want a homogenous class of all white students or all black students," Lehman says.

But attorney Kirk Kolbo, who represents the white students suing the university, says that argument is racist. "It's offensive to think when talking about crack cocaine you have black students in class," he says. "It's wrong to perpetuate these stereotypes based on race.

Philosophy professor Carl Cohen, who started the effort at Michigan to eliminate race as a factor in admissions, agrees that diversity enhances education but says schools can't violate the Constitution to do it.

"The only way to overcome racial discrimination is to stop doing it," says Cohen, an old-time liberal who is a former national board member of the American Civil Liberties Union.

"When I first heard they wanted a diverse class, I thought it would help me," says Grutter, a health care consultant who wanted to get a law degree. Then, she says, she realized that race was the type of diversity the school wanted.

"When I entered the workforce in the early 1970s, it wasn't the easiest environment for women. It was very

disillusioning and discouraging, as a woman, to be discriminated against on another basis."

Since the Bakke decision, universities have devised ways to consider race while avoiding quotas. The University of Michigan uses a point system for undergraduate admissions: a 4.0 GPA is worth 80 points, scholarships athletes get 20 points, Michigan residents get 10 points, blacks and Hispanics get 20, and so on.

The law school has a less formal system. It combines an applicant's undergraduate GPA and LSAT score into a composite number. Then it considers other factors, including race, to create a diverse and vibrant class. "One might, for example, give substantial weight to an Olympic gold medal, a Ph.D. in physics, the attainment of age 50 in a class that otherwise lacked anyone over 30, or the experience of having been a Vietnamese boat person," according to a faculty report on admissions policy.

"Racial diversity requires work," says University of Michigan president Lee Bollinger. "This is a matter of deep principle. This is what a public university is all about: breaking down barriers of race, gender and class."

Discrimination, Not Diversity: At Michigan and Other Universities, 'Affirmative Action' Is Just Another Phrase for Racism.

Legal Times

June 3, 2002

Roger Clegg

On May 14, the U.S. Court of Appeals for the 6th Circuit upheld the constitutionality of the University of Michigan Law School's use of racial and ethnic preferences in its admissions. The preference issue has always been at least simmering since "affirmative action" or "reverse discrimination"-or, Nathan Glazer's phrase, "affirmative discrimination"-began being used in the 1960s. From time to time, however, it comes to a boil. That's where we are headed now.

The practice got a big boost in the Nixon administration, and has never been very popular with many Democrats-especially the blue-collar and Catholic "Reagan Democrats"-but somehow it has become an article of faith among politically active Democrats over the years, even as it has become unpopular among Republicans. Consider the 6th Circuit's vote last month in Grutter v. Bollinger.

The en banc court split 5-4. The five judges voting to uphold the discrimination were all appointed by Democratic presidents (one by Jimmy Carter, four by Bill Clinton) and all three Republican appointees (one by Ronald Reagan, two by George Bush) voted against it. Only one judge-a Clinton appointee-broke the party line and voted to strike down the use of preferences by the law school, and he did so on narrower grounds than the three Republican appointees.

The Center for Individual Rights, which is handling the litigation on behalf of the discriminated-against plaintiffs, has already announced that it will be asking the Supreme Court to review the case. Typically, the Court weighs three factors in determining the "cert-worthiness" of a case: whether there is a division in the federal courts of appeals on the legal issue presented (yes), whether the issue is of national importance (yes), and whether the lower court's decision was wrong (there are likely at least four justices-the number needed for a cert-grant-if not nine, who will be unpersuaded by the Grutter majority's bizarre claim that the Supreme Court has already resolved this issue). It is very likely that the Court will grant CIR's petition for a writ of certiorari.

Bush On The Spot

So, sometime in the fall, the Court will probably grant review of this case (and of Gratz v. Bollinger, the companion case dealing with Michigan's undergraduate admissions program, which the 6th Circuit should hand down soon). When it does, the Bush administration will be on the spot. Republicans may not like racial and ethnic preferences, but it is the conventional wisdom among them-that is, they stupidly believe-that the issue is a political loser. Thus, this administration has done its best to avoid grappling with affirmative action, but both sides will urge it to file a brief in the Michigan case.

Whichever side it chooses, the other side will howl. This is not a baby that can be cut in half, and it will also be awkward for the administration to say nothing. What's more, with the Supreme Court almost certain to divide 5-4, the brief filed by the United States could well tip the balance.

If the issue is heating up at the federal level, it is also boiling in some of the states, like Virginia, for instance.

Recently the Center for Equal Opportunity (CEO) used the state's freedom-of-information law to get admissions data from the three public law schools in Virginia: the University of Virginia, William & Mary, and George Mason University. The data were then turned over to two independent social scientists, Robert Lerner and Althea Nagai of Rockville, Md., who crunched the numbers and wrote a report, "Racial and Ethnic Preferences at the Three Virginia Public Law Schools," that was released on April 25. A similar regression analysis was used by the Michigan federal trial judge whose decision striking down the law school's discrimination there the 6th Circuit just reversed.

The CEO study and the Michigan case show that, if you thought that law schools would be less likely to play fast and loose with laws and precedents that cast a cold eye on blatant racial and ethnic discrimination, you would be wrong. In fact, of all the schools that the CEO has studied-47 undergraduate institutions, six medical schools, and now these three law schools-the University of Virginia School of Law wins the dubious distinction of discriminating the most.

At U.Va., the odds favoring a black candidate over an equally qualified white candidate were an astonishing 731-to-1 in 1999 and 647-to-1 in 1998. William & Mary is no slouch when it comes to discriminating either: The odds ratio favoring blacks over whites there was 168-to-1 in 1999 and 351-to-1 in 1998. At the University of Michigan Law School, meanwhile, the black-white odds ratio in 1995 was 513-to-1. (Interestingly, the Virginia schools did not have preferences for Hispanics, but Michigan did. Apparently some minorities are more equal than others.)

To put it in other terms: In 1999, if you had an LSAT score of 160 and an undergraduate grade-point-average of 3.25-these are the two measures that law schools typically weigh most heavily in making admissions decisions-you had a 95 percent chance of getting into U.Va. if you were black, but only a 3 percent chance of getting in if you were white. When schools are caught discriminating, the usual defense is to say that race is "just one factor." Just one factor, all right: one that can make the difference between having a 95 percent chance of getting in, or a 3 percent chance.

'Pure Sophistry'

U.Va.'s law school dean, John Jeffries Jr., wrote a biography of Justice Lewis Powell Jr., which has in it a passage about Powell's solo opinion in Regents of the University of California v. Bakke (1978) that The New York Times has, embarrassingly, quoted recently: "Mr. Jeffries wrote that Justice Powell's distinction between an unconstitutional quota and giving extra weight to race was nothing more than 'pure sophistry.'" University officials also object that odds ratios typically do not consider "soft factors" like teacher recommendations, application essays, and the like-as if such factors were weighed as heavily as test

scores and grades, and as if the favored minorities wrote essays and got teacher recommendations that were 731 times better than those of their white counterparts.

Earlier the same week, the CEO study on law schools was released. Meanwhile, State Solicitor William Hurd, in the office of Virginia Attorney General Jerry Kilgore, sent a memorandum to all Virginia state universities, telling them that racial and ethnic preferences in admissions and scholarships can no longer be justified on the grounds that they "remedy" past discrimination. This is the only justification for preferences that the Supreme Court has recognized in recent years-as Justice Sandra O'Connor has pointed out-and it's off the table now, Virginia's top legal office is telling its clients. Be careful.

The Hurd memorandum does not take a position on whether the diversity rationale can ever justify discrimination, but does make clear that, even if it can, such preferences must still pass a difficult, five-part "narrow tailoring" test. Be careful, again.

Linda Chavez, the CEO's president, got hold of a copy of the Hurd memorandum from one of its recipients, and decided to write a letter to Virginia's governor, lieutenant governor, and all state university presidents and members of their boards of visitors. In it, she urges them to end the use of racial and ethnic preferences in Virginia higher education. The letter encloses Hurd's memorandum (saying that discrimination is illegal, or at least very risky), as well as the studies that the CEO has published (documenting overwhelming evidence that discrimination is nonetheless widespread in Virginia law schools and undergraduate institutions).

Attention to Damages

Chavez's letter also highlights for university officials an interesting sentence in a footnote in Hurd's memorandum that may get their attention: "Additionally, monetary damages and attorneys' fees may be assessed against officials in their individual capacity if they act in a manner that violates a clearly established constitutional right." The Center for Individual Rights has, in fact, sued officials in their individual capacities in its lawsuits against the University of Michigan, the U.M. Law School, and the University of Washington School of Law.

There's a simple enough solution to all this, of course-one that will take the issue out of the courts, would be politically popular, and would be fair to everyone. Start treating people so that their skin color and where their ancestors came from don't matter.

Roger Clegg is the general counsel of the Center for Equal Opportunity, a Sterling, Va.-based think tank. The CEO filed an amicus brief with the 6th circuit in the University of Michigan litligation.

Inclusive America, Under Attack

The New York Times

August 8, 1999

Gerald R. Ford

Of all the triumphs that have marked this as America's century -- breathtaking advances in science and technology, the democratization of wealth and dispersal of political power in ways hardly imaginable in 1899 -- none is more inspiring, if incomplete, than our pursuit of racial justice. The milestones include Theodore Roosevelt's inviting Booker T. Washington to dine at the White House, Harry Truman's desegregating the armed forces, Dwight Eisenhower's using Federal troops to integrate Little Rock's Central High School and Lyndon Johnson's electrifying the nation by standing before Congress in 1965 and declaring, "We shall overcome."

I came by my support of that year's Voting Rights Act naturally. Thirty years before Selma, I was a University of Michigan senior, preparing with my Wolverine teammates for a football game against visiting Georgia Tech. Among the best players on that year's Michigan squad was Willis Ward, a close friend of mine whom the Southern school reputedly wanted dropped from our roster because he was black. My classmates were just as adamant that he should take the field. In the end, Willis decided on his own not to play. His sacrifice led me to question how educational administrators could capitulate to raw prejudice. A university, after all, is both a preserver of tradition and a hotbed of innovation. So long as books are kept open, we tell ourselves, minds can never be closed.

But doors, too, must be kept open. Tolerance, breadth of mind and appreciation for the world beyond our neighborhoods: these can be learned on the football field and in the science lab as well as in the lecture hall. But only if students are exposed to America in all her variety.

For the class of '35, such educational opportunities were diminished by the relative scarcity of African-Americans, women and various ethnic groups on campus. I have often wondered how different the world might have been in the 1940's, 50's and 60's -- how much more humane and just -- if my generation had experienced a more representative sampling of the American family. That the indignities visited on Willis Ward would be unimaginable in today's Ann Arbor is a measure of how far we have come toward realizing, however belatedly, the promises we made to each other in declaring our nationhood and professing our love of liberty.

And yet. In the last speech of his life, Lyndon Johnson reminded us of how much unfinished work remained. "To be black in a white society is not to stand on level and equal ground," he said. "While the races may stand side by side, whites stand on history's mountain and blacks stand in history's hollow. Until we overcome unequal history, we cannot overcome unequal opportunity."

Like so many phrases that have become political buzzwords, affirmative action means different things to different people.

Practically speaking, it runs the gamut from mandatory quotas, which the Supreme Court has ruled are clearly unconstitutional, to mere lip service, which is just as clearly unacceptable.

At its core, affirmative action should try to offset past injustices by fashioning a campus population more truly reflective of modern America and our hopes for the future. Unfortunately, a pair of lawsuits brought against my alma mater pose a threat to such diversity. Not content to oppose formal quotas, plaintiffs suing the University of Michigan would prohibit that and other universities from even considering race as one of many factors weighed by admission counselors.

So drastic a ban would scuttle Michigan's current system, one that takes into account nearly a dozen elements -- race, economic standing, geographic origin, athletic and artistic achievement among them -- to create the finest educational environment for all students.

This eminently reasonable approach, as thoughtful as it is fair, has produced a student body with a significant minority component whose record of academic success is outstanding.

Times of change are times of challenge. It is estimated that by 2030, 40 percent of all Americans will belong to various racial minorities. Already the global economy requires unprecedented grasp of diverse viewpoints and cultural traditions. I don't want future college students to suffer the cultural and social impoverishment that afflicted my generation. If history has taught us anything in this remarkable century, it is the notion of America as a work in progress. Do we really want to risk turning back the clock to an era when the Willis Wards were isolated and penalized for the color of their skin, their economic standing or national ancestry?

To eliminate a constitutional affirmative action policy would mock the inclusive vision Carl Sandburg had in mind when he wrote: "The Republic is a dream. Nothing happens unless first a dream." Lest we forget: America remains a nation with have-nots as well as haves. Its government is obligated to provide for hope no less than for the common defense.

Gerald R. Ford was sworn in as the 38th President of the United States [August 9, 1974].

Easing the Spring:
Strict Scrutiny and Affirmative Action After the Redistricting Cases

43 Wm & Mary L. Rev. 1569

2002

Pamela S. Karlan

One of the striking features of the Supreme Court's docket is how few classic affirmative action cases it has taken over the years. This has left the lower courts with relatively little guidance. Not surprisingly, in the years since Adarand [Constructors v. Pena (1995)], they have reached contradictory results. My own sense is that, with a little help from the parties, the Supreme Court has been more than happy to stay out of the fray.

The Supreme Court, however, has not been entirely absent from the controversy over governmental uses of race. Far from it. Over the past decade, the Supreme Court has addressed the question repeatedly, in the context of race-conscious redistricting. Its decisions, which are all over the map in both the literal and figurative senses of the phrase, suggest a nuanced understanding both of what triggers and of what satisfies strict scrutiny. The redistricting cases may flesh out the Court's expressed wish in Adarand "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" They suggest that strict scrutiny may be strict in theory, but rather pliable in practice...

When it came to redistricting, for all the Court's invocations of the ideal of colorblindness, the Court did not require plan drawers to ignore race. The Court distinguished redistricting from other kinds of government decision making on the grounds that "the legislature always is aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors." That awareness, however, is not inevitable: the reason politicians who draw district lines are aware of race in a precise form is that they have obtained race-specific data from the Census Bureau. It is entirely possible to draw district lines without regard to race at all. The reason politicians don't do so is primarily that they find race very helpful for purely partisan reasons-in some places race is highly correlated with voting behavior (indeed, it can be more highly correlated than party registration), and serves as a shorthand way of figuring out the political complexion of a potential district....

Nor is that awareness unique. Many government decision makers are aware of race and other demographic factors when they make their decisions. An admissions officer at the University of Michigan, for example, is bound to know that the Detroit public school system is over ninety percent black, and thus that an applicant who attended high school there is quite likely to be African-American. An admissions officer at the University of Texas who sees that an applicant's name is "Viola Canales" and that she grew up in McAllen, in the Rio Grande Valley, can reasonably assume that she is Hispanic. Any decision maker who encounters an individual face-to-face will have at least some racial or ethnic information about some applicants. It may turn out that the Supreme Court has a somewhat naive view of the information typically available

to state actors because the affirmative action cases that produced its embrace of strict scrutiny Croson and Adarand involved the highly formal and thus somewhat atypical practice of competitive bidding. In competitive bidding, anonymity is easy to achieve, and, assuming the bid meets the specifications, bids can be ranked against each other along one entirely quantifiable dimension, namely, price....

The Court's subsequent [redistricting] cases suggest ... some uses of race are insufficient to trigger strict scrutiny. That principle debuted in Miller v. Johnson a decision announced less than three weeks after Adarand -and was recently given real teeth in Easley v. Cromartie [(2002): under Adarand, all racial classifications must be analyzed under strict scrutiny, but under Shaw and its progeny, only when race predominates and subordinates race-neutral considerations does it prompt heightened scrutiny.]....

The Supreme Court's discussions of what constitutes a compelling state interest justifying the use of race in the redistricting process may also mark a promising turn in equal protection doctrine. In suggesting that compliance with sections 2 and 5 of the Voting Rights Act can constitute a compelling state interest, the Court has raised the possibility that congressional or executive understandings of equality that go beyond what the Constitution itself requires can provide a justification for race-conscious state action...

[The Court] has recognized that compliance with federal law can constitute a compelling state interest for taking race into account even when the federal law goes beyond what the Constitution itself requires. It has permitted states to take race into account to prevent their election systems from having a disparate impact on minority voters. In short, the Court has been unwilling to use strict scrutiny to dismantle the crown jewel of the Second Reconstruction. Faced with the prospect of a wholesale ouster of minority representatives from federal and state legislative bodies, the Court has created a more forbearant version of strict scrutiny. The question is whether that version has legs beyond redistricting....

[There are] reasons to think that affirmative action in the higher education admissions process resembles redistricting-therefore calling for a softer form of scrutiny-more than it resembles the competitive bidding process at issue in cases like Croson and Adarand.

Redistricting and admissions to competitive educational institutions share a set of characteristics that suggests that race plays a complicated role in each. To understand why, let us begin by considering the nature of the decision process absent the use of race. Both redistricting and admissions to a state's flagship educational institutions still would demand looking at more than numbers, and for similar sorts of reasons.

One person, one vote is a nice, easy-to-quantify starting point for drawing districts, but there are a huge number of equally compliant plans that will produce dramatically different legislative bodies. It would be possible to choose among equipopulous plans at random. But not all equipopulous plans will make sense on the ground: some plans will split real communities, unite dissimilar groups, ignore physical and political boundaries, place incumbents in unfamiliar districts, or produce very disproportionate partisan balance. Some plans will simply produce legislative bodies that are more "representative" than others. Thus, even

most proponents of computer-driven apolitical redistricting processes would require including other variables in the formula, such as geographic compactness, respect for subdivision boundaries, and respect for community lines. In the real world, where redistricting remains a fiercely political process, even monoracial communities consider such additional factors as partisan advantage and balance, and protection of incumbents. In any event, slavish pursuit of maximum population equality involves a spurious faith in statistics-the census figures are themselves essentially a static estimate of a constantly changing reality and no one seriously believes that individuals in districts with over a half million people in them suffer any real injury if the districts differ by a few hundred residents....

Similarly, in higher education, elite institutions could rely entirely on a few raw or mechanically adjusted numbers. Indeed, virtually everywhere such numbers form a starting point in the admissions process and are used to separate those who are capable of benefitting from and contributing to the school's educational programs from those who are not (or who are markedly less likely to be). At most elite institutions, however, it would be possible to produce entering classes with vastly different characteristics, each made up entirely of well-qualified students. The numbers themselves, even when adjusted, may offer a spurious precision with respect to particular applicants. A school, like a legislature, may decide that a variety of other factors beyond standardized test scores and grade point averages will enhance its various missions. In that regard, it might decide, even in the complete absence of racial considerations, to take into account factors such as geographic diversity, choice of specialization, distinctive extra-curricular experiences, nonquantifiable evidence that an applicant's future promise is not adequately signaled by her past performance, and the like. Moreover, along the same vaguely venal lines as incumbent protection and partisanship, a school may decide to grant preferences to children of alumni or other financial or political supporters...

In a multidimensional admissions process, race is a factor, but it does not subordinate such apparently traditional, race-neutral criteria as prior academic achievement and promise, and the admission of a well-rounded class. On the other hand, in a more rigid admissions process, race appears to predominate. The difference between the two maps onto the distinction the Court has recently made in the redistricting process. If not all awareness and use of race triggers strict scrutiny in the redistricting process, then why should it do so in the admissions process?...

The redistricting cases also suggest a potentially fruitful new line of argument with regard to the compelling state interest inquiry. If a reasonable attempt to comply with a federally mandated effects test can serve as an appropriate justification for race consciousness in the districting process, then perhaps it can do so in the admissions process as well.

So-called section 602 regulations provide one possible counterpart to the Voting Rights Act. Virtually all public institutions of higher education are subject to Title VI of the Civil Rights Act of 1964, which forbids racial discrimination in programs receiving federal funds.... Under section 602 ..., at least forty federal agencies, including the Department of Education, have adopted regulations that prohibit practices that have a discriminatory effect. The Department of Education's

regulations provide, among other things, that recipients of federal funds cannot "utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin," and make clear that admissions practices are among the covered actions. Moreover, "[e]ven in the absence of ... prior discrimination [by the particular institution or program], a recipient ... may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." Thus, the Department of Education's regulations, like sections 2 and 5 of the Voting Rights Act, embody a results test....

An educational institution could reasonably fear being found in violation of the Department of Education's regulations if it implemented an admissions policy that resulted in the wholesale exclusion of black or Hispanic applicants, particularly because it might be difficult to show that such a policy pursued some other valid goal. In order to avoid violating the regulations, some level of race-consciousness might be necessary. Further, like section 2 of the Voting Rights Act, the Department of Education's regulations do not require proof of prior intentional, unconstitutional behavior by the specific government entity in order to justify race-conscious affirmative action. In light of the federal government's determination that full effectuation of the straightforward constitutional (and statutory) command to avoid purposeful racial discrimination requires prohibiting state action that has a discriminatory impact as well, compliance with these rules by public educational institutions, like compliance by state redistricting authorities, ought to be considered a compelling state interest.

As in redistricting, the question of narrow tailoring is likely to be the issue least amenable to broad statements of principle. It may turn out that many affirmative action plans, like many legislative districts, get struck down not because the institution was forbidden from relying on race altogether, but because it relied too much, and in too visible a way, on racial factors. Pamela S. Karlan, Disarming the Private Attorney General, 2002 U. Ill. L. Rev. ___ (forthcoming)