BUSINESS LAW AND THE LEGAL ENVIRONMENT-CASES, STATUTES, REGULATIONS AND ARTICLES

2020, v. 5.1

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Chapter 1 Introduction to Law and Legal Systems

Harris v. Forklift Systems, 510 U.S. 17 (U.S. Supreme Court 1992*)*

JUDGES: O'CONNOR, J., delivered the opinion for a unanimous Court. SCALIA, J., and GINSBURG, J., filed concurring opinions.

JUSTICE O'CONNOR delivered the opinion of the Court.

In this case we consider the definition of a discriminatorily "abusive work environment" (also known as a "hostile work environment") under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e et seq. (1988 ed., Supp. III).

I

Teresa Harris worked as a manager at Forklift Systems, Inc., an equipment rental company, from April 1985 until October 1987. Charles Hardy was Forklift's president.

The Magistrate found that, throughout Harris' time at Forklift, Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendoes. Hardy told Harris on several occasions, in the presence of other employees, "You're a woman, what do you know" and "We need a man as the rental manager"; at least once, he told her she was "a dumbass woman." Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate [Harris's] raise." Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up. He made sexual innuendoes about Harris' and other women's clothing.

In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "What did you do, promise the guy…some [sex] Saturday night?" On October 1, Harris collected her paycheck and quit.

Harris then sued Forklift, claiming that Hardy's conduct had created an abusive work environment for her because of her gender. The United States District Court for the Middle District of Tennessee, adopting the report and recommendation of the Magistrate, found this to be "a close case," but held that Hardy's conduct did not create an abusive environment. The court found that some of Hardy's comments "offended [Harris], and would offend the reasonable woman," but that they were not "so severe as to be expected to seriously affect [Harris's] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance.

"Neither do I believe that [Harris] was subjectively so offended that she suffered injury.…Although Hardy may at times have genuinely offended [Harris], I do not believe that he created a working environment so poisoned as to be intimidating or abusive to [Harris]."

In focusing on the employee's psychological well-being, the District Court was following Circuit precedent. See Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (CA6 1986), cert. denied, 481 U.S. 1041, 95 L. Ed. 2d 823, 107 S. Ct. 1983 (1987). The United States Court of Appeals for the Sixth Circuit affirmed in a brief unpublished decision…reported at 976 F.2d 733 (1992).

We granted certiorari, 507 U.S. 959 (1993), to resolve a conflict among the Circuits on whether conduct, to be actionable as "abusive work environment" harassment (no quid pro quo harassment issue is present here), must "seriously affect [an employee's] psychological well-being" or lead the plaintiff to "suffer injury." Compare Rabidue (requiring serious effect on psychological well-being); Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1510 (CA11 1989) (same); and Downes v. FAA, 775 F.2d 288, 292 (CA Fed. 1985) (same), with Ellison v. Brady, 924 F.2d 872, 877–878 (CA9 1991) (rejecting such a requirement).

II

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer…to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). As we made clear in Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), this language "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment," which includes requiring people to work in a discriminatorily hostile or abusive environment. Id., at 64, quoting Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702, 707, n.13, 55 L. Ed. 2d 657, 98 S. Ct. 1370 (1978). When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 U.S. at 65, that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," Title VII is violated.

This standard, which we reaffirm today, takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in Meritor, "mere utterance of an…epithet which engenders offensive feelings in an employee," does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality. The appalling conduct alleged in Meritor, and the reference in that case to environments "'so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,'" Id., at 66, quoting Rogers v. EEOC, 454 F.2d 234, 238 (CA5 1971), cert. denied, 406 U.S. 957,32 L. Ed. 2d 343, 92 S. Ct. 2058 (1972), merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.

We therefore believe the District Court erred in relying on whether the conduct "seriously affected plaintiff's psychological well-being" or led her to "suffer injury." Such an inquiry may needlessly focus the fact finder's attention on concrete psychological harm, an element Title VII does not require. Certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, but the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, Meritor, supra, at 67, there is no need for it also to be psychologically injurious.

This is not, and by its nature cannot be, a mathematically precise test. We need not answer today all the potential questions it raises, nor specifically address the Equal Employment Opportunity Commission's new regulations on this subject, see 58 Fed. Reg. 51266 (1993) (proposed 29 CFR §§ 1609.1, 1609.2); see also 29 CFR § 1604.11 (1993). But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

III

Forklift, while conceding that a requirement that the conduct seriously affect psychological well-being is unfounded, argues that the District Court nonetheless correctly applied the Meritor standard. We disagree. Though the District Court did conclude that the work environment was not "intimidating or abusive to [Harris]," it did so only after finding that the conduct was not "so severe as to be expected to seriously affect plaintiff's psychological well-being," and that Harris was not "subjectively so offended that she suffered injury," ibid. The District Court's application of these incorrect standards may well have influenced its ultimate conclusion, especially given that the court found this to be a "close case."

We therefore reverse the judgment of the Court of Appeals, and remand the case for further proceedings consistent with this opinion.

Chapter 2 Corporate Social Responsibility and Business Ethics

Corporations and Corporate Governance

One effort to integrate the two viewpoints of stakeholder theory and shareholder primacy is the conscious capitalism movement. Companies that practice conscious capitalism embrace the idea that profit and prosperity can and must go hand in hand with social justice and environmental stewardship. They operate with a holistic or systems view. This means that they understand that all stakeholders are connected and interdependent. They reject false trade-offs between stakeholder interests and strive for creative ways to achieve win-win-win outcomes for all. Milton Friedman, John Mackey, and T. J. Rodgers, "Rethinking the Social Responsibility of Business," Reason.com, October 2005, http://reason.com/archives/2005/10/01/rethinking-the-social-responsi.

Foreign Corrupt Practices Act 15 U.S.C. Sections 78dd-1

Skilling v. United States**,** 130 S. Ct. 2896 (2010) [Beatty text pp 171-72]

Commmonwealth v. Angelo Todesca Corp., 446 Mass. 128, 842 N.E. 2d 930 (2006)

Henningsen v. Bloomfield Motors, Inc., 101 A.2d 69 73-96 (1960) (*Strict Liability*)

Automobile Workers v. Johnson Controls, Inc., 89 U. S. 1215 (1991)

State Department of Environmental Protection v. Ventron Corporation 94 N. J. 475 (1983)

Chapter 3 Courts and the Legal Process: Alternative Means of Resolving Disputes

Cases

EPIC SYSTEMS CORP. *v.* LEWIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 16–285. Argued October 2, 2017—Decided May 21, 2018*

In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate Fair Labor Standards Act and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held: Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise. Pp. 5–25.

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*Together with No. 16–300, *Ernst & Young LLP et al.* v. *Morris et al.*, on certiorari to the United States Court of Appeals for the Ninth Circuit, and No. 16–307, *National Labor Relations Board* v. *Murphy Oil USA, Inc., et al.*, on certiorari to the United States Court of Appeals for the Fifth Circuit.

(a) The Arbitration Act requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. See 9
U. S. C. §§2, 3, 4. These emphatic directions would seem to resolve any argument here. The Act's saving clause—which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," §2—recognizes only " 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' " *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," *id.*, at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes. Pp. 5–9.
(b) The employees also mistakenly claim that, even if the Arbitration Act normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." *Morton* v. *Mancari*, 417 U. S. 535, 551. To prevail, the employees must show a " 'clear and manifest' " congressional intention to displace one Act with another. *Ibid*. There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" preexisting law before suspending the law's normal operations in a later statute. *United States* v. *Fausto*, 484
U. S. 439, 452, 453.

The employees ask the Court to infer that class and collective actions are "concerted activities" protected by §7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U. S. C. §157. But §7 focuses on the right to organize unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in §7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term "other concerted activities for the purpose of . . . other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, *i.e.,* things employees do for themselves in the course of exercising their right to free association in the workplace.

The NLRA's structure points to the same conclusion. After speaking of various "concerted activities" in §7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration (Cite as: 584 U. S. ____ (2018). Nor is it at all obvious what rules should govern on such essential issues as opt-out and opt-in procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., *e.g.,* 29 U. S. C. §§216(b), 626, or to override the Arbitration Act, see, *e.g.,* 15 U. S. C. §1226(a)(2), but Congress has done nothing like that in the NLRA.

The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use *existing* procedures provided by statute or rule, but the

NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U. S. 20, 32. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings—matters that are usually left to, *e.g.,* the Federal Rules of Civil Procedure, the Arbitration Act, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29
U. S. C. §102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the Arbitration Act and other federal statutes, see, *e.g. American Express Co.* v. *Italian Colors Restaurant*, 570 U. S. 228; and its §7 cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration, see, *e.g., NLRB* v. *Washington Aluminum Co.*, 370 U. S. 9 (4 EPIC SYSTEMS CORP. *v.* LEWIS.).

Finally, the employees cannot expect deference under *Chevron*
U. S. A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," *id.,* at 842, but to interpret that statute in a way that limits the work of the Arbitration Act, which the agency does not administer. The Board and the Solicitor General also dispute the NLRA's meaning, articulating no single position on which the Executive Branch might be held "accountable to the people." *Id.,* at 865. And after "employing traditional tools of statutory construction," *id.,* at 843, n. 9, including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address. Pp. 9–21.

No. 16–285, 823 F. 3d 1147, and No. 16–300, 834 F. 3d 975, reversed and remanded; No. 16–307, 808 F. 3d 1013, affirmed.

GORSUCH, J., delivered the opinion of the Court, in which ROBERTS,
C. J., and KENNEDY, THOMAS, and ALITO, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which BREYER, SOTOMAYOR, and KAGAN, JJ., joined.

SouthTrust Bank v. Williams

775 So.2d 184 (Ala. 2000)

Cook, J.

SouthTrust Bank ("SouthTrust") appeals from an order denying its motion to compel arbitration of an action against it by checking-account customers Mark Williams and Bessie Daniels. We reverse and remand.

Daniels and Williams began their relationship with SouthTrust in 1981 and 1995, respectively, by executing checking-account "signature cards." The signature card each customer signed contained a "change-in-terms" clause. Specifically, when Daniels signed her signature card, she "agree[d] to be subject to the Rules and Regulations as may now or *hereafter* be adopted by the Bank." (Emphasis added.)…[Later,] SouthTrust added paragraph 33 to the regulations:…

ARBITRATION OF DISPUTES. You and we agree that the transactions in your account involve 'commerce' under the Federal Arbitration Act ('FAA'). ANY CONTROVERSY OR CLAIM BETWEEN YOU AND US…WILL BE SETTLED BY BINDING ARBITRATION UNDER THE FAA.…

This action…challenges SouthTrust's procedures for paying overdrafts, and alleges that SouthTrust engages in a "uniform practice of paying the largest check(s) before paying multiple smaller checks…[in order] to generate increased service charges for [SouthTrust] at the expense of [its customers]."

SouthTrust filed a "motion to stay [the] lawsuit and to compel arbitration." It based its motion on paragraph 33 of the regulations. [T]he trial court…entered an order denying SouthTrust's motion to compel arbitration. SouthTrust appeals.…

Williams and Daniels contend that SouthTrust's amendment to the regulations, adding paragraph 33, was ineffective because, they say, they did not *expressly assent* to the amendment. In other words, they object to submitting their claims to arbitration because, they say, when they opened their accounts, neither the regulations nor any other relevant document contained an arbitration provision. They argue that "mere failure to object to the addition of a material term cannot be construed as an acceptance of it."…They contend that SouthTrust could not unilaterally insert an arbitration clause in the regulations and make it binding on depositors like them.

SouthTrust, however, referring to its change-of-terms clause insists that it "notified" Daniels and Williams of the amendment in January 1997 by enclosing in each customer's "account statement" a complete copy of the regulations, as amended. Although it is undisputed that Daniels and Williams never affirmatively assented to these amended regulations, SouthTrust contends that their assent was evidenced by their failure to close their accounts after they

received notice of the amendments.…Thus, the disposition of this case turns on the legal effect of Williams and Daniels's continued use of the accounts after the regulations were amended.

Williams and Daniels argue that "[i]n the context of contracts between merchants [under the UCC], a written confirmation of an acceptance may modify the contract *unless* it adds a *material* term, and arbitration clauses are material terms."…

Williams and Daniels concede—as they must—…that Article 2 governs "transactions in goods," and, consequently, that it is not applicable to the transactions in this case. Nevertheless, they argue:

It would be astonishing if a Court were to consider the addition of an arbitration clause a material alteration to a contract between merchants, who by definition are sophisticated in the trade to which the contract applies, but *not* hold that the addition of an arbitration clause is a material alteration pursuant to a change-of-terms clause in a contract between one sophisticated party, a bank, and an entire class of less sophisticated parties, its depositors.…

In response, SouthTrust states that "because of the 'at-will' nature of the relationship, banks by necessity must contractually reserve the right to amend their deposit agreements from time to time." In so stating, SouthTrust has precisely identified the fundamental difference between the transactions here and those transactions governed by [Article 2].

Contracts for the purchase and sale of goods are essentially *bilateral* and executory in nature. See [Citation] "An agreement whereby one party promises to sell and the other promises to buy a thing at a later time…is a bilateral promise of sale or contract to sell".…"[A] unilateral contract results from an exchange of a promise for an act; a bilateral contract results from an exchange of promises."…Thus, "in a unilateral contract, there is no bargaining process or exchange of promises by parties as in a bilateral contract." [Citation] "[O]nly one party makes an offer (or promise) which invites performance by another, and performance constitutes both acceptance of that offer and consideration." Because "a 'unilateral contract' is one in which no promisor receives promise as consideration for his promise," only one party is bound.… The difference is not one of semantics but of substance; it determines the rights and responsibilities of the parties, including the time and the conditions under which a cause of action accrues for a breach of the contract.

This case involves at-will, commercial relationships, based upon a series of unilateral transactions. Thus, it is more analogous to cases involving insurance policies, such as [Citations]. The common thread running through those cases was the *amendment* by one of the parties to a business relationship of a document underlying that relationship—without the express assent of the other party—to require the arbitration of disputes arising after the amendment.…

The parties in [the cited cases], like Williams and Daniels in this case, took no action that could be considered inconsistent with an assent to the arbitration provision. In each case, they

continued the business relationship after the interposition of the arbitration provision. In doing so, they implicitly assented to the addition of the arbitration provision.…

Reversed and remanded.

BUCKEYE CHECK CASHING, INC., Petitioner, v. John CARDEGNA et al.

126 S.Ct. 1204

Argued Nov. 29, 2005. Decided Feb. 21, 2006

Synopsis

Background:

Borrowers brought putative class action lawsuit against lender, alleging that lender made illegal usurious loans disguised as check cashing transactions in violation of various state statutes. Lender filed motion to compel arbitration and to stay proceedings pursuant to provisions for arbitration contained in deferred deposit and disclosure agreement signed by borrowers. The Circuit Court, 15th Judicial Circuit, Palm Beach County, Thomas H. Barkdull, III, J., denied motion, but the District Court of Appeal, 824 So.2d 228,reversed and remanded. Borrowers petitioned for review. The Florida Supreme Court, 894 So.2d 860,quashed and remanded, ruling that borrowers' claim that underlying contract was illegal and void ab initio had to be resolved by trial court before arbitration of other disputes could be compelled. Certiorari was granted.

Holding: The Supreme Court, Justice Scalia, held that claim that purportedly usurious contract containing an arbitration provision was void for illegality was to be determined by arbitrator, not court.

Reversed and remanded.

Justice Thomas filed dissenting opinion

Syllabus*

For each deferred-payment transaction respondents entered into with Buckeye **1206 Check Cashing, they signed an Agreement containing provisions that required binding arbitration to resolve disputes arising out of the Agreement. Respondents sued in Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida laws, rendering it criminal on its face. The trial court denied Buckeye's motion to compel arbitration, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void ab initio. A state appellate court reversed, but was in turn reversed by the Florida Supreme Court, which reasoned that enforcing an arbitration agreement in a contract challenged as unlawful would violate state public policy and contract law.

Held: Regardless of whether it is brought in federal or state court, a challenge to the validity of a contract as a whole, and not specifically to the arbitration clause within it, must go to the arbitrator, not the court. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270, and Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1,

answer the question presented here by establishing three propositions. First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. See Prima Paint, 388 U.S., at 400, 402–404, 87 S.Ct. 1801. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. See id., at 403–404, 87 S.Ct. 1801. Third, this arbitration law applies in state as well as federal courts. See Southland, supra, at 12, 104 S.Ct. 852. The crux of respondents' claim is that the Agreement as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge. Because this challenges the Agreement, and not specifically its arbitration provisions, the latter are enforceable apart from the remainder of the contract, and the challenge should be considered by an arbitrator, not a court. The Florida Supreme Court erred in declining to apply Prima Paint's severability rule, and respondents' assertion that that rule does not apply in state court runs contrary to Prima Paint and Southland. Pp. 1207–1211.

894 So.2d 860, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, post, p. 1211. ALITO, J., took no part in the consideration or decision of the case.

Opinion
Justice SCALIA delivered the opinion of the Court.

*442 We decide whether a court or an arbitrator should consider the claim that a contract containing an arbitration provision is void for illegality.

I
Respondents John Cardegna and Donna Reuter entered into various deferred-payment transactions with petitioner Buckeye Check Cashing (Buckeye), in which they received cash in exchange for a personal check in the amount of the cash plus a finance charge. For each separate transaction they signed a “Deferred Deposit and Disclosure Agreement” (Agreement), which included the following arbitration provisions:

“1. Arbitration Disclosure By signing this Agreement, you agree that i[f] a dispute of any kind arises out of this Agreement or your application therefore or any instrument relating thereto, th[e]n either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration as set forth in Paragraph 2 below ....

“2. Arbitration Provisions Any claim, dispute, or controversy ... arising from or relating to this Agreement ... or the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement (collectively ‘Claim’), shall be resolved, upon the election of you or us or said third-parties, by binding arbitration .... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed *443 by the Federal Arbitration Act (‘FAA’), 9 U.S.C. Sections 1–16. The arbitrator shall apply applicable substantive law constraint

[sic] with the FAA and applicable statu[t]es of limitations and shall honor claims of privilege recognized by law ... .” App. 36, 38, 40, 42.

Respondents brought this putative class action in Florida state court, alleging that Buckeye charged usurious interest rates and that the Agreement violated various Florida lending and consumer-protection laws, rendering it criminal on its face. Buckeye moved to compel arbitration. The trial court denied the motion, holding that a court rather than an arbitrator should resolve a claim that a contract is illegal and void ab initio. The District Court of Appeal of Florida for the Fourth District reversed, holding that because respondents did not challenge the arbitration provision itself, but instead claimed that the entire contract was void, the agreement to arbitrate was enforceable, and the question of the contract's legality should go to the arbitrator.

Respondents appealed, and the Florida Supreme Court reversed, reasoning that to enforce an agreement to arbitrate in a contract challenged as unlawful “ ‘could breathe life into a contract that not only violates state law, but also is criminal in nature ... .’ ” 894 So.2d 860, 862 (2005) (quoting Party Yards, Inc. v. Templeton, 751 So.2d 121, 123 (Fla.App.2000)). We granted certiorari. 545 U.S. 1127, 125 S.Ct. 2937, 162 L.Ed.2d 864 (2005).

II

A

1 To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts:

**1208 “A written provision in ... a contract ... to settle by arbitration a controversy thereafter arising out of such *444 contract ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

Challenges to the validity of arbitration agreements “upon such grounds as exist at law or in equity for the revocation of any contract” can be divided into two types. One type challenges specifically the validity of the agreement to arbitrate. See, e.g., Southland Corp. v. Keating, 465 U.S. 1, 4–5, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) (challenging the agreement to arbitrate as void under California law insofar as it purported to cover claims brought under the state Franchise Investment Law). The other challenges the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid.1 Respondents' claim is of this second type. The crux of the complaint is that the contract as a whole (including its arbitration provision) is rendered invalid by the usurious finance charge.

In Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), we addressed the question of who—court or arbitrator—decides these two types of challenges. The issue in the case was “whether a claim of fraud in the inducement of the entire contract is to be resolved by the federal *445 court, or whether the matter is to be referred to

the arbitrators." Id., at 402, 87 S.Ct. 1801. Guided by § 4 of the FAA,2 we held that "if the claim is fraud in the inducement of the arbitration clause itself—an issue which goes to the making of the agreement to arbitrate—the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally." Id., at 403–404, 87 S.Ct. 1801 (internal quotation marks and footnote omitted). We rejected the view that the question of "severability" was one of state law, so that if state law held the arbitration provision not to be severable a challenge to the contract as a whole would be decided by the court. See id., at 400, 402–403, 87 S.Ct. 1801.

Subsequently, in Southland Corp., we held that the FAA "create[d] a body of **1209 federal substantive law," which was "applicable in state and federal courts." 465 U.S., at 12, 104 S.Ct. 852 (internal quotation marks omitted). We rejected the view that state law could bar enforcement of § 2, even in the context of state-law claims brought in state court. See id., at 10–14, 104 S.Ct. 852; see also Allied–Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270–273, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995).

B

Respondents assert that Prima Paint's rule of severability does not apply in state court. They argue that Prima Paint interpreted only §§ 3 and 4—two of the FAA's procedural provisions, which appear to apply by their terms only in federal court—but not § 2, the only provision that we have applied in state court. This does not accurately describe Prima Paint. Although § 4, in particular, had much to do with Prima Paint's understanding of the rule of severability, see 388 U.S., at 403–404, 87 S.Ct. 1801, this rule ultimately arises out of § 2, the FAA's substantive command that arbitration agreements be treated like all other contracts. The rule of severability establishes how this equal-footing guarantee for "a written [arbitration] provision" is to be implemented. Respondents' **1210 reading of Prima Paint as establishing nothing more than a federal-court rule of procedure also runs contrary to Southland's understanding of that case. One of the bases for Southland's application of § 2 in state court was precisely Prima Paint's "reli[ance] for [its] holding on Congress' broad power to fashion substantive rules under the Commerce Clause." 465 U.S., at 11, 104 S.Ct. 852; see also Prima Paint, supra, at 407, 87 S.Ct. 1801 (Black, J., dissenting) ("[t]he Court here holds that the [FAA], as a matter of federal substantive law ..." (emphasis added)). Southland itself refused to "believe Congress intended to limit the Arbitration Act to disputes subject only to federal-court jurisdiction." 465 U.S., at 15, 104 S.Ct. 852.

5 Respondents point to the language of § 2, which renders "valid, irrevocable, and enforceable" "a written provision in" or "an agreement in writing to submit to arbitration an existing controversy arising out of" a "contract." Since, respondents argue, the only arbitration agreements to which § 2 applies are those involving a "contract," and since an agreement void ab initio under state law is not a "contract," there is no "written provision" in or "controversy arising out of" a "contract," to which § 2 can apply. This argument echoes *448 Justice Black's dissent in Prima Paint: "Sections 2 and 3 of the Act assume the existence of a valid contract. They merely provide for enforcement where such a valid contract exists." 388 U.S., at 412–413, 87 S.Ct. 1801. We do not read "contract" so narrowly. The word appears four times in § 2. Its

last appearance is in the final clause, which allows a challenge to an arbitration provision "upon such grounds as exist at law or in equity for the revocation of any contract." (Emphasis added.) There can be no doubt that "contract" as used this last time must include contracts that later prove to be void. Otherwise, the grounds for revocation would be limited to those that rendered a contract voidable—which would mean (implausibly) that an arbitration agreement could be challenged as voidable but not as void. Because the sentence's final use of "contract" so obviously includes putative contracts, we will not read the same word earlier in the same sentence to have a more narrow meaning.3 We note that neither Prima Paint nor Southland lends support to respondents' reading; as we have discussed, neither case turned on whether the challenge at issue would render the contract voidable or void.

* * *

It is true, as respondents assert, that the Prima Paint rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that *449 the court later finds to be perfectly enforceable. Prima Paint resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

**1211 The judgment of the Florida Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chapter 4 Constitutional Law and US Commerce

Griswold v. Connecticut 381 U.S. 479 (U.S. Supreme Court 1965)

A nineteenth-century Connecticut law made the use, possession, or distribution of birth control devices illegal. The law also prohibited anyone from giving information about such devices. The executive director and medical director of a planned parenthood association were found guilty of giving out such information to a married couple that wished to delay having children for a few years. The directors were fined $100 each.

They appealed throughout the Connecticut state court system, arguing that the state law violated (infringed) a basic or fundamental right of privacy of a married couple: to live together and have sex together without the restraining power of the state to tell them they may legally have intercourse but not if they use condoms or other birth control devices. At each level (trial court, court of appeals, and Connecticut Supreme Court), the Connecticut courts upheld the constitutionality of the convictions.

Plurality Opinion by Justice William O. Douglass

We do not sit as a super legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. The [Connecticut] law, however, operates directly on intimate relation of husband and wife and their physician's role in one aspect of that relation.

[Previous] cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.…Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one.…The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which the government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described…as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." We recently referred in *Mapp v. Ohio…*to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people."

[The law in question here], in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by having a maximum destructive impact on [the marital] relationship. Such a law cannot stand.…Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marital relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Mr. Justice Stewart, whom Mr. Justice Black joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

…

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States. It has not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." No soldier has been quartered in any house. There has been no search, and no seizure. Nobody has been compelled to be a witness against himself.

The Court also quotes the Ninth Amendment, and my Brother Goldberg's concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which

this Court held "states but a truism that all is retained which has not been surrendered," *United States v. Darby*, 312 U.S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.

JOSEPH LOCHNER, Plff. in Err., v. PEOPLE OF THE STATE OF NEW YORK

No. 292.

Argued February 23, 24, 1905.

Decided April 17, 1905.

Synopsis

IN ERROR to the County Court of Oneida County, State of New York, to review a judgment entered pursuant to the mandate of the Court of Appeals of that state affirming the judgment of the Appellate Division of the Supreme Court, Fourth Department, which had itself affirmed a conviction in the Oneida County Court of a violation of the labor law of that state by permitting an employee in a bakery to work more than sixty hours in one week. Judgments of all the courts below reversed, and the cause remanded to the Oneida County Court for further proceedings.

See same case below in Appellate Division, 73 App. Div. 120, 76 N. Y. Supp. 396, and in Court of Appeals, 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373.

Attorneys and Law Firms

**540 *48 Messrs.Frank Harvey Field and Henry Weismann (by special leave) for plaintiff in error.

*50 Mr.Julius M. Mayer for defendant in error.

Opinion

Statement by Mr. Justice Peckham:

*45 This is a writ of error to the county court of Oneida county, in the state of New York (to which court the record had been remitted), to review the judgment of the court of appeals of that state, affirming the judgment of the supreme court, which itself affirmed the judgment of the county court, convicting the defendant of a misdemeanor on an indictment under a statute of that state, known, by its short title, as the labor *46 law. The section of the statute under which the indictment was found is § 110, and is reproduced in the margin† (together with the other sections of the labor law upon the subject of bakeries, being §§ 111 to 115, both inclusive).

The indictment averred that the defendant 'wrongfully and unlawfully required and permitted an employee working for him in his biscuit, bread, and cake bakery and confectionery establishment, at the city of Utica, in this county, to work more than sixty hours in one week,' after having been theretofore convicted of a violation of the name act; and therefore, as averred, he committed the crime of misdemeanor, second offense. The plaintiff in error demurred to the indictment on several grounds, one of which was that the facts stated did not *47 constitute a crime. The demurrer was overruled, and, the plaintiff in error having refused to plead further, a plea of not guilty was entered by order of the court and the trial commenced, and he was convicted of misdemeanor, second offense, as indicted, and sentenced to pay a fine of $50, and to stand committed until paid, not to exceed fifty days in the Oneida county jail. A certificate of reasonable doubt was granted by the county judge of Oneida county, whereon an appeal was taken to the appellate division of the supreme court, fourth department, where the judgment of conviction was affirmed. 73 App. Div. 120, 76 N. Y. Supp. 396. A further appeal was then taken to the court of appeals, where the judgment of conviction was again affirmed. 177 N. Y. 145, 101 Am. St. Rep. 773, 69 N. E. 373.

*52 Mr. Justice Peckham, after making the foregoing statement of the facts, delivered the opinion of the court:

The indictment, it will be seen, charges that the plaintiff in error violated the 110th section of article 8, chapter 415, of the Laws of 1897, known as the labor law of the state of New York, in that he wrongfully and unlawfully required and permitted an employee working for him to work more than sixty hours in one week. There is nothing in any of the opinions delivered in this case, either in the supreme court or the court of appeals of the state, which construes

**541 the section, in using the word 'required,' as referring to any physical force being used to obtain the labor of an employee. It is assumed that the word means nothing more than the requirement arising from voluntary contract for such labor in excess of the number of hours specified in the statute. There is no pretense in any of the opinions that the statute was intended to meet a case of involuntary labor in any form. All the opinions assume that there is no real distinction, so far as this question is concerned, between the words 'required' and 'permitted.' The mandate of the statute, that 'no employee shall be required or permitted to work,' is the substantial equivalent of an enactment that 'no employee shall contract or agree to work,' more than ten hours per day; and, as there is no provision for special emergencies, the statute is mandatory in all cases. It is not an act merely fixing the number of hours which shall constitute a legal day's work, but an absolute prohibition upon the employer permitting, under any circumstances, more than ten hours' work to be done in his establishment. The employee may desire to earn the extra money which would arise from his working more than the prescribed *53 time, but this statute forbids the employer from permitting the employee to earn it.

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. Under that provision no state can deprive any person of life, liberty, or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right. There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated, and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals, and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designed to interfere. Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Re Kemmler, 136 U. S. 436, 34 L. ed. 519, 10 Sup. Ct. Rep. 930; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13; Re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The state, therefore, has power to prevent the individual from making certain kinds of contracts, and in regard to them the Federal Constitution offers no protection. If the contract be one which the state, in the legitimate exercise of its police power, has the right to prohibit, it is not prevented from prohibiting it by the 14th Amendment. Contracts in violation of a statute, either of the Federal or state government, or a contract to let one's property for immoral purposes, or to do any other unlawful act, could obtain no protection from the Federal Constitution, as coming under the liberty of *54 person or of free contract. Therefore, when the state, by its legislature, in the assumed exercise of its police powers, has passed an act which seriously limits the **542 right to labor or the right of contract in regard to their means of

livelihood between persons who are sui juris (both employer and employee), it becomes of great importance to determine which shall prevail,-the right of the individual to labor for such time as he may choose, or the right of the state to prevent the individual from laboring, or from entering into any contract to labor, beyond a certain time prescribed by the state.

This court has recognized the existence and upheld the exercise of the police powers of the states in many cases which might fairly be considered as border ones, and it has, in the course of its determination of questions regarding the asserted invalidity of such statutes, on the ground of their violation of the rights secured by the Federal Constitution, been guided by rules of a very liberal nature, the application of which has resulted, in numerous instances, in upholding the validity of state statutes thus assailed. Among the later cases where the state law has been upheld by this court is that of Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. A provision in the act of the legislature of Utah was there under consideration, the act limiting the employment of workmen in all underground mines or workings, to eight hours per day, 'except in cases of emergency, where life or property is in imminent danger.' It also limited the hours of labor in smelting and other institutions for the reduction or refining of ores or metals to eight hours per day, except in like cases of emergency. The act was held to be a valid exercise of the police powers of the state. A review of many of the cases on the subject, decided by this and other courts, is given in the opinion. It was held that the kind of employment, mining, smelting, etc., and the character of the employees in such kinds of labor, were such as to make it reasonable and proper for the state to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. The following citation *55 from the observations of the supreme court of Utah in that case was made by the judge writing the opinion of this court, and approved: 'The law in question is confined to the protection of that class of people engaged in labor in underground mines, and in smelters and other works wherein ores are reduced and refined. This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters, and other works for the reduction and refining of ores. Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments.'

It will be observed that, even with regard to that class of labor, the Utah statute provided for cases of emergency wherein the provisions of the statute would not apply. The statute now before this court has no emergency clause in it, and, if the statute is valid, there are no circumstances and no emergencies under which the slightest violation of the provisions of the act would be innocent. There is nothing in Holden v. Hardy which covers the case now before us. Nor does Atkin v. Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124, touch the case at bar. The Atkin Case was decided upon the right of the state to control its municipal corporations, and to prescribe the conditions upon which it will permit work of a public character to be done for a municipality. Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, is equally far from an authority for this legislation. The employees in that case were held to be at a disadvantage with the employer in matters of wages, they being

miners and coal workers, and the act simply provided for the cashing of coal orders when presented by the miner to the employer.

The latest case decided by this court, involving the police power, is that of Jacobson v. Massachusetts, decided at this term and reported in 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed.643. It related to compulsory vaccination, and the law was held vaild as a proper exercise of the police powers with reference to the public health. It was stated in the opinion that it was a case 'of an adult who, for aught that appears, was himself in perfect health and a fit *56 subject of vaccination, and yet, while remaining in the community, refused to obey the statute and the regulation, adopted in execution of its provisions, for the protection of the public health and the public safety, confessedly endangered by the presence of a dangerous disease.' That case is also far from covering the one now before the court.

Petit v. Minnesota, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666, was upheld as a proper exercise of the police power relating to the observance of Sunday, and the case held that the legislature had the right to declare that, as matter of law, keeping barber shops open on Sunday was not a work of necessity or charity.

It must, of course, be conceded that there is a limit to the valied exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would **543 have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,-become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of substituting the judgment of the *57 court for that of the legislature. If the act be within the power of the state it is valid, although the judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the state? and that question must be answered by the court.

The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker. There is no

contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state. Viewed in the light of a purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals, nor the welfare, of the public, and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labor does not come within the police power on that ground.

It is a question of which of two powers or rights shall prevail,-the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes *58 with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.

This case has caused much diversity of opinion in the state courts. In the supreme court two of the five judges composing the court dissented from the judgment affirming the validity of the act. In the court of appeals three of the seven judges also dissented from the judgment upholding the statute. Although found in what is called a labor law of the state, the court of appeals has upheld the act as one relating to the public health,-in other words, as a health law. One of the judges of the court of appeals, in upholding the law, stated that, in his opinion, the regulation in question could not be sustained unless they were able to say, from common knowledge, that working in a bakery and candy factory was an unhealthy employment. The judge held that, while the evidence was not uniform, it still led him to the conclusion that the occupation of a baker or confectioner was unhealthy and tended to result in diseases of the respiratory organs. Three of the judges dissented from that view, and they thought the occupation of a baker was not to such an extent unhealthy as to warrant the interference of the legislature with the liberty of the individual.

We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, sui juris, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem **544 to be no length to which legislation of this nature might not go. The case differs widely, as we have already stated, from the expressions of this court in regard to laws of this nature, as

stated in Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, and Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed.--.

*59 We think that there can be no fair doubt that the trade of a baker, in and of itself, is not an unhealthy one to that degree which would authorize the legislature to interfere with the right to labor, and with the right of free contract on the part of the individual, either as employer or employee In looking through statistics regarding all trades and occupations, it may be true that the trade of a baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or of any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the government. It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities? A printer, a tinsmith, a locksmith, a carpenter, a cabinetmaker, a dry goods clerk, a bank's, a lawyer's, or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on this assumption. No trade, no occupation, no mode of earning one's living, could escape this all-pervading power, and the acts of the legislature in limiting the hours of labor in all employments would be valid, although such limitation might seriously cripple the ability of the laborer to support himself and his family. In our large cities there are many buildings into which the sun penetrates for but a short time in each day, and these buildings are occupied by people carrying on the *60 business of bankers, brokers, lawyers, real estate, and many other kinds of business, aided by many clerks, messengers, and other employees. Upon the assumption of the validity of this act under review, it is not possible to say that an act, prohibiting lawyers' or bank clerks, or others, from contracting to labor for their employers more than eight hours a day would be invalid. It might be said that it is unhealthy to work more than that number of hours in an apartment lighted by artificial light during the working hours of the day; that the occupation of the bank clerk, the lawyer's clerk, the real estate clerk, or the broker's clerk, in such offices is therefore unhealthy, and the legislature, in its paternal wisdom, must, therefore, have the right to legislate on the subject of, and to limit, the hours for such labor; and, if it exercises that power, and its validity be questioned, it is sufficient to say, it has reference to the public health; it has reference to the health of the employees condemned to labor day after day in buildings where the sun never shines; it is a health law, and therefore it is valid, and cannot be questioned by the courts.

It is also urged, pursuing the same line of argument, that it is to the interest of the state that its population should be strong and robust, and therefore any legislation which may be said to tend to make people healthy must be valid as health laws, enacted under the police power. If

this be a valid argument and a justification for this kind of legislation, it follows that the protection of the Federal Constitution from undue interference with liberty of person and freedom of contract is visionary, wherever the law is sought to be justified as a valid exercise of the police power. Scarcely any law but might find shelter under such assumptions, and conduct, properly so called, as well as contract, would come under the restrictive sway of the legislature. Not only the hours of employees, but the hours of employers, could be regulated, and doctors, lawyers, scientists, all professional men, as well as athletes and artisans, could be forbidden to fatigue their brains and bodies by prolonged hours of exercise, lest the fighting strength *61 of the state be impaired. We mention these extreme cases because the contention is extreme. We do not believe in the soundness of the views which uphold this law. On the contrary, we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree **545 upon with the other parties to such contracts. Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual, and they are not asved from condemnation by the claim that they are passed in the exercise of the police power and upon the subject of the health of the individual whose rights are interfered with, unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health, or to the health of the employees, if the hours of labor are not curtailed. If this be not clearly the case, the individuals whose rights are thus made the subject of legislative interference are under the protection of the Federal Constitution regarding their liberty of contract as well as of person; and the legislature of the state has no power to limit their right as proposed in this statute. All that it could properly do has been done by it with regard to the conduct of bakeries, as provided for in the other sections of the act, above set forth. These several sections provide for the inspection of the premises where the bakery is carried on, with regard to furnishing proper wash rooms and water closets, apart from the bake room, also with regard to providing proper drainage, plumbing, and painting; the sections, in addition, provide for the height of the ceiling, the cementing or tiling of floors, where necessary in the opinion of the factory inspector, and for other things of *62 that nature; alterations are also provided for, and are to be made where necessary in the opinion of the inspector, in order to comply with the provisions of the statute. These various sections may be wise and valid regulations, and they certainly go to the full extent of providing for the cleanliness and the healthiness, so far as possible, of the quarters in which bakeries are to be conducted. Adding to all these requirements a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week is, in our judgment, so wholly beside the matter of a proper, reasonable, and fair provision as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

It was further urged on the argument that restricting the hours of labor in the case of bakers was valid because it tended to cleanliness on the part of the workers, as a man was more apt to

be cleanly when not overworked, and if cleanly then his 'output' was also more likely to be so. What has already been said applies with equal force to this contention. We do not admit the reasoning to be sufficient to justify the claimed right of such interference. The state in that case would assume the position of a supervisor, or pater familias, over every act of the individual, and its right of governmental interference with his hours of labor, his hours of exercise, the character thereof, and the extent to which it shall be carried would be recognized and upheld. In our judgment it is not possible in fact to discover the connection between the number of hours a baker may work in the bakery and the healthful quality of the bread made by the workman. The connection, if any exist, is too shadowy and thin to build any argument for the interference of the legislature. If the man works ten hours a day it is all right, but if ten and a half or eleven his health is in danger and his bread may be unhealthy, and, therefore, he shall not be permitted to do it. This, we think, is unreasonable and entirely arbitrary. When assertions such as we have adverted to become necessary in order to give, if possible, a plausible foundation for the contention that the law is a 'health law,' *63 it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare.

This interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase. In the supreme court of New York, in the case of People v. Beattie, appellate division, first department, decided in 1904 (96 App. Div. 383, 89 N. Y. Supp. 193), a statute regulating the trade of horseshoeing, and requiring the person practicing such trade to be examined, and to obtain a certificate from a board of examiners and file the same with the clerk of the county wherein the person proposes to practice such trade, was held invalid, as an arbitrary interference with personal liberty and private property without due process of law. The attempt was made, unsuccessfully, to justify it as a health law.

The same kind of a statute was held invalid (Re Aubry) by the supreme court of Washington in December, 1904. 78 Pac. 900. The court held that the act deprived citizens of their liberty and property without due process of law, and denied to them the equal protection of the laws. It also held that the trade of a horseshoer is not a subject of regulation under the police power of the state, as a business concerning and directly affecting the health, welfare, or comfort of its inhabitants; and that, therefore, a law which provided for the examination and registration of horseshoers in **546 certain cities was unconstitutional, as an illegitimate exercise of the police power.

The supreme court of Illinois, in Bessette v. People, 193 Ill. 334, 56 L. R. A. 558, 62 N. E. 215, also held that a law of the same nature, providing for the regulation and licensing of horseshoers, was unconstitutional as an illegal interference with the liberty of the individual in adopting and pursuing such calling as he may choose, subject only to the restraint necessary to secure the common welfare. See also Godcharles v. Wigeman, 113 Pa. 431, 437, 6 Atl. 354; Low v. Rees Printing Co. 41 Neb. 127, 145, 24 L. R. A. 702, 43 Am. St. Rep. 670, 59 N. W. 362. In *64

these cases the courts upheld the right of free contract and the right to purchase and sell labor upon such terms as the parties may agree to.

It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213. The court looks beyond the mere letter of the law in such cases. Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to, and no such substantial effect upon, the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, Sui juris), in a private business, not dangerous in any degree to morals, or in any real and substantial degree to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.

The judgment of the Court of Appeals of New York, as well as that of the Supreme Court and of the County Court of Oneida County, must be reversed and the case remanded to *65 the County Court for further proceedings not inconsistent with this opinion.

Reversed.

Mr. Justice Holmes dissenting:

I regret sincerely that I am unable to agree with the judgment *75 in this case, and that I think it my duty to express my dissent.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might

think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. ___ United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168. The decision sustaining an eight-hour law for miners is still recent. Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383. Some of these laws embody convictions or prejudices which judges are **547 likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. *76 It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word 'liberty,' in the 14th Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Mr. Justice Harlan (with whom Mr. Justice White and Mr. Justice Day concurred) dissenting:

While this court has not attempted to mark the precise boundaries of what is called the police power of the state, the existence of the power has been uniformly recognized, equally by the Federal and State courts.

All the cases agree that this power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights.

In Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115, after referring to the general principle that rights given by the Constitution cannot be impaired by state legislation of any kind, this court said: 'It [this court] has, nevertheless, with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding state police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property which each state owes to her citizens.' So in Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357: 'But neither the [14th] Amendment, -broad and comprehensive as it is,-nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people.'

Speaking generally, the state, in the exercise of its powers, may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of the inherent rights belonging to everyone, among which rights is the right 'to be free in the enjoyment of all his faculties, to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation.' This was declared *66 in Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427, 431. But in the same case it was conceded that the right to contract in relation to persons and property, or to do business, within a state, may be 'regulated, and sometimes prohibited, when the contracts or business conflict with the policy of the state as contained in its statutes.' (p. 591, L. ed. p. 836, Sup. Ct. Rep. p. 432.)

So, as said in Holden v. Hardy, 169 U. S. 366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383, 388: 'This right of contract, however, is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers. While this power is inherent in all governments, it has doubtless been greatly expanded in its application during the past century, owing to an enormous increase in the number of occupations which are dangerous, or so far detrimental, to the health of employees as to demand special precautions for their well-being and protection, or the safety of adjacent property. While this court has held, notably in the cases Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616, and Yick Wo. v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064, that the police power cannot be put forward as an excuse for oppressive and unjust legislation, it may be lawfully resorted to for the purpose of preserving the public health, safety, or morals, or the abatement of public nuisances; and a large discretion 'is necessarily vested in the legislature to determine, not only what the interests of the public required, but what measures are necessary for the protection of such interests.' **548 Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499, 501.' Referring to the limitations placed by the state upon the hours of workmen, the court in the same case said (p. 395, L. ed. p. 792, Sup. Ct. Rep. p. 389): 'These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employees, and,

so long as there are reasonable grounds for believing that this is so, its decision upon this subject cannot be reviewed by the Federal courts.'

Subsequently, in Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633, 635, this court said: 'Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and *67 to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state, and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference. As stated in Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13, 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community.''

In St. Louis I. M. & S. R. Co. v. Paul, 173 U. S. 404, 409, 43 L. ed. 746, 748, 19 Sup. Ct. Rep. 419, and in Knoxville Iron Co. v. Harbison, 183 U. S. 13, 21, 22, 46 L. ed. 55, 61, 22 Sup. Ct. Rep. 1, it was distinctly adjudged that the right of contract was not 'absolute, but may be subjected to the restraints demanded by the safety and welfare of the state.' Those cases illustrate the extent to which the state may restrict or interfere with the exercise of the right of contracting.

The authorities on the same line are so numerous that further citations are unnecessary.

I take it to be firmly established that what is called the liberty of contract may, within certain limits, be subjected to regulations designed and calculated to promote the general welfare, or to guard the public health, the public morals, or the public safety. 'The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import.' this court has recently said, 'an absolute right in each person to be at all times and in all circumstances wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good.' Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. e d.

*68 Granting, then, that there is a liberty of contract which cannot be violated even under the sanction of direct legislative enactment, but assuming, as according to settled law we may assume, that such liberty of contract is subject to such regulations as the state may reasonably prescribe for the common good and the well-being of society, what are the conditions under which the judiciary may declare such regulations to be in excess of legislative authority and void? Upon this point there is no room for dispute; for the rule is universal that a legislative enactment, Federal or state, is never to be disregarded or held invalid unless it be, beyond question, plainly and palpably in excess of legislative power. In Jacobson v. Massachusetts, 197 U. S. 11, 25 Sup. Ct. Rep. 358, 49 L. ed. --, we said that the power of the courts to review

legislative action in respect of a matter affecting the general welfare exists only 'when that which the legislature has done comes within the rule that, if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law,' citing Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Minnesota v. Barber, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124. If there be doubt as to the validity of the statute, that doubt must therefore be resolved in favor of its validity, and the courts must keep their hands off, leaving the legislature to meet the responsibility for unwise legislation. If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the court cannot interfere. In other words, when the validity of a statute is questioned, the burden of proof, so to speak, is upon those who assert it to be unconstitutional. M'Culloch v. Maryland, 4 Wheat. 316, 421, 4 L. ed. 579, 605.

Let these principles be applied to the present case. By the statute in question it **549 is provided that 'no employee shall be required, or permitted, to work in a biscuit, bread, or cake *69 bakery, or confectionery establishment, more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.'

It is plain that this statute was enacted in order to protect the physical well-being of those who work in bakery and confectionery establishments. It may be that the statute had its origin, in part, in the belief that employers and employees in such establishments were not upon an equal footing, and that the necessities of the latter often compelled them to submit to such exactions as unduly taxed their strength. Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation it is not the province of the court to inquire. Under our systems of government the courts are not concerned with the wisdom or policy of legislation. So that, in determining the question of power to interfere with liberty of contract, the court may inquire whether the means devised by the state are germane to an end which may be lawfully accomplished and have a real or substantial relation to the protection of health, as involved in the daily work of the persons, male and female, engaged in bakery and confectionery establishments. But when this inquiry is entered upon I find it impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation. Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273. Nor can I say that the statute has no appropriate or direct connection with that protection to health which each state owes to her citizens (Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115); or that it is not promotive of the health of the employees in question (Holden v. Hardy, 169 U. S.

366, 391, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Lawton v. Steele, 152 U. S. 133, 139, 38 L. ed. 385, 389, 14 Sup. Ct. Rep. 499); *70 or that the regulation prescribed by the state is utterly unreasonable and extravagant or wholly arbitrary (Gundling v. Chicago, 177 U. S. 183, 188, 44 L. ed. 725, 728, 20 Sup. Ct. Rep. 633). Still less can I say that the statute is, beyond question, a plain, palpable invasion of rights secured by the fundamental law. Jacobson v. Massachusetts, 196 U. S. 11, ante, p. 358, 25 Sup. Ct. Rep. 358. Therefore I submit that this court will transcend its functions if it assumes to annul the statute of New York. It must be remembered that this statute does not apply to all kinds of business. It applies only to work in bakery and confectionery establishments, in which, as all know, the air constantly breathed by workmen is not as pure and healthful as that to be found in some other establishments or out of doors.

Professor Hirt in his treatise on the 'Diseases of the Workers' has said: 'The labor of the bakers is among the hardest and most laborious imaginable, because it has to be performed under conditions injurious to the health of those engaged in it. It is hard, very hard, work, not only because it requires a great deal of physical exertion in an overheated workshop and during unreasonably long hours, but more so because of the erratic demands of the public, compelling the baker to perform the greater part of his work at night, thus depriving him of an opportunity to enjoy the necessary rest and sleep,-a fact which is highly injurious to his health.' Another writer says: 'The constant inhaling of flour dust causes inflammation of the lungs and of the bronchial tubes. The eyes also suffer through this dust, which is responsible for the many cases of running eyes among the bakers. The long hours of toil to which all bakers are subjected produce rheumatism, cramps, and swollen legs. The intense heat in the workshops induces the workers to resort to cooling drinks, which, together with their habit of exposing the greater part of their bodies to the change in the atmosphere, is another source of a number of diseases of various organs. Nearly all bakers are palefaced and of more delicate health than the workers of other crafts, which is chiefly due to their hard work and their irregular and unnatural mode of living, whereby the power of resistance against disease is *71 greatly diminished. The average age of a baker is below that of other workmen; they seldom live over their fiftieth year, most of them dying between the ages of forty and fifty. During periods of epidemic diseases the bakers are generally the first to succumb to the disease, and the number swept away during such periods far exceeds the number of other crafts in comparison to the men employed in the respective industries. When, in 1720, the plague visited the city of Marseilles, France, every baker in the city succumbed to the epidemic, which caused considerable excitement in the neighboring **550 cities and resulted in measures for the sanitary protection of the bakers.'

In the Eighteenth Annual Report by the New York Bureau of Statistics of Labor it is stated that among the occupations involving exposure to conditions that interfere with nutrition is that of a baker. (p. 52.) In that Report it is also stated that, 'from a social point of view, production will be increased by any change in industrial organization which diminishes the number of idlers, paupers, and criminals. Shorter hours of work, by allowing higher standards of comfort and purer family life, promise to enhance the industrial efficiency of the wage-working class,-improved health, longer life, more content and greater intelligence and inventiveness.' (p. 82.)

Statistics show that the average daily working time among workingmen in different countries is, in Australia, eight hours; in Great Britain, nine; in the United States, nine and three-quarters; in Denmark, nine and three-quarters; in Norway, ten; Sweden, France, and Switzerland, ten and one-half; Germany, ten and one-quarter; Belgium, Italy, and Austria, eleven; and in Russia, twelve hours.

We judicially know that the question of the number of hours during which a workman should continuously labor has been, for a long period, and is yet, a subject of serious consideration among civilized peoples, and by those having special knowledge of the laws of health. Suppose the statute prohibited labor in bakery and confectionery establishments in excess of eighteen hours each day. No one, I take it, could dispute the power of the state to enact such a statute. But the statute *72 before us does not embrace extreme or exceptional cases. It may be said to occupy a middle ground in respect of the hours of labor. What is the true ground for the state to take between legitimate protection, by legislation, of the public health and liberty of contract is not a question easily solved, nor one in respect of which there is or can be absolute certainty. There are very few, if any, questions in political economy about which entire certainty may be predicated. One writer on relation of the state to labor has well said: 'The manner, occasion, and degree in which the state may interfere with the industrial freedom of its citizens is one of the most debatable and difficult questions of social science.' Jevons, 33.

We also judicially know that the number of hours that should constitute a day's labor in particular occupations involving the physical strength and safety of workmen has been the subject of enactments by Congress and by nearly all of the states. Many, if not most, of those enactments fix eight hours as the proper basis of a day's labor.

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion. There are many reasons of a weighty, substantial character, based upon the experience of mankind, in support of the theory that, all things considered, more than ten hours' steady work each day, from week to week, in a bakery or confectionery establishment, may endanger the health and shorten the lives of the workmen, thereby diminishing their physical and mental capacity to serve the state and to provide for those dependent upon them.

If such reasons exist that ought to be the end of this case, for the state is not amenable to the judiciary, in respect of its legislative enactments, unless such enactments are plainly, palpably, beyond all question, inconsistent with the Constitution *73 of the United States. We are not to presume that the state of New York has acted in bad faith. Nor can we assume that its legislature acted without due deliberation, or that it did not determine this question upon the fullest attainable information and for the common good. We cannot say that the state has acted without reason, nor ought we to proceed upon the theory that its action is a mere sham. Our duty, I submit, is to sustain the statute as not being in conflict with the Federal

Constitution, for the reason-and such is an all-sufficient reason-it is not shown to be plainly and palpably inconsistent with that instrument. Let the state alone in the management of its purely domestic affairs, so long as it does not appear beyond all question that it has violated the Federal Constitution. This view necessarily results from the principle that the health and safety of the people of a state are primarily for the state to guard and protect.

I take leave to say that the New York statute, in the particulars here involved, cannot be held to be in conflict with the 14th Amendment, without enlarging the scope of the amendment far beyond its original purpose, and without bringing under the supervision of this court matters which have been supposed to belong exclusively to the legislative departments of the several states when exerting their conceded power to guard the health and safety of their citizens by such regulations as they in their wisdom deem best. Health laws of every description constitute, said Chief Justice Marshall, a part of that mass of legislation **551 which 'embraces everything within the territory of a state, not surrendered to the general government; all which can be most advantageously exercised by the states themselves.' Gibbons v. Ogden, 9 Wheat. 1, 203, 6 L. ed. 23, 71. A decision that the New York statute is void under the 14th Amendment will, in my opinion, involve consequences of a far-reaching and mischievous character; for such a decision would seriously cripple the inherent power of the states to care for the lives, health, and wellbeing of their citizens. Those are matters which can be best controlled by the states. *74 The preservation of the just powers of the states is quite as vital as the preservation of the powers of the general government.

When this court had before it the question of the constitutionality of a statute of Kansas making it a criminal offense for a contractor for public work to permit or require his employees to perform labor upon such work in excess of eight hours each day, it was contended that the statute was in derogation of the liberty both of employees and employer. It was further contended that the Kansas statute was mischievous in its tendencies. This court, while disposing of the question only as it affected public work, held that the Kansas statute was not void under the 14th Amendment. But it took occasion to say what may well be here repeated: 'The responsibility therefor rests upon legislators, not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law, should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights of the citizen against merely arbitrary power. That is unquestionably true. But it is equally true-indeed, the public interests imperatively demand-that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably beyond all question in violation of the fundamental law of the Constitution.' Atkin v. Kansas, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124, 128.

The judgment, in my opinion, should be affirmed.

Wickard v. Filburn 317 U.S. 111 (U.S. Supreme Court 1942)

Mr. Justice Jackson delivered the opinion of the Court.

Mr. Filburn for many years past has owned and operated a small farm in Montgomery County, Ohio, maintaining a herd of dairy cattle, selling milk, raising poultry, and selling poultry and eggs. It has been his practice to raise a small acreage of winter wheat, sown in the Fall and harvested in the following July; to sell a portion of the crop; to feed part to poultry and livestock on the farm, some of which is sold; to use some in making flour for home consumption; and to keep the rest for the following seeding.

His 1941 wheat acreage allotment was 11.1 acres and a normal yield of 20.1 bushels of wheat an acre. He sowed, however, 23 acres, and harvested from his 11.9 acres of excess acreage 239 bushels, which under the terms of the Act as amended on May 26, 1941, constituted farm marketing excess, subject to a penalty of 49 cents a bushel, or $117.11 in all.

The general scheme of the Agricultural Adjustment Act of 1938 as related to wheat is to control the volume moving in interstate and foreign commerce in order to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce. [T]he Secretary of Agriculture is directed to ascertain and proclaim each year a national acreage allotment for the next crop of wheat, which is then apportioned to the states and their counties, and is eventually broken up into allotments for individual farms.

It is urged that under the Commerce Clause of the Constitution, Article I, § 8, clause 3, Congress does not possess the power it has in this instance sought to exercise. The question would merit little consideration since our decision in United States v. Darby, 312 U.S. 100, sustaining the federal power to regulate production of goods for commerce, except for the fact that this Act extends federal regulation to production not intended in any part for commerce but wholly for consumption on the farm.

Case Questions

1. Why would Congress want to regulate the price and supply of wheat? Why did it not let the free market decide?

2. If Congress can control what a person can grow and consume on his or her own land, are there any limits to the power of the federal government?

Kassel v. Consolidated Freightways Corp. 450 U.S. 662 (U.S. Supreme Court 1981)

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS joined.

The question is whether an Iowa statute that prohibits the use of certain large trucks within the State unconstitutionally burdens interstate commerce.

I

Appellee Consolidated Freightways Corporation of Delaware (Consolidated) is one of the largest common carriers in the country: it offers service in 48 States under a certificate of public convenience and necessity issued by the Interstate Commerce Commission. Among other routes, Consolidated carries commodities through Iowa on Interstate 80, the principal east-west route linking New York, Chicago, and the west coast, and on Interstate 35, a major north-south route.

Consolidated mainly uses two kinds of trucks. One consists of a three-axle tractor pulling a 40-foot two-axle trailer. This unit, commonly called a single, or "semi," is 55 feet in length overall. Such trucks have long been used on the Nation's highways. Consolidated also uses a two-axle tractor pulling a single-axle trailer which, in turn, pulls a single-axle dolly and a second single-axle trailer. This combination, known as a double, or twin, is 65 feet long overall. Many trucking companies, including Consolidated, increasingly prefer to use doubles to ship certain kinds of commodities. Doubles have larger capacities, and the trailers can be detached and routed separately if necessary. Consolidated would like to use 65-foot doubles on many of its trips through Iowa.

The State of Iowa, however, by statute, restricts the length of vehicles that may use its highways. Unlike all other States in the West and Midwest, Iowa generally prohibits the use of 65-foot doubles within its borders.

…

Because of Iowa's statutory scheme, Consolidated cannot use its 65-foot doubles to move commodities through the State. Instead, the company must do one of four things: (i) use 55-foot singles; (ii) use 60-foot doubles; (iii) detach the trailers of a 65-foot double and shuttle each through the State separately; or (iv) divert 65-foot doubles around Iowa. Dissatisfied with these options, Consolidated filed this suit in the District Court averring that Iowa's statutory scheme unconstitutionally burdens interstate commerce. Iowa defended the law as a reasonable safety measure enacted pursuant to its police power. The State asserted that 65-foot doubles are more dangerous than 55-foot singles and, in any event, that the law promotes safety and reduces road wear within the State by diverting much truck traffic to other states.

In a 14-day trial, both sides adduced evidence on safety and on the burden on interstate commerce imposed by Iowa's law. On the question of safety, the District Court found that the "evidence clearly establishes that the twin is as safe as the semi." 475 F.Supp. 544, 549 (SD Iowa 1979). For that reason, "there is no valid safety reason for barring twins from Iowa's highways because of their configuration.…The evidence convincingly, if not overwhelmingly, establishes that the 65-foot twin is as safe as, if not safer than, the 60-foot twin and the 55-foot semi.…"

"Twins and semis have different characteristics. Twins are more maneuverable, are less sensitive to wind, and create less splash and spray. However, they are more likely than semis to jackknife or upset. They can be backed only for a short distance. The negative characteristics are not such that they render the twin less safe than semis overall. Semis are more stable, but are more likely to 'rear-end' another vehicle."

In light of these findings, the District Court applied the standard we enunciated in *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), and concluded that the state law impermissibly burdened interstate commerce: "[T]he balance here must be struck in favor of the federal interests. The *total effect* of the law as a safety measure in reducing accidents and casualties is so slight and

problematical that it does not outweigh the national interest in keeping interstate commerce free from interferences that seriously impede it."

The Court of Appeals for the Eighth Circuit affirmed. 612 F.2d 1064 (1979). It accepted the District Court's finding that 65-foot doubles were as safe as 55-foot singles. *Id.* at 1069. Thus, the only apparent safety benefit to Iowa was that resulting from forcing large trucks to detour around the State, thereby reducing overall truck traffic on Iowa's highways. The Court of Appeals noted that this was not a constitutionally permissible interest. It also commented that the several statutory exemptions identified above, such as those applicable to border cities and the shipment of livestock, suggested that the law, in effect, benefited Iowa residents at the expense of interstate traffic. *Id.* at 1070-1071. The combination of these exemptions weakened the presumption of validity normally accorded a state safety regulation. For these reasons, the Court of Appeals agreed with the District Court that the Iowa statute unconstitutionally burdened interstate commerce.

Iowa appealed, and we noted probable jurisdiction. 446 U.S. 950 (1980). We now affirm.

II

It is unnecessary to review in detail the evolution of the principles of Commerce Clause adjudication. The Clause is both a "prolific ' of national power and an equally prolific source of conflict with legislation of the state[s]." *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 336 U.S. 534 (1949). The Clause permits Congress to legislate when it perceives that the national welfare is not furthered by the independent actions of the States. It is now well established, also, that the Clause itself is "a limitation upon state power even without congressional implementation." *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333 at 350 (1977). The Clause requires that some aspects of trade generally must remain free from interference by the States. When a State ventures excessively into the regulation of these aspects of commerce, it "trespasses upon national interests," *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366, 424 U.S. 373 (1976), and the courts will hold the state regulation invalid under the Clause alone.

The Commerce Clause does not, of course, invalidate all state restrictions on commerce. It has long been recognized that, "in the absence of conflicting legislation by Congress, there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

The extent of permissible state regulation is not always easy to measure. It may be said with confidence, however, that a State's power to regulate commerce is never greater than in matters traditionally of local concern. *Washington Apple Advertising Comm'n, supra* at 432 U.S. 350. For example, regulations that touch upon safety—especially highway safety—are those that "the Court has been most reluctant to invalidate." *Raymond, supra* at 434 U.S. 443 (and other cases cited). Indeed, "if safety justifications are not illusory, the Court will not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." *Raymond, supra* at 434 U.S. at 449. Those who would challenge such bona fide safety regulations must overcome a "strong presumption of validity." *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 at (1959).

But the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause. In the Court's recent unanimous decision in *Raymond* we declined to "accept the

State's contention that the inquiry under the Commerce Clause is ended without a weighing of the asserted safety purpose against the degree of interference with interstate commerce." This "weighing" by a court requires—and indeed the constitutionality of the state regulation depends on—"a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Id.* at 434 U.S. at 441; *accord, Pike v. Bruce Church, Inc.*, 397 U.S. 137 at 142 (1970); *Bibb, supra*, at 359 U.S. at 525-530.

III

Applying these general principles, we conclude that the Iowa truck length limitations unconstitutionally burden interstate commerce.

In *Raymond Motor Transportation, Inc. v. Rice*, the Court held that a Wisconsin statute that precluded the use of 65-foot doubles violated the Commerce Clause. This case is *Raymond* revisited. Here, as in *Raymond*, the State failed to present any persuasive evidence that 65-foot doubles are less safe than 55-foot singles. Moreover, Iowa's law is now out of step with the laws of all other Midwestern and Western States. Iowa thus substantially burdens the interstate flow of goods by truck. In the absence of congressional action to set uniform standards, some burdens associated with state safety regulations must be tolerated. But where, as here, the State's safety interest has been found to be illusory, and its regulations impair significantly the federal interest in efficient and safe interstate transportation, the state law cannot be harmonized with the Commerce Clause.

A

Iowa made a more serious effort to support the safety rationale of its law than did Wisconsin in *Raymond*, but its effort was no more persuasive. As noted above, the District Court found that the "evidence clearly establishes that the twin is as safe as the semi." The record supports this finding. The trial focused on a comparison of the performance of the two kinds of trucks in various safety categories. The evidence showed, and the District Court found, that the 65-foot double was at least the equal of the 55-foot single in the ability to brake, turn, and maneuver. The double, because of its axle placement, produces less splash and spray in wet weather. And, because of its articulation in the middle, the double is less susceptible to dangerous "off-tracking," and to wind.

None of these findings is seriously disputed by Iowa. Indeed, the State points to only three ways in which the 55-foot single is even arguably superior: singles take less time to be passed and to clear intersections; they may back up for longer distances; and they are somewhat less likely to jackknife.

The first two of these characteristics are of limited relevance on modern interstate highways. As the District Court found, the negligible difference in the time required to pass, and to cross intersections, is insignificant on 4-lane divided highways, because passing does not require crossing into oncoming traffic lanes, *Raymond*, 434 U.S. at 444, and interstates have few, if any, intersections. The concern over backing capability also is insignificant, because it seldom is necessary to back up on an interstate. In any event, no evidence suggested any difference in backing capability between the 60-foot doubles that Iowa permits and the 65-foot doubles that it bans. Similarly, although doubles tend to jackknife somewhat more than singles, 65-foot doubles actually are less likely to jackknife than 60-foot doubles.

Statistical studies supported the view that 65-foot doubles are at least as safe overall as 55-foot singles and 60-foot doubles. One such study, which the District Court credited, reviewed Consolidated's comparative accident experience in 1978 with its own singles and doubles. Each kind of truck was driven 56 million miles on identical routes. The singles were involved in 100 accidents resulting in 27 injuries and one fatality. The 65-foot doubles were involved in 106 accidents resulting in 17 injuries and one

fatality. Iowa's expert statistician admitted that this study provided "moderately strong evidence" that singles have a higher injury rate than doubles. Another study, prepared by the Iowa Department of Transportation at the request of the state legislature, concluded that "[s]ixty-five foot twin trailer combinations have *not* been shown by experiences in other states to be less safe than 60-foot twin trailer combinations *or* conventional tractor-semitrailers."

In sum, although Iowa introduced more evidence on the question of safety than did Wisconsin in *Raymond*, the record as a whole was not more favorable to the State.

B

Consolidated, meanwhile, demonstrated that Iowa's law substantially burdens interstate commerce. Trucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them through separately. Alternatively, trucking companies must use the smaller 55-foot singles or 65-foot doubles permitted under Iowa law. Each of these options engenders inefficiency and added expense. The record shows that Iowa's law added about $12.6 million each year to the costs of trucking companies.

Consolidated alone incurred about $2 million per year in increased costs.

In addition to increasing the costs of the trucking companies (and, indirectly, of the service to consumers), Iowa's law may aggravate, rather than, ameliorate, the problem of highway accidents. Fifty-five-foot singles carry less freight than 65-foot doubles. Either more small trucks must be used to carry the same quantity of goods through Iowa or the same number of larger trucks must drive longer distances to bypass Iowa. In either case, as the District Court noted, the restriction requires more highway miles to be driven to transport the same quantity of goods. Other things being equal, accidents are proportional to distance traveled. Thus, if 65-foot doubles are as safe as 55-foot singles, Iowa's law tends to increase the number of accidents and to shift the incidence of them from Iowa to other States.

[IV. Omitted]

V

In sum, the statutory exemptions, their history, and the arguments Iowa has advanced in support of its law in this litigation all suggest that the deference traditionally accorded a State's safety judgment is not warranted. *See Raymond, supra* at 434 U.S. at 444-447. The controlling factors thus are the findings of the District Court, accepted by the Court of Appeals, with respect to the relative safety of the types of trucks at issue, and the substantiality of the burden on interstate commerce.

Because Iowa has imposed this burden without any significant countervailing safety interest, its statute violates the Commerce Clause. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Footnotes

§ 110, *Hours of labor in bakeries and confectionery establishments*.-No employee shall be required or permitted to work in a biscuit, bread, or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless for the purpose of making a shorter work day on the last day of the week; nor more hours in any one week than will make an average of ten hours per day for the number of days during such week in which such employee shall work.

'§ 111. *Drainage and plumbing of buildings and rooms occupied by bakeries*.-All buildings or rooms occupied as biscuit, bread, pie, or cake bakeries, shall be drained and plumbed in a manner conducive to the proper and healthful sanitary

condition thereof, and shall be constructed with air shafts, windows, or ventilating pipes, sufficient to insure ventilation. The factory inspector may direct the proper drainage, plumbing, and ventilation of such rooms or buildings. No cellar or basement, not now used for a bakery, shall hereafter be so occupied or used, unless the proprietor shall comply with the sanitary provisions of this article.

'§ 112. *Requirements as to rooms, furniture, utensils, and manufactured products*.-Every room used for the manufacture of flour or meal food products shall be at least 8 feet in height and shall have, if deemed necessary by the factory inspector, an impermeable floor constructed of cement, or of tiles laid in cement, or an additional flooring of wood properly saturated with linseed oil. The side walls of such rooms shall be plastered or wainscoted. The factory inspector may require the side walls and ceiling to be whitewashed at least once in three months. He may also require the wood work of such walls to be painted. The furniture and utensils shall be so arranged as to be readily cleansed and not prevent the proper cleaning of any part of the room. The manufactured flour or meal food products shall be kept in dry and airy rooms, so arranged that the floors, shelves, and all other facilities for storing the same can be properly cleaned. No domestic animals, except cats, shall be allowed to remain in a room used as a biscuit, bread, pie, or cake bakery, or any room in such bakery where flour or meal products are stored.

'§ 113. *Wash rooms and closets; sleeping places*.-Every such bakery shall be provided with a proper wash room and water-closet, or water-closets, apart from the bake room, or rooms where the manufacture of such food product is conducted, and no water-closet, earth closet, privy, or ashpit shall be within, or connected directly with, the bake room of any bakery, hotel, or public restaurant.

'No person shall sleep in a room occupied as a bake room. Sleeping places for the persons employed in the bakery shall be separate from the rooms where flour or meal food products are manufactured or stored. If the sleeping places are on the same floor where such products are manufactured, stored, or sold, the factory inspector may inspect and order them put in a proper sanitary condition.

'§ 114. *Inspection of bakeries*.-The factory inspector shall cause all bakeries to be inspected. If it be found upon such inspection that the bakeries so inspected are constructed and conducted in compliance with the provisions of this chapter, the factory inspector shall issue a certificate to the person owning or conducting such bakeries.
'§ 115. *Notice requiring alterations*.-If, in the opinion of the factory inspector, alterations are required in or upon premises occupied and used as bakeries, in order to comply with the provisions of this article, a written notice shall be served by him upon the owner, agent, or lessee of such premises, either personally or by mail, requiring such alterations to be made within sixty days after such service, and such alterations shall be made accordingly.' [N. Y. Laws 1897, chap 415.]

Case Questions

1. Under the Constitution, what gives Iowa the right to make rules regarding the size or configuration of trucks upon highways within the state?
2. Did Iowa try to exempt trucking lines based in Iowa, or was the statutory rule nondiscriminatory as to the origin of trucks that traveled on Iowa highways?

West Coast Hotel Co. v. Parrish 300 U.S. 379 (1937)

Syllabus

1. Deprivation of liberty to contract is forbidden by the Constitution if without due process of law, but restraint or regulation of this liberty, if reasonable in relation to its subject and if adopted for the protection of the community against evils menacing the health, safety, morals and welfare of the people, is due process. P. 391.

2. In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and

good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. P. 393.

3. The State has a special interest in protecting women against employment contracts which through poor working conditions, long hours or scant wages may leave them inadequately supported and undermine their health; because:

(1) The health of women is peculiarly related to the vigor of the race;

(2) Women are especially liable to be overreached and exploited by unscrupulous employers; and

(3) This exploitation and denial of a living wage is not only detrimental to the health and wellbeing of the women affected, but casts a direct burden for their support upon the community. Pp. 394, 398, *et seq.*

4. Judicial notice is taken of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. P. 399.

5. A state law for the setting of minimum wages for women is not an arbitrary discrimination because it does not extend to men. P. 400.

6. A statute of the State of Washington (Laws, 1913, c. 174; Remington's Rev.Stats., 1932, § 7623 *et seq.*) providing for the establishment of minimum wages for women, held valid. *Adkins v. Children's Hospital,* 261 U.S. 525, is overruled; *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 587, distinguished. P. 400.

[p380]

This was an appeal from a judgment for money directed by the Supreme Court of Washington, reversing the trial court, in an action by a chambermaid against a hotel company to recover the difference between the amount of wages paid or tendered to her as per contract and a larger amount computed on the minimum wage fixed by a state board or commission. **[p386]**

Opinion

HUGHES, C.J., Opinion of the Court

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. Laws of 1913 (Washington) chap. 174; Remington's Rev.Stat. (1932), § 7623 *et seq.* It provides:

SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals, and it shall be unlawful to employ **[p387]** women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

SEC. 3. There is hereby created a commission to be known as the "Industrial Welfare Commission" for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women.

Further provisions required the Commission to ascertain the wages and conditions of labor of women and minors within the State. Public hearings were to be held. If, after investigation, the Commission found that, in any occupation, trade or industry, the wages paid to women were "inadequate to supply them necessary cost of living and to maintain the workers in health," the Commission was empowered to call a conference of representatives of employers and employees together with disinterested persons representing the public. The conference was to recommend to the Commission, on its request, an estimate of a minimum wage adequate for the purpose above stated, and, on the approval of such a recommendation, it became the duty of the Commission to issue an obligatory order fixing minimum wages. Any such order might be reopened, and the question reconsidered with the aid of the former conference or a new one. Special licenses were authorized for the employment of women who were "physically defective or crippled by age or otherwise," and also for apprentices, at less than the prescribed minimum wage.

By a later Act, the Industrial Welfare Commission was abolished, and its duties were assigned to the Industrial Welfare Committee, consisting of the Director of Labor and Industries, the Supervisor of Industrial Insurance, **[p388]** the Supervisor of Industrial Relations, the Industrial Statistician, and the Supervisor of Women in Industry. Laws of 1921 (Washington) c. 7; Remington's Rev.Stat. (1932), §§ 10840, 10893.

The appellant conducts a hotel. The appellee, Elsie Parrish, was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was $14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish v. West Coast Hotel Co.,* 185 Wash. 581, 55 P.2d 1083. The case is here on appeal.

The appellant relies upon the decision of this Court in *Adkins v. Children's Hospital,* 261 U.S. 525, which held invalid the District of Columbia Minimum Wage Act, which was attacked under the due process clause of the Fifth Amendment. On the argument at bar, counsel for the appellees attempted to distinguish the *Adkins* case upon the ground that the appellee was employed in a hotel, and that the business of an innkeeper was affected with a public interest. That effort at distinction is obviously futile, as it appears that, in one of the cases ruled by the *Adkins* opinion, the employee was a woman employed as an elevator operator in a hotel. *Adkins v. Lyons,* 261 U.S. 525, at p. 542.

The recent case of *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 587, came here on certiorari to the New York court, which had held the New York minimum wage act for women to be invalid. A minority of this Court thought that the New York statute was distinguishable in a material feature from that involved in the *Adkins* case, and, that for that and other reasons, the New **[p389]** York statute should be sustained. But the Court of Appeals of New York had said that it found no material difference between the two statutes, and this Court held that the "meaning of the statute" as fixed by the decision of the state court "must be accepted here as if the meaning had been specifically expressed in the enactment." *Id.,* p. 609. That view led the affirmance by this Court of the judgment in the *Morehead* case, as the Court considered that the only question before it was whether the *Adkins* case was distinguishable, and that reconsideration of that decision had not been sought. Upon that point, the Court said:

The petition for the writ sought review upon the ground that this case [*Morehead*] is distinguishable from that one [*Adkins*]. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. . . . Here, the review granted was no broader than that sought by the petitioner. . . . He is not entitled, and does not ask, to be heard upon the question whether the *Adkins* case should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar.

Id. pp. 604, 605.

We think that the question which was not deemed to be open in the *Morehead* case is open and is necessarily presented here. The Supreme Court of Washington has upheld the minimum wage

statute of that State. It has decided that the statute is a reasonable exercise of the police power of the State. In reaching that conclusion, the state court has invoked principles long established by this Court in the application of the Fourteenth Amendment. The state court has refused to regard the decision in the *Adkins* case as determinative, and has pointed to our decisions both before and since that case as justifying its position. We are of the opinion that this ruling of **[p390]** the state court demands on our part a reexamination of the *Adkins* case. The importance of the question, in which many States having similar laws are concerned, the close division by which the decision in the *Adkins* case was reached, and the economic conditions which have supervened, and in the light of which the reasonableness of the exercise of the protective power of the State must be considered, make it not only appropriate, but we think imperative, that, in deciding the present case, the subject should receive fresh consideration.

The history of the litigation of this question may be briefly stated. The minimum wage statute of Washington was enacted over twenty-three years ago. Prior to the decision in the instant case, it had twice been held valid by the Supreme Court of the State. *Larsen v. Rice,* 100 Wash. 642, 171 Pac. 1037; *Spokane Hotel Co. v. Younger,* 113 Wash. 359, 194 Pac. 595. The Washington statute is essentially the same as that enacted in Oregon in the same year. Laws of 1913 (Oregon) chap. 62. The validity of the latter act was sustained by the Supreme Court of Oregon in *Stettler v. O'Hara,* 69 Ore. 519, 139 Pac. 743, and *Simpson v. O'Hara,* 70 Ore. 261, 141 Pac. 158. These cases, after reargument, were affirmed here by an equally divided court, in 1917. 243 U.S. 629. The law of Oregon thus continued in effect. The District of Columbia Minimum Wage Law (40 Stat. 960) was enacted in 1918. The statute was sustained by the Supreme Court of the District in the *Adkins* case. Upon appeal, the Court of Appeals of the District first affirmed that ruling, but, on rehearing, reversed it, and the case came before this Court in 1923. The judgment of the Court of Appeals holding the Act invalid was affirmed, but with Chief Justice Taft, Mr. Justice Holmes and Mr. Justice Sanford dissenting, and Mr. Justice Brandeis taking no part. The dissenting opinions took the ground that the decision was at variance with the **[p391]** principles which this Court had frequently announced and applied. In 1925 and 1927, the similar minimum wage statutes of Arizona and Arkansas were held invalid upon the authority of the *Adkins* case. The Justices who had dissented in that case bowed to the ruling, and Mr. Justice Brandeis dissented. *Murphy v. Sardell,* 269 U.S. 530; *Donham v. West-Nelson Co.,* 273 U.S. 657. The question did not come before us again until the last term in the *Morehead* case, as already noted. In that case, briefs supporting the New York statute were submitted by the States of Ohio, Connecticut, Illinois, Massachusetts, New Hampshire, New Jersey and Rhode Island. 298 U.S. p. 604, note. Throughout this entire period, the Washington statute now under consideration has been in force.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment, governing the States, as the due process clause invoked in the *Adkins* case governed Congress. In each case, the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process. **[p392]**

This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago, we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described: [n1]

But it was recognized in the cases cited, as in many others, that freedom of contract is a qualified, and not an absolute, right. There is no absolute freedom to do as one wills or to contract as one chooses. The guaranty of liberty does not withdraw from legislative supervision that wide department of activity which consists of the making of contracts, or deny to government the power to provide

restrictive safeguards. Liberty implies the absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community.

Chicago, B. & Q. R. Co. v. McGuire, 219 U.S. 549, 567.

This power under the Constitution to restrict freedom of contract has had many illustrations.[n2] That it may be exercised in the public interest with respect to contracts **[p393]** between employer and employee is undeniable. Thus, statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (*Holden v. Hardy,* 169 U.S. 366); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (*Knoxville Iron Co. v. Harbison,* 183 U.S. 13); in forbidding the payment of seamen's wages in advance (*Patterson v. Bark Eudora,* 190 U.S. 169); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (*McLean v. Arkansas,* 211 U.S. 539); in prohibiting contracts limiting liability for injuries to employees (*Chicago, B. & Q. R. Co. v. McGuire, supra*); in limiting hours of work of employees in manufacturing establishments (*Bunting v. Oregon,* 243 U.S. 426), and in maintaining workmen's compensation laws (*New York Central R. Co. v. White,* 243 U.S. 188; *Mountain Timber Co. v. Washington,* 243 U.S. 219). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. *Chicago, B. & Q. R. Co. v. McGuire, supra,* p. 570.

The point that has been strongly stressed that adult employees should be deemed competent to make their own contracts was decisively met nearly forty years ago in *Holden v. Hardy, supra,* where we pointed out the inequality in the footing of the parties. We said (*Id.* 397):

The legislature has also recognized the fact, which the experience of legislators in many States has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that **[p394]** their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employes, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases, self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

And we added that the fact

that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself.

The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.

It is manifest that this established principle is peculiarly applicable in relation to the employment of women, in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908), 208 U.S. 412, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence," and that her physical wellbeing "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that,

though limitations upon personal and contractual rights may be removed by legislation, there is that in her **[p395]** disposition and habits of life which will operate against a full assertion of those rights.

She will still be where some legislation to protect her seems necessary to secure a real equality of right.

Hence, she was

properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained.

We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor," were "not imposed solely for her benefit, but also largely for the benefit of all." Again, in *Quong Wing v. Kirkendall,* 223 U.S. 59, 63, in referring to a differentiation with respect to the employment of women, we said that the Fourteenth Amendment did not interfere with state power by creating a "fictitious equality." We referred to recognized classifications on the basis of sex with regard to hours of work and in other matters, and we observed that the particular points at which that difference shall be enforced by legislation were largely in the power of the State. In later rulings, this Court sustained the regulation of hours of work of women employees in *Riley v. Massachusetts,* 232 U.S. 671 (factories), *Miller v. Wilson,* 236 U.S. 373 (hotels), and *Bosley v. McLaughlin,* 236 U.S. 385 (hospitals).

This array of precedents and the principles they applied were thought by the dissenting Justices in the *Adkins* case to demand that the minimum wage statute be sustained. The validity of the distinction made by the Court between a minimum wage and a maximum of hours in limiting liberty of contract was especially challenged. 261 U.S. p. 564. That challenge persists, and is without any satisfactory answer. As Chief Justice Taft observed:

In absolute freedom of contract, the one term is as important as the other, for both enter equally into the consideration given and received, a restriction as to **[p396]** the one is not greater, in essence, than the other, and is of the same kind. One is the multiplier, and the other the multiplicand.

And Mr. Justice Holmes, while recognizing that "the distinctions of the law are distinctions of degree," could perceive no difference in the kind or degree of interference with liberty, the only matter with which we have any concern, between the one case and the other. The bargain is equally affected whichever half you regulate.

Id., p. 569.

One of the points which was pressed by the Court in supporting its ruling in the *Adkins* case was that the standard set up by the District of Columbia Act did not take appropriate account of the value of the services rendered. In the *Morehead* case, the minority thought that the New York statute had met that point in its definition of a "fair wage," and that it accordingly presented a distinguishable feature which the Court could recognize within the limits which the *Morehead* petition for certiorari was deemed to present. The Court, however, did not take that view, and the New York Act was held to be essentially the same as that for the District of Columbia. The statute now before us is like the latter, but we are unable to conclude that, in its minimum wage requirement, the State has passed beyond the boundary of its broad protective power.

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins* case is pertinent:

This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as **[p397]** the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law, in its character and operation, is like hundreds of so-called police laws that have been upheld.

261 U.S. p. 570. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character:

Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that, when sweating employers are prevented from paying unduly low wages by positive law, they will continue their business, abating that part of their profits which were wrung from the necessities of their employees, and will concede the better terms required by the law, and that, while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed, and so to that of the community at large.

Id., p. 563.

We think that the views thus expressed are sound, and that the decision in the *Adkins* case was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus, in *Radice v. New York,* 264 U.S. 292, we sustained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman & Young v. Hartford Fire Insurance Co.,* 282 U.S. 251, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In *Nebbia v. New York,* 291 U.S. 502, dealing **[p398]** with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination, and we again declared that, if such laws have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied; that with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal; that times without number, we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that, though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

Id. pp. 537, 538.

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins* case, we find it impossible to reconcile that ruling with these well considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," **[p399]** the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deep-seated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power, and are thus relatively defenceless against the denial of a living wage, is not only detrimental to their health and wellbeing, but casts a direct burden for their support upon the community. What these workers lose in wages, the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish

what is of common knowledge through the length and breadth of the land. While, in the instant case, no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is, in effect, a subsidy for unconscionable employers. The [p*400] community may direct its lawmaking power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest." If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.

There is no "doctrinaire requirement" that the legislation should be couched in all embracing terms. *Carroll v. Greenwich Insurance Co.,* 199 U.S. 401, 411; *Patsone v. Pennsylvania,* 232 U.S. 138, 144; *Keokee Coke Co. v. Taylor,* 234 U.S. 224, 227; *Sproles v. Binford,* 286 U.S. 374, 396; *Semler v. Oregon Board,* 294 U.S. 608, 610, 611. This familiar principle has repeatedly been applied to legislation which singles out women, and particular classes of women, in the exercise of the State's protective power. *Miller v. Wilson, supra,* p. 384; *Bosley v. McLaughlin, supra,* pp. 394, 395; *Radice v. New York, supra,* pp. 295-298. Their relative need in the presence of the evil, no less than the existence of the evil itself, is a matter for the legislative judgment.

Our conclusion is that the case of *Adkins v. Children's Hospital, supra,* should be, and it is, overruled. The judgment of the Supreme Court of the State of Washington is

Affirmed.

1. *Allgeyer v. Louisiana,* 165 U.S. 578; *Lochner v. New York,* 198 U.S. 45; *Adair v. United States,* 208 U.S. 161.

2. *Munn v. Illinois,* 94 U.S. 113; *Railroad Commission Cases,* 116 U.S. 307; *Willcox v. Consolidated Gas Co.,* 212 U.S. 19; *Atkin v. Kansas,* 191 U.S. 207; *Mugler v. Kansas,* 123 U.S. 623; *Crowley v. Christensen,* 137 U.S. 86; *Gundling v. Chicago,* 177 U.S. 183; *Booth v. Illinois,* 184 U.S. 425; *Schmidinger v. Chicago,* 226 U.S. 578; *Armour & Co. v. North Dakota,* 240 U.S. 510; *National Fire Insurance Co. v. Wanberg,* 260 U.S. 71; *Radice v. New York,* 264 U.S. 292; *Yeiser v. Dysart,* 267 U.S. 540; *Liberty Warehouse Co. v. Burley Tobacco Growers' Assn.,* 276 U.S. 71, 97; *Highland v. Russell Car Co.,* 279 U.S. 253, 261; *O'Gorman & Young v. Hartford Insurance Co.,* 282 U.S. 249, 251; *Hardware Dealers Insurance Co. v. Glidden Co.,* 284 U.S. 151, 157; *Packer Corp. v. Utah,* 285 U.S. 95, 111; *Stephenson v. Binford,* 287 U.S. 251, 274; *Hartford Accident Co. v. Nelson Mfg. Co.,* 291 U.S. 352, 360; *Petersen Baking Co. v. Bryan,* 290 U.S. 570; *Nebbia v. New York,* 291 U.S. 502, 527-529.

Dissent

SUTHERLAND, J., Dissenting Opinion

MR. JUSTICE SUTHERLAND, dissenting:

MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS, MR. JUSTICE BUTLER and I think the judgment of the court below should be reversed. **[p401]**

The principles and authorities relied upon to sustain the judgment were considered in *Adkins v. Children's Hospital,* 261 U.S. 525, and *Morehead v. New York ex rel. Tipaldo,* 298 U.S. 587, and their lack of application to cases like the one in hand was pointed out. A sufficient answer to all that is now said will be found in the opinions of the court in those cases. Nevertheless, in the circumstances, it seems well to restate our reasons and conclusions.

Under our form of government, where the written Constitution, by its own terms, is the supreme law, some agency, of necessity, must have the power to say the final word as to the validity of a statute assailed as unconstitutional. The Constitution makes it clear that the power has been intrusted to this court when the question arises in a controversy within its jurisdiction, and, so long as the power remains there, its exercise cannot be avoided without betrayal of the trust.

It has been pointed out many times, as in the *Adkins* case, that this judicial duty is one of gravity and delicacy, and that rational doubts must be resolved in favor of the constitutionality of the statute. But whose doubts, and by whom resolved? Undoubtedly it is the duty of a member of the court, in the process of reaching a right conclusion, to give due weight to the opposing views of his associates; but, in the end, the question which he must answer is not whether such views seem sound to those who entertain them, but whether they convince him that the statute is constitutional or engender in his mind a rational doubt upon that issue. The oath which he takes as a judge is not a composite oath, but an individual one. And, in passing upon the validity of a statute, he discharges a duty imposed upon *him,* which cannot be consummated justly by an automatic acceptance of the views of others which have neither convinced, nor created a reasonable doubt in, his mind. If upon a question so **[p402]** important he thus surrender his deliberate judgment, he stands forsworn. He cannot subordinate his convictions to that extent and keep faith with his oath or retain his judicial and moral independence.

The suggestion that the only check upon the exercise of the judicial power, when properly invoked to declare a constitutional right superior to an unconstitutional statute, is the judge's own faculty of self-restraint is both ill-considered and mischievous. Self-restraint belongs in the domain of will, and not of judgment. The check upon the judge is that imposed by his oath of office, by the Constitution, and by his own conscientious and informed convictions, and since he has the duty to make up his own mind and adjudge accordingly, it is hard to see how there could be any other restraint. This court acts as a unit. It cannot act in any other way, and the majority (whether a bare majority or a majority of all but one of its members) therefore establishes the controlling rule as the decision of the court, binding, so long as it remains unchanged, equally upon those who disagree and upon those who subscribe to it. Otherwise, orderly administration of justice would cease. But it is the right of those in the minority to disagree, and sometimes, in matters of grave importance, their imperative duty to voice their disagreement at such length as the occasion demands -- always, of course, in terms which, however forceful, do not offend the proprieties or impugn the good faith of those who think otherwise.

It is urged that the question involved should now receive fresh consideration, among other reasons, because of "the economic conditions which have supervened"; but the meaning of the Constitution does not change with the ebb and flow of economic events. We frequently are told in more general words that the Constitution must be construed in the light of the present. If by that it is meant that the Constitution is made up of **[p403]** living words that apply to every new condition which they include, the statement is quite true. But to say, if that be intended, that the words of the Constitution mean today what they did not mean when written -- that is, that they do not apply to a situation now to which they would have applied then -- is to rob that instrument of the essential element which continues it in force as the people have made it until they, and not their official agents, have made it otherwise.

The words of Judge Campbell in *Twitchell v. Blodgett,* 13 Mich. 127, 139-140, apply with peculiar force. "But it may easily happen," he said,

that specific provisions may, in unforeseen emergencies, turn out to have been inexpedient. This does not make these provisions any less binding. Constitutions cannot be changed by events alone. They remain binding as the acts of the people in their sovereign capacity, as the framers of Government, until they are amended or abrogated by the action prescribed by the authority which created them. It is not competent for any department of the Government to change a constitution, or declare it changed, simply because it appears ill-adapted to a new state of things.

. . . Restrictions have, it is true, been found more likely than grants to be unsuited to unforeseen circumstances . . . But, where evils arise from the application of such regulations, their force cannot be denied or evaded, and the remedy consists in repeal or amendment, and not in false construction.

The principle is reflected in many decisions of this court. *See South Carolina v. United States,* 199 U.S. 437, 448-449; *Lake County v. Rollins,* 130 U.S. 662, 670; *Knowlton v. Moore,* 178 U.S. 41, 95; *Rhode Island v. Massachusetts,* 12 Pet. 657, 723; *Craig v. Missouri,* 4 Pet. 410, 431-432; *Ex parte*

Bain, 121 U.S. 1, 12; *Maxwell v. Dow,* 176 U.S. 581, 602; *Jarrolt v. Moberly,* 103 U.S. 580, 586. **[p404]**

The judicial function is that of interpretation; it does not include the power of amendment under the guise of interpretation. To miss the point of difference between the two is to miss all that the phrase "supreme law of the land" stands for, and to convert what was intended as inescapable and enduring mandates into mere moral reflections.

If the Constitution, intelligently and reasonably construed in the light of these principles, stands in the way of desirable legislation, the blame must rest upon that instrument, and not upon the court for enforcing it according to its terms. The remedy in that situation -- and the only true remedy -- is to amend the Constitution. Judge Cooley, in the first volume of his Constitutional Limitations (8th ed.), p. 124, very clearly pointed out that much of the benefit expected from written constitutions would be lost if their provisions were to be bent to circumstances or modified by public opinion. He pointed out that the common law, unlike a constitution, was subject to modification by public sentiment and action which the courts might recognize, but that

a court or legislature which should allow a change in public sentiment to influence it in giving to a written constitution a construction not warranted by the intention of its founders would be justly chargeable with reckless disregard of official oath and public duty, and if its course could become a precedent, these instruments would be of little avail. . . . What a court is to do, therefore, is *to declare the law as written,* leaving it to the people themselves to make such changes as new circumstances may require. The meaning of the constitution is fixed when it is adopted, and it is not different at any subsequent time when a court has occasion to pass upon it.

The *Adkins* case dealt with an act of Congress which had passed the scrutiny both of the legislative and executive branches of the government. We recognized that **[p405]** thereby these departments had affirmed the validity of the statute, and properly declared that their determination must be given great weight, but we then concluded, after thorough consideration, that their view could not be sustained. We think it not inappropriate now to add a word on that subject before coming to the question immediately under review.

The people, by their Constitution, created three separate, distinct, independent and coequal departments of government. The governmental structure rests, and was intended to rest, not upon any one or upon any two, but upon all three of these fundamental pillars. It seems unnecessary to repeat what so often has been said, that the powers of these departments are different, and are to be exercised independently. The differences clearly and definitely appear in the Constitution. Each of the departments is an agent of its creator, and one department is not and cannot be the agent of another. Each is answerable to its creator for what it does, and not to another agent. The view, therefore, of the Executive and of Congress that an act is constitutional is persuasive in a high degree; but it is not controlling.

Coming, then, to a consideration of the Washington statute, it first is to be observed that it is in every substantial respect identical with the statute involved in the *Adkins* case. Such vices as existed in the latter are present in the former. And if the *Adkins* case was properly decided, as we who join in this opinion think it was, it necessarily follows that the Washington statute is invalid.

In support of minimum wage legislation it has been urged, on the one hand, that great benefits will result in favor of underpaid labor, and, on the other hand, that the danger of such legislation is that the minimum will tend to become the maximum, and thus bring down the **[p406]** earnings of the more efficient toward the level of the less efficient employees. But with these speculations we have nothing to do. We are concerned only with the question of constitutionality.

That the clause of the Fourteenth Amendment which forbids a state to deprive any person of life, liberty or property without due process of law includes freedom of contract is so well settled as to be no longer open to question. Nor reasonably can it be disputed that contracts of employment of labor are included in the rule. *Adair v. United States,* 208 U.S. 161, 174-175; *Coppage v. Kansas,* 236 U.S. 1, 10, 14. In the first of these cases, Mr. Justice Harlan, speaking for the court, said,

The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars, the employer and employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.

In the *Adkins* case, we referred to this language, and said that, while there was no such thing as absolute freedom of contract, but that it was subject to a great variety of restraints, nevertheless, freedom of contract was the general rule, and restraint the exception, and that the power to abridge that freedom could only be justified by the existence of exceptional circumstances. This statement of the rule has been many times affirmed, and we do not understand that it is questioned by the present decision.

We further pointed out four distinct classes of cases in which this court from time to time had upheld statutory interferences with the liberty of contract. They were, in brief, (1) statutes fixing rates and charges to be **[p407]** exacted by businesses impressed with a public interest; (2) statutes relating to contracts for the performance of public work; (3) statutes prescribing the character, methods and time for payment of wages, and (4) statutes fixing hours of labor. It is the last class that has been most relied upon as affording support for minimum wage legislation, and much of the opinion in the *Adkins* case (261 U.S. 547-553) is devoted to pointing out the essential distinction between fixing hours of labor and fixing wages. What is there said need not be repeated. It is enough for present purposes to say that statutes of the former class deal with an incident of the employment having no necessary effect upon wages. The parties are left free to contract about wages, and thereby equalize such additional burdens as may be imposed upon the employer as a result of the restrictions as to hours by an adjustment in respect of the amount of wages. This court, wherever the question is adverted to, has been careful to disclaim any purpose to uphold such legislation as fixing wages, and has recognized an essential difference between the two. *E.g., Bunting v. Oregon,* 243 U.S. 426; *Wilson v. New,* 243 U.S. 332, 345-346, 353-354, *and see* Freund, Police Power, § 318.

We then pointed out that minimum wage legislation such as that here involved does not deal with any business charged with a public interest, or with public work, or with a temporary emergency, or with the character, methods or periods of wage payments, or with hours of labor, or with the protection of persons under legal disability, or with the prevention of fraud. It is, simply and exclusively, a law fixing wages for adult women who are legally as capable of contracting for themselves as men, and cannot be sustained unless upon principles apart from those involved in cases already decided by the court.

Two cases were involved in the *Adkins* decision. In one of them, it appeared that a woman 21 years of age, **[p408]** who brought the suit, was employed as an elevator operator at a fixed salary. Her services were satisfactory, and she was anxious to retain her position, and her employer, while willing to retain her, was obliged to dispense with her services on account of the penalties prescribed by the act. The wages received by her were the best she was able to obtain for any work she was capable of performing, and the enforcement of the order deprived her, as she alleged, not only of that employment, but left her unable to secure any position at which she could make a living with as good physical and moral surroundings and as good wages as she was receiving and was willing to take. The Washington statute, of course, admits of the same situation and result, and, for aught that appears to the contrary, the situation in the present case may have been the same as that just described. Certainly, to the extent that the statute applies to such cases, it cannot be justified as a reasonable restraint upon the freedom of contract. On the contrary, it is essentially arbitrary.

Neither the statute involved in the *Adkins* case nor the Washington statute, so far as it is involved here, has the slightest relation to the capacity or earning power of the employee, to the number of hours which constitute the day's work, the character of the place where the work is to be done, or the circumstances or surroundings of ,he employment. The sole basis upon which the question of validity rests is the assumption that the employee is entitled to receive a sum of money sufficient to provide a living for her, keep her in health, and preserve her morals. And, as we pointed out at some length in that case (pp. 555-557), the question thus presented for the determination of the board cannot be solved by any general formula prescribed by a statutory bureau, since it is not a

composite, but an individual, question to be answered for each individual, considered by herself. **[p409]** What we said further in that case (pp. 557-559), is equally applicable here:

The law takes account of the necessities of only one party to the contract. It ignores the necessities of the employer by compelling him to pay not less than a certain sum not only whether the employee is capable of earning it, but irrespective of the ability of his business to sustain the burden, generously leaving him, of course, the privilege of abandoning his business as an alternative for going on at a loss. Within the limits of the minimum sum, he is precluded, under penalty of fine and imprisonment, from adjusting compensation to the differing merits of his employees. It compels him to pay at least the sum fixed in any event, because the employee needs it, but requires no service of equivalent value from the employee. It therefore undertakes to solve but one-half of the problem. The other half is the establishment of a corresponding standard of efficiency, and this forms no part of the policy of the legislation, although in practice the former half without the latter must lead to ultimate failure, in accordance with the inexorable law that no one can continue indefinitely to take out more than he puts in without ultimately exhausting the supply. The law is not confined to the great and powerful employers, but embraces those whose bargaining power may be as weak as that of the employee. It takes no account of periods of stress and business depression, of crippling losses which may leave the employer himself without adequate means of livelihood. To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.

The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it **[p410]** exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the work the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals. The ethical right of every worker, man or woman, to a living wage may be conceded. One of the declared and important purposes of trade organizations is to secure it. And with that principle and with every legitimate effort to realize it, in fact, no one can quarrel; but the fallacy of the proposed method of attaining it is that it assumes that every employer is bound at all events to furnish it. The moral requirement implicit in every contract of employment, *viz.,* that the amount to be paid and the service to be rendered shall bear to each other some relation of just equivalence, is completely ignored. The necessities of the employee are alone considered, and these arise outside of the employment, are the same when there is no employment, and as great in one occupation as in another. Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. On the contrary, to the extent of what he pays, he has relieved it. In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or grocer to buy food, he is morally entitled to obtain the worth of his money, but he is not entitled to more. If what he gets is worth what he pays, he is not justified in demanding more simply because he needs more, and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities. Should a statute undertake to vest in a commission **[p411]** power to determine the quantity of food necessary for individual support and require the shopkeeper, if he sell to the individual at all, to furnish that quantity at not more than a fixed maximum, it would undoubtedly fall before the constitutional test. The fallacy of any argument in support of the validity of such a statute would be quickly exposed. The argument in support of that now being considered is equally fallacious, though the weakness of it may not be so plain. A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the services rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things, and solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.

Whether this would be equally or at all true in respect of the statutes of some of the states we are not called upon to say. They are not now before us, and it is enough that it applies in every particular to the Washington statute now under consideration.

The Washington statute, like the one for the District of Columbia, fixes minimum wages for adult women. Adult men and their employers are left free to bargain as they please, and it is a significant and an important fact that all state statutes to which our attention has been called are of like character. The common law rules restricting the power of women to make contracts have, under our system, long since practically disappeared. Women today stand upon a legal and political equality with men. There is no longer any reason why they should be put in different classes in respect of their legal **[p412]** right to make contracts; nor should they be denied, in effect, the right to compete with men for work paying lower wages which men may be willing to accept. And it is an arbitrary exercise of the legislative power to do so. In the *Tipaldo* case, 298 U.S. 587, 615, it appeared that the New York legislature had passed two minimum wage measures -- one dealing with women alone, the other with both men and women. The act which included men was vetoed by the governor. The other, applying to women alone, was approved. The "factual background" in respect of both measures was substantially the same. In pointing out the arbitrary discrimination which resulted (pp. 615-617) we said:

These legislative declarations, in form of findings or recitals of fact, serve well to illustrate why any measure that deprives employers and adult women of freedom to agree upon wages, leaving employers and men employees free so to do, is necessarily arbitrary. Much, if not all, that in them is said in justification of the regulations that the Act imposes in respect of women's wages applies with equal force in support of the same regulation of men's wages. While men are left free to fix their wages by agreement with employers, it would be fanciful to suppose that the regulation of women's wages would be useful to prevent or lessen the evils listed in the first section of the Act. Men in need of work are as likely as women to accept the low wages offered by unscrupulous employers. Men in greater number than women support themselves and dependents, and, because of need, will work for whatever wages they can get, and that without regard to the value of the service, and even though the pay is less than minima prescribed in accordance with this Act. It is plain that, under circumstances such as those portrayed in the "Factual background," prescribing of minimum wages for women alone would unreasonably restrain them **[p413]** in competition with men and tend arbitrarily to deprive them of employment and a fair chance to find work.

An appeal to the principle that the legislature is free to recognize degrees of harm, and confine its restrictions accordingly, is but to beg the question, which is, since the contractual rights of men and women are the same, does the legislation here involved, by restricting only the rights of women to make contracts as to wages, create an arbitrary discrimination? We think it does. Difference of sex affords no reasonable ground for making a restriction applicable to the wage contracts of all working women from which like contracts of all working men are left free. Certainly a suggestion that the bargaining ability of the average woman is not equal to that of the average man would lack substance. The ability to make a fair bargain, as everyone knows, does not depend upon sex.

If, in the light of the facts, the state legislation, without reason or for reasons of mere expediency, excluded men from the provisions of the legislation, the power was exercised arbitrarily. On the other hand, if such legislation in respect of men was properly omitted on the ground that it would be unconstitutional, the same conclusion of unconstitutionality is inescapable in respect of similar legislative restraint in the case of women, 261 U.S. 553.

Finally, it may be said that a statute absolutely fixing wages in the various industries at definite sums and forbidding employers and employees from contracting for any other than those designated would probably not be thought to be constitutional. It is hard to see why the power to fix minimum wages does not connote a like power in respect of maximum wages. And yet, if both powers be exercised in such a way that the minimum and the maximum so nearly approach each other as to **[p414]** become substantially the same, the right to make any contract in respect of wages will have been completely abrogated.

A more complete discussion may be found in the *Adkins* and *Tipaldo* cases cited *supra.*

Hunt v. Washington Apple Advertising Commission 432 U.S. 33 (1977)

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

In 1973, North Carolina enacted a statute which required, *inter alia*, all closed containers of apples sold, offered for sale, or shipped into the State to bear "no grade other than the applicable U.S. grade or standard."…Washington State is the Nation's largest producer of apples, its crops accounting for approximately 30% of all apples grown domestically and nearly half of all apples shipped in closed containers in interstate commerce. [Because] of the importance of the apple industry to the State, its legislature has undertaken to protect and enhance the reputation of Washington apples by establishing a stringent, mandatory inspection program [that] requires all apples shipped in interstate commerce to be tested under strict quality standards and graded accordingly. In all cases, the Washington State grades [are] the equivalent of, or superior to, the comparable grades and standards adopted by the [U.S. Dept. of] Agriculture (USDA).

[In] 1972, the North Carolina Board of Agriculture adopted an administrative regulation, unique in the 50 States, which in effect required all closed containers of apples shipped into or sold in the State to display either the applicable USDA grade or a notice indicating no classification. State grades were expressly prohibited. In addition to its obvious consequence—prohibiting the display of Washington State apple grades on containers of apples shipped into North Carolina—the regulation presented the Washington apple industry with a marketing problem of potentially nationwide significance. Washington apple growers annually ship in commerce approximately 40 million closed containers of apples, nearly 500,000 of which eventually find their way into North Carolina, stamped with the applicable Washington State variety and grade. [Compliance] with North Carolina's unique regulation would have required Washington growers to obliterate the printed labels on containers shipped to North Carolina, thus giving their product a damaged appearance. Alternatively, they could have changed their marketing practices to accommodate the needs of the North Carolina market, i.e., repack apples to be shipped to North Carolina in containers bearing only the USDA grade, and/or store the estimated portion of the harvest destined for that market in such special containers. As a last resort, they could discontinue the use of the preprinted containers entirely. None of these costly and less efficient options was very attractive to the industry. Moreover, in the event a number of other States followed North Carolina's lead, the resultant inability to display the Washington grades could force the Washington growers to abandon the State's expensive inspection and grading system which their customers had come to know and rely on over the 60-odd years of its existence.…

Unsuccessful in its attempts to secure administrative relief [with North Carolina], the Commission instituted this action challenging the constitutionality of the statute. [The] District Court found that the North Carolina statute, while neutral on its face, actually discriminated against Washington State growers and dealers in favor of their local counterparts [and] concluded that this discrimination [was] not justified by the asserted local interest—the elimination of deception and confusion from the marketplace—arguably furthered by the [statute].

…

[North Carolina] maintains that [the] burdens on the interstate sale of Washington apples were far outweighed by the local benefits flowing from what they contend was a valid exercise of North Carolina's [police powers]. Prior to the statute's enactment,…apples from 13 different States were shipped into North Carolina for sale. Seven of those States, including [Washington], had their own grading systems which, while differing in their standards, used similar descriptive labels (e.g., fancy, extra fancy, etc.). This multiplicity of inconsistent state grades [posed] dangers of deception and confusion not only in the North Carolina market, but in the Nation as a whole. The North Carolina statute, appellants claim, was enacted to eliminate this source of deception and confusion. [Moreover], it is contended that North Carolina sought to accomplish this goal of uniformity in an evenhanded manner as evidenced by the fact that its statute applies to all apples sold in closed containers in the State without regard to their point of origin.

[As] the appellants properly point out, not every exercise of state authority imposing some burden on the free flow of commerce is invalid, [especially] when the State acts to protect its citizenry in matters pertaining to the sale of foodstuffs. By the same token, however, a finding that state legislation furthers matters of legitimate local concern, even in the health and consumer protection areas, does not end the inquiry. Rather, when such state legislation comes into conflict with the Commerce Clause's overriding requirement of a national "common market," we are confronted with the task of effecting an accommodation of the competing national and local interests. We turn to that task.

As the District Court correctly found, the challenged statute has the practical effect of not only burdening interstate sales of Washington apples, but also discriminating against them. This discrimination takes various forms. The first, and most obvious, is the statute's consequence of raising *the costs* of doing business in the North Carolina market for Washington apple growers and dealers, while leaving those of their North Carolina counterparts unaffected. [This] disparate effect results from the fact that North Carolina apple producers, unlike their Washington competitors, were not forced to alter their marketing practices in order to comply with the statute. They were still free to market their wares under the USDA grade or none at all as they had done prior to the statute's enactment. Obviously, the increased costs imposed by the statute would tend to shield the local apple industry from the competition of Washington apple growers and dealers who are already at a competitive disadvantage because of their great distance from the North Carolina market.

Second, the statute has the effect of *stripping away* from the Washington apple industry the competitive and economic advantages it has earned for itself through its expensive inspection and grading system. The record demonstrates that the Washington apple-grading system has gained nationwide acceptance in the apple trade. [The record] contains numerous affidavits [stating a] preference [for] apples graded under the Washington, as opposed to the USDA, system because of the former's greater consistency, its emphasis on color, and its supporting mandatory inspections. Once again, the statute had no similar impact on the North Carolina apple industry and thus operated to its benefit.

Third, by *prohibiting* Washington growers and dealers from marketing apples under their State's grades, the statute has a *leveling effect* which insidiously operates to the advantage of local apple producers. [With] free market forces at work, Washington sellers would normally enjoy a distinct market advantage vis-à-vis local producers in those categories where the Washington grade is superior. However, because of the statute's operation, Washington apples which would otherwise qualify for and be sold under the superior Washington grades will now have to be marketed under their inferior USDA counterparts. Such "downgrading" offers the North Carolina apple industry the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit. At worst, it will have the effect of an embargo against those Washington apples in the superior grades as Washington dealers withhold them from the North Carolina market. At best, it will deprive Washington sellers of the market premium that such apples would otherwise command.

Despite the statute's facial neutrality, the Commission suggests that its discriminatory impact on interstate commerce was not an unintended by-product, and there are some indications in the record to that effect. The most glaring is the response of the North Carolina Agriculture Commissioner to the Commission's request for an exemption following the statute's passage in which he indicated that before he could support such an exemption, he would "want to have the sentiment from our apple producers *since they were mainly responsible for* this *legislation being passed*." [Moreover], we find it somewhat suspect that North Carolina singled out only closed containers of apples, the very means by which apples are transported in commerce, to effectuate the statute's ostensible consumer protection purpose when apples are not generally sold at retail in their shipping containers. However, we need not ascribe an economic protection motive to the North Carolina Legislature to resolve this case; we conclude that the challenged statute cannot stand insofar as it prohibits the display of Washington State grades even if enacted for the declared purpose of protecting consumers from deception and fraud in the marketplace.

…

Finally, we note that any potential for confusion and deception created by the Washington grades was not of the type that led to the statute's enactment. Since Washington grades are in all cases equal or superior to their USDA counterparts, they could only "deceive" or "confuse" a consumer to his benefit, hardly a harmful result.

In addition, it appears that nondiscriminatory alternatives to the outright ban of Washington State grades are readily available. For example, North Carolina could effectuate its goal by permitting out-of-state growers to utilize state grades only if they also marked their shipments with the applicable USDA label. In that case, the USDA grade would serve as a benchmark against which the consumer could evaluate the quality of the various state grades.…

[The court affirmed the lower court's holding that the North Carolina statute was unconstitutional.]

Case Questions

1. Was the North Carolina law discriminatory on its face? Was it, possibly, an undue burden on interstate commerce? Why wouldn't it be?
2. What evidence was there of discriminatory intent behind the North Carolina law? Did that evidence even matter? Why or why not?

Sierra Club, Petitioner, v. Rogers C. B. Morton, Individually, and as Secretary of the Interior of the United States, et al., 92 S.Ct. 1361, 405 U.S. 727 (1972)

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Synopsis

Action by membership corporation for declaratory judgment that construction of proposed ski resort and recreation area in national game refuge and forest would contravene federal laws and for preliminary and permanent injunctions restraining federal officials from approving or issuing permits for the project. The United States District Court for the Northern District of California granted a preliminary injunction and the defendants appealed. The United States Court of Appeals, Ninth Circuit, 433 F.2d 24, vacated the injunction and remanded the cause with directions, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that, in absence of allegation that corporation or its members would be affected in any of their activities or pastimes by the proposed project, the corporation, which claimed special interest in conservation of natural game refuges and forests, lacked standing under Administrative Procedure Act to maintain the action.

Affirmed.

Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Blackmun filed dissenting opinions.

Mr. Justice Powell and Mr. Justice Rehnquist took no part in consideration or decision of the case.

**1362 *727 Syllabus*

Petitioner, a membership corporation with 'a special interest in the conservation and sound maintenance of the national parks, game refuges, and forests of the country,' brought this suit for a declaratory judgment and an injunction to restrain federal officials from approving an extensive skiing development in the Mineral King Valley in the Sequoia National Forest. Petitioner relies on s 10 of the Administrative Procedure Act, which accords judicial review to a 'person suffering

legal wrong because of agency action, or (who is) adversely affected or aggrieved by agency action within the meaning of a relevant statute.' On the theory that this was a 'public' action involving questions as to the use of natural resources, petitioner did not allege that the challenged development would affect the club or its members in their activities or that they used Mineral King, but maintained that the project would adversely change the area's aesthetics and ecology. The District Court granted a preliminary injunction. The Court of Appeals reversed, holding that the club lacked standing, **1363 and had not shown irreparable injury. Held: A person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether economic or otherwise. In this case, where petitioner asserted no individualized harm to itself or its members, it lacked standing to maintain the action. Pp. 1364—1369, 433 F.2d 24, affirmed.

Mr. Justice STEWART delivered the opinion of the Court.

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The Mineral King Valley is an area of great natural beauty nestled in the Sierra Nevada Mountains in Tulare County, California, adjacent to Sequoia National Park. It has been part of the Sequoia National Forest since 1926, and is designated as a national game refuge by special Act of Congress.1 Though once the site of extensive mining activity, Mineral King is now used almost exclusively for recreational purposes. Its relative inaccessibility and lack of development have limited the number of visitors each year, and at the same time have preserved the valley's quality as a quasi-wilderness area largely uncluttered by the products of civilization.

*729 The United States Forest Service, which is entrusted with the maintenance and administration of national forests, began in the late 1940's to give consideration to Mineral King as a potential site for recreational development. Prodded by a rapidly increasing demand for skiing facilities, the Forest Service published a prospectus in 1965, inviting bids from private developers for the construction and operation of a ski resort that would also serve as a summer recreation area. The proposal of Walt Disney Enterprises, Inc., was chosen from those of six bidders, and Disney received a three-year permit to conduct surveys and explorations in the valley in connection with its preparation of a complete master plan for the resort.

The final Disney plan, approved by the Forest Service in January 1969, outlines a $35 million complex of motels, restaurants, swimming pools, parking lots, and other structures designed to accommodate 14,000 visitors daily. This complex is to be constructed on 80 acres of the valley floor under a 30-year use permit from the Forest Service. Other facilities, including ski lifts, ski trails, a cog-assisted railway, and utility installations, are to be constructed on the mountain slopes and in other parts of the valley under a revocable special-use permit. To provide access to the resort, the State of California proposes to construct a highway 20 miles in length. A section of this road would traverse Sequoia National Park, as would a proposed highvoltage power line needed to provide electricity for the resort. Both the highway and the power line require the approval of the Department of the Interior, which is entrusted with the preservation and maintenance of the national parks.

Representatives of the Sierra Club, who favor maintaining Mineral King largely in its present state, followed the progress of recreational planning for the valley *730 with close attention and increasing dismay. They unsuccessfully sought a public hearing on the proposed development in

1965, and in subsequent correspondence with officials of the Forest Service and the Department of the Interior, they expressed the Club's objections to Disney's plan as a whole and to particular features included in it. In June 1969 the Club filed the present suit in the United States District Court for the Northern District of California, seeking a declaratory judgment that various aspects of the proposed development **1364 contravene federal laws and regulations governing the preservation of national parks, forests, and game refuges,2 and also seeking preliminary and permanent injunctions restraining the federal officials involved from granting their approval or issuing permits in connection with the Mineral King project. The petitioner Sierra Club sued as a membership corporation with 'a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country,' and invoked the judicial-review provisions of the Administrative Procedure Act, 5 U.S.C. s 701 et seq.
*731 After two days of hearings, the District Court granted the requested preliminary injunction. It rejected the respondents' challenge to the Sierra Club's standing to sue, and determined that the hearing had raised questions 'concerning possible excess of statutory authority, sufficiently substantial and serious to justify a preliminary injunction. . . .' The respondents appealed, and the Court of Appeals for the Ninth Circuit reversed. 433 F.2d 24. With respect to the petitioner's standing, the court noted that there was 'no allegation in the complaint that members of the Sierra Club would be affected by the actions of (the respondents) other than the fact that the actions are personally displeasing or distasteful to them,' id., at 33, and concluded:
'We do not believe such club concern without a showing of more direct interest can constitute standing in the legal sense sufficient to challenge the exercise of responsibilities on behalf of all the citizens by two cabinet level officials of the government acting under Congressional and Constitutional authority.' Id., at 30.

Alternatively, the Court of Appeals held that the Sierra Club had no made an adequate showing of irreparable injury and likelihood of success on the merits to justify issuance of a preliminary injunction. The court thus vacated the injunction. The Sierra Club filed a petition for a writ of certiorari which we granted, 401 U.S. 907, 91 S.Ct. 870, 27 L.Ed.2d 805, to review the questions of federal law presented.

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[1] [2] [3] [4] The first question presented is whether the Sierra Club has alleged facts that entitle it to obtain judicial review of the challenged action. Whether a party has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy is what *732 has traditionally been referred to as the question of standing to sue. Where the party does not rely on any specific statute authorizing invocation of the judicial process, the question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663, as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' Flast v. Cohen, 392 U.S. 83, 101, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947. Where, however, Congress has authorized public officials **1365 to perform certain functions according to law, and has provided by statute for judicial review of

those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff.3

The Sierra Club relies upon s 10 of the Administrative Procedure Act (APA), 5 U.S.C. s 702, which provides:
'A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency *733 action within the meaning of a relevant statute, is entitled to judicial review thereof.'

Early decisions under this statute interpreted the language as adopting the various formulations of 'legal interest' and 'legal wrong' then prevailing as constitutional requirements of standing.4 But, in Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184, and Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192, decided the same day, we held more broadly that persons had standing to obtain judicial review of federal agency action under s 10 of the APA where they had alleged that the challenged action had caused them 'injury in fact,' and where the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated.5
In Data Processing, the injury claimed by the petitioners consisted of harm to their competitive position in the computer-servicing market through a ruling by the Comptroller of the Currency that national banks might perform data-processing services for their customers. In Barlow, the petitioners were tenant farmers who claimed that certain regulations of the Secretary of Agriculture adversely affected their economic position vis-a -vis their landlords. These palpable economic injuries have long been recognized as sufficient to lay the basis for standing, with or without a specific statutory *734 provision for judicial review.6 Thus, neither Data Processing nor Barlow addressed itself to the question, which has arisen with increasing **1366 frequency in federal courts in recent years, as to what must be alleged by persons who claim injury of a noneconomic nature to interests that are widely shared.7 That question is presented in this case.

III

[5] The injury alleged by the Sierra Club will be incurred entirely by reason of the change in the uses to which Mineral King will be put, and the attendant change in the aesthetics and ecology of the area. Thus, in referring to the road to be built through Sequoia National Park, the complaint alleged that the development 'would destroy or otherwise adversely affect the scenery, natural and historic objects and wildlife of the park and would impair the enjoyment of the park for future generations.' We do not question that this type of harm may amount to an 'injury in fact' sufficient to lay the basis for standing under s 10 of the APA. Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process. But the 'injury in fact' test requires more than an injury to a cognizable *735 interest. It requires that the party seeking review be himself among the injured.

The impact of the proposed changes in the environment of Mineral King will not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use Mineral King and Sequoia National Park, and for whom the aesthetic and recreational values of the area will be lessened by the highway and ski resort. The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.8

**1367 *736 The Club apparently regarded an allegations of individualized injury as superfluous, on the theory that this was a 'public' action involving questions as to the use of natural resources, and that the Club's longstanding concern with and expertise in such matters were sufficient to give it standing as a 'representative of the public.'9 This theory reflects a misunderstanding of our cases involving so-called 'public actions' in the area of administrative law.

The origin of the theory advanced by the Sierra Club may be traced to a dictum in Scripps-Howard Radio v. FCC, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229, in which the licensee of a radio station in Cincinnati, Ohio, sought a stay of an order of the FCC allowing another radio station in a nearby city to change its frequency and increase its range. In discussing its power to grant a stay, the Court noted that 'these private litigants have standing only as representatives of the public interest.' Id., at 14, 62 S.Ct., at 882. But that observation did not describe the basis upon which the appellant was allowed to obtain judicial review as a 'person aggrieved' within the meaning of the statute involved in that case,10 since *737 Scripps-Howard was clearly 'aggrieved' by reason of the economic injury that it would suffer as a result of the Commission's action.11 The Court's statement was, rather directed to the theory upon which Congress had authorized judicial review of the Commission's actions. That theory had been described earlier in FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869, as follows:

'Congress had some purpose in enacting section 402(b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.'

[6] Taken together, Sanders and Scripps-Howard thus established a dual proposition: the fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.12 It was in the latter sense that the 'standing' of the appellant in Scripps-Howard, existed only as a 'representative of the public interest.' It is in a similar sense that we have used the phrase 'private attorney general' to *738 describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action. See Data Processing, supra, 397 U.S., at 154, 90 S.Ct., at 830.

The trend of cases arising under the APA and other statutes authorizing judicial **1368 review of federal agency action has been toward recognizing that injuries other than economic harm are sufficient to bring a person within the meaning of the statutory language, and toward discarding the notion that an injury that is widely shared is ipso facto not an injury sufficient to provide the basis for judicial review.13 We noted this development with approval in Data Processing, 397 U.S., at 154, 90 S.Ct., at 830, in saying that the interest alleged to have been injured 'may reflect 'aesthetic, conservational, and recreational' as well as economic values.' But broadening the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury. [7] [8] Some courts have indicated a willingness to take this latter step by conferring standing upon organizations *739 that have demonstrated 'an organizational interest in the problem' of environmental or consumer protection. Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App.D.C. 391, 395, 428 F.2d 1093, 1097.14 It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review. See, e.g., NAACP v. Button, 371 U.S. 415, 428, 83 S.Ct. 328, 335, 9 L.Ed.2d 405. But a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to render the organization 'adversely affected' or 'aggrieved' within the meaning of the APA. The Sierra Club is a large and long-established organization, with a historic commitment to the cause of protecting our Nation's natural heritage from man's depredations. But if a 'special interest' in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide 'special interest' organization however small or short-lived. And if any group with a bona fide 'special interest' could initiate such litigation, it is difficult to perceive why any individual citizen with the *740 same bona fide special interest would not also be entitled to do so.

[9] [10] The requirement that a party seeking review must allege facts showing that he is himself adversely affected does not insulate executive action from judicial review, nor does it prevent any public interests from being protected **1369 through the judicial process.15 It does serve as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome. That goal would be undermined were we to construe the APA to authorize judicial review at the behest of organizations or individuals who seek to do no more than vindicate their own value preferences through the judicial process.16 The principle that the Sierra Club would have us establish in this case would do just that.

*741 [11] As we conclude that the Court of Appeals was correct in its holding that the Sierra Club lacked standing to maintain this action, we do not reach any other questions presented in the petition, and we intimate no view on the merits of the complaint. The judgment is

Affirmed.

Mr. Justice POWELL and Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice DOUGLAS, dissenting.

I share the views of my Brother BLACKMUN and would reverse the judgment below.
The critical question of 'standing'1 would be simplified and also put neatly in focus if we fashioned a federal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern *742 for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation. See Stone, Should Trees Have Standing?— **1370 Toward Legal Rights for Natural Objects, 45 S.Cal.L.Rev. 450 (1972). This suit would therefore be more properly labeled as Mineral King v. Morton.
Inanimate objects are sometimes parties in litigation. A ship has a legal personality, a fiction found useful for maritime purposes.2 The corporation sole—a creature of ecclesiastical law—is an acceptable adversary and large fortunes ride on its cases.3 The ordinary corporation is a 'person' for purposes of the adjudicatory processes, *743 whether it represents proprietary, spiritual, aesthetic, or charitable causes.4
So it should be as respects valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swampland, or even air that feels the destructive pressures of modern technology and modern life. The river, for example, is the living symbol of all the life it sustains or nourishes—fish, aquatic insects, water ouzels, otter, fisher, deer, elk, bear, and all other animals, including man, who are dependent on it or who enjoy it for its sight, its sound, or its life. The river as plaintiff speaks for the ecological unit of life that is part of it. Those people who have a meaningful relation to that body of water—whether it be a fisherman, a canoeist, a zoologist, or a logger—must be able to speak for the values which the river represents and which are threatened with destruction.
I do not know Mineral King. I have never seen it nor traveled it, though I have seen articles describing its proposed 'development'5 notably Hano, Protectionists **1371 vs. recreationists—The Battle of Mineral King, *744 N.Y. Times Mag., Aug. 17, 1969, p. 25; and Browning, Mickey Mouse in the Mountains, Harper's, March 1972, p. 65. The Sierra Club in its complaint alleges that '(o)ne of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains.' The District Court held that this uncontested allegation made the Sierra Club 'sufficiently aggrieved' to have 'standing' to sue on behalf of Mineral King.
Mineral King is doubtless like other wonders of the Sierra Nevada such as Tuolumne Meadows and the John Muir Trail. Those who hike it, fish it, hunt it, camp *745 in it, frequent it, or visit it merely to sit in solitude and wonderment are legitimate spokesmen for it, whether they may be few or many. Those who have that intimate relation with the inanimate object about to be injured, polluted, or otherwise despoiled are its legitimate spokesmen.
The Solicitor General, whose views on this subject are in the Appendix to this opinion, takes a wholly different approach. He considers the problem in terms of 'government by the Judiciary.' With all respect, the problem is to make certain that the inanimate objects, which are the very core of America's beauty, have spokesmen before they are destroyed. It is, of course, true that

most of them are under the control of a federal or state agency. The standards given those agencies are usually expressed in terms of the 'public interest.' Yet 'public interest' has so many differing shades of meaning as to be quite meaningless on the environmental front. Congress accordingly has adopted ecological standards in the National Environmental Policy Act of 1969, Pub.L. 91—90, 83 Stat. 852, 42 U.S.C. s 4321 et seq., and guidelines for agency action have been provided by the Council on Environmental Quality of which Russell E. Train is Chairman. See 36 Fed.Reg. 7724.

Yet the pressures on agencies for favorable action one way or the other are enormous. The suggestion that Congress can stop action which is undesirable is true in theory; yet even Congress is too remote to give meaningful direction and its machinery is too ponderous to use very often. The federal agencies of which I speak are not venal or corrupt. But they are notoriously under the control of powerful interests who manipulate them through advisory committees, or friendly working relations, or who have that natural affinity with the agency *746 which in time develops between the regulator and the regulated.6 **1372 As early as 1894, Attorney General Olney predicted that regulatory agencies might become 'industry-minded,' *747 as illustrated by his forecast concerning the Interstate Commerce Commission:

'The Commission . . . is, or can be made, of great use to the railroads. It satisfies the popular clamor for a government supervision of railroads, at the same time that that supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be found to take the business and railroad view of things.' M. Josephson, The Politicos 526 (1938).

Years later a court of appeals observed, 'the recurring question which has plagued public regulation of industry (is) whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.' Moss v. CAB, 139 U.S.App.D.C. 150, 152, 430 F.2d 891, 893. See also Office of Communication of United Church of Christ v. FCC, 123 U.S.App.D.C. 328, 337—338, 359 F.2d 994, 1003—1004; Udall v. FPC, 387 U.S. 428, 87 S.Ct. 1712, 18 L.Ed.2d 869; Calvert Cliffs' Coordinating Committee, Inc. v. AEC, 146 U.S.App.D.C. 33, 449 F.2d 1109; Environmental Defense Fund, Inc. v. Ruckelshaus, 142 U.S.App.D.C. 74, 439 F.2d 584; Environmental Defense Fund, Inc. v. United States Dept. of HEW, 138 U.S.App.D.C. 381, 428 F.2d 1083; Scenic Hudson Preservation Conf. v. FPC, 354 F.2d 608, 620. But see Jaffe, The Federal Regulatory Agencies In Perspective: Administrative Limitations In A Political Setting, 11 B.C.Ind. & Com.L.Rev. 565 (1970) (labels 'industry-mindedness' as 'devil' theory).

*748 The Forest Service—one of the foderal agencies behind the scheme to despoil Mineral King—has been notorious for its alignment with lumber companies, although its mandate from Congress directs it to consider the various aspects of multiple use in its supervision of the national forests.7

**1374 *749 The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal *750 agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard.8

*751 Perhaps they will not win. Perhaps the bulldozers of 'progress' will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?
Those who hike the Appalachian Trail into Sunfish Pond, New Jersey, and camp or sleep there, or run the *752 Allagash in Maine, or climb the Guadalupes in West Texas, or who canoe and portage the Quetico Superior in Minnesota, certainly should have standing to defend those natural wonders before courts or agencies, though they live 3,000 miles away. Those who merely are caught up in environmental news or propaganda and flock to defend these waters or areas may be treated differently. That is why these environmental issues should be tendered by the inanimate object itself. Then there will be assurances that all of the forms of life9 which it represents will stand before the court—the pileated woodpecker as well as the coyote and **1375 bear, the lemmings as well as the trout in the streams. Those inarticulate members of the ecological group cannot speak. But those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.
Ecology reflects the land ethic; and Aldo Leopold wrote in A Sand County Almanac 204 (1949), 'The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.'
That, as I see it, is the issue of 'standing' in the present case and controversy.

*753 APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Mr. Justice BRENNAN, dissenting.
I agree that the Sierra Club has standing for the reasons stated by my Brother BLACKMUN in Alternative No. 2 of his dissent. I therefore would reach the merits. Since the Court does not do so, however, I simply note agreement with my Brother BLACKMUN that the merits are substantial.

Mr. Justice BLACKMUN, dissenting.
The Court's opinion is a practical one espousing and adhering to traditional notions of standing as somewhat modernized by Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); and Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). If this were an ordinary case, I would join the opinion and the Court's judgment and be quite content.
But this is not ordinary, run-of-the-mill litigation. The case poses—if only we choose to acknowledge and reach them—significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its resulting ecological disturbances. Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional *756 concepts do not quite fit and do not prove to be entirely adequate for new issues?
The ultimate result of the Court's decision today, I fear, and sadly so, is that the 35.3-million-dollar complex, over 10 times greater than the Forest Service's suggested minimum, will now

hastily proceed to completion; that serious opposition to it will recede in discouragement; and that Mineral King, the 'area of great natural beauty nestled in the Sierra Nevada Mountains,' to use the Court's words, will become defaced, at least in part, and, like so many other areas, will cease to be 'uncluttered by the products of civilization.'

I believe this will come about because: (1) The District Court, although it accepted standing for the Sierra Club and granted preliminary injunctive relief, was reversed by the Court of Appeals, and this Court now upholds that reversal. (2) With the reversal, interim relief by the District Court is now out of the question and a permanent injunction becomes most unlikely. (3) The Sierra Club may not choose to amend its complaint or, if it does desire to do so, may not, at this late date, be granted permission. (4) The ever-present pressure to get the project under way will mount. (5) Once under way, any prospect of bringing it to a halt will grow dim. Reasons, most of them economic, for not stopping the project will have a tendency to multiply. And the irreparable harm will be largely inflicted in the earlier stages of construction and development.

**1377 Rather than pursue the course the Court has chosen to take by its affirmance of the judgment of the Court of Appeals, I would adopt one of two alternatives:

1. I would reverse that judgment and, instead, approve the judgment of the District Court which recognized standing in the Sierra Club and granted preliminary relief. I would be willing to do this on condition that the Sierra Club forthwith amend its complaint to meet the *757 specifications the Court prescribes for standing. If Sierra Club fails or refuses to take that step, so be it; the case will then collapse. But if it does amend, the merits will be before the trial court once again. As the Court, ante, at 1364 n. 2, so clearly reveals, the issues on the merits are substantial and deserve resolution. They assay new ground. They are crucial to the future of Mineral King. They raise important ramifications for the quality of the country's public land management. They pose the propriety of the 'dual permit' device as a means of avoiding the 80-acre 'recreation and resort' limitation imposed by Congress in 16 U.S.C. s 497, an issue that apparently has never been litigated, and is clearly substantial in light of the congressional expansion of the limitation in 1956 arguably to put teeth into the old, unrealistic five-acre limitation. In fact, they concern the propriety of the 80-acre permit itself and the consistency of the entire, enormous development with the statutory purposes of the Sequoia Game Refuge, of which the Valley is a part. In the context of this particular development, substantial questions are raised about the use of a national park area for Disney purposes for a new high speed road and a 66,000-volt power line to serve the complex. Lack of compliance with existing administrative regulations is also charged. These issues are not shallow or perfunctory.

2. Alternatively, I would permit an imaginative expansion of our traditional concepts of standing in order to enable an organization such as the Sierra Club, possessed, as it is, of pertinent, bona fide, and well-recognized attributes and purposes in the area of environment, to litigate environmental issues. This incursion upon tradition need not be very extensive. Certainly, it should be no cause for alarm. It is no more progressive than was the decision in Data Processing itself. It need only recognize the interest of one who has a provable, *758 sincere, dedicated, and established status. We need not fear that Pandora's box will be opened or that there will be no limit to the number of those who desire to participate in environmental litigation. The courts will exercise appropriate restraints just as they have exercised them in the past. Who would have suspected 20 years ago that the concepts of standing enunciated in Data Processing and Barlow

would be the measure for today? And Mr. Justice DOUGLAS, in his eloquent opinion, has imaginatively suggested another means and one, in its own way, with obvious, appropriate, and self-imposed limitations as to standing. As I read what he has written, he makes only one addition to the customary criteria (the existence of a genuine dispute; the assurance of adversariness; and a conviction that the party whose standing is challenged will adequately represent the interests he asserts), that is, that the litigant be one who speaks knowingly for the environmental values he asserts.

I make two passing references:

1. The first relates to the Disney figures presented to us. The complex, the Court notes, will accommodate 14,000 visitors a day (3,100 overnight; some 800 employees; 10 restaurants; 20 ski lifts). The State of California has proposed to build a new road from Hammond to Mineral King. That road, to the extent of 9.2 miles, is to traverse Sequoia National Park. It will have only two lanes, with occasional passing areas, but it will be capable, it is said, of accommodating 700—800 vehicles per hour and a peak of 1,200 per hour. We are **1378 told that the State has agreed not to seek any further improvement in road access through the park.

If we assume that the 14,000 daily visitors come by automobile (rather than by helicopter or bus or other known or unknown means) and that each visiting automobile carries four passengers (an assumption, I am *759 sure, that is far too optimistic), those 14,000 visitors will move in 3,500 vehicles. If we confine their movement (as I think we properly may for this mountain area) to 12 hours out of the daily 24, the 3,500 automobiles will pass any given point on the two-lane road at the rate of about 300 per hour. This amounts to five vehicles per minute, or an average of one every 12 seconds. This frequency is further increased to one every six seconds when the necessary return traffic along that same two-lane road is considered. And this does not include service vehicles and employees' cars. Is this the way we perpetuate the wilderness and its beauty, solitude, and quiet?

2. The second relates to the fairly obvious fact that any resident of the Mineral King area—the real 'user'—is an unlikely adversary for this Disney governmental project. He naturally will be inclined to regard the situation as one that should benefit him economically. His fishing or camping or guiding or handyman or general outdoor prowess perhaps will find an early and ready market among the visitors. But that glow of anticipation will be short-lived at best. If he is a true lover of the wilderness—as is likely, or he would not be near Mineral King in the first place—it will not be long before he yearns for the good old days when masses of people—that 14,000 influx per day—and their thus far uncontrollable waste were unknown to Mineral King. Do we need any further indication and proof that all this means that the area will no longer be one 'of great natural beauty' and one 'uncluttered by the products of civilization?' Are we to be rendered helpless to consider and evaluate allegations and challenges of this kind because of procedural limitations rooted in traditional concepts of standing? I suspect that this may be the result of today's holding. As the Court points out, at 1367—1368, other federal tribunals have *760 not felt themselves so confined.1 I would join those progressive holdings.

The Court chooses to conclude its opinion with a foot note reference to De Tocqueville. In this environmental context I personally prefer the older and particularly pertinent observation and warning of John Donne.2

Footnotes

*

The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the render. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1

Act of July 3, 1926, s 6, 44 Stat. 821, 16 U.S.C. s 688.

2

As analyzed by the District Court, the complaint alleged violations of law falling into four categories. First, it claimed that the special-use permit for construction of the resort exceeded the maximum-acreage limitation placed upon such permits by 16 U.S.C. s 497, and that issuance of a 'revocable' use permit was beyond the authority of the Forest Service. Second, it challenged the proposed permit for the highway through Sequoia National Park on the grounds that the highway would not serve any of the purposes of the park, in alleged violation of 16 U.S.C. s 1, and that it would destroy timber and other natural resources protected by 16 U.S.C. ss 41 and 43. Third, it claimed that the Forest Service and the Department of the Interior had violated their own regulations by failing to hold adequate public hearings on the proposed project. Finally, the complaint asserted that 16 U.S.C.s 45c requires specific congressional authorization of a permit for construction of a power transmission line within the limits of a national park.

3

Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions, Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 450, 55 L.Ed. 246, or to entertain 'friendly' suits, United States v. Johnson, 319 U.S. 302, 63 S.Ct. 1075, 87 L.Ed. 1413, or to resolve 'political questions,' Luther v. Borden, 7 How. 1, 12 L.Ed. 581, because suits of this character are inconsistent with the judicial function under Art. III. But where a dispute is otherwise justiciable, the question whether the litigant is a 'proper party to request an adjudication of a particular issue,' Flast v. Cohen, 392 U.S. 83, 100, 88 S.Ct. 1942, 1952, 20 L.Ed.2d 947, is one within the power of Congress to determine. Cf. FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 477, 60 S.Ct. 693, 698, 84 L.Ed. 869; Flast v. Cohen, supra, 392 U.S., at 120, 88 S.Ct., at 1963 (Harlan, J., dissenting); Associated Industries of New York State v. Ickes, 2 Cir., 134 F.2d 694, 704. See generally Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?, 78 Yale L.J. 816, 827 et seq. (1969); Jaffe, The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff, 116 U.Pa.L.Rev. 1033 (1968).

4

See, e.g., Kansas City Power & Light Co. v. McKay, 96 U.S.App.D.C. 273, 281, 225 F.2d 924, 932; Ove Gustavsson Contracting Co. v. Floete, 2 Cir., 278 F.2d 912, 914; Duba v.

Schuetzle, 8 Cir., 303 F.2d 570, 574. The theory of a 'legal interest' is expressed in its extreme form in Alabama Power Co. v. Ickes, 302 U.S. 464, 479—481, 58 S.Ct. 300, 303—304, 82 L.Ed. 374. See also Tennessee Electric Power Co. v. TVA, 306 U.S. 118, 137—139, 59 S.Ct. 366, 369—370, 83 L.Ed. 543.

5

In deciding this case we do not reach any questions concerning the meaning of the 'zone of interests' test or its possible application to the facts here presented.

6

See, e.g., Hardin v. Kentucky, Utilities Co., 390 U.S. 1, 7, 88 S.Ct. 651, 655, 19 L.Ed.2d 787; Chicago v. Atchison, T. & S.F.R. Co., 357 U.S. 77, 83, 78 S.Ct. 1063, 1067, 2 L.Ed.2d 1174; FCC v. Sanders Bros. Radio Station, supra, 309 U.S., at 477, 60 S.Ct., at 698.

7

No question of standing was raised in Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136. The complaint in that case alleged that the organizational plaintiff represented members who were 'residents of Memphis, Tennessee who use Overton Park as a park land and recreation area and who have been active since 1964 in efforts to preserve and protect Overton Park as a part land and recreation area.'

8

The only reference in the pleadings to the Sierra Club's interest in the dispute is contained in paragraph 3 of the complaint, which reads in its entirety as follows:
'Plaintiff Sierra Club is a non-profit corporation organized and operating under the laws of the State of California, with its principal place of business in San Francisco, California since 1892. Membership of the club is approximately 78,000 nationally, with approximately 27,000 members residing in the San Francisco Bay Area. For many years the Sierra Club by its activities and conduct has exhibited a special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country, regularly serving as a responsible representative of persons similar interested. One of the principal purposes of the Sierra Club is to protect and conserve the national resources of the Sierra Nevada Mountains. Its interests would be vitally affected by the acts hereinafter described and would be aggrieved by those acts of the defendants as hereinafter more fully appears.'
In an amici curiae brief filed in this Court by the Wilderness Society and others, it is asserted that the Sierra Club has conducted regular camping trips into the Mineral King area, and that various members of the Club have used and continue to use the area for recreational purposes. These allegations were not contained in the pleadings, nor were they brought to the attention of the Court of Appeals. Moreover, the Sierra Club in its reply brief specifically declines to rely on its individualized interest, as a basis for standing. See n. 15, infra. Our decision does not, of course, bar the Sierra Club from seeking in the District Court to amend its complaint by a motion under Rule 15, Federal Rules of Civil Procedure.

9

This approach to the question of standing was adopted by the Court of Appeals for the Second Circuit in Citizens Committee for Hudson Valley v. Volpe, 425 F.2d 97, 105:
'We hold, therefore, that the public interest in environmental resources—an interest created by statutes affecting the issuance of this permit—is a legally protected interest affording these plaintiffs, as responsible representatives of the public, standing to obtain judicial review of agency action alleged to be in contravention of that public interest.'

10

The statute involved was s 402(b)(2) of the Communications Act of 1934, 48 Stat. 1093.

11

This much is clear from the Scripps-Howard Court's citation of FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed 869, in which the basis for standing was the competitive injury that the appellee would have suffered by the licensing of another radio station in its listening area.

12

The distinction between standing to initiate a review proceeding, and standing to assert the rights of the public or of third persons once the proceeding is properly initiated, is discussed in 3 K. Davis, Administrative Law Treatise ss 22.05—22.07 (1958).

13

See, e.g., Environmental Defense Fund, Inc. v. Hardin, 138 U.S.App.D.C. 391, 395, 428 F.2d 1093, 1097 (interest in health affected by decision of Secretary of Agriculture refusing to suspend registration of certain pesticides containing DDT); Office of Communication of United Church of Christ v. FCC, 123 U.S.App.D.C. 328, 339, 359 F.2d 994, 1005 (interest of television viewers in the programing of a local station licensed by the FCC); Scenic Hudson Preservation Conf. v. FPC, 2 Cir., 354 F.2d 608, 615—616 (interests in aesthetics, recreation, and orderly community planning affected by FPC licensing of a hydroelectric project); Reade v. Ewing, 2 Cir., 205 F.2d 630, 631—632 (intest of consumers of oleomargarine in fair labeling of product regulated by Federal Security Administration); Crowther v. Seaborg, D.C., 312 F.Supp. 1205, 1212 (interest in health and safety of persons residing near the site of a proposed atomic blast).

14

See Citizens Committee for Hudson Valley v. Volpe, n. 9, supra; Environmental Defense Fund, Inc. v. Corps of Engineers, D.C., 325 F.Supp. 728, 734—736; Izaak Walton League of America v. St. Clair, D.C., 313 F.Supp. 1312, 1317. See also Scenic Hudson Preservation Conf. v. FPC, supra, 354 F.2d, at 616:
'In order to insure that the Federal Power Commission will adequately protect the public interest in the aesthetic, conservational, and recreational aspects of power development, those who by their activities and conduct have exhibited a special interest in such areas, must be held to be included in the class of 'aggrieved' parties under s 313(b) (of the Federal Power Act).'

In most, if not all, of these cases, at least one party to the proceeding did assert an individualized injury either to himself or, in the case of an organization, to its members.

15

In its reply brief, after noting the fact that it might have chosen to assert individualized injury to itself or to its members as a basis for standing, the Sierra Club states:
'The Government seeks to create a 'heads I win, tails you lose' situation in which either the courthouse door is barred for lack of assertion of a private, unique injury or a preliminary injunction is denied on the ground that the litigant has advanced private injury which does not warrant an injunction adverse to a competing public interest. Counsel have shaped their case to avoid this trap.'
The short answer to this contention is that the 'trap' does not exist. The test of injury in fact goes only to the question of standing to obtain judicial review. Once this standing is established, the party may assert the interests of the general public in support of his claims for equitable relief. See n. 12 and accompanying text, supra.

16

Every school boy may be familiar with Alexis de Tocqueville's famous observation, written in the 1830's, that 'scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.' 1 Democracy in America 280 (1945). Less familiar, however, is De Tocqueville's further observation that judicial review is effective largely because it is not available simply at the behest of a partisan faction, but is exercised only to remedy a particular, concrete injury.
'It will be seen, also, that by leaving it to private interest to censure the law, any by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.' Id., at 102.

1

See generally Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); Barlow v. Collins, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). See also Mr. Justice Brennan's separate opinion in Barlow v. Collins, supra, 397 U.S., at 167, 90 S.Ct., at 838. The issue of statutory standing aside, no doubt exists that 'injury in fact' to 'aesthetic' and 'conservational' interests is here sufficienty threatened to satisfy the case-or-controversy clause. Association of Data Processing Service Organizations, Inc. v. Camp, supra, 397 U.S., at 1564, 90 S.Ct., at 830.

2

In rem actions brought to adjudicate libelants' interests in vessels are well known in admiralty. G. Gilmore & C. Black, The Law of Admiralty 31 (1957). But admiralty also permits a salvage action to be brought in the name of the rescuing vessel. The Camanche, 8 Wall. 448,

476, 19 L.Ed. 397 (1869). And, in collision litigation, the first-libeled ship may counterclaim in its own name. The Gylfe v. The Trujillo, 209 F.2d 386 (CA2 1954). Our case law has personified vessels:
'A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron . . .. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed . . .. She acquires a personality of her own.' Tucker v. Alexandroff, 183 U.S. 424, 438, 22 S.Ct. 195, 201, 46 L.Ed. 264.

3

At common law, an officeholder, such as a priest or the king, and his successors constituted, a corporation sole, a legal entity distinct from the personality which managed it. Rights and duties were deemed to adhere to this device rather than to the officeholder in order to provide continuity after the latter retired. The notion is occasionally revived by American courts. E.g., Reid v. Barry, 93 Fla. 849, 112 So. 846 (1927), discussed in Recent Cases, 12 Minn.L.Rev. 295 (1928), and in Note, 26 Mich.L.Rev. 545 (1928); see generally 1 W. Fletcher, Cyclopedia of the Law of Private Corporations ss 50—53 (1963); 1 P. Potter, Law of Corporations 27 (1881).

4

Early jurists considered the conventional corporation to be a highly artificial entity. Lord Coke opined that a corporation's creation 'rests only in intendment and consideration of the law.' Case of Sutton's Hospital, 77 Eng.Rep. 937, 973 (K.B.1612). Mr. Chief Justice Marshall added that the device is 'an artificial being, invisible, intangible, and existing only in contemplation of law.' Trustees of Dartmouth College v. Woodward, 4 Wheat. 518, 636, 4 L.Ed. 629 (1819). Today, suits in the names of corporations are taken for granted.

5

Although in the past Mineral King Valley has annually supplied about 70,000 visitordays of simpler and more rustic forms of recreation—hiking, camping, and skiing (without lifts)—the Forest Service in 1949 and again in 1965 invited developers to submit proposals to 'improve' the Valley for resort use. Walt Disney Productions won the competition and transformed the Service's idea into a mammoth project 10 times its originally proposed dimensions. For example, while the Forest Service prospectus called for an investment of at least $3 million and a sleeping capacity of at least 100, Disney will spend $35.3 million and will bed down 3,300 persons by 1978. Disney also plans a nine-level parking structure with two supplemental lots for automobiles, 10 restaurants and 20 ski lifts. The Service's annual license revenue is hitched to Disney's profits. Under Disney's projections, the Valley will be forced to accommodate a tourist population twice as dense as that in Yosemite Valley on a busy day. And, although Disney has bought up much of the private land near the project, another commercial firm plans to transform an adjoining 160-acre parcel into a 'piggyback' resort complex, further adding to the volume of human activity the Valley must endure. See generally Note, Mineral King Valley: Who Shall Watch the Watchmen?, 25 Rutgers L.Rev. 103, 107 (1970); Thar's Gold in Those Hills, 206 The Nation 260 (1968). For a general critique of mass recreation enclaves in national forests see

Christian Science Monitor, Nov. 22, 1965, p. 5, col. 1 (Western ed.). Michael Frome cautions that the national forests are 'fragile' and 'deteriorate rapidly with excessive recreation use' because '(T)he trampling effect alone eliminates vegetative growth, creating erosion and water run-off problems. The concentration of people, particularly in horse parties, on excessively steep slopes that follow old Indian or cattle routes, has torn up the landscape of the High Sierras in California and sent tons of wilderness soil washing downstream each year.' M. Frome, The Forest Service 69 (1971).

6

The federal budget annually includes about $75 million for underwriting about 1,500 advisory committees attached to various regulatory agencies. These groups are almost exclusively composed of industry representatives appointed by the President or by Cabinet members. Although public members may be on these committees, they are rarely asked to serve. Senator Lee Metcalf warns: 'Industry advisory committees exist inside most important federal agencies, and even have offices in some. Legally, their function is purely as kibitzer, but in practice many have become internal lobbies—printing industry handouts in the Government Printing Office with taxpayers' money, and even influencing policies. Industry committees perform the dual function of stopping government from finding out about corporations while at the same time helping corporations get inside information about what government is doing. Sometimes, the same company that sits on an advisory council that obstructs or turns down a government questionnaire is precisely the company which is withholding information the government needs in order to enforce a law.' Metcalf, The Vested Oracles; How Industry Regulates Government, 3 The Washington Monthly, July 1971, p. 45. For proceedings conducted by Senator Metcalf exposing these relationships, see Hearings on S. 3067 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 91st Cong., 2d Sess. (1970); Hearings on S. 1637, S. 1964, and S. 2064 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92d Cong., 1st Sess. (1971).

The web spun about administrative agencies by industry representatives does not depend, of course, solely upon advisory committees for effectiveness. See Elman, Administrative Reform of the Federal Trade Commission, 59 Geo.L.J. 777, 788 (1971); Johnson, A New Fidelity to the Regulatory Ideal, 59 Geo.L.J. 869, 874, 906 (1971); R. Berkman & K. Viscusi, Damming The West, The Ralph Nader Study Group Report On The Bureau of Reclamation 155 (1971); R. Fellmeth, The Interstate Commerce Omission, The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation 15—39 and passim (1970); J. Turner, The Chemical Feast, The Ralph Nader Study Group Report on Food Protection and the Food and Drug Administration passim (1970); Massel, The Regulatory Process, 26 Law & Contemp.Prob. 181, 189 (1961); J. Landis, Report on Regulatory Agencies to the President-Elect 13, 69 (1960).

7

The Forest Reserve Act of 1897, 30 Stat. 35, 16 U.S.C. s 551, imposed upon the Secretary of the Interior the duty to 'preserve the (national) forests . . . from destruction' by regulating their 'occupancy and use.' In 1905 these duties and powers were transferred to the

Forest Service created within the Department of Agriculture by the Act of Feb. 1, 1905, 33 Stat. 628, 16 U.S.C. s 472. The phrase 'occupancy and use' has been the cornerstone for the concept of 'multiple use' of national forests, that is, the policy that uses other than logging were also to be taken into consideration in managing our 154 national forests. This policy was made more explicit by the Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. ss 528—531, which provides that competing considerations should include outdoor recreation, range, timber, watershed, wildlife, and fish purposes. The Forest Service, influenced by powerful logging interests, has, however, paid only lip service to its multiple-use mandate and has auctioned away millions of timberland acres without considering environmental or conservational interests. The importance of national forests to the construction and logging industries results from the type of lumber grown therein which is well suited to builders' needs. For example, Western acreage produces Douglas fir (structural support) and ponderosa pine (plywood lamination). In order to preserve the total acreage and so-called 'maturity' of timber, the annual size of a Forest Service harvest is supposedly equated with expected yearly reforestation. Nonetheless, yearly cuts have increased from 5.6 billion board feet in 1950 to 13.74 billion in 1971. Forestry professionals challenge the Service's explanation that this harvest increase to 240% is not really overcutting but instead has resulted from its improved management of timberlands. 'Improved management,' answer the critics, is only a euphemism for exaggerated regrowth forecasts by the Service. N.Y. Times, Nov. 15, 1971, p. 48, col. 1. Recent rises in lumber prices have caused a new round of industry pressure to auction more federally owned timber. See Wagner, Resources Report/Lumbermen, conservationists head for new battle over government timber, 3 National J. 657 (1971).

Aside from the issue of how much timber should be cut annually, another crucial question is how lumber should be harvested. Despite much criticism, the Forest Service had adhered to a policy of permitting logging companies to 'clearcut' tracts of actioned acreage. 'Clearcutting,' somewhat analogous to strip mining, is the indiscriminate and complete shaving from the earth of all trees—regardless of size or age—often across hundreds of contiguous acres.

Of clearcutting, Senator Gale McGee, a leading antagonist of Forest Service policy, complains: 'The Forest Service's management policies are wreaking havoc with the environment. Soil is eroding, reforestation is neglected if not ignored, streams are silting, and clearcutting remains a basic practice.' N.Y. Times, Nov. 14, 1971, p. 60, col. 2. He adds: 'In Wyoming . . . the Forest Service is very much . . . nursemaid . . . to the lumber industry . . ..' Hearings on Management Practices of the Public Lands before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, pt. 1, p. 7 (1971).

Senator Jennings Randolph offers a similar criticism of the leveling by lumber companies of large portions of the Monongahela National Forest in West Virginia. Id., at 9. See also 116 Cong.Rec. 36971 (reprinted speech of Sen. Jennings Randolph concerning Forest Service policy in Monongahela National Forest). To investigate similar controversy surrounding the Service's management of the Bitterroot National Forest in Montana, Senator Lee Metcalf recently asked forestry professionals at the University of Montana to study local harvesting practices. The faculty group concluded that public dissatisfaction had arisen from the Forest Service's 'overriding concern for sawtimber production' and its 'insensitivity to the related forest uses and to the . . . public's interest in environmental values.' S.Doc. No. 91—115, p. 14 (1970). See also

Behan, Timber Mining: Accusation or Prospect?, American Forests, Nov. 1971, p. 4 (additional comments of faculty participant); Reich, The Public and the Nation's Forests, 50 Calif.L.Rev. 381—400 (1962).

Former Secretary of the Interior Walter Hickel similarly faulted clearcutting as excusable only as a money-saving harvesting practice for large lumber corporations. W. Hickel, Who Owns America? 130 (1971). See also Risser, The U.S. Forest Service: Smokey's Strip Miners, 3 The Washington Monthly, Dec. 1971, p. 16. And at least one Forest Service study team shares some of these criticisms of clearcutting. U.S. Dept. of Agriculture, Forest Management in Wyoming 12 (1971). See also Public Land Law Review Comm'n, Report to the President and to the Congress 44 (1970); Chapman, Effects of Logging upon Fish Resources of the West Coast, 60 J. of Forestry 533 (1962).

A third category of criticism results from the Service's huge backlog of delayed reforestation projects. It is true that Congress has underfunded replanting programs of the Service but it is also true that the Service and lumber companies have regularly ensured that Congress fully funds budgets requested for the Forest Service's 'timber sales and management.' M. Frome, The Environment and Timber Resources, in What's Ahead for Our Public Lands? 23, 24 (H. Pyles ed. 1970).

8

Permitting a court to appoint a representative of an inanimate object would not be significantly different from customary judicial appointments of guardians ad litem, executors, conservators, receivers, or counsel for indigents.

The values that ride on decisions such as the present one are often not appreciated even by the so-called experts.

'A teaspoon of living earth contains 5 million bacteria, 20 million fungi, one million protozoa, and 200,000 algae. No living human can predict what vital miracles may be locked in this dab of life, this stupendous reservoir of genetic materials that have evolved continuously since the dawn of the earth. For example, molds have existed on earth for about 2 billion years. But only in this century did we unlock the secret of the penicillins, tetracyclines, and other antibiotics from the lowly molds, and thus fashion the most powerful and effective modicines ever discovered by man. Medical scientists still wince at the thought that we might have inadvertently wiped out the rhesus monkey, medically, the most important research animal on earth. And who knows what revelations might lie in the cells of the blackback gorilla nesting in his eyrie this moment in the Virunga Mountains of Rwanda? And what might we have learned from the European lion, the first species formally noted (in 80 A.D.) as extinct by the Romans?

'When a species is gone, it is gone forever, Nature's genetic chain, billions of years in the making, is broken for all time.' Conserve—Water, Land and Life, Nov. 1971, p. 4.

Aldo Leopold wrote in Round River 147 (1953):

'In Germany there is a mountain called the Spessart. Its south slope bears the most magnificent oaks in the world. American cabinetmakers, when they want the last word in quality, use Spessart oak. The north slope, which should be the better, bears an indifferent stand of Scotch pine. Why? Both slopes are part of the same state forest; both have been managed with equally scrupulous care for two centuries. Why the difference?

'Kick up the litter under the oaks and you will see that the leaves rot almost as fast as they fall. Under the pines, though, the needles pile up as a thick duff; decay is much slower. Why? Because in the Middle Ages the south slope was preserved as a deer forest by a hunting bishop; the north slope was pastured, plowed, and cut by settlers, just as we do with our woodlots in Wisconsin and Iowa today. Only after this period of abuse was the north slope replanted to pines. During this period of abuse something happened to the microscopic flora and fauna of the soil. The number of species was greatly reduced, i.e., the digestive apparatus of the soil lost some of its parts. Two centuries of conservation have not sufficed to restore these losses. It required the modern microscope, and a century of research in soil science, to discover the existence of these 'small cogs and wheels' which determine harmony or disharmony between men and land in the Spessart.'

9

Senator Cranston has introduced a bill to establish a 35,000-acre Pupfish National Monument to honor the pupfish which are one inch long and are useless to man. S. 2141, 92d Cong., 1st Sess. They are too small to eat and unfit for a home aquarium. But as Michael Frome has said:

'Still, I agree with Senator Cranston that saving the pupfish would symbolize our appreciation of diversity in God's tired old biosphere, the qualities which hold it together and the interaction of life forms. When fishermen rise up united to save the pupfish they can save the world as well.' Field & Stream, Dec. 1971, p. 74.

Citizens United v. Federal Election Commission, 588 U.S. 310; 130 S. Ct. 876 (U.S. Supreme Court 2010)

Justice Kennedy delivered the opinion of the Court.

Federal law prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech defined as an "electioneering communication" or for speech expressly advocating the election or defeat of a candidate. 2 U.S.C. §441b. Limits on electioneering communications were upheld in *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203–209 (2003). The holding of *McConnell* rested to a large extent on an earlier case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990). *Austin* had held that political speech may be banned based on the speaker's corporate identity.

In this case we are asked to reconsider *Austin* and, in effect, *McConnell*. It has been noted that "*Austin* was a significant departure from ancient First Amendment principles," *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 490 (2007) (*WRTL*) (Scalia, J., concurring in part and concurring in judgment). We agree with that conclusion and hold that *stare decisis* does not compel the continued acceptance of *Austin*. The Government may regulate corporate political speech through disclaimer and disclosure requirements, but it may not suppress that speech altogether. We turn to the case now before us.

I

A

Citizens United is a nonprofit corporation. It has an annual budget of about $12 million. Most of its funds are from donations by individuals; but, in addition, it accepts a small portion of its funds from for-profit corporations.

In January 2008, Citizens United released a film entitled *Hillary: The Movie*. We refer to the film as *Hillary*. It is a 90-minute documentary about then-Senator Hillary Clinton, who was a candidate in the Democratic Party's 2008 Presidential primary elections. *Hillary* mentions Senator Clinton by name and depicts interviews with political commentators and other persons, most of them quite critical of Senator Clinton.…

In December 2007, a cable company offered, for a payment of $1.2 million, to make *Hillary* available on a video-on-demand channel called "Elections '08."…Citizens United was prepared to pay for the video-on-demand; and to promote the film, it produced two 10-second ads and one 30-second ad for *Hillary*. Each ad includes a short (and, in our view, pejorative) statement about Senator Clinton, followed by the name of the movie and the movie's Website address. Citizens United desired to promote the video-on-demand offering by running advertisements on broadcast and cable television.

B

Before the Bipartisan Campaign Reform Act of 2002 (BCRA), federal law prohibited—and still does prohibit—corporations and unions from using general treasury funds to make direct contributions to candidates or independent expenditures that expressly advocate the election or defeat of a candidate, through any form of media, in connection with certain qualified federal elections.…BCRA §203 amended §441b to prohibit any "electioneering communication" as well. An electioneering communication is defined as "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office" and is made within 30 days of a primary or 60 days of a general election. §434(f)(3)(A). The Federal Election Commission's (FEC) regulations further define an electioneering communication as a communication that is "publicly distributed." 11 CFR §100.29(a)(2) (2009). "In the case of a candidate for nomination for President…*publicly distributed* means" that the communication "[c]an be received by 50,000 or more persons in a State where a primary election…is being held within 30 days." 11 CFR §100.29(b)(3)(ii). Corporations and unions are barred from using their general treasury funds for express advocacy or electioneering communications. They may establish, however, a "separate segregated fund" (known as a political action committee, or PAC) for these purposes. 2 U.S.C. §441b(b)(2). The moneys received by the segregated fund are limited to donations from stockholders and employees of the corporation or, in the case of unions, members of the union. *Ibid*.

C

Citizens United wanted to make *Hillary* available through video-on-demand within 30 days of the 2008 primary elections. It feared, however, that both the film and the ads would be covered by §441b's ban on corporate-funded independent expenditures, thus subjecting the corporation to civil and criminal penalties under §437g. In December 2007, Citizens United sought declaratory and injunctive relief against the FEC. It argued that (1) §441b is unconstitutional as applied to *Hillary*; and (2) BCRA's disclaimer and disclosure requirements, BCRA §§201 and 311, are unconstitutional as applied to *Hillary* and to the three ads for the movie.

The District Court denied Citizens United's motion for a preliminary injunction, and then granted the FEC's motion for summary judgment.

…

The court held that §441b was facially constitutional under *McConnell*, and that §441b was constitutional as applied to *Hillary* because it was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." 530 F. Supp. 2d, at 279. The court also rejected Citizens United's challenge to BCRA's disclaimer and disclosure requirements. It noted that "the Supreme Court has written approvingly of disclosure provisions triggered by political speech even though the speech itself was constitutionally protected under the First Amendment." *Id.* at 281.

II

[Omitted: the court considers whether it is possible to reject the BCRA without declaring certain provisions unconstitutional. The court concludes it cannot find a basis to reject the BCRA that does not involve constitutional issues.]

III

The First Amendment provides that "Congress shall make no law…abridging the freedom of speech." Laws enacted to control or suppress speech may operate at different points in the speech process.…The law before us is an outright ban, backed by criminal sanctions. Section 441b makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Thus, the following acts would all be felonies under §441b: The Sierra Club runs an ad, within the crucial phase of 60 days before the general election, that exhorts the public to disapprove of a Congressman who favors logging in national forests; the National Rifle Association publishes a book urging the public to vote for the challenger because the incumbent U.S. Senator supports a handgun ban; and the American Civil Liberties Union creates a Web site telling the public to vote for a Presidential candidate in light of that candidate's defense of free speech. These prohibitions are classic examples of censorship.

Section 441b is a ban on corporate speech notwithstanding the fact that a PAC created by a corporation can still speak. PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations. For example, every PAC must appoint a treasurer, forward donations to the treasurer promptly, keep detailed records of the identities of the persons making donations, preserve receipts for three years, and file an organization statement and report changes to this information within 10 days.

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

PACs have to comply with these regulations just to speak. This might explain why fewer than 2,000 of the millions of corporations in this country have PACs. PACs, furthermore, must exist before they can speak. Given the onerous restrictions, a corporation may not be able to establish a PAC in time to make its views known regarding candidates and issues in a current campaign.

Section 441b's prohibition on corporate independent expenditures is thus a ban on speech. As a "restriction on the amount of money a person or group can spend on political communication during a campaign," that statute "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley v. Valeo*, 424 U.S. 1 at 19 (1976).…

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. See *Buckley*, *supra*, at 14–15 ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential.") The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. The First Amendment "'has its fullest and most urgent application' to speech uttered during a campaign for political office."

For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."

…

The Court has recognized that First Amendment protection extends to corporations. This protection has been extended by explicit holdings to the context of political speech. Under the rationale of these precedents, political speech does not lose First Amendment protection "simply because its source is a corporation." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, at 784. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not "natural persons."

The purpose and effect of this law is to prevent corporations, including small and nonprofit corporations, from presenting both facts and opinions to the public. This makes *Austin*'s antidistortion rationale all the more an aberration. "[T]he First Amendment protects the right of corporations to petition legislative and administrative bodies." *Bellotti*, 435 U.S., at 792, n. 31.…

Even if §441b's expenditure ban were constitutional, wealthy corporations could still lobby elected officials, although smaller corporations may not have the resources to do so. And wealthy individuals and unincorporated associations can spend unlimited amounts on independent expenditures. See, e.g., *WRTL*, 551 U.S., at 503–504 (opinion of Scalia, J.) ("In the 2004 election cycle, a mere 24 individuals contributed an astounding total of $142 million to [26 U.S.C. §527 organizations]"). Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.

When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.

What we have said also shows the invalidity of other arguments made by the Government. For the most part relinquishing the anti-distortion rationale, the Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance.…

When Congress finds that a problem exists, we must give that finding due deference; but Congress may not choose an unconstitutional remedy. If elected officials succumb to improper influences from independent expenditures; if they surrender their best judgment; and if they put expediency before principle, then surely there is cause for concern. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical

preelection period is not a permissible remedy. Here Congress has created categorical bans on speech that are asymmetrical to preventing *quid pro quo* corruption.

Our precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts us on a course that is sure error. "Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." [citing prior cases]

These considerations counsel in favor of rejecting *Austin*, which itself contravened this Court's earlier precedents in *Buckley* and *Bellotti*. "This Court has not hesitated to overrule decisions offensive to the First Amendment." *WRTL*, 551 U.S., at 500 (opinion of Scalia, J.). "*[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision." *Helvering* v. *Hallock*, 309 U.S. 106 at 119 (1940).

Austin is undermined by experience since its announcement. Political speech is so ingrained in our culture that speakers find ways to circumvent campaign finance laws. See, *e.g.*, *McConnell*, 540 U.S., at 176–177 ("Given BCRA's tighter restrictions on the raising and spending of soft money, the incentives…to exploit [26 U.S.C. §527] organizations will only increase"). Our Nation's speech dynamic is changing, and informative voices should not have to circumvent onerous restrictions to exercise their First Amendment rights. Speakers have become adept at presenting citizens with sound bites, talking points, and scripted messages that dominate the 24-hour news cycle. Corporations, like individuals, do not have monolithic views. On certain topics corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts, including the speech of candidates and elected officials.

Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers. Today, 30-second television ads may be the most effective way to convey a political message. Soon, however, it may be that Internet sources, such as blogs and social networking Web sites, will provide citizens with significant information about political candidates and issues. Yet, §441b would seem to ban a blog post expressly advocating the election or defeat of a candidate if that blog were created with corporate funds. The First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker and the content of the political speech.

Due consideration leads to this conclusion: *Austin* should be and now is overruled. We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity. No sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations.

[IV. Omitted]

V

When word concerning the plot of the movie *Mr. Smith Goes to Washington* reached the circles of Government, some officials sought, by persuasion, to discourage its distribution. See Smoodin, "Compulsory" Viewing for Every Citizen: *Mr. Smith* and the Rhetoric of Reception, 35 Cinema Journal 3, 19, and n. 52 (Winter 1996) (citing Mr. Smith Riles Washington, Time, Oct. 30, 1939, p. 49); Nugent, Capra's Capitol Offense, N. Y. Times, Oct. 29, 1939, p. X5. Under *Austin*, though, officials could have done more than discourage its distribution—they could have banned the film. After all, it, like *Hillary,* was speech funded by a corporation that was critical of Members of Congress. *Mr. Smith Goes to Washington* may be fiction and caricature; but fiction and caricature can be a powerful force.

Modern day movies, television comedies, or skits on YouTube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. 2 U.S.C. §431(9)(A)(i). Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design.

Some members of the public might consider *Hillary* to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation's course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make. "The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it." *McConnell*, *supra*, at 341 (opinion of Kennedy, J.).

The judgment of the District Court is reversed with respect to the constitutionality of 2 U.S.C. §441b's restrictions on corporate independent expenditures. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Case Questions

1. What does the case say about disclosure? Corporations have a right of free speech under the First Amendment and may exercise that right through unrestricted contributions of money to political parties and candidates. Can the government condition that right by requiring that the parties and candidates disclose to the public the amount and origin of the contribution? What would justify such a disclosure requirement?
2. Are a corporation's contributions to political parties and candidates tax deductible as a business expense? Should they be?
3. How is the donation of money equivalent to speech? Is this a strict construction of the

(Freedom of Press)

New York Times Co., v. United States; United States v. Washington Post Co., 403 U.S. 713 (1971)

(Freedom of Press Pentagon Papers: Daniel Ellsburg)

Questions Presented

1. Why is this Prior Restraint of Expression? *Lovell v. Griffin*, 303 U. S. 444 (1938).
2. Who has the "burden"?
3. Did the Executive Branch prove "National Security"?
4. Do you agree with the following;

"Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate…"?

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

(Content-Based Restrictions)

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC ET AL. v. BENNETT, SECRETARY OF STATE OF ARIZONA, ET AL.

No. 10-238.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2010
Argued March 28, 2011
Decided June 27, 2011*

The Arizona Citizens Clean Elections Act (matching funds provision), Ariz. Rev. Stat. Ann. 16-940 et seq., created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. Petitioners, candidates and independent expenditure groups, filed suit challenging the constitutionality of the matching funds provision. The Court held that the matching funds provision substantially burdened the speech of privately financed candidates and independent expenditure groups without serving a compelling state interest where the professed purpose of the state law was to cause a sufficient number of candidates to sign up for public financing, which subjected them to the various restrictions on speech that went along with that program. Therefore, the Court held that the matching funds scheme violated the First Amendment and reversed the judgment of the Ninth Circuit.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Arizona Citizens Clean Elections Act created a public financing system to fund the primary and general election campaigns of candidates for state office. Candidates who opt to participate, and who accept certain campaign restrictions and obligations, are granted an initial

outlay of public funds to conduct their campaign. They are also granted additional matching funds if a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the publicly financed candidate's initial state allotment. Once matching funds are triggered, a publicly financed candidate receives roughly one dollar for every dollar raised or spent by the privately financed candidate— including any money of his own that a privately financed candidate spends on his campaign—and for every dollar spent by independent groups that support the privately financed candidate. When there are multiple publicly financed candidates in a race, each one receives matching funds as a result of the spending of privately financed candidates and independent expenditure groups. Matching funds top out at two times the initial grant to the publicly financed candidate.

Petitioners, past and future Arizona candidates and two independent expenditure groups that spend money to support and oppose Arizona candidates, challenged the constitutionality of the matching funds provision, arguing that it unconstitutionally penalizes their speech and burdens their ability to fully exercise their First Amendment rights. The District Court entered a permanent injunction against the enforcement of the matching funds provision. The Ninth Circuit reversed, concluding that the provision imposed only a minimal burden and that the burden was justified by Arizona's interest in reducing *quid pro quo* political corruption.

Held: Arizona's matching funds scheme substantially burdens political speech and is not sufficiently justified by a compelling interest to survive First Amendment scrutiny. Pp. 8-30.

(a) The matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups. Pp. 8-22.

(1) Petitioners contend that their political speech is substantially burdened in the same way that speech was burdened by the so-called "Millionaire's Amendment" of the Bipartisan Campaign Reform Act of 2002, which was invalidated in *Davis* v. *Federal Election Comm'n,* 554 U. S. 724. That law—which permitted the opponent of a candidate who spent over $350,000 of his personal funds to collect triple the normal contribution amount, while the candidate who spent the personal funds remained subject to the original contribution cap— unconstitutionally forced a candidate "to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations." *Id.,* at 739. This "unprecedented penalty" "impose[d] a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech" that was not justified by a compelling government interest. *Id.,* at 739-740. Pp. 8-10.

(2) The logic of *Davis* largely controls here. Once a privately financed candidate has raised or spent more than the State's initial grant to a publicly financed candidate, each personal dollar the privately financed candidate spends results in an award of almost one additional dollar to his

opponent. The privately financed candidate must "shoulder a special and potentially significant burden" when choosing to exercise his First Amendment right to spend funds on his own candidacy. 554 U. S., at 739. If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.

The differences between the matching funds provision and the law struck down in *Davis* make the Arizona law *more* constitutionally problematic, not less. First, the penalty in *Davis* consisted of raising the contribution limits for one candidate, who would still have to raise the additional funds. Here, the direct and automatic release of public money to a publicly financed candidate imposes a far heavier burden. Second, in elections where there are multiple publicly financed candidates—a frequent occurrence in Arizona—the matching funds provision can create a multiplier effect. Each dollar spent by the privately funded candidate results in an additional dollar of funding to each of that candidate's publicly financed opponents. Third, unlike the law in *Davis,* all of this is to some extent out of the privately financed candidate's hands. Spending by independent expenditure groups to promote a privately financed candidate's election triggers matching funds, regardless whether such support is welcome or helpful. Those funds go directly to the publicly funded candidate to use as he sees fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate.

The burdens that matching funds impose on independent expenditure groups are akin to those imposed on the privately financed candidates themselves. The more money spent on behalf of a privately financed candidate or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State. The effect of a dollar spent on election speech is a guaranteed financial payout to the publicly funded candidate the group opposes, and spending one dollar can result in the flow of dollars to multiple candidates. In some ways, the burdens imposed on independent groups by matching funds are more severe than the burdens imposed on privately financed candidates. Independent groups, of course, are not eligible for public financing. As a result, those groups can only avoid matching funds by changing their message or choosing not to speak altogether. Presenting independent expenditure groups with such a choice—trigger matching funds, change your message, or do not speak—makes the matching funds provision particularly burdensome to those groups and certainly contravenes "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Hurley* v. *Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.,* 515 U. S. 557, 573. Pp. 10-14.

(3) The arguments of Arizona, the Clean Elections Institute, and *amicus* United States attempting to explain away the existence or significance of any burden imposed by matching funds are unpersuasive.

Arizona correctly points out that its law is different from the law invalidated in *Davis,* but there is no doubt that the burden on speech is significantly greater here than in *Davis.* Arizona argues that the provision actually creates more speech. But even if that were the case, only the speech of publicly financed candidates is increased by the state law. And burdening the speech of some—here privately financed candidates and independent expenditure groups—to increase the speech of others is a concept "wholly foreign to the First Amendment," *Buckley* v. *Valeo,* 424 U. S. 1, 48-49; cf. *Miami Herald Publishing Co.* v. *Tornillo,* 418 U. S. 241, 244, 258. That no candidate or group is forced to express a particular message does not mean that the matching funds provision does not burden their speech, especially since the direct result of that speech is a state-provided monetary subsidy to a political rival. And precedents upholding government subsidies against First Amendment challenge provide no support for matching funds; none of the subsidies at issue in those cases were granted in response to the speech of another.

The burden on privately financed candidates and independent expenditure groups also cannot be analogized to the burden placed on speakers by the disclosure and disclaimer requirements upheld in *Citizens United* v. *Federal Election Comm'n,* 558 U. S. _____ . A political candidate's disclosure of his funding resources does not result in a cash windfall to his opponent, or affect their respective disclosure obligations.

The burden imposed by the matching funds provision is evident and inherent in the choice that confronts privately financed candidates and independent expenditure groups. Indeed every court to have considered the question after *Davis* has concluded that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries. Arizona is correct that the candidates do not complain that providing a lump sum payment equivalent to the maximum state financing that a candidate could obtain through matching funds would be impermissible. But it is not the amount of funding that the State provides that is constitutionally problematic. It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups. Pp. 14-22.

(b) Arizona's matching funds provision is not " 'justified by a compelling state interest,' " *Davis, supra,* at 740. Pp. 22-28.

(1) There is ample support for the argument that the purpose of the matching funds provision is to "level the playing field" in terms of candidate resources. The clearest evidence is that the provision operates to ensure that campaign funding is equal, up to three times the initial public funding allotment. The text of the Arizona Act confirms this purpose. The provision setting up the matching funds regime is titled "Equal funding of candidates," Ariz. Rev. Stat. Ann. §16—952; and the Act and regulations refer to the funds as "equalizing funds," *e.g.,* §16—952(C)(4). This Court has repeatedly rejected the argument that the government has a compelling state interest in "leveling the playing field" that can justify undue burdens on political speech, see, *e.g.,*

Citizens United, supra, at _____, and the burdens imposed by matching funds cannot be justified by the pursuit of such an interest. Pp. 22-25.

(2) Even if the objective of the matching funds provision is to combat corruption—and not "level the playing field"—the burdens that the matching funds provision imposes on protected political speech are not justified. Burdening a candidate's expenditure of his own funds on his own campaign does not further the State's anticor-ruption interest. Indeed, "reliance on personal funds *reduces* the threat of corruption." *Davis, supra,* at 740-741; see *Buckley, supra,* at 53. The burden on independent expenditures also cannot be supported by the anticorruption interest. Such expenditures are "political speech . . . not coordinated with a candidate." *Citizens United,* 558 U. S., at ____ . That separation negates the possibility that the expenditures will result in the sort of *quid pro quo* corruption with which this Court's case law is concerned. See *e.g., id.,* at___-__ . Moreover, "[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations." *Buckley, supra,* at 55. Given Arizona's contribution limits, some of the most austere in the Nation, its strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.

The State and the Clean Elections Institute contend that even if the matching funds provision does not directly serve the anticorruption interest, it indirectly does so by ensuring that enough candidates participate in the State's public funding system, which in turn helps combat corruption. But the fact that burdening constitutionally protected speech might indirectly serve the State's anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision. The matching funds provision substantially burdens speech, to an even greater extent than the law invalidated in *Davis.* Those burdens cannot be justified by a desire to "level the playing field," and much of the speech burdened by the matching funds provision does not pose a danger of corruption. The fact that the State may feel that the matching funds provision is necessary to allow it to calibrate its public funding system to achieve its desired level of participation— without an undue drain on public resources—is not a sufficient justification for the burden.

The flaw in the State's argument is apparent in what its reasoning would allow. By the State's logic it could award publicly financed candidates five dollars for every dollar spent by a privately financed candidate, or force candidates who wish to run on private funds to pay a $10,000 fine, in order to encourage participation in the public funding regime. Such measures might well promote such participation, but would clearly suppress or unacceptably alter political speech. How the State chooses to encourage participation in its public funding system matters, and the Court has never held that a State may burden political speech—to the extent the matching funds provision does—to ensure adequate participation in a public funding system. Pp. 25-28.

(c) Evaluating the wisdom of public financing as a means of funding political candidacy is not the Court's business. But determining whether laws governing campaign finance violate the First Amendment is. The government "may engage in public financing of election campaigns," and doing so can further "significant governmental in-terest[s]." *Buckley,* 424 U. S., at 57, n. 65, 92-93, 96. But the goal of creating a viable public financing scheme can only be pursued in a manner consistent with the First Amendment. Arizona's program gives money to a candidate in direct response to the campaign speech of an opposing candidate or an independent group. It does this when the opposing candidate has chosen not to accept public financing, and has engaged in political speech above a level set by the State. This goes too far; Arizona's matching funds provision substantially burdens the speech of privately financed candidates and independent expenditure groups without serving a compelling state interest. Pp. 28-30.

611 F. 3d 510, reversed.

ROBERTS, C. J., delivered the opinion of the Court, in which SCALIA, KENNEDY, THOMAS, and ALITO, JJ., joined. KAGAN, J., filed a dissenting opinion, in which GLNSBURG, BREYER, and SOTOMAYOR, JJ., joined.

QUESTION: DOES THIS SUPPORT CITIZENS UNITED?

IN THE SUPREME COURT OF THE UNITED STATES

MARK JANUS, Petitioner, v. No. 16-1466 AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, COUNCIL 31, ET AL., 585 U. S. ____ (2018).

Illinois law permits public employees to unionize. If a majority of the employees in a bargaining unit vote to be represented by a union, that union is designated as the exclusive representative of all the employees, even those who do not join. Only the union may engage in collective bargaining; individual employees may not be represented by another agent or negotiate directly with their employer. Nonmembers are required to pay what is generally called an "agency fee," *i.e.*, a percentage of the full union dues. Under *Abood* v. *Detroit Bd. of Ed.*, 431 U. S. 209, 235–236, this fee may cover union expenditures attributable to those activities "germane" to the union's collective-bargaining activities (chargeable expenditures), but may not cover the union's political and ideological projects (nonchargeable expenditures). The union sets the agency fee annually and then sends nonmembers a notice explaining the basis for the fee and the breakdown of expenditures. Here it was 78.06% of full union dues. Petitioner Mark Janus is a state employee whose unit is represented by a public-sector union (Union), one of the respondents. He refused to join the Union because he opposes many of its positions, including those taken in collective bargaining. Illinois' Governor, similarly opposed to many of these positions, filed suit challenging the constitutionality of the state law authorizing agency fees. The state attorney general, another respondent, intervened to defend the law, while Janus moved to intervene on the Governor's side. The District Court dismissed the Governor's

challenge for lack of standing, but it simultaneously allowed Janus to file his own complaint challenging the constitutionality of agency fees. The District Court granted respondents' motion to dismiss on the ground that the claim was foreclosed by *Abood*. The Seventh Circuit affirmed.

Held:

1. The District Court had jurisdiction over petitioner's suit. Petitioner was undisputedly injured in fact by Illinois' agency-fee scheme and his injuries can be redressed by a favorable court decision. For jurisdictional purposes, the court permissibly treated his amended complaint in intervention as the operative complaint in a new lawsuit. *United States ex rel. Texas Portland Cement Co.* v. *McCord*, 233
U. S. 157, distinguished. Pp. 6–7.

2. The State's extraction of agency fees from nonconsenting public-sector employees violates the First Amendment. *Abood* erred in concluding otherwise, and *stare decisis* cannot support it. *Abood* is therefore overruled. Pp. 7–47.

(a) *Abood*'s holding is inconsistent with standard First Amendment principles. Pp. 7–18.

(1) Forcing free and independent individuals to endorse ideas they find objectionable raises serious First Amendment concerns. *E.g.*, *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 633. That includes compelling a person to subsidize the speech of other private speakers. *E.g.*, *Knox* v. *Service Employees*, 567 U. S. 298, 309. In *Knox* and *Harris* v. *Quinn*, 573 U. S. ___, the Court applied an "exacting" scrutiny standard in judging the constitutionality of agency fees rather than the more traditional strict scrutiny. Even under the more permissive standard, Illinois' scheme cannot survive. Pp. 7–11

(2) Neither of *Abood*'s two justifications for agency fees passes muster under this standard. First, agency fees cannot be upheld on the ground that they promote an interest in "labor peace." The *Abood* Court's fears of conflict and disruption if employees were represented by more than one union have proved to be unfounded: Exclusive representation of all the employees in a unit and the exaction of agency fees are not inextricably linked. To the contrary, in the Federal Government and the 28 States with laws prohibiting agency fees, millions of public employees are represented by unions that effectively serve as the exclusive representatives of all the employees. Whatever may have been the case 41 years ago when *Abood* was decided, it is thus now undeniable that "labor peace" can readily be achieved through less restrictive means than the assessment of agency fees.

Second, avoiding "the risk of 'free riders,' " *Abood*, *supra*, at 224, is not a compelling state interest. Free-rider "arguments . . . are generally insufficient to overcome First Amendment objections," *Knox*, *supra*, at 311, and the statutory requirement that unions represent members and nonmembers alike does not justify different treatment.As is evident in non-agency-fee jurisdictions, unions are quite willing to represent nonmembers in the absence of agency fees. And their duty of fair representation is a necessary concomitant of the authority that a union seeks when it chooses to be the exclusive representative. In any event, States can avoid free riders through less restrictive means than the imposition of agency fees. Pp. 11–18.

(b) Respondents' alternative justifications for *Abood* are similarly unavailing. Pp. 18–26.

(1) The Union claims that *Abood* is supported by the First Amendment's original meaning. But neither founding-era evidence nor dictum in *Connick* v. *Myers*, 461 U. S. 138, 143, supports the

view that the First Amendment was originally understood to allow States to force public employees to subsidize a private third party. If anything, the opposite is true. Pp. 18–22.
(2) Nor does *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563, provide a basis for *Abood*. *Abood* was not based on *Pickering*, and for good reasons. First, *Pickering*'s framework was developed for use in cases involving "one employee's speech and its impact on that employee's public responsibilities," *United States* v. *Treasury Employees*, 513 U. S. 454, 467, while *Abood* and other agency-fee cases involve a blanket requirement that all employees subsidize private speech with which they may not agree. Second, *Pickering*'s framework was designed to determine whether a public employee's speech interferes with the effective operation of a government office, not what happens when the government compels speech or speech subsidies in support of third parties.

Third, the categorization schemes of *Pickering* and *Abood* do not line up. For example, under *Abood*, nonmembers cannot be charged for speech that concerns political or ideological issues; but under *Pickering*, an employee's free speech interests on such issues could be overcome if outweighed by the employer's interests. Pp. 22–26.
(c) Even under some form of *Pickering*, Illinois' agency-fee arrangement would not survive. Pp. 26–33.
(1) Respondents compare union speech in collective bargaining and grievance proceedings to speech "pursuant to [an employee's] official duties," *Garcetti* v. *Ceballos*, 547 U. S. 410, 421, which the State may require of its employees. But in those situations, the employee's words are really the words of the employer, whereas here the union is speaking on behalf of the employees. *Garcetti* therefore does not apply. Pp. 26–27.
(2) Nor does the union speech at issue cover only matters.

(2) Nor does the union speech at issue cover only matters of private concern, which the State may also generally regulate under *Pickering*. To the contrary, union speech covers critically important and public matters such as the State's budget crisis, taxes, and collective bargaining issues related to education, child welfare, healthcare, and minority rights. Pp. 27–31.

(3) The government's proffered interests must therefore justify the heavy burden of agency fees on nonmembers' First Amendment interests. They do not. The state interests asserted in *Abood*— promoting "labor peace" and avoiding free riders—clearly do not, as explained earlier. And the new interests asserted in *Harris* and here—bargaining with an adequately funded agent and improving the efficiency of the work force—do not suffice either. Experience shows that unions can be effective even without agency fees. Pp. 31–
33.
d) *Stare decisis* does not require retention of *Abood*. An analysis of several important factors that should be taken into account in deciding whether to overrule a past decision supports this conclusion.Pp. 33–47.
(1) *Abood* was poorly reasoned, and those arguing for retaining it have recast its reasoning, which further undermines its *stare decisis* effect, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 558 U. S. 310, 363. *Abood* relied on *Railway Employes* v. *Hanson*, 351 U. S. 225, and *Machinists* v. *Street*, 367 U. S. 740, both of which involved private-sector collective-bargaining agreements where the government merely authorized agency fees. *Abood* did not appreciate thevery different First Amendment question that arises when a State *requires* its employees to pay agency fees. *Abood* also judged the constitutionality of public-sector agency fees using

Hanson's deferential standard, which is inappropriate in deciding free speech issues. Nor did *Abood* take into account the difference between the effects of agency fees in public- and private-sector collective bargaining, anticipate administrative problems with classifying union expenses as chargeable or nonchargeable, foresee practical problems faced by nonmembers wishing to challenge those decisions, or understand the inherently political nature of public-sector bargaining. Pp. 35–38.

(2) *Abood*'s lack of workability also weighs against it. Its line between chargeable and nonchargeable expenditures has proved to be impossible to draw with precision, as even respondents recognize. See, *e.g.*, *Lehnert* v. *Ferris Faculty Assn.*, 500 U. S. 507, 519. What is more, a nonmember objecting to union chargeability determinations will have much trouble determining the accuracy of the union's reported expenditures, which are often expressed in extremely broad and vague terms. Pp. 38–41.

(3) Developments since *Abood*, both factual and legal, have "eroded" the decision's "underpinnings" and left it an outlier among the Court's First Amendment cases. *United States* v. *Gaudin*, 515 U. S. 506, 521. *Abood* relied on an assumption that "the principle of exclusive representation in the public sector is dependent on a union or

agency shop," *Harris*, 573 U. S., at ___–___, but experience has shown otherwise. It was also decided when public-sector unionism was a relatively new phenomenon. Today, however, public-sector union membership has surpassed that in the private sector, and that ascendency corresponds with a parallel increase in public spending. *Abood* is also an anomaly in the Court's First Amendment jurisprudence, where exacting scrutiny, if not a more demanding standard, generally applies. Overruling *Abood* will also end the oddity of allowing public employers to compel union support (which is not supported by any tradition) but not to compel party support (which is supported by tradition), see, *e.g.*, *Elrod* v. *Burns*, 427 U. S. 347. Pp. 42–44.

(4) Reliance on *Abood* does not carry decisive weight. The uncertain status of *Abood*, known to unions for years; the lack of clarity it provides; the short-term nature of collective-bargaining agreements; and the ability of unions to protect themselves if an agency-fee provision was crucial to its bargain undermine the force of reliance. Pp. 44–47. 3. For these reasons, States and public-sector unions may no longer extract agency fees from nonconsenting employees. The First Amendment is violated when money is taken from nonconsenting employees for a public-sector union; employees must choose to support the union before anything is taken from them. Accordingly, neither an agency fee nor any other form of payment to a public-sector union may be deducted from an employee, nor may any other attempt be made to collect such a payment, unless the employee affirmatively consents to pay. Pp. 48–49.

851 F. 3d 746, reversed and remanded.

PHH CORPORATION, ET AL., PETITIONERS v. CONSUMER FINANCIAL PROTECTION BUREAU, RESPONDENT

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 12, 2016

Decided October 11, 2016

No. 15-1177

On Petition for Review of an Order of the Consumer Financial Protection Bureau

(CFPB File 2014-CFPB-0002)

KAVANAUGH, *Circuit Judge*:

INTRODUCTION AND SUMMARY

This is a case about executive power and individual liberty. The U.S. Government's executive power to enforce federal law against private citizens – for example, to bring criminal prosecutions and civil enforcement actions – is essential to societal order and progress, but simultaneously a grave threat to individual liberty.

The Framers understood that threat to individual liberty. When designing the executive power, the Framers first separated the executive power from the legislative and judicial powers. "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). To ensure accountability for the exercise of executive power, and help safeguard liberty, the Framers then lodged full responsibility for the executive power in the President of the United States, who is elected by and accountable to the people.

The text of Article II provides quite simply: "The executive Power shall be vested in a President of the United States of America." U.S. CONST. art. II, § 1. And Article II assigns the President alone the authority and responsibility to "take Care that the Laws be faithfully executed." *Id.* § 3. As Justice Scalia explained: "The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom. Morrison v. Olson, 487 U.S. at 699 (Scalia, J., dissenting).

In light of the consistent historical practice under which independent agencies have been headed by multiple commissioners or board members, and in light of the threat to individual liberty posed by a single-Director independent agency, we conclude that *Humphrey's Executor* cannot be stretched to cover this novel agency structure. We therefore hold that the CFPB is unconstitutionally structured.

What is the remedy for that constitutional flaw? PHH contends that the constitutional flaw means that we must shut down the entire CFPB (if not invalidate the entire Dodd-Frank Act)

until Congress, if it chooses, passes new legislation fixing the constitutional flaw. But Supreme Court precedent dictates a narrower remedy. To remedy the constitutional flaw, we follow the Supreme Court's precedents, including *Free Enterprise Fund*, and simply sever the statute's unconstitutional for-cause provision from the remainder of the statute. Here, that targeted remedy will not affect the ongoing operations of the CFPB. With the for-cause provision severed, the President now will have the power to remove the Director at will, and to supervise and direct the Director. The CFPB therefore will continue to operate and to perform its many duties, but will do so as an executive agency akin to other executive agencies headed by a single person, such as the Department of Justice and the Department of the Treasury. Those executive agencies have traditionally been headed by a single person precisely because the agency head operates within the Executive Branch chain of command under the supervision and direction of the President. The President is a check on and accountable for the actions of those executive agencies, and the President now will be a check on and accountable for the actions of the CFPB as well.

Because the CFPB as remedied will continue operating, we must also address the statutory issues raised by PHH in its challenge to the $109 million order against it.[1] PHH raises three main statutory arguments.

First, PHH argues that the CFPB incorrectly interpreted Section 8 of the Real Estate Settlement Procedures Act to bar so-called captive reinsurance arrangements involving mortgage lenders such as PHH and their affiliated reinsurers. In a captive reinsurance arrangement, a mortgage lender (such as PHH) refers borrowers to a mortgage insurer…As a result, we could not and would not remand to the CFPB for any further proceedings in this case. By contrast, even if PHH fully prevails on the statutory issues, we still will have to remand to the CFPB for the agency to conduct the proceeding in accordance with the appropriate statutory requirements, under which PHH may still be liable for certain alleged wrongdoing. In other words, PHH's constitutional and severability argument, if accepted, would afford it full relief from any CFPB enforcement action and thus would afford it broader relief than would its statutory arguments. For that reason, we have no choice but to address the constitutional issue first. The constitutional issue cannot be avoided in any principled way. We therefore respectfully but firmly disagree with Judge Henderson's suggestion in her separate opinion that the constitutional issue can be avoided. In our view, failing to decide the constitutional issue here would be impermissible judicial abdication, not judicial restraint.

Moreover, apart from that necessity in this case, when a litigant raises a fundamental constitutional challenge to the very structure or existence of an agency enforcing the law against it, the courts ordinarily address that issue promptly, at least so long as jurisdictional requirements such as standing are met. *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 490-91; *Morrison v. Olson*, 487 U.S. at 669-70; *Buckley v. Valeo*, 424 U.S. 1, 12 (1976). That was the approach we took in both *Intercollegiate Broadcasting System, Inc.*

[1] If PHH fully prevailed on its constitutional argument, including with respect to severability, the CFPB could not continue

v. Copyright Royalty Board, 684 F.3d 1332, 1334, 1336-37 (D.C. Cir. 2012), and *Raymond J. Lucia Cos. v. SEC*, No. 15-1345, slip op. at 7, 2016 WL 4191191, at *3 (D.C. Cir., Aug. 9, 2016). It can be irresponsible for a court to unduly delay ruling on such a fundamental and ultimately unavoidable structural challenge, given the systemic ramifications of such an issue. mortgage insurer buys reinsurance from a mortgage reinsurer affiliated with (or owned by) the referring mortgage lender. We agree with PHH that Section 8 of the Act allows captive reinsurance arrangements so long as the amount paid by the mortgage insurer for the reinsurance does not exceed the reasonable market value of the reinsurance.

Second, PHH claims that, in any event, the CFPB departed from the consistent prior interpretations issued by the Department of Housing and Urban Development, and that the CFPB then *retroactively* applied its new interpretation of the Act against PHH, thereby violating PHH's due process rights. We again agree with PHH: The CFPB's order violated bedrock principles of due process.

Third, in light of our ruling on the constitutional and statutory issues, the CFPB on remand still will have an opportunity to demonstrate that the relevant mortgage insurers in fact paid more than reasonable market value to the PHH-affiliated reinsurer for reinsurance, thereby making disguised payments for referrals in contravention of Section 8. PHH claims, however, that much of the alleged misconduct occurred outside of the three-year statute of limitations and therefore may not be the subject of a CFPB enforcement action. The CFPB responds that, under Dodd-Frank, there is no statute of limitations for *any* CFPB administrative actions to enforce *any* consumer protection law. In the alternative, the CFPB contends that there is no statute of limitations for administrative actions to enforce Section 8 of the Real Estate Settlement Procedures Act. We disagree with the CFPB on both points. First of all, the Dodd-Frank Act incorporates the statutes of limitations in the underlying statutes enforced by the CFPB in administrative proceedings. And under the Real Estate Settlement Procedures Act, a three-year statute of limitations applies to all CFPB enforcement actions to enforce Section 8, whether brought in court or administratively.

In sum, we grant PHH's petition for review, vacate the CFPB's order against PHH, and remand for further proceedings consistent with this opinion. On remand, the CFPB may determine among other things whether, within the applicable three-year statute of limitations, the relevant mortgage insurers paid more than reasonable market value to the PHH-affiliated reinsurer.

In so ruling, we underscore the important but limited real-world implications of our decision. As before, the CFPB will continue to operate and perform its many critical responsibilities, albeit under the ultimate supervision and direction of the President. Section 8 will continue to mean what it has traditionally meant: that captive reinsurance agreements are permissible so long as the mortgage insurer pays no more than reasonable market value for the reinsurance. And the three-year statute of limitations that has traditionally applied to agency actions to enforce Section 8 will continue to apply.

With apologies for the length of this opinion, we now turn to our detailed explanation and analysis of these important issues.

I

PHH is a large home mortgage lender. When PHH and other lenders provide mortgage loans to homebuyers, they require certain homebuyers to obtain mortgage insurance. Mortgage insurance protects lenders by covering part of the lenders' losses if homebuyers default on their mortgages.

Homebuyers pay monthly premiums to the mortgage insurer for the insurance.

In turn, mortgage insurers may obtain mortgage *re*insurance. In the same way that mortgage insurance protects lenders, mortgage reinsurance protects mortgage insurers. Reinsurers assume some of the risk of insuring the mortgage. In exchange, mortgage insurers pay a fee (usually a portion of the homebuyers' monthly insurance premiums) to the reinsurers.

In 1994, PHH established a wholly owned subsidiary known as Atrium Insurance Corporation. Atrium provided reinsurance to the mortgage insurers that insured mortgages generated by PHH. In return, PHH often referred borrowers to mortgage insurers that used Atrium's reinsurance services. That is known as a "captive reinsurance" arrangement, which was not uncommon in the industry at the time. According to PHH, the mortgage insurers did not pay more than reasonable market value to Atrium for the reinsurance.

Originally passed by Congress and signed by President Ford in 1974, the Real Estate Settlement Procedures Act is a broad statute governing real estate transactions. One of its stated purposes was "the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services." 12 U.S.C. § 2601(b)(2).

To achieve that objective, Section 8(a) of the Act, which is titled "Prohibition against kickbacks and unearned fees," provides: "No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person." *Id.* § 2607(a). In plain English, Section 8(a) prohibits, as relevant here, paying for a referral – for example, a mortgage insurer's paying a lender for the lender's referral of home buying customers to that mortgage insurer.

Standing alone, Section 8(a) perhaps might have been construed by government enforcement agencies to cast doubt on a mortgage lender's referrals of customers to mortgage insurers who in turn purchased reinsurance from a reinsurer affiliated with the lender. But another provision of the Real Estate Settlement Procedures Act, Section 8(c), carved out a series of expansive exceptions, qualifications, and safe harbors related to Section 8(a). Of relevance here, Section 8(c) provides: "Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed . . . ." *Id.* § 2607(c).

Before the creation of the CFPB in 2010, the Department of Housing and Urban Development, known as HUD, interpreted Section 8(c) to establish a safe harbor allowing bona fide transactions between a lender and a mortgage insurer (or between a mortgage insurer and a lender-affiliated reinsurer), so long as the mortgage insurer did not pay the lender for a referral. HUD therefore interpreted Section 8(c) to allow captive reinsurance arrangements so long as the mortgage insurer paid no more than reasonable market value for the reinsurance. If the mortgage insurer paid more than reasonable market value for the reinsurance, then a presumption would arise that the excess payment was indeed a disguised payment *for the referral*, which is impermissible under Section 8(a). HUD repeatedly reaffirmed that interpretation, and the mortgage lending industry relied on it.

When Congress created the CFPB in 2010, Congress provided that the CFPB would take over enforcement of Section 8 from HUD. By regulation, the CFPB carried forward HUD's rules, policy statements, and guidance, subject of course to any future change by the CFPB.

Therefore, under Section 8(c), as authoritatively interpreted by the Federal Government, PHH as a mortgage lender could refer customers to mortgage insurers who obtained reinsurance from Atrium – so long as the mortgage insurers paid Atrium no more than reasonable market value for the reinsurance.

Or so PHH thought. In 2014, notwithstanding Section 8(c) and HUD's longstanding interpretation, the CFPB initiated an administrative enforcement action against PHH. The CFPB alleged that PHH's captive reinsurance arrangement with the mortgage insurers violated Section 8.

Under the CFPB's newly minted interpretation, Section 8 prohibits most referrals made by lenders to mortgage insurers in exchange for the insurer's purchasing reinsurance from a lender-affiliated reinsurer. The CFPB said that Section 8 bars such a captive reinsurance arrangement even when the mortgage insurer pays no more than reasonable market value to the reinsurer for the reinsurance.

In its order in this case, the CFPB thus discarded HUD's longstanding interpretation of Section 8 and, for the first time, pronounced its new interpretation. And then the CFPB applied its new interpretation of Section 8 *retroactively* against PHH, notwithstanding PHH's reliance on HUD's prior interpretation. The CFPB sanctioned PHH for previous actions that PHH had taken in reliance on HUD's prior interpretation, even though PHH's conduct had occurred *before* the CFPB's new interpretation of Section 8. The CFPB ordered PHH to pay $109 million in disgorgement and enjoined PHH from entering into future captive reinsurance arrangements.

PHH petitioned this Court for review. A motions panel of this Court (Judges Henderson, Millett, and Wilkins) previously granted PHH's motion for a stay of the CFPB's order pending resolution of the merits in this case.

MASTERPIECE CAKESHOP, LTD., ET AL. *v.* COLORADO CIVIL RIGHTS COMMISSION ET AL.

CERTIORARI TO THE COURT OF APPEALS OF COLORADO

No. 16–111. Argued December 5, 2017—Decided June 4, 2018

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operatedby Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that hewould sell them other baked goods, *e.g.,* birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA),which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public andany place offering services . . . to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendmentclaims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held: The Commission's actions in this case violated the Free Exercise

QUESTION PRESENTED

Whether applying Colorado's public accommodations law to compel Phillips to create expression that violates his sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.

15-577 TRINITY LUTHERAN CHURCH V. COMER

DECISION BELOW: 788 F.3d 779
CERT. GRANTED 1/15/2016
QUESTION PRESENTED:
Trinity Lutheran Church applied for Missouri's Scrap Tire Grant Program so that it could provide a safer playground for children who attend its daycare and for neighborhood children who use the playground after hours--a purely secular matter. But the state denied Trinity's application solely because it is a church. The Eighth Circuit affirmed that denial by equating a grant to resurface Trinity's playground using scrap tire material with funding the devotional training of clergy. The Eighth Circuit's decision was not faithful to this Court's ruling in *Locke v. Davey*, 540 U.S. 712 (2004), and deepened an existing circuit conflict. Three lower courts—two courts of appeals and one state supreme court--interpret *Locke* as justifying the exclusion of religion from a neutral aid program where no valid Establishment Clause concern exists. In

contrast, two courts of appeals remain faithful to *Locke* and the unique historical concerns on which it relied.
The question presented is:
Whether the exclusion of churches from an otherwise neutral and secular aid program violates the Free Exercise and Equal Protection Clauses when the state has no valid

Establishment Clause concern. (Compare to Masterpiece Cakeshop)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON STATE OF WASHINGTON,
ARLENE'S FLOWERS AND GIFTS, and BARRONELLE STUTZMAN, Appellants.
ROBERT INGERSOLL and CURT FREED,
Respondents,
v.
ARLENE'S FLOWERS, INC., d/b/a
ARLENE'S FLOWERS AND GIFTS, and
BARRONELLE STUTZMAN,
Appellants.
NO. 91615-2
ENBANC
Filed FEB 1 6 2017

GORDON McCLOUD, J.-The State of Washington bars discrimination in "public ... accommodation[s]" on the basis of"sexual orientation." RCW 49.60.215
No. 91615-2
(Washington Law Against Discrimination (WLAD)). Barronelle Stutzman owns and operates a place of public accommodation in our state: Arlene's Flowers Inc.
Stutzman and her public business, Arlene's Flowers and Gifts, refused to sell wedding flowers to Robert Ingersoll because his betrothed, Curt Freed, is a man.
The State and the couple sued, each alleging violations of the WLAD and the Consumer Protection Act (CPA), ch. 19.86 RCW. Stutzman defended on the grounds that the WLAD and CPA do not apply to her conduct and that, if they do, those statutes violate her state and federal constitutional rights to free speech, free exercise, and free association.
The Benton County Superior Court granted summary judgment to the State and the couple, rejecting all of Stutzman's claims. We granted review and now affirm.
FACTS
In 2004, Ingersoll and Freed began a committed, romantic relationship. In 2012, our state legislature passed Engrossed Substitute Senate Bill 6239, which recognized equal civil marriage rights for same-sex couples. LAWS OF 2012, ch. 3, § 1. Freed proposed marriage to Ingersoll that same year. The two intended to marry on their ninth anniversary, in September 2013, and were "excited about organizing [their] wedding." Clerk's Papers (CP) at 350. Their plans included inviting "[a] hundred plus" guests to celebrate with them at Bella Fiori Gardens, complete with a dinner or reception, a photographer, a caterer, a wedding cake, and flowers. *Id.* at 1775-77.
By the time he and Freed became engaged, Ingersoll had been a customer at

Arlene's Flowers for at least nine years, purchasing numerous floral arrangements from Stutzman and spending an estimated several thousand dollars at her shop.
Stutzman is the owner and president of Arlene's Flowers. She employs approximately 10 people, depending on the season, including three floral designers, one of whom is herself. Stutzman knew that Ingersoll is gay and that he had been in a relationship with Freed for several years. The two men considered Arlene's
Flowers to be "[their] florist." *Id.* at 350.
Stutzman is an active member of the Southern Baptist church. It is uncontested that her sincerely held religious beliefs include a belief that marriage can exist only between one man and one woman.
On February 28, 2013, Ingersoll went to Arlene's Flowers on his way home from work, hoping to talk to Stutzman about purchasing flowers for his upcoming wedding. Ingersoll told an Arlene's Flowers employee that he was engaged to marry
Freed and that they wanted Arlene's Flowers to provide the flowers for their wedding. The employee informed Ingersoll that Stutzman was not at the shop and that he would need to speak directly with her. The next day, Ingersoll returned to speak with Ms. Stutzman. At that time, Stutzman told Ingersoll that she would be unable to do the flowers for his wedding because of her religious beliefs, specifically, because of"her relationship with Jesus Christ." *Id.* at 155, 351, 1741-42, 1744-45,
1 7 63. Ingersoll did not have a chance to specify what kind of flowers or floral arrangements he was seeking before Stutzman told him that she would not serve him. They also did not discuss whether Stutzman would be asked to bring the arrangements to the wedding location or whether the flowers would be picked up from her shop.
Stutzman asserts that she gave Ingersoll the name of other florists who might be willing to serve him, and that the two hugged before Ingersoll left her store.
Ingersoll maintains that he walked away from that conversation "feeling very hurt and upset emotionally." *Id.* at 1743.
Early the next morning, after a sleepless night, Freed posted a status update on his personal Facebook feed regarding Stutzman's refusal to sell him wedding flowers. The update observed, without specifically naming Arlene's Flowers, that the couple's "favorite Richland Lee Boulevard flower shop" had declined to provide flowers for their wedding on religious grounds, and noted that Freed felt "so deeply offended that apparently our business is no longer good business," because "[his] loved one [did not fit] within their personal beliefs." *Id.* at 1262. This message was apparently widely circulated, though Ingersoll testified that their Facebook settings were such that the message was "only intended for our friends and family." *Id.* at
1760, 1785. Eventually, the story drew the attention of numerous media outlets.
As a result of the "emotional toll" Stutzman's refusal took on Freed and
Ingersoll, they "lost enthusiasm for a large ceremony" as initially imagined. *Id.* at
1490. In fact, the two "stopped planning for a wedding in September 2013 because [they] feared being denied service by other wedding vendors." *I d.* at 351. The couple also feared that in light of increasing public attention-some of which caused them to be concerned for their own safety-as well as then-ongoing litigation, a larger wedding might require a security presence or attract protesters, such as the Westboro Baptist group. So they were married on July 21, 2013, in a modest ceremony at their home. There were 11 people in attendance. For the occasion,

Freed and Ingersoll purchased one bouquet of flowers from a different florist and boutonnieres from their friend. When word of this story got out in the media, a handful of florists offered to provide their wedding flowers free of charge.
Stutzman also received a great deal of attention from the publicity surrounding this case, including threats to her business and other unkind messages.
5
No. 91615-2
Prior to Ingersoll's request, Arlene's Flowers had never had a request to provide flowers for a same-sex wedding, and the only time Stutzman has ever refused to serve a customer is when Ingersoll and Freed asked her to provide flowers for their wedding. The decision not to serve Ingersoll was made strictly by Stutzman and her husband. After Ingersoll's and Freed's request, Stutzman developed an "unwritten policy" for Arlene's Flowers that they "don't take same sex marriages." *Id.* at 120. Stutzman states that the only reason for this policy is her conviction that "biblically marriage is between a man and a woman." *Id.* at 120-21. Aside from Ingersoll and Freed, she has served gay and lesbian customers in the past for other, non-wedding-related flower orders.
Stutzman maintains that she would not sell Ingersoll any arranged flowers for his wedding, even if he were asking her only to replicate a prearranged bouquet from a picture book of sample arrangements. She believes that participating, or allowing any employee of her store to participate, in a same-sex wedding by providing custom floral arrangements and related customer service is tantamount to endorsing marriage equality for same-sex couples. She draws a distinction between creating floral arrangements--even those designed by someone else-and selling bulk flowers and "raw materials," which she would be happy to do for Ingersoll and
Freed. *I d.* at 546-4 7. Stutzman believes that to create floral arrangements is to use her "imagination and artistic skill to intimately participate in a same-sex wedding ceremony." *Id.* at 547. However, Stutzman acknowledged that selling flowers for an atheistic or Muslim wedding would not be tantamount to endorsing those systems her "imagination and artistic skill to intimately participate in a same-sex wedding ceremony." *Id.* at 547. However, Stutzman acknowledged that selling flowers for an atheistic or Muslim wedding would not be tantamount to endorsing those systems of belief.
By Stutzman's best estimate, approximately three percent of her business comes from weddings. Stutzman is not currently providing any wedding floral services (other than for members of her immediate family) during the pendency of this case.

MASTERCRAFT FURNITURE, INC., an Oregon corporation, Plaintiff, v. SABA NORTH AMERICA, LLC, a Michigan limited liability company, Defendant.

Civ. No. 6:14-01303-AA

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

March 31, 2015

AIKEN, Chief Judge:

Plaintiff Mastercraft Furniture, Inc. ("Mastercraft") filed suit against SABA North America, LLC ("SABA"), alleging breach of contract and breach of the implied covenant of good faith and fair dealing. Plaintiff seeks damages, interest on its damages, and declaratory relief. Plaintiff now moves for partial' summary judgment pursuant to Fed. R. Civ. P. 56 on: (1) plaintiff's first claim for breach of contract on the issue of liability only; (2) plaintiff's second claim for breach of the covenant of good faith and fair dealing on the issue of liability only; and (3) defendant's fifth affirmative defense, asserting limitation of liability. Defendant opposes plaintiff's motion.

Plaintiff's motion for partial summary judgment on the matters listed above is granted.

I. BACKGROUND

Mastercraft is a furniture company located in Stayton, Oregon, which builds and supplies furniture for companies including IKEA. As a part of its agreement with IKEA, Mastercraft must follow IKEA's manufacturing and sourcing requirements, some of which prohibit Mastercraft from using products in its furniture that contain certain chemicals, including diisobutyl phthalate ("DIBP").

SABA North America, LLC, is a limited liability company located in Michigan which is an international manufacturer and supplier of adhesive. SABA North America, LLC is a subsidiary of SABA International BV, which is owned by SABA Dmxperlo BV. Sometime during 2012, Mastercraft and SABA entered into negotiations for SABA to supply adhesive to Mastercraft, which Mastercraft would use when building and supplying furniture to IKEA, one of its main customers. On July 2, 2012, SABA presented a quote to Mastercraft. On July 17, 2012, Matercraft

agreed with the quote and signed the Equipment Agreement. Subsequently, SABA signed the Equipment Agreement.

On July 20, 2012, James Turner, the President of SABA, signed the IWAY/Mastercraft Vendor Agreement. As part of the agreement, SABA received IKEA'S Specifications document, identifying the chemical compound and substances that IKEA prohibits the use of in its products, including DIBP. SABA Dinxperlo BV signed and acknowledged receiving the Specifications document.

Between August 13, 2012 and March 2013, Mastercraft and SABA entered into a series of contracts for the purchase, sale, 'shipment of, and payment for 16 totes of Sababond 3175, the agreed-upon adhesive product. The backside of SABA's invoices contained "Terms and Conditions of Sale" in small print. Olson Decl. at 8, Ex. 3. At the top of the Terms and Conditions is a paragraph entitled "Offer and Acceptance." Olson Decl. Ex. 3; Turner Aff., Ex. 5. The first line of that paragraph states, "Seller's [SABA's] offers are made strictly on the terms and conditions stated herein and no others. Acceptance of Seller's offers [by Mastercraft] is strictly limited to the terms and conditions stated herein and no others." Id. The seventh paragraph of the Terms and Conditions attempts to limit damages' for defective adhesive products to the amount of the purchase price of the product. Id. Mastercraft, without reading the Terms and Conditions, paid for the adhesive and incorporated it into its furniture. Olson Decl. at 8.

In September 2012, IKEA conducted a routine test of Mastercraft's furniture and found DIBP in Mastercraft's furniture. After further testing, it was determined that SABA was the source and cause of the DIBP. On April 11, 2013, Jim Turner, SABA's President, sent an email to Mastercraft's President stating that some of the adhesive orders shipped by SABA mistakenly contained DIBP. On August 14, 2014, plaintiff filed this suit.

II. STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A court may grant judgment to a party on all or part of a claim. Id. The substantive law on an issue determines the materiality of a fact. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). A factual dispute is genuine if the evidence is such that a reasonable jury could determine the issue in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 242 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Elec., 809 F.2d at 630.

III. DISCUSSION

A. Breach of Contract Claims

Plaintiff alleges that defendant breached its contract with plaintiff and violated the covenant of good faith and fair dealing by shipping adhesive product to plaintiff containing DIBP, which is a prohibited chemical substance under the parties' agreement. Defendant does not contest this fact and admits that it shipped some adhesive product to plaintiff containing DIBP. However, defendant argues that there are genuine issues of material fact with respect to the causal relationship between its breach and plaintiff's claimed damages. Plaintiff argues that defendant conflates causation of damages with the amount owed in damages. I agree.

Defendant correctly states that "a breach of contract claim requires the (1) existence of a valid contract; (2) defendant's breach of the contract; and (3) a proximate cause relationship between the defendant's breach and harm to plaintiff." Def.'s Br. at 4 (citing Nw. Nat. Gas Co. v. Chase Gardens, Inc., 333 Or. 304 (2002)). Similarly, defendant correctly states that the elements for a "breach of an implied covenant of good faith and fair dealing are: (1) existence of a valid contract; (2) action by defendant to deprive the plaintiff of expected contractual benefits; and (3) a proximate cause relationship between the defendant's actions and harm to plaintiff." Id. Defendant admits that the statement of facts in plaintiff's motion for partial' summary judgment is "substantially correct and can be conceded for the purposes of plaintiff's motion." Def.'s Br. at 2. Consequently, defendant has admitted its breach of contract by mistakenly shipping adhesive containing DIBP, a prohibited chemical, to plaintiff.

For example, defendant admits that 6 of the 16 adhesive orders shipped by SABA to Mastercraft mistakenly contained DIBP, even though SABA was aware that DIBP was forbidden by IKEA and, in turn, Mastercraft. Olson Decl. Ex. 4. Additionally, in an email from SABA to Mastercraft, SABA's President wrote: "Unfortunately it was found that the initial shipments, and several later shipments, were indeed batches of the old formulation which contained DIBP. I cannot give a concrete explanation as to how this occurred." Id.

Despite this admission, defendant argues that plaintiff has not shown there is no genuine issue of material fact as to the element of proximate cause, i.e., that its breach caused plaintiff's claimed damages. Defendant argues specifically that plaintiff has not proffered pleadings, depositions, answers to interrogatories, admissions and affidavits proving that defendant's admitted breach caused the amount of damages claimed by plaintiff. Def.'s Br. at 7. Defendant states that questions of fact remain, including when plaintiff first learned about the DIBP in its

furniture, why plaintiff waited over seven months to inform defendant of the DIBP in the adhesive, and how and when IKEA suspended production of plaintiff's furniture. Id. at 8. Defendant thus argues that plaintiff's motion is premature since discovery has not been conducted by either party.

In response, plaintiff argues that even after discovery, there will be no change in the fact that defendant's actions caused some damage to plaintiff by the defendant's breach of the parties' contract, which has already been admitted by defendant. Pl.'s Rep. Br. at 2. I agree. Defendant conflates proving causation of damages with proving the amount of damages; plaintiff need only show that defendant caused some amount of damages for purposes of this motion and does not need to show the exact amount of damages caused.

Plaintiff correctly argues that defendant has not shown a question of fact as to whether the damages it incurred as a result of defendant's breach equals zero. Chamberlain Grp., Inc. v. Nassimi, 2010 WL 4286192 at *8 (W.D. Wash. Oct. 25, 2010). To the contrary, plaintiff presents Mr. Olson's declaration stating that plaintiff suffered damages as a result of the contaminated adhesive. Olson Decl. at 11. At a minimum, plaintiff incurred testing costs of its furniture, and it could not sell the furniture that had been built utilizing the adhesive with the prohibited chemical in it. Id. Defendant has not shown that plaintiff's damages are equal to zero, and I find that plaintiff has satisfied the damages element for the purposes of its current motion. However, after further discovery, defendant is not foreclosed from challenging the amount of damages claimed to be proximately caused by its breach.

Accordingly, partial summary judgment on Counts I and II as to liability is granted.

B. Defendant's Fifth Affirmative Defense

Plaintiff also moves for summary judgment on defendant's fifth affirmative defense, which claims that plaintiff is barred from recovering damages due to the limitation of liability in defendant's terms and conditions on its invoice form. Plaintiff argues that this is a classic "battle of the forms" case which is governed by UCC section 2-207.

Oregon has codified this section of the UCC as Or. Rev. Stat. §72.2070 which states:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent' to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer;
(b) They materially alter it; or
(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of the Uniform Commercial Code. Or. Rev. Stat. §72.2070 (emphasis added).

Plaintiff argues that the terms and conditions did not become part of the agreement when UCC §2-207 is applied. Defendant contends that it did not receive enough information to be able to respond properly to plaintiff's argument that defendant's terms and conditions regarding liability did not become part of the parties' contract. I do not agree.

Here, plaintiff was the offeror and stated its requested quantity and price in its purchase orders to defendant. Pl.'s Mot. Part. Sum. J. at 8. In response, defendant attempted to impose additional terms and conditions regarding liability, in the "Terms and Conditions of Sale" section of its invoice. As plaintiff points out, defendant's invoice essentially operates as a counteroffer; if assent is given by plaintiff, then these terms become a part of the contract. Diamond Fruit Growers v. Krack Corp, 794 F.2d 1440, 1443(9th Cir. 1986) If no assent is given, then the parties' contract is limited to the terms that both parties agreed upon to be in the contract. Id. at 1443; Or. Rev. Stat. §72.2070(3). Plaintiff contends that it did not assent to the terms and conditions of defendant's invoice, and they are not binding.

Under the Ninth Circuit's ruling in Diamond Fruit Growers, a party must "specifically and unequivocally assent" to new terms of a contract. Diamond Fruit Growers, 794 F.2d at 1445; See also Textile Unlimited, Inc. v. A..BMH & Co., Inc., 240 F.3d 781, 787 (9th Cir. 2001) (same). Here, defendant attempted to impose new terms upon plaintiff through its invoice statements, and defendant presents no evidence that plaintiff "specifically and unequivocally assented" to those new terms. Id.

Generally, a buyer's silence is not considered "assent" to additional terms in a seller's acknowledgment. Smith & Loveless, Inc. v. Caicos Corp., 2005 WL 1533116, at *3 (D. Kan. June 29, 2005) ("plaintiff's theory of 'assent by silence' would not withstand judicial scrutiny"); see

also Altronics of Bethlehem, Inc. v. Repco, Inc., 957 F.2d 1102, 1108 (3d Cir. 1992) (rejecting argument that "buyer's continued performance with constructive or actual knowledge of the disclaimers demonstrated their acceptance of the new terms"); McJunkin Corp. v. Mechanicals, Inc., 888 F.2d 481, 488 (6th Cir. 1989) (assent must be explicit); Dorton v. Collins & Aikman Corp., 453 F.2d 1161, 1168 (6th Cir. 1972) (rejecting silence as assent to additional or different terms).

Defendant does not dispute that in this case a contract was formed. Under Or. Rev. Stat. §72.2070(3), the terms of the contract are those upon which the parties agreed, consisting of price, quantity, and place of delivery; and do not include such terms to which both parties' did not agree, such as the limited liability clause. See Textile Unlimited, 240 F.3d at 787 (so stating).

Accordingly, plaintiff's motion for partial summary judgment is granted with respect to defendant's fifth affirmative defense regarding limited liability under the terms and conditions in the invoice.

CONCLUSION

Therefore, plaintiff's motion for partial summary judgment (doc. 29) is GRANTED as to liability on plaintiff's contract claims and defendant's fifth affirmative defense, with the amount of defendant's damages to be determined at trial or upon further motion. IT IS SO ORDERED.

Dated this 31st day of March, 2015.

/s/_____
Ann Aiken
United States District Judge

Chapter 5 Administrative Law

Cases:

Michigan et. al. v. EPA, 576 U.S. (2015)
(Hardbound page 139)

Doug DECKER, in his official capacity as Oregon State Forester, et al., Petitioners v. NORTHWEST ENVIRONMENTAL DEFENSE CENTER.

Georgia–Pacific West, Inc., et al., Petitioners
133 S.Ct. 1326
185 L.Ed.2d 447
81 USLW 4190

Supreme Court of the United States

Argued Dec. 3, 2012.
Decided March 20, 2013.*

Summaries:
Source: Justia

The Clean Water Act requires that National Pollutant Discharge Elimination System (NPDES) permits be secured before pollutants are discharged from any point source into navigable waters of the United States, 33 U. S. C. 1311(a), 1362(12). An Environmental Protection Agency implementing regulation, the Silvicultural Rule, specifies which types of logging-related discharges are point sources, requiring NPDES permits unless some other provision exempts them. One exemption covers "discharges composed entirely of stormwater," 33 U. S. C. 1342(p)(1), unless the discharge is "associated with industrial activity." Under the EPA's Industrial Stormwater Rule, the term "associated with industrial activity" covers only discharges "from any conveyance that is used for collecting and conveying storm water and that is directly related to

manufacturing, processing or raw materials storage areas at an industrial plant." A final version of a recent amendment to the Industrial Stormwater Rule clarifies that the NPDES permit requirement applies only to logging operations involving rock crushing, gravel washing, log sorting, and log storage facilities, which are all listed in the Silvicultural Rule. Georgia-Pacific has a contract to harvest timber from an Oregon forest. When it rains, water runs off its logging roads into ditches that discharge the water into rivers and streams, often with sediment, which may be harmful to fish and other aquatic organisms. NEDC sued Georgia-Pacific and state and local governments. The district court dismissed, concluding that NPDES permits were not required because the ditches were not point sources of pollution under the CWA and the Silvicultural Rule. The Ninth Circuit reversed. The Supreme Court reversed, first holding that section1369(b), did not bar the district court from hearing a citizen suit against an alleged violator and seeking to enforce an obligation imposed by the CWA. The recent amendment to the Industrial Stormwater Rule did not make the case moot. Past discharges might be the basis for penalties even if, in the future, those discharges will not require a permit. The pre-amendment Rule, as construed by the EPA, exempted discharges of channeled stormwater runoff from logging roads from the NPDES requirement. The regulation is a reasonable interpretation of the statutory term "associated with industrial activity;" it was reasonable for the EPA to conclude that the conveyances at issue are "directly related" only to harvesting raw materials, rather than to "manufacturing, processing, or raw materials storage areas at an industrial plant." The EPA has been consistent in its view that the types of discharges at issue do not require NPDES permits.

[133 S.Ct. 1328]

Syllabus*

The Clean Water Act (Act) requires that National Pollutant Discharge Elimination System (NPDES) permits be secured before pollutants are discharged from any point source into the navigable waters of the United States. See 33 U.S.C. §§ 1311(a), 1362(12). One of the Environmental Protection Agency's (EPA) implementing regulations, the Silvicultural Rule, specifies which types of logging-related discharges are point sources. 40 C.F.R. § 122.27(b)(1). These discharges require NPDES permits unless some other federal statutory provision exempts them from coverage. One such statutory provision exempts "discharges composed entirely of stormwater," 33 U.S.C. § 1342(p)(1), unless the discharge is "associated with industrial activity," § 1342(p)(2)(B). Under the EPA's Industrial Stormwater Rule, the term "associated with industrial activity" covers only discharges "from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). Shortly before oral argument in the instant cases, the EPA issued a final version of an amendment to the Industrial Stormwater Rule, clarifying that the NPDES permit requirement applies only to logging operations involving rock

crushing, gravel washing, log sorting, and log storage facilities, which are all listed in the Silvicultural Rule.

Petitioner Georgia–Pacific West has a contract with Oregon to harvest timber from a state forest. When it rains, water runs off two logging roads used by petitioner into ditches, culverts, and channels that discharge the water into nearby rivers and streams. The discharges often contain large amounts of sediment, which evidence shows may be harmful to fish and other aquatic organisms. Respondent Northwest Environmental Defense Center (NEDC) filed suit against petitioner and state and local governments and officials, including petitioner Decker, invoking the Act's citizen-suit provision, 33 U.S.C. § 1365, and alleging that the defendants had not obtained NPDES permits before discharging stormwater runoff into two Oregon rivers. The District Court dismissed the action for failure to state a claim, concluding that NPDES permits were not required because the ditches, culverts, and channels were not point sources of pollution under the Act and the Silvicultural Rule. The Ninth Circuit reversed. It held that the conveyances were point sources under the Silvicultural Rule. It also concluded that the discharges were "associated with industrial activity" under the Industrial Stormwater Rule, despite the EPA's contrary conclusion that the regulation excludes the type of stormwater discharges from logging roads at issue. Thus, the court held, the discharges were not exempt from the NPDES permitting scheme.

Held **:**

1. A provision of the Act governing challenges to agency actions, § 1369(b), is not a jurisdictional bar to this suit. That provision is the exclusive vehicle for suits seeking to invalidate certain agency decisions, such as the establishment of effluent standards and the issuance of permits. It does not bar a district court from entertaining a citizen suit under § 1365 when the suit is against an alleged violator and seeks to enforce an obligation imposed by the Act or its regulations. The present action falls within the scope of § 1365. Pp. 1334 – 1335.

2. The EPA's recent amendment to the Industrial Stormwater Rule does not make the cases moot. A live controversy continues to exist regarding whether petitioners may be held liable for unlawful discharges under the earlier version of the Industrial Stormwater Rule. That version governed petitioners' past discharges, which might be the basis for the imposition of penalties even if, in the future, those types of discharges will not require a permit. These cases thus remain live and justiciable. See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.,* 484 U.S. 49, 64–65, 108 S.Ct. 376, 98 L.Ed.2d 306. The fact that the District Court might rule that NEDC's arguments lack merit, or that relief is not warranted on the facts of these cases, does not make the cases moot. Pp. 1335 – 1336.

3. The preamendment version of the Industrial Stormwater Rule, as permissibly construed by the EPA, exempts discharges of channeled stormwater runoff from logging roads from the

NPDES permitting scheme. The regulation is a reasonable interpretation of the statutory term "associated with industrial activity," § 1342(p)(2)(B), and the agency has construed the regulation to exempt the discharges at issue here. When an agency interprets its own regulation, the Court, as a general rule, defers to it "unless that interpretation is 'plainly erroneous or inconsistent with the regulation.' " *Chase Bank USA, N.A. v. McCoy,* 562 U.S. ——, ——, 131 S.Ct. 871, 880, 178 L.Ed.2d 716 (quoting *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79). Here, it was reasonable for the EPA to conclude that the conveyances at issue are "directly related" only to the harvesting of raw materials, rather than to "manufacturing, processing, or raw materials storage areas at an industrial plant." 40 C.F.R. § 122.26(b)(14). The regulatory scheme, taken as a whole, leaves open the rational interpretation that the regulation extends only to traditional industrial buildings such as factories and associated sites and other relatively fixed facilities.

Another reason to accord *Auer* deference to the EPA's interpretation is that there is no indication that the agency's current view is a change from prior practice or is a *post hoc* justification adopted in response to litigation. See *Christopher v. SmithKline Beecham Corp.,* 567 U.S. ——, ——, 132 S.Ct. 2156, 2166–2167, 183 L.Ed.2d 153. Rather, the EPA has been consistent in its view that the types of discharges at issue do not require NPDES permits. Its decision also exists against a background of state regulation with respect to stormwater runoff from logging roads. In exercising the broad discretion the Act gives the EPA in the realm of stormwater runoff, the agency could reasonably have concluded that further federal regulation would be duplicative or counterproductive in light of Oregon's extensive rules on the subject.

640 F.3d 1063, reversed and remanded.

Chapter 7 Introduction to Tort Law

Negligence: Duty of Due Care

Whitlock v. University of Denver, 744 P.2d 54 (Supreme Court of Colorado 1987)

On June 19, 1978, at approximately 10:00 p.m., plaintiff Oscar Whitlock suffered a paralyzing injury while attempting to complete a one-and-three-quarters front flip on a trampoline. The injury rendered him a quadriplegic. The trampoline was owned by the Beta Theta Pi fraternity (the Beta house) and was situated on the front yard of the fraternity premises, located on the University campus. At the time of his injury, Whitlock was twenty years old, attended the University of Denver, and was a member of the Beta house, where he held the office of acting house manager. The property on which the Beta house was located was leased to the local chapter house association of the Beta Theta Pi fraternity by the defendant University of Denver.

During the evening of June 18 and early morning of June 19, 1978, Whitlock attended a party at the Beta house, where he drank beer, vodka and scotch until 2:00 a.m. Whitlock then retired and did not awaken until 2:00 p.m. on June 19. He testified that he jumped on the trampoline between 2:00 p.m. and 4:00 p.m., and again at 7:00 p.m. At 10:00 p.m., the time of the injury, there again was a party in progress at the Beta house, and Whitlock was using the trampoline with only the illumination from the windows of the fraternity house, the outside light above the front door of the house, and two street lights in the area. As Whitlock attempted to perform the one-and-three-quarters front flip, he landed on the back of his head, causing his neck to break.

Whitlock brought suit against the manufacturer and seller of the trampoline, the University, the Beta Theta Pi fraternity and its local chapter, and certain individuals in their capacities as representatives of the Beta Theta Pi organizations. Whitlock reached settlements with all of the named defendants except the University, so only the negligence action against the University proceeded to trial. The jury returned a verdict in favor of Whitlock, assessing his total damages at $ 7,300,000. The jury attributed twenty-eight percent of causal negligence to the conduct of Whitlock and seventy-two percent of causal negligence to the conduct of the University. The trial court accordingly reduced the amount of the award against the University to $ 5,256,000.

The University moved for judgment notwithstanding the verdict, or, in the alternative, a new trial. The trial court granted the motion for judgment notwithstanding the verdict, holding that as a matter of law, no reasonable jury could have found that the University was more negligent than Whitlock, and that the jury's monetary award was the result of sympathy, passion or prejudice.

A panel of the court of appeals reversed…by a divided vote. *Whitlock v. University of Denver,* 712 P.2d 1072 (Colo. App. 1985). The court of appeals held that the University owed Whitlock a duty of due care to remove the trampoline from the fraternity premises or to supervise its use.…The case was remanded to the trial court with orders to reinstate the verdict and

damages as determined by the jury. The University then petitioned for certiorari review, and we granted that petition.

A negligence claim must fail if based on circumstances for which the law imposes no duty of care upon the defendant for the benefit of the plaintiff. [Citations] Therefore, if Whitlock's judgment against the University is to be upheld, it must first be determined that the University owed a duty of care to take reasonable measures to protect him against the injury that he sustained.

Whether a particular defendant owes a legal duty to a particular plaintiff is a question of law. [Citations] "The court determines, as a matter of law, the existence and scope of the duty—that is, whether the plaintiff's interest that has been infringed by the conduct of the defendant is entitled to legal protection." [Citations] In *Smith v. City & County of Denver,* 726 P.2d 1125 (Colo. 1986), we set forth several factors to be considered in determining the existence of duty in a particular case:

Whether the law should impose a duty requires consideration of many factors including, for example, the risk involved, the foreseeability and likelihood of injury as weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against injury or harm, and the consequences of placing the burden upon the actor.

…A court's conclusion that a duty does or does not exist is "an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is [or is not] entitled to protection."

We believe that the fact that the University is charged with negligent failure to act rather than negligent affirmative action is a critical factor that strongly militates against imposition of a duty on the University under the facts of this case. In determining whether a defendant owes a duty to a particular plaintiff, the law has long recognized a distinction between action and a failure to act—"that is to say, between active misconduct working positive injury to others [misfeasance] and passive inaction or a failure to take steps to protect them from harm [nonfeasance]." W. Keeton, § 56, at 373. Liability for nonfeasance was slow to receive recognition in the law. "The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs." *Id.* The *Restatement (Second) of Torts* § 314 (1965) summarizes the law on this point as follows:

The fact that an actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

Imposition of a duty in all such cases would simply not meet the test of fairness under contemporary standards.

In nonfeasance cases the existence of a duty has been recognized only during the last century in situations involving a limited group of special relationships between parties. Such special relationships are predicated on "some definite relation between the parties, of such a character that social policy justifies the imposition of a duty to act." W. Keeton, § 56, at 374. Special relationships that have been recognized by various courts for the purpose of imposition of a duty of care include common carrier/passenger, innkeeper/guest, possessor of land/invited entrant, employer/employee, parent/child, and hospital/patient. *See Restatement (Second) of Torts* § 314 A (1965); 3 Harper and James, § 18.6, at 722–23. The authors of the *Restatement (Second) of Torts* § 314 A, comment b (1965), state that "the law appears…to be working slowly toward a recognition of the duty to aid or protect in any relation of dependence or of mutual dependence."

…

III.

The present case involves the alleged negligent failure to act, rather than negligent action. The plaintiff does not complain of any affirmative action taken by the University, but asserts instead that the University owed to Whitlock the duty to assure that the fraternity's trampoline was used only under supervised conditions comparable to those in a gymnasium class, or in the alternative to cause the trampoline to be removed from the front lawn of the Beta house.…If such a duty is to be recognized, it must be grounded on a special relationship between the University and Whitlock. According to the evidence, there are only two possible sources of a special relationship out of which such a duty could arise in this case: the status of Whitlock as a student at the University, and the lease between the University and the fraternity of which Whitlock was a member. We first consider the adequacy of the student-university relationship as a possible basis for imposing a duty on the University to control or prohibit the use of the trampoline, and then examine the provisions of the lease for that same purpose.

A.

The student-university relationship has been scrutinized in several jurisdictions, and it is generally agreed that a university is not an insurer of its students' safety. [Citations] The relationship between a university and its students has experienced important change over the years. At one time, college administrators and faculties stood in loco parentis to their students, which created a special relationship "that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college." *Bradshaw,* 612 F.2d at 139. However, in modern times there has evolved a gradual reapportionment of responsibilities from the universities to the students, and a corresponding departure from the in loco parentis relationship. *Id.* at 139–40. Today, colleges and universities are regarded as educational institutions rather than custodial ones. *Beach,* 726 P.2d at 419 (contrasting colleges and universities with elementary and high schools).

…

…By imposing a duty on the University in this case, the University would be encouraged to exercise more control over private student recreational choices, thereby effectively taking away much of the responsibility recently recognized in students for making their own decisions with respect to private entertainment and personal safety. Such an allocation of responsibility would "produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education." *Beach,* 726 P.2d at 419.

The evidence demonstrates that only in limited instances has the University attempted to impose regulations or restraints on the private recreational pursuits of its students, and the students have not looked to the University to assure the safety of their recreational choices. Nothing in the University's student handbook, which contains certain regulations concerning student conduct, reflects an effort by the University to control the risk-taking decisions of its students in their private recreation.…Indeed, fraternity and sorority self-governance with minimal supervision appears to have been fostered by the University.

Considering all of the factors presented, we are persuaded that under the facts of this case the University of Denver had no duty to Whitlock to eliminate the private use of trampolines on its campus or to supervise that use. There exists no special relationship between the parties that justifies placing a duty upon the University to protect Whitlock from the well-known dangers of using a trampoline. Here, a conclusion that a special relationship existed between Whitlock and the University sufficient to warrant the imposition of liability for nonfeasance would directly contravene the competing social policy of fostering an educational environment of student autonomy and independence.

We reverse the judgment of the court of appeals and return this case to that court with directions to remand it to the trial court for dismissal of Whitlock's complaint against the University.

Case Questions

1. How are comparative negligence numbers calculated by the trial court? How can the jury say that the university is 72 percent negligent and that Whitlock is 28 percent negligent?
2. Why is this not an assumption of risk case?
3. Is there any evidence that Whitlock was contributorily negligent? If not, why would the court engage in comparative negligence calculations?

Klein v. Pyrodyne Corporation, 810 P.2d 917 (Supreme Court of Washington 1991)

Pyrodyne Corporation (Pyrodyne) is a licensed fireworks display company that contracted to display fireworks at the Western Washington State Fairgrounds in Puyallup, Washington, on July 4,1987. During the fireworks display, one of the mortar launchers discharged a rocket on a

horizontal trajectory parallel to the earth. The rocket exploded near a crowd of onlookers, including Danny Klein. Klein's clothing was set on fire, and he suffered facial burns and serious injury to his eyes. Klein sued Pyrodyne for strict liability to recover for his injuries. Pyrodyne asserted that the Chinese manufacturer of the fireworks was negligent in producing the rocket and therefore Pyrodyne should not be held liable. The trial court applied the doctrine of strict liability and held in favor of Klein. Pyrodyne appealed.

Section 519 of the Restatement (Second) of Torts provides that any party carrying on an "abnormally dangerous activity" is strictly liable for ensuing damages. The public display of fireworks fits this definition. The court stated: "Any time a person ignites rockets with the intention of sending them aloft to explode in the presence of large crowds of people, a high risk of serious personal injury or property damage is created. That risk arises because of the possibility that a rocket will malfunction or be misdirected." Pyrodyne argued that its liability was cut off by the Chinese manufacturer's negligence. The court rejected this argument, stating, "Even if negligence may properly be regarded as an intervening cause, it cannot function to relieve Pyrodyne from strict liability."

The Washington Supreme Court held that the public display of fireworks is an abnormally dangerous activity that warrants the imposition of strict liability.

Affirmed.

Case Questions

1. Why would certain activities be deemed ultrahazardous or abnormally dangerous so that strict liability is imposed?
2. If the activities are known to be abnormally dangerous, did Klein assume the risk?
3. Assume that the fireworks were negligently manufactured in China. Should Klein's only remedy be against the Chinese company, as Pyrodyne argues? Why or why not?

Palsgraf v. Long Island R.R. 248 N.Y. 339,162 N.E. 99 (N.Y. 1928)

CARDOZO, Chief Judge

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded.

The shock of· the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

The conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away. Relatively to her it was not negligence at all. Nothing in the situation gave notice that the falling package had in it the potency of peril to persons thus removed. Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. "Proof of negligence in the air, so to speak, will not do.…If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else.…The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.

A different conclusion will involve us, and swiftly too, in a maze of contradictions. A guard stumbles over a package which has been left upon a platform.

It seems to be a bundle of newspapers. It turns out to be a can of dynamite. To the eye of ordinary vigilance, the bundle is abandoned waste, which may be kicked or trod on with impunity. Is a passenger at the other end of the platform protected by the law against the unsuspected hazard concealed beneath the waste? If not, is the result to be any different, so far as the distant passenger is concerned, when the guard stumbles over a valise which a truckman or a porter has left upon the walk?…The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty. One who jostles one's neighbor in a crowd does not invade the rights of others standing at the outer fringe when the unintended contact casts a bomb upon the ground. The wrongdoer as to them is the man who carries the bomb, not the one who explodes it without suspicion of the danger. Life will have to be made over, and human nature transformed, before prevision so extravagant can be accepted as the norm of conduct, the customary standard to which behavior must conform.

The argument for the plaintiff is built upon the shifting meanings of such words as "wrong" and "wrongful" and shares their instability. For what the plaintiff must show is a "wrong" to herself; i.e., a violation of her own right, and not merely a "wrong" to someone else, nor conduct "wrongful" because unsocial, but not a "wrong" to anyone. We are told that one who drives at reckless speed through a crowded city street is guilty of a negligent act and therefore of a wrongful one, irrespective of the consequences.

Negligent the act is, and wrongful in the sense that it is unsocial, but wrongful and unsocial in relation to other travelers, only because the eye of vigilance perceives the risk of damage. If the same act were to be committed on a speedway or a race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension. This does not mean, of course, that one who launches a destructive force is always relieved of liability, if the force,

though known to be destructive, pursues an unexpected path.…Some acts, such as shooting are so imminently dangerous to anyone who may come within reach of the missile however unexpectedly, as to impose a duty of prevision not far from that of an insurer. Even today, and much oftener in earlier stages of the law, one acts sometimes at one's peril.…These cases aside, wrong-is defined in terms of the natural or probable, at least when unintentional.…Negligence, like risk, is thus a term of relation.

Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all.…One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.

* * *

The judgment of the Appellate Division and that of the Trial Term should be reversed, and the complaint dismissed, with costs in all courts.

Case Questions

1. Is there actual cause in this case? How can you tell?
2. Why should Mrs. Palsgraf (or her insurance company) be made to pay for injuries that were caused by the negligence of the Long Island Rail Road?
3. How is this accident *not* foreseeable?

(Special Standard of Conduct)

Brune v. Belinkoff, 354 Mass. 102, 235 N.E. 2d793 (1968)

Holland v. Sisters of Saint Joseph of Peace, 522 P.2d 208 (Or. 1974) (Duty to inform)

Hall v. E.L. DuPont De Nemours & Co. Inc., 345 F. supp. 353 (1972)

Damages

Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912 (1968)

Wrongful Death and Life

First National Bank v. Niagara Therapy Manufacturing Corp., 229 F. Supp. 460 (1964)

Economic Loss

Union Oil company v. Oppen, 502 F. 2d 558 (1974)

NOTES:

CONTRIBUTORY NEGLIGENCE/COMPARATIVE FAULT **LAWS IN ALL 5O STATES**

A *contributory negligence state* (bars recovery with only 1% of fault by the plaintiff) or a *comparative negligence state* (recovery by plaintiff is reduced or prohibited based on the percentage of fault attributed to the plaintiff), and whether the state is a *pure comparative* or

modified comparative state. This list is useful in evaluating subrogation potential where there may be contributory negligence on the insured's part. Please bear in mind that there are many exceptions within each state with regard to whether the particular fault allocation scheme applied in a state is applicable to a particular cause of action. Some states limit the application of the scheme to negligence claims, and avoid applying it to product liability cases, while other states have effective dates which may come into play and/or have rules which may modify the application of the particular scheme referenced. This list should be used only as a guideline, and questions regarding specific fact situations should be directed to one of our subrogation lawyers.

Every state employs one of four basic systems for allocating fault and damages:

1. Pure Contributory Negligence Rule/Defense
2. Pure Comparative Fault System
3. Modified Comparative Fault System
4. Slight/Gross Negligence Comparative Fault System

"Contributory negligence" refers to the negligent conduct of the plaintiff. The comparative fault/negligence systems for the 51 U.S. jurisdictions break down as follows:

PURE CONTRIBUTORY NEGLIGENCE

"Contributory negligence" is negligent conduct on the part of the plaintiff/injured party contributes to the negligence of the defendant in causing the injury or damage. The Pure Contributory Negligence Rule is literally a defense which says that a damaged party cannot recover any damages if it is even 1% at fault. The pure contributory negligence defense has been criticized for being too harsh on the plaintiff, because even the slightest amount of contributory negligence by the plaintiff which contributes to an accident bars all recovery no matter how egregiously negligent the defendant might be. Only four (4) states and the District of Columbia recognize the Pure Contributory Negligence Rule.

a *contributory negligence state* (bars recovery with only 1% of fault by the plaintiff) or a *comparative negligence state* (recovery by plaintiff is reduced or prohibited based on the percentage of fault attributed to the plaintiff), and whether the state is a *pure comparative* or *modified comparative state*. This list is useful in evaluating subrogation potential where there may be contributory negligence on the insured's part. Please bear in mind that there are many exceptions within each state with regard to whether the particular fault allocation scheme applied in a state is applicable to a particular cause of action. Some states limit the application of the scheme to negligence claims, and avoid applying it to product liability cases, while other states have effective dates which may come into play and/or have rules which may modify the application of the particular scheme referenced. This list should be used only as a guideline, and questions regarding specific fact situations should be directed to one of our subrogation lawyers.

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"Contributory negligence" refers to the negligent conduct of the plaintiff. The comparative fault/negligence systems for the 51 U.S. jurisdictions break down as follows:

MODIFIED COMPARATIVE FAULT

Under Modified Comparative Fault System, each party is held responsible for damages in proportion to their own percentage of fault, unless the plaintiff's negligence reaches a certain designated percentage (*e.g.,* 50% or 51%). If the plaintiff's own negligence reaches this percentage bar, then the plaintiff cannot recover any damages. There are competing schools of thought in the 33 states that recognize the Modified Comparative Fault Rule. This system has been questioned because of the complications resulting from multiple at-fault parties and the confusion it causes for juries. Eleven (11) states follow the **50% Bar Rule**, meaning a damaged party cannot recover if it is 50% or more at fault, but if it is 49% or less at fault, it can recover, although its recovery is reduced by its degree of fault.

Twenty-two (22) states follow the **51% Bar Rule**, under which a damaged party cannot recover if it is 51% or more at fault, but can recover if it is 50% or less at fault, the recovery would be reduced by its degree of fault. Oregon is in this category:

OREGON

Modified Comparative Fault – 51% Bar	With his own negligence, plaintiff's recovery will not be barred, but it may diminish his right to damages. Or. Rev. Stat. Ann. § 31.600.

Additional Cases

Tarasoff v. Regents of University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976)

Facts: On October 27, 1969 Mr. Poddar killed Tatiana Tarasoff. Tatiana's parents claimed that two months earlier Poddar had confided his intention to kill Tatiana to Dr. Lawrence Moore, a psychologist employed by the University of California at Berkeley. They sued the university. Claiming that Dr. Moore should have warned Tatiana and/or should have arranged for Poddar's confinement.

Issue: Did Dr. Moore have a duty to Titiana Tarasoff, and did he breach that duty? Under common Law was there a duty?

Notes:

An indispensable predicate to tort liability founded upon negligence is the existence of a duty of care owed by the alleged wrongdoer to the person injured. See Turney v. Sullivan, 89 Nev. 554, 516 P.2d 738 (1973). Under the common law, as a general rule, one person owed no duty to control the dangerous conduct of another, nor to warn those endangered by such conduct. See

Tarasoff v. Regents of University of California, 17 Cal.3d 425, 131 Cal.Rptr. 14, 551 P.2d 334 (1976); Rest. 2d, Torts (1965) § 314. However, the common law has carved out an exception to this rule in cases where the defendant bears some special relationship to the dangerous person or to the potential victim. See Tarasoff v. Regents of University of California, supra ; Rest. 2d, Torts [94 Nev. 403] (1965) §§ 314A, 315. In such circumstances, the defendant is impressed with a duty to warn foreseeable victims of foreseeable harm. Cf. Thomas v. Bokelman, 86 Nev. 10, 462 P.2d 1020 (1970); Tarasoff v. Regents of University of California, supra. Applying these principles to the present case, we are unable to conclude that respondents had a duty to warn Mangeris of potential harm. Indeed, even assuming a special relationship existed, an issue which we need not and, therefore, do not here decide, a reasonable person would not, from the facts alleged, foresee a risk that Brimmage would murder Mangeris at a remote time and distant location. Absent the foreseeability of such a risk, respondents had no duty to warn Mangeris of Brimmage's criminal conduct. Cf. Thomas v. Bokelman, supra; Dillon v. Legg, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968). See generally, Annot., 10 A.L.R.3d 619 (1966).

Rainey v. Domino's Pizza, LLC., 998 A. 2d 342 (2010) Franchise Liability Vicarious liability

Martin v. McDonald's Corporation 572 N. E. ed. 1073, (Ill 1991) Franchisor Liability

Hernandez v. Arizona Board of Regents

(TORTS) Products Liability (Hardbound chapter 20)

Cases

Implied Warranty of Merchantability and the Requirement of a "Sale"

Sheeskin v. Giant Food, Inc. 318 A.2d 874 (Md. App. 1974)

Every Friday for over two years Nathan Seigel, age 73, shopped with his wife at a Giant Food Store. This complex products liability case is before us because on one of these Fridays, 23 October 1970, Mr. Seigel was carrying a six-pack carton of Coca-Cola from a display bin at the Giant to a shopping cart when one or more of the bottles exploded. Mr. Seigel lost his footing, fell to the floor and was injured.

In an action based on breach of warranty it is necessary for the plaintiff to show the existence of the warranty, the fact that the warranty was broken and that the breach of warranty was the proximate cause of the loss sustained. [UCC] 2-314.…The retailer, Giant Food, Inc., contends that appellant failed to prove that an implied warranty existed between himself and the retailer because he failed to prove that there was a sale by the retailer to him or a contract of sale

between the two. The retailer maintains that there was no sale or contract of sale because at the time the bottles exploded Mr. Seigel had not yet paid for them. We do not agree.

[UCC] 2-314(1) states in pertinent part:

Unless excluded or modified, a warranty that the goods shall be merchantable is implied **in a contract for their sale** if the seller is a merchant with respect to goods of that kind.Uniform Commercial Code, Section 2-316. (emphasis added)

Thus, in order for the implied warranties of 2-314 to be applicable there must be a "contract for sale." In Maryland it has been recognized that neither a completed 'sale' nor a fully executed contract for sale is required. It is enough that there be in existence an executory contract for sale.…

Here, the plaintiff has the burden of showing the existence of the warranty by establishing that at the time the bottles exploded there was a contract for their sale existing between himself and the Giant. [Citation] Mr. Titus, the manager of the Giant, testified that the retailer is a "self-service" store in which "the only way a customer can buy anything is to select it himself and take it to the checkout counter." He stated that there are occasions when a customer may select an item in the store and then change his mind and put the item back. There was no evidence to show that the retailer ever refused to sell an item to a customer once it had been selected by him or that the retailer did not consider himself bound to sell an item to the customer after the item had been selected. Finally, Mr. Titus said that an employee of Giant placed the six-pack of Coca-Cola selected by Mr. Seigel on the shelf with the purchase price already stamped upon it. Mr. Seigel testified that he picked up the six-pack with the intent to purchase it.

We think that there is sufficient evidence to show that the retailer's act of placing the bottles upon the shelf with the price stamped upon the six-pack in which they were contained manifested an intent to offer them for sale, the terms of the offer being that it would pass title to the goods when Mr. Seigel presented them at the check-out counter and paid the stated price in cash. We also think that the evidence is sufficient to show that Mr. Seigel's act of taking physical possession of the goods with the intent to purchase them manifested an intent to accept the offer and a promise to take them to the checkout counter and pay for them there.

[UCC] 2-206 provides in pertinent part:

(1) Unless otherwise unambiguously indicated by the language or circumstances

(a) An offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.…

The Official Comment 1 to this section states:

Any reasonable manner of acceptance is intended to be regarded as available unless the offeror has made quite clear that it will not be acceptable.

In our view the manner by which acceptance was to be accomplished in the transaction herein involved was not indicated by either language or circumstances. The seller did not make it clear that acceptance could not be accomplished by a promise rather than an act. Thus it is equally reasonable under the terms of this specific offer that acceptance could be accomplished in any of three ways: 1) by the act of delivering the goods to the check-out counter and paying for them; 2) by the promise to pay for the goods as evidenced by their physical delivery to the check-out counter; and 3) by the promise to deliver the goods to the check-out counter and to pay for them there as evidenced by taking physical possession of the goods by their removal from the shelf.

The fact that customers, having once selected goods with the intent to purchase them, are permitted by the seller to return them to the shelves does not preclude the possibility that a selection of the goods, as evidenced by taking physical possession of them, could constitute a reasonable mode of acceptance. Section 2-106(3) provides:

"Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise then for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

Here the evidence that the retailer permits the customer to "change his mind" indicates only an agreement between the parties to permit the consumer to end his contract with the retailer irrespective of a breach of the agreement by the retailer. It does not indicate that an agreement does not exist prior to the exercise of this option by the consumer.…

Here Mr. Seigel testified that all of the circumstances surrounding his selection of the bottles were normal; that the carton in which the bottles came was not defective; that in lifting the carton from the shelf and moving it toward his basket the bottles neither touched nor were touched by anything other than his hand; that they exploded almost instantaneously after he removed them from the shelf; and that as a result of the explosion he fell injuring himself. It is obvious that Coca-Cola bottles which would break under normal handling are not fit for the ordinary use for which they were intended and that the relinquishment of physical control of such a defective bottle to a consumer constitutes a breach of warranty. Thus the evidence was sufficient to show that when the bottles left the retailer's control they did not conform to the representations of the warranty of merchantability, and that this breach of the warranty was the cause of the loss sustained.…

[Judgment in favor of Giant Foods is reversed and the case remanded for a new trial. Judgment in favor of the bottler is affirmed because the plaintiff failed to prove that the bottles were defective when they were delivered to the retailer.]

Case Questions

1. What warranty did the plaintiff complain was breached here?
2. By displaying the soda pop, the store made an offer to its customers. How did the court say such offers might be accepted?
3. Why did the court get into the discussion about "termination" of the contract?
4. What is the controlling rule of law applied in this case?

(TORTS) Strict Liability and Bystanders

Embs v. Pepsi-Cola Bottling Co. 528 S.W.2d 703 (Ky. 1975)

On the afternoon of July 25, 1970 plaintiff-appellant entered the self-service retail store operated by the defendant-appellee, Stamper's Cash Market, Inc., for the purpose of "buying soft drinks for the kids." She went to an upright soft drink cooler, removed five bottles and placed them in a carton. Unnoticed by her, a carton of Seven-Up was sitting on the floor at the edge of the produce counter about one foot from where she was standing. As she turned away from the cooler she heard an explosion that sounded "like a shotgun." When she looked down she saw a gash in her leg, pop on her leg, green pieces of a bottle on the floor and the Seven-Up carton in the midst of the debris. She did not kick or otherwise come into contact with the carton of Seven-Up prior to the explosion. Her son, who was with her, recognized the green pieces of glass as part of a Seven-Up bottle.

When she rested her case, the defendants-appellees moved for a directed verdict in their favor. The trial court granted the motion on the grounds that the doctrine of strict product liability in tort does not extend beyond users and consumers and that the evidence was insufficient to permit an inference by a reasonably prudent man that the bottle was defective or if it was, when it became so.

402 A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it was sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Comment *f* on that section makes it abundantly clear that this rule applies to any person engaged in the business of supplying products for use or consumption, including any manufacturer of such a product and any wholesale or retail dealer or distributor.

Comment *c* points out that on whatever theory, the justification for the rule has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; that the public has the right to and does expect that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

The caveat to the section provides that the Institute expresses no opinion as to whether the rule may not apply to harm to persons other than users or consumers. Comment on caveat *o* states the Institute expresses neither approval nor disapproval of expansion of the rule to permit recovery by casual bystanders and others who may come in contact with the product, and admits there may be no essential reason why such plaintiffs should not be brought within the scope of protection afforded, other than they do not have the same reasons for expecting such protection as the consumer who buys a marketed product, and that the social pressure which has been largely responsible for the development of the rule has been a consumer's pressure, and there is not the same demand for the protection of casual strangers.…

The caveat articulates the essential point: Once strict liability is accepted, bystander recovery is fait accompli.

Our expressed public policy will be furthered if we minimize the risk of personal injury and property damage by charging the costs of injuries against the manufacturer who can procure liability insurance and distribute its expense among the public as a cost of doing business; and since the risk of harm from defective products exists for mere bystanders and passersby as well as for the purchaser or user, there is no substantial reason for protecting one class of persons and not the other. The same policy requires us to maximize protection for the injured third party and promote the public interest in discouraging the marketing of products having defects that are a menace to the public by imposing strict liability upon retailers and wholesalers in the distributive chain responsible for marketing the defective product which injures the bystander. The imposition of strict liability places no unreasonable burden upon sellers because they can adjust the cost of insurance protection among themselves in the course of their continuing business relationship.

We must not shirk from extending the rule to the manufacturer for fear that the retailer or middleman will be impaled on the sword of liability without regard to fault. Their liability was already established under Section 402 A of the Restatement of Torts 2d. As a matter of public policy the retailer or middleman as well as the manufacturer should be liable since the loss for injuries resulting from defective products should be placed on those members of the marketing chain best able to pay the loss, who can then distribute such risk among themselves by means of insurance and indemnity agreements. [Citation]…

The result which we reach does not give the bystander a "free ride." When products and consumers are considered in the aggregate, bystanders, as a class, purchase most of the same products to which they are exposed as bystanders. Thus, as a class, they indirectly subsidize the liability of the manufacturer, middleman and retailer and in this sense do pay for the insurance policy tied to the product.…

For the sake of clarity we restate the extension of the rule. The protections of Section 402 A of the Restatement of Torts 2d extend to bystanders whose injury from the defective product is reasonably foreseeable.…

The judgment is reversed and the cause is remanded to the Clark Circuit Court for further proceedings consistent herewith.

Case Questions

1. Why didn't the plaintiff here use warranty as a theory of recovery, as Mr. Seigel did in the previous case?
2. The court offers a rationale for the doctrine of strict products liability. What is it?
3. Restatement, Section 402A, by its terms extends protection "to the ultimate user or consumer," but Mrs. Embs [plaintiff-appellant] was not that. What rationale did the court give for expanding the protection here?
4. Among the entities in the vertical distribution chain—manufacturer, wholesaler, retailer—who is liable under this doctrine?

   See Greenman v. Yuba Power Products, 377 P. 2d 897 (1963) [13 A.L.R. 3d 1049] Strict Liability for a manufacturer with no privity of contract.

Chapter 8 Introduction to Contract Law (Hardbound chapter 53)

Explicitness: Implied Contract

Roger's Backhoe Service, Inc. v. Nichols

681 N.W.2d 647 (Iowa 2004)

Carter, J.

Defendant, Jeffrey S. Nichols, is a funeral director in Muscatine. * * * In early 1998 Nichols decided to build a crematorium on the tract of land on which his funeral home was located. In working with the Small Business Administration, he was required to provide drawings and specifications and obtain estimates for the project. Nichols hired an architect who prepared plans and submitted them to the City of Muscatine for approval. These plans provided that the surface water from the parking lot would drain onto the adjacent street and alley and ultimately enter city storm sewers. These plans were approved by the city.

Nichols contracted with Roger's [Backhoe Service, Inc.] for the demolition of the foundation of a building that had been razed to provide room for the crematorium and removal of the concrete driveway and sidewalk adjacent to that foundation. Roger's completed that work and was paid in full.

After construction began, city officials came to the job site and informed Roger's that the proposed drainage of surface water onto the street and alley was unsatisfactory. The city required that an effort be made to drain the surface water into a subterranean creek, which served as part of the city's storm sewer system. City officials indicated that this subterranean sewer system was about fourteen feet below the surface of the ground. * * * Roger's conveyed the city's mandate to Nichols when he visited the job site that same day.

It was Nichols' testimony at trial that, upon receiving this information, he advised * * * Roger's that he was refusing permission to engage in the exploratory excavation that the city required. Nevertheless, it appears without dispute that for the next three days Roger's did engage in digging down to the subterranean sewer system, which was located approximately twenty feet below the surface. When the underground creek was located, city officials examined the brick walls in which it was encased and determined that it was not feasible to penetrate those walls in order to connect the surface water drainage with the underground creek. As a result of that conclusion, the city reversed its position and once again gave permission to drain the surface water onto the adjacent street and alley.

[T]he invoices at issue in this litigation relate to charges that Roger's submitted to Nichols for the three days of excavation necessary to locate the underground sewer system and the cost for labor and materials necessary to refill the excavation with compactable materials and attain compaction by means of a tamping process. * * * The district court found that the charges submitted on the * * * invoices were fair and reasonable and that they had been performed for Nichols' benefit and with his tacit approval. * * *

The court of appeals * * * concluded that a necessary element in establishing an implied-in-fact contract is that the services performed be beneficial to the alleged obligor. It concluded that Roger's had failed to show that its services benefited Nichols. * * *

In describing the elements of an action on an implied contract, the court of appeals stated in [Citation], that the party seeking recovery must show:

(1) the services were carried out under such circumstances as to give the recipient reason to understand:

(a) they were performed for him and not some other person, and

(b) they were not rendered gratuitously, but with the expectation of compensation from the recipient; and

(2) the services were beneficial to the recipient.

In applying the italicized language in [Citation] to the present controversy, it was the conclusion of the court of appeals that Roger's' services conferred no benefit on Nichols. We disagree. There was substantial evidence in the record to support a finding that, unless and until an effort was made to locate the subterranean sewer system, the city refused to allow the project to proceed. Consequently, it was necessary to the successful completion of the project that the effort be made. The fact that examination of the brick wall surrounding the underground creek indicated that it was unfeasible to use that source of drainage does not alter the fact that the project was stalemated until drainage into the underground creek was fully explored and rejected. The district court properly concluded that Roger's' services conferred a benefit on Nichols. * * *

Decision of court of appeals vacated; district court judgment affirmed.

Case Questions

1. What facts must be established by a plaintiff to show the existence of an implied contract?
2. What argument did Nichols make as to why there was no implied contract here?
3. How would the facts have to be changed to make an express contract?

Mutuality of Contract: Unilateral Contract

PITTSLEY v. HOUSER, 875 P.2d 232 (1994)

SWANSTROM, Judge, pro tem.

Appellant Donald Houser, doing business as Hilton Contract Carpet Co., appeals from a decision of the district court, acting in its appellate capacity, vacating the judgment and remanding the case to the magistrate for further findings of fact. For the reasons stated below, we also vacate the judgment and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

In September of 1988, Jane Pittsley contracted with Hilton Contract Carpet Co. (Hilton) for the installation of carpet in her home. The total contract price was $4,402. Hilton paid the installers $700 to put the carpet in Pittsley's home. Following installation, Pittsley complained to Hilton that some seams were visible, that gaps appeared, that the carpet did not lay flat in all areas, and that it failed to reach the wall in certain locations. Although Hilton made various attempts to fix the installation, by attempting to stretch the carpet and other methods, Pittsley was not satisfied with the work. Eventually, Pittsley refused any further efforts to fix the carpet. Pittsley initially paid Hilton $3,500 on the contract, but refused to pay the remaining balance of $902.

Pittsley later filed suit, seeking rescission of the contract, return of the $3,500 and incidental damages. Hilton answered and counterclaimed for the balance remaining on the contract. The matter was heard by a magistrate sitting without a jury. The magistrate found that there were defects in the installation and that the carpet had been installed in an unworkmanlike manner. The magistrate also found that there was a lack of evidence on damages. The trial was continued to allow the parties to procure evidence on the amount of damages incurred by Pittsley. Following this continuance, Pittsley did not introduce any further evidence of damages, though witnesses for Hilton estimated repair costs at $250.

Although Pittsley had asked for recission of the contract and a refund of her money, the magistrate determined that recission, as an equitable remedy, was only available when one party committed a breach so material that it destroyed the entire purpose of the contract. Because the only estimate of damages was for $250, the magistrate ruled recission would not be a proper remedy. Instead, the magistrate awarded Pittsley $250 damages plus $150 she expended in moving furniture prior to Hilton's attempt to repair the carpet. On the counterclaim, the magistrate awarded Hilton the $902 remaining on the contract. Additionally, both parties had requested attorney fees in the action. The magistrate determined that both parties had prevailed and therefore awarded both parties their attorney fees.

Following this decision, Pittsley appealed to the district court, claiming that the transaction involved was governed by the Idaho Uniform Commercial Code (UCC), I.C. §§ 28-1-101 through 28-12-532. Pittsley argued that if the UCC had been properly applied, a different result would have been reached. The district court agreed with Pittsley's argument, reversing and remanding the case to the magistrate to make additional findings of fact and to apply the UCC to the transaction. The district court ruled

[875 P.2d 234]

that because the matter was remanded, the prior award of attorney fees to both parties had to be vacated. The district court also denied Hilton's request for attorney fees on appeal.

Hilton now appeals the decision of the district court. Hilton claims that Pittsley failed to allege or argue the UCC in either her pleadings or at trial. Even if application of the UCC was properly raised, Hilton argues that there were no defects in the goods that were the subject of the transaction, only in the installation, making application of the UCC inappropriate. Hilton also argues that the magistrate did not err in denying recission below, and that the award of attorney fees was proper below. Hilton further challenges the district court's denial of attorney fees on the appeal to the district court and seeks attorney fees on this appeal.

ANALYSIS

We first note that on appeal from an order of the district court reviewing a determination made by the magistrate, we examine the record of the trial court independently of, but with due regard for, the

district court's intermediate appellate decision. *Ireland v. Ireland,* 123 Idaho 955, 957-58, 855 P.2d 40, 42-43 (1993); *Haley v. Clinton,* 123 Idaho 707, 710, 851 P.2d 1003, 1006 (Ct.App. 1993).

In this case, the magistrate's findings of fact have not been challenged on appeal. The issues in dispute only concern the magistrate's application of the law to the facts. On appeal, we freely review the conclusions of law reached below by stating legal rules or principles and applying them to the facts as found. *Kawai Farms, Inc. v. Longstreet,* 121 Idaho 610, 613, 826 P.2d 1322, 1325 (1992); *Matter of Goerig,* 121 Idaho 26, 28, 822 P.2d 545, 547 (Ct.App.1991).

The single question upon which this appeal depends is whether the UCC is applicable to the subject transaction.[1] If the underlying transaction involved the sale of "goods," then the UCC would apply. If the transaction did not involve goods, but rather was for services, then application of the UCC would be erroneous.

Idaho Code § 28-2-105(1) defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale. . . ." Although there is little dispute that carpets are "goods," the transaction in this case also involved installation, a service. Such hybrid transactions, involving both goods and services, raise difficult questions about the applicability of the UCC. Two lines of authority have emerged to deal with such situations.

The first line of authority, and the majority position, utilizes the "predominant factor" test. The Ninth Circuit, applying the Idaho Uniform Commercial Code to the subject transaction, restated the predominant factor test as:

The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

United States v. City of Twin Falls, Idaho, 806 F.2d 862, 871 (9th Cir.1986) *cert. denied* 482 U.S. 914, 107 S.Ct. 3185, 96 L.Ed.2d 674 (1987), *citing Bonebrake v. Cox,* 499 F.2d 951 (8th Cir.1974); *see also* Sonja A. Soehnel, Annotation, *Applicability of UCC Article 2 to Mixed Contracts for Sale of Goods and Services,* 5 A.L.R.4th 501 (1981). This test essentially involves consideration of the contract in its entirety, applying the UCC to the entire contract or not at all.

The second line of authority, which Hilton urges us to adopt, allows the contract to be severed into different parts, applying the UCC to the goods involved in the contract, but not to the nongoods involved, including services as well as other nongoods assets and property. Thus, an action focusing on defects or problems with the goods themselves would be covered by the UCC, while a suit based on the service provided or some other nongoods aspect would not be covered by the UCC. This position was advanced by the Tenth Circuit Court of Appeals in *Foster v. Colorado Radio Corp.,* 381 F.2d 222 (10th Cir.1967), which involved the sale of a radio station. The court in *Foster* held that, although there was a single contract for the purchase of a radio station, the UCC applied only to the actual goods that were covered under the contract.[2] Thus, the court applied different analyses and remedies to two different aspects of the same contract.

We believe the predominant factor test is the more prudent rule. Severing contracts into various parts, attempting to label each as goods or nongoods and applying different law to each separate part clearly contravenes the UCC's declared purpose "to simplify, clarify and modernize the law governing commercial transactions." I.C. § 28-1-102(2)(a). As the Supreme Court of Tennessee suggested in

Hudson v. Town & Country True Value Hardware, Inc., 666 S.W.2d 51 (Tenn. 1984), such a rule would, in many contexts, present "difficult and in some instances insurmountable problems of proof in segregating assets and determining their respective values at the time of the original contract and at the time of resale, in order to apply two different measures of damages." *Id.* at 54.

Applying the predominant factor test to the case before us, we conclude that the UCC was applicable to the subject transaction. The record indicates that the contract between the parties called for "165 yds Masterpiece # 2122 — Installed" for a price of $4319.50. There was an additional charge for removing the existing carpet. The record indicates that Hilton paid the installers $700 for the work done in laying Pittsley's carpet. It appears that Pittsley entered into this contract for the purpose of obtaining carpet of a certain quality and color. It does not appear that the installation, either who would provide it or the nature of the work, was a factor in inducing Pittsley to choose Hilton as the carpet supplier. On these facts, we conclude that the sale of the carpet was the predominant factor in the contract, with the installation being merely incidental to the purchase. Therefore, in failing to consider the UCC, the magistrate did not apply the correct legal principles to the facts as found. We must therefore vacate the judgment and remand for further findings of fact and application of the UCC to the subject transaction.

On remand, the magistrate may consider such issues as whether the carpet was properly rejected under I.C. § 28-2-602 or whether the actions of Pittsley constituted acceptance under I.C. § 28-2-606. If the goods were accepted, the magistrate may consider if the acceptance could have been revoked under I.C. § 28-2-608. The magistrate may then consider the various remedies that are available under the UCC and any other provisions of the code that the court deems applicable.

As for attorney fees, because we are vacating the judgment, we must also set aside the award of attorney fees to both sides. Likewise, no attorney fees should have been awarded at the district court level or on this appeal. Such an award may be appropriate on remand, depending upon the magistrate's determination of the prevailing party and any other consideration applicable to an award of fees. Costs are awarded to the respondent, Pittsley, on this appeal.

WALTERS, C.J., and CAREY, J. pro tem, concur.

SouthTrust Bank v. Williams 775 So.2d 184 (Ala. 2000)

Cook, J.

SouthTrust Bank (“SouthTrust”) appeals from an order denying its motion to compel arbitration of an action against it by checking-account customers Mark Williams and Bessie Daniels. We reverse and remand.

Daniels and Williams began their relationships with SouthTrust in 1981 and 1995, respectively, by executing checking-account “signature cards.” The signature card each customer signed contained a “change-in-terms” clause. Specifically, when Daniels signed her signature card, she “agree[d] to be subject to the Rules and Regulations as may now or *hereafter* be adopted by the Bank.” (Emphasis added) * * * [Later,] SouthTrust added paragraph 33 to the regulations:

*ARBITRATION OF DISPUTES. You and we agree that the transactions in your account involve ‘commerce’ under the Federal Arbitration Act (‘FAA’). ANY CONTROVERSY OR CLAIM BETWEEN YOU AND US…WILL BE SETTLED BY BINDING ARBITRATION UNDER THE FAA. * * **

This action * * * challenges SouthTrust's procedures for paying overdrafts, and alleges that SouthTrust engages in a "uniform practice of paying the largest check(s) before paying multiple smaller checks * * * [in order] to generate increased service charges for [SouthTrust] at the expense of [its customers]."

SouthTrust filed a "motion to stay [the] lawsuit and to compel arbitration." It based its motion on paragraph 33 of the regulations. [T]he trial court…entered an order denying SouthTrust's motion to compel arbitration. SouthTrust appeals. * * *

Williams and Daniels contend that SouthTrust's amendment to the regulations, adding paragraph 33, was ineffective because, they say, they did not *expressly assent* to the amendment. In other words, they object to submitting their claims to arbitration because, they say, when they opened their accounts, neither the regulations nor any other relevant document contained an arbitration provision. They argue that "mere failure to object to the addition of a material term cannot be construed as an acceptance of it." * * * They contend that SouthTrust could not unilaterally insert an arbitration clause in the regulations and make it binding on depositors like them.

SouthTrust, however, referring to its change-of-terms clause, insists that it "notified" Daniels and Williams of the amendment in January 1997 by enclosing in each customer's "account statement" a complete copy of the regulations, as amended. Although it is undisputed that Daniels and Williams never affirmatively assented to these amended regulations, SouthTrust contends that their assent was evidenced by their failure to close their accounts after they received notice of the amendments. * * * Thus, the disposition of this case turns on the legal effect of Williams and Daniels's continued use of the accounts after the regulations were amended.

Williams and Daniels argue that "[i]n the context of contracts between merchants [under the UCC], a written confirmation of an acceptance may modify the contract *unless* it adds a *material* term, and arbitration clauses are material terms."

Williams and Daniels concede—as they must—…that Article 2 governs "transactions in goods," and, consequently, that it is not applicable to the transactions in this case. Nevertheless, they argue:

It would be astonishing if a Court were to consider the addition of an arbitration clause a material alteration to a contract between merchants, who by definition are sophisticated in the trade to which the contract applies, but not *hold that the addition of an arbitration clause is a material alteration pursuant to a change-of-terms clause in a contract between one sophisticated party, a bank, and an entire class of less sophisticated parties, its depositors.…*

In response, SouthTrust states that "because of the 'at-will' nature of the relationship, banks by necessity must contractually reserve the right to amend their deposit agreements from time to time." In so stating, SouthTrust has precisely identified the fundamental difference between the transactions here and those transactions governed by [Article 2].

Contracts for the purchase and sale of goods are essentially *bilateral* and executory in nature. See [Citation] "An agreement whereby one party promises to sell and the other promises to buy a thing at a later time…is a bilateral promise of sale or contract to sell." * * * "[A] unilateral contract results from an exchange of a promise for an act; a bilateral contract results from an exchange of promises." * * * Thus, "in a unilateral contract, there is no bargaining process or exchange of promises by parties as in a bilateral contract." [Citation] "[O]nly one party makes an offer (or promise) which invites performance by another, and performance constitutes both acceptance of that offer and consideration." Because "a 'unilateral contract' is one in which no promisor receives promise as consideration for his promise," only one party is bound. * * * The difference is not one of semantics but of substance; it determines the rights and responsibilities of the parties, including the time and the conditions under which a cause of action accrues for a breach of the contract.

This case involves at-will, commercial relationships, based upon a series of unilateral transactions. Thus, it is more analogous to cases involving insurance policies, such as [Citations]. The common thread running through those cases was the *amendment* by one of the parties to a business relationship of a document underlying that relationship—without the express assent of the other party—to require the arbitration of disputes arising after the amendment. * * *

The parties in [the cited cases], like Williams and Daniels in this case, took no action that could be considered inconsistent with an assent to the arbitration provision. In each case, they continued the business relationship after the interposition of the arbitration provision. In doing so, they implicitly assented to the addition of the arbitration provision. * * *

Reversed and remanded.

Case Questions

1. Why did the plaintiffs think they should not be bound by the arbitration clause?
2. The court said this case involved a unilateral contract. What makes it that, as opposed to a bilateral contract?
3. What should the plaintiffs have done if they didn't like the arbitration requirement?

Unilateral Contract and At-Will Employment

Woolley v. Hoffmann-La Roche, Inc. 491 A.2d 1257 (N.J. 1985)

Wilntz, C. J.

Plaintiff, Richard Woolley, was hired by defendant, Hoffmann-La Roche, Inc., in October 1969, as an Engineering Section Head in defendant's Central Engineering Department at Nutley. There

was no written employment contract between plaintiff and defendant. Plaintiff began work in mid-November 1969. Sometime in December, plaintiff received and read the personnel manual on which his claims are based.

[The company's personnel manual had eight pages;] five of the eight pages are devoted to "termination." In addition to setting forth the purpose and policy of the termination section, it defines "the types of termination" as "layoff," "discharge due to performance," "discharge, disciplinary," "retirement" and "resignation." As one might expect, layoff is a termination caused by lack of work, retirement a termination caused by age, resignation a termination on the initiative of the employee, and discharge due to performance and discharge, disciplinary, are both terminations for cause. There is no category set forth for discharge without cause. The termination section includes "Guidelines for discharge due to performance," consisting of a fairly detailed procedure to be used before an employee may be fired for cause. Preceding these definitions of the five categories of termination is a section on "Policy," the first sentence of which provides: "It is the policy of Hoffmann-La Roche to retain to the extent consistent with company requirements, the services of all employees who perform their duties efficiently and effectively."

In 1976, plaintiff was promoted, and in January 1977 he was promoted again, this latter time to Group Leader for the Civil Engineering, the Piping Design, the Plant Layout, and the Standards and Systems Sections. In March 1978, plaintiff was directed to write a report to his supervisors about piping problems in one of defendant's buildings in Nutley. This report was written and submitted to plaintiff's immediate supervisor on April 5, 1978. On May 3, 1978, stating that the General Manager of defendant's Corporate Engineering Department had lost confidence in him, plaintiff's supervisors requested his resignation. Following this, by letter dated May 22, 1978, plaintiff was formally asked for his resignation, to be effective July 15, 1978.

Plaintiff refused to resign. Two weeks later defendant again requested plaintiff's resignation, and told him he would be fired if he did not resign. Plaintiff again declined, and he was fired in July.

Plaintiff filed a complaint alleging breach of contract. * * * The gist of plaintiff's breach of contract claim is that the express and implied promises in defendant's employment manual created a contract under which he could not be fired at will, but rather only for cause, and then only after the procedures outlined in the manual were followed. Plaintiff contends that he was not dismissed for good cause, and that his firing was a breach of contract.

Defendant's motion for summary judgment was granted by the trial court, which held that the employment manual was not contractually binding on defendant, thus allowing defendant to terminate plaintiff's employment at will. The Appellate Division affirmed. We granted certification.

The employer's contention here is that the distribution of the manual was simply an expression of the company's "philosophy" and therefore free of any possible contractual consequences. The former employee claims it could reasonably be read as an explicit statement of company

policies intended to be followed by the company in the same manner as if they were expressed in an agreement signed by both employer and employees. * * *

This Court has long recognized the capacity of the common law to develop and adapt to current needs. * * * The interests of employees, employers, and the public lead to the conclusion that the common law of New Jersey should limit the right of an employer to fire an employee at will.

In order for an offer in the form of a promise to become enforceable, it must be accepted. Acceptance will depend on what the promisor bargained for: he may have bargained for a return promise that, if given, would result in a bilateral contract, both promises becoming enforceable. Or he may have bargained for some action or non-action that, if given or withheld, would render his promise enforceable as a unilateral contract. In most of the cases involving an employer's personnel policy manual, the document is prepared without any negotiations and is voluntarily distributed to the workforce by the employer. It seeks no return promise from the employees. It is reasonable to interpret it as seeking continued work from the employees, who, in most cases, are free to quit since they are almost always employees at will, not simply in the sense that the employer can fire them without cause, but in the sense that they can quit without breaching any obligation. Thus analyzed, the manual is an offer that seeks the formation of a unilateral contract—the employees' bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue.

The unilateral contract analysis is perfectly adequate for that employee who was aware of the manual and who continued to work intending that continuation to be the action in exchange for the employer's promise; it is even more helpful in support of that conclusion if, but for the employer's policy manual, the employee would have quit. See generally [Citation] (judicial use of unilateral contract analysis in employment cases is widespread).

* * * All that this opinion requires of an employer is that it be fair. It would be unfair to allow an employer to distribute a policy manual that makes the workforce believe that certain promises have been made and then to allow the employer to renege on those promises. What is sought here is basic honesty: if the employer, for whatever reason, does not want the manual to be capable of being construed by the court as a binding contract, there are simple ways to attain that goal. All that need be done is the inclusion in a very prominent position of an appropriate statement that there is no promise of any kind by the employer contained in the manual; that regardless of what the manual says or provides, the employer promises nothing and remains free to change wages and all other working conditions without having to consult anyone and without anyone's agreement; and that the employer continues to have the absolute power to fire anyone with or without good cause.

Reversed and remanded for trial.

Case Questions

1. What did Woolley do to show his acceptance of the terms of employment offered to him?

2. In part of the case not included here, the court notes that Mr. Woolley died "before oral arguments on this case." How can there be any damages if the plaintiff has died? Who now has any case to pursue?
3. The court here is changing the law of employment in New Jersey. It is making case law, and the rule here articulated governs similar future cases in New Jersey. Why did the court make this change? Why is it relevant that the court says it would be easy for an employer to avoid this problem?

Objective Intention

Lucy v. Zehmer 84 S.E.2d 516 (Va. 1954)

Buchanan, J.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm.…

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done.…

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business

transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts."

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party.

"* * * The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. * * *." [Citation]

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.…

Reversed and remanded.

Case Questions

1. What objective evidence was there to support the defendants' contention that they were just kidding when they agreed to sell the farm?
2. Suppose the defendants really did think the whole thing was a kind of joke. Would that make any difference?
3. As a matter of public policy, why does the law use an objective standard to determine the seriousness of intention, instead of a subjective standard?
4. It's 85 degrees in July and 5:00 p.m., quitting time. The battery in Mary's car is out of juice, again. Mary says, "Arrgh! I will sell this stupid car for $50!" Jason, walking to his car nearby, whips out his checkbook and says, "It's a deal. Leave your car here. I'll give you a ride home and pick up your car after you give me the title." Do the parties have a contract?

Consequential Damages

EBWS, LLC v. Britly Corp. 928 A.2d 497 (Vt. 2007)

Reiber, C.J.

The Ransom family owns Rock Bottom Farm in Strafford, Vermont, where Earl Ransom owns a dairy herd and operates an organic dairy farm. In 2000, the Ransoms decided to build a creamery on-site to process their milk and formed EBWS, LLC to operate the dairy-processing plant and to market the plant's products. In July 2000, Earl Ransom, on behalf of EBWS, met with Britly's president to discuss building the creamery.…In January 2001, EBWS and Britly entered into a contract requiring Britly to construct a creamery building for EBWS in exchange for $160,318.…The creamery was substantially completed by April 15, 2001, and EBWS moved in soon afterward. On June 5, 2001, EBWS notified Britly of alleged defects in construction. [EBWS continued to use the creamery pending the necessity to vacate it for three weeks when repairs were commenced].

On September 12, 2001, EBWS filed suit against Britly for damages resulting from defective design and construction.…

Following a three-day trial, the jury found Britly had breached the contract and its express warranty, and awarded EBWS: (1) $38,020 in direct damages, and (2) $35,711 in consequential damages.…

…The jury's award to EBWS included compensation for both direct and consequential damages that EBWS claimed it would incur while the facility closed for repairs. Direct damages [i.e., compensatory damages] are for "losses that naturally and usually flow from the breach itself," and it is not necessary that the parties actually considered these damages. [Citation]. In comparison, special or consequential damages "must pass the tests of causation, certainty and foreseeability, and, in addition, be reasonably supposed to have been in the contemplation of both parties at the time they made the contract."

…The court ruled that EBWS could not recover for lost profits because it was not a going concern at the time the contract was entered into, and profits were too speculative. The court concluded, however, that EBWS could submit evidence of other business losses, including future payment for unused milk and staff wages.…

At trial, Huyffer, the CEO of EBWS, testified that during a repairs closure the creamery would be required to purchase milk from adjacent Rock Bottom Farm, even though it could not process this milk. She admitted that such a requirement was self-imposed as there was no written output contract between EBWS and the farm to buy milk. In addition, Huyffer testified that EBWS would pay its employees during the closure even though EBWS has no written contract to pay its employees when they are not working. The trial court allowed these elements of damages to be submitted to the jury, and the jury awarded EBWS consequential damages for unused milk and staff wages.

On appeal, Britly contends that because there is no contractual or legal obligation for EBWS to purchase milk or pay its employees, these are not foreseeable damages. EBWS counters that it is common knowledge that cows continue to produce milk, even if the processing plant is not working, and thus it is foreseeable that this loss would occur. We conclude that these damages are not the foreseeable result of Britly's breach of the construction contract and reverse the award.…

[W]e conclude that…it is not reasonable to expect Britly to foresee that its failure to perform under the contract would result in this type of damages. While we are sympathetic to EBWS's contention that the cows continue to produce milk, even when the plant is closed down, this fact alone is not enough to demonstrate that buying and dumping milk is a foreseeable result of Britly's breach of the construction contract. Here, the milk was produced by a separate and distinct entity, Rock Bottom Farm, which sold the milk to EBWS.…

Similarly, EBWS maintained no employment agreements with its employees obligating it to pay wages during periods of closure for repairs, dips in market demand, or for any other reason. Any losses EBWS might suffer in the future because it chooses to pay its employees during a plant closure for repairs would be a voluntary expense and not in Britly's contemplation at the

time it entered the construction contract. It is not reasonable to expect Britly to foresee losses incurred as a result of agreements that are informal in nature and carry no legal obligation on EBWS to perform. "[P]arties are not presumed to know the condition of each other's affairs nor to take into account contracts with a third party that is not communicated." [Citation] While it is true that EBWS may have business reasons to pay its employees even without a contractual obligation, for example, to ensure employee loyalty, no evidence was introduced at trial by EBWS to support a sound rationale for such considerations. Under these circumstances, this business decision is beyond the scope of what Britly could have reasonably foreseen as damages for its breach of contract.…

In addition, the actual costs of the wages and milk are uncertain.…[T]he the milk and wages here are future expenses, for which no legal obligation was assumed by EBWS, and which are separate from the terms of the parties' contract. We note that at the time of the construction contract EBWS had not yet begun to operate as a creamery and had no history of buying milk or paying employees. See [Citation] (explaining that profits for a new business are uncertain and speculative and not recoverable). Thus, both the cost of the milk and the number and amount of wages of future employees that EBWS might pay in the event of a plant closure for repairs are uncertain.

Award for consequential damages is reversed.…

Case Questions

1. Why, according to EBWS's CEO, would EBWS be required to purchase milk from adjacent Rock Bottom Farm, even though it could not process this milk?
2. Surely it is well known in Vermont dairy country that dairy farmers can't simply stop milking cows when no processing plant is available to take the milk—the cows will soon stop producing. Why was EBWS then not entitled to those damages which it will certainly suffer when the creamery is down for repairs?
3. Britly (the contractor) must have known EBWS had employees that would be idled when the creamery shut down for repairs. Why was it not liable for their lost wages?
4. What could EBWS have done at the time of contracting to protect itself against the damages it would incur in the event the creamery suffered downtime due to faulty construction?

Additional Cases

Thomas **O'CONNOR**, Plaintiff–Appellant, v. Louis W. **SULLIVAN**, Secretary of Health and Human Services, Defendant–Appellee.

938 F.2d 70

United States Court of Appeals,

Seventh Circuit.

Argued May 31, 1991.Decided July 23, 1991.Rehearing Denied Oct. 8, 1991.

Attorneys and Law Firms

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Gail C. Ginsberg, Asst. U.S. Atty., Fred Foreman, U.S. Atty., Office of U.S. Atty., Crim. Div., Michael S. Messer, Dept. of Health and Human Services, Region V, Office of Gen. Counsel, Nancy K. Needles, Asst. U.S. Atty., Office of U.S. Atty., Civ. Div., Appellate Section, Chicago, Ill., for defendant-appellee.

Before CUDAHY, POSNER, and RIPPLE, Circuit Judges.

Opinion

POSNER, Circuit Judge.

Thomas O'Connor appeals from a decision by the district court upholding the denial by the Social Security Administration of O'Connor's application for disability benefits. At the time of his hearing before an administrative law judge, O'Connor was 47 years old. He had not worked since the year after one lobe of his left lung was removed as a result of a gunshot wound; until then he had done strenuous unskilled factory work as an assembler and janitor. Besides having lost some pulmonary capacity as a consequence of the lobectomy, O'Connor has diabetes. He is also an alcoholic, who for several years before the hearing had been drinking two to three pints of hard liquor a day. Although his diabetes is controllable by diet and medicine, his alcoholism causes him at times to go off his diet and forget to take his medicine, and a frequent result is seizures and other medical crises requiring hospitalization. Yet at the time of the hearing his formidable intake of liquor had not yet impaired his mental capacity significantly, or prevented him from living without supervision. That mental capacity, however, is limited. O'Connor is illiterate and has an IQ of 74. The administrative law judge concluded that O'Connor, who spends his days cooking, washing dishes, playing cards, visiting with friends—and, of course, drinking—is physically and mentally capable of doing light unskilled work; therefore he is not totally disabled.

12 Mr. O'Connor is unemployable. Who would hire a person with such a combination of physical and mental impairments? His heavy drinking alone would make him a considerable menace to himself and others in his place of work, and he has no offsetting skills to offer. It is true that the social security disability program is not an unemployment program. A partial disability that in other than the tightest labor markets would keep a worker of limited skills from getting or holding a job creates no entitlement to disability benefits. The disability must be total, 42 U.S.C. §§ 423(d)(1), (2); Stephens v. Heckler, 766 F.2d 284, 285 (7th Cir.1985); DeFrancesco v. Bowen, 867 F.2d 1040, 1042 (7th Cir.1989), implying that the applicant's job prospects would be vanishingly poor even in a tight market. Cummins v. Schweiker, 670 F.2d

81, 83–84 (7th Cir.1982). The judgment required by such a standard is—judgmental, subjective. To cabin the discretion of its hundreds of administrative law judges, the Social Security Administration has promulgated regulations designed to enable most disability cases to be decided mechanically, by identifying specific factors pertinent to the applicant's job prospects and then reading off the decision from a grid on which those factors (the severity of the impairment and the applicant's age, education, and previous work experience) are arrayed. 20 C.F.R. pt. 404, Subpt. P, App. 2 ("Medical Vocational Guidelines"); Heckler v. Campbell, 461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983).

3 By a further simplification, even before he gets to the grid an applicant may be able to establish his entitlement to benefits by showing that he has an impairment equal in severity to a list of severe impairments that the Social Security Administration maintains. 20 C.F.R. §§ 404.1520(d), 416.920(d); Sullivan v. Zebley, 493 U.S. 521, 110 S.Ct. 885, 892, 107 L.Ed.2d 967 (1990); Davidson v. Secretary of Health & Human Services, 912 F.2d 1246, 1252–53 (10th Cir.1990) (per curiam). One of these "listed impairments," as they are called, is a pulmonary diffusing capacity of fewer than 6 milliliters of hemoglobin per minute. "Diffusing capacity" is the capacity of the *73 lungs to distribute oxygen to the blood. A capacity of fewer than 6 milliliters of hemoglobin per minute indicates a severe chronic pulmonary impairment—so severe that the regulations deem it conclusive evidence of total disability. The record contains a test of O'Connor's diffusing capacity that shows it to be below the 6 milliliter threshold. One might have thought that this would be the end of the case. But the administrative law judge unaccountably found that O'Connor had only a slight pulmonary impairment, and the district judge, while catching the error, held that it was harmless, because the medical record as a whole supported (in his view) the conclusion that O'Connor's pulmonary impairment was indeed only slight.

4 In so ruling the district judge misconstrued the regulations. To establish disability all that the record need show is one listed impairment. 20 C.F.R. § 404.1520(d); Moon v. Sullivan, 923 F.2d 1175, 1181 (6th Cir.1990). Several of the listed impairments pertain to lung capacity. O'Connor failed to come up (or rather down) to the levels specified in these listings, other than the one for diffusing capacity, and perhaps on a holistic judgment of the state of his lungs this failure shows that his performance on the diffusion test does not establish total disability. But the regulations do not permit a holistic judgment against the applicant. To repeat, all that the record need show is one listed impairment. Period.

5 True, the test establishing the impairment must be a valid test. 42 U.S.C. § 423(d)(3); Muse v. Sullivan, 925 F.2d 785, 790 (5th Cir.1991) (per curiam). The government argues that the diffusion test result for O'Connor was invalid. It bases the argument on some enigmatic notations that appear on the test form. The argument misconceives the relationship between an administrative agency and a reviewing court. We have no authority to supply a ground for the agency's decision. SEC v. Chenery Corp., 318 U.S. 80, 94, 63 S.Ct. 454, 462, 87 L.Ed. 626 (1943); Brown v. Bowen, 794 F.2d 703, 708 n. 7 (D.C.Cir.1986); Pate v. Director, 834 F.2d 675, 676 (7th Cir.1987). The administrative law judge did not reject O'Connor's claim on the ground that the test result was invalid. He said that "recent pulmonary function testing has shown only

a mild restrictive defect." Either he overlooked the result of the diffusion test entirely, or he balanced that result against the results of the other tests; either way he was wrong and we cannot rectify the error by playing administrative law judge.

6 The administrative law judge's opinion is inadequate in another respect, the treatment of O'Connor's alcoholism. He pronounced O'Connor generally credible and apparently believed his testimony that he drinks two or three pints of hard liquor a day (with occasional heavy binges—once O'Connor was hospitalized after downing a half gallon of vodka). But he concluded that O'Connor's alcoholism was not disabling because it has not yet severely damaged his brain, as shown not only by the results of neurological tests but also by his ability to take care of himself, play cards, etc. This cannot be dispositive. The fact that an alcoholic has not yet been drinking to excess long enough to destroy his brain, and therefore can get through the day, does not establish that he is able to hold a job. Purter v. Heckler, 771 F.2d 682, 696–98 (3d Cir.1985); Cooper v. Bowen, 815 F.2d 557, 560–61 (9th Cir.1987). These decisions are, it is true, in tension with decisions such as Smith v. Secretary of Health & Human Services, 893 F.2d 106, 110 (6th Cir.1989), which insist that the applicant's drinking have "kept her from pursuing her normal day-to-day activities." But we do not think the latter decisions are sound. The conditions of work are not identical to those of home life. (Of course it is possible that O'Connor does all his drinking at night, but there is no evidence of this.) Another point ignored by the administrative law judge is that O'Connor's alcoholism interacts with his diabetes (and perhaps his other conditions—impaired lung capacity, hypertension, and what appears to be severe weight loss) to cause frequent hospitalizations.

7 *74 The regulations make clear that alcoholism is not a listed impairment, 20 C.F.R. § 404.1525(e), an impairment (as we said) that without more demonstrates total disability under the regulations. "Alcoholism" is a vague term that can mean simply drinking steadily to excess; the degree of excess and the stubbornness of the habit are critical to a decision whether it is totally disabling, and that is a case-specific inquiry. If alcoholism causes physical or behavior changes sufficient to satisfy the criteria for a listed impairment, then the applicant is entitled to benefits without having to make a further showing. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.09. If not, not. But of course impairments that are not so grave and irremediable that they can be categorically pronounced permanently disabling are not thereby rendered irrelevant to a judgment of disability. They just require a further inquiry. Moore v. Secretary of U.S. Dept. of Health & Human Services, 778 F.2d 127, 131–33 (2d Cir.1985), by citing as if relevant a decision construing an earlier regulation, more restrictive than the present one, which made alcoholism a ground for finding disability only if it produced one or more listed impairments, Carter v. Schweiker, 649 F.2d 937, 941 (2d Cir.1981), could be read to have interpreted the present regulation, 20 C.F.R. § 404.1525(e), as having the same meaning. But the present regulation is different. It says merely that alcoholism is not a listed impairment. Anyway the applicant in Moore was arguing only that his alcoholism had produced a listed impairment (the court agreed and reversed). The question of the significance of alcoholism when it does not cause a listed impairment was not presented.

The administrative law judge did not make the error of thinking that alcoholism is irrelevant to disability unless it causes a listed impairment. Having properly rejected alcoholism as a listed impairment he, also properly, proceeded to the next step in the disability algorithm and inquired whether O'Connor's impairments, singly or in combination, permanently disabled him from doing his past work as a factory assembler and janitor. He found that they did. This brought him to the question whether O'Connor's residual physical and mental capacity was sufficient to permit him to do any other work. The administrative law judge concluded that, given O'Connor's age and other work-related characteristics, as well as his physical and mental impairments, he had sufficient residual capacity to do light unskilled work. It was at this stage of the inquiry that the administrative law judge considered the bearing of O'Connor's alcoholism, but he considered it mechanically, inquiring only whether the alcoholism had so impaired O'Connor's brain that he could no longer live on his own. That was the wrong inquiry. The question is not whether one can survive in a noninstitutional setting—feed oneself, socialize, etc.—but whether one can work. They are not identical questions. A higher degree of sobriety is required to hold a job than to stay out of an institution for the mentally incompetent. If, like the applicant in Ferguson v. Heckler, 750 F.2d 503, 505 (5th Cir.1985), O'Connor is unable to control his drinking, and unable to do even light work unless he does control his drinking, then he is totally disabled. The administrative law judge, as in Cannon v. Harris, 651 F.2d 513, 519 (7th Cir.1981) (per curiam), failed to investigate these questions. See also Petition of Sullivan, 904 F.2d 826, 843 (3d Cir.1990).

The judgment upholding the denial of disability benefits is reversed and the matter is returned to the Social Security Administration for further proceedings consistent with this opinion.

REVERSED, AND REMANDED WITH DIRECTIONS.

ADDITIONAL CASE:

Hamer v. Sidway; 124 N.Y. 538, 27 N.E. 256 (1891)

Synopsis

Appeal from an order of the general term of the supreme court in the fourth judicial department, reversing a judgment entered on the decision of the court at special term in the county clerk's office of Chemung county on the 1st day of October, 1889. The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests, he promised his nephew that if he would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became 21 years of age, he would pay him the sum of $5,000. The nephew assented thereto, and fully performed the conditions inducing the promise. When the nephew arrived at the age of 21 years, and on the 31st day of January, 1875, he wrote to his uncle, informing him that he had performed his part of the agreement, and had thereby become entitled to the sum of $5,000. The uncle received the letter, and a few days later, and on the 6th day of February, he

wrote and mailed to his nephew the following letter: ‘Buffalo, Feb. 6, 1875. W. E. Story, Jr.—Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any was till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jack-plane many a day, butchered three or four years, then came to this city, and, after three months' perseverance, I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet, and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season of '49 and '52, and the deaths averaged 80 to 125 daily, and plenty of small-pox. I wanted to go home, but but Mr. Fisk, the gentleman I was working for, told me, if I left them, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are twenty-one, and you have many a thing to learn yet. This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. One thing more. Twenty-one years ago I bought you 15 sheep. These sheep were put out to double every four years. I kept track of them the first eight years. I have not heard much about them since. Your father and grandfather promised me that they would look after them till you were of age. Have they done so? I hope they have. By this time you have between five and six hundred sheep, worth a nice little income this spring. Willie, I have said much more than I expectied to. Hope you can make out what I have written. To-day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better to day. Think I will get out next week. You need not mention to father, as he always worries about small matters. Truly yours, W. E. STORY. P. S. You can consider this money on interest.’ The nephew received the letter, and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letter. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest.

Opinion

544 PARKER, J., (*after stating the facts as above*.)

The question which provoked the most discussion by counsel on this appeal, **257 and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator, William E. Story, became indebted to his nephew, William E. Story, 2d, on his twenty-first birthday in the sum of $5,000. The trial court found as a fact that ‘on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. *545 Story, 2d, that if he would refrain from drinking liquor using tobacco, swearing, and playing cards or billiards for money until should become twenty-one years of age, then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed,’ and that he ‘in all things fully performed his part of said agreement.’ The defendant contends that the contract was without consideration to support it, and therefore invalid. He asserts that the promisee, by refraining from the use of liquor and tobacco, was not harmed, but benefited; that that which he did was best for him to do, independently of his uncle's promise,—and insists that it follows that, unless the promisor was benefited, the contract was without consideration,—a contention which, if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was in fact of such benefit to him as to leave no consideration to

support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The exchequer chamber in 1875 defined 'consideration' as follows: 'A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.' Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to any one. It is enough that something is promised, done, forborne, or suffered by the party to whom the promise is made as consideration for the promise made to him.' Anson, Cont. 63. 'In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' Pars. Cont. *444. 'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' 2 Kent, Comm. (12th Ed.) *465. Pollock in his work on Contracts, (page 166,) after citing the definition given by the exchequer chamber, already quoted, *546 says: 'The second branch of this judicial description is really the most important one. 'Consideration' means not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first.' Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now, having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it; but, were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been, support the position we have taken. In Shadwell v. Shadwell, 9 C. B. (N. S.) 159, an uncle wrote to his nephew as follows: 'My dear Lancey: I am so glad to hear of your intended marriage with Ellen Nicholl, and, as I promised to assist you at starting, I am happy to tell you that I will pay you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall receive or require. Your affectionate uncle, CHARLES SHADWELL.' It was held that the promise was binding, and made upon good consideration. *547 In Lakota v. Newton, (an unreported case in the superior court of Worcester, Mass.,) the complaint averred defendant's promise that 'if you [meaning the plaintiff] will leave off drinking for a year I will give you $100,' plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred, on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled. In Talbott v. Stemmons, 12 S. W. Rep. 297, (a Kentucky case, not yet officially reported,) the step-grandmother of the plaintiff made with him the following agreement: 'I do promise and bind myself to give my grandson Albert R. Talbott $500 at my death if he will never take another chew of tobacco or smoke another cigar during my life, from this date up to my death; and if he breaks this pledge he is to refund double the amount to his mother.' The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained, and an appeal taken therefrom to the court of appeals, where the decision of the court below was reversed. In the opinion of the court it is said that 'the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff, and not forbidden by law. The abandonment of its use may have saved him money, or contributed to his health; nevertheless, the surrender of that right caused the promise, and, having the right to contract with reference to the subjectmatter, the abandonment of the use was a sufficient consideration to uphold the **258 promise.' Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes, 60 Mo. 249. The cases cited by the defendant on this question are not in point. In Mallory v. Gillett, 21 N. Y. 412; Belknap v. Bender, 74 N. Y. 446; and Berry v. Brown, 107 N. Y. 659, 14 N. E. Rep. 289,—the promise was in contravention of that provision of the statute of frauds which declares void all promises to answer for the debts of third persons unless reduced

to writing. In Beaumont *548 v. Reeve, Shir. Lead. Cas. 7, and Porterfield v. Butler, 47 Miss. 165, the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In Duvoll v. Wilson, 9 Barb. 487, and Wilbur v. Warren, 104 N. Y. 192, 10 N. E. Rep. 263, the proposition involved was whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In Vanderbilt v. Schreyer, 91 N. Y. 392, the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guaranty its payment, which was done. It was held that the guaranty could not be enforced for want of consideration; for in building the house the plaintiff only did that which he had contracted to do. And in Robinson v. Jewett, 116 N. Y. 40, 22 N. E. Rep. 224, the court simply held that 'the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract.' It will be observed that the agreement which we have been considering was within the condemnation of the statute of frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the statute of frauds, and therefore such defense could not be made available unless set up in the answer. Porter v. Wormser, 94 N. Y. 431, 450. This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $5,000; and, if this action were founded on that contract, it would be barred by the statute of limitations, which has been pleaded, but on that date the nephew wrote to his uncle as follows: *549 'Dear Uncle: I am 21 years old to-day, and I am now my own boss; and I believe, according to agreement, that there is due me $5,000. I have lived up to the contract to the letter in every sense of the word.' A few days later, and on February 6th, the uncle replied, and, so far as it is material to this controversy, the reply is as follows: 'Dear Nephew: Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $5,000, as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right, and lose this money in one year. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time; and you are quite welcome to the money. Hope you will make good use of it. * * * W. E. STORY. P. S. You can consider this money on interest.' The trial court found as a fact that 'said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter.' And further, 'that afterwards, on the 1st day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred, and assigned all his right, title, and interest in and to said sum of $5,000 to his wife, Libbie H. Story, who thereafter duly sold, transferred, and assigned the same to the plaintiff in this action.' We must now consider the effect of the letter and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee *550 and *cestui que trust?* If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. Lewin, Trusts, 55. A person in the legal possession of money or property acknowledging a trust with the assent of the *cestui que trust* becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever if may have been, no longer controls. 2 Story, Eq. Jur., § 972. If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands, and stipulating for its investment on the creditor's account, will have the effect to create a trust. Day v. Roth, 18

N. Y. 448. It is essential that the letter, interpreted in the light of surrounding circumstances, must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. White v. Hoyt, 73 N. Y. 505, 511. At the time the uncle wrote the letter he was indebted to his nephew in the sum of $5,000, and payment **259 had been requested. The uncle, recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say, 'I will pay you at some other time,' or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had 'earned,' for him, so that when he should be capable of taking care of it he should receive it with interest. He said: 'I had the money in the bank the day you were 21 years old that I intend for you, and you shall have the money certain.' That he had set apart the money is further *551 evidenced by the next sentence: 'Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it.' Certainly the uncle must have intended that his nephew should understand that the promise not 'to interfere with this money' referred to the money in the bank, which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word 'trust,' or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: 'This money you have earned much easier than I did. * * * You are quite welcome to. I had it in the bank the day you were 21 years old, and don't intend to interfere with it in any way until I think you are capable of taking care of it; and the sooner that time comes the better it will please me.' In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented. The learned judge who wrote the opinion of the general term seems to have taken the view that the trust was executed during the life-time of defendant's testator by payment to the nephew, but, as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment. The order appealed from should be reversed, and the judgment of the special term affirmed, with costs payable out of the estate. All concur.

Chapter 9 The Agreement

Objective Intention

Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954)

Buchanan, J.

This suit was instituted by W. O. Lucy and J. C. Lucy, complainants, against A. H. Zehmer and Ida S. Zehmer, his wife, defendants, to have specific performance of a contract by which it was alleged the Zehmers had sold to W. O. Lucy a tract of land owned by A. H. Zehmer in Dinwiddie county containing 471.6 acres, more or less, known as the Ferguson farm, for $50,000. J. C. Lucy, the other complainant, is a brother of W. O. Lucy, to whom W. O. Lucy transferred a half interest in his alleged purchase.

The instrument sought to be enforced was written by A. H. Zehmer on December 20, 1952, in these words: "We hereby agree to sell to W. O. Lucy the Ferguson farm complete for $50,000.00, title satisfactory to buyer," and signed by the defendants, A. H. Zehmer and Ida S. Zehmer.

The answer of A. H. Zehmer admitted that at the time mentioned W. O. Lucy offered him $50,000 cash for the farm, but that he, Zehmer, considered that the offer was made in jest; that so thinking, and both he and Lucy having had several drinks, he wrote out "the memorandum" quoted above and induced his wife to sign it; that he did not deliver the memorandum to Lucy, but that Lucy picked it up, read it, put it in his pocket, attempted to offer Zehmer $5 to bind the bargain, which Zehmer refused to accept, and realizing for the first time that Lucy was serious, Zehmer assured him that he had no intention of selling the farm and that the whole matter was a joke. Lucy left the premises insisting that he had purchased the farm....

In his testimony Zehmer claimed that he "was high as a Georgia pine," and that the transaction "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." That claim is inconsistent with his attempt to testify in great detail as to what was said and what was done....

If it be assumed, contrary to what we think the evidence shows, that Zehmer was jesting about selling his farm to Lucy and that the transaction was intended by him to be a joke, nevertheless the evidence shows that Lucy did not so understand it but considered it to be a serious business transaction and the contract to be binding on the Zehmers as well as on himself. The very next day he arranged with his brother to put up half the money and take a half interest in the land. The day after that he employed an attorney to examine the title. The next night, Tuesday, he was back at Zehmer's place and there Zehmer told him for the first time, Lucy said, that he wasn't going to sell and he told Zehmer, "You know you sold that place fair and square." After receiving the report from his attorney that the title was good he wrote to Zehmer that he was ready to close the deal.

Not only did Lucy actually believe, but the evidence shows he was warranted in believing, that the contract represented a serious business transaction and a good faith sale and purchase of the farm.

In the field of contracts, as generally elsewhere, "We must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts."

At no time prior to the execution of the contract had Zehmer indicated to Lucy by word or act that he was not in earnest about selling the farm. They had argued about it and discussed its terms, as Zehmer admitted, for a long time. Lucy testified that if there was any jesting it was about paying $50,000 that night. The contract and the evidence show that he was not expected to pay the money that night. Zehmer said that after the writing was signed he laid it down on the counter in front of Lucy. Lucy said Zehmer handed it to him. In any event there had been what appeared to be a good faith offer and a good faith acceptance, followed by the execution and apparent delivery of a written contract. Both said that Lucy put the writing in his pocket and then offered Zehmer $5 to seal the bargain. Not until then, even under the defendants' evidence, was anything said or done to indicate that the matter was a joke. Both of the Zehmers testified that when Zehmer asked his wife to sign he whispered that it was a joke so Lucy wouldn't hear and that it was not intended that he should hear.

The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of one of the parties have but one reasonable meaning, his undisclosed intention is immaterial except when an unreasonable meaning which he attaches to his manifestations is known to the other party.

"* * * The law, therefore, judges of an agreement between two persons exclusively from those expressions of their intentions which are communicated between them. * * *." [Citation]

An agreement or mutual assent is of course essential to a valid contract but the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. If his words and acts, judged by a reasonable standard, manifest an intention to agree, it is immaterial what may be the real but unexpressed state of his mind.

So a person cannot set up that he was merely jesting when his conduct and words would warrant a reasonable person in believing that he intended a real agreement.

Whether the writing signed by the defendants and now sought to be enforced by the complainants was the result of a serious offer by Lucy and a serious acceptance by the defendants, or was a serious offer by Lucy and an acceptance in secret jest by the defendants, in either event it constituted a binding contract of sale between the parties.…

Reversed and remanded.

Case Questions

1. What objective evidence was there to support the defendants' contention that they were just kidding when they agreed to sell the farm?
2. Suppose the defendants really did think the whole thing was a kind of joke. Would that make any difference?
3. As a matter of public policy, why does the law use an objective standard to determine the seriousness of intention, instead of a subjective standard?
4. It's 85 degrees in July and 5:00 p.m., quitting time. The battery in Mary's car is out of juice, again. Mary says, "Arrgh! I will sell this stupid car for $50!" Jason, walking to his car nearby, whips out his checkbook and says, "It's a deal. Leave your car here. I'll give you a ride home and pick up your car after you give me the title." Do the parties have a contract?

Limitation on Damages: Mitigation of Damages

Parker v. Twentieth Century-Fox Film Corp., 3 Cal.3d 176, 474 P. 2d 689 (1970)

(Hardbound chapter 16 Shirley MacLaine Parker v. Twentieth Century-Fox Film Corporation 474 P.2d 689 (Cal. 1970))

Burke, Justice.

Defendant Twentieth Century-Fox Film Corporation appeals from a summary judgment granting to plaintiff the recovery of agreed compensation under a written contract for her services as an actress in a motion picture. As will appear, we have concluded that the trial court correctly ruled in plaintiff's favor and that the judgment should be affirmed.

Plaintiff is well known as an actress.…Under the contract, dated August 6, 1965, plaintiff was to play the female lead in defendant's contemplated production of a motion picture entitled "Bloomer Girl." The contract provided that defendant would pay plaintiff a minimum "guaranteed compensation" of $53,571.42 per week for 14 weeks commencing May 23, 1966, for a total of $750,000 [about $5,048,000 in 2010 dollars]. Prior to May 1966 defendant decided not to produce the picture and by a letter dated April 4, 1966, it notified plaintiff of that decision and that it would not "comply with our obligations to you under" the written contract.

By the same letter and with the professed purpose "to avoid any damage to you," defendant instead offered to employ plaintiff as the leading actress in another film tentatively entitled "Big Country, Big Man" (hereinafter, "Big Country"). The compensation offered was identical, as were 31 of the 34 numbered provisions or articles of the original contract. Unlike "Bloomer Girl," however, which was to have been a musical production, "Big Country" was a dramatic "western type" movie. "Bloomer Girl" was to have been filmed in California; "Big Country" was to be produced in Australia. Also, certain terms in the proffered contract varied from those of the original. Plaintiff was given one week within which to accept; she did not and the offer lapsed. Plaintiff then commenced this action seeking recovery of the agreed guaranteed compensation.

The complaint sets forth two causes of action. The first is for money due under the contract; the second, based upon the same allegations as the first, is for damages resulting from defendant's breach of contract. Defendant in its answer admits the existence and validity of the contract, that plaintiff complied with all the conditions, covenants and promises and stood ready to complete the performance, and that defendant breached and "anticipatorily repudiated" the contract. It denies, however, that any money is due to plaintiff either under the contract or as a result of its breach, and pleads as an affirmative defense to both causes of action plaintiff's allegedly deliberate failure to mitigate damages, asserting that she unreasonably refused to accept its offer of the leading role in "Big Country."

Plaintiff moved for summary judgment…[T]he motion was granted…for $750,000 plus interest…in plaintiff's favor. This appeal by defendant followed.…

The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. [Citation] However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages. [Citations]

In the present case defendant has raised no issue of reasonableness of efforts by plaintiff to obtain other employment; the sole issue is whether plaintiff's refusal of defendant's substitute offer of "Big Country" may be used in mitigation. Nor, if the "Big Country" offer was of employment different or inferior when compared with the original "Bloomer Girl" employment, is there an issue as to whether or not plaintiff acted reasonably in refusing the substitute offer. Despite defendant's arguments to the contrary, no case cited or which our research has discovered holds or suggests that reasonableness is an element of a wrongfully discharged employee's option to reject, or fail to seek, different or inferior employment lest the possible earnings therefrom be charged against him in mitigation of damages.

Applying the foregoing rules to the record in the present case, with all intendments in favor of the party opposing the summary judgment motion—here, defendant—it is clear that the trial court correctly ruled that plaintiff's failure to accept defendant's tendered substitute employment could not be applied in mitigation of damages because the offer of the "Big Country" lead was of employment both different and inferior, and that no factual dispute was presented on that issue. The mere circumstance that "Bloomer Girl" was to be a musical review calling upon plaintiff's talents as a dancer as well as an actress, and was to be produced in the City of Los Angeles, whereas "Big Country" was a straight dramatic role in a "Western Type" story taking place in an opal mine in Australia, demonstrates the difference in kind between the two employments; the female lead as a dramatic actress in a western style motion picture can by no stretch of imagination be considered the equivalent of or substantially similar to the lead in a song-and-dance production.

Additionally, the substitute "Big Country" offer proposed to eliminate or impair the director and screenplay approvals accorded to plaintiff under the original "Bloomer Girl" contract, and thus constituted an offer of inferior employment. No expertise or judicial notice is required in order to hold that the deprivation or infringement of an employee's rights held under an original employment contract converts the available "other employment" relied upon by the employer to mitigate damages, into inferior employment which the employee need not seek or accept. [Citation]

In view of the determination that defendant failed to present any facts showing the existence of a factual issue with respect to its sole defense—plaintiff's rejection of its substitute employment offer in mitigation of damages—we need not consider plaintiff's further contention that for various reasons, including the provisions of the original contract set forth in footnote 1, Ante, plaintiff was excused from attempting to mitigate damages.

The judgment is affirmed.

Case Questions

1. Why did Ms. MacLaine refuse to accept the employment opportunity offered by the defendant?
2. Why did the defendant think it should not be liable for any damages as a result of its admitted breach of the original contract?
3. Who has the burden of proof on mitigation issues—who has to show that no mitigation occurred?
4. Express the controlling rule of law out of this case.

Chapter 10: Consideration Cases

Consideration for an Option

Board of Control of Eastern Michigan University v. Burgess

206 N.W.2d 256 (Mich. 1973)

Burns, J.

On February 15, 1966, defendant signed a document which purported to grant to plaintiff a 60-day option to purchase defendant's home. That document, which was drafted by plaintiff's agent, acknowledged receipt by defendant of "One and no/100 ($1.00) Dollar and other valuable consideration." Plaintiff concedes that neither the one dollar nor any other consideration was ever paid or even tendered to defendant. On April 14, 1966, plaintiff delivered to defendant written notice of its intention to exercise the option. On the closing date defendant rejected plaintiff's tender of the purchase price. Thereupon, plaintiff commenced this action for specific performance.

At trial defendant claimed that the purported option was void for want of consideration, that any underlying offer by defendant had been revoked prior to acceptance by plaintiff, and that the agreed purchase price was the product of fraud and mutual mistake. The trial judge concluded that no fraud was involved, and that any mutual mistake was not material. He also held that defendant's acknowledgment of receipt of consideration bars any subsequent contention to the contrary. Accordingly, the trial judge entered judgment for plaintiff.

Options for the purchase of land, if based on valid consideration, are contracts which may be specifically enforced. [Citations] Conversely, that which purports to be an option, but which is not based on valid consideration, is not a contract and will not be enforced. [Citations] One dollar is valid consideration for an option to purchase land, provided the dollar is paid or at least tendered. [Citations] In the instant case defendant received no consideration for the purported option of February 15, 1966.

A written acknowledgment of receipt of consideration merely creates a rebuttable presumption that consideration has, in fact, passed. Neither the parol evidence rule nor the doctrine of estoppel bars the presentation of evidence to contradict any such acknowledgment. [Citation]

It is our opinion that the document signed by defendant on February 15, 1966, is not an enforceable option, and that defendant is not barred from so asserting.

The trial court premised its holding to the contrary on *Lawrence v. McCalmont*…(1844). That case is significantly distinguishable from the instant case. Mr. Justice Story held that '(t)he guarantor acknowledged the receipt of one dollar, and is now estopped to deny it.' However, in reliance upon the guaranty substantial credit had been extended to the guarantor's sons. The guarantor had received everything she bargained for, save one dollar. In the instant case defendant claims that she never received any of the consideration promised her.

That which purports to be an option for the purchase of land, but which is not based on valid consideration, is a simple offer to sell the same land. [Citation] An option is a contract collateral to an offer to sell whereby the offer is made irrevocable for a specified period. [Citation] Ordinarily, an

offer is revocable at the will of the offeror. Accordingly, a failure of consideration affects only the collateral contract to keep the offer open, not the underlying offer.

A simple offer may be revoked for any reason or for no reason by the offeror at any time prior to its acceptance by the offeree. [Citation] Thus, the question in this case becomes, "Did defendant effectively revoke her offer to sell before plaintiff accepted that offer?"

Defendant testified that within hours of signing the purported option she telephoned plaintiff's agent and informed him that she would not abide by the option unless the purchase price was increased. Defendant also testified that when plaintiff's agent delivered to her on April 14, 1966, plaintiff's notice of its intention to exercise the purported option, she told him that "the option was off."

Plaintiff's agent testified that defendant did not communicate to him any dissatisfaction until sometime in July, 1966.

If defendant is telling the truth, she effectively revoked her offer several weeks before plaintiff accepted that offer, and no contract of sale was created. If plaintiff's agent is telling the truth, defendant's offer was still open when plaintiff accepted that offer, and an enforceable contract was created. The trial judge thought it unnecessary to resolve this particular dispute. In light of our holding the dispute must be resolved.

An appellate court cannot assess the credibility of witnesses. We have neither seen nor heard them testify. [Citation] Accordingly, we remand this case to the trial court for additional findings of fact based on the record already before the court. * * *

Reversed and remanded for proceedings consistent with this opinion. Costs to defendant.

Case Questions

1. Why did the lower court decide the option given by the defendant was valid?
2. Why did the appeals court find the option invalid?
3. The case was remanded. On retrial, how could the plaintiff (the university) still win?
4. It was not disputed that the defendant signed the purported option. Is it right that she should get out of it merely because she didn't really get the $1.00?

Chapters 11 and 12

No Cases

CHAPTER 13: Form and Meaning

Fairmount Glass Works v. Crunden-Martin woodenware Co., 106 Ky. 659, 51 S.W.196 (1899)

CHAPTER 14

NO CASES

CHAPTER 15

No Cases

CHAPTER 16

Jacob & Young v. Kent, 230 N. Y. 239, 129 N.E. 2d 889, 23 A.L.R.1429 (1921)

Chapter 17 Introduction to Sales and Leases

OREGON REVISED STATUTES-ANNOTATED

https://www.oregonlegislature.gov/bills_laws/Pages/Oregon-Laws.aspx

https://www.oregonlegislature.gov/bills_laws/Pages/ORS.aspx

https://www.oregonlaws.org/oregon_revised_statutes

Mixed Goods and Services Contracts: The "Predominant Factor" Test

Pittsley v. Houser, *875 P.2d 232 (Idaho App. 1994)*

Swanstrom, J.

In September of 1988, Jane Pittsley contracted with Hilton Contract Carpet Co. (Hilton) for the installation of carpet in her home. The total contract price was $4,402 [about $8,800 in 2016 dollars]. Hilton paid the installers $700 to put the carpet in Pittsley's home. Following installation, Pittsley complained to Hilton that some seams were visible, that gaps appeared, that the carpet did not lay flat in all areas, and that it failed to reach the wall in certain locations. Although Hilton made various attempts to fix the installation, by attempting to stretch the carpet and other methods, Pittsley was not satisfied with the work. Eventually, Pittsley refused any further efforts to fix the carpet. Pittsley initially paid Hilton $3,500 on the contract, but refused to pay the remaining balance of $902.

Pittsley later filed suit, seeking rescission of the contract, return of the $3,500 and incidental damages. Hilton answered and counterclaimed for the balance remaining on the contract. The matter was heard by a magistrate sitting without a jury. The magistrate found that there were

defects in the installation and that the carpet had been installed in an unworkmanlike manner. The magistrate also found that there was a lack of evidence on damages. The trial was continued to allow the parties to procure evidence on the amount of damages incurred by Pittsley. Following this continuance, Pittsley did not introduce any further evidence of damages, though witnesses for Hilton estimated repair costs at $250.

Although Pittsley had asked for rescission of the contract and a refund of her money, the magistrate determined that rescission, as an equitable remedy, was only available when one party committed a breach so material that it destroyed the entire purpose of the contract. Because the only estimate of damages was for $250, the magistrate ruled rescission would not be a proper remedy. Instead, the magistrate awarded Pittsley $250 damages plus $150 she expended in moving furniture prior to Hilton's attempt to repair the carpet. On the counterclaim, the magistrate awarded Hilton the $902 remaining on the contract. Additionally, both parties had requested attorney fees in the action. The magistrate determined that both parties had prevailed and therefore awarded both parties their attorney fees.

Following this decision, Pittsley appealed to the district court, claiming that the transaction involved was governed by the Idaho Uniform Commercial Code (UCC), [Citation]. Pittsley argued that if the UCC had been properly applied, a different result would have been reached. The district court agreed with Pittsley's argument, reversing and remanding the case to the magistrate to make additional findings of fact and to apply the UCC to the transaction. * * *

Hilton now appeals the decision of the district court. Hilton claims that Pittsley failed to allege or argue the UCC in either her pleadings or at trial. Even if application of the UCC was properly raised, Hilton argues that there were no defects in the goods that were the subject of the transaction, only in the installation, making application of the UCC inappropriate. * * *

The single question upon which this appeal depends is whether the UCC is applicable to the subject transaction. If the underlying transaction involved the sale of "goods," then the UCC would apply. If the transaction did not involve goods, but rather was for services, then application of the UCC would be erroneous.

Idaho Code § 28–2-105(1) defines "goods" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale. . . ." Although there is little dispute that carpets are "goods," the transaction in this case also involved installation, a service. Such hybrid transactions, involving both goods and services, raise difficult questions about the applicability of the UCC. Two lines of authority have emerged to deal with such situations.

The first line of authority, and the majority position, utilizes the "predominant factor" test. The Ninth Circuit, applying the Idaho Uniform Commercial Code to the subject transaction, restated the predominant factor test as:

The test for inclusion or exclusion is not whether they are mixed, but, granting that they are mixed, whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g., installation of a water heater in a bathroom).

[Citations]. This test essentially involves consideration of the contract in its entirety, applying the UCC to the entire contract or not at all.

The second line of authority, which Hilton urges us to adopt, allows the contract to be severed into different parts, applying the UCC to the goods involved in the contract, but not to the non-goods involved, including services as well as other non-goods assets and property. Thus, an action focusing on defects or problems with the goods themselves would be covered by the UCC, while a suit based on the service provided or some other non-goods aspect would not be covered by the UCC. * * *

We believe the predominant factor test is the more prudent rule. Severing contracts into various parts, attempting to label each as goods or non-goods and applying different law to each separate part clearly contravenes the UCC's declared purpose "to simplify, clarify and modernize the law governing commercial transactions." I.C. § 28–1–102(2)(a). As the Supreme Court of Tennessee suggested in [Citation], such a rule would, in many contexts, present "difficult and in some instances insurmountable problems of proof in segregating assets and determining their respective values at the time of the original contract and at the time of resale, in order to apply two different measures of damages."

Applying the predominant factor test to the case before us, we conclude that the UCC was applicable to the subject transaction. The record indicates that the contract between the parties called for "175 yds Masterpiece # 2122-Installed" for a price of $4,319.50 [about $8,700 in 2016 dollars]. There was an additional charge for removing the existing carpet. The record indicates that Hilton paid the installers $700 for the work done in laying Pittsley's carpet. It appears that Pittsley entered into this contract for the purpose of obtaining carpet of a certain quality and color. It does not appear that the installation, either who would provide it or the nature of the work, was a factor in inducing Pittsley to choose Hilton as the carpet supplier. On these facts, we conclude that the sale of the carpet was the predominant factor in the contract, with the installation being merely incidental to the purchase. Therefore, in failing to consider the UCC, the magistrate did not apply the correct legal principles to the facts as found. We must therefore vacate the judgment and remand for further findings of fact and application of the UCC to the subject transaction.

Case Questions

1. You may recall in Chapter 15 "Discharge of Obligations" the discussion of the "substantial performance" doctrine. It says that if a common-law contract is not completely, but still "substantially," performed, the nonbreaching party still owes something on the contract. And it was noted there that under the UCC, there is no such doctrine. Instead, the "perfect tender" rule applies: the goods delivered by the seller must be exactly right. Does the distinction between the substantial performance doctrine and the perfect tender rule shed light on what difference applying the common law or the UCC would make in this case?
2. If Pittsley won on remand, what would she get?
3. In discussing the predominant factor test, the court here quotes from the Ninth Circuit, a *federal* court of appeals. What is a federal court doing making rules for a state court (the UCC is state law)?

"Merchants" under the UCC:

Goldkist, Inc. v. Brownlee, *355 S.E.2d 773 (Ga. App. 1987)*

Beasley, J.

The question is whether the two defendant farmers, who as a partnership both grew and sold their crops, were established by the undisputed facts as not being "merchants" as a matter of law, according to the definition in [Georgia UCC 2-104(1)]. * * *

Appellees admit that their crops are "goods" as defined in [2-105]. The record establishes the following facts. The partnership had been operating the row crop farming business for 14 years, producing peanuts, soybeans, corn, milo, and wheat on 1,350 acres, and selling the crops.

It is also established without dispute that Barney Brownlee, whose deposition was taken, was familiar with the marketing procedure of "booking" crops, which sometimes occurred over the phone between the farmer and the buyer, rather than in person, and a written contract would be signed later. He periodically called plaintiff's agent to check the price, which fluctuated. If the price met his approval, he sold soybeans. At this time the partnership still had some of its 1982 crop in storage, and the price was rising slowly. Mr. Brownlee received a written confirmation in the mail concerning a sale of soybeans and did not contact plaintiff to contest it but simply did nothing. In addition to the agricultural business, Brownlee operated a gasoline service station. * * *

In dispute are the facts with respect to whether or not an oral contract was made between Barney Brownlee for the partnership and agent Harrell for the buyer in a July 22 telephone conversation. The plaintiff's evidence was that it occurred and that it was discussed soon thereafter with Brownlee at the service station on two different occasions, when he acknowledged it, albeit reluctantly, because the market price of soybeans had risen. Mr. Brownlee denies booking the soybeans and denies the nature of the conversations at his service station with Harrell and the buyer's manager….

Whether or not the farmers in this case are "merchants" as a matter of law, which is not before us, the evidence does not demand a conclusion that they are outside of that category which is excepted from the requirement of a signed writing to bind a buyer and seller of goods. * * * To allow a farmer who deals in crops of the kind at issue, or who otherwise comes within the definition of "merchant" in [UCC] 2-104(1), to renege on a confirmed oral booking for the sale of crops, would result in a fraud on the buyer. The farmer could abide by the booking if the price thereafter declined but reject it if the price rose; the buyer, on the other hand, would be forced to sell the crop following the booking at its peril, or wait until the farmer decides whether to honor the booking or not.

Defendants' narrow construction of "merchant" would, given the booking procedure used for the sale of farm products, thus guarantee to the farmers the best of both possible worlds (fulfill booking if price goes down after booking and reject it if price improves) and to the buyers the worst of both possible worlds. On the other hand, construing "merchants" in [UCC] 2-104(1) as not excluding as a matter of law farmers such as the ones in this case, protects them equally as well as the buyer. If the market price declines after the booking, they are assured of the higher booking price; the buyer cannot renege, as [UCC]2-201(2) would apply.

In giving this construction to the statute, we are persuaded by [Citation], supra, and the analyses provided in the following cases from other states: [Citations]. By the same token, we reject the narrow construction given in other states' cases: [Citations]. We believe this is the proper construction to give the two statutes, [UCC 2-104(1) and 2-201(2)], as taken together they are thus further branches stemming from the centuries-old simple legal idea *pacta servanda sunt*—agreements are to be kept. So construed, they evince the legislative intent to enforce the accepted practices of the marketplace among those who frequent it.

Judgment reversed. [Four justices concurred with Justice Beasley].

Benham, J., dissenting.

Because I cannot agree with the majority's conclusion that appellees are merchants, I must respectfully dissent.

* * * The validity of [plaintiff's] argument, that sending a confirmation within a reasonable time makes enforceable a contract even though the statute of frauds has not been satisfied, rests upon a showing that the contract was "[b]etween merchants." "Between merchants" is statutorily defined in the Uniform Commercial Code as meaning "any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants" [2-104(3)]. "'Merchant' means a person [1] who deals in goods of the kind or [2] otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or [3] to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill" [Citation]. Whether [plaintiff] is a merchant is not questioned here; the question is whether, under the facts in the record, [defendant]/farmers are merchants. * * *

The Official Comment to § 2-104 of the U.C.C. (codified in Georgia)…states: "This Article assumes that transactions between professionals in a given field require special and clear rules which may not apply to a casual or inexperienced seller or buyer. * * * This section lays the foundation of this policy by defining those who are to be regarded as professionals or 'merchants' and by stating when a transaction is deemed to be 'between merchants.' The term 'merchant' as defined here roots in the 'law merchant' concept of a professional in business." As noted by the Supreme Court of Kansas in [Citation] (1976): "The concept of professionalism is heavy in determining who is a merchant under the statute. The writers of the official UCC comment virtually equate professionals with merchants—the casual or inexperienced buyer or seller is not to be held to the standard set for the professional in business. The defined term 'between merchants,' used in the exception proviso to the statute of frauds, contemplates the knowledge and skill of professionals on each side of the transaction." The Supreme Court of Iowa [concurs in cases cited]. Where, as here, the undisputed evidence is that the farmer's sole experience in the marketplace consists of selling the crops he has grown, the courts of several of our sister states have concluded that the farmer is not a merchant. [Citations]. Just because appellee Barney Brownlee kept "conversant with the current price of [soybeans] and planned to market it to his advantage does not necessarily make him a 'merchant.' It is but natural for anyone who desires to sell anything he owns to negotiate and get the best price obtainable. If this would make one a 'merchant,' then practically anyone who sold anything would be deemed a merchant, hence would be an exception under the statute[,] and the need for a contract in writing could be eliminated in most any kind of a sale." [Citation]

It is also my opinion that the record does not reflect that appellees "dealt" in soybeans, or that through their occupation, they held themselves out as having knowledge or skill peculiar to the practices or goods involved in the transaction. See [UCC] 2-104(1). "[A]lthough a farmer may well possess special knowledge or skill with respect to the production of a crop, the term 'merchant,' as used in the Uniform Commercial Code, contemplates special knowledge and skill associated with the marketplace. As to the area of farm crops, this special skill or knowledge means, for instance, special skill or knowledge associated with the operation of the commodities market. It is inconceivable that the drafters of the Uniform Commercial Code intended to place the average farmer, who merely grows his yearly crop and sells it to the local elevator, etc., on equal footing with the professional commodities dealer whose sole business is the buying and selling of farm commodities" [Citations]. If one who buys or sells something on an annual basis is a merchant, then the annual purchaser of a new automobile is a merchant who need not sign a contract for the purchase in order for the contract to be enforceable. * * *

If these farmers are not merchants, a contract signed by both parties is necessary for enforcement. If the farmer signs a contract, he is liable for breach of contract if he fails to live up to its terms. If he does not sign the contract, he cannot seek enforcement of the terms of the purchaser's offer to buy. * * *

Because I find no evidence in the record that appellees meet the statutory qualifications as merchants, I would affirm the decision of the trial court. I am authorized to state that [three other justices] join in this dissent.

Case Questions

1. How is the UCC's ten-day-reply doctrine in issue here?
2. Five justices thought the farmers here should be classified as "merchants," and four of them thought otherwise. What argument did the majority have against calling the farmers "merchants"? What argument did the dissent have as to why they should not be called merchants?
3. Each side marshaled persuasive precedent from other jurisdictions to support its contention. As a matter of public policy, is one argument better than another?
4. What does the court mean when it says the defendants are not excluded from the definition of merchants "as a matter of law"?

Additional cases

Decatur Cooperative Ass'n v. Urban, 219 Kan. 171, 541 P.2d 323 (1976)

Meister v. Arden-Mayfair Inc., 276 Or. 517, 555P.2d 923 (1976)

Fallsview Glatt Kosher Caterers, Inc., v. Rosenfeld, WL 53623 (2005)

Mixed contracts Predominant purpose test:

Jannusch v. Naffziger (WL 54 0877 (Ill 2008) (See Beatty Text pp. 226 and 431)

Unconscionability:

W. L. May Co., Inc. v. Philco-Ford Corp, 273 Or. 701, 543.P2d 283 (1975)

Synopsis

Wholesale parts distributor brought action against manufacturer for damages arising out of termination of a distributorship contract between the parties. The Circuit Court, Multnomah County, Patrick E. Dooley, J., entered a judgment for the distributor, and the manufacturer appealed. The Supreme Court, Howell, J., held that plaintiff failed to show that provision in distributorship contract whih gave manufacturer option to repurchase any of its products sold to the distributor was unconscionable at the time of the formation of the contract within the meaning of the Uniform Commercial Code, that the purchase provision was not unduly oppressive, and that neither the distributor's complaint nor the theory under which the case was tried supported a finding for the distributor on a breach of the implied covenant of good faith and fair dealing on the part of the manufacturer

Opinion

HOWELL, Justice.

This is an action at law for damages arising out of the termination of a distributorship contract between the plaintiff, W. L. May Co., Inc., and the defendant, Philco-Ford Corporation. It was tried before the circuit court sitting without a jury. Defendant appeals from a judgment for plaintiff for $6,500.

*704 Plaintiff May Co., a wholesale parts distributor located in Portland, distributes the appliance parts of approximately 40 manufacturers to local servicemen and retail dealers. Plaintiff entered into a distributorship agreement with Philco in July, 1962. The agreement provided that either party could terminate at any time upon written notice of 90 days. Under the agreement, plaintiff was required to carry an 'adequate' inventory of Philco parts. The agreement also provided:

'* * *.

'15. Upon termination of this Agreement Distributor shall cease to be an authorized Philco Distributor and:

'* * *.

'(c) Distributor will resell and deliver to Philco upon demand, free and clear of all liens and encumbrances, such Philco Products and materials bearing Philco's name as Philco shall elect to repurchase, at a mutually agreed price but not in excess of Philco's current distributor price for said products and materials.'

The parties operated under this contract until April 1, 1971, at which time Philco gave plaintiff written notice of termination effective July 1, 1971. The termination was due to a change in Philco's parts distribution policy, and all independent Philco distributors were terminated at that tims.

Following notice of termination, Philco notified plaintiff that it did not intend to demand repurchase of any of its products which might remain after termination. Philco contended that the 90-day notice period allowed plaintiff 'adequate time to sell profitably' the Philco parts which remained on hand. However, plaintiff was unable to market most of its remaining Philco inventory during the 90-day period or thereafter.

Approximately one year later, plaintiff *705 requested that Philco buy back the remaining Philco inventory because it was impossible for plaintiff to dispose of it. Philco refused.

….

Thus, in determining whether the substantive contract provisions of a commercial contract are unconscionable, we look to the circumstances existing at the time of the execution of the contract and

examine the challenged provisions in the light of both *708 the general commercial background and the special commercial needs of the particular trade involved. See Division of Triple T Service, Inc. v. Mobil Oil Corp., 60 Misc.2d 720, 304 N.Y.S.2d 191, Aff'd 34 A.D.2d 618, 311 N.Y.S.2d 961 (1969). In order to prove the unconscionableness of the termination provisions of a contract between merchants, it must be shown that the terms of the agreement bear no reasonable relation to the business risks involved and are so one-sided as to be oppressive. See Central Ohio Co-op. Milk Producers Inc. v. Rowland, 29 Ohio App.2d 236, 281 N.E.2d 42 (1972).

We do not feel that plaintiff has shown that the repurchase provision was unconscionable within the meaning of s 2—302 at the time of the formation of the contract. Plaintiff has not shown that Philco's reasons for reserving a repurchase election in its distributorship agreements were not reasonably related to the business risks involved and to Philco's reasonable commercial interests at the time of eventual termination. Although Philco presented no evidence to explain its inclusion of the repurchase election, we are not persuaded that it is unreasonable per se for a manufacturer to reserve the right to refuse to repurchase at least portions of a distributor's inventory upon termination. It may be that Philco was able to insist upon this particular allocation of risks only because of its superiod bargaining power. However, under the Code, a bona fide allocation of risks will not be disturbed merely because one party had a superior bargaining position. See UCC s 2—302, Comment 1. It may also be noted that both parties to this particular contract were sophisticated business people. This is clearly not the case of an innocent consumer who has unsuspectingly signed an adhesion contract. Compare *709 Williams v. Walker-Thomas Furniture Co., 121 U.S.App.D.C. 315, 350 F.2d 445, 2 UCC Rep. 955 (1965). See also, Leff, Unconscionability and the Code—The Emperor's New Clause, 115 Pa.L.Rev. 485, 489—508 (1967).

We believe that neither plaintiff's complaint nor the theory under which this case was tried supports a finding for plaintiff based on a breach of the implied *712 covenant of good faith and fair dealing. Consequently, plaintiff is not entitled to recover **289 either the ‘value’ of the remaining Philco inventory or its cost to plaintiff.
Reversed with directions to enter a judgment for defendant

Columbia Nitrogen Corp., v. Royster Co., 451 F.2d 3 (4th CA 1971) (Trade practices and course of dealings).

Synopsis

Action for breach of contract for purchase of phosphate by plaintiff from defendant, wherein defendant asserted antitrust defense and counterclaim based on plaintiff's alleged reciprocal trade practices. The United States District Court for the Eastern District of Virginia, at Norfolk, John A. MacKenzie, J., entered judgment for plaintiff and defendant appealed. The Court of Appeals, Butzner, Circuit Judge, held that where sales contract did not expressly state that course of dealing and usage of trade could not be used to explain it, it was silent as to adjusting prices and quantities in declining market and default clause failed to state any consequences of buyer's failure to take delivery, general law of contracts permitting recovery of damages upon buyer's refusal to take delivery according to written provisions would not be applied and evidence that express price and quantity terms in contracts for materials in industry were mere projections to be adjusted according to market forces and that, in prior dealings, parties had deviated from stated amount or price was not inconsistent with contract and was admissible to establish rights upon buyer's refusal to take delivery. Judgment as to antitrust issues affirmed and judgment for plaintiff on contract vacated and case remanded.

Opinion

BUTZNER, Circuit Judge:
Columbia Nitrogen Corp. appeals a judgment in the amount of $750,000 in favor of F. S. **Royster** Guano Co. for breach of a contract for the sale of phosphate to **Columbia** by **Royster**. **Columbia** defended on the

grounds that the contract, construed in light of the usage of the trade and course of dealing, imposed no duty to accept at the quoted prices the minimum quantities stated in the contract. It also asserted an antitrust defense and counterclaim based on **Royster's** alleged reciprocal trade practices.[1] The district court excluded the evidence about course of dealing and usage of the trade. It submitted the antitrust issues based on coercive reciprocity to the jury, but refused to submit the alternative theory of non-coercive reciprocity. The jury found for **Royster** on both the contract claim and the antitrust counterclaim. We hold that **Columbia's** proffered evidence was improperly excluded and **Columbia** is entitled to a new trial on the contractual issues. With respect to the antitrust issues, we affirm.

I.

Royster manufactures and markets mixed fertilizers, the principal components of which are **nitrogen**, phosphate and potash. **Columbia** is primarily a producer of **nitrogen**, although it manufactures some mixed fertilizer. For several years **Royster** had been a major purchaser of **Columbia's** products, but **Columbia** had never been a significant customer of **Royster**. In the fall of 1966, **Royster** constructed a facility which enabled it to produce more phosphate than it needed in its own operations. After extensive negotiations, the companies executed a contract for **Royster's** sale of a minimum of 31,000 tons of phosphate each year for **three** years to **Columbia**, with an option to extend the term. The contract stated the price per ton, subject to an escalation clause dependent on production costs.[2]

	Minimum Tonnage Per Year
"Diammonium Phosphate 18-46-0	15,000
Granular Triple Superphosphate 0-46-0	15,000
Run-of-Pile Triple Superphosphate 0-46-0	1,000

*7 Phosphate prices soon plunged precipitously. Unable to resell the phosphate at a competitive price, **Columbia** ordered only part of the scheduled tonnage. At **Columbia's** request, **Royster** lowered its price for diammonium phosphate on shipments for **three** months in 1967, but specified that subsequent shipments would be at the original contract price. Even with this concession, **Royster's** price was still substantially above the market. As a result, **Columbia** ordered less than a tenth of the phosphate **Royster** was to ship in the first contract year. When pressed by **Royster**, **Columbia** offered to take the phosphate at the current market price and resell it without brokerage fee. **Royster**, however, insisted on the contract price. When **Columbia** refused delivery, **Royster** sold the unaccepted phosphate for **Columbia's** account at a price substantially below the contract price.

II.

Columbia assigns error to the pretrial ruling of the district court excluding all evidence on usage of the trade and course of dealing between the parties. It offered the testimony of witnesses with long experience in the trade that because of uncertain crop and weather conditions, farming practices, and government agricultural programs, express price and quantity terms in contracts for materials in the mixed fertilizer industry are mere projections to be adjusted according to market forces.[3]

*8 **Columbia** also offered proof of its business dealings with **Royster** over the six-year period preceding the phosphate contract. Since **Columbia** had not been a significant purchaser of **Royster's** products, these dealings were almost exclusively **nitrogen** sales to **Royster** or exchanges of stock carried in inventory. The pattern which emerges, **Columbia** claimed, is one of repeated and substantial deviation from the stated amount or price, including four instances where **Royster** took none of the goods for which it had contracted. **Columbia** offered proof that the total variance amounted to more than $500,000 in reduced sales. This experience, a **Columbia** officer offered to testify, formed the basis of an understanding on which he depended in conducting negotiations with **Royster**.

The district court held that the evidence should be excluded. It ruled that "custom and usage or course of dealing are not admissible to contradict the express, plain, unambiguous language of a valid written contract, which by virtue of its detail negates the proposition that the contract is open to variances in its terms. * * *"

1 A number of Virginia cases have held that extrinsic evidence may not be received to explain or supplement a written contract unless the court finds the writing is ambiguous. *E. g.,* Mathieson Alkali Works v. Virginia Banner Coal **Corp**., 147 Va. 125, 136 S.E. 673 (1927). This rule, however, has been changed by the Uniform Commercial Code which Virginia has adopted. The Code expressly states that it "shall be liberally construed and applied to promote its underlying purposes and policies," which include "the continued expansion of commercial practices through custom, usage and agreement of the parties * * *." Va.Code Ann. § 8.1-102 (1965). The importance of usage of trade and course of dealing between the parties is shown by § 8.2-202,[4] which *9 authorizes their use to explain or supplement a contract. The official comment states this section rejects the old rule that evidence of course of dealing or usage of trade can be introduced only when the contract is ambiguous.[5] And the Virginia commentators, noting that "[t]his section reflects a more liberal approach to the introduction of parol evidence * * * than has been followed in Virginia," express the opinion that *Mathieson, supra,* and similar Virginia cases no longer should be followed. Va. Code Ann. § 8.2-202, Va. Comment. *See also* Portsmouth Gas Co. v. Shebar, 209 Va. 250, 253 n.1, 163 S.E.2d 205, 208 n.1 (1968) (dictum). We hold, therefore, that a finding of ambiguity is not necessary for the admission of extrinsic evidence about the usage of the trade and the parties' course of dealing.

2**3** We turn next to **Royster's** claim that **Columbia's** evidence was properly excluded because it was inconsistent with the express terms of their agreement. There can be no doubt that the Uniform Commercial Code restates the well established rule that evidence of usage of trade and course of dealing should be excluded whenever it cannot be reasonably construed as consistent with the terms of the contract. Division of Triple T Service, Inc. v. Mobil Oil **Corp**., 60 Misc. 2d 720, 304 N.Y.S.2d 191, 203 (1969), *aff'd mem.,* 311 N.Y.S.2d 961 (1970). **Royster** argues that the evidence should be excluded as inconsistent because the contract contains detailed provisions regarding the base price, escalation, minimum tonnage, and delivery schedules. The argument is based on the premise that because a contract appears on its face to be complete, evidence of course of dealing and usage of trade should be excluded. We believe, however, that neither the language nor the policy of the Code supports such a broad exclusionary rule. Section 8.2-202 expressly allows evidence of course of dealing or usage of trade to explain or supplement terms intended by the parties as a final expression of their agreement.[6] When this section is read in light of Va. Code Ann. § 8.1-205(4),[7] it is clear that the test of admissibility is not whether the contract appears on its face to be complete in every detail, but whether the proffered evidence of course of dealing and trade usage reasonably can be construed as consistent with the express terms of the agreement.

4 The proffered testimony sought to establish that because of changing weather conditions, farming practices, and government agricultural programs, dealers adjusted prices, quantities, and delivery schedules to reflect declining market conditions. For the following reasons it is reasonable to construe this evidence as consistent with the express terms of the contract:

The contract does not expressly state that course of dealing and usage of trade cannot be used to explain or supplement the written contract.

The contract is silent about adjusting prices and quantities to reflect a declining market. It neither permits nor prohibits *10 adjustment, and this neutrality provides a fitting occasion for recourse to usage of trade and prior dealing to supplement the contract and explain its terms.

Minimum tonnages and additional quantities are expressed in terms of "Products Supplied Under Contract." Significantly, they are not expressed as just "Products" or as "Products Purchased Under Contract." The description used by the parties is consistent with the proffered testimony.

Finally, the default clause of the contract refers only to the failure of the buyer to pay for delivered phosphate.[8] During the contract negotiations, **Columbia** rejected a **Royster** proposal for liquidated damages of $10 for each ton **Columbia** declined to accept. On the other hand, **Royster** rejected a **Columbia** proposal for a clause that tied the price to the market by obligating **Royster** to conform its price to offers **Columbia** received from other phosphate producers. The parties, having rejected both proposals, failed to state any consequences of **Columbia's** refusal to take delivery–the kind of default **Royster** alleges in this case. **Royster** insists that we span this hiatus by applying the general law of contracts permitting recovery of damages upon

the buyer's refusal to take delivery according to the written provisions of the contract. This solution is not what the Uniform Commercial Code prescribes. Before allowing damages, a court must first determine whether the buyer has in fact defaulted. It must do this by supplementing and explaining the agreement with evidence of trade usage and course of dealing that is consistent with the contract's express terms. Va.Code Ann. §§ 8.1-205(4), 8.2-202. Faithful adherence to this mandate reflects the reality of the marketplace and avoids the overly legalistic interpretations which the Code seeks to abolish.
5 **Royster** also contends that **Columbia's** proffered testimony was properly rejected because it dealt with mutual willingness of buyer and seller to adjust contract terms to the market. **Columbia**, **Royster** protests, seeks unilateral adjustment. This argument misses the point. What **Columbia** seeks to show is a practice of mutual adjustments so prevalent in the industry and in prior dealings between the parties that it formed a part of the agreement governing this transaction. It is not insisting on a unilateral right to modify the contract.
6 Nor can we accept **Royster's** contention that the testimony should be excluded under the contract clause: "No verbal understanding will be recognized by either party hereto; this contract expresses all the terms and conditions of the agreement, shall be signed in duplicate, and shall not become operative until approved in writing by the Seller."

Course of dealing and trade usage are not synonymous with verbal understandings, terms and conditions. Section 8.2-202 draws a distinction between supplementing a written contract by consistent additional terms and supplementing it by course of dealing or usage of trade.[9] Evidence of additional terms must be excluded when "the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement." Significantly, no similar limitation is placed on the introduction of evidence of course of dealing or usage of trade. Indeed the official comment notes that course of dealing and usage of trade, unless carefully negated, are admissible to supplement the terms of any writing, and that contracts are to be read on the assumption that these elements were taken for granted when the document was *11 phrased.[10] Since the Code assigns course of dealing and trade usage unique and important roles, they should not be conclusively rejected by reading them into stereotyped language that makes no specific reference to them. *Cf.* Provident Tradesmens Bank & Trust Co. v. Pemberton, 196 Pa.Super. 180, 173 A.2d 780 (1961). Indeed, the Code's official commentators urge that overly simplistic and overly legalistic interpretation of a contract should be shunned.[11]
We conclude, therefore, that **Columbia's** evidence about course of dealing and usage of trade should have been admitted. Its exclusion requires that the judgment against **Columbia** must be set aside and the case retried

(Doctrine of impossibility)

Transatlantic financing Corp v. United States. 363 F. 2d 312 (1968)

Synopsis

Action by operator of vessel to recover for costs attributable to ship's diversion from normal sea route caused by closing of Suez Canal. The United States District Court for the District of Columbia, Howard F. Corcoran, J., 259 F.Supp. 725, dismissed the libel, and an appeal was taken. The Court of Appeals, J. Skelly Wright, Circuit Judge, held that performance of contract to carry, for the United States, a full cargo of wheat from a United States gulf port to a safe port in Iran was not rendered commercially impracticable by closing of Suez Canal where goods shipped were not subject to harm from longer, less temperate southern route, vessel and crew were fit to proceed around Cape, and operator of vessel was no less able than government to purchase insurance to cover contingency's occurrence; but even if such event had made performance commercially impracticable, ship operator's remedy would have been recovery in quantum meruit for entire

performance and it could not collect its contract price and then seek quantum meruit relief for additional expense of trip around Cape

Decree Affirmed

Opinion

J. SKELLY WRIGHT, Circuit Judge:

This appeal involves a voyage charter between Transatlantic Financing Corporation, operator of the SS CHRISTOS, and the United States covering carriage of a full cargo of wheat from a United States Gulf port to a safe port in Iran. The District Court dismissed a libel filed by Transatlantic against the United States for costs attributable to the ship's diversion from the normal sea route caused by the closing of the Suez Canal. We affirm.

On July 26, 1956, the Government of Egypt nationalized the Suez Canal Company and took over operation of the Canal. On October 2, 1956, during the international crisis which resulted from the seizure, the voyage charter in suit was executed between representatives of Transatlantic and the United States. The charter indicated the termini of the voyage but not the route. On October 27, 1956, the SS CHRISTOS sailed from Galveston for Bandar Shapur, Iran, on a course which would have taken her through Gibraltar and the Suez Canal. On October 29, 1956, Israel invaded Egypt. On October 31, 1956, Great Britain and France invaded the Suez Canal Zone. On November 2, 1956, the Egyptian Government obstructed the Suez Canal with sunken vessels and closed it to traffic.

On or about November 7, 1956, Beckmann, representing Transatlantic, contacted Potosky, an employee of the United States Department of Agriculture, who appellant concedes was unauthorized to bind the Government, requesting instructions concerning disposition of the cargo and seeking an agreement for payment of additional compensation for a voyage around the Cape of Good Hope. Potosky advised Beckmann that Transatlantic was expected to perform the charter according to its terms, that he did not believe Transatlantic was entitled *315 **186 to additional compensation for a voyage around the Cape, but that Transatlantic was free to file such a claim. Following this discussion, the CHRISTOS changed course for the Cape of Good Hope and eventually arrived in Bandar Shapur on December 30, 1956.

Transatlantic's claim is based on the following train of argument. The charter was a contract for a voyage from a Gulf port to Iran. Admiralty principles and practices, especially stemming from the doctrine of deviation, require us to imply into the contract the term that the voyage was to be performed by the ‘usual and customary’ route. The usual and customary route from Texas to Iran was, at the time of contract, via Suez, so the contract was for a voyage from Texas to Iran via Suez. When Suez was closed this contract became impossible to perform. Consequently, appellant's argument continues, when Transatlantic delivered the cargo by going around the Cape of Good Hope, in compliance with the Government's demand under claim of right, it conferred a benefit upon the United States for which it should be paid in quantum meruit.

1234 The doctrine of impossibility of performance has gradually been freed from the earlier fictional and unrealistic strictures of such tests as the ‘implied term’ and the parties' ‘contemplation.’ Page, The Development of the Doctrine of Impossibility of Performance, 18 MICH.L.REV. 589, 596 (1920). See generally 6 CORBIN, CONTRACTS §§ 1320-1372 (rev.ed. 1962); 6 WILLISTON, CONTRACTS §§ 1931-1979 (rev. ed. 1938). It is now recognized that “A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.” Mineral Park land Co. v. Howard, 172 Cal. 289, 293, 156 P. 458, 460, L.R.A. 1916F, 1 (1916). Accord, Whelan v. Griffith Consumers Company, D.C.Mun.App., 170 A.2d 229 (1961); RESTATEMENT, CONTRACTS § 454 (1932); UNIFORM COMMERCIAL CODE (U.L.A.) § 2-615, comment 3. The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.[1] When the issue is raised, the court is asked to construct a condition of performance[2] based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency-something unexpected- must have occurred. Second, the risk of the unexpected

occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable.[3] Unless *316 **187 the court finds these three requirements satisfied, the plea of impossibility must fail.

The first requirement was met here. It seems reasonable, where no route is mentioned in a contract, to assume the parties expected performance by the usual and customary route at the time of contract.[4] Since the usual and customary route from Texas to Iran at the time of contract[5] was through Suez, closure of the Canal made impossible the expected method of performance. But this unexpected development raises rather than resolves the impossibility issue, which turns additionally on whether the risk of the contingency's occurrence had been allocated and, if not, whether performance by alternative routes was rendered impracticable

Affirmed.

CHAPTER 18 PERFORMANCE AND REMEDIES

NO CASES

CHAPTER 19 NATURE AND FORM OF COMMERCIAL PAPER

Cases

Bearer Paper

(Note: this is a trial court's opinion.)

Chung v. New York Racing Ass'n, 714 N.Y.S.2d 429 (N.Y. Dist. Ct. 2000)

Gartner, J.

A published news article recently reported that an investigation into possible money laundering being conducted through the racetracks operated by the defendant New York Racing Association was prompted by a small-time money laundering case in which a Queens bank robber used stolen money to purchase betting vouchers and then exchanged the vouchers for clean cash. [Citation] The instant case does not involve any such question of wrongdoing, but does raise a novel legal issue regarding the negotiability of those same vouchers when their possession is obtained by a thief or finder. The defendant concedes that "there are no cases on point."

The defendant is a private stock corporation incorporated and organized in New York as a non-profit racing association pursuant to [New York law]. The defendant owns and operates New York's largest thoroughbred racetracks—Belmont Park Racetrack, Aqueduct Racetrack, and Saratoga Racetrack—where it stages thoroughbred horse races and conducts pari-mutuel wagering on them pursuant to a franchise granted to the defendant by the State of New York.

The plaintiff was a Belmont Park Racetrack horse player. He attended the track and purchased from the defendant a voucher for use in SAMS machines. As explained in [Citation]:

In addition to accepting bets placed at parimutuel facility windows staffed by facility employees, [some] facilities use SAMS. SAMS are automated machines which permit a bettor to enter his bet by inserting money, vouchers or credit cards into the machine, thereby enabling him to select the number or combination he wishes to purchase. A ticket is issued showing those numbers.

When a voucher is utilized for the purpose of placing a bet at a SAMS machine, the SAMS machine, after deducting the amount bet by the horse player during the particular transaction, provides the horse player with, in addition to his betting ticket(s), a new voucher showing the remaining balance left on the voucher.

In the instant case, the unfortunate horse player departed the SAMS machine with his betting tickets, but *without* his new voucher—showing thousands of dollars in remaining value—which

he inadvertently left sitting in the SAMS machine. Within several minutes he realized his mistake and hurried back to the SAMS machine, only to find the voucher gone. He immediately notified a security guard. The defendant's personnel thereafter quickly confirmed the plaintiff as the original purchaser of the lost voucher. The defendant placed a computerized "stop" on the voucher. However, whoever had happened upon the voucher in the SAMS machine and taken it had acted even more quickly: the voucher had been brought to a nearby track window and "cashed out" within a minute or so of the plaintiff having mistakenly left it in the SAMS machine.

The plaintiff now sues the defendant, contending that the defendant should be liable for having failed to "provide any minimal protection to its customers" in checking the identity and ownership of vouchers prior to permitting their "cash out." The defendant, in response, contends that the voucher consists of "bearer paper," negotiable by anyone having possession, and that it is under no obligation to purchasers of vouchers to provide any such identity or ownership checks.

As opposed to instruments such as ordinary checks, which are typically made payable to the order of a specific person and are therefore known as "order paper," bearer paper is payable to the "bearer," *i.e.*, whoever walks in carrying (or "bearing") the instrument. Pursuant to [New York's UCC] "[a]n instrument is payable to bearer when by its terms it is payable to…(c) 'cash' or the order of 'cash', or any other indication which does not purport to designate a specific payee."

Each New York Racing Association voucher is labeled "Cash Voucher." Each voucher contains the legend "Bet Against the Value or Exchange for Cash." Each voucher is also encoded with certain computer symbols which are readable by SAMS machines. The vouchers do by their terms constitute "bearer paper."

There is no doubt that under the [1990 Revision] Model Uniform Commercial Code the defendant would be a "holder in due course" of the voucher, deemed to have taken it free from all defenses that could be raised by the plaintiff. As observed in 2 White & Summers, *Uniform Commercial Code* pp. 225–226, 152–153 (4th ed. 1995):

Consider theft of bearer instruments. . . . [T]he thief can make his or her transferee a holder simply by transfer to one who gives value in good faith. If the thief's transferee cashes the check and so gives value in good faith and without notice of any defense, that transferee will be a holder in due course under 3-302, free of all claims to the instrument on the part . . . of any person and free of all personal defenses of any prior party. Therefore, the holder in due course will not be liable in conversion to the true owner. . . . Of course, the owner of the check will have a good cause of action against the thief, but no other cause of action. . . .

If an instrument is payable to bearer . . . the possessor of the instrument will be a holder and, if he meets the other tests, a holder in due course. This is so even though the instrument may have passed through the hands of a thief; the holder in due course is one of the few purchasers in Anglo-Saxon jurisprudence who may derive a good title from a chain of title that includes a thief in its links.

However, the Model Uniform Commercial Code in its present form is not in effect in New York. In 1990, the National Conference of Commissioners on Uniform State Laws and the American Law Institute approved a revised Article 3. This revised Article 3 has never been enacted in New York. Comment 1 to § 3-201 of the [1990] Uniform Commercial Code, commenting on the difference between it and its predecessor (which is still in effect in New York), states:

A person can become holder of an instrument . . . as the result of an event that occurs after issuance. "Negotiation" is the term used in Article 3 to describe this post-issuance event. . . . In defining "negotiation" former Section 3-202(1) used the word "transfer," an undefined term, and "delivery," defined in Section 1-201(14) to mean voluntary change of possession. Instead, subsections (a) and (b) [now] use the term "transfer of possession," and subsection (a) states that negotiation can occur by an involuntary transfer of possession. For example, if an instrument is payable to bearer and it is stolen by Thief or is found by Finder, Thief or Finder becomes the holder of the instrument when possession is obtained. In this case there is an involuntary transfer of possession that results in negotiation to Thief or Finder.

Thus, it would initially appear that under the prior Model Uniform Commercial Code, still in effect in New York, a thief or finder of bearer paper, as the recipient of an involuntary transfer, could not become a "holder," and thus could not pass holder-in-due-course status, or good title, to someone in the position of the defendant.

This conclusion, however, is not without doubt. For instance, in 2 Anderson, *Uniform Commercial Code* § 3-202:35 (2nd ed., 1971), it was observed that:

The Code states that bearer paper is negotiated by "delivery." This is likely to mislead for one is not inclined to think of the acquisition of paper by a finder or a thief as a "voluntary transfer of possession."

By stating that the Code's terminology was "misleading," the treatise appears to imply that despite the literal import of the words, the contrary was true—negotiation could be accomplished by involuntary transfer, *i.e.,* loss or theft.

In [Citation], the Appellate Division determined that the Tropicana Casino in New Jersey became a holder in due course of signed cashier's checks with blank payee designations which a thief had stolen from the defendant and negotiated to the casino for value after filling in the payee designation with his brother-in-law's name. The Appellate Division, assuming without discussion that the thief was a "holder" of the stolen instruments and therefore able to transfer good title, held the defendant obligated to make payment on the stolen checks. *Accord* [Citation] (check cashing service which unknowingly took for value from an intervening thief the plaintiff's check, which the plaintiff had endorsed in blank and thus converted to a bearer instrument, was a holder in due course of the check, having received good title from the thief).

Presumably, these results have occurred because the courts in New York have implicitly interpreted the undefined term "transfer" as utilized in [the pre-1990] U.C.C. § 3-202(1) as including the involuntary transfer of possession, so that as a practical matter the old Code (as

still in effect in New York) has the same meaning as the new Model Uniform Commercial Code, which represents a clarification rather than a change in the law.

This result makes sense. A contrary result would require extensive verification procedures to be undertaken by all transferees of bearer paper. The problem with imposing an identity or ownership check requirement on the negotiation of bearer paper is that such a requirement would impede the free negotiability which is the essence of bearer paper. As held in [Citation (1970)],

[Where] the instrument entrusted to a dishonest messenger or agent was freely negotiable bearer paper . . . the drawee bank [cannot] be held liable for making payment to one presenting a negotiable instrument in bearer form who may properly be presumed to be a holder [citations omitted].

* * * Moreover, the plaintiff in the instant case knew that the voucher could be "Exchange[d] for cash." The plaintiff conceded at trial that (1) when he himself utilized the voucher prior to its loss, no identity or ownership check was ever made; and (2) he nevertheless continued to use it. The plaintiff could therefore not contend that he had any expectation that the defendant had in place any safeguards against the voucher's unencumbered use, or that he had taken any actions in reliance on the same.

This Court is compelled to render judgment denying the plaintiff's claim, and in favor of the defendant.

Case Questions

1. Was the instrument in question a note or a draft?
2. How did the court determine it was bearer paper?
3. What would the racetrack have to have done if it wanted the machine to dispense order paper?
4. What confusion arose from the UCC's pre-1990 use of the words "transfer" and "delivery," which was clarified by the revised Article 3's use of the phrase "transfer of possession"? Does this offer any insight into why the change was made?
5. How had—have—the New York courts decided the question as to whether a thief could be a holder when the instrument was acquired from its previous owner involuntarily

ADDITIONAL CASES

The "Good Faith and Reasonable Commercial Standards" Requirement: Buckeye Check Cashing, Inc. v. Camp, *825 N.E.2d 644 (Ohio App. 2005)*

Donovan, J.

Defendant-appellant Shawn Sheth appeals from a judgment of the Xenia Municipal Court in favor of plaintiff-appellee Buckeye Check Cashing, Inc. ("Buckeye"). Sheth contends that the trial court erred

in finding that Buckeye was a holder in due course of a postdated check drawn by Sheth and therefore was entitled to payment on the instrument despite the fact that Sheth had issued a stop-payment order to his bank.

In support of this assertion, Sheth argues that the trial court did not use the correct legal standard in granting holder-in-due-course status to Buckeye. In particular, Sheth asserts that the trial court used the pre-1990 Uniform Commercial Code ("UCC") definition of "good faith" as it pertains to holder-in-due-course status, which defined it as "honesty in fact." The definition of "good faith" was extended by the authors of the UCC in 1990 to also mean "the observance of reasonable commercial standards of fair dealing." The post-1990 definition was adopted by the Ohio legislature in 1994.

Sheth argues that while Buckeye would prevail under the pre-1990, "honesty in fact" definition of "good faith," it failed to act in a commercially reasonable manner when it chose to cash the postdated check drawn by Sheth. The lower court * * * adjudged Buckeye to be a holder in due course and, therefore, entitled to payment. We conclude that the trial court used the incorrect "good faith" standard when it granted holder-in-due-course status to Buckeye because Buckeye did not act in a commercially reasonable manner when it cashed the postdated check drawn by Sheth. Because we accept Sheth's sole assignment of error, the judgment of the trial court is reversed.

On or about October 12, 2003, Sheth entered into negotiations with James A. Camp for Camp to provide certain services to Sheth by October 15, 2003. To that end, Sheth issued Camp a check for $1,300. The check was postdated to October 15, 2003.

On October 13, 2003, Camp negotiated the check to Buckeye and received a payment of $1,261.31. Apparently fearing that Camp did not intend to fulfill his end of the contract, Sheth contacted his bank on October 14, 2003, and issued a stop-payment order on the check. Unaware of the stop-payment order, Buckeye deposited the check with its own bank on October 14, 2003, believing that the check would reach Sheth's bank by October 15, 2003. Because the stop-payment order was in effect, the check was ultimately dishonored by Sheth's bank. After an unsuccessful attempt to obtain payment directly from Sheth, Buckeye brought suit.

Sheth's sole assignment of error is as follows:

"The trial court erred by applying the incorrect legal standard in granting holder in due course status to the plaintiff-appellee because the plaintiff-appellee failed to follow commercially reasonable standards in electing to cash the check that gives rise to this dispute."

[UCC 3-302] outlines the elements required to receive holder-in-due-course status. The statute states:

…'holder in due course' means the holder of an instrument if both of the following apply:

"(1) The instrument when issued or negotiated to the holder does not bear evidence of forgery or alteration that is so apparent, or is otherwise so irregular or incomplete as to call into question its authenticity;

"(2) The holder took the instrument under all of the following circumstances:

(a) For value;

(b) ***In good faith****;*

(c) Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;

(d) Without notice that the instrument contains an unauthorized signature or has been altered;

(e) Without notice of any claim to the instrument as described in [3-306];

(f) Without notice that any party has a defense or claim in recoupment described in [UCC 3-305(a); emphasis added].

At issue in the instant appeal is whether Buckeye acted in "good faith" when it chose to honor the postdated check originally drawn by Sheth. * * * UCC 1-201, defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Before the Ohio legislature amended UCC 1-201 in 1994, that section did not define "good faith"; the definition of "good faith" as "honesty in fact" in UCC 1-201 was the definition that applied[.] * * *

"Honesty in fact" is defined as the absence of bad faith or dishonesty with respect to a party's conduct within a commercial transaction. [Citation] Under that standard, absent fraudulent behavior, an otherwise innocent party was assumed to have acted in good faith. The "honesty in fact" requirement, also known as the "pure heart and empty head" doctrine, is a subjective test under which a holder had to subjectively believe he was negotiating an instrument in good faith for him to become a holder in due course. Maine [Citation, 1999].

In 1994, however, the Ohio legislature amended the definition of "good faith" to include not only the subjective "honesty in fact" test, but also an objective test: "the observance of reasonable commercial standards of fair dealing." UCC 1-201(20). A holder in due course must now satisfy both a subjective and an objective test of good faith. What constitutes "reasonable commercial standards of fair dealing" for parties claiming holder-in-due-course status, however, has not heretofore been defined in the state of Ohio.

In support of his contention that Buckeye is not a holder in due course, Sheth cites a decision from the Supreme Court of Maine, [referred to above] in which the court provided clarification with respect to the objective prong of the "good faith" analysis:

"The fact finder must therefore determine, first, whether the conduct of the holder comported with industry or 'commercial' standards applicable to the transaction and second, whether those standards were reasonable standards intended to result in fair dealing. Each of those determinations must be made in the context of the specific transaction at hand. If the fact finder's conclusion on each point is 'yes,' the holder will be determined to have acted in good faith even if, in the individual transaction at issue, the result appears unreasonable. Thus, a holder may be accorded holder in due course where it acts pursuant to those reasonable commercial standards of fair dealing—even if it is negligent—but may lose that status, even where it complies with commercial standards, if those standards are not reasonably related to achieving fair dealing." [Citation]

Check cashing is an unlicensed and unregulated business in Ohio. [Citation] Thus, there are no concrete commercial standards by which check-cashing businesses must operate. Moreover,

Buckeye argues that its own internal operating policies do not require that it verify the availability of funds, nor does Buckeye apparently have any guidelines with respect to the acceptance of postdated checks. Buckeye asserts that cashing a postdated check does not prevent a holder from obtaining holder-in-due-course status and cites several cases in support of this contention. All of the cases cited by Buckeye, however, were decided prior to the UCC's addition of the objective prong to the definition of "good faith."

Under a purely subjective "honesty in fact" analysis, it is clear that Buckeye accepted the check from Camp in good faith and would therefore achieve holder-in-due-course status. When the objective prong of the good faith test is applied, however, we find that Buckeye did not conduct itself in a commercially reasonable manner. While not going so far as to say that cashing a postdated check prevents a holder from obtaining holder-in-due-course status in every instance, the presentation of a postdated check should put the check cashing entity on notice that the check might not be good. Buckeye accepted the postdated check at its own peril. Some attempt at verification should be made before a check-cashing business cashes a postdated check. Such a failure to act does not constitute taking an instrument in good faith under the current objective test of "reasonable commercial standards" enunciated in [the UCC].

We conclude that in deciding to amend the good faith requirement to include an objective component of "reasonable commercial standards," the Ohio legislature intended to place a duty on the holders of certain instruments to act in a responsible manner in order to obtain holder-in-due-course status. When Buckeye decided to cash the postdated check presented by Camp, it did so without making any attempt to verify its validity. This court in no way seeks to curtail the free negotiability of commercial instruments. However, the nature of certain instruments, such as the postdated check in this case, renders it necessary for appellee Buckeye to take minimal steps to protect its interests. That was not done. Buckeye was put on notice that the check was not good until October 15, 2003. "Good faith," as it is defined in the UCC and the Ohio Revised Code, requires that a holder demonstrate not only honesty in fact but also that the holder act in a commercially reasonable manner. Without taking any steps to discover whether the postdated check issued by Sheth was valid, Buckeye failed to act in a commercially reasonable manner and therefore was not a holder in due course.

Based upon the foregoing, Sheth's single assignment of error is sustained, the judgment of the Xenia Municipal Court is reversed, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this opinion.

Judgment reversed, and cause remanded.

Case Questions

1. Who was Camp? Why did Sheth give him a check? Why is the case titled *Buckeye v. Camp*?
2. How does giving someone a postdated check offer the drawer any protection? How does it give rise to any "notice that the check might not be good"?
3. If Camp had taken the check to Sheth's bank to cash it, what would have happened?
4. What difference did the court discern between the pre-1990 UCC Article 3 and the post-1990 Article 3 (that Ohio adopted in 1994)?

CHAPTER 20 Negotiability: Requires Unconditional Promise to Pay

CASES

Holly Hill Acres, Ltd. v. Charter Bank of Gainesville, *314 So.2d 209 (Fla. App. 1975)*

Scheb, J.

Appellant/defendant [Holly Hill] appeals from a summary judgment in favor of appellee/plaintiff Bank in a suit wherein the plaintiff Bank sought to foreclose a note and mortgage given by defendant.

The plaintiff Bank was the assignee from Rogers and Blythe of a promissory note and purchase money mortgage executed and delivered by the defendant. The note, executed April 28, 1972, contains the following stipulation:

This note with interest is secured by a mortgage on real estate, of even date herewith, made by the maker hereof in favor of the said payee, and shall be construed and enforced according to the laws of the State of Florida. ***The terms of said mortgage are by this reference made a part hereof.*** *(emphasis added)*

Rogers and Blythe assigned the promissory note and mortgage in question to the plaintiff Bank to secure their own note. Plaintiff Bank sued defendant [Holly Hill] and joined Rogers and Blythe as defendants alleging a default on their note as well as a default on defendant's [Holly Hill's] note.

Defendant answered incorporating an affirmative defense that fraud on the part of Rogers and Blythe induced the sale which gave rise to the purchase money mortgage. Rogers and Blythe denied the fraud. In opposition to plaintiff Bank's motion for summary judgment, the defendant submitted an affidavit in support of its allegation of fraud on the part of agents of Rogers and Blythe. The trial court held the plaintiff Bank was a holder in due course of the note executed by defendant and entered a summary final judgment against the defendant.

The note having incorporated the terms of the purchase money mortgage was not negotiable. The plaintiff Bank was not a holder in due course, therefore, the defendant was entitled to raise against the plaintiff any defenses which could be raised between the appellant and Rogers and Blythe. Since defendant asserted an affirmative defense of fraud, it was incumbent on the plaintiff to establish the non-existence of any genuine issue of any material fact or the legal insufficiency of defendant's affirmative defense. Having failed to do so, plaintiff was not entitled to a judgment as a matter of law; hence, we reverse.

The note, incorporating by reference the terms of the mortgage, did not contain the unconditional promise to pay required by [the UCC]. Rather, the note falls within the scope of [UCC 3-106(a)(ii)]: "A promise or order is unconditional unless it states that…it is subject to or governed by any other writing."

Plaintiff Bank relies upon *Scott v. Taylor* [Florida] 1912 [Citation], as authority for the proposition that its note is negotiable. *Scott*, however, involved a note which stated: "this note secured by mortgage." Mere reference to a note being secured by mortgage is a common commercial practice and such reference in itself does not impede the negotiability of the note. There is, however, a

significant difference in a note stating that it is “secured by a mortgage” from one which provides, “the terms of said mortgage are by this reference made a part hereof.” In the former instance the note merely refers to a separate agreement which does not impede its negotiability, while in the latter instance the note is rendered non-negotiable.

As a general rule the assignee of a mortgage securing a non-negotiable note, even though a bona fide purchaser for value, takes subject to all defenses available as against the mortgagee. [Citation] Defendant raised the issue of fraud as between himself and other parties to the note, therefore, it was incumbent on the plaintiff Bank, as movant for a summary judgment, to prove the non-existence of any genuinely triable issue. [Citation]

Accordingly, the entry of a summary final judgment is reversed and the cause remanded for further proceedings.

Case Questions

1. What was wrong with the promissory note that made it nonnegotiable?
2. How did the note’s nonnegotiability—as determined by the court of appeals—benefit the defendant, Holly Hill?
3. The court determined that the bank was not a holder in due course; on remand, what happens now?

Negotiability: Requires Fixed Amount of Money: Centerre Bank of Branson v. Campbell

744 S.W.2d 490 (Mo. App. 1988)

Crow, J.

On or about May 7, 1985, appellants (“the Campbells”) signed the following document:

PROMISSORY NOTE

$11,2500.00 May 7, 1985

For value received, the undersigned jointly and severally as principals, promise to pay to the order of Strand Investment Company Eleven Thousand and Two Hundred and Fifty Dollars ($11,250.00) with interest thereon from date at the rate of 14% interest per annum, said principal and interest to be paid in annual installments as follows:

First Year - $3,750.00 + $1,575.00 interest $5,325.00

Second Year - $3,750.00 + $1,050.00 interest $4,800.00

Third Year - $3,750.00 + $525.00 interest $4,275.00

Interest will be payable semi-annually.

Interest may vary with bank rates charged to Strand Investment Company.

If default is made in the payment of any annual installment when due, then the investor's participation in Notch Real Estate Partnership will be forfeited.

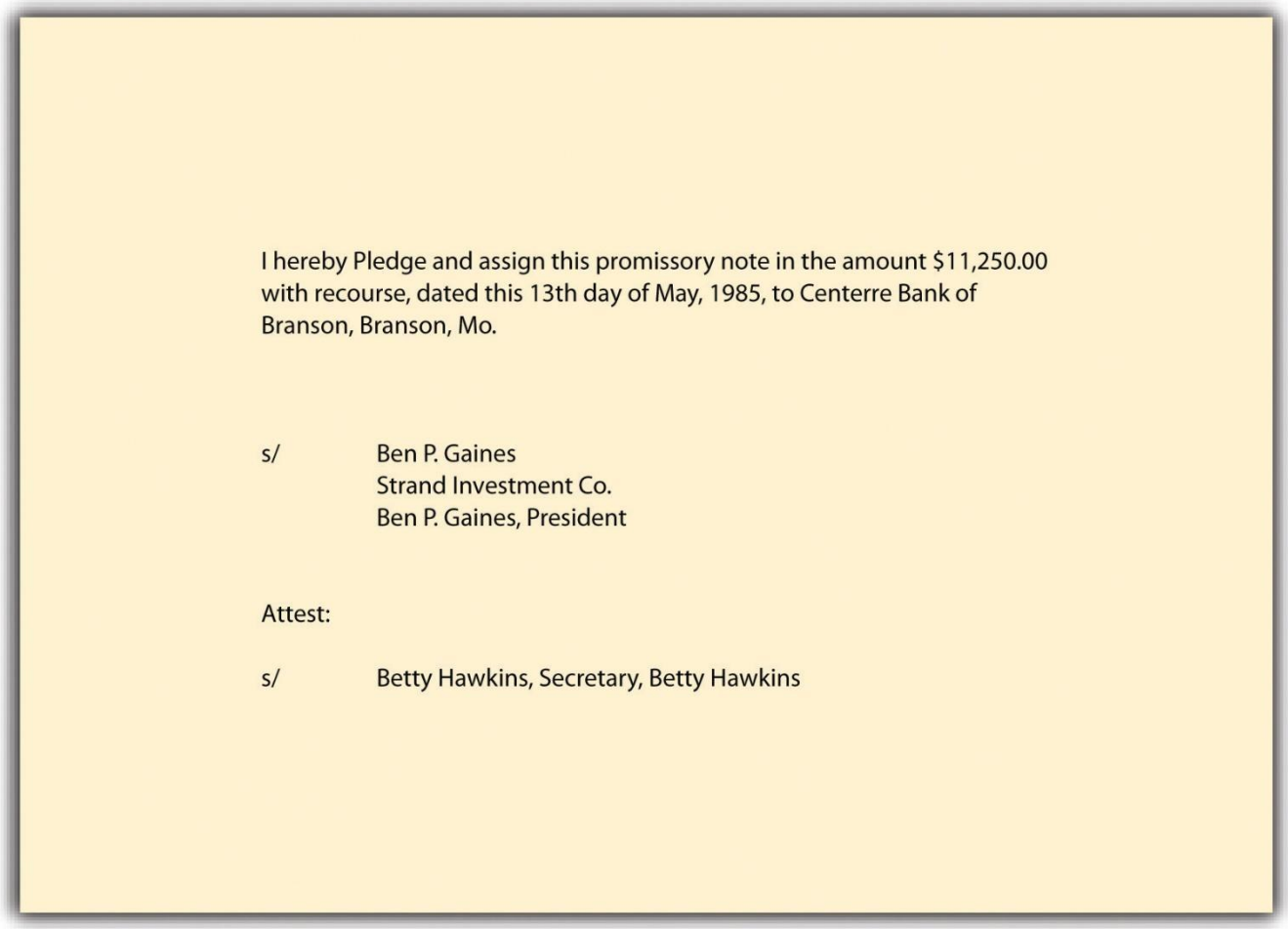
Privilege is given to pay all or any part of this note at any time without penalty.

This note may be used as collateral to obtain funds from a financial institution.

s/ Dowe Campbell s/ Debbie A. Campbell

Curtis D. Campbell Debbie A. Campbell

On May 13, 1985, the president and secretary of Strand Investment Company ("Strand") signed the following provision on the reverse side of the above document:



I hereby Pledge and assign this promissory note in the amount $11,250.00 with recourse, dated this 13th day of May, 1985, to Centerre Bank of Branson, Branson, Mo.

s/ Ben P. Gaines
Strand Investment Co.
Ben P. Gaines, President

Attest:

s/ Betty Hawkins, Secretary, Betty Hawkins

On June 30, 1986, Centerre Bank of Branson ("Centerre") sued the Campbells. Pertinent to the issues on this appeal, Centerre's petition averred:

"1. …on [May 7,] 1985, the [Campbells] made and delivered to Strand . . . their promissory note…and thereby promised to pay to Strand . . . or its order . . . ($11,250.00 [about $25,000 in 2016 dollars) with interest thereon from date at the rate of fourteen percent (14%) per annum; that a copy of said promissory note is attached here . . . and incorporated herein by reference.

2. That thereafter and before maturity, said note was assigned and delivered by Strand . . . to [Centerre] for valuable consideration and [Centerre] is the owner and holder of said promissory note."

Centerre's petition went on to allege that default had been made in payment of the note and that there was an unpaid principal balance of $9,000, plus accrued interest, due thereon. Centerre's petition prayed for judgment against the Campbells for the unpaid principal and interest.

[The Campbells] aver that the note was given for the purchase of an interest in a limited partnership to be created by Strand, that no limited partnership was thereafter created by Strand, and that by reason thereof there was "a complete and total failure of consideration for the said promissory note." Consequently, pled the answers, Centerre "should be estopped from asserting a claim

against [the Campbells] on said promissory note because of such total failure of consideration for same."

The cause was tried to the court, all parties having waived trial by jury. At trial, the attorney for the Campbells asked Curtis D. Campbell what the consideration was for the note. Centerre's attorney interrupted: "We object to any testimony as to the consideration for the note because it's our position that is not a defense in this lawsuit since the bank is the holder in due course." * * *

The trial court entered judgment in favor of Centerre and against the Campbells for $9,000, plus accrued interest and costs. The trial court filed no findings of fact or conclusions of law, none having been requested. The trial court did, however, include in its judgment a finding that Centerre "is a holder in due course of the promissory note sued upon."

The Campbells appeal, briefing four points. Their first three, taken together, present a single hypothesis of error consisting of these components: (a) the Campbells showed "by clear and convincing evidence a valid and meritorious defense in that there existed a total lack and failure of consideration for the promissory note in question," (b) Centerre acquired the note subject to such defense in that Centerre was not a holder in due course, as one can be a holder in due course of a note only if the note is a negotiable instrument, and (c) the note was not a negotiable instrument inasmuch as "it failed to state a sum certain due the payee." * * *

We have already noted that if Centerre is not a holder in due course, the Campbells can assert the defense of failure of consideration against Centerre to the same degree they could have asserted it against Strand. We have also spelled out that Centerre cannot be a holder in due course if the note is not a negotiable instrument. The pivotal issue, therefore, is whether the provision that interest may vary with bank rates charged to Strand prevents the note from being a negotiable instrument. * * *

Neither side has cited a Missouri case applying [UCC 3-104(a)] to a note containing a provision similar to: "Interest may vary with bank rates charged to Strand." Our independent research has likewise proven fruitless. There are, however, instructive decisions from other jurisdictions.

In *Taylor v. Roeder*, [Citation, Virginia] (1987), a note provided for interest at "[t]hree percent (3.00%) over Chase Manhattan prime to be adjusted monthly." A second note provided for interest at "3% over Chase Manhattan prime adjusted monthly." Applying sections of the Uniform Commercial Code adopted by Virginia identical to [the Missouri UCC], the court held the notes were not negotiable instruments in that the amounts required to satisfy them could not be ascertained without reference to an extrinsic source, the varying prime rate of interest charged by Chase Manhattan Bank.

In *Branch Banking and Trust Co. v. Creasy*, [Citation, North Carolina] (1980), a guaranty agreement provided that the aggregate amount of principal of all indebtedness and liabilities at any one time for which the guarantor would be liable shall not exceed $35,000. The court, emphasizing that to be a negotiable instrument a writing must contain, among other things, an unconditional promise to pay a sum certain in money, held the agreement was not a negotiable instrument. The opinion recited that for the requirement of a sum certain to be met, it is necessary that at the time of payment the holder be able to determine the amount which is then payable from the instrument itself, with any necessary computation, without reference to any outside source. It is essential, said

the court, for a negotiable instrument "to bear a definite sum so that subsequent holders may take and transfer the instrument without having to plumb the intricacies of the instrument's background. * * *

In *A. Alport & Son, Inc. v. Hotel Evans, Inc.,* [Citation] (1970), a note contained the notation "with interest at bank rates." Applying a section of the Uniform Commercial Code adopted by New York identical to [3-104(a)] the court held the note was not a negotiable instrument in that the amount of interest had to be established by facts outside the instrument.

In the instant case, the Campbells insist that it is impossible to determine from the face of the note the amount due and payable on any payment date, as the note provides that interest may vary with bank rates charged to Strand. Consequently, say the Campbells, the note is not a negotiable instrument, as it does not contain a promise to pay a "sum certain" [UCC 3-104(a)].

Centerre responds that the provision that interest may vary with bank rates charged to Strand is not "directory," but instead is merely "discretionary." The argument begs the question. Even if one assumes that Strand would elect not to vary the interest charged the Campbells if interest rates charged Strand by banks changed, a holder of the note would have to investigate such facts before determining the amount due on the note at any time of payment. We hold that under 3-104 and 3-106, supra, and the authorities discussed earlier, the provision that interest may vary with bank rates charged to Strand bars the note from being a negotiable instrument, thus no assignee thereof can be a holder in due course. The trial court therefore erred as a matter of law in ruling that Centerre was a holder in due course.…

An alert reader will have noticed two other extraordinary features about the note, not mentioned in this opinion. First, the note provides in one place that principal and interest are to be paid in annual installments; in another place it provides that interest will be payable semiannually. Second, there is no acceleration clause providing that if default be made in the payment of any installment when due, then all remaining installments shall become due and payable immediately. It would have thus been arguable that, at time of trial, only the first year's installment of principal and interest was due. No issue is raised, however, regarding any of these matters, and we decline to consider them sua sponte [on our own].

The judgment is reversed and the cause is remanded for a new trial.

Case Questions

1. What was defective about this note that made it nonnegotiable?
2. What was the consequence to Centerre of the court's determination that the note was nonnegotiable?
3. What did the Campbells give the note for in the first place, and why do they deny liability on it?

Undated or Incomplete Instruments: Newman v. Manufacturers Nat. Bank of Detroit, *152 N.W.2d 564 (Mich. App. 1967)*

Holbrook, J.

As evidence of [a debt owed to a business associate, Belle Epstein], plaintiff [Marvin Newman in 1955] drew two checks on the National Bank of Detroit, one for $1,000 [about $9,000 in 2016 dollars] and the other for $200 [about $1,800 in 2010 dollars]. The checks were left undated. Plaintiff testified that he paid all but $300 of this debt during the following next 4 years. Thereafter, Belle Epstein told plaintiff that she had destroyed the two checks. * * *

Plaintiff never notified defendant Bank to stop payment on the checks nor that he had issued the checks without filling in the dates. The date line of National Bank of Detroit check forms contained the first 3 numbers of the year but left the last numeral, month and day entries, blank, viz., "Detroit 1, Mich. _ _ 195_ _." The checks were cashed in Phoenix, Arizona, April 17, 1964, and the date line of each check was completed. * * * They were presented to and paid by Manufacturers National Bank of Detroit, April 22, 1964, under the endorsement of Belle Epstein. The plaintiff protested such payment when he was informed of it about a month later. Defendant Bank denied liability and plaintiff brought suit. * * *

The two checks were dated April 16, 1964. It is true that the dates were completed in pen and ink subsequent to the date of issue. However, this was not known by defendant. Defendant had a right to rely on the dates appearing on the checks as being correct. [UCC 3-113] provides in part as follows:

(a) An instrument may be antedated or postdated.

Also, [UCC 3-114] provides in part as follows:

[T]ypewritten terms prevail over printed terms, handwritten terms prevail over both…

Without notice to the contrary, defendant was within its rights to assume that the dates were proper and filled in by plaintiff or someone authorized by him. * * *

Plaintiff admitted at trial that defendant acted in good faith in honoring the two checks of plaintiff's in question, and therefore defendant's good faith is not in issue.

In order to determine if defendant bank's action in honoring plaintiff's two checks under the facts present herein constituted an exercise of proper procedure, we turn to article 4 of the UCC. * * * [UCC 4-401(d)] provides as follows:

A bank that in good faith makes payment to a holder may charge the indicated account of its customer according to:

(1) the original tenor of his altered item; or

(2) the tenor of his completed item, even though the bank knows the item has been completed unless the bank has notice that the completion was improper.

* * * [W]e conclude it was shown that two checks were issued by plaintiff in 1955, filled out but for the dates which were subsequently completed by the payee or someone else to read April 16, 1964, and presented to defendant bank for payment, April 22, 1964. Applying the rules set forth in the UCC as quoted herein, the action of the defendant bank in honoring plaintiff's checks was in good faith and in accord with the standard of care required under the UCC.

Since we have determined that there was no liability under the UCC, plaintiff cannot succeed on this appeal.

Affirmed.

Case Questions

1. Why does handwriting control over printing or typing on negotiable instruments?
2. How could the plaintiff have protected himself from liability in this case?

Negotiability

Summary

Commercial paper is the collective term for a variety of instruments—including checks, certificates of deposit, and notes—that are used to pay for goods; commercial paper is basically a contract to pay money. The key to the central role of commercial paper is negotiability, the means by which a person is empowered to transfer to another more than what the transferor himself possesses. The law regulating negotiability is Article 3 of the Universal Commercial Code.

Commercial paper can be divided into two basic types: the draft and the note. A draft is a document prepared by a drawer ordering the drawee to remit a stated sum of money to the payee. Drafts can be subdivided into two categories: sight drafts and time drafts. A note is a written promise to pay a specified sum of money on demand or at a definite time.

A special form of draft is the common bank check, a draft drawn on a bank and payable on demand. A special form of note is the certificate of deposit, a written acknowledgment by a bank that it has received money and agrees to repay it at a time specified in the certificate.

In addition to drawers, makers, drawees, and payees, one can deal with commercial paper in five other capacities: as indorsers, indorsees, holders, holders in due course, and accommodation parties.

A holder of a negotiable instrument must be able to ascertain all essential terms from its face. These terms are that the instrument (1) be in writing, (2) be signed by the maker or drawer, (3) contain an unconditional promise or order to pay (4) a sum certain in money, (5) be payable on demand or at a definite time, and (6) be payable to order or to bearer. If one of these terms is missing, the document is not negotiable, unless it is filled in before being negotiated according to authority given.

Cases

Executory Promise as Satisfying "Value"

Carter & Grimsley v. Omni Trading, Inc., 716 N.E.2d 320 (Ill. App. 1999)

Lytton, J.

Facts

Omni purchased some grain from Country Grain, and on February 2, 1996, it issued two checks, totaling $75,000, to Country Grain. Country Grain, in turn, endorsed the checks over to Carter as a retainer for future legal services. Carter deposited the checks on February 5; Country Grain failed the next day. On February 8, Carter was notified that Omni had stopped payment on the checks. Carter subsequently filed a complaint against Omni…alleging that it was entitled to the proceeds of the checks, plus pre-judgment interest, as a holder in due course.…[Carter moved for summary judgment; the motion was denied.]

Discussion

Carter argues that its motion for summary judgment should have been granted because, as a holder in due course, it has the right to recover on the checks from the drawer, Omni.

The Illinois Uniform Commercial Code (UCC) defines a holder in due course as:

"the holder of an instrument if:

(1) the instrument when issued does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity, and (2) the holder took the instrument (i) for value,…

Section 3-303(a) of the UCC also states that:

(a) "An instrument is issued or transferred for value if: (1) the instrument is issued or transferred for a promise of performance, **to the extent that the promise has been performed** * * *." (emphasis added)

Carter contends that in Illinois a contract for future legal services should be treated differently than other executory contracts. It contends that when the attorney-client relationship is

created by payment of a fee or retainer, the contract is no longer executory. Thus, Carter would achieve holder in due course status. We are not persuaded.

A retainer is the act of a client employing an attorney; it also denotes the fee paid by the client when he retains the attorney to act for him. [Citation] We have found no Illinois cases construing section 3-303(a) as it relates to a promise to perform future legal services under a retainer. The general rule, however, is that "an executory promise is not value." [Citation] "[T]he promise does not rise to the level of 'value' in the commercial paper market until it is actually performed." [Citation]

The UCC comment to section 303 gives the following example:

"Case # 2. X issues a check to Y in consideration of Y's promise to perform services in the future. Although the executory promise is consideration for issuance of the check it is value only to the extent the promise is performed.

We have found no exceptions to these principles for retainers. Indeed, courts in other jurisdictions interpreting similar language under section 3-303 have held that attorneys may be holders in due course only to the extent that they have actually performed legal services prior to acquiring a negotiable instrument. See [Citations: Pennsylvania, Florida, Massachusetts]. We agree.

This retainer was a contract for future legal services. Under section 3-303(a)(1), it was a "promise of performance," not yet performed. Thus, no value was received, and Carter is not a holder in due course.

Furthermore, in this case, no evidence was presented in the trial court that Carter performed any legal services for Country Grain prior to receiving the checks. Without an evidentiary basis for finding that Carter received the checks for services performed, the trial court correctly found that Carter failed to prove that it was a holder in due course. [Citations]

Conclusion

Because we have decided that Carter did not take the checks for value under section 3-303(a) of the UCC, we need not address its other arguments.

The judgment of the circuit court of Peoria County is affirmed.

Case Questions

1. How did Carter & Grimsley obtain the two checks drawn by Omni?
2. Why—apparently—did Omni stop payments on the checks?
3. Why did the court determine that Carter was not an HDC?

4. Who is it that must have performed here in order for Carter to have been an HDC, Country Grain or Carter?
5. How could making a retainer payment to an attorney be considered anything other than payment on an executory contract, as the dissent argues?

Buckeye Check Cashing Inc., v. Camp, 825 N. E. 2d 844 (2005)

Donovan, J.

Defendant-appellant Shawn Sheth appeals from a judgment of the Xenia Municipal Court in favor of plaintiff-appellee Buckeye Check Cashing, Inc. ("Buckeye"). Sheth contends that the trial court erred in finding that Buckeye was a holder in due course of a postdated check drawn by Sheth and therefore was entitled to payment on the instrument despite the fact that Sheth had issued a stop-payment order to his bank.

In support of this assertion, Sheth argues that the trial court did not use the correct legal standard in granting holder-in-due-course status to Buckeye. In particular, Sheth asserts that the trial court used the pre-1990 Uniform Commercial Code ("UCC") definition of "good faith" as it pertains to holder-in-due-course status, which defined it as "honesty in fact." The definition of "good faith" was extended by the authors of the UCC in 1990 to also mean "the observance of reasonable commercial standards of fair dealing." The post-1990 definition was adopted by the Ohio legislature in 1994.

Sheth argues that while Buckeye would prevail under the pre-1990, "honesty in fact" definition of "good faith," it failed to act in a commercially reasonable manner when it chose to cash the postdated check drawn by Sheth. The lower court…adjudged Buckeye to be a holder in due course and, therefore, entitled to payment. We conclude that the trial court used the incorrect "good faith" standard when it granted holder-in-due-course status to Buckeye because Buckeye did not act in a commercially reasonable manner when it cashed the postdated check drawn by Sheth. Because we accept Sheth's sole assignment of error, the judgment of the trial court is reversed.

On or about October 12, 2003, Sheth entered into negotiations with James A. Camp for Camp to provide certain services to Sheth by October 15, 2003. To that end, Sheth issued Camp a check for $1,300. The check was postdated to October 15, 2003.

On October 13, 2003, Camp negotiated the check to Buckeye and received a payment of $1,261.31. Apparently fearing that Camp did not intend to fulfill his end of the contract, Sheth contacted his bank on October 14, 2003, and issued a stop-payment order on the check. Unaware of the stop-payment order, Buckeye deposited the check with its own bank on October 14, 2003, believing that the check would reach Sheth's bank by October 15, 2003. Because the stop-payment order was in effect, the check was ultimately dishonored by Sheth's

bank. After an unsuccessful attempt to obtain payment directly from Sheth, Buckeye brought suit.

Sheth's sole assignment of error is as follows:

"The trial court erred by applying the incorrect legal standard in granting holder in due course status to the plaintiff-appellee because the plaintiff-appellee failed to follow commercially reasonable standards in electing to cash the check that gives rise to this dispute."

[UCC 3-302] outlines the elements required to receive holder-in-due-course status. The statute states:

…'holder in due course' means the holder of an instrument if both of the following apply:

"(1) The instrument when issued or negotiated to the holder does not bear evidence of forgery or alteration that is so apparent, or is otherwise so irregular or incomplete as to call into question its authenticity;

"(2) The holder took the instrument under all of the following circumstances:

(a) For value;

(b) **In good faith**;

(c) Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;

(d) Without notice that the instrument contains an unauthorized signature or has been altered;

(e) Without notice of any claim to the instrument as described in [3-306];

(f) Without notice that any party has a defense or claim in recoupment described in [UCC 3-305(a); emphasis added].

At issue in the instant appeal is whether Buckeye acted in "good faith" when it chose to honor the postdated check originally drawn by Sheth.…UCC 1-201, defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Before the Ohio legislature amended UCC 1-201 in 1994, that section did not define "good faith"; the definition of "good faith" as "honesty in fact" in UCC 1-201 was the definition that applied[.]…

"Honesty in fact" is defined as the absence of bad faith or dishonesty with respect to a party's conduct within a commercial transaction. [Citation] Under that standard, absent fraudulent behavior, an otherwise innocent party was assumed to have acted in good faith. The "honesty

in fact" requirement, also known as the "pure heart and empty head" doctrine, is a subjective test under which a holder had to subjectively believe he was negotiating an instrument in good faith for him to become a holder in due course. Maine [Citation, 1999].

In 1994, however, the Ohio legislature amended the definition of "good faith" to include not only the subjective "honesty in fact" test, but also an objective test: "the observance of reasonable commercial standards of fair dealing." Ohio UCC 1-201(20). A holder in due course must now satisfy both a subjective and an objective test of good faith. What constitutes "reasonable commercial standards of fair dealing" for parties claiming holder-in-due-course status, however, has not heretofore been defined in the state of Ohio.

In support of his contention that Buckeye is not a holder in due course, Sheth cites a decision from the Supreme Court of Maine, [referred to above] in which the court provided clarification with respect to the objective prong of the "good faith" analysis:

"The fact finder must therefore determine, first, whether the conduct of the holder comported with industry or 'commercial' standards applicable to the transaction and second, whether those standards were reasonable standards intended to result in fair dealing. Each of those determinations must be made in the context of the specific transaction at hand. If the fact finder's conclusion on each point is 'yes,' the holder will be determined to have acted in good faith even if, in the individual transaction at issue, the result appears unreasonable. Thus, a holder may be accorded holder in due course where it acts pursuant to those reasonable commercial standards of fair dealing—even if it is negligent—but may lose that status, even where it complies with commercial standards, if those standards are not reasonably related to achieving fair dealing." [Citation]

Check cashing is an unlicensed and unregulated business in Ohio. [Citation] Thus, there are no concrete commercial standards by which check-cashing businesses must operate. Moreover, Buckeye argues that its own internal operating policies do not require that it verify the availability of funds, nor does Buckeye apparently have any guidelines with respect to the acceptance of postdated checks. Buckeye asserts that cashing a postdated check does not prevent a holder from obtaining holder-in-due-course status and cites several cases in support of this contention. All of the cases cited by Buckeye, however, were decided prior to the UCC's addition of the objective prong to the definition of "good faith."

Under a purely subjective "honesty in fact" analysis, it is clear that Buckeye accepted the check from Camp in good faith and would therefore achieve holder-in-due-course status. When the objective prong of the good faith test is applied, however, we find that Buckeye did not conduct itself in a commercially reasonable manner. While not going so far as to say that cashing a postdated check prevents a holder from obtaining holder-in-due-course status in every instance, the presentation of a postdated check should put the check cashing entity on notice that the check might not be good. Buckeye accepted the postdated check at its own peril. Some attempt at verification should be made before a check-cashing business cashes a postdated

check. Such a failure to act does not constitute taking an instrument in good faith under the current objective test of "reasonable commercial standards" enunciated in [the UCC].

We conclude that in deciding to amend the good faith requirement to include an objective component of "reasonable commercial standards," the Ohio legislature intended to place a duty on the holders of certain instruments to act in a responsible manner in order to obtain holder-in-due-course status. When Buckeye decided to cash the postdated check presented by Camp, it did so without making any attempt to verify its validity. This court in no way seeks to curtail the free negotiability of commercial instruments. However, the nature of certain instruments, such as the postdated check in this case, renders it necessary for appellee Buckeye to take minimal steps to protect its interests. That was not done. Buckeye was put on notice that the check was not good until October 15, 2003. "Good faith," as it is defined in the UCC and the Ohio Revised Code, requires that a holder demonstrate not only honesty in fact but also that the holder act in a commercially reasonable manner. Without taking any steps to discover whether the postdated check issued by Sheth was valid, Buckeye failed to act in a commercially reasonable manner and therefore was not a holder in due course.

Based upon the foregoing, Sheth's single assignment of error is sustained, the judgment of the Xenia Municipal Court is reversed, and this matter is remanded to that court for further proceedings in accordance with law and consistent with this opinion.

Judgment reversed, and cause remanded.

Case Questions

1. Who was Camp? Why did Sheth give him a check? Why is the case titled *Buckeye v. Camp*?
2. How does giving someone a postdated check offer the drawer any protection? How does it give rise to any "notice that the check might not be good"?
3. If Camp had taken the check to Sheth's bank to cash it, what would have happened?
4. What difference did the court discern between the pre-1990 UCC Article 3 and the post-1990 Article 3 (that Ohio adopted in 1994)?

Perfection by Mere Attachment; Priorities

In re NICOLOSI 4 UCC Rep. 111 (Ohio 1966)

Preliminary Statement and Issues

This matter is before the court upon a petition by the trustee to sell a diamond ring in his possession free of liens.…Even though no pleadings were filed by Rike-Kumler Company, the issue from the briefs is whether or not a valid security interest was perfected in this chattel as consumer goods, superior to the statutory title and lien of the trustee in bankruptcy.

Findings of Fact

The [debtor] purchased from the Rike-Kumler Company, on July 7, 1964, the diamond ring in question, for $1237.35 [about $8,500 in 2010 dollars], as an engagement ring for his fiancée. He executed a purchase money security agreement, which was not filed. Also, no financing statement was filed. The chattel was adequately described in the security agreement.

The controversy is between the trustee in bankruptcy and the party claiming a perfected security interest in the property. The recipient of the property has terminated her relationship with the [debtor], and delivered the property to the trustee.

Conclusion of Law, Decision, and Order

If the diamond ring, purchased as an engagement ring by the bankrupt, cannot be categorized as consumer goods, and therefore exempted from the notice filing requirements of the Uniform Commercial Code as adopted in Ohio, a perfected security interest does not exist.

No judicial precedents have been cited in the briefs.

Under the commercial code, collateral is divided into tangible, intangible, and documentary categories. Certainly, a diamond ring falls into the tangible category. The classes of tangible goods are distinguished by the primary use intended. Under [the UCC] the four classes [include] “consumer goods,” “equipment,” “farm products” and “inventory.”

The difficulty is that the code provisions use terms arising in commercial circles which have different semantical values from legal precedents. Does the fact that the purchaser bought the goods as a special gift to another person signify that it was not for his own “personal, family or household purposes”? The trustee urges that these special facts control under the express provisions of the commercial code.

By a process of exclusion, a diamond engagement ring purchased for one's fiancée is not "equipment" bought or used in business, "farm products" used in farming operations, or "inventory" held for sale, lease or service contracts. When the [debtor] purchased the ring, therefore, it could only have been "consumer goods" bought "primarily for personal use." There could be no judicial purpose to create a special class of property in derogation of the statutory principles.

Another problem is implicit, although not covered by the briefs.

By the foregoing summary analysis, it is apparent that the diamond ring, when the interest of the debtor attached, was consumer goods since it could have been no other class of goods. Unless the fiancée had a special status under the code provision protecting a bona fide buyer, without knowledge, for value, of consumer goods, the failure to file a financing statement is not crucial. No evidence has been adduced pertinent to the scienter question.

Is a promise, as valid contractual consideration, included under the term "value"? In other words, was the ring given to his betrothed in consideration of marriage (promise for a promise)? If so, and "value" has been given, the transferee is a "buyer" under traditional concepts.

The Uniform Commercial Code definition of "value"…very definitely covers a promise for a promise. The definition reads that "a person gives 'value' for rights if he acquires them…generally in return for any consideration sufficient to support a simple contract."

It would seem unrealistic, nevertheless, to apply contract law concepts historically developed into the law of marriage relations in the context of new concepts developed for uniform commercial practices. They are not, in reality, the same juristic manifold. The purpose of uniformity of the code should not be defeated by the obsessions of the code drafters to be all inclusive for secured creditors.

Even if the trustee, in behalf of the unsecured creditors, would feel inclined to insert love, romance and morals into commercial law, he is appearing in the wrong era, and possibly the wrong court.

Ordered, that the Rike-Kumler Company holds a perfected security interest in the diamond engagement ring, and the security interest attached to the proceeds realized from the sale of the goods by the trustee in bankruptcy.

Case Questions

1. Why didn't the jewelry store, Rike-Kumler, file a financing statement to protect its security interest in the ring?
2. How did the bankruptcy trustee get the ring?

3. What argument did the trustee make as to why he should be able to take the ring as an asset belonging to the estate of the debtor? What did the court determine on this issue?

PANKRATZ IMPLEMENT COMPANY V. CITIZENS NATIONAL BANK,

130 P. 3d 57 (kan. 2006) [See Text on reserve Cheeseman p. 407]

United States v. Big Z Warehouse, 311 F. Supp 283 (S.D.Ga. 1970)

Financing statement covered all crops to be grown on Blackacre owned by john jones located one mile north of a designated town in a designated county in state. Description sufficient But see Piggott State Bank v. pollard Gin Co., 243 Ark. 159, 419 S.W. 2d 120 (1967) description defective when a financing statement referred to "seven acres of cotton" to be grown by the debtor on the land of a named third person in a designated county within the state.

Purchase Money Security Interest Automatic Perfection (UCC 9-203) (UCC 9-302(1) (d) [see Williams v. Walker-Thomas Furniture Co., 350 F. 2d 445 (W.D. Mo. 1971) White and Summers p. 922]

CHAPTER 23 Introduction to Property: Personal Property and Fixtures

NO CASES

CHAPTER 24 INTELLECTUAL PROPERTY

Reasonable Use Doctrine:

Hoover v. Crane 362 Mich. 36, 106 N.W.2d 563 (1960)

EDWARDS, JUSTICE

This appeal represents a controversy between plaintiff cottage and resort owners on an inland Michigan lake and defendant, a farmer with a fruit orchard, who was using the lake water for irrigation. The chancellor who heard the matter ruled that defendant had a right to reasonable use of lake water. The decree defined such reasonable use in terms which were unsatisfactory to plaintiffs who have appealed.

The testimony taken before the chancellor pertained to the situation at Hutchins Lake, in Allegan county, during the summer of 1958. Defendant is a fruit farmer who owns a 180-acre farm abutting on the lake. Hutchins Lake has an area of 350 acres in a normal season. Seventy-five cottages and several farms, including defendant's, abut on it. Defendant's frontage is approximately 1/4 mile, or about 10% of the frontage of the lake.

Hutchins Lake is spring fed. It has no inlet but does have an outlet which drains south. Frequently in the summertime the water level falls so that the flow at the outlet ceases.

All witnesses agreed that the summer of 1958 was exceedingly dry and plaintiffs' witnesses testified that Hutchins Lake's level was the lowest it had ever been in their memory. Early in August, defendant began irrigation of his 50-acre pear orchard by pumping water out of Hutchins Lake. During that month the lake level fell 6 to 8 inches—the water line receded 50 to 60 feet and cottagers experienced severe difficulties with boating and swimming.

* * *

The tenor of plaintiffs' testimony was to attribute the 6- to 8-inch drop in the Hutchins Lake level in that summer to defendant's irrigation activities. Defendant contended that the decrease was due to natural causes, that the irrigation was of great benefit to him and contributed only slightly to plaintiff's discomfiture. He suggests to us:

One could fairly say that because plaintiffs couldn't grapple with the unknown causes that admittedly occasioned a greater part of the injury complained of, they chose to grapple mightily with the defendant because he is known and visible.

The circuit judge found it impossible to determine a normal lake level from the testimony, except that the normal summer level of the lake is lower than the level at which the lake ceases to drain into the outlet. He apparently felt that plaintiffs' problems were due much more to the abnormal weather conditions of the summer of 1958 than to defendant's irrigation activities.

His opinion concluded:

Accepting the reasonable use theory advanced by plaintiffs it appears to the court that the most equitable disposition of this case would be to allow defendant to use water from the lake until such time when his use interferes with the normal use of his neighbors. One quarter inch of water from the lake ought not to interfere with the rights and uses of defendant's neighbors and this quantity of water ought to be sufficient in time of need to service 45 acres of pears. A meter at the pump, sealed if need be, ought to be a sufficient safeguard. Pumping should not be permitted between the hours of 11 p.m. and 7 a.m. Water need be metered only at such times as there is no drainage into the outlet.

The decree in this suit may provide that the case be kept open for the submission of future petitions and proofs as the conditions permit or require.

* * *

Michigan has adopted the reasonable-use rule in determining the conflicting rights of riparian owners to the use of lake water.

In 1874, Justice COOLEY said:

It is therefore not a diminution in the quantity of the water alone, or an alteration in its flow, or either or both of these circumstances combined with injury, that will give a right of action, if in view of all the circumstances, and having regard to equality of right in others, that which has been done and which causes the injury is not unreasonable. In other words, the injury that is incidental to a reasonable enjoyment of the common right can demand no redress. *Dumont* v. *Kellogg*, 29 Mich 420, 425.

And in *People* v. *Hulbert*, the Court said:

No statement can be made as to what is such reasonable use which will, without variation or qualification, apply to the facts of every case. But in determining whether a use is reasonable we must consider what the use is for; its extent, duration, necessity, and its application; the nature and size of the stream, and the several uses to which it is put; the extent of the injury to the one proprietor and of the benefit to the other; and all other facts which may bear upon the reasonableness of the use. *Red River Roller Mills* v. *Wright*, 30 Minn 249, 15 NW 167, and cases cited.

The Michigan view is in general accord with 4 Restatement, Torts, §§ 851–853.

* * *

We interpret the circuit judge's decree as affording defendant the total metered equivalent in pumpage of 1/4 inch of the content of Hutchins Lake to be used in any dry period in between the cessation of flow from the outlet and the date when such flow recommences. Where the decree also provides for the case to be kept open for future petitions based on changed conditions, it would seem to afford as much protection for plaintiffs as to the future as this record warrants.

Both resort use and agricultural use of the lake are entirely legitimate purposes. Neither serves to remove water from the watershed. There is, however, no doubt that the irrigation use does occasion some water loss due to increased evaporation and absorption. Indeed, extensive irrigation might constitute a threat to the very existence of the lake in which all riparian owners have a stake; and at some point the use of the water which causes loss must yield to the common good.

The question on this appeal is, of course, whether the chancellor's determination of this point was unreasonable as to plaintiffs. On this record, we cannot overrule the circuit judge's view that most of plaintiffs' 1958 plight was due to natural causes. Nor can we say, if this be the only irrigation use intended and the only water diversion sought, that use of the amount provided in the decree during the dry season is unreasonable in respect to other riparian owners.

Affirmed.

Case Questions

1. If the defendant has caused a diminution in water flow, an alteration of the water flow, and the plaintiff is adversely affected, why would the Supreme Court of Michigan not provide some remedy?
2. Is it possible to define an injury that is "not unreasonable"?
3. Would the case even have been brought if there had not been a drought?

Criminal Liability of Employees under RCRA:

U.S. v. Johnson & Towers, Inc., Jack W. Hopkins, and Peter Angel, 741 F.2d 662 (1984)

SLOVITER, Circuit Judge

Before us is the government's appeal from the dismissal of three counts of an indictment charging unlawful disposal of hazardous wastes under the Resource Conservation and Recovery Act. In a question of first impression regarding the statutory definition of "person," the district court concluded that the Act's criminal penalty provision imposing fines and imprisonment could not apply to the individual defendants. We will reverse.

The criminal prosecution in this case arose from the disposal of chemicals at a plant owned by Johnson & Towers in Mount Laurel, New Jersey. In its operations the company, which repairs and overhauls large motor vehicles, uses degreasers and other industrial chemicals that contain chemicals such as methylene chloride and trichlorethylene, classified as "hazardous wastes" under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901–6987 (1982) and "pollutants" under the Clean Water Act, 33 U.S.C. §§ 1251–1376 (1982). During the period relevant here, the waste chemicals from cleaning operations were drained into a holding tank and, when the tank was full, pumped into a trench. The trench flowed from the plant property into Parker's Creek, a tributary of the Delaware River. Under RCRA, generators of such wastes must obtain a permit for disposal from the Environmental Protection Agency (E.P.A.). The E.P.A. had neither issued nor received an application for a permit for Johnson & Towers' operations.

The indictment named as defendants Johnson & Towers and two of its employees, Jack Hopkins, a foreman, and Peter Angel, the service manager in the trucking department. According to the indictment, over a three-day period federal agents saw workers pump waste from the tank into the trench, and on the third day observed toxic chemicals flowing into the creek.

Count 1 of the indictment charged all three defendants with conspiracy under 18 U.S.C. § 371 (1982). Counts 2, 3, and 4 alleged violations under the RCRA criminal provision, 42 U.S.C. § 6928(d) (1982). Count 5 alleged a violation of the criminal provision of the Clean Water Act, 33 U.S.C. § 1319(c) (1982). Each substantive count also charged the individual defendants as aiders and abettors under 18 U.S.C. § 2 (1982).

The counts under RCRA charged that the defendants "did knowingly treat, store, and dispose of, and did cause to be treated, stored and disposed of hazardous wastes without having obtained a permit…in that the defendants discharged, deposited, injected, dumped, spilled, leaked and placed degreasers…into the trench…." The indictment alleged that both Angel and Hopkins "managed, supervised and directed a substantial portion of Johnson & Towers' operations…including those related to the treatment, storage and disposal of the hazardous wastes and pollutants" and that the chemicals were discharged by "the defendants and others at their direction." The indictment did not otherwise detail Hopkins' and Angel's activities or responsibilities.

Johnson & Towers pled guilty to the RCRA counts. Hopkins and Angel pled not guilty, and then moved to dismiss counts 2, 3, and 4. The court concluded that the RCRA criminal provision applies only to "owners and operators," i.e., those obligated under the statute to obtain a permit. Since neither Hopkins nor Angel was an "owner" or "operator," the district court granted the motion as to the RCRA charges but held that the individuals could be liable on these three counts under 18 U.S.C. § 2 for aiding and abetting. The court denied the government's motion for reconsideration, and the government appealed to this court under 18 U.S.C. § 3731 (1982).

* * *

The single issue in this appeal is whether the individual defendants are subject to prosecution under RCRA's criminal provision, which applies to:

any person who—

….

(2) knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter either—

(A) without having obtained a permit under section 6925 of this title…or

(B) in knowing violation of any material condition or requirement of such permit.

42 U.S.C. § 6928(d) (emphasis added). The permit provision in section 6925, referred to in section 6928(d), requires "each person owning or operating a facility for the treatment, storage, or disposal of hazardous waste identified or listed under this subchapter to have a permit" from the E.P.A.

The parties offer contrary interpretations of section 6928(d)(2)(A). Defendants consider it an administrative enforcement mechanism, applying only to those who come within section 6925 and fail to comply; the government reads it as penalizing anyone who handles hazardous waste without a permit or in violation of a permit. Neither party has cited another case, nor have we

found one, considering the application of this criminal provision to an individual other than an owner or operator.

As in any statutory analysis, we are obliged first to look to the language and then, if needed, attempt to divine Congress' specific intent with respect to the issue.

First, "person" is defined in the statute as "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." 42 U.S.C. § 6903(15) (1982). Had Congress meant in section 6928(d)(2)(A) to take aim more narrowly, it could have used more narrow language. Since it did not, we attribute to "any person" the definition given the term in section 6903(15).

Second, under the plain language of the statute the only explicit basis for exoneration is the existence of a permit covering the action. Nothing in the language of the statute suggests that we should infer another provision exonerating persons who knowingly treat, store or dispose of hazardous waste but are not owners or operators.

Finally, though the result may appear harsh, it is well established that criminal penalties attached to regulatory statutes intended to protect public health, in contrast to statutes based on common law crimes, are to be construed to effectuate the regulatory purpose.

* * *

Congress enacted RCRA in 1976 as a "cradle-to-grave" regulatory scheme for toxic materials, providing "nationwide protection against the dangers of improper hazardous waste disposal." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6238, 6249. RCRA was enacted to provide "a multifaceted approach toward solving the problems associated with the 3–4 billion tons of discarded materials generated each year, and the problems resulting from the anticipated 8% annual increase in the volume of such waste." *Id.* at 2, 1976 U.S. Code Cong. & Ad. News at 6239. The committee reports accompanying legislative consideration of RCRA contain numerous statements evincing the Congressional view that improper disposal of toxic materials was a serious national problem.

The original statute made knowing disposal (but not treatment or storage) of such waste without a permit a misdemeanor. Amendments in 1978 and 1980 expanded the criminal provision to cover treatment and storage and made violation of section 6928 a felony. The fact that Congress amended the statute twice to broaden the scope of its substantive provisions and enhance the penalty is a strong indication of Congress' increasing concern about the seriousness of the prohibited conduct.

We conclude that in RCRA, no less than in the Food and Drugs Act, Congress endeavored to control hazards that, "in the circumstances of modern industrialism, are largely beyond self-protection." *United States v. Dotterweich*, 320 U.S. at 280. It would undercut the purposes of

the legislation to limit the class of potential defendants to owners and operators when others also bear responsibility for handling regulated materials. The phrase "without having obtained a permit *under section 6925*" (emphasis added) merely references the section under which the permit is required and exempts from prosecution under section 6928(d)(2)(A) anyone who has obtained a permit; we conclude that it has no other limiting effect. Therefore we reject the district court's construction limiting the substantive criminal provision by confining "any person" in section 6928(d)(2)(A) to owners and operators of facilities that store, treat or dispose of hazardous waste, as an unduly narrow view of both the statutory language and the congressional intent.

Case Questions

1. The district court (trial court) accepted the individual defendants' argument. What was that argument?
2. On what reasoning did the appellate court reject that argument?
3. If employees of a company that is violating the RCRA carry out disposal of hazardous substances in violation of the RCRA, they would presumably lose their jobs if they didn't. What is the moral justification for applying criminal penalties to such employees (such as Hopkins and Angel)?

CHAPTERS 25-26

NO CASES

Chapter 27: The Nature and Regulation of Real Estate and the Environment

Chapters 28-33

No cases

Chapter 34: Employment Law

Disparate Treatment: Burdens of Proof: Barbano v. Madison County

922 F.2d 139 (2d Cir. 1990)

Factual Background

At the Madison County (New York State) Veterans Service Agency, the position of director became vacant. The County Board of Supervisors created a committee of five men to hold interviews for the position. The committee interviewed Maureen E. Barbano and four others. When she entered the interview room, she heard someone say, "Oh, another woman." At the beginning of the interview, Donald Greene said he would not consider "some woman" for the position. Greene also asked Barbano some personal questions about her family plans and whether her husband would mind if she transported male veterans. Ms. Barbano answered that the questions were irrelevant and discriminatory. However, Greene replied that the questions were relevant because he did not want to hire a woman who would get pregnant and quit. Another committee member, Newbold, agreed that the questions were relevant, and no committee member said the questions were not relevant.

None of the interviewers rebuked Greene or objected to the questions, and none of them told Barbano that she need not answer them. Barbano did state that if she decided to have a family she would take no more time off than medically necessary. Greene once again asked whether Barbano's husband would object to her "running around the country with men" and said he would not want his wife to do it. Barbano said she was not his wife. The interview concluded after Barbano asked some questions about insurance.

After interviewing several other candidates, the board hired a man. Barbano sued the county for sex discrimination in violation of Title VII, and the district court held in her favor. She was awarded $55,000 in back pay (about $117,000 in 2015 dollars), prejudgment interest, and attorney's fees. Madison County appealed the judgment of Federal District Judge McAvoy; Barbano cross-appealed, asking for additional damages.

The court found that Barbano had established a prima facie case of discrimination under Title VII, thus bringing into issue the appellants' purported reasons for not hiring her. [A prima facie case of discrimination is where the plaintiff has sufficient evidence to prove discrimination; then the employer has the burden to show discrimination was not the reason for the action complained of, and if the employer cannot, the employee victim will likely win.] The appellants provided four reasons why they chose Wagner over Barbano, which the district court rejected either as unsupported by the record or as a pretext for discrimination in light of Barbano's interview. The district court then found that because of Barbano's education and experience in social services, the appellants had failed to prove that absent the discrimination, they still would not have hired Barbano. Accordingly, the court awarded Barbano back pay, prejudgment interest, and attorney's fees. Subsequently, the court denied Barbano's request for front pay and a mandatory injunction ordering her appointment as director upon the next vacancy. This appeal and cross-appeal followed.

From the Opinion of FEINBERG, CIRCUIT JUDGE

Appellants argue that the district court erred in finding that Greene's statements during the interview showed that the Board discriminated in making the hiring decision, and that there was no direct evidence of discrimination by the Board, making it improper to require that appellants prove that they would not have hired Barbano absent the discrimination. Barbano in turn challenges the adequacy of the relief awarded to her by the district court.

*** * ***

B. The Employer's Burden

Having found that Barbano carried her burden of proving discrimination, the district court then placed the burden on appellants to prove by a preponderance of the evidence that, absent the discrimination, they would not have hired Barbano for the position. Appellants argue that this burden is only placed on an employer if the plaintiff proves discrimination by direct evidence, and since Barbano's evidence of discrimination was merely circumstantial, the district court erred by placing the burden of proof on them. Appellants, however, misapprehend the nature of Barbano's proof and thus the governing legal standard.

The burden is properly placed on the defendant "once the plaintiff establishes by direct evidence that an illegitimate factor played a motivating or substantial role in an employment decision." [Citation.] Thus, the key inquiry on this aspect of the case is whether the evidence is direct, that is,

whether it shows that the impermissible criterion played some part in the decision-making process. If plaintiff provides such evidence, the fact-finder must then determine whether the evidence shows that the impermissible criterion played a motivating or substantial part in the hiring decision. [Citation.]

As we found above, the evidence shows that Barbano's gender was clearly a factor in the hiring decision. That the discrimination played a substantial role in that decision is shown by the importance of the recommendation to the Board. As Rafte testified, the Board utilizes a committee system, and so the Board "usually accepts" a committee's recommendation, as it did here when it unanimously voted to appoint Wagner [another candidate]. Had the Board distanced itself from Barbano's allegations of discrimination and attempted to ensure that it was not relying upon illegitimate criteria in adopting the Committee's recommendation, the evidence that discrimination played a substantial role in the Board's decision would be significantly weakened. The Board showed no inclination to take such actions, however, and in adopting the discriminatory recommendation allowed illegitimate criteria to play a substantial role in the hiring decision.

The district court thus properly required appellants to show that the Board would not have hired Barbano in the absence of discrimination. "The employer has not yet been shown to be a violator, but neither is it entitled to the . . . presumption of good faith concerning its employment decisions. At this point the employer may be required to convince the fact-finder that, despite the smoke, there is no fire." [Citation.]

[The court reviewed the reasons the employer gave for choosing another candidate—a man—instead of Barbano.] * * *

To be sure, both candidates were qualified for the Director's position, and it is not our job—nor was it the district court's—to decide which one was preferable. However, there is nothing to indicate that [the lower court judge] misconceived his function in this phase of the case, which was to decide whether appellants failed to prove by a preponderance of the evidence that they would not have hired Barbano even if they had not discriminated against her. The judge found that defendants had not met that burden. We must decide whether that finding was clearly erroneous, and we cannot say that it was.

Case Questions

1. Madison County contended that Barbano needed to provide "direct evidence" of discrimination that had played a motivating or substantial part in the decision. What would such evidence look like? Is it likely that most plaintiffs who are discriminated against because of their gender would be able to get "direct evidence" that gender was a motivating or substantial factor?
2. The "clearly erroneous" standard is applied here, as it is in many cases where appellate courts review trial court determinations. State the test, and say why the appellate court believed that the trial judge's ruling was not "clearly erroneous."

Title VII and Hostile Work Environment:

Duncan v. General Motors Corporation, *300 F.3d 928 (8th Cir. 2002)*

OPINION BY HANSEN, Circuit Judge.

The Junior College District of St. Louis (the College) arranged for Diana Duncan to provide in-house technical training at General Motors Corporation's (GMC) manufacturing facility in Wentzville, Missouri. Throughout her tenure at GMC, Duncan was subjected to unwelcome attention by a GMC employee, James Booth, which culminated in Duncan's resignation. Duncan subsequently filed this suit under Title VII of the Civil Rights Act and the Missouri Human Rights Act * * * alleging that she was sexually harassed and constructively discharged. A jury found in favor of Duncan and awarded her $4,600 in back pay, $700,000 [about $96,000 in 2017 dollars] in emotional distress damages on her sexual harassment claim, and $300,000 in emotional distress damages on her constructive discharge claim. GMC appeals from the district court's denial of its post trial motion for judgment as a matter of law, and the district court's award of attorneys' fees attendant to the post trial motion. We reverse.

I. [Facts]

Diana Duncan worked as a technical training clerk in the high-tech area at GMC as part of the College's Center for Business, Industry, and Labor program from August 1994 until May 1997. Duncan provided in-house training support to GMC employees.

Duncan first learned about the College's position at GMC from Booth, a United Auto Workers Union technology training coordinator for GMC. Booth frequented the country club where Duncan worked as a waitress and a bartender. Booth asked Duncan if she knew anyone who had computer and typing skills and who might be interested in a position at GMC. Duncan expressed interest in the job. Booth brought the pre-employment forms to Duncan at the country club, and he forwarded her completed forms to Jerry Reese, the manager of operations, manufacturing, and training for the College. * * * Duncan began work at GMC in August 1994. Two weeks after Duncan began working at GMC, Booth requested an off-site meeting with her at a local restaurant. Booth explained to Duncan that he was in love with a married coworker and that his own marriage was troubled. Booth then propositioned Duncan by asking her if she would have a relationship with him. Duncan rebuffed his advance and left the restaurant. The next day Duncan mentioned the incident to the paint department supervisor Joe Rolen, who had no authority over Booth. Duncan did not report Booth's conduct to either Reese (her supervisor) at the College or Ish (Booth's management counterpart) at GMC. However, she did confront Booth, and he apologized for his behavior. He made no further such "propositions." Duncan stated that Booth's manner toward her after she declined his advance became hostile, and he became more critical of her work. For example, whenever she made a typographical error, he told her that she was incompetent and that he should hire a "Kelly Services" person to replace her. Duncan admitted that Booth's criticisms were often directed at other employees as well, including male coworkers.

Duncan testified to numerous incidents of Booth's inappropriate behavior. Booth directed Duncan to create a training document for him on his computer because it was the only computer with the necessary software. The screen saver that Booth had selected to use on his computer was a picture of a naked woman. Duncan testified to four or five occasions when Booth would unnecessarily touch her hand when she handed him the telephone. In addition, Booth had a planter in his office that was shaped like a slouched man wearing a sombrero. The planter had a hole in the front of the

man's pants that allowed for a cactus to protrude. The planter was in plain view to anyone entering Booth's office. Booth also kept a child's pacifier that was shaped like a penis in his office that he occasionally showed to his coworkers and specifically to Duncan on two occasions.

In 1995, Duncan requested a pay increase and told Booth that she would like to be considered for an illustrator's position. Booth said that she would have to prove her artistic ability by drawing his planter. Duncan objected, particularly because previous applicants for the position were required to draw automotive parts and not his planter. Ultimately, Duncan learned that she was not qualified for the position because she did not possess a college degree.

Additionally in 1995, Booth and a College employee created a "recruitment" poster that was posted on a bulletin board in the high-tech area. The poster portrayed Duncan as the president and CEO of the Man Hater's Club of America. It listed the club's membership qualifications as: "Must always be in control of: (1) Checking, Savings, all loose change, etc.; (2) (Ugh) Sex; (3) Raising children our way!; (4) Men must always do household chores; (5) Consider T.V. Dinners a gourmet meal."…

On May 5, 1997, Booth asked Duncan to type a draft of the beliefs of the "He-Men Women Hater's Club." The beliefs included the following:

—Constitutional Amendment, the 19th, giving women [the] right to vote should be repealed. Real He-Men indulge in a lifestyle of cursing, using tools, handling guns, driving trucks, hunting and of course, drinking beer.

—Women really do have coodies [sic] and they can spread.

—Women [are] the cause of 99.9 per cent of stress in men.

—Sperm has a right to live.

—All great chiefs of the world are men.

—Prostitution should be legalized.

Duncan refused to type the beliefs and resigned two days later.

Duncan testified that she complained to anyone who would listen to her about Booth's behavior, beginning with paint department supervisor Joe Rolen after Booth propositioned her in 1994. Duncan testified that between 1994 and 1997 she complained several times to Reese at the College about Booth's behavior, which would improve at least in the short term after she spoke with Reese. …

Duncan filed a charge of sex discrimination with the Equal Employment Opportunity Commission (EEOC) on October 30, 1997. The EEOC issued Duncan a right to sue notice on April 17, 1998. Alleging sexual harassment and constructive discharge, Duncan filed suit against the College and GMC under both Title VII of the Civil Rights Act and the Missouri Human Rights Act. Duncan settled with the College prior to trial. After the jury found in Duncan's favor on both counts against GMC, GMC filed a post-trial motion for judgment as a matter of law or, alternatively, for a new trial. The district court denied the motion. The district court also awarded Duncan attorneys' fees in conjunction with GMC's post-trial motion. GMC appeals.

II. [Analysis]

A. Hostile Work Environment

GMC argues that it was entitled to judgment as a matter of law on Duncan's hostile work environment claim because she failed to prove a prima facie case. We agree. * * *

It is undisputed that Duncan satisfies the first two elements of her prima facie case: she is a member of a protected group and Booth's attention was unwelcome. We also conclude that the harassment was based on sex.…Although there is some evidence in the record that indicates some of Booth's behavior, and the resulting offensive and disagreeable atmosphere, was directed at both male and female employees, GMC points to ten incidents when Booth's behavior was directed at Duncan alone. GMC concedes that five of these ten incidents could arguably be based on sex: (1) Booth's proposition for a "relationship"; (2) Booth's touching of Duncan's hand; (3) Booth's request that Duncan sketch his planter; (4) the Man Hater's Club poster; and (5) Booth's request that Duncan type the He-Men Women Haters beliefs. "A plaintiff in this kind of case need not show…that only women were subjected to harassment, so long as she shows that women were the primary target of such harassment." We conclude that a jury could reasonably find that Duncan and her gender were the overriding themes of these incidents. The evidence is sufficient to support the jury finding that the harassment was based on sex.

We agree, however, with GMC's assertion that the alleged harassment was not so severe or pervasive as to alter a term, condition, or privilege of Duncan's employment. … To clear the high threshold of actionable harm, Duncan has to show that "the workplace is permeated with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Systems, Inc*. (U.S. 1993). "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview." Thus, the fourth part of a hostile environment claim includes both objective and subjective components: an environment that a reasonable person would find hostile and one that the victim actually perceived as abusive. [Citing *Harris*.] In determining whether the conduct is sufficiently severe or pervasive, we look to the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." * * * These standards are designed to "filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing." [*Citing Faragher v. City of Boca Raton*, U.S. 1998.]

The evidence presented at trial illustrates that Duncan was upset and embarrassed by the posting of the derogatory poster and was disturbed by Booth's advances and his boorish behavior; but, as a matter of law, she has failed to show that these occurrences in the aggregate were so severe and extreme that a reasonable person would find that the terms or conditions of Duncan's employment had been altered. … Numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here. See, e.g., *Shepherd v. Comptroller of Pub. Accounts*, (5th Cir.) (holding that several incidents over a two-year period, including the comment "your elbows are the same color as your nipples," another comment that plaintiff had big thighs, repeated touching of plaintiff's arm, and attempts to look down the plaintiff's dress, were insufficient to support hostile work environment claim); *Adusumilli v. City of Chicago* (7th Cir. 1998) (holding conduct insufficient to support hostile environment claim when employee teased plaintiff, made sexual jokes aimed at her, told her not to wave at police officers "because people would think she was a prostitute," commented about low-necked tops, leered at her breasts, and touched her

arm, fingers, or buttocks on four occasions); *Black v. Zaring Homes, Inc*., (6th Cir.) (reversing jury verdict and holding behavior merely offensive and insufficient to support hostile environment claim when employee reached across plaintiff, stating "nothing I like more in the morning than sticky buns" while staring at her suggestively; suggested to plaintiff that parcel of land be named "Hootersville," "Titsville," or "Twin Peaks"; and asked "weren't you there Saturday night dancing on the tables?" while discussing property near a biker bar); *Weiss v. Coca-Cola Bottling Co*., (7th Cir. 1993) (holding no sexual harassment when plaintiff's supervisor asked plaintiff for dates, asked about her personal life, called her a "dumb blonde," put his hand on her shoulder several times, placed "I love you" signs at her work station, and attempted to kiss her twice at work and once in a bar).

Booth's actions were boorish, chauvinistic, and decidedly immature, but we cannot say they created an objectively hostile work environment permeated with sexual harassment. Construing the evidence in the light most favorable to Duncan, she presented evidence of four categories of harassing conduct based on her sex: a single request for a relationship, which was not repeated when she rebuffed it, four or five isolated incidents of Booth briefly touching her hand, a request to draw a planter, and teasing in the form of a poster and beliefs for an imaginary club. It is apparent that these incidents made Duncan uncomfortable, but they do not meet the standard necessary for actionable sexual harassment. It is worth noting that Duncan fails to even address this component of her prima facie case in her brief. We conclude as a matter of law that she did not show a sexually harassing hostile environment sufficiently severe or pervasive so as to alter the conditions of her employment, a failure that dooms Duncan's hostile work environment claim. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67, 91 L. Ed. 2d 49, 106 S. Ct. 2399 (1986). Reversed.

[There was a heated dissent in this case, ripping apart the majority's ruling. To read it, go here: http://caselaw.findlaw.com/us-8th-circuit/1435580.html, and begin reading at III, starting with the second paragraph. The United States Supreme Court declined to take the case.]

Case Questions

1. Is the majority opinion persuasive? How would you have ruled, and why?
2. "Numerous cases have rejected hostile work environment claims premised upon facts equally or more egregious than the conduct at issue here." By what standard or criteria does the majority opinion conclude that Duncan's experiences were no worse than those mentioned in the other cases?
3. Should the majority on the appeals court substitute its judgment for that of the jury?

Age Discrimination: Burden of Persuasion:

Gross v. FBL Financial Services, Inc., *557 U.S. 167 (2009)*

JUSTICE CLARENCE THOMAS delivered the opinion of the court.

I

Petitioner Jack Gross began working for respondent FBL Financial Group, Inc. (FBL), in 1971. As of 2001, Gross held the position of claims administration director. But in 2003, when he was 54 years old, Gross was reassigned to the position of claims project coordinator. At that same time, FBL transferred many of Gross' job responsibilities to a newly created position—claims administration

manager. That position was given to Lisa Kneeskern, who had previously been supervised by Gross and who was then in her early forties. Although Gross (in his new position) and Kneeskern received the same compensation, Gross considered the reassignment a demotion because of FBL's reallocation of his former job responsibilities to Kneeskern.

In April 2004, Gross filed suit in District Court, alleging that his reassignment to the position of claims project coordinator violated the ADEA, which makes it unlawful for an employer to take adverse action against an employee "because of such individual's age." [Citation to statute.] The case proceeded to trial, where Gross introduced evidence suggesting that his reassignment was based at least in part on his age. FBL defended its decision on the grounds that Gross' reassignment was part of a corporate restructuring and that Gross' new position was better suited to his skills.

At the close of trial, and over FBL's objections, the District Court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that FBL "demoted [him] to claims projec[t] coordinator" and that his "age was a motivating factor" in FBL's decision to demote him. The jury was further instructed that Gross' age would qualify as a "'motivating factor,' if [it] played a part or a role in [FBL]'s decision to demote [him]." The jury was also instructed regarding FBL's burden of proof. According to the District Court, the "verdict must be for [FBL]…if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age." *Ibid.* The jury returned a verdict for Gross, awarding him $46,945 in lost compensation. FBL challenged the jury instructions on appeal. The United States Court of Appeals for the Eighth Circuit reversed and remanded for a new trial, holding that the jury had been incorrectly instructed under the standard established in *Price Waterhouse* v. *Hopkins*, 490 U. S. 228 (1989). * * *

Because Gross conceded that he had not presented direct evidence of discrimination, the Court of Appeals held that the District Court should not have given the mixed-motives instruction. Rather, Gross should have been held to the burden of persuasion applicable to typical, non-mixed-motives claims; the jury thus should have been instructed only to determine whether Gross had carried his burden of "prov[ing] that age was the determining factor in FBL's employment action."

We * * * now vacate the decision of the Court of Appeals.

II

The parties have asked us to decide whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." Before reaching this question, however, we must first determine whether the burden of persuasion ever shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA. We hold that it does not.

A

Petitioner relies on this Court's decisions construing Title VII for his interpretation of the ADEA. Because Title VII is materially different with respect to the relevant burden of persuasion, however, these decisions do not control our construction of the ADEA.

In *Price Waterhouse*, a plurality of the Court and two Justices concurring in the judgment determined that once a "plaintiff in a Title VII case proves that [the plaintiff's membership in a

protected class] played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken [that factor] into account." But as we explained in *Desert Palace, Inc.* v. *Costa* (2003), Congress has since amended Title VII by explicitly authorizing discrimination claims in which an improper consideration was "a motivating factor" for an adverse employment decision (providing that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for any employment practice, even though other factors also motivated the practice" (emphasis added)). * * *

This Court has never held that this burden-shifting framework applies to ADEA claims. And, we decline to do so now. When conducting statutory interpretation, we "must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination." Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§2000e–2(m) and 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways. * * *

We cannot ignore Congress' decision to amend Title VII's relevant provisions but not make similar changes to the ADEA. When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. … As a result, the Court's interpretation of the ADEA is not governed by Title VII decisions such as *Desert Palace* and *Price Waterhouse*.

B

The ADEA provides, in relevant part, that "[i]t shall be unlawful for an employer … to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U. S. C. §623(a)(1) (emphasis added).

The words "because of" mean "by reason of: on account of." * * * The ordinary meaning of the ADEA's requirement that an employer took adverse action "because of" age is that age was the "reason" that the employer decided to act. * * *

It follows, then, that under §623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the "but-for" cause of the employer's adverse action. Indeed, we have previously held that the burden is allocated in this manner in ADEA cases. . . . And nothing in the statute's text indicates that Congress has carved out an exception to that rule for a subset of ADEA cases. Where the statutory text is "silent on the allocation of the burden of persuasion," we "begin with the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Schaffer* v. *Weast*, 546 U. S. 49, 56 (2005) …

Hence, the burden of persuasion necessary to establish employer liability is the same in alleged mixed-motives cases as in any other ADEA disparate-treatment action. A plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial), that age was the "but-for" cause of the challenged employer decision.

* * *

[Section III is omitted.]

IV

We hold that a plaintiff bringing a disparate-treatment claim pursuant to the ADEA must prove, by a preponderance of the evidence, that age was the "but-for" cause of the challenged adverse employment action. The burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision. Accordingly, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Case Questions

1. What is the practical effect of this decision? Will plaintiffs with age-discrimination cases find it harder to win after *Gross*?
2. As Justice Thomas writes about it, does "but-for" cause here mean the "sole cause"? Must plaintiffs now eliminate any other possible cause in order to prevail in an ADEA lawsuit?
3. Based on this opinion, if the employer provides a nondiscriminatory reason for the change in the employee's status (such as "corporate restructuring" or "better alignment of skills"), does the employer bear any burden of showing that those are not just words but that, for example, the restructuring really does make sense or that the "skills" really do line up better in the new arrangement?
4. If the plaintiff was retained at the same salary as before, how could he have a "discrimination" complaint, since he still made the same amount of money?
5. The case was decided by a 5-4 majority. A dissent was filed by Justice Stevens, and a separate dissent by Justice Breyer, joined by Justices Ginsburg and Souter. You can access those at http://www.law.cornell.edu/supct/pdf/08-441P.ZD1.

Disability Discrimination:

Toyota v. Williams, 534 U.S. 184 (2000)

Factual Background

Ella Williams's job at the Toyota manufacturing plant involved using pneumatic tools. When her hands and arms began to hurt, she consulted a physician and was diagnosed with carpal tunnel syndrome. The doctor advised her not to work with any pneumatic tools or lift more than twenty pounds. Toyota shifted her to a different position in the quality control inspection operations (QCIO) department, where employees typically performed four different tasks.

Initially, Williams was given two tasks, but Toyota changed its policy to require all QCIO employees to rotate through all four tasks. When she performed the "shell body audit," she had to hold her hands and arms up around shoulder height for several hours at a time.

She soon began to experience pain in her neck and shoulders. When she asked permission to do only the two tasks that she could perform without difficulty, she was refused. According to Toyota, Williams then began missing work regularly.

In 1997, Toyota Motor Manufacturing, Kentucky, Inc. terminated Ella Williams, citing her poor attendance record. Subsequently, claiming to be disabled from performing her automobile assembly line job by carpal tunnel syndrome and related impairments, Williams sued Toyota for failing to provide her with a reasonable accommodation as required by the Americans with Disabilities Act (ADA) of 1990.

Granting Toyota summary judgment, the district court held that Williams's impairment did not qualify as a disability under the ADA because it had not substantially limited any major life activity and that there was no evidence that Williams had had a record of a substantially limiting impairment. In reversing, the court of appeals found that the impairments substantially limited Williams in the major life activity of performing manual tasks. Because her ailments prevented her from doing the tasks associated with certain types of manual jobs that require the gripping of tools and repetitive work with hands and arms extended at or above shoulder levels for extended periods of time, the appellate court concluded that Williams demonstrated that her manual disability involved a class of manual activities affecting the ability to perform tasks at work.

JUSTICE SANDRA DAY O'CONNOR delivered the unanimous opinion of the court.

When it enacted the ADA in 1990, Congress found that some 43 million Americans have one or more physical or mental disabilities. If Congress intended everyone with a physical impairment that precluded the performance of some isolated, unimportant, or particularly difficult manual task to qualify as disabled, the number of disabled Americans would surely have been much higher. We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairments impact must also be permanent or long-term.

When addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job. In this case, repetitive work with hands and arms extended at or above shoulder levels for extended periods of time is not an important part of most people's daily lives. The court, therefore, should not have considered respondent's inability to do such manual work in or specialized assembly line job as sufficient proof that she was substantially limited in performing manual tasks.

At the same time, the Court of Appeals appears to have disregarded the very type of evidence that it should have focused upon. It treated as irrelevant "[t]he fact that [respondent] can…ten[d] to her personal hygiene [and] carr[y]out personal or household chores." Yet household chores, bathing, and brushing one's teeth are among the types of manual tasks of central importance to people's daily lives, and should have been part of the assessment of whether respondent was substantially limited in performing manual tasks.

The District Court noted that at the time respondent sought an accommodation from petitioner, she admitted that she was able to do the manual tasks required by her original two jobs in QCIO. In addition, according to respondent's deposition testimony, even after her condition worsened, she could still brush her teeth, wash her face, bathe, tend her flower garden, fix breakfast, do laundry, and pick up around the house. The record also indicates that her medical conditions caused her to avoid sweeping, to quit dancing, to occasionally seek help dressing, and to reduce how often she plays with her children, gardens, and drives long distances. But these changes in her life did not amount to such severe restrictions in the activities that are of central importance to most people's daily lives that they establish a manual task disability as a matter of law. On this record, it was therefore inappropriate for the Court of Appeals to grant partial summary judgment to respondent on the issue of whether she was substantially limited in performing manual tasks, and its decision to do so must be reversed.

Accordingly, we reverse the Court of Appeals' judgment granting partial summary judgment to respondent and remand the case for further proceedings consistent with this opinion.

Case Questions

1. What is the court's most important "finding of fact" relative to hands and arms? How does this relate to the statutory language that Congress created in the ADA?
2. The case is remanded to the lower courts "for further proceedings consistent with this opinion." In practical terms, what does that mean for this case?

Summary

For the past forty-eight years, Title VII of the Civil Rights Act of 1964 has prohibited employment discrimination based on race, religion, sex, or national origin. Any employment decision, including hiring, promotion, and discharge, based on one of these factors is unlawful and subjects the employer to an award of back pay, promotion, or reinstatement. The Equal Employment Opportunity Commission (EEOC) may file suits, as may the employee—after the commission screens the complaint.

Two major types of discrimination suits are those for disparate treatment (in which the employer intended to discriminate) and disparate impact (in which, regardless of intent, the impact of a particular non-job-related practice has a discriminatory effect). In matters of religion, the employer is bound not only to refrain from discrimination based on an employee's religious beliefs or preferences but also to accommodate the employee's religious practices to the extent that the accommodation does not impose an undue hardship on the business.

Sex discrimination, besides refusal to hire a person solely on the basis of sex, includes discrimination based on pregnancy. Sexual harassment is a form of sex discrimination, and it includes the creation of a hostile or offensive working environment. A separate statute, the Equal Pay Act, mandates equal pay for men and women assigned to the same job.

One major exception to Title VII permits hiring people of a particular religion, sex, or nationality if that feature is a bona fide occupational qualification. There is no bona fide occupational qualification (BFOQ) exception for race, nor is a public stereotype a legitimate basis for a BFOQ.

Affirmative action plans, permitting or requiring employers to hire on the basis of race to make up for past discrimination or to bring up the level of minority workers, have been approved, even though the plans may seem to conflict with Title VII. But affirmative action plans have not been permitted to overcome bona fide seniority or merit systems.

The Age Discrimination in Employment Act protects workers over forty from discharge solely on the basis of age. Amendments to the law have abolished the age ceiling for retirement, so that most people working for employers covered by the law cannot be forced to retire.

The Americans with Disabilities Act of 1990 prohibits discrimination based on disability and applies to most jobs in the private sector.

At common law, an employer was free to fire an employee for any reason or for no reason at all. In recent years, the employment-at-will doctrine has been seriously eroded. Many state courts have found against employers on the basis of implied contracts, tortious violation of public policy, or violations of an implied covenant of good faith and fair dealing.

Beyond antidiscrimination law, several other statutes have an impact on the employment relationship. These include the plant-closing law, the Employee Polygraph Protection Act, the Occupational Safety and Health Act, the Employee Retirement Income Security Act, and the Fair Labor Standards Act.

CHAPTER 35 Labor-Management Relations

No cases

ADDENDA

Landmark Cases

Source: *Landmark Cases: 12 Historic Supreme Court Decisions*, Tony Mauro (C-SPAN Series). Vols. 1-2. On reserve at the LBCC Library circulation desk.

1. *Marbury v. Madison*, 5 U. S. 137 (1803); Separation of Powers; Vol. 1 p. 21

2. *McCulloch v. Maryland*, 17 U.S. 316 (1819); Separation of Powers; Vol. 2 p. 21

3. Slaughterhouse Cases, *The Butchers' Benevolent Assoc. of New Orleans v. The Crescent City Livestock Landing and Slaughterhouse Co*. 83 U.S. 36 (1873) Government Monopolies, regulation and Privileges or Immunities Clause 14th Amendment; Vol. 1 p. 35.

4. *Lochner v. New York*, 198 U.S. 45 (1905) Labor Laws, property right of contract Equal Protection; (See West Coast Hotel v. Parrish p. 47 and economic rights cases p. 49) Vol. 2 p. 43

6. *Katz v. United States*, 389 U.S. 347 (1967) Search and seizure Vol. 2 p. 99

7. Schenck *v. United States* (Speech) 249 U.S. 47 1919) Vol. 1 p. 49

8. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Freedom of Speech, Vol. 2, p. 65

9. *Tinker v. Des Moines Independent Community School District*, 393 U. S. 503 (1969), Freedom of Speech, Vol 2 p. 71

10. *New York Times v. United States*, 403 U.S. 713 (1971) Freedom of Speech, Vol 2 p. 79

11. *Brown v. Board of Education,* (Overruled Plessy v. Ferguson 163 U.S. 537(1896)) Vol. 2. p.41

12. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); Separation of Powers, Vol. 1 p. 63.

13. *Griswold v. Connecticut*, 381 U. S. 479 (1965); (Fundamental rights –privacy) Vol 2 p. 53

14. *Roe v. Wade*, 410 U.S. 113 (1973); Fundamental rights- privacy) Vol 1 p. 101

15. Civil Rights Cases: *United States v. Stanley; United States v. Ryan; United States v. Nichols; United States v. Singleton; Robinson and wife v. Memphis & Charleston Railroad Co.,* 109 U.S. 3 (1883) Racial Discrimination. Vol 2 p. 28

16. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886) Racial Discrimination Vol. 2 p. 35

17. *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978) Affirmative Action, Vol 2 p. 95

Leading Supreme Court Cases

Source: *Landmark Supreme Court Cases,* Richard A. Leiter and Roy M. Mersky; Vols. 1-3. On Reserve at the LBCC Library circulation desk.

Notes: This is a three volume text. Volume I starts page-1, "Abortion" and ends with "Death Penalty" page 338. Volume II starts on page 379 "Due Process" and ends with "Privacy" page 766. Volume III starts page 785 "Freedom of Religion" and ends on p. 1133 "additional cases". Important appendixes are in volume III at page 1137. Appendixes include; Table of cases, U.S. Constitution, Glossary, page 1161, Selected Bibliography and Index.

Students should focus on the following sections for business law:

1. ***Antitrust and Competition*** Vol. I, p.30

a. *The Slaughterhouse cases*-63 U.S. 36 (1872)

b. *United States v. E.C. Knight Co*., 156 U.S. 1 (1895) Monopoly of sugar (rationalize this case?)

c. *Swift & Company v. United States*, 196 U. S. 375 (1905) (overrule Knight?) Affecting commerce standard) (Civil rights and Equal Protection Vol. I, p. 47.

2. ***Civil Rights and Equal Protection*** Vol. I, p. 47 - 266

3. ***Contracts*** Vol. I, p. 267 (contracts clause United States Constitution- *Article 1, section 10, clause 1*, (see *Sveen v. Melvin*, 584 U. S. ___ (2018)

a. *Home Building and Loan Association v. Braisdell*, 290 U.S. 415 (1934);

b. *Lochner v. New York*, 198 U.S. 45 (1905)

4. ***Due Process***, Vol II, p. 379-498(Fourth Amendment, Article I sect. 10 and Fourteenth Amendment Section I)
    a. See page *Penn Central Transportation Co., v. New York,* 438 U.S. 104 (1978) regarding taking clause and zoning cases on page 462. See Nolan case on page 472. Lucas case page 481. Dolan case page 484. Important page 490 Tahoe Sierra v. Tahoe Regional Planning Agency 535 U.S. 302 (2002) temporary moratoriums not a taking and page 494 *Kelo v. City of New London*, 545 U.S. 469 (2005)
    b. *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990) Can state deny termination of life support and violate 5th amendment due process? See related cases page 480. See Glucksberg case page 485.
5. ***Intellectual Property***, Vol. II, p. 540
6. ***Interstate Commerce***, Vol. II p. 604.
    a. *Gibbons v. Ogden*, 22 U.S. 1 (1824);
    b. *Wickard v. Filburn*, 337 U.S. 111 (1942) Wheat case;
    c. Discussion page 638 of *Swift v. Tyson*, reversed by *Erie Railroad,* 304 U.S. 64 (1938)page 660, establishing no federal common law; *Pennoyer v. Neff*, 95 U.S. 714 (1877);

d. *Sierra Club v. Morton*, 405 U.S. 727 (1972) page 665, standing in environmental cases, what is injury, Douglas dissent; see *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

7. ***Jurisdiction***, Vol. II, p. 648.
   a. *Marbury v. Madison*, 5 U.S. 137 (1803);
   b. *McCulloch v. Maryland*,17 U.S. 316 (1819);
   c. *Humphrey's v. United States*, 295 U.S. 602 (1935), power of president to remove federal officials.
8. ***Labor Unions***, Vol. II, p. 676;
   a. *Adair v. United States*, 208 U.S. 161 (1902); Yellow dog contracts
   b. *Youngstown Sheet and Tube Co., v. Sawyer,* 343 U. S. 579 (1952) Power of President to seize a business.
9. ***Freedom of the Press***, Vol III, p. 746;
   a. *New York Times v. Sullivan,* 376 U.S.234 (1964);
   b. *New York Times v. United States*, 403 U.S. 713 (1971)(Pentagon Papers)
10. ***Privacy***, [see abortion cases vol. I, p.1]Vol. II, p. 766;
   a. *Doe v. Chao*, 540 U.S. 614 (2004); Federal Privacy Act of 1974