

The Post

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The Post

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AN INTRODUCTION TO *THE POST*

Anna Ivey[†]

To state the obvious, lawyers and law professors are a wordy bunch. For better or worse, they love to share what's on their minds, and they embrace new technologies, like blogs, to do so. The most popular legal blogs draw millions of visitors per year,¹ a readership that even the most widely read law reviews can envy.² The explosion of legal blogs in the last ten years or so³ inspires us to ask: What constitutes good legal blog writing? And is it possible to identify the best of the best? In that spirit, we introduce *The Post*.

THE ELEMENTS OF GOOD LEGAL BLOGGING

Blogging

In showcasing the best of legal blogging – and we use “blogging” loosely to include whatever other digital platforms the future holds for short-form, real-time, public writing – we embrace blogging for what it is, no more and no less. We intentionally do not venture into larger debates about whether legal blogging, even at its best, rises (or descends, or congeals, or metastasizes) to the level of legal scholarship, and we accept that they are two different things, at least for now. We are, however, inspired by the debate.

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¹ Paul Caron, *Law Prof Blog Traffic Rankings*, Tax Prof Blog, http://taxprof.typepad.com/taxprof_blog/2011/06/law-prof-.html#tp (June 14, 2011).

² Davies, Ross E., *The Dipping Point: Law Review Circulation 2010*, Green Bag Almanac and Reader, 547-554 (2011); George Mason Law & Economics Research Paper No. 11-01, available at SSRN: <http://ssrn.com/abstract=1738530>.

³ Early-adopter legal blogs that continue to thrive include Overlawyered (founded in 1999), Volokh Conspiracy (2002), and How Appealing (2002).

Five years ago, a number of prominent legal academics (most of them also rock-star bloggers) convened at Harvard Law School for a symposium⁴ dedicated to the question of blogging as scholarship. A rough agreement emerged (with one dissent from the lone non-blogger) that legal blogging can seed and nurture “micro-discoveries”⁵ or “pre-scholarship”⁶ that has the potential to bloom into the longer-form, more sophisticated, more mediated, and more “mulled”⁷ over scholarship than is typically featured in law reviews. They agreed on the shorthand “bloggership”⁸ to describe this kind of proto-scholarly blogging. That concept of legal blogging fits nicely with the founding mission of the *Journal of Law*: to incubate promising ideas in the hope that a subset will merit and inspire further development by someone, somewhere.⁹

We therefore don’t presume to elevate blogging into something it’s not. Not every idea or observation merits 100 pages as an article, but some can influence courts, academics, practitioners, law-makers, and the public nonetheless. (And then there are the ideas and observations that do not merit 100 words, or even ten, and yet find their way onto reputable blogs.) The aspects of blogging that

⁴ “Bloggership: How Blogs are Transforming Legal Scholarship” symposium held at Harvard Law School on April 28, 2006. Papers available at SSRN: <http://www.ssrn.com/link/Bloggership-2006.html>.

⁵ Eugene Volokh, *Scholarship, Blogging and Trade-offs: On Discovering, Disseminating, and Doing [Very Early Draft]* (April 2006). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference Paper; UCLA School of Law Research Paper No. 06-17, at 8. Available at SSRN: <http://ssrn.com/abstract=898172>.

⁶ D. Gordon Smith, *A Case Study in Bloggership* (May 15, 2007). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference Paper; Univ. of Wisconsin Legal Studies Research Paper No. 1017, at 5; Washington University Law Review, Vol. 84, 2007. Available at SSRN: <http://ssrn.com/abstract=898178>.

⁷ Orin S. Kerr, *Blogs and the Legal Academy* (April 14, 2006). GWU Law School Public Law Research Paper No. 203, at 6; Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship Conference. Available at SSRN: <http://ssrn.com/abstract=896994>.

⁸ Paul L. Caron, *Are Scholars Better Bloggers?* (November 1, 2007). Berkman Center for Internet & Society – Bloggership: How Blogs are Transforming Legal Scholarship; Washington University Law Review, Vol. 84, at 1025 (2006); U of Cincinnati Public Law Research Paper No. 07-12. Available at SSRN: <http://ssrn.com/abstract=947637>.

⁹ Ross E. Davies, *Like Water for Law Reviews*, 1 J.L. 1 (2011).

arguably make it unsuitable for traditional scholarly publishing – its public stream of consciousness, its cheerful engagement with the wider world (however unsophisticated, from the perspective of academia), the trade-offs inherent in quick thinking and quick writing – those, we argue, are features rather than bugs.

For the same reason, we are also receptive to blog posts that nurture further discussion *after* and in response to publication of a true-blue law review article. Many law reviews are still Web 1.0 creatures: they put content up on their websites, and that's the end of their engagement with the wider world within those four corners. It's not common, as of now, for law reviews to provide a 2.0 experience, by putting up content and inviting conversation in the form of a discussion board or comments section. So as excited as we are about proto-scholarship that is born on a blog and matures into full scholarship in a law review article, we're also curious about the reverse: law review articles that inspire conversation which by necessity must migrate over to a blog to find a receptive online home for discussion.

Noteworthiness

Even if one accepts the merits of our project in principle, how does one determine good, let alone the *best*, legal blogging?

While we hope to keep an open mind about different approaches to legal blogging, most fundamentally we are looking for blog posts that pose an interesting question or make a novel observation worthy of longer-term notice. (Blogs are like supermodels: as a practical matter, their longevity must be measured in dog years, and any single blog post that continues to make an impression even months later is something special.) That means we are looking for the best of “bloggership,” but also for posts that do not necessarily aspire to become law review articles when they grow up. While scholars need to worry primarily, and perhaps solely, whether their academic colleagues find their ideas worthwhile, *The Post* will also take note if, for example, a court finds a blog posting persuasive or on point,¹⁰

¹⁰ “Most law professors want their law review articles to influence courts Yet law clerks, I’m told, often read blogs.” Volokh, *supra* note 5, at 5. However, it is probably

or a legal blog post inspires rambunctious and interesting conversation among astute commenters. The sphere of influence and audience is naturally wider for blogs than it is for long-form scholarship, and we embrace that wider radius.

Writing Style

We are also suckers for good writing in and of itself. It requires no daring to note that law review writing can verge on the sclerotic, the pompous, and the incomprehensible. By featuring the great writing that some bloggers manage to produce on the fly, we hope to inspire more writers and editors working on traditional platforms to adopt and encourage a fresher, more accessible writing style.

Authorship

And who is a legal *blogger* for our purposes? There we will also look beyond the boundaries of academia. Law school professors are prolific bloggers, but so are practitioners, and they too can have micro- and macro-discoveries worthy of notice. We welcome their observations about the law shaped by their experience in the trenches.

Subject Matter

By *legal* blogging, we mean blogging that relates to the law (in the capital-L sense), specific laws, or legal systems, as opposed to writing about the ins and outs of legal practice, the state of law school education, and other ancillary topics. There is much fine blogging to be found in that wider radius of subject matter, but *The Post* will focus on writing about law and laws and legal systems, full stop. The intended audience should also be legally trained rather than an educated public at large.

worth keeping in mind the possibility that “[t]o be cited by a court on an issue laden with political implications is not to have influence, but to be used.” Paul D. Carrington, *Stewards of Democracy: Law as a Public Profession* 70 (1999).

Format

We will take different approaches with format. Sometimes interesting ideas emerge within a single blog posting, but other times the real action happens in the back-and-forth of the comments section. Blogging beautifully takes care of Socrates' pre-2.0 objection to putting thoughts down in writing: Every word, once written, "is bandied about, alike among those who understand and those who have no interest in it" and "has no power to protect or help itself."¹¹ Perhaps only the smallest minority of blog comments rise to the level of Socratic dialogues, but the blog medium at least enables a written idea to evolve in dialectical fashion, assuming there's sufficient momentum and expertise among its readership. Perhaps Socrates would have cheered blogging? Who knows? Alternatively, perhaps the law-blogsphere is now so large and energetic that its denizens are participating in the legal equivalent of the Shakespearean Infinite Monkey Theorem.¹² We'll use our judgment in deciding whether to showcase blog postings in their stand-alone form, or to excerpt the most salient parts of longer, organic conversations.

OUR ESTEEMED JUDGES

Because the blogosphere is vast (even when restricted to law-related blogs), we rely on a small group of editor-experts to help us identify the posts that are likely to hold up, age well, and influence legal thinking in one way or another. These experts represent a mix of academics and practitioners, have some experience blogging themselves (although they will not be encouraged to nominate their own writing), and – most importantly – are voracious, appreciative, and intelligent consumers of legal blogs. They are donating their good judgment and eagle eyes in helping to curate our selections. Throughout the year, they will be nominating posts to be

¹¹ Plato, *Phaedrus* 275e (Fowler translation), <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.01.0174%3Atext%3DPhaedrus%3Asection%3D275e>.

¹² *Virtual Monkeys Write Shakespeare*, <http://www.bbc.co.uk/news/technology-15060310> (September 26, 2011).

voted on by the panel; as editor-in-chief of *The Post*, I will determine how many votes are required for a post to be featured here, and I will aim to stay within a yearly range of 5-20 featured posts with a minimum of arbitrariness or capriciousness.

Beyond those guidelines, we won't try to circumscribe the elements of "best legal blogging" any further *ex ante*, but rather hope to distill a definition over time as our experts deduce the features that tie the finest examples together. We view *The Post* as a start-up to be incubated in its own right, and there will be course corrections and refinements along the way. There's a big, dynamic world of legal blogging out there, and through *The Post*, we hope to find and feature the best. //

FROM: THE VOLOKH CONSPIRACY

SO MUCH FOR THE COMMERCE CLAUSE CHALLENGE TO INDIVIDUAL MANDATE BEING “FRIVOLOUS”

Randy Barnett[†]

Remember when the Commerce Clause challenge to the individual insurance mandate was dismissed by all serious and knowledgeable constitutional law professors and Nancy Pelosi as “frivolous”? Well, as Jonathan notes below, the administration is now apparently telling the New York Times that the individual insurance “requirement” and “penalty” is really an exercise of the Tax Power of Congress.

Administration officials say the tax argument is a linchpin of their legal case in defense of the health care overhaul and its individual mandate, now being challenged in court by more than 20 states and several private organizations.

Let that sink in for a moment. If the Commerce Clause claim of power were a slam dunk, as previously alleged, would there be any need now to change or supplement that theory? Maybe the administration lawyers confronted the inconvenient fact that the Commerce Clause has never in history been used to mandate that all Americans enter into a commercial relationship with a private company on pain of a “penalty” enforced by the IRS. So there is no Su-

[†] Carmack Waterhouse Professor of Legal Theory, Georgetown University Law Center. Original at volokh.com/2010/07/18/so-much-for-frivolous-commerce-clause-challenge-to-individual-mandate/ (July 18, 2010; vis. Sept. 30, 2011). © Randy E. Barnett.

preme Court ruling that such a claim of power is constitutional. In short, this claim of power is both factually and judicially unprecedented.

Remarkably, and to its credit, the NYT informs its readers about 2 key facts that pose a problem with the tax theory – and without even attributing these to the measure’s opponents.

Congress anticipated a constitutional challenge to the individual mandate. Accordingly, the law includes 10 detailed findings meant to show that the mandate regulates commercial activity important to the nation’s economy. Nowhere does Congress cite its taxing power as a source of authority.

And

The law describes the levy on the uninsured as a “penalty” rather than a tax.

This is a sign that NYT’s reporter Robert Pear is on the ball. But wait! There is more that is not in the article.

The Supreme Court has defined a tax as having a revenue raising purpose – a requirement that is usually easy to satisfy. But in the section of the act that specifically identifies all of its revenue raising provisions for purposes of scoring its costs (which is a big deal), the insurance mandate “penalty” goes unmentioned.

Unlike any other tax, according to the act, the failure to pay the penalty “shall not be subject to any criminal prosecution or penalty with respect to such failure.” Nor shall the IRS “file notice of lien with respect to any property of a taxpayer by reason of any failure to pay the penalty imposed by this section,” or “levy on any such property with respect to such failure.”

The article reports this response from the Justice Department:

The Justice Department brushes aside the distinction, saying “the statutory label” does not matter. The constitutionality of a tax law depends on “its practical operation,” not the precise form of words used to describe it, the department says, citing a long line of Supreme Court cases.

Now there are cases that say (1) when Congress does not invoke a specific power for a claim of power, the Supreme Court will look

for a basis on which to sustain the measure; (2) when Congress does invoke its Tax power, such a claim is not defeated by showing the measure would be outside its commerce power if enacted as a regulation (though there are some older, never-reversed precedents pointing the other way), and (3) the Courts will not look behind a claim by Congress that a measure is a tax with a revenue raising purpose.

But I have so far seen no case that says (4) when a measure is expressly justified in the statute itself as a regulation of commerce (as the NYT accurately reports), the courts will look behind that characterization during litigation to ask if it could have been justified as a tax, or (5) when Congress fails to include a penalty among all the “revenue producing” measures in a bill, the Court will nevertheless impute a revenue purpose to the measure.

Now, of course, the Supreme Court can always adopt these two additional doctrines. It could decide that any measure passed and justified expressly as a regulation of commerce is constitutional if it could have been enacted as a tax. But if it upholds this act, it would also have to say that Congress can assert any power it wills over individuals so long as it delegates enforcement of the penalty to the IRS. Put another way since every “fine” collects money, the Tax Power gives Congress unlimited power to fine any activity or, as here, inactivity it wishes! (Do you doubt this will be a major line of questioning in oral argument?)

But it gets still worse. For calling this a tax does not change the nature of the “requirement” or mandate that is enforced by the “penalty.” ALL previous cases of taxes upheld (when they may have exceeded the commerce power) involved “taxes” on conduct or activity. None involved taxes on the refusal to engage in conduct. In short, none of these tax cases involved using the Tax Power to impose a mandate.

So, like the invocation of the Commerce Clause, this invocation of the Tax Power is factually and judicially unprecedented. It is yet another unprecedented claim of Congressional power. Only this one is even more sweeping and dangerous than the Commerce Clause theory.

I responded to this theory in the Wall Street Journal back in April, in an op-ed the editors entitled The Insurance Mandate in Peril.¹ Here is a key passage from my op-ed:

Supporters of the mandate cite *U.S. v. Kahriger* (1953), where the Court upheld a punitive tax on gambling by saying that “[u]nless there are provisions extraneous to any tax need, courts are without authority to limit the exercise of the taxing power.” Yet the Court in *Kahriger* also cited *Bailey* with approval. The key to understanding *Kahriger* is the proposition the Court there rejected: “it is said that Congress, under the *pretense* of exercising its power to tax has attempted to penalize illegal intrastate gambling through the regulatory features of the Act” (emphasis added).

In other words, the Court in *Kahriger* declined to look behind Congress’s assertion that it was exercising its tax power to see whether a measure was really a regulatory penalty. As the Court said in *Sonzinsky v. U.S.* (1937), “[i]nquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.” But this principle cuts both ways. Neither will the Court look behind Congress’s inadequate assertion of its commerce power to speculate as to whether a measure was “really” a tax. The Court will read the cards as Congress dealt them.

My piece is not behind a subscription wall so interested readers can read (or reread) the whole thing.

Now the usual caveat. Just because the constitutional challenge to the health insurance mandate is not frivolous does not mean it will prevail. *The odds are always that the Supreme Court will uphold an act of Congress.* Given the wording of the Act, however, the implications of doing so using the Tax Power are so sweeping and dangerous that I doubt a majority of the Court would adopt this claim of power on these facts.

But the argument is far from over. //

¹ Randy E. Barnett, *The Insurance Mandate in Peril: First Congress said it was a regulation of commerce. Now it's supposed to be a tax. Neither claim will survive Supreme Court scrutiny.*, Wall St. J., Apr. 29, 2010, online.wsj.com/article/SB10001424052748704446704575206502199257916.html.

FROM: THE VOLOKH CONSPIRACY

“LET ’EM PLAY”

Mitch Berman[†]

OVERVIEW

Many thanks to Eugene for inviting me to discuss my just-published paper “Let ’em Play”: A Study in the Jurisprudence of Sport,¹ in this forum. I’m grateful for the opportunity and look forward to your comments.

Recall the women’s semifinal of the 2009 U.S. Open, pitting Serena Williams against Kim Clijsters. Having lost the first set, Williams was serving to Clijsters at 5–6 in the second. Down 15–30, Williams’s first serve was wide. On Williams’s second service, the line judge called a foot fault, putting her down double-match point.

Williams exploded at the call, shouting at and threatening the lineswoman. Because Williams had earlier committed a code violation for racket abuse, this second code violation called forth a mandatory one-point penalty. That gave the match to Clijsters.

Williams’s outburst was indefensible. But put that aside and focus on the fault. CBS color commentator John McEnroe remarked at the time: “you don’t call that there.” His point was not that the call was factually mistaken, but that it was inappropriate at that point in the match even if factually correct: the lineswoman should have cut Williams a little slack. Many observers agreed. As another former tour professional put it,² a foot fault “is something you just

[†] Richard Dale Endowed Chair in Law, University of Texas School of Law. Original at volokh.com/author/mitchberman/ (July 18-22, 2011; vis. Oct. 1, 2011). © 2011, Mitchell N. Berman.

¹ 99 Geo. L.J. 1325 (2011).

² Michael Wilbon, *A Call and a Response That Cannot Be Defended*, Wash. Post, Sept. 14, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/09/13/AR2009091302533.html.

don't call – not at that juncture of the match.”

The McEnrovian position – that at least some rules of some sports should be enforced less strictly toward the end of close matches – is an endorsement of what might be termed “temporal variance.” It is highly controversial. As one letter writer to the *New York Times* objected: “To suggest that an official not call a penalty just because it happens during a critical point in a contest would be considered absurd in any sport. Tennis should be no exception.” On this view, which probably resonates with a common understanding of “the rule of law,” sports rules should be enforced with resolute temporal invariance.

Perhaps McEnroe was wrong about Williams's foot fault. But the premise of the *Times* letter – that participants and fans of any other sport would reject temporal variance decisively – is demonstrably false. One letter appearing in *Sports Illustrated* objected to the disparity of attention focused on Williams as compared to U.S. Open officials, precisely on the grounds that “[r]eferees for the NFL, NHL and NBA have generally agreed that in the final moments, games should be won or lost by the players and not the officials.”

Regardless of just how general this supposed agreement is, many NBA fans would affirm both that contact that would ordinarily constitute a foul is frequently not called during the critical last few possessions of a close contest and that that is how it should be. So insistence on rigid temporal invariance requires argument not just assertion.

However, advocates of temporal variance shouldn't be smug either. For while the negative import of temporal variance is clear – the *denial* of categorical temporal invariance – its positive import is not. Surely those who believe that Williams should not have been called for a fault implicitly invoke a principle broader than “don't call foot faults in the twelfth game of the second set of semifinal matches in grand slam tournaments.”

But how much broader? Is the governing principle that *all* rules of *all* sports should be enforced less rigorously toward the end of contests? Presumably not. Few proponents of temporal variance would contend that pitchers should be awarded extra inches around

the plate in the ninth inning, or that a last-second touchdown pass should be called good if the receiver was only a little out of bounds. So even if categorical temporal invariance is too rigid, the contours and bases of optimal temporal variance remain to be argued for.

“*Let 'em Play*” is an attempt to think through this problem. My goal is *not* to establish whether and in what respects temporal variance is optimal, all things considered, for any given sport. That’s too darn hard.

My goal at this early stage is merely to figure out whether “sense can be made” of such a practice. Instead of trying to determine conclusively just what optimal practices should be, I aim only to explain why temporally variant rule enforcement might be sensible – what can plausibly be said for it.

Furthermore, investigating temporal variance in sport is only the paper’s surface agenda.

While econometricians are busily tackling sport, and while philosophers of sport occasionally draw on legal philosophy (in addition to, e.g., aesthetics, ethics, and metaphysics), legal theorists have paid sports only passing attention. Most jurisprudential appeals to sports and games have been ad hoc, and most legal writing on sports that does not pertain to sports law is intended more to entertain than to edify.³

The lack of sustained jurisprudential attention to games, and sports in particular, should surprise, for sports leagues constitute distinct legal systems. This is superficially apparent to non-Americans. While baseball, football, and basketball are governed by official “rule books,” the most popular global team sports like soccer, cricket, and rugby are all formally governed by “laws,” not “rules.” More substantively, sports systems exhibit such essential institutional features as legislatures, adjudicators, and the union of primary and secondary rules.

Accordingly, my grander ambition is to help spur the growth of the jurisprudence of sport as a field worthy of more systematic attention by legal theorists and comparativists. In a sense, “*Let 'em*

³ *Aside: The Common Law Origins of the Infield Fly Rule*, http://www.pennumbra.com/issues/pdfs/157-1/Infield_Fly_Rule.pdf, and 123 U. Pa. L. Rev. 1474 (1975).

Play” does double duty as a manifesto for an enlarged program of jurisprudential inquiry.

Importantly, it’s not just that (municipal) legal systems and sports systems confront similar challenges. For several reasons, jurisprudential attention to sports is particularly likely to contribute to our understanding of phenomena and dynamics shared in common.

First, because sports’ rules and practices have long been thought unworthy of serious philosophical investigation, even low-hanging fruit has yet to be harvested. Second, sports supply vastly many examples for the generation and testing of hypotheses. And third, our judgments and intuitions about certain practices – such as, to take the present topic, the propriety of context-variant enforcement of rules – are less likely in the sports courts than in the courts of law to be colored or tainted by possibly distracting substantive value commitments and preferences.

For all these reasons, sporting systems, though rarely explored with seriousness by legal theorists and comparative lawyers, comprise a worthy object of legal-theoretical study.

Here’s my plan for the remainder of the week. Tomorrow, I will summarize my *prima facie* case for temporally variant enforcement of non-shooting fouls in basketball and, by extension, of similar violations in other sports. In a nutshell, that argument depends upon a growing gap between the competitive cost of the infraction and the cost of the sanction imposed for the infraction.

On Wednesday, I will explain why the argument that might explain and justify temporally variant enforcement of fouls in sports like basketball, hockey, and football most likely does not cover the rules governing faults in tennis. On Thursday I will propose a different account that might fill that need – one that draws on what I think are novel observations about the hoary rules/standards distinction.

On Friday, I will advance a modest proposal for improving the world’s most popular sport.

Tags: basketball, discretion, foul, jurisprudence, penalty, sports, tennis. 45 Comments.

A FIRST SOLUTION

Although the Serena Williams episode provoked my interest in the puzzle of temporal variance, I'll start not with tennis, but with other sports in which a practice of temporal variance might seem more secure – sports like football, hockey, and basketball. In each, whistles for minor physical contact toward the end of tight contests predictably elicit a cry from the stands: “Let 'em play!” or “Swallow the whistle!”

Though the plea is familiar, its rationale is obscure. To be sure, the tighter the rules are enforced, the less physical contact there will be. And observers may reasonably disagree about the level of physicality that makes a sport the best it can be.

But however a league might answer that question, it is not self-evident why the optimal degree of laxity should differ in crunch time during an NBA game relative to ordinary time, or throughout the NHL playoffs relative to the regular season. It is not obvious what can be said for “letting them play” *at this particular time* different in character or force from what can be said *generally* for “letting them play.”

Still, basketball remains a good place to start. I doubt that many tennis fans are justifiably confident that tennis officials do (or don't) allow players a little more foot faulting toward the end of close matches than earlier. Maybe they do (or don't), but foot faults just aren't called enough to permit those without intimate knowledge of the sport to be sure what the enforcement patterns are.

Basketball is different. That basketball referees respect some measure of temporal variance seems clear to many hoops fans. Maybe that's because the case for temporal variance in basketball is unusually clear. (Or maybe not.) If we can explain and justify slack in the calling of basketball fouls, we might be better able to assess whether temporal variance makes sense elsewhere too.

One rationale for temporal variance invokes essentially aesthetic considerations: the referee's whistle disrupts play, thereby reducing spectators' enjoyment of the action. And while disruption of play almost always incurs an aesthetic cost, disruption during crunch time is especially costly (aesthetically speaking) given heightened

dramatic tension.

There is something to this justification for temporal variance. It would seem to apply, though, only when play would continue uninterrupted but for the calling of a foul. However in some sports that arguably respect temporal variance play stops either way.

For example, it appears to me (and not only to me⁴) that football officials are often more reluctant to call defensive pass interference during crunch time even though an incompletion stops play just like a penalty flag. Because an aesthetic or dramatic preference that play continue unabated wouldn't seem to explain or justify temporal variance everywhere it appears, it might not provide the whole story even in basketball. So without denying that appreciation for dramatic excitement can help explain why officials should give the competitors somewhat greater slack during moments of high drama, we have reason to look for an alternative account too.

A second answer, recently advanced by Chicago economist Tobias Moskowitz and SI columnist L. Jon Wertheim in their book *Scorecasting*,⁵ depends entirely on the omission bias. By relying entirely on a cognitive bias, however, the authors all but ensure that, even insofar as their account might help explain temporal variance, it is unlikely to *justify* it.

The alternative account I offer runs as follows:

(1) In the main, a sanction imposed for an infraction has a greater expected impact on contest outcome (against the rule-violator) than does the infraction itself (in the violator's favor). This must be so for the sanction to serve a deterrent function in addition to a restitutionary one.

(2) The expected impact of all outcome-affecting contest events – e.g., scores, base hits, yardage gains, infractions, penalties, etc. – are not constant, but context-variant. To start: the closer the contest, the greater the impact. The variance that matters for my purposes, however, is temporal: when the contest is close (and holding

⁴ Peter King, *Monday Morning Quarterback*, Sports Illustrated, Nov. 23, 2009, sportsillustrated.cnn.com/2009/writers/peter_king/11/22/Week11/3.html.

⁵ *Scorecasting: The Hidden Influences Behind How Sports Are Played and Games Are Won* (2011), scorecasting.com.

the closeness of the contest constant), the expected impact of outcome-affecting events varies in inverse proportion to the distance remaining to contest's completion.

For example, touchdowns and baskets, 15-yard penalties and free throw opportunities, all have greater impact on the expected outcome when occurring 2 minutes before the end of a then-tied game than when they occur 2 minutes from the start. (I expect pushback here, and look forward to debates in the comments.)

(3) From (1) and (2) it follows that the absolute magnitude of the gap between the competitive impact of the infraction (say, a non-shooting foul) and the competitive impact of the penalty imposed for the infraction (say, the award of free throws) is significantly greater in crunch time during close games than earlier in the same contest. The penalty becomes more overcompensatory in absolute terms.

(It does *not* become more overcompensatory in *relative* terms, which is why some of yesterday's posters rightly observed that if the stakes become higher for the competitor who would wish to invoke temporal variance, they become higher for their opponents too.)

(4) It is a general principle of competitive sport that athletic contests go better insofar as their outcomes reflect the competitors' relative excellence in executing the particular athletic virtues that the sport is centrally designed to showcase and reward. (This is a first cut; no doubt my proposed principle could be profitably refined further.) This is why we prefer to reduce the impact of luck on outcomes (e.g., we generally want playing surfaces to be regular thus reducing unpredictable bounces).

It is also why almost everybody agreed, in Casey Martin's lawsuit against the PGA,⁶ that if (as the Supreme Court majority essentially concluded, but as the dissent denied) the central athletic challenge the PGA Tour presented was the ability to hole a ball by means of striking it with a club, in the fewest number of strokes, while battling fatigue, then golf is less good – it exemplifies a core value of sport less well – if it requires competitive golfers to walk

⁶ *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001), at <http://www.law.cornell.edu/supct/html/00-24.ZS.html>.

the course even when it is extraordinarily difficult for them to do so and when they are greatly fatigued without walking.

(5) From (3) and (4) we have a reason (not a conclusive reason) to enforce restrictions on minor or incidental contact less strictly toward the end of close contests if – as is contestable but surely plausible – the ability to refrain from minor bodily contact with opponents is a peripheral athletic virtue in basketball as we know it. If this is so, then a penalty of nominally constant magnitude that it is optimal to impose early in a contest may become suboptimal later in that same contest.

To be clear: I do not claim that the excellence of avoiding minor contact is something that no sport could wish most to valorize. My argument for temporal variance in basketball is explicitly contingent on its being the case that this particular excellence does not rank so highly among the excellences that basketball wishes to feature and encourage. Whether this is so is an interpretive question.

That's my proposed *pro tanto* argument for temporally variant enforcement of non-shooting fouls in basketball. The argument extends to similar fouls in sports like football and hockey. At bottom, it's based on an aversion to the awarding of windfall remedies disproportionate to the harm suffered. That's a principle the law frequently endorses – from the harmless error rule to contract law's material breach doctrine.

83 Comments.

OF CONSECUTIVE AND NEGATIVE RULES

At first blush, we might suppose that the analysis I provided yesterday applies, *mutatis mutandis*, to foot faults in tennis and therefore that tennis officials should call foot faults less strictly at crunch time. But this conclusion would be premature. It could be that foot faults in tennis differ from fouls and similar infractions in basketball, football and comparable sports in ways that make a difference.

I'll explain today why I believe that foot faults *do* differ in a way that matters. Tomorrow I'll argue that temporal variance in their enforcement might nonetheless be defensible on alternate

grounds. This afternoon I will respond to some of the many excellent comments already posted by VC readers.

The analysis I presented yesterday for temporal variance in the enforcement of penalties for fouls like those committed in basketball depended upon the claim that there are times when it might better serve the objectives of competitive sports to refrain from enforcing a penalty despite the occurrence of an infraction. That's because the competitive costs of an infraction and of the sanction or penalty that it begets are both temporally variant and the latter can become, at game's end, very much greater than the former.

Yet assessing the competitive costs of these two things – the infraction and the sanction – seems impossible in some cases. Take balls and strikes in baseball. The denomination of a pitch as a “ball” is not properly conceptualized as the penalty for an infraction; the concepts of infraction and penalty just don't apply here.

That not all undesired consequences that attach to nonconformity with the dictates of a rule are sanctions imposed for infractions was a central claim upon which Hart relied when critiquing the Austinian command theory of law.

Most of the rules of the criminal law impose duties and threaten sanctions for their violation. But other legal rules, like those specifying the conditions for valid wills or contracts, are of a different sort. These, Hart proposed, are “power-conferring rules” – rules that (somewhat simplified) provide that “if you wish to do this, this is the way to do it.” In the case of rules that impose a duty, he explained, “we can distinguish clearly the rule prohibiting certain behaviour from the provision for penalties to be exacted if the rule is broken, and suppose the first to exist without the latter. We can, in a sense, subtract the sanction and still leave an intelligible standard of behaviour which it is designed to maintain.”

But the distinction between the rule and the sanction is not intelligible in the case of power-conferring rules. It makes sense to say “do not kill” even when we leave off the part about what happens if you do. In contrast, we know we're leaving something critical out of the picture if we say “get two witnesses” but don't explain that the will will be invalid otherwise. The power-conferring/duty-

imposing distinction is, at a minimum, a close cousin to another distinction between rule types made famous by John Searle: the distinction between constitutive and regulative rules.

The Hartian analysis of power-conferring rules helps to explain why balls and strikes in baseball feel very different from the infractions I have discussed in basketball. In the case of the latter, we can sensibly ask both whether some type of contact ought to be proscribed (thus denominated as a “foul”), and, in addition, whether, if so, the penalty attached to commission of the foul – two free throws, say, or ten yards – is too great (or too small).

But every pitch is either a ball or a strike. The logical consequence of its being outside the strike zone is that it is a ball. While we can sensibly ask whether the strike zone is too small (or too large), or whether the number of balls that constitutes a walk is too great (or too small), or whether any number of balls should result in the award of a base, it seems nonsense to ask whether a pitch’s being a ball is too high a price for its having narrowly missed the strike zone: that the pitch was a ball is just what it means for its not having been a strike.

In short, balls and strikes are not proper candidates for temporal variance on the analysis I sketched yesterday because (1) temporal variance depends upon the widening of a gap between the competitive cost of an infraction and the competitive cost of the penalty it incurs, but (2) there is no such gap between nonconformity with a power-conferring rule and the consequences that attach, and (3) the rules governing balls and strikes are power-conferring rules (or constitutive rules, or something of this sort).

If this is right, the question becomes whether the rules governing foot faults in tennis are power-conferring (or constitutive) as opposed to duty-imposing (or regulative). For want of space, I’ll just assert that the former construal seems significantly more plausible. In order to successfully or “validly” put the ball into play, thus giving oneself an opportunity to win the point, the server must do several things: (1) start behind the baseline, (2) strike the ball before stepping on or over the baseline, and (3) by striking the ball, cause it to land in the service court diagonally opposite.

We might say that these are three components of the rule that defines a valid serve. A failure on any of these three grounds is just a failure to perfect the power conferred upon the server; none is a violation or an infraction.

Let's suppose that's correct. Even if so, here's the puzzling thing. If foot faults, just like ordinary "zone" faults (i.e., the failure to serve the ball into the service box), are governed by power-conferring rules, and if temporal variance could be defended only on the analysis developed to this point, then we should expect foot faults to be immune from temporal variance just as surely as are zone faults. But widespread intuitions are more equivocal.

I have not run across anybody who is tempted by temporal variance for zone faults. If, facing match point, the server hits a second service wide by a smidgen, well then's the breaks and that's the match. And yet some folks (McEnroe, for example) believe that foot faults should be enforced with temporal variance. Just as revealingly, many more feel that the temporal variance of foot faults is, at the least, more plausible, less obviously mistaken. The fact that even those who resist temporal variance for foot faults do not feel about foot faults quite as they do about zone faults – the fact that many of them at least feel the tug of temporal variance – requires explanation even if we end up concluding that, all things considered, foot faults should be enforced invariantly. That fact is inexplicable if the argument for temporal variance depends upon the widening of a gap between infraction and penalty and if faults aren't penalties for infractions.

I favor our taking widespread intuitions seriously. Doing so invites us to consider whether the analysis supplied thus far furnishes the only sound basis for temporal variance. Perhaps it doesn't. Perhaps temporal variance for some power-conferring (or constitutive) rules might be warranted on other (possibly related) grounds. That's my topic for tomorrow.

36 Comments.

SOME RESPONSES TO COMMENTS

First, let me thank the many readers who have commented these past few days. I did not know what to expect when I accepted Eugene's invitation to blog about my article, and have been impressed by, and grateful for, the number and incisiveness of the comments. Unfortunately, there have been too many to permit me to respond in a systematic manner, let alone in a comprehensive one. So here are a mess of somewhat random reactions.

1. I've agreed with many of the posts, and have been gratified to see that many readers anticipated arguments to come.

For example, Assistant Village Idiot observed that my analysis "would suggest that a possible strategy would be to reduce the penalty late in the game but call it more closely. I don't know if that would actually play out well, however."

Agreed on both counts. See p.1349 n.73 of my article for some remarks on just this score.

Soronel Haetir remarked on Tuesday: "I can see some argument for allowing more contact later in a game (an argument I don't particularly agree with), but I don't see any reason whatsoever for relaxing the basic rules of ball possession." I hope that this morning's post revealed my full agreement that the argument I offered on Tuesday would not support relaxing "the basic rules of ball possession." Those are constitutive rules.

Justin agreed with Tuesday's analysis but added: "except for fouling out in basketball and red cards in soccer. Two fouls called on a key player in the first 5 minutes of a basketball game can change the entire contest. And a soccer team playing 80 minutes while a man down is almost certain to lose."

So true. Wait for Friday. Incidentally, Friday's post will simplify matters by ignoring Visitor Again's observation that soccer refs might already respect temporal variance in the issuance of red cards. This is addressed in the article at p.1368 & n.116.

Guy and I seem to be on the same page. I agree with his observation on the regulative/constitutive distinction that "the distinction is

less something that can be derived by objective observation of the law in operation, but more by how people understand the law and what its purposes are.” He then added: “the most obvious distinction between foot faults and zone faults is that most people think of the game as being a test of skill with respect to hitting the ball, not where you place your feet. Foot faults only exist because the game needs to prescribe a spot for you to serve from, but minor variations in the rule are unlikely to change the difficulty of performing a proper serve. Rigid adherence to the rule is probably thought of as more penal by the audience than rigid adherence to zone fault rules because the game is ‘testing’ your ability to hit the ball precisely to serve to a particular spot, but it isn’t ‘testing’ your skill at putting your foot close to a line without going over.”

Yep, that will a core piece of tomorrow’s argument. Incidentally, Justin agreed with Guy, but added: “Unfortunately, I think one of the problems with your analysis is that you are looking at it through a legal philosophy prism when the answer you are looking for is an anthropological one.” This puzzled me. Anthropology and philosophy needn’t be at odds. I understand my philosophical analysis to point out which anthropological facts are relevant, in what ways, and why. Perhaps Justin might further explain why he thought his observation showed a problem with my analysis (or with Guy’s?).

Lastly, I think Martinned is right, as against both Noah and Gentleman Farmer, that the relative distinction is not objective/subjective.

2. The problem of time-sensitive impact.

I received fewer challenges than I anticipated to my claim that outcome-affecting events have greater impact the later they occur in a close contest, holding closeness of contest constant. I believe only Bruce Boyden and Tom Swift objected.

Here are a few additional thoughts on the matter. I think almost all of us feel comfortable saying things like Team A has a .X probability of winning this game. We believe, for example, that the U.S. women’s soccer team had a pretty high probability of victory immediately after Abby Wambach’s goal. We believe that the team’s

probability of victory was lower once Japan equalized. Almost all probability theorists believe that such statements are meaningful and that they must be some type of subjective probabilities. (The objective probability of a U.S. victory was, at all times, 0.)

If we then believe that events can affect outcome-probabilities, we must be comfortable assessing these things in terms of subjective probability. And once we're in subjective probability land, my claim that late events change the probabilities more than early events do is quite sound as a generalization, though there can be exceptions. (See, e.g., p. 1350 n.74.) Given all this, I'd need to hear more from Bruce Boyden regarding why he believes that the perspective of an omniscient observer supplies the "more relevant comparison."

Tom Swift is surely right in one sense that "points count the same at the beginning of a game as they do in the last 2 minutes." They count the same in terms of nominal additions to the score. But they don't count the same in terms of changes to probability of winning so long as the relevant probability is subjective – which, I've just said, it must be so long as we continue to make claims about probability less than 1 and greater than 0.

3. Miscellaneous thoughts.

Many of the remaining posts raised ideas that might not be strictly germane to my arguments thus far, but which I found interesting enough to merit some reaction.

tbaugh wrote:

I've never understood how an official not calling a violation late in the game is "letting the players and not the officials decide the game." A non-call of a violation is an official influencing the game, perhaps decisively. I think the comment from James about uncertainty in the determination of an infraction is a good one, however, particularly in basketball. Perhaps some "temporal variance" is justified in terms of the degree of certainty the official should have in making a late call (I've done a little refereeing, and I'd say it's kind of a "felt" thing rather than a conscious decision).

I wonder whether the ideas in this post are in tension. Temporal

variance in degree of certainty (actually, the NBA has a rule about this!) would make sense if the costs of false positives and false negatives differ toward contest's end. But tbaugh seems to deny that. I happen to agree that temporal variance in the standard of proof makes sense. But the judgment that a false positive is worse than a false negative is (and must be, I think) parasitic on the supposition that the sanction and the penalty are differently costly as measured against the competitive desideratum. (Incidentally, James's different argument for why uncertainty might lead to temporal variance seems largely dependent upon omission bias.)

duffy pratt observed that "Baseball has a different time element than other games" and asked for examples "where this idea of "temporal variance" would apply in baseball?"

I'm disposed to think that baseball has few good examples not because it has a different time element (see 1336 n.32) but because it has few duty-imposing/regulative rules and many power-conferring/constitutive ones. I do think that balks provide a good potential example, though.

Ossus recalled

baseball announcers advocating a form of situational (if not strictly temporal) variance with balls and strikes. For example, on 0-2 counts when the batter takes a close pitch, I have heard announcers talk about how the umpire either should have (when they call a third strike) or did (when they call a ball) take the situation into account. The implication is obviously that the penalty for a called strike to the batter is much greater than the penalty of a called ball to the pitcher, so I think this can actually fit into your analysis whereas you claim that it does not.

The analysis in a book I mentioned earlier, *Scorecasting*, reveals that umpires do take the situation into account in must this way. I am disposed to believe that they ought not to. More interestingly, as some commentators observed previously, Steven Jay Gould thought that home plate umpire Babe Pinelli rightly gave Don Larsen a few extra inches on his last called strike to end his perfect game in the 1956 World Series. I differ with Gould here. (See pp. 1352-54)

Lastly, Byomtov opined that “calling a pitch a ball is a penalty, or at least can be seen as one. If we say the idea of the game is for the batter to try to hit the ball, etc., then there needs to be a rule requiring the pitcher to throw it where the batter actually can reach it. The penalty for violating the rule four times is a walk.” I think that’s an interesting analysis. Balls could have arisen as Byomtov conjectures and still count as constitutive rules today. I’ll think more about this.

Byomtov also remarked, presumably tongue-in-cheek, that he “wouldn’t be surprised if the rule was established – by Abner Doubleday no doubt – precisely for this purpose, though of course it turned out that it often makes sense to violate it and suffer the penalty.”

Interestingly, early baseball had no bases on balls. There were balls, but no number of balls resulted in a free pass to first. I believe that bases-on-balls were introduced in 1879. At that time, though, a pitcher had 9 balls for a walk. The current rule that awards a walk on 4 balls was introduced ten years later.

That’s it for now. See you tomorrow.

24 Comments.

OF RULES AND STANDARDS

Recall Tuesday’s contention: Competitive sports go better, all else equal, insofar as contest outcomes reflect the competitors’ relative excellence in executing the particular athletic virtues that the sport is centrally designed to showcase, develop and reward. Call this “the competitive desideratum.” If something like this is so, then we should identify the athletic challenges that the rules governing tennis serves are designed to hone and test.

To a first approximation, the challenge is to strike the ball with power and accuracy into a specified space. Yet serving while standing at the net would not conform to the athletic challenge that tennis service is meant to present. So a refinement is necessary. Perhaps this: the challenge is to strike the ball *into a precisely defined space from a precisely defined distance*.

Notice that if this is the best understanding of the athletic challenge presented by serving in tennis, then temporally variant enforcement of foot faults would not serve the competitive desideratum. If it's constitutive of a core athletic challenge in tennis to hit the serve without touching the line, then to forgive a server's having stepped on the line would frustrate that athletic ideal and would contravene the competitive desideratum.

But perhaps that is not quite the athletic challenge that the service rules embody. Perhaps the challenge is better formulated as the ability to serve the ball *into a precisely defined space from a generally defined distance*. That is, notwithstanding that the formal rules specify both the starting point and the landing space with precision, the underlying athletic challenge that the rules codify involves a precise target but a general launching site.

I am tempted to describe the challenge this way: "get the ball *in here* from *around there*." That puts things too loosely, but it conveys that the sport might care more about precision in the placement of the served ball than precision in the placement of the server's body.

Arguments could be mustered to bolster this interpretation of the core athletic challenge in serving. But I concede that it's debatable. Let's move on because my jurisprudential ambitions are served by exploring what might follow if this is the better conception of the athletic challenge; it's not essential to establish that this is the better interpretation of tennis.

Importantly, that the foot fault rule is *written* in hard-edged terms does not disprove that the real norm the rule implements is a standard that prohibits servers from going "too far" over the line, or that prohibits "unreasonable" encroachments. Even if the true norm is a standard, it doesn't follow that the formal norm should assume the same shape.

Because the factors that bear on reasonableness would be debatable in every case, considerations like predictability, certainty, and finality all forcefully favor implementing this norm by means of a rule rather than by means of a standard. This is Rules vs. Standards 101.

In short, I am suggesting a critical asymmetry. The written crite-

ria of valid service that govern the landing of the ball and the placement of the server's feet are, in both cases, rules rather than standards. But they are formulated as rules for different reasons.

The former is a rule because it reflects an aspect of the underlying athletic challenge that is *itself* sharp-edged and rule-like: get the ball in the pre-defined space. Tennis rules require that the ball go into the service court because that's the nature of the challenge of serving. It is how tennis instantiates one of the most commonly tested skills across all of sports: target-hitting. Horseshoes and curling notwithstanding, precision is generally part of the nature of targeting.

Although a target's contours may be arbitrary, the demand that competitors hit the target and not merely come close is not arbitrary, for the rule is designed to test and reward that particular class of physical excellences (needed by, e.g., archers and riflemen) involving accuracy and precision in limb-eye coordination. The rules of tennis require that, for a serve to be valid, the ball must land within the defined service court because that is the nature of this particular athletic challenge.

In contrast, the formal norm governing foot placement is rule-like not standard-like, I suggest, because, although the aspect of the underlying athletic challenge that it captures is standard-like (start behind the line and don't go unreasonably over it), we have good institutional reasons to codify it in bright-line fashion.

To coin terms, we might say that that portion of the power-conferring rule of tennis service that requires the serve to land in the service court is a "true rule," whereas that portion of the rule that requires the server not to step on the baseline is a "rulified standard." It is often thought that norms are standard-like in what we might call their "natural" state, and that they become rules, when they do, in response to institutional pressures. I am suggesting that this is true of some norms but not all. Some of the rules we come across are rules naturally.

Granting me all this, does it follow that line judges should enforce the rule governing faults as though a foot fault could occur only when the server steps unreasonably far over the line? No. A

rulified standard is, after rulification, a rule, not a standard. To routinely pierce the rule and apply the underlying or animating standard would defeat the purposes served by having rulified it.

But that we must not *routinely* pierce a rulified standard does not mean that we must never pierce it. Whether to disregard the rule's form in favor of its underlying considerations is always at least askable with regard to rulified standards. That is a central upshot of the distinction between rulified standards and true rules.

At least two additional requirements must be satisfied to pierce a rulified standard: (1) that enforcing the rule as a rule would produce unusually high costs; and (2) that disregarding the rule's form on this occasion would incur low costs on the dimensions, such as predictability and the like, that warranted its rulification.

These two additional conditions are probably satisfied by foot faults in crunch time. Enforcing the rule as a rule is costly because doing so allows the foot fault to unduly impact the match outcome. That is, it undermines the "competitive desideratum." And the costs of piercing the rule are low because nonconformity with the rule is hidden, given that tennis does not employ its Hawk-Eye electronic system to judge foot faults.

From the perspective of optimal game design, that might be a good thing. Rule makers who want to preserve rule-enforcers' discretion to sometimes apply the standard that animates a rulified standard should arrange things so that non-compliance with the rule isn't apparent. Transparency is not always a virtue.

Of course, even if the ethos of tennis should permit line judges to assess crunch-time foot faults against the underlying standard of reasonableness, not against the nominal rule, that does not fully resolve the Serena Williams case. Her foot fault would have run afoul even of the standard if, for example, her transgression was substantial or repeated. I think it wasn't, but needn't argue about that here.

In sum, my analysis is doubly contingent: if the foot fault rule is a rulified standard not a true rule, and if Williams complied with the underlying standard-like norm governing service, we'd have promising support for McEnroe's contention: the line judge should have cut Williams some slack.

CONCLUDING THOUGHTS

I started on Monday with a puzzle – what might be said in favor of enforcing at least some rules of sports less strictly at crunch time? – and tried to develop a solution. That solution turned out to be two solutions, or two variants of a single solution.

All competitive sports, I have claimed, share a core interest that the outcomes of contests reward competitors' relative excellence in the performance of the sport's fundamental athletic tests. To further this interest, each sport has reasons – weighty but not decisive – (1) not to enforce penalties on infractions when, for contextual reasons, the penalty would be unusually over-compensatory, and (2) to sometimes disregard the rule-like form or surface of some norms in favor of the standard that underlies it.

These arguments are tentative and partial, only first steps toward a solution to the puzzle. But whether they ultimately justify the temporally variant enforcement of particular rules of particular sports, all things considered, is not greatly important to me. Think of this study as a search for what Robert Nozick called a philosophical explanation: not a defense of the thesis that temporal variance in sports is optimal, but an account of how that could be.

Philosophical explanations are not always the right goal. Often we want to know what some agent should do. In this case, however, I'm satisfied to identify factors and analytical devices that might prove useful for theoretical projects across reaches of law and sports.

For example, the analyses here might helpfully illuminate the lost chance doctrine in torts; the granting of equitable relief, near contest's end, from rules governing municipal and corporate elections, or appellate litigation; the difference between genuine "jurisdictional rules" and mere claim-processing rules; and possibly much else.

Those are just promissory notes at this point. So I'll conclude by offering one final non-obvious lesson – albeit one for gamewrights, not for legislators or judges. It concerns soccer.

Here are two much-noted problems with the beautiful game: there is too much diving, and refs make too many errors. The latter

is partly a consequence of the former, but it's also a consequence of there being only a single referee and FIFA's refusal to introduce any form of instant replay review. (Plug: my thoughts on instant replay are [here](#).⁷)

While these are familiar criticisms, I maintain that soccer harbors a third defect, one that works as a multiplier, exacerbating the first two problems and exacerbated by the fact (not itself a problem) of low scoring. That problem concerns the red card – in particular that it results in ejection of a player for the remainder of the match without allowance given for substitution.

This is an unusual complaint. But if it's a surprising charge, its connection to the issue of temporal variance might seem obscure.

Here's the connection. A central assumption undergirding the argument that basketball referees should "let 'em play" is that, presumptively, the competitive impact of a penalty should bear a stable relationship, over the course of a contest, to the competitive impact of the infraction that the penalty penalizes. We saw, however, that (holding closeness of contest constant) a contest event has a greater impact on outcome the closer it occurs toward contest's end. Non-enforcement of the penalty at crunch time aims to rectify this imbalance.

I'm not going to suggest that soccer's red card should be brandished more reluctantly at crunch time. Unfortunately, that's not because soccer ensures that the red card exerts a constant competitive effect regardless of when issued. It's because red cards exert a greater competitive effect the earlier they are awarded. Because a red card results in ejection of the offending player and a ban on his being replaced, it entails that the offender's team play short for the remainder of the match (or until the opposition is red-carded too).

So the more time remaining at point of infraction, the greater the penalty. In effect, a red card awarded at minute 15 reads "play shorthanded for 75 minutes" whereas one awarded for the very same infraction at minute 85 reads "play shorthanded for 5 minutes." The red card thus violates the sensible principle of game

⁷ Mitchell N. Berman, *Replay*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1830403.

design that, presumptively, the same infraction should call forth the same penalty regardless of the time of occurrence.

This disparity in the effective magnitude of the red card sanction should occasion little concern if the optimal penalty for committing a red-card offense (serious fouls, spitting, handling the ball to deny an obvious goal-scoring opportunity, etc.) were to be shorthanded for 90 minutes. In that event, the sanction would never be too high, and the fact that it would generally be too low would be unavoidable. But that's not plausible.

To be sure, what would be an optimal period of shorthandedness is extraordinarily difficult to determine. But the basic parameters are plain: Because a red card is awarded for a serious offense, the offending team should incur a significant penalty, one that meaningfully affects its prospects for victory. Yet we don't want the penalty to be virtually outcome-determinative – all the more so given the prospect (exacerbated by the prevalence of diving, by the presence of a lone referee, and by the absence of replay) that some red cards will be issued in error.

Nobody would seriously entertain a proposal to replace the penalty of ejection with the award of two goals to the opposing team. Given soccer's very low average scores and margins of victory, a sanction of such magnitude would threaten to convert the sport into an extended exercise in penalty avoidance. Similarly, we might expect that sending off a player in, say, the 10th minute is apt to have such a significant impact on game outcome as to contravene the competitive desideratum.

The obvious solution is for soccer to unlink the penalty of ejection from the penalty of shorthandedness. Soccer already decouples the consequences of a red card for the player involved from the consequences for his team: The player is sent off for the remainder of the match and is disqualified for the next game too, but the team plays shorthanded only for the remainder of that game, not for the next.

Soccer's governing bodies should consider taking this decoupling further. That the offending player may not return does not entail that his team should play shorthanded for the rest of the contest re-

ardless of when the foul occurred. Many sports, not only hockey, allow a team to substitute for an ejected player after some period of penalty time. Perhaps soccer should follow their lead.

To require a team to play shorthanded for nearly a full game is draconian even when the offense really warranted dismissal. But it's heartbreaking when — as happens disappointingly often in this otherwise beautiful game — the red card should never have been issued.

Figuring out what would be an appropriate period of shorthandedness would prove challenging. I'll leave that to the econometricians. I claim only that the current system that makes the competitive impact of a red card so radically dependent on its time of issuance is unlikely to dominate the alternatives, and therefore that further investigation is warranted. More to the point: that we should think harder about soccer's red-card system is only one among the many and diverse lessons to be learned by reflecting on the puzzle of temporal variance in sport.

17 Comments. //

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FROM: PRAWFSBLAWG

HEALTHCARE AND FEDERALISM

SHOULD COURTS STRICTLY SCRUTINIZE FEDERAL
REGULATION OF MEDICAL SERVICES?

Rick Hills[†]

I am sick to death of arguing about functionally empty federalism theories. Therefore, if you want a detailed analysis of why the 11th Circuit's recent opinion in *Florida v. United States*¹ errs in accepting Randy's argument against the constitutionality of PACA's individual mandate, take a look at Mark Hall's excellent post at Balkinization² or David Orentlicher's post over at Health Law Profs blog.³ (In the unlikely event that you are interested in my views, they're all over prawnsblawg – here,⁴ here,⁵ here,⁶ and here,⁷ for

[†] William T. Comfort, III Professor of Law, NYU School of Law. Original at prawnsblawg.blogs.com/prawnsblawg/2011/08/healthcare-and-federalism-should-courts-strictly-scrutinize-federal-regulation-of-medical-services-.html (Aug. 14, 2011; vis. Oct. 1, 2011). © Roderick Hills (for post). © PrawfsBlawg, LLC (for comments).

¹ aca-litigation.wikispaces.com/file/view/CA11+opinion.pdf.

² *Why the 11th Circuit's Opinion Self-Destructs*, balkin.blogspot.com/2011/08/why-11th-circuits-opinion-self.html.

³ *Judge Sutton More Persuasive Than Judge Hull*, lawprofessors.typepad.com/healthlawprof_blog/2011/08/judge-sutton-more-persuasive-than-judge-hull.html.

⁴ *Federalism & healthcare: The dangers & benefits of confusing individual rights with federalism*, prawnsblawg.blogs.com/prawnsblawg/2010/12/federalism-healthcare-the-dangers-benefits-of-confusing-individual-rights-with-federalism.html.

⁵ *An economist's view of what is (charitably) called "legal reasoning."* prawnsblawg.blogs.com/prawnsblawg/2011/02/an-economists-view-of-what-is-charitably-called-legal-reasoning.html

⁶ *Judge Vinson's incoherent extension of Printz's anti-commandeering principle from states to private*

instance).

My objection to Randy’s argument is that the action/inaction distinction is just more empty federalism etiquette born entirely of the need to distinguish precedents rather than the desire to construct a sensible division of powers in a federal system. The action/inaction distinction will not really limit federal power: As Randy concedes, Congress could impose precisely the same mandate through the taxing power or even conditional “prohibitions” on “actions” like buying insurance or being employed. Moreover, the distinction is not even very crisp, as Judge Sutton’s concurring opinion in *Thomas More Law Center v. Obama*⁸ explains with exemplary clarity and dispassionate good sense. So I’ll be delighted when the SCOTUS finally upholds PACA’s mandate and we can get on with the real business of figuring out how to limit the federal leviathan in ways that actually make a practical difference.

Which leads me to a question asked by Abby Moncrieff via e-mail: She asks me why a sensible theory of functional federalism would not suggest “devolution in the ACA case.” As Abby puts the matter, “[h]ere is a case of deep and salient disagreement among local populations as to the propriety of insurance mandates,” disagreement that would suggest that a one-size-fits-all national law would be a bad idea. Why not, instead, let the states go their different ways on the issues addressed by PACA?

Good question, Abby – and one blessedly free from the normatively vacuous precedent slalom that is the PACA litigation.⁹ My answer, following the jump, is that sensible functional federalism (a) *would* devolve the regulation of medical practice to the states but (b) would give the national government substantial power to finance health care. Resolving the tension between (a) and (b), however,

persons, prawfsblawg.blogs.com/prawfsblawg/2011/01/the-folly-of-extending-printzs-anti-commandeering-principle-from-states-to-private-persons.html.

⁷ *Should libertarians applaud the Individual Mandate as a matter of policy?*, prawfsblawg.blogs.com/prawfsblawg/2011/02/should-libertarians-applaud-the-individual-mandate-as-a-matter-of-policy.html.

⁸ aca-litigation.wikispaces.com/file/view/CA6+decision+%2806.29.11%29.pdf.

⁹ Rick Hills, *What does it mean to have a theory of federalism?*, prawfsblawg.blogs.com/prawfsblawg/2010/12/what-does-it-mean-to-have-a-theory-of-federalism.html.

requires a little more elaboration as well as an explanation of where I stand regarding Abby's excellent theory of "federalization snowballs."¹⁰

First, why give subnational jurisdictions a lead role in the regulation of medical practice? Professional standards for the practice of medicine raise religiously and culturally sensitive issues of life and death, physical privacy, and acceptable risk-taking. National legislation on such matters invites unnecessarily divisive struggles for the commanding heights of federal power. Devolution of such issues reduces the acrimony of pitting Red State folks (who dislike medical liability but hate *avaunt-garde* ethical innovations like physician-assisted suicide) against Blue State folks (who have opposite instincts). Given that the choice-of-law rules for medical malpractice and professional discipline predictably assign legislative jurisdiction to the state where medical services are performed, states can easily internalize the costs of their regulatory regimes in terms of inflated or reduced insurance premiums. (This latter point distinguishes standards of professional care from standards for the design of highly mobile pharmaceuticals – hence, the need for the Food, Drug, & Cosmetic Act).

Second, why give the feds the lead role in healthcare finance? The reason is the familiar point, set forth by Paul Peterson long ago,¹¹ that the subnational governments cannot redistribute wealth effectively in a federal system characterized by mobility of labor and capital. Any health insurance scheme will involve massive redistribution of wealth from the young to the old, from the rich to the poor, and from the sick to the healthy. The notion that subnational jurisdictions can take the lead in performing these financing functions strikes me as untenable.

But here's the rub: Limits on insurance coverage provided by the feds under Medicare (or PACA) will obviously affect the standards

¹⁰ *Federalization Snowballs: The Need for National Action in Medical Malpractice Reform*, at www.columbialawreview.org/assets/pdfs/109/4/Moncrieff.pdf, and 109 Colum. L. Rev. 844 (2009).

¹¹ Paul E. Peterson, *The Price of Federalism* (1995), books.google.com/books/about/The_price_of_federalism.html?id=_A-Dg_NnvakC.

of medical care provided by state-regulated doctors and hospitals. Costs imposed by those standards of care imposed by state law will obviously affect the costs of health care financed by the feds. Abby Moncrieff emphasizes this latter point in her article on “Federalization Snowballs”: Because the feds foot the bill for medical services, the federal taxpayer ends up subsidizing states’ medical malpractice regimes. Abby argues that the feds, therefore, might need to preempt state med mal regimes. But I’d argue that the feds need only do what private insurers do: Price the liability through higher premiums. Specifically, the federal spending power could legitimately impose special Medicare payroll taxes in states where the med mal liability really seems to impose an extra burden on the federal fisc. Differential payroll taxation has always been used to equalize spending between states with state-financed unemployment insurance systems and states without: Why could not such a tax system solve the problem of “federalization snowballs”?

So that’s my 500-word theory of federalism and medicine. I do not pretend that it is comprehensive answer to the problems of dividing power over medicine in a federal regime. But these are the sorts of functional considerations that I would like to see being debated in the U.S. reports rather than the nonsense of whether “inaction” is “commerce.”

COMMENTS

Hi Rick,

Thanks for the answer to the email question – and for the kind words on Snowballs. I have several reactions, not surprisingly, but I’ll selfishly focus on the two that are most important to what I’m working on right now.

1. It’s not clear, in your analysis of healthcare federalism, where the individual mandate ought to fall. The mandate is a financing measure that’s intended to be redistributive, but it’s a kind of financing regulation that isn’t obviously outside of the states’ competency to enact and enforce. Even when it works perfectly, a mandate redistributes only within the discrete private insurance pools that mandated individuals join, and the vast majority of those pools

remain state-specific after PACA (much to my chagrin). Furthermore, many of them do not do much by way of redistributing from young to old, rich to poor, or sick to healthy due to too much homogeneity in the pools. This particular tool of redistribution, thus, might be less subject to the traditional failures of subnational government.

2. The problem with a national mandate is not just that it's contentious. It's that it has become contentious along a particular dimension that is highly "culturally sensitive" – in the invocation of constitutional liberty interests. I agree, of course, that the action/inaction distinction is deeply silly and problematic for federalism doctrine. But the action/inaction distinction, as I think all reasonable scholars have recognized, is merely a thin veneer for what the courts (and Barnett) really care about: substantive liberty interests in economic freedom – and also, I would argue, in healthcare autonomy. The question, then, is whether the scope and content of the constitutional freedom of contract and the constitutional freedom of health – both of which are substantive freedoms that have arguably been left to political protection (rather than simply abolished from the constitutional landscape) – should be decided at the state or national level. If that is the question, then the answer is obviously, I think, that the states could do a much better job, thanks to their advantages in voice, diversity, experimentation, and exit – i.e. for the same reasons that you think they'd do better at defining rules for medical practice. The courts therefore could hold, consistently with functional federalism of the kind you like, that Congress exceeded its authority by implementing a new and significant encroachment of constitutional liberty interests – interests that should be left to state elaboration. Like the action/inaction distinction, that holding would be a new kind of Commerce Clause holding for the courts, but it would not be a totally new kind of holding. It would be essentially identical to what the Court said in *Glucksberg* when it refused to set a uniform national right to physician assisted suicide, choosing instead to leave elaboration of that right to state political processes.

In my view, such a holding would essentially say that the best federalism for healthcare regulation should take a back seat to the best federalism for substantive libertarianism. I'm not sure whether that's how I would choose to organize the world if I were dictator of the Court, but it's not a crazy or vacuous idea.

Posted by: Abby Moncrieff | Aug 14, 2011 1:54:02 PM

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Abby writes:

The question, then, is whether the scope and content of the constitutional freedom of contract and the constitutional freedom of health – both of which are substantive freedoms that have arguably been left to political protection (rather than simply abolished from the constitutional landscape) – should be decided at the state or national level. If that is the question, then the answer is obviously, I think, that the states could do a much better job, thanks to their advantages in voice, diversity, experimentation, and exit....

Well, if I thought that that PACA's individual mandate really raised genuinely important issues of individual liberty, then I might be inclined to agree with you. I agree that, when a law burdens important liberty interests, then it makes sense for the SCOTUS to discourage Congress from enacting such a law through "plain statement rules" or even constitutional invalidation. For instance, I believe that the SCOTUS was right to construe the Controlled Substances Act narrowly in *Gonzales v. Oregon* to exclude the use of controlled substances to induce death rather than for recreational purposes. Just because the Court did not protect this right judicially through substantive due process doctrine in *Glucksberg* does not mean that the Court should not try to protect the right politically through federalism, by allowing different states to take different positions on the divisive and difficult question of private liberty's proper definition.

It just seems odd to me to consider the PACA's financial penalty for failure to buy insurance as similar to the criminalization of physician-assisted suicide. Yes, freedom of contract as a general matter enjoys some protection under the 5th and 14th Amendment. And, yes, I'd agree that judicial refusal to protect such freedoms directly

through judicial injunction on state and federal laws does not mean that the Court should not encourage a decentralized resolution of conflict over the definition of such freedoms.

But surely it is not the case that every single federal invasion of freedom of contract automatically constitutes an invasion of a sensitive liberty interest! How exactly is PACA's mandate different, from a libertarian point of view, from any number of financial penalties imposed by the tax code that encourage us not to "free ride" off of other people's expenditures? The Cato Institute wants to use tax credits to promote the purchase of insurance: How is the extra tax liability that the uninsured will bear under the Cato Institute's proposal any different in principle, from a libertarian point of view, from PACA's mandate?

Not every limit on private freedom constitutes a burden on a sensitive liberty interest sufficient to trigger some limit on Congress' power. So until I have some account of why PACA's burden is different from run-of-the-mill social welfare legislation that Congress routinely enacts (sometimes with "conditional prohibitions" like the Fair Labor Standards Act, sometimes with the tax code), I am not inclined to invoke constitutional limits on Congress' power to preserve the liberty of waiting until one is sick before purchasing insurance.

Posted by: Rick Hills | Aug 14, 2011 3:40:21 PM

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Okay, fair enough. I think there's a tiny little something to the argument that conditions of citizenship (really of residency, in this case) should look openly compulsory, like taxes, rather than being framed and sold as conditional penalties. That argument would lend a bit of credence to the Cato Institute's view. And I think there's a tiny little something in the notion that the penalty must raise constitutional concerns because it has raised concerns of a constitutional magnitude. I'm not quite willing to write off a massive populist groundswell as political opportunism, even though that might well be what it is (and even though this argument obviously renders the existence of a constitutional liberty interest conclusory in some

sense). But I've also said from the beginning of the ACA litigation that the insurance "mandate" is economically indistinguishable from the first time home buyers' tax credit and should therefore be unquestionably constitutional from a substantive libertarian point of view.

(The paper I'm working on argues that it would be better to protect liberty through structural holdings than through substantive holdings; it doesn't actually argue that the liberty interests exist or that the mandate violates them.)

Posted by: Abby Moncrieff | Aug 14, 2011 4:30:50 PM

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Rick, interesting post. I'm interested in health care and functional federalism myself,¹² and (2) unsurprisingly, have chatted with Abby about it. (Hi, Abby). Quick thoughts:

Speaking purely from a functional (rather than constitutional) perspective: prior to ACA, the health insurance market simply wasn't open to millions of people. For reasons of price or health condition, many could not buy insurance even if they wanted to. ACA addresses both market barriers, but I just want to say a quick word about the latter – preexisting condition exclusions – because of the influence it's had on some of my thinking about federal and state power.

If I'm the federal government, and I federally bar preexisting condition exclusions, then I open the market, yes, but if I don't deal with the resulting adverse selection problem, then I might destroy the market I just opened. If I leave solving the adverse selection problem to the individual states, i.e., total devolution, some states might fail to solve – or take a very long time to solve – the problem. In the interim, significant damage could result both to insurance companies and their consumers.

So if, in addition to barring preexisting condition exclusions, I enact a federal individual mandate, then I've increased access to and preserved the health insurance market in one fell swoop. Once the

¹² papers.ssrn.com/sol3/papers.cfm?abstract_id=1798004.

market has been so opened, it seems to me the states may well be better at choosing the legal rules that govern the tort and insurance rules applicable in their specific markets. (I also think it would be great if states could experiment with private insurance arrangements explicitly incorporating cost-effectiveness thresholds into the insurance promise itself, but I digress). Opening state insurance markets also gives employees, at least theoretically, more choice between state law and federal ERISA law (although that choice is considerably complicated by other factors) in those areas about which ACA does not directly speak, which to me seems appealing, because ERISA does not represent modern thinking regarding what optimal legal rules are.

To me, then, a federal surcharge for states with certain legal rules could make sense to offset the externalities arising from federal subsidization Abby memorably discussed. But there's a measurement problem that's significant, I think, and it may make more sense administratively and politically to simply accept that federal subsidies frequently result, at some level, in state level inefficiencies. Perhaps, perhaps not.

I also don't know the degree to which ACA using federal power to "open and preserve markets" is meaningful from a big picture line-drawing perspective; I make no such claim. But I do think that's a difference between ACA's regulation of the insurance market and the frequently discussed hypothetical Congressional regulation of the "broccoli market."

Posted by: Brendan Maher | Aug 14, 2011 4:51:06 PM

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BDG writes:

"Will most customers recognize that state law is driving their insurance costs? If they don't, will state officials fully internalize the costs of their regulatory choices, given that all such costs will be off-budget?"

I haven't addressed the snowballing parts of Rick's original post yet, but I think these are excellent points. There are two other problems with using Medicare, too: (1) the mobility of the citizenry

and (2) the difficulty of calculating per-state costs. On (1), let's say that I spend my working life in Wyoming, a state that I'll postulate has low med-mal expenses, and therefore pay a low or zero med-mal penalty through my Medicare FICA contributions. Then I retire to Florida, a state that I'll postulate has high med-mal costs. I'm no longer paying into the system at that point but am now consuming healthcare in the higher-cost environment and thereby draining the federal fisc. So it seems to me that Medicare payroll is quite an imprecise way to go about the problem, even if placing the penalty on consumers rather than states would work. Maybe we could get around this mobility issue by adding a penalty to Medicare's cost-sharing provisions as well as the FICA contributions, so that the penalty kicks in at point of service as well, but then we're still not solving the off-budget problem that BDG (Brian?) points out.

On (2), the problem is that we just don't know how much we spend on med-mal-induced utilization, even overall, much less per-state, and we therefore can't calibrate the penalty well at all. It's not for lack of trying – it's just really, really hard to figure out. Maybe the feds could just rely on differentials as an incentive – force Texas to pay more for Medicare than Louisiana on the ground that Texas seems to have more med-mal troubles than Louisiana, without worrying whether the penalty is fully recapturing the federal portion. But that seems so unsatisfying...

Posted by: Abby Moncrieff | Aug 14, 2011 5:18:37 PM

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All of the above comments illustrate the basic point of my post: To discuss federalism intelligently, one needs to take a functional perspective, explaining why subnational resolution is especially important (such that federal law would not be “proper”) or why subnational resolution might be impossible (such the federal law is “necessary”). Yet our constitutional doctrine and litigation wastes its time parsing indeterminate precedents and has a peculiar abhorrence for functional considerations. It is this weird obsession with distinguishing past cases rather than trying to explain what the federal regime is supposed to accomplish that leads to what I take to be hair-splitting

litigation about the alleged distinction between forcing and conditionally prohibiting “action” and the like.

Now, as to the various specifics . . .

(1) Abby notes that “[i]t’s not clear, in your analysis of healthcare federalism, where the individual mandate ought to fall. The mandate is a financing measure that’s intended to be redistributive, but it’s a kind of financing regulation that isn’t obviously outside of the states’ competency to enact and enforce.”

Constitutional categories, being difficult to change and fine tune, have to be reasonably crude: If the actual purpose of a federal law is to engage in redistribution that is plausibly impeded by interstate competition, then that purpose would be good enough for me as a justification for federal legislation, barring some special reason to strictly scrutinize whether the federal law was “necessary.” The purpose being “proper,” I’d defer to Congress even if it were not “obvious” that states were incompetent to act. Under ordinary circumstances – e.g., no “sensitive” issue demanding subnational resolution because of its cultural sensitivity – so long as it was not obvious that state *were* competent, I’d uphold the law.

(2) Brian asks: ““Will most customers recognize that state law is driving their insurance costs? If they don’t, will state officials fully internalize the costs of their regulatory choices, given that all such costs will be off-budget?”

I’d think that an extra tenth of a percentage point of a payroll tax in high liability states would focus attention of voters wonderfully. (It could even be labeled “unreasonable medical malpractice surcharge” on the voters’ paycheck).

(3) I agree with Brendan’s basic point that banning discrimination based on preexisting conditions requires or, at least, is obviously facilitated by, the individual mandate. It is this basic functional point that, I think, will in the end trump all of the scholastic pettifoggery about whether “inaction” is “commerce.”

I have a bit of a quibble with the idea that ACA greatly broadens our healthcare options by limiting ERISA preemption, simply because I think ERISA preemption is itself absurdly broad – far broader than anything Congress could reasonably have foreseen or in-

tended. “Opting in” from such a wacky judge-made regime of extremely spare fiduciary duties is hardly a great boon for decentralization, given the lousiness of the ERISA baseline. Instead, Congress ought to have simply repealed ERISA preemption, replacing it with a much narrower rule. The rejection of the Kucinich amendment to PACA exempting states’ single-payer systems from ERISA was a blow to “opt-in federalism,” not an advancement of it.

Posted by: Rick Hills | Aug 14, 2011 5:57:24 PM

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“My objection to Randy’s argument is that the action/inaction distinction is just more empty federalism etiquette born entirely of the need to distinguish precedents rather than the desire to construct a sensible division of powers in a federal system.”

Well said. I remain surprised that this rather obvious point has not penetrated the discussion further. What is the link between the action/inaction distinction and the division between state and federal power? I haven’t heard it.

Posted by: John Greenman | Aug 15, 2011 2:03:30 AM //

FROM: ELECTION LAW BLOG

WHY JOHN EDWARDS PROBABLY DID NOT COMMIT A CRIME,

REGARDLESS OF HIS MOTIVES
OR THOSE OF HIS DONORS

Richard Pildes[†]

Much of the initial reaction to the Edwards indictment from experts in campaign-finance law has been critical or skeptical of the government's theory. But in my view, the reaction has not been critical enough. Some skeptics think the problem with the government's case is figuring out what the "true motives" of Edwards and his supporters were when they gave large amounts of money to keep his affair secret. If their motives were to benefit Edward's campaign, then perhaps this money was an illegal campaign "contribution;" if their motives were anything else, like preserving Edward's family relationships, then the money was not a campaign contribution. On this view, the government has a difficult, but not impossible, problem on its hands only because sorting out mixed motives in a situation like this is extraordinarily complex. This is Rick Hasen's view¹ of the case: the government's case is difficult, but plausible, because if the government can prove Edwards

[†] Sudler Family Professor of Constitutional Law, NYU School of Law. Original at electionlawblog.org/?p=18735 (June 4, 2011; vis. Oct. 1, 2011). © Richard H. Pildes and Election Law Blog.

¹ Richard L. Hasen, *A Cover-Up, Not a Crime. Why the case against John Edwards may be hard to prove.*, Slate, www.slate.com/articles/news_and_politics/jurisprudence/2011/06/a_coverup_not_a_crime.html.

and the donors “really intended” the money to benefit his campaign, then a crime will have been committed.

But I believe the government’s case is even more tenuous than Hasen’s view suggests. What constitutes a “campaign contribution” under the federal election law for criminal-law purposes must be defined in objective terms. The definition of a “contribution” cannot turn on the subjective motive of the actors involved. There are a limitless number of ways supporters of a candidate can spend money that could indirectly benefit the electoral prospects of that candidate. Whether any of these means are “contributions” or not should depend, for purposes of criminal law, on objective facts, not on whether those involved intended to benefit some candidate. For example, if a candidate has published an autobiography, a supporter could buy up thousands of copies of the book and help turn it into a bestseller, which could enhance the candidate’s stature and visibility. Most forms of this kind of indirect activity will cost more than the \$2300 cap on campaign contributions (at \$25 a book, buying 93 books would exceed that cap). But the courts are unlikely to accept the view that whether buying up these books constitutes a crime turns on whether the purchases were motivated by a desire to help the campaign or, instead, a belief in the correctness of the ideas expressed and a desire to share those ideas with others. Motives are irrelevant. The FEC has already recognized² this in the flip-side of the Edwards case; when a donor gives money directly to a candidate, this will be treated as a contribution, regardless of whether the donor says my real motive is to give a gift to the candidate, not a campaign contribution. But just as subjective intent cannot turn a contribution into something else, it cannot turn something not a contribution into one. There are two points here: (1) not every form of spending that indirectly benefits a candidate is, in legal terms, a “campaign contribution;” (2) determining which forms of spending are contributions cannot turn on whether the actors involved are motivated to help the campaign or not – especially in the criminal-law context, where due process considerations require that

² Letter from Darryl R. Wold, Chairman, FEC, to Philip D. Harvey, DKT International, June 14, 2000, saos.nictusa.com/aodocs/2000-08.pdf.

potential defendants have clear notice of whether their conduct constitutes a crime or not.

The question in the Edwards case is thus whether money given to support a mistress is, under the law, a campaign “contribution,” period, regardless of trying to sort out why the money was given. Based on my knowledge of the election laws, I find it hard to believe the courts will answer yes to that question. For one, the money involved here was not a substitute for money the campaign itself might otherwise have spent; indeed, if Edwards has used campaign money to support his mistress, that would itself have violated the criminal law. So the donors did not save the Edwards campaign from spending money it might otherwise have spent. Criminal prosecutions under the federal election laws are extremely rare to begin with; the government has never brought a criminal case involving an expansive notion of “contribution,” let alone one as expansive as this case involves. Indeed, even in the civil context, the FEC has never tried to stretch the definition of “contribution” this far. The money spent here is almost certainly not a “contribution” within the meaning of the election laws, at least for criminal-law purposes. I believe at least nine out of ten election-law experts would have been of that view before this prosecution was announced. But even if there is uncertainty about that, the Constitution prohibits criminal prosecutions under statutes that are too vague to provide fair notice about the boundaries between lawful and criminal conduct.

The confusion on this issue might be a result of the fact that specific intent is *necessary* to establish a criminal violation of the federal campaign finance laws. Thus, the government must generally prove that the offender was aware of what the law required, and that he or she violated that law notwithstanding that knowledge. But the fact that intent is *necessary* doesn't mean it's *sufficient*: the payments either are contributions, within the meaning of the law, or they are not. Whatever motivated the donors or Edwards cannot turn spending that is not a contribution into a contribution. I have no sympathy as a moral matter for John Edwards, but regardless of his motives, I doubt the courts are going to accept the view that he can be prosecuted for criminal violations of the federal campaign-finance laws –

regardless of whether he or his donors intended to benefit his campaign through the payments. //

FROM: LEGAL THEORY BLOG

LEGAL THEORY LEXICON: LEGAL THEORY, JURISPRUDENCE, AND THE PHILOSOPHY OF LAW

Lawrence B. Solum[†]

INTRODUCTION

The *Legal Theory Lexicon* series usually explicates some concept in legal theory, jurisprudence, or philosophy of law. But what are those fields and how do they relate to each other? Is “jurisprudence” a synonym for “philosophy of law” or are these two overlapping but distinct fields? Is “legal theory” broader or narrower than jurisprudence? And why should we care about this terminology?

As always, this entry in the *Legal Theory Lexicon* series is aimed at law students, especially first-year law students with an interest in legal theory.

WHO CARES ABOUT TERMINOLOGY

Why should we care about terminology? Who cares what goes under the label “jurisprudence” or “philosophy of law” or “legal theory”? Well, of course, there is a sense in which we

[†] Professor of Law, Georgetown University Law Center. Original at lsolum.typepad.com/legaltheory/2011/04/introduction-thelegal-theory-lexiconseries-usually-explicates-some-concept-in-legal-theory-jurisprudence-or-philosophy-o.html (Apr. 24, 2011; vis. Oct. 1, 2011). © by Lawrence B. Solum.

shouldn't care at all. What matters in a deep way is the *substance* of theorizing about law. On the other hand, these labels are important for a different reason – because their use tells us something about the *sociology* of the academy. When people argue about what “jurisprudence” really is, the terminological dispute may reflect a conflict over “turf” and “authority.”

DISCIPLINARY LINES AND THEORIZING ABOUT LAW

Very broadly speaking, the turf of high-level legal theory is disputed by at least four groups. First and (still) foremost are the academic lawyers, those whose graduate-level training is exclusively (or almost exclusively) in law as it is taught in the legal academy. Second, there are the economists – some of whom are primarily (or exclusively) trained in economics; while others legal economists were trained primarily by law professors. Third, there is the “law and society” movement – broadly defined as the study of law from a social science (but noneconomic) perspective. Law-and-society theorists may have been trained in political science or sociology or criminology, but many may have been trained in the legal academy as well. Fourth, there is the law-and-philosophy movement, with “analytic legal philosophy” or “analytic jurisprudence” as the focal point of a variety of philosophical approaches. Many “philosophers of law” have formal philosophical training, but some were trained in law or political theory in a political science department. There are other approaches to the study of law (e.g., “law and courts” scholarship in political science departments), but for the most part they do not claim to be doing “legal theory” or “jurisprudence.”

So, what about the turf wars? Those who use the phrase “philosophy of law” tend to be philosophers, while the term “jurisprudence” is more strongly associated with the legal tradition of theorizing about the law, but there is frequently a blurring of these two terms. From the 1960s on, a single figure had a dominant influence in defining the content of “philosophy of law” courses in philosophy departments and “jurisprudence” courses in the law schools – that figure was H.L.A. Hart. Of course, there were many, many

exceptions, but for quite a long time the standard course in both disciplines included as a central, organizing component, an examination of Hart's ideas, either *The Concept of Law*, Hart's great book, or the Hart-Fuller debate in the Harvard Law Review. When I was a student in the 70s and early 80s, I thought that "jurisprudence" and "philosophy of law" were synonymous – and that both were references to analytic philosophy of law in the tradition of Hart and included figures like Dworkin and Raz. One consequence of the "philosophicalization" of jurisprudence was the move to fold moral and political philosophy into jurisprudence. I have a very clear memory of browsing the law shelves of the textbook section of the UCLA bookstore in the mid to late 70s, and discovering John Rawls's *A Theory of Justice* and Robert Nozick's *Anarchy, State, and Utopia* as the texts for the jurisprudence course. I have always assumed that similar courses were offered elsewhere, although I could be wrong about that.

Philosophy is important as a matter of the sociology of the legal academy, but it is not the only important interdisciplinary influence: economics, political science, and sociology, each of these also has a major influence. Given that the "jurisprudence" course was "captured" by philosophers, how could these other approaches to legal theorizing express their theoretical framework in the law school curriculum. One mode of expression was the alternative theory course – "Law and Economics" and "Law and Society" were the two leading competitors of "Jurisprudence." Moreover, the tradition of distinctively legal thinking about high legal theory remains. American Legal Realism was largely the product of the law schools – although many other disciplines figured in the realist movement. Likewise, Critical Legal Studies was largely a phenomenon of the legal academy. Some jurisprudence or legal theory courses incorporate philosophy of law, law and economics, and law and society into a course that is taught from a distinctively legal point of view.

What can we say about our three terms – jurisprudence, philosophy of law, and legal theory?

JURISPRUDENCE

My sense is that most Anglo-American legal academics view “jurisprudence” as mostly synonymous with “philosophy of law”. This is not a unanimous view. There is still a lingering sense of “jurisprudence” that encompasses high legal theory of a nonphilosophical sort – the elucidation of legal concepts and normative theory from within the discipline of law. Moreover, in other legal cultures, for example, in Europe and Latin America, my sense is that the move to identify jurisprudence with philosophy of law never really took root.

PHILOSOPHY OF LAW

The meaning of the phrase “philosophy of law” is inevitably tied up in the relationship between the two academic disciplines – philosophy and law. In the United States and the rest of the Anglophone world, “philosophy of law” is a subdiscipline of philosophy, a special branch of what is nowadays frequently called “normative theory” and closely related to political philosophy. Of course, there are many different tendencies within academic philosophy generally and the philosophy of law in particular. Still, the dominant approach to philosophy of law in the Anglophone world is represented by “analytic jurisprudence,” which might be defined by the Hart-Dworkin-Raz tradition on the one hand and by the larger Austin-Wittgenstein-Quine-Davidson-Kripke tradition on the other. (In both cases, the list of names is arbitrary and illustrative – we could add Coleman or Finnis or drop Davidson or Wittgenstein and still refer to the same set of central tendencies.)

Coexisting with the analytic tradition in the philosophy of law are many other philosophical approaches. These include Hegelianism, neo-Thomism, Marxism, as well as the contemporary continental philosophical tradition, ranging from Habermas (with close affinities to the analytic tradition) to Foucault and Derrida (with much more tenuous links).

The philosophy of law covers a lot of ground. An important line of development focuses on the “what is law?” question, but much

contemporary legal philosophy is focused on normative questions in specific doctrinal fields. The application of moral and political philosophy to questions in tort and criminal law is an example of this branch of contemporary legal philosophy.

My sense of the “lay of the land” is that debates over the “What is Law?” question have recently become more exciting (Scott Shapiro’s work is just one example) – but in my opinion the center of attention has shifted from the nature of law to normative legal theory. A variety of potentially exciting developments that are very recent include the emergence of experimental jurisprudence and explorations of the connections between metaethics and metajurisprudence.

LEGAL THEORY

Legal theory is a much broader and encompassing term, encompassing the philosophy of law and jurisprudence as well as theorizing from a variety of other perspectives, including law and economics and the law and society movement. In my opinion, “legal theory” is currently the best neutral term for referring to legal theorizing, broadly understood. It allows us to avoid the turf wars and sectarian disputes that make the word “jurisprudence” somewhat problematic.

CONCLUSION

When you start theorizing about law, you are likely to adopt some term or phrase to describe your activity. “I’m doing jurisprudence,” or “I’m a philosopher of law.” I hope that this entry in the *Legal Theory Lexicon* will help you use these labels with some awareness of their history and the controversies that surround their use.

RELATED LEXICON ENTRIES

[Legal Theory Lexicon 065: The Nature of Law](#)¹

[Legal Theory Lexicon 016: Positive and Normative Legal Theory](#)²

¹ solum.typepad.com/legal_theory_lexicon/2008/05/legal-theory-le.html.

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FROM: TRUTH ON THE MARKET

ANTITRUST REMEDIES

Josh Wright[†]

BARNETT V. BARNETT ON ANTITRUST

Tom Barnett (Covington & Burling) represents Expedia in, among other things, its efforts to persuade a US antitrust agency to bring a case against Google involving the alleged use of its search engine results to harm competition. In that role, in a recent piece in Bloomberg,¹ Barnett wrote the following things:

- “The U.S. Justice Department stood up for consumers last month by requiring Google Inc. to submit to significant conditions on its takeover of ITA Software Inc., a company that specializes in organizing airline data.”
- “According to the department, without the judicially monitored restrictions, Google’s control over this key asset “would have substantially lessened competition among providers of comparative flight search websites in the United States, resulting in reduced choice and less innovation for consumers.”
- “Now Google also offers services that compete with other sites to provide specialized “vertical” search services in particular segments (such as books, videos, maps and, soon, travel) and information sought by users (such as hotel and restaurant

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¹ *Google’s Search Tactics Warrant Antitrust Scrutiny: Commentary*, lammgl.files.wordpress.com/2011/03/google_s-search-tactics-warrant-antitrust-scrutiny_-commentary1.pdf.

reviews in Google Places). So Google now has an incentive to use its control over search traffic to steer users to its own services and to foreclose the visibility of competing websites.”

- “Search Display: Google has led users to expect that the top results it displays are those that its search algorithm indicates are most likely to be relevant to their query. This is why the vast majority of user clicks are on the top three or four results. Google now steers users to its own pages by inserting links to its services at the top of the search results page, often without disclosing what it has done. If you search for hotels in a particular city, for example, Google frequently inserts links to its Places pages.”
- “All of these activities by Google warrant serious antitrust scrutiny. . . . It’s important for consumers that antitrust enforcers thoroughly investigate Google’s activities to ensure that competition and innovation on the Internet remain vibrant. The ITA decision is a great win for consumers; even bigger issues and threats remain.”

The themes are fairly straightforward: (1) Google is a dominant search engine, and its size and share of the search market warrants concern, (2) Google is becoming vertically integrated, which also warrants concern, (3) Google uses its search engine results in manner that harms rivals through actions that “warrant serious antitrust scrutiny,” and (4) Barnett appears to applaud judicial monitoring of Google’s contracts involving one of its “key assets.” Sigh.

The notion of firms “coming full circle”² in antitrust, a la Microsoft’s journey from antitrust defendant to complainant, is nothing new. Neither is it too surprising or noteworthy when an antitrust lawyer, including very good ones like Barnett, say things when representing a client that are at tension with prior statements made when representing other clients. By itself, that is not really worth a post. What I think is interesting here is that the prior statements from Barnett about the appropriate scope of antitrust enforcement generally, and monopolization in the specific, were made as Assis-

² Geoffrey Manne, *Microsoft comes full circle*, truthonthemarket.com/2011/03/31/Microsoft-comes-full-circle/.

tant Attorney General for the Antitrust Division – and thus, I think are more likely to reflect Barnett’s actual views on the law, economics, and competition policy than the statements that appear in Bloomberg. The comments also expose some shortcomings in the current debate over competition policy and the search market.

But lets get to it. Here is a list of statements that Barnett made in a variety of contexts while at the Antitrust Division.

- “Mere size does not demonstrate competitive harm.” (Section 2 of the Sherman Act Presentation, June 20, 2006)³
- “. . . if the government is too willing to step in as a regulator, rivals will devote their resources to legal challenges rather than business innovation. This is entirely rational from an individual rival’s perspective: seeking government help to grab a share of your competitor’s profit is likely to be low cost and low risk, whereas innovating on your own is a risky, expensive proposition. But it is entirely irrational as a matter of antitrust policy to encourage such efforts. (Interoperability Between Antitrust and Intellectual Property, George Mason University School of Law Symposium, September 13, 2006)⁴
- “Rather, rivals should be encouraged to innovate on their own – to engage in leapfrog or Schumpeterian competition. New innovation expands the pie for rivals and consumers alike. We would do well to heed Justice Scalia’s observation in *Trinko*, that creating a legal avenue for such challenges can ‘distort investment’ of both the dominant and the rival firms.” (emphasis added) (Interoperability Between Antitrust and Intellectual Property, George Mason University School of Law Symposium, September 13, 2006)⁵
- “Because a Section 2 violation hurts competitors, they are often the focus of section 2 remedial efforts. But competitor well-being, in itself, is not the purpose of our antitrust laws. The Darwinian process of natural selection described by Judge Easterbrook and Professor Schumpeter cannot drive

³ www.justice.gov/atr/public/hearings/single_firm/docs/218775.pdf.

⁴ www.justice.gov/atr/public/speeches/218316.htm.

⁵ *Id.*

growth and innovation unless tigers and other denizens of the jungle are forced to survive the crucible of competition.” (Cite).⁶

- “Implementing a remedy that is too broad runs the risk of distorting markets, impairing competition, and prohibiting perfectly legal and efficient conduct.” (same)
- “Access remedies also raise efficiency and innovation concerns. By forcing a firm to share the benefits of its investments and relieving its rivals of the incentive to develop comparable assets of their own, access remedies can reduce the competitive vitality of an industry.” (same)
- “The extensively discussed problems with behavioral remedies need not be repeated in detail here. Suffice it to say that agencies and courts lack the resources and expertise to run businesses in an efficient manner. . . . [R]emedies that require government entities to make business decisions or that require extensive monitoring or other government activity should be avoided wherever possible.” (Cite)⁷
- “We need to recognize the incentive created by imposing a duty on a defendant to provide competitors access to its assets. Such a remedy can undermine the incentive of those other competitors to develop their own assets as well as undermine the incentive for the defendant competitor to develop the assets in the first instance. If, for example, you compel access to the single bridge across the Missouri River, you might improve competitive options in the short term but harm competition in the longer term by ending up with only one bridge as opposed to two or three.” (same)
- “There seems to be consensus that we should prohibit unilateral conduct only where it is demonstrated through rigorous economic analysis to harm competition and thereby harm consumer welfare.” (same)

⁶ *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, American Bar Association Conference on Monopolization Remedies, Charlottesville, VA, June 4, 2008.

⁷ *Section 2 Remedies: A Necessary Challenge*, Fordham Competition Law Institute 34th Annual Conference on International Antitrust Law & Policy New York, NY, Sept. 28, 2007.

I'll take Barnett (2006-08) over Barnett (2011) in a technical knockout. Concerns about administrable antitrust remedies, unintended consequences of those remedies, error costs, helping consumers and restoring competition rather than merely giving a handout to rivals, and maintaining the incentive to compete and innovate are all serious issues in the Section 2 context. Antitrust scholars from Epstein and Posner to Areeda and Hovenkamp and others have all recognized these issues – as did Barnett when he was at the DOJ (and no doubt still). I do not fault him for the inconsistency. But on the merits, the current claims about the role of Section 2 in altering competition in the search engine space, and the applause for judicially monitored business activities, runs afoul of the well grounded views on Section 2 and remedies that Barnett espoused while at the DOJ.

Let me end with one illustration that I think drives the point home. When one compares Barnett's column in Bloomberg to his speeches at DOJ, there is one difference that jumps off the page and I think is illustrative of a real problem in the search engine antitrust debate. Barnett's focus in the Bloomberg piece, as counsel for Expedia, is largely harm to rivals. Google is big. Google has engaged in practices that might harm various Internet businesses. The focus is not consumers, i.e. the users. They are mentioned here and there – but in the context of Google's practices that might "steer" users toward their own sites. As Barnett (2006-08) well knew, and no doubt continues to know, is that vertical integration and vertical contracts with preferential placement of this sort can well be (and often are) pro-competitive. This is precisely why Barnett (2006-08) counseled requiring hard proof of harm to consumers before he would recommend much less applaud an antitrust remedy tinkering with the way search business is conducted and running the risk of violating the "do no harm" principle. By way of contrast, Barnett's speeches at the DOJ frequently made clear that the notion that the antitrust laws "protection competition, not competitors," was not just a mantra, but a serious core of sensible Section 2 enforcement.

The focus can and should remain upon consumers rather than ri-

vals.⁸ The economic question is whether, when and if Google uses search results to favor its own content, that conduct is efficient and pro-consumer or can plausibly cause antitrust injury. Those leaping from “harm to rivals” to harm to consumers should proceed with caution. Neither economic theory nor empirical evidence indicate that the leap is an easy one. Quite the contrary, the evidence⁹ suggests these arrangements are generally pro-consumer and efficient. On a case-by-case analysis, the facts might suggest a competitive problem in any given case.

Barnett (2006-08) has got Expedia’s antitrust lawyer dead to rights on this one. Consumers would be better off if the antitrust agencies took the advice of the former and ignored the latter.

SEARCHING FOR ANTITRUST REMEDIES, PART I

This is part one of a two part series of posts in which I’ll address the problems associated with discerning an appropriate antitrust remedy to alleged search engine bias. The first problem – and part – is, of course, how we should conceptualize Google’s allegedly anticompetitive conduct; in the next part, I will address how antitrust regulators should conceive of a potential remedy, assuming *arguendo* the existence of a problem at all. Despite some commentators’ assumptions, I do not think the economics indicate any such problem exists.

The question of how to conceptualize Google’s business practices – even its business model! – remains the indispensable starting point for antitrust analysis, including potential remedies; doubly so in the wake of the FTC’s decision to formally investigate Google. While the next part will focus more directly upon potential remedies that have been proposed by various Google critics, there is a fundamental link between how we conceptualize Google’s provision of search results for the purposes of antitrust analysis and the design

⁸ Josh Wright, *Google, Antitrust, and First Principles*, truthonthemarket.com/2011/03/31/google-antitrust-and-first-principles/.

⁹ Francine Lafontaine and Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, www.aeaweb.org/articles.php?doi=10.1257/jel.45.3.629, and 45 J. Econ. Literature 629 (2007).

of remedies. Indeed, antitrust enforcers and scholars have taught that thinking hard about remedies upfront can and frequently should influence how we think about the competitive nature of the conduct at issue. The question of how to conceptualize Google's organic search results has sparked serious debate, as some¹⁰ have claimed that "Google's behavior is harder to define" than traditional anti-competitive actions and represents "a new kind of competition." Some have also focused upon "search bias" itself as the relevant conduct for antitrust purposes. Of course, as I've pointed out,¹¹ these statements are not in line with modern antitrust economics and usually precede calls to deviate from traditional consumer-welfare-focused antitrust analysis.

I see two useful conceptual constructs in evaluating "search bias" within the antitrust framework. Recall that "search bias" typically translates to allegations that Google favors its own affiliated content over that of rivals. For example, a search query on Google for "map of Arlington, VA" might turn up a map of Arlington from Google Maps in the top link. These allegations usually concede that we would expect Bing Maps if we ran the same search on Bing. The complaints from vertical search engines and travel services like Expedia particularly center around the notion that Google's "entry" into various spaces – such as travel services – supported by prominent search rankings disadvantages rivals and may lead to their exit.

Observant readers will note my use of scare quotes around "entry." This is not coincidental. It is not obvious to me that Google necessarily *enters* a new sector (much less a well-defined antitrust product market) when it directs a user to content in a new format—such as a map, video, or place page. Google's primary function is search; users rely on search engines to reduce search and information costs. I think it is at least as likely that Google's attempts to provide this content by *any* chosen metric is simply an attempt to do their cardinal job better: answering user queries with relevant in-

¹⁰ *Google antitrust probe could bring out enemies*, www.politico.com/news/stories/0711/58464_Page2.html.

¹¹ *Sacrificing Consumer Welfare in the Search Bias Debate, Part II*, truthonthemarket.com/2011/06/28/sacrificing-consumer-welfare-in-the-search-bias-debate-part-ii/.

formation at a minimum of cost. Holding that threshold issue aside for a moment, in my mind, there are two ways to classify that conduct in the antitrust framework.

First, one might conceive of search bias allegations as “vertical integration” or vertical contractual activity. I’ve explored this conception at significant length both in blog posts (see, e.g. [here](#)¹² and [here](#)¹³) as well as a [longer article with Geoff](#).¹⁴ The classic antitrust concern in this setting is that a monopolist might foreclose rivals from an input the rivals need to compete effectively. For example, Google owns YouTube; Google could prominently place YouTube results when users enter queries seeking video content. (Ignore for the moment that YouTube will necessarily rank highly on other search engines because it is the leading site for video content). Within this vertical integration framework, there is a standard analysis for understanding when competitive concerns might arise, the conditions that must be satisfied for those concerns to warrant scrutiny, a deeply embedded understanding that harm to rivals must be distinguished from demonstrable harm to competition, and an equally deeply held understanding that these vertical arrangements and relationships are often, even typically, pro-competitive (e.g., in the YouTube example vertical integration likely leads to reduced latency and faster provision of video content).

Second, one might conceptualize organic search results as the product of Google’s algorithm and thus falling into the category of conduct analyzed as “product design” for antitrust purposes. This algorithm faces competition from other search algorithms and vertical search engines to deliver relevant results to consumers. It is the design of the algorithm that ranks Google-affiliated content, according to the complaints, preferentially and to the disadvantage of rivals. I explore both beneath the fold.

The two conceptions are not mutually exclusive. The antitrust

¹² *Id.*

¹³ *Sacrificing Consumer Welfare in the Search Bias Debate*, truthonthemarket.com/2011/04/22/sacrificing-consumer-welfare-in-the-search-bias-debate/.

¹⁴ Geoffrey A. Manne and Joshua D. Wright, *If Search Neutrality is the Answer, What's the Question?*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1807951.

implications of the two different conceptions of Google's organic search are significant. Courts and agencies generally give wide latitude to product design decisions, through with some prominent exceptions (Microsoft, *FTC v. Intel*). Courts are skeptical to intervene on the basis of complaints about product design by rivals because they concerned that such intervention will chill innovation. Concern for false positives play a central part in the analysis, as do concerns that any remedy will involve judicial oversight of product innovation. Plaintiffs can and do, from time to time, win these cases, but the product-design conception carries with it a heavy deference for design decisions.

The "vertical" (in the antitrust sense) conception of Google's search results requires us to think about the economics of algorithmic search ranking, placement choices, and the economics of vertical relationships between a content provider and a search engine. There are many economic reasons for vertical contractual relationships between such content or product providers and retailers. Coca-Cola pays retailers for promotional shelf space, manufacturers compensate retailers by granting them exclusive territories, and product manufacturers and distributors often enter into exclusive relationships in which the distributor does not simply feature or promote the manufacturer's product, but does so to the exclusion of all of the manufacturer's rivals.

The anticompetitive narrative of Google's conduct focuses heavily on that prominent placement within Google's rankings, e.g. the first link or one towards the top of the page, results in a substantial amount of traffic. This is no doubt true; it is not a sufficient condition for proving competitive harm. It is equally true that eye-level and other premium level shelf space in the supermarket generates more sales than other placements within the store. There is good economic reason for manufacturers to pay retailers for premium shelf space (see [Klein and Wright, 2007](#)¹⁵) and evidence that these arrangements are good for consumers ([Wright, 2008](#)¹⁶). Retailers'

¹⁵ Benjamin Klein and Joshua D. Wright, *The Economics of Slotting Contracts*, papers.ssrn.com/sol3/papers.cfm?abstract_id=773464.

¹⁶ Joshua D. Wright, *Slotting Contracts and Consumer Welfare*, papers.ssrn.com/sol3/papers.

shelf space decisions, and decisions to promote one product over another, are often influenced by contractual incentives; and it is a good thing for consumers. Now consider the case when the retailer shelf space decision is influenced not by contractual incentive and compensation, but by ownership. This is really just a special case – as ownership aligns the incentives (like the contract would) of the manufacturer and retailer. For example, a supermarket might promote its own private label brand in eye-level shelf space. Alternatively, in a category management relationship,¹⁷ a retailer might delegate a specific manufacturer as “category captain” and allow it significant influence over product selection and shelf space placement decisions. Note that in the case of exclusive relationships, the presumption that such arrangements are pro-competitive applies to shelf placement that would entirely exclude a rival from the shelf, not just demote it.

In economics, the theoretical and empirical verdict is in about these sorts of vertical contractual relationships: while they can be anticompetitive under some circumstances, the appropriate presumption is that they are generally pro-competitive and a part of the normal competitive process until proven otherwise. How we conceptualize placement of search results, including those affiliated with the search engine (e.g. Google Maps on Google or Bing Maps on Bing), should influence how we think about the appropriate burden of production facing would-be antitrust plaintiffs, including the Federal Trade Commission.

Indeed, these two models offer important trade-offs for antitrust analysis. To wit, in my view, the vertical integration model provides a still difficult, but relatively easier case for potential rivals to make under existing case law, but it also integrates efficiencies directly into the analysis. For example, vertical integration and exclusive dealing cases accept as a starting point the notion that such arrangements are often efficient. On the other hand, while potential plaintiffs have a tougher initial burden in a product design case, the focus

cfm?abstract_id=897394.

¹⁷ Joshua D. Wright, *Antitrust Analysis of Category Management: Conwood v. United States Tobacco Co.*, papers.ssrn.com/sol3/papers.cfm?abstract_id=945178.

often turns to how the design impacts interoperability and whether the defendant can defend its technical design choices. Having explored the potential conceptual constructs for characterizing Google's conduct for the purpose of antitrust analysis, my next post will link those concepts to a discussion of potential remedies, exploring the proposed remedies for Google's conduct, a relevant historical parallel to today's "search bias" debate raised by some as a model of regulatory success, and a discussion of the economic non sequiturs surrounding the case against Google as juxtaposed against these proposed remedies.

SEARCHING FOR ANTITRUST REMEDIES, PART II

In the last post,¹⁸ I discussed possible characterizations of Google's conduct for purposes of antitrust analysis. A firm grasp of the economic implications of the different conceptualizations of Google's conduct is a necessary – but not sufficient – precondition for appreciating the inconsistencies underlying the proposed remedies for Google's alleged competitive harms. In this post, I want to turn to a different question: assuming *arguendo* a competitive problem associated with Google's algorithmic rankings – an assumption I do not think is warranted, supported by the evidence, or even consistent with the relevant literature on vertical contractual relationships – how might antitrust enforcers conceive of an appropriate and consumer-welfare-conscious remedy? Antitrust agencies, economists, and competition policy scholars have all appropriately stressed the importance of considering a potential remedy prior to, rather than following, an antitrust investigation; this is good advice not only because of the benefits of thinking rigorously and realistically about remedial design, but also because clear thinking about remedies upfront might illuminate something about the competitive nature of the conduct at issue.

Somewhat ironically,¹⁹ former DOJ Antitrust Division Assistant Attorney General Tom Barnett – now counsel for Expedia, one of

¹⁸ "Searching for Antitrust Remedies, Part I" above.

¹⁹ "Barnett v. Barnett on Antitrust" above.

the most prominent would-be antitrust plaintiffs against Google – warned (in his prior, rather than his present, role) that “[i]mplementing a remedy that is too broad runs the risk of distorting markets, impairing competition, and prohibiting perfectly legal and efficient conduct,” and that “forcing a firm to share the benefits of its investments and relieving its rivals of the incentive to develop comparable assets of their own, access remedies can reduce the competitive vitality of an industry.” Barnett also noted that “[t]here seems to be consensus that we should prohibit unilateral conduct only where it is demonstrated through rigorous economic analysis to harm competition and thereby harm consumer welfare.” Well said. With these warnings well in-hand, we must turn to two inter-related concerns necessary to appreciating the potential consequences of a remedy for Google’s conduct: (1) the menu of *potential* remedies available for an antitrust suit against Google, and (2) the efficacy of these potential remedies from a consumer-welfare, rather than firm-welfare, perspective.

What are the potential remedies?

The burgeoning search neutrality crowd presents no lack of proposed remedies; indeed, if there is one segment in which Google’s critics have proven themselves prolific, it is in their constant ingenuity conceiving ways to bring governmental intervention to bear upon Google. Professor Ben Edelman has usefully aggregated and discussed several of the alternatives, four of which bear mention: (1) a la Frank Pasquale and Oren Bracha, the creation of a “Federal Search Commission,”²⁰ (2) a la the regulations²¹ surrounding the Customer Reservation Systems (CRS) in the 1990s, a prohibition on rankings that order listings “us[ing] any factors directly or indirectly relating to” whether the search engine is affiliated with the link, (3) mandatory disclosure of all manual adjustments to algorithmic search, and (4) transfer of the “browser choice” menu of the

²⁰ Frank A. Pasquale III and Oren Bracha, *Federal Search Commission? Access, Fairness and Accountability in the Law of Search*, papers.ssrn.com/sol3/papers.cfm?abstract_id=1002453.

²¹ 14 C.F.R. pt. 255 – Airline Computer Reservations Systems.

EC Microsoft litigation to the Google search context, requiring Google to offer users a choice of five or so rivals whenever a user enters particular queries.

Geoff and I discuss several of these potential remedies in our paper, *If Search Neutrality is the Answer, What's the Question?*²² It suffices to say that we find significant consumer welfare threats from the creation of a new regulatory agency designed to impose “neutral” search results. For now, I prefer to focus on the second of these remedies – analogized to CRS technology in the 1990s – here; Professor Edelman not only explains proposed CRS-inspired regulation, but does so in effusive terms:

A first insight comes from recognizing that regulators have already – *successfully!* – addressed the problem of bias in information services. One key area of intervention was customer reservation systems (CRS’s), the computer networks that let travel agents see flight availability and pricing for various major airlines. Three decades ago, when CRS’s were largely owned by the various airlines, some airlines favored their own flights. For example, when a travel agent searched for flights through Apollo, a CRS then owned by United Airlines, United flights would come up first – even if other carriers offered lower prices or nonstop service. The Department of Justice intervened, culminating in rules²³ prohibiting any CRS owned by an airline from ordering listings “us[ing] any factors directly or indirectly relating to carrier identity” (14 CFR 255.4). Certainly one could argue that these rules were an undue intrusion: A travel agent was always free to find a different CRS, and further additional searches could have uncovered alternative flights. Yet most travel agents hesitated to switch CRS’s, and extra searches would be both time-consuming and error-prone. Prohibiting biased listings was the better approach.

The same principle applies in the context of web search. On this theory, Google ought not rank results by any metric that distinctively favors Google. I credit that web search considers

²² See above at note 18.

²³ 14 C.F.R. pt. 255 – Airline Computer Reservations Systems, law.justia.com/cfr/title-14/14-4.0.1.1.32.html#14:4.0.1.1.32.0.8.4.

myriad web sites – far more than the number of airlines, flights, or fares. And I credit that web search considers more attributes of each web page – not just airfare price, transit time, and number of stops. But these differences only grant a search engine more room to innovate. These differences don't change the underlying reasoning, so compelling in the CRS context, that a system provider must not design its rules to systematically put itself first.

The analogy is a superficially attractive one, and we're tempted to entertain it, so far as it goes. Organizational questions inhere in both settings, and similarly so: both flights and search results must be ordinally ranked, and before CRS regulation, a host airline's flights often appeared before those of rival airlines. Indeed, we will take Edelman's analogy at face value. Problematically for Professor Edelman and others pushing the CRS-style remedy, a fuller exploration of CRS regulation reveals this market intervention – well, put simply, wasn't so successful after all. Not for consumers anyway. It did, however, generate (economically) predictable consequences: reduced consumer welfare through reduced innovation. Let's explore the consequences of Edelman's analogy further below the fold.

History of CRS Antitrust Suits and Regulation

Early air travel primarily consisted of “interline” flights – flights on more than one carrier to reach a final destination. CRSs arose to enable airlines to coordinate these trips for their customers across multiple airlines, which necessitated compiling information about rival airlines, their routes, fares, and other price- and quality-relevant information. Major airlines predominantly owned CRSs at this time, which served both competitive and cooperative ends; this combination of economic forces naturally drew antitrust advocates' attention.

CRS regulation proponents proffered numerous arguments as to the potentially anticompetitive nature and behavior of CRS-owning airlines. For example, they claimed that CRS-owning airlines engaged in “dirty tricks,” such as using their CRSs to terminate passengers' reservations on smaller, rival airlines and to rebook customers

on their own flights, and refusing to allow smaller airlines to become CRS co-hosts, thereby preventing these smaller airlines from being listed in search results. CRS-owning airlines faced further allegations of excluding rivals through contractual provisions, such as long-term commitments from travel agents. Proponents of antitrust enforcement alleged that the nature of the CRS market created significant barriers to entry and provided CRS-owning airlines with significant cost advantages to selling their own flights. These cost advantages purportedly derived from two main sources: (1) quality advantages that airline-owned CRSs enjoyed, as they could commit to providing comprehensive and accurate information about the owner airline's flight schedule, and (2) joint ownership of CRSs, which facilitated coordination between airlines and CRSs, thereby decreasing the distribution and information costs.

These claims suffered from serious shortcomings including both a failure to demonstrate harm to competition rather than injury to specific rivals as well as insufficient appreciation for the value of dynamic efficiency and innovation to consumer welfare. These latter concerns were especially pertinent in the CRS context, as CRSs arose at a time of incredible change – the deregulated airline industry, joined with novel computer technology, necessitated significant and constant innovation. Courts accordingly generally denied antitrust remedies in these cases – rejecting claims that CRSs imposed unreasonable restraints on competition, denied access to an essential facility, or facilitated monopoly leverage.

Yet, particularly relevant for present purposes, one of the most popular anticompetitive stories was that CRSs practiced “display bias,” defined as ranking the owner airline's flights above those of all other airlines. Proponents claimed display bias was particularly harmful in the CRS setting, because only the travel agent, and not the customer, could see the search results, and travel agents might have incentives to book passengers on more expensive flights for which they receive more commission. Fred Smith²⁴ describes the

²⁴ Fred L. Smith, Jr., *The Case for Repealing the Antitrust Regulations*, cei.org/pdf/3261.pdf (“Based Upon ‘The Case For Reforming the Antitrust Regulations (If Repeal Is Not an Option)’ in *The Harvard Journal of Law and Public Policy*, Vol. 23, No. 1, Fall 1999. pp. 23-

investigations surrounding this claim:

These initial CRS services were used mostly by sophisticated travel agents, who could quickly scroll down to a customer's preferred airline. But this extra "effort" was considered discriminatory by some at the DOJ and the DOT, and hearings were held to investigate this threat to competition. Great attention was paid to the "time" required to execute only a few keystrokes, to the "complexity" of re-designing first screens by computer-proficient travel agents, and to the "barriers" placed on such practices by the host CRS provider.

CRS Rules

While courts declined to intervene in the CRS market, the Department of Transportation (DOT) eagerly crafted rules to govern CRS operations. The DOT's two primary goals in enacting the 1984 CRS regulations were (1) to incentivize entry into the CRS market and (2) to prevent airline ownership of CRSs from decreasing competition in the downstream passenger air travel market. One of the most notable rules introduced in the 1984 CRS regulations prohibited display bias. The DOT changed both this rule and CRS rules as a whole significantly, and by 1997, the DOT required each CRS "(i) to offer at least one integrated display that uses the same criteria for both online and interline connections and (ii) to use elapsed time or non-stop itinerary as a significant factor in selecting the flight options from the database" (Alexander, 2004). However, the DOT did not categorically forbid display bias; rather, it created several exceptions to this rule – and even allowed airlines to disseminate software that introduced bias into displays. Additionally, the DOT expressly refused to enforce its anti-bias rules against travel agent displays.

Other CRS rules attempted to reinforce these two goals of additional market entry and preservation of downstream competition. CRS rules specifically focused on mitigating travel agent switching costs between CRS vendors and reducing any quality advantage in-

58.”).

cumbent CRSs allegedly had. Rules prohibited discriminatory booking fees and the tying of travel agent commissions to CRS use, limited contract lengths, prohibited minimum uses and rollover clauses, and required CRSs to give all participating carriers equal service upgrades.

Evidence of CRS Regulation “Success”?

The CRS regulatory experiment had years to run its course; despite the extent and commitment of its regulatory sweep, these rules failed to improve consumer outcomes in any meaningful way. CRS regulations precipitated neither innovation nor entry, and likely incurred serious allocative efficiency and consumer welfare losses by attempting to prohibit display bias.

First, CRS regulations unambiguously failed in their goal of increasing ease of entry:

Only six CRS vendors offered their services to domestic airlines and travel agents in the mid-1980s . . . If the rules had actually facilitated entry, the number of CRS vendors should have grown or some new entrants should have been seen during the past twenty years. The evidence, however, is to the contrary. It remains that ‘[s]ince the [CAB] first adopted CRS rules, no firm has entered the CRS business.’ Meanwhile, there has been a series of mergers coupled with introduction of multinational CRS; the cumulative effect was to *reduce* the number of CRSs . . . Even if a regulation could successfully facilitate entry by a supplier of CRS services, the gain from such entry would at this point be relatively small, and possibly negative. (Alexander and Lee, 2004) (emphasis added).

As such, CRS regulations did not achieve one of their primary objectives – a fact which stands in stark contrast to Edelman’s declaration that CRS rules represent an unequivocal regulatory success.

Most relevant to the search engine bias analogy, the CRS regulations prohibiting bias did not positively affect consumer welfare. To the contrary, by ignoring the reality that most travel agents took consumer interests into account in their initial choice of CRS operator (even if they do so to a lesser extent in each individual search

they conduct for consumers), and that even if residual bias remained, consumers were “informed and repeat players who have their own preferences,” CRS regulations imposed unjustified costs. As Alexander and Lee²⁵ describe it

[T]he social value of prohibiting display . . . bias solely to improve the quality of information that consumers receive about travel options appears to be low and may be negative. Travel agents have strong incentives to protect consumers from poor information, through how they customize their internal display screens, and in their choices of CRS vendors.

Moreover, and predictably, CRS regulations appear to have caused serious harm to the competitive process:

The major competitive advantage of the pre-regulation CRS was that it permitted the leading airlines to slightly disadvantage their leading competitors by placing them a bit farther down on the list of available flights. United would place American slightly farther down the list, and American would return the favor for United flights. The result, of course, was that the other airlines received slightly higher ranks than they would have otherwise. When “bias” was eliminated, United moved up on the American system and vice versa, while all other airlines moved down somewhat. The antitrust restriction on competitive use of the CRS, then, actually reduced competition. Moreover, the rules ensured that the United/American market leadership would endure fewer challenges from creative newcomers, since any changes to the system would have to undergo DOT oversight, thus making “sneak attacks” impossible. The resulting slowdown of CRS technology damaged the competitiveness of these systems. Much of the innovative lead that these systems had enjoyed slowly eroded as the internet evolved. Today, much of the air travel business has moved to the internet (as have the airlines themselves) (Smith, 1999).

²⁵ Cindy R. Alexander and Yoon-Ho Alex Lee, *The Economics of Regulatory Reform: Termination of Airline Computer Reservation System Rules*, litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=21+Yale+J.+on+Reg.+369&srctype=smi&srcid=3B15&key=c8729641e598741bc2a21a40e62a99ba, and 21 Yale J. on Reg. 369 (2004).

These competitive losses occurred despite evidence suggesting that CRSs themselves enhanced competition and thus had the predictable positive impact for consumers. For example, one study found that CRS usage increased travel agents' productivity by an average of 41% and that in the early 1990s over 95% of travel agents used a CRS – indicating that travel agents were able to assist consumers far more effectively once CRSs became available (Ellig, 1991). The rules governing contractual terms fared no better; indeed, these also likely reduced consumer welfare:

The prohibited contract practices – long-term contracting and exclusive dealing – that had been regarded as exclusionary might not have proved to be such a critical barrier to entry: entry did not occur, independently of those practices. Evidence on the dealings between travel agents and CRS vendors, post-regulation, suggests that these practices may have enhanced overall allocative efficiency. Travel agents appear to have agreed to some, if not all, restrictive contracts with CRS vendors as a means of providing those vendors with assurance that they would be repaid gradually, over time, for their up-front investments in the travel agent, such as investments in equipment or training (Alexander and Lee, 2004).

Accordingly, CRS regulations seem to have threatened innovation by decreasing the likelihood that CRS vendors would recover research and development expenditures without providing a commensurate consumer benefit.

Termination of Rules

The DOT terminated CRS regulations in 2004 in light of their failure to improve competitive outcomes in the CRS market and a growing sense that they were making things worse, not better – which Edelman fails to acknowledge and which certainly undermines his claim that regulators addressed this problem “successfully.” From the time CRS regulations were first adopted in 1984 until 2004, the CRS market and the associated technology changed significantly, rapidly becoming more complex. As the market increased in complexity, it became increasingly more difficult for the DOT to

effectively regulate. Two occurrences in particular precipitated deregulation: (1) the major airlines divested themselves of CRS ownership (despite the absence of any CRS regulations requiring or encouraging divestiture!), and (2) the commercialization of the internet introduced novel forms of substitutes to the CRS system that the CRS regulations did not govern. Online direct-to-traveler services, such as Travelocity, Expedia and Orbitz provide consumers with a method to choose their own flights, entirely absent travel agent assistance. More importantly, Expedia and Orbitz each developed direct connection technologies that allow them to make reservations directly with an airline's internal reservation system – bypassing CRS systems almost completely. Moreover, Travelocity, Expedia, and Orbitz were never forced to comply with CRS regulations, which allowed them to adopt more consumer-friendly products and innovate in meaningful ways, obsoleting traditional CRSs. It is unsurprising that Expedia has warned against overly broad regulations in the search engine bias debate – it has first-hand knowledge of how crucial the ability to innovate is.)

These developments, taken in harmony, mean that in order to cause any antitrust harm in the first instance, a hypothetical CRS monopolist must have been interacting with (1) airlines, (2) travel agents, and (3) consumers who *all* had an insufficient incentive to switch to another alternative in the face of a significant price increase. Given this nearly insurmountable burden, and the failure of CRS regulations to improve consumer welfare in even the earlier and simpler state of the world, Alexander and Lee find that, by the time CRS regulations were terminated in 2004, they failed to pass a cost-benefit analysis.

Overall, CRS regulations incurred significant consumer welfare losses and rendered the entire CRS system nearly obsolete by stifling its ability to compete with dynamic and innovative online services. As Ellig notes, “[t]he legal and economic debate over CRS. . . frequently overlooked the peculiar economics of innovation and entrepreneurship.” Those who claim search engine bias exists (as distinct from valuable product differentiation between engines) and can be meaningfully regulated rely upon this same flawed analysis

and expect the same flawed regulatory approach to “fix” whatever issues they perceive as ailing the search engine market. Search engine regulation will make consumers worse off. In the meantime, proponents of so-called search neutrality and heavy-handed regulation of organic search results battle over which of a menu of cumbersome and costly regulatory schemes should be adopted in the face of evidence that the approaches are more likely to harm consumers than help them, and even stronger evidence that there is no competitive problem with search in the first place.

Indeed, one benefit of thinking hard about remedies in the first instance is that it may illuminate something about the competitive nature of the conduct one seeks to regulate. I defer to former AAG Barnett in explaining this point:²⁶

Put another way, a bad section 2 remedy risks hurting consumers and competition and thus is worse than no remedy at all. That is why it is important to consider remedies at the outset, before deciding whether a tiger needs catching. Doing so has a number of benefits. . . .

Furthermore, contemplation of the remedy may reveal that there is no competitive harm in the first place. Judge Posner has noted that “[t]he nature of the remedy sought in an antitrust case is often . . . an important clue to the soundness of the antitrust claim.”²⁷ The classic non-section 2 example is *Pueblo Bowl-O-Mat*, where plaintiffs claimed that the antitrust laws prohibited a firm from buying and reinvigorating failing bowling alleys and prayed for an award of the “profits that would have been earned had the acquired centers closed.”²⁸ The Supreme Court correctly noted that condemning conduct that increased competition “is inimical to the purposes of [the antitrust] laws”²⁹ — more competition is not a competitive harm to be remedied. In the section 2 context, one might wish that the Supreme Court had focused on the injunctive relief issued in *Aspen Skiing* — a compelled joint venture whose ability to enhance competition

²⁶ *Section 2 Remedies: What to Do After Catching the Tiger by the Tail*, June 4, 2008, www.justice.gov/atr/public/speeches/233884.htm.

²⁷ *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 267 (7th Cir. 1984).

²⁸ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 490 (1977).

²⁹ *Id.* at 488.

among ski resorts was not discussed³⁰ – in assessing whether discontinuing a similar joint venture harmed competition in the first place.³¹

A review of my paper with Geoff reveals several common themes among proposed remedies intimated by the above discussion of CRS regulations. The proposed remedies consistently: (1) disadvantage Google, (2) advantage its rivals, and (3) have little if anything to do with consumers. Neither economics nor antitrust history supports such a regulatory scheme; unfortunately, it is consumers that might again ultimately pay the inevitable tax for clumsy regulatory tinkering with product design and competition. //

³⁰ See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 598 n.23 (1985).

³¹ See generally Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal – Why Aspen and Kodak Are Misguided*, 68 Antitrust L.J. 659, 662 (2001) (maintaining that “the only outcome to expect from court intervention” in situations like *Aspen Skiing* “is inefficiency”).