

The Post

GOOD SCHOLARSHIP FROM THE INTERNET

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The Post

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Editor-in-Chief:

Anna Ivey

Ivey Consulting, Inc. (annaivey.com)

Editors:

Howard Bashman

Law Offices of Howard J. Bashman (hjbashman.com), *How Appealing*
(howappealing.law.com)

Adam Bonin

Cozen O'Connor (cozen.com), *Daily Kos* (dailykos.com)

Bridget J. Crawford

Pace Law School (pace.edu), *The Faculty Lounge* (thefacultyounge.org)

Thom Lambert

University of Missouri School of Law (law.missouri.edu), *Truth on the Market*
(truthonthemarket.com)

David Schleicher

George Mason University School of Law (law.gmu.edu)

Tung Yin

Lewis & Clark Law School (law.lclark.edu), *The Yin Blog* (yin.typepad.com)

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INTRODUCTION

Anna Ivey[†]

Much has transpired since our inaugural edition of *The Post* came out at the end of 2011. Most excitingly, in our Superbowl for lawyers and policy geeks, the Supreme Court has finally ruled on the constitutionality of the Patient Protection and Affordable Care Act (ACA).

In an interesting paradox for *The Post*, so much has been written about the ACA in the run-up to the decision that our panel of expert confessed to “ACA fatigue.” As an editorial matter, *The Post* agreed that we didn’t want to swamp this entire edition with health-reform-related posts. Among our winners being showcased in this edition, you’ll find only one post on the ACA (although we read many fine related pieces), amidst five others on entirely unrelated subjects. No doubt many more worthwhile posts will be written in the wake of the opinion, so while we’ve restricted ourselves to one post on that topic in this edition, it is perhaps not the last. Incidentally, we selected this ACA post before the ruling was handed down, and we decided *ex ante* that its worthiness did not depend on the ultimate holding.

It is with great interest that we have also observed the (sometimes heated) conversation about the influence of bloggers on the ACA debate, in particular a fair amount of hand-wringing over Randy Barnett’s blogging on the subject.¹ For a journal whose founding mission has been to consider the influence of blogging on law (whether in legal practice or on the legal academy), *The Post* now has another important data point confirming that legal bloggers

[†] Founder and president, Ivey Consulting, Inc.

¹ E.g., Adam Teicholz, “Did Bloggers Kill the Healthcare Mandate?” at www.theatlantic.com/national/archive/2012/03/did-bloggers-kill-the-health-care-mandate/255182 (March 28, 2012).

do in fact influence the debate, either to one's delight or chagrin, depending on the circumstances. Legal bloggers as riffraff or gadflies? The conversation continues, and *The Post* enjoys the front-row seats.

We have also enjoyed watching legal academics use blogs as a forum to test their ideas and elicit feedback. Glenn Cohen, for example, posted this appeal on PrawfsBlog²:

I don't normally post drafts on SSRN until they are in page proofs (this draft is before the editors have had a chance to improve it) but am doing so early in this case because the topic is developing and I want my views to be part of the conversation. Still, it is a work-in-progress, so if you have any feedback you want to give me I always value it; though I think it makes more sense just to email me comments on the paper directly rather than post it on here so as not to clog the blog . . . but happy for more editorial/conversational comments to be added on here.

Blogging as academic crowdsourcing – a fascinating development.

And speaking of popular legal blogs, we wish a very happy 10th birthday to the *How Appealing* blog, one of the longest-running and most widely read legal blogs that just so happens to have been founded by one of our panelists, the prolific Howard Bashman. *The Post* herewith lights a virtual candle on a virtual cake. Congratulations, Howard.

In a more somber spirit, *The Post* also notes the passing of the widely respected law professor and legal blogger Larry Ribstein, a friend to many of *The Post's* panelists and editorial team. In this edition we reproduce a fine tribute to him by Stephen Bainbridge that originally appeared on the *ProfessorBainbridge.com* blog. We are proud to republish it here. //

² Glenn Cohen, "Circumvention Tourism: Traveling for Abortion, Assisted Suicide, Reproductive Technology, Female Genital Cutting, Stem Cell Treatments, and More . . .," at prawfsblawg.blogs.com/prawfsblawg/2011/12/circumvention-tourism-traveling-for-abortion-assisted-suicide-reproductive-technology-female-genital.html (December 5, 2011).

FROM: PROFESSORBAINBRIDGE.COM

LARRY RIBSTEIN, RIP

Stephen Bainbridge[†]

I was stunned and deeply saddened to learn that my dear friend Larry Ribstein has passed away. The news came via an email from our mutual friend Henry Manne and has been confirmed on several blogs.

The first time I met Larry, I thought he would make a brilliant Mephistopheles. He was lean in body with sharp and angular facial features, ever so slightly swarthy, and somehow just a little scary. As I got to know him over many years, of course, I learned that he was a brilliant scholar with a wide array of interests, an incisive mind, a vast store of learning, and a talent for getting to the heart of the matter, but also that he was a great person and someone whose company was always a treat.

Larry's scholarship ranged widely. He wrote frequently on securities regulation, with an especial emphasis on the ways securities regulators and legislators tended to err in response to financial crises. See, for example, his brilliant book [The Sarbanes Oxley Debacle](#)¹ (co-authored with Henry Butler), which greatly influenced my own thinking in this area. He provided devastating critiques of the tendency to criminalize agency costs. He made contributions to the literature on federalism that ranged from corporate law to marriages.

Larry is probably best known, of course, for his work on "uncorporations," to use his awkward neologism. I.e., agency, partnerships, and, especially, limited liability companies. His book [The Rise](#)

[†] William D. Warren Distinguished Professor of Law, UCLA School of Law. Original at www.professorbainbridge.com/professorbainbridge.com/2011/12/larry-ribstein-rip.html (Dec. 24, 2011; vis. July 5, 2012). © 2012 Stephen M. Bainbridge.

¹ www.amazon.com/gp/product/0844771945/ref=as_li_tf_tl?ie=UTF8&tag=corporatila-20&linkCode=as2&camp=1789&creative=9325&creativeASIN=0844771945.

of the Uncorporation² remains the single best book I've ever read on the subject.

Yet, I liked best – and I suspect he did too – his work on how lawyers and businessmen are portrayed in movies. Larry loved movies and was one of the few people to successfully turn that love into serious scholarship. His essay, Wall Street and Vine: Hollywood's View of Business³ (March 8, 2009) has been downloaded over 1100 times at SSRN. As the abstract explains: "American films have long presented a negative view of business. This article is the first comprehensive and in-depth analysis of filmmakers' attitude toward business. It shows that it is not business that filmmakers dislike, but rather the control of firms by profit-maximizing capitalists. The article argues that this dislike stems from filmmakers' resentment of capitalists' constraints on their artistic vision. Filmmakers' portrayal of business is significant because films have persuasive power that tips the political balance toward business regulation."

Sadly, I had never had the opportunity to work with Larry on a joint scholarly project. Next year, however, he was to contribute a paper to a volume of essays on insider trading that I will be editing. I was looking forward to working with him on that project. Now both the book and the experience will be all the lesser for his absence.

In recent years, of course, Larry and I shared an interest in blogging. Larry frequently commented on my posts, not always favorably, but always incisively and in the spirit of intellectual debate. As Ted Frank observed, Larry was "an intellectually honest [friend] who wouldn't hesitate to tell you when he thought you were wrong (which happened several times a year to me)." Me too. So I not only enjoyed our back and forths tremendously, I always came away from them feeling I had learned something useful.

I will miss him. A lot.

My condolences and deepest sympathy go out to his wife Ann and the rest of his family.

Excerpts from tributes elsewhere:

² www.amazon.com/gp/product/0195377095/ref=as_li_tf_tl?ie=UTF8&tag=corporatila-20&linkCode=as2&camp=1789&creative=9325&creativeASIN=0195377095.

³ papers.ssrn.com/sol3/papers.cfm?abstract_id=563181.

Todd Henderson:⁴ “I will consider it a life well lived if when I die there is at least one person left behind who feels as I do about Larry.” Ditto.

Larry Solum:⁵ “My former colleague and dear friend Larry Ribstein passed away this morning. Ribstein had a powerful intellect and iron will. His contributions to legal scholarship are many. In recent years, he has been best known for his work on the “uncorporation” – the move away from the corporate form of business organization, and for his work on jurisdictional competition and choice of law. . . . I have fond memories of many long discussions with Ribstein. He defended his vision of law with a tenacity and rigor that is rare, even among law professors.”

Josh Wright:⁶ “Larry was – as those who crossed his path in legal academia know – a force to be reckoned with. He pursued his research interests – from corporate law and jurisdictional competition to the reform of legal education – with a passion not rivaled by many in the academy. The legal academy will be worse off for losing Larry’s voice as a scholar.”

Geoff Manne:⁷ “The intellectual life of everyone who knew him, of this blog, and of the legal academy at large is deeply diminished for his passing.”

Ilya Somin:⁸ “My personal favorite among his many excellent works is his recent book The Law Market⁹ (coauthored with Erin O’Hara), which is perhaps the best recent book on the potential benefits of competition between state legal systems in American federalism.”

Ted Frank:¹⁰

I cannot begin to say how devastated I am at the sudden death of Larry Ribstein this morning,¹¹ just two days shy of his fortieth

⁴ truthonthemarket.com/2011/12/24/goodbye-my-friend/.

⁵ lsolum.typepad.com/legaltheory/2011/12/larry-ribstein-rest-in-peace.html.

⁶ truthonthemarket.com/2011/12/24/larry-ribstein-rip-2/.

⁷ truthonthemarket.com/2011/12/24/larry-ribstein-rip/.

⁸ www.volokh.com/2011/12/24/larry-ribstein-rip/.

⁹ www.amazon.com/exec/obidos/ASIN/0195312899/thevolocons0d-20/.

¹⁰ www.pointoflaw.com/archives/2011/12/an-irreplaceable-loss-rip-larry-ribstein.php.

¹¹ lsolum.typepad.com/legaltheory/2011/12/larry-ribstein-rest-in-peace.html.

wedding anniversary. Larry was so creative and innovative in so many fields (this is just how many times we cited to him since February,¹² including just this week¹³), I often found myself wishing that there were several Larrys because everything he wrote had such opportunity cost for other things he didn't have time to write. I was always begging him to write for me when I was at AEI, and the time he said yes, he (with Henry Butler) turned out the important *The Sarbanes-Oxley Debacle*,¹⁴ a devastating and persuasive takedown of the new law. I'd end up plagiarizing Professor Bainbridge's summary¹⁵ of the rest of Ribstein's body of work to discuss the rest of it, so I'll refer you to his thorough post. In area after area – overcriminalization,¹⁶ overregulation, popular-culture portrayal of business, the cartelization of legal practice and education – he was often close to alone in taking important contrarian positions. If I found myself disagreeing with Larry, I knew it meant I'd better put some soul-searching and analysis into my own position; if I hadn't already thought about an issue of corporate law or federalism, I knew I could scan Ribstein's work on the subject to have a good starting point. So not only do we not have the three or five Larry Ribsteins we needed, we now don't even have the one, and we're poorer for it.

But beyond the loss to legal scholarship is the loss of a good person. Larry was also a friend, but an intellectually honest one who wouldn't hesitate to tell you when he thought you were wrong (which happened several times a year to me). But that made it all the more flattering when he demonstrated support, and he was an early supporter of mine¹⁷ when it was far from clear that my hare-brained quixotic scheme would accomplish anything.¹⁸ I'm going to miss him a lot. Condolences to his family and friends. //

¹² www.pointoflaw.com/cgi-bin/mt/mt-search.cgi?search=ribstein.

¹³ www.pointoflaw.com/archives/2011/12/legal-education-debate-shifts-from-content-t-o-comp.php.

¹⁴ www.amazon.com/exec/obidos/ASIN/0844771945/thf2homepageA.

¹⁵ www.professorbainbridge.com/professorbainbridgecom/2011/12/larry-ribstein-rip.html.

¹⁶ papers.ssrn.com/sol3/papers.cfm?abstract_id=1737915.

¹⁷ busmovie.typepad.com/ideoblog/2009/08/atl-has-a-cool-interview-with-ted-frank-abo-ut-his-cool-new-public-interest-law-firm-that-is-planning-to-represent-consumers-u.html.

¹⁸ truthonthemarket.com/2011/10/31/ted-frank-class-action-crusader/.

FROM: PRAWFSBLOG

PERSONHOOD

Glenn Cohen[†]

MISSISSIPPI'S PERSONHOOD AMENDMENT

The NY Times has just run [this op-ed](#)¹ I authored (along with [Jonathan Wills](#)²) on Mississippi's proposed Personhood Amendment 26, which is up for a vote on November 8. Here is the initiative's official description:

Initiative #26 would amend the Mississippi Constitution to define the word 'person' or 'persons', as those terms are used in Article III of the state constitution, to include every human being from the moment of fertilization, cloning, or the functional equivalent thereof."

Jonathan and I argue in the op-ed that whether one is pro-life or pro-choice, the amendment is a bad idea because it is ambiguous in two key ways: (1) that "fertilization" could mean anything from the moment sperm penetrates egg to the moment the fertilize egg implants in the uterus (or does not, in the case of IVF embryos that are not used), thus it is unclear whether it sweeps in some forms of birth control, IVF embryo discard, and stem cell derivation along

[†] Assistant Professor of Law, Harvard Law School. Originals at prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippi-personhood-amendment.html (Oct. 31, 2011); prawfsblawg.blogs.com/prawfsblawg/2011/11/the-constitutionality-of-mississippi-personhood-amendment-if-it-passes.html (Nov. 1, 2011); prawfsblawg.blogs.com/prawfsblawg/2011/11/stem-cells-ivf-and-abortion-is-there-a-right-and-left-position.html (Nov. 2, 2011); prawfsblawg.blogs.com/prawfsblawg/2011/11/life-humanity-and-personhood-a-source-of-some-confusion.html (Nov. 3, 2011) (vis. July 5, 2012). © I. Glenn Cohen.

¹ www.nytimes.com/2011/10/31/opinion/mississippi-ambiguous-personhood-amendment.html?_r=2&ref=opinion.

² law.mc.edu/faculty-staff/faculty/will/.

with abortion. (2) It is unclear whether the Amendment is self-executing and thus updates the criminal code among other pieces of law, or whether it instead would require legislative action to do so piece-by-piece. We argue that without a clear amendment, Missisippians can't know what they are voting for. Moreover, if courts are inclined to read the ambiguities in a way to avoid raising federal constitutional questions, even pro-life groups hoping to offer the courts an opportunity to revisit *Roe* may not get what they want with an ambiguous amendment.

I will have more to say about this Amendment during my blogging stint this month, but I just want to make one observation based on my experience in a public debate in Mississippi³ that I participated in.

Here I should make clear I am speaking only for myself, and not Jonathan:

During the debate, it felt a good deal like the pro-life groups seemed to want to have it both ways on the self-executing question when I pushed them on this during the debate. If it is not self-executing, if it just a statement of "policy" or "principle" without legal effect, it is unclear why they are pushing this amendment so hard politically and financially. They accused me of "fear mongering," and I am too close to this to be objective on the issue, but I do harbor this fear I want to share (if not "monger"): I fear some groups are pushing an ambiguous amendment they hope they can slip by Mississippi voters by protesting against its likely implications as to IVF and abortion, only then to press the courts to rely on the amendment as having altered criminal other laws in the state once it is in effect, impacting a good deal of reproductive practices. I am not trying to cast aspersions on the views of those supporting this amendment. I am sure their motivations are complex, heterogeneous, and in some cases overdetermined. I think abortion is actually a hard question from a bioethics perspective, and understand where disagreements on the subject come from. But I found the positions they took on the self-executing question downright peculi-

³ www.cbsnews.com/8301-201_162-20126236/debating-mississippi-personhood-amendment/.

ar, and I have yet to hear a straight answer from supporters of the law that they do not think it self-executing. Until they publicly take that stand, I will continue pressing (if not “mongering”) this fear.

THE CONSTITUTIONALITY OF MISSISSIPPI’S PERSONHOOD AMENDMENT IF IT PASSES

I earlier shared my thoughts on the ambiguity of the Mississippi personhood amendment. In this blog post I focus on the question of its constitutionality.

While I have seen state courts apply the constitutional avoidance canon to state statutes, I have never seen it applied to the meaning of the a ballot initiative, but it is possible the courts will in any event resolve the question I discussed in my [last post](#)⁴ of whether the Amendment is self-executing in such a way that will allow the courts to avoid having to face a possible conflict with the federal constitution.

If not, and the [ambiguity of “fertilization”](#)⁵ is resolved to cover everything from the moment that sperm penetrates egg, the amendment ([if self-executing](#)⁶) may criminalize some forms of birth control, destruction of excess embryos fertilized as part of IVF, stem cell derivation, and abortion (pre and post-viability).

Let me take those contexts one by one.

As-applied to prohibit pre-viability abortions, the amendment obviously conflicts with *Roe* and *Casey*. Of course, some supporters of this amendment know that and want to offer the Supreme Court an opportunity to reverse these decisions, but I think the fetal pain abortion bans I have written about (with Sad Sayeed) [elsewhere](#)⁷ in other states are actually a more likely way to get the Court to revisit the issue, although we ultimately think they too are unconstitutional for the reasons we set out in that article.

What about the application of the amendment to criminalize de-

⁴ prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippis-personhood-amendment.html.

⁵ *Id.*

⁶ *Id.*

⁷ papers.ssrn.com/sol3/papers.cfm?abstract_id=1805904.

stroying embryos fertilized for IVF but discarded when not needed – that is to force all embryos to be available for embryo adoption? Here the issue will turn on whether there is a federal constitutional right not to procreate (or as I prefer to put it rights not to procreate). I have written about those issues⁸ in the context of courts looking for such a right to resolve embryo disposition disputes. In that article I expressed some doubt as to whether there exists a right not to be a genetic parent when unbundled from unwanted gestational and legal parenthood, but I also raised some arguments as to state action and waiver which seem less relevant in this context. There is also a practical question of whether the ban may be evaded by engaging in indefinite freezing rather than either destruction or adoption.

As applied to a ban on stem cell derivation, I am unsure there is a federal constitutional problem, especially if *Abigail Alliance*⁹ (full disclosure, I represented DOJ in this matter) is accepted as stating the law in the area. If anything, because stem cells are further away from therapeutics at the moment, if anything the argument seems weaker than that in *Abigail Alliance*.

As applied to certain forms of birth control that terminate pregnancy after the sperm penetrates the egg, I am less sure of my view. Following *Griswold*, *Carey*, and *Eisenstadt* (if read as due process not equal protection), there seems to be an infringement of a fundamental right. However, perhaps the state could argue the availability of pre-fertilization forms of birth control means such a ban could survive strict scrutiny. One can think of this as the birth control equivalent to the most recent *Carhart* decision on the partial birth abortion procedure, that the state may be permissibly rule out some forms of contraception as long as some remain open. That said, so much of the *Carhart* opinion was based on Kennedy's views about women regretting their abortion decisions, which my colleague Jeannie Suk among others has written about,¹⁰ that one might think the opinion

⁸ papers.ssrn.com/sol3/papers.cfm?abstract_id=1114806.

⁹ en.wikipedia.org/wiki/Abigail_Alliance_v._von_Eschenbach.

¹⁰ www.columbialawreview.org/articles/the-trajectory-of-trauma-bodies-and-minds-of-abortion-discourse.

very much limited to abortion and even then not something to bank on.

Thus on my reading the constitutionality would vary dramatically based on as-applied context. Still, these thoughts are very tentative and I would love to hear what others think.

STEM CELLS, IVF, AND ABORTION: IS THERE A RIGHT AND LEFT POSITION?

This is my third post inspired by the Mississippi Personhood Amendment, and this one turns to the normative issues.

Many people who identify as pro-life as to abortion, oppose stem cell derivation involving the destruction of pre-embryos (or “embryos” simpliciter if you prefer, language is power), and often discard of embryos as part of IVF. Many people who are pro-choice by contrast oppose prohibitions on abortion, stem cell derivation, or IVF embryo discard. What I try to show my students in the classes I teach,¹¹ and I want to argue here, the three issues do not necessarily go together and the terrain is more complicated than the way it is usually presented.

First, for the left. As Judith Jarvis Thompson most famously tried to show in her (still quite controversial) work, support for an abortion right is not necessarily inconsistent with recognition of fetal personhood. That is, even if one believes fetuses are full persons, one can still support a right not to be a gestational parent (to use my terminology¹²) for women that stems from bodily integrity or perhaps autonomy. As I have argued, as a normative¹³ and as a constitutional¹⁴ matter recognition of a right not to be a gestational parent does not necessarily imply recognition of a right not to be a genetic parent, which suggests that the abortion right and the right to engage in IVF discard are quite severable because prohibiting the destruction of excess IVF embryos does not require forcing unwanted gestational duties on anyone. The disconnect is even stronger when

¹¹ www.law.harvard.edu/academics/curriculum/catalog/.

¹² papers.ssrn.com/sol3/papers.cfm?abstract_id=1116269.

¹³ *Id.*

¹⁴ papers.ssrn.com/sol3/papers.cfm?abstract_id=1114806.

it comes to stem cell derivation, where none of the “rights not to procreate” is involved. That means that one can very happily be pro-choice as to abortion, and prohibit embryo discard or destruction via stem cell derivation.

Second, as to the right

Let us assume the pro-life position on abortion depends on the view that fetuses are persons or close enough to persons that their protection trumps the interests in avoiding gestational parenthood of pregnant mothers. That position does not imply that the destruction of embryos at all stages of development is also equally problematic. A lot depends on one’s theory of why fetuses should be given personhood or rights claims against destruction (on this issue I highly recommend Cynthia Cohen’s chapter on personhood in her book¹⁵ on stem cells). If your theory of personhood is about the actual possession of criteria X, on some ways to fill in “X” – such as fetal pain, which I have written about here¹⁶ – fetuses late in gestation may possess the criteria but not embryos as the stage they are discarded/destroyed as part of IVF or stem cell derivation. Similarly, many have defended a 14-day or later view of personhood, where personhood begins on the 14th day after fertilization where embryonic twinning – the potential for an embryo to become monozygotic twins – ends. This argument is usually premised on problems with numerical identity. If the embryo was a person before day 14, but twins into two people, which one was it – person A or person B? Many find this argument persuasive, although certainly there are objectors (for example, those who say that if a stick is broken into two that does not mean it wasn’t originally one stick, though others doubt the analogy). For present purposes all I want to suggest is someone who opposes abortion can thus fairly easily consistently oppose prohibition on destruction of early embryos.

None of that means that zealots on either side are capable of being nuanced here. The cultural cognition project,¹⁷ if anything, sug-

¹⁵ www.oup.com/us/catalog/general/subject/Medicine/Ethics/?view=usa&ci=9780195305241.

¹⁶ papers.ssrn.com/sol3/papers.cfm?abstract_id=1805904.

¹⁷ www.culturalcognition.net/.

gests the opposite. Still I hope that judges and academics are better poised to see the nuances here.

LIFE, HUMANITY, AND PERSONHOOD . . . A SOURCE OF SOME CONFUSION

In the comments to one of my prior posts¹⁸ one of the commentators (Lifeisbeautiful) makes some statements regarding living and its impact on the abortion debate. I think it more likely than not this was not an attempt to engage in serious debate, but in any event I think the comment helps point out a bit of equivocation or confusion that is common in these debates.

We ought to distinguish (at least) three questions:

Life: Is X living or not living?

Human: Is X a member of the human species, or not?

Person: Is X a person or not – and by person here we mean the bearer of a set of moral and legal rights, the most important of which is that they are inviolable?

The relation of these three concepts, though, is non-obvious and depends on an argumentation.

One could have a view that if X has LIFE + is HUMAN, then X is a PERSON. This would treat being living humans as sufficient for personhood.

One could have a view that ONLY living humans are persons, this would treat those conditions as necessary.

Neither proposition is self-evidently true

Defenders of what might be referred to as a “quality X” view of personhood for instance, would disagree. If your quality X is the capacity for rational reasoning, you might treat certain living non-humans (like intelligent apes, or intelligent aliens if they ever show up) as persons. You may also exclude some living humans from personhood, for example ancephalic children or the severely retarded.

Peter Singer, for example, famously argues that views that

¹⁸ prawfsblawg.blogs.com/prawfsblawg/2011/10/mississippi-personhood-amendment.html#comments.

equate being human with being a person, and exclude non-human animals from personhood definitionally are “speciesist” and that this is a kind of discrimination equivalent to racism.

There are still further nuances: what is the right quality or joint set of qualities to fill in “quality X”? Does one have to actually possess quality X at the time in order to be a person, or is it enough to have the potential to possess quality X in the ordinary course of things? What does the “ordinary course of things” mean, for instance is human sperm standing alone the kind of thing that in the ordinary course of things will have the potential for quality X? Is a fetus that is gestating? Can a line be drawn? There are further questions about non-living humans, and their relationship to personhood, which may govern how we treat the dead. Finally, there are questions about the relationship between moral and legal personhood, and within legal personhood between constitutional and non-constitutional conceptions of personhood.

One can only get at these very hard and interesting questions, though, if one is careful to note the possibility that being living, being human, and being a person are three separate concepts whose interactions are complex and not self-evident. //

FROM: ACSBLOG

DEBATE ON ANTITRUST SCRUTINY OF GOOGLE

Benjamin G. Edelman[†] vs. Joshua D. Wright^{}*

GOOGLE'S DOMINANCE – AND WHAT TO DO ABOUT IT

Benjamin G. Edelman

The Senate Antitrust Subcommittee recently held a hearing¹ to investigate persistent allegations of Google abusing its market power. Witnesses Jeff Katz (CEO of Nextag) and Jeremy Stoppelman (CEO of Yelp) demonstrated Google giving its own services an advantage other sites cannot match. For example, when a user searches for products for possible purchase, Google presents the user with Google Product Search links front-and-center, a premium placement no other product search service can obtain. Furthermore, Google Product Search shows prices and images, where competitors get just text links. Meanwhile, a user

[†] Associate Professor of Business Administration, Harvard Business School.

^{*} Professor, George Mason University School of Law and Department of Economics. Originals at www.acslaw.org/acsblog/all/edelman-wright-debate-on-antitrust-scrutiny-of-google (Oct. 3-7, 2011; vis. July 5, 2012). Each of the four main posts (they are presented here in chronological order) begins as follows:

Editor's Note: This is the first [or second or third or final] post in an ACSblog debate on antitrust scrutiny of Google between Harvard Business School Professor Benjamin G. Edelman and George Mason University School of Law Professor Joshua D. Wright. This online debate follows a recent U.S. Senate hearing [www.acslaw.org/acsblog/senate-antitrust-hearing-to-examine-google-practices] on whether Google's business practices "serve consumers" or "threaten competition."

Comments on a post are reproduced after the end of that post. Professor Edelman's posts are © 2012 Benjamin Edelman. Professor Wright's posts are © 2012 Joshua D. Wright.

¹ www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba64d93cb.

searching for restaurants, hotels, or other local merchants sees Google Places results with similar prominence, pushing other information services to locations users are unlikely to notice. In anti-trust parlance, this is tying: A user who wants only Google Search, but not Google's other services, will be disappointed. Instead, any user who wants Google Search is forced to receive Google's other services too. Google's approach also forecloses competition: Other sites cannot compete on their merits for a substantial portion of the market – consumers who use Google to find information – because Google has kept those consumers for itself.

But Google's antitrust problems extend beyond tying Google's ancillary services. Consider advertisers buying placements from Google. Google controls 75% of U.S. PC search traffic and more than 90% in many countries. As a result, advertisers are compelled² to accept whatever terms Google chooses to impose. For example, an advertiser seeking placement through Google's premium Search Network partners (like AOL and The New York Times) must also accept placement through the entire Google Search Network which includes all manner of typosquatting sites,³ adware,⁴ and pop-up ads,⁵ among other undesirable placements. While these bogus ad placements defraud and overcharge advertisers, Google's U.S. Advertising Program Terms⁶ offer remarkable defenses: these terms purport to let Google place ads "on any content or property provided by Google . . . or . . . provided by a third party upon which Google places ads" (clause 2.(y)-(z)) – a circular "definition" that sounds more like a Dr. Seuss tale than an official contract. Even Google's dispute resolution provisions are one-sided: An unsatisfied advertiser must complain to Google by "first class mail or air mail or overnight courier" with a copy by "confirmed facsimile." (Despite my best efforts, I still don't know how a "confirmed" facsimile differs from a regular fax.) Meanwhile, Google may send messages to

² www.benedelman.org/news/092011-1.html.

³ www.benedelman.org/presentations/inta-2009.pdf#page=47.

⁴ www.benedelman.org/news/051309-1.html#whenu.

⁵ www.benedelman.org/news/011210-1.html.

⁶ www.google.com/intl/en_us/adwords/select/TCUSbilling0806.html.

an advertiser merely by “sending an email to the email address specified in [the advertiser’s] account” (clause 9). This hardly looks like a contract fairly negotiated among equals. Quite the contrary, Google has all the power and is using it to the utmost.

Google likes to claim⁷ that “competition is one click away.” I disagree. Google CFO Patrick Pichette recently defended Google’s large investments in Chrome by arguing⁸ that “everybody that uses Chrome is a guaranteed locked-in user for us.” He’s right about Chrome’s effective lock-in, and the lock-in is bigger than Chrome: Google also buys premium placement in Firefox, and Google’s Android platform also offers preferred placement for Google Search. Even on non-Google mobile platforms, Google serves fully 95% of searches thanks to defaults that systematically direct users to Google. (Indeed, when Google then-CEO Schmidt was also on Apple’s board, Google sealed a sweetheart deal for iPhone search traffic. Competitors never even had the chance to bid for this traffic.) In addition, Google’s web syndication contracts assure exclusive long-term placement on most top web sites. Google has spent billions of dollars to establish these relationships, with the necessary consequence that users systematically and predictably run their searches on Google.

The Google of 2004 promised⁹ to help users “leave its website as quickly as possible” while showing, initially, zero ads. But times have changed. Google has modified its site design to encourage users to linger on other Google properties, even when competing services have more or better information. And Google now shows as many fourteen ads on a page;¹⁰ users with mid-sized screens often must scroll to see the second algorithmic result. By adding bias and filling its site with advertising, Google has effectively raised prices to consumers – a price paid not in dollars but in attention, yet with consequences equally real. Meanwhile, prices charged to advertisers – set

⁷ blogs.pcmworld.com/techlog/archives/004530.html.

⁸ www.zdnet.com/blog/btl/why-is-chrome-so-important-to-google-its-a-locked-in-user/47295.

⁹ web.archive.org/web/20040603020634/http://www.google.com/corporate/tenthings.html.

¹⁰ www.benedelman.org/images/google-sep11/acuvue-14ads-091611.png.

through a secretive process with details known only to Google – climbed sharply as Google grew. Finally, as Yelp and Nextag leaders told the Senate last month, Google’s current practices make it infeasible to launch businesses like theirs – presaging a world where myriad sectors are off-limits to competition because Google effectively blocks every service but its own.

Search and search advertising are the foundation of online commerce – crucial to users and sites alike. With Google increasingly dominant, exceptionally opaque, and continuously invoking its power in search to expand into ever-more sectors, it’s time for antitrust authorities to take a closer look.

RETROGRADE ANTITRUST ANALYSIS IS NO FIT FOR GOOGLE

Joshua D. Wright

The theoretical antitrust case against Google reflects a troubling disconnect between the state of our technology and the state of our antitrust economics. Google’s is a 2011 high tech market being condemned by 1960s economics. Of primary concern (although there are a lot of things to be concerned about, and my paper with Geoffrey Manne, “If Search Neutrality Is the Answer, What’s the Question?”¹¹ canvasses the problems in much more detail) is the treatment of so-called search bias (whereby Google’s ownership and alleged preference for its own content relative to rivals’ is claimed to be anticompetitive) and the outsized importance given to complaints by competitors and individual web pages rather than consumer welfare in condemning this bias.

The recent political theater in the Senate’s hearings on Google¹² displayed these problems prominently, with the first half of the hearing dedicated to Senators questioning Google’s Eric Schmidt about search bias and the second half dedicated to testimony from and about competitors and individual websites allegedly harmed by Google. Very little, if any, attention was paid to the underlying

¹¹ papers.ssrn.com/sol3/papers.cfm?abstract_id=1807951.

¹² www.judiciary.senate.gov/hearings/hearing.cfm?id=3d9031b47812de2592c3baeba64d93cb.

economics of search technology, consumer preferences, and the ultimate impact of differentiation in search rankings upon consumers.

So what is the alleged problem? Well, in the first place, the claim is that *there is* bias. Proving that bias exists – that Google favors its own maps over MapQuest’s, for example – would be a necessary precondition for proving that the conduct causes anticompetitive harm, but let us be clear that the existence of bias alone is not sufficient to show competitive harm, nor is it even particularly interesting, at least viewed through the lens of modern antitrust economics.

In fact, economists have known for a very long time that favoring one’s own content – a form of “vertical” arrangement whereby the firm produces (and favors) both a product and one of its inputs – is generally procompetitive. Vertically integrated firms may “bias” their own content in ways that increase output, just as other firms may do so by arrangement with others. Economists since Nobel Laureate Ronald Coase¹³ have known – and have been reminded by Klein, Crawford & Alchian,¹⁴ as well as Nobel Laureate Oliver Williamson¹⁵ and many others – that firms may achieve by contract anything they could do within the boundaries of the firm. The point is that, in the economics literature, it is well known that self-promotion in a vertical relationship can be either efficient or anticompetitive depending on the circumstances of the situation. It is never presumptively problematic. In fact, the empirical literature¹⁶ suggests that such relationships are almost always procompetitive and that restrictions imposed upon the abilities of firms to enter them generally *reduce* consumer welfare. Procompetitive vertical integration is the rule; the rare exception (and the exception relevant to antitrust analysis) is the use of vertical arrangements to harm not just individual competitors, but competition, thus reducing consumer welfare.

¹³ en.wikipedia.org/wiki/The_Nature_of_the_Firm.

¹⁴ faculty.fuqua.duke.edu/%7Echarlesw/s591/Bocconi-Duke/Papers/new_C09/Vertical%20Integration,%20Appropriable%20Rents%20and%20the%20Competitive%20Contracting%20Process.pdf.

¹⁵ pages.stern.nyu.edu/%7Ewgreene/entertainmentandmedia/Williamsonvertint.pdf.

¹⁶ www.aeaweb.org/articles.php?doi=10.1257/jel.45.3.629.

One has to go back to the antitrust economics of the 1960s to find a literature – and a jurisprudence – espousing the notion that “bias” alone is *inherently* an antitrust problem. This is why it is so disconcerting to find academics, politicians, and policy wags promoting such theories today on the basis that this favoritism harms competitors. *The relevant antitrust question is not whether there is bias but whether that bias is efficient.* Evidence that other search engines with much smaller market shares, and certainly without any market power, exhibit similar bias suggests that the practice certainly has some efficiency justifications. Ignoring that possibility ignores nearly a half century of economic theory and empirical evidence.

It adds insult to injury to point to harm borne by competitors as justification for antitrust enforcement already built upon outdated, discredited economic notions. The standard in antitrust jurisprudence (and antitrust economics) is harm to *consumers*. When a monopolist restricts output and prices go up, harming consumers, it is a harm potentially cognizable by antitrust; but when Safeway brands, sells, and promotes its own products and the only identifiable harm is that Kraft sells less macaroni and cheese, it is not.

Understanding the competitive economics of vertical integration and vertical contractual arrangements is difficult because there are generally both anticompetitive and procompetitive theories of the conduct. One must be very careful with the facts in these cases to avoid conflating harm to rivals arising from competition on the merits with harm to competition arising out of exclusionary conduct. Misapplication of even this nuanced approach can generate significant consumer harm by prohibiting efficient, pro-consumer conduct that is wrongly determined to be the opposite and by reducing incentives for other firms to take risks and innovate for fear that they, too, will be wrongly condemned.

Professor Edelman has been prominent among Google’s critics calling for antitrust intervention. Yet, unfortunately, he too has demonstrated a surprising inattention to this complexity and its very real anti-consumer consequences. In an interview in *Politico*¹⁷ (login

¹⁷ www.politicopro.com/login/.

required), he suggests that we should simply prevent Google from vertically integrating:

I don't think it's out of the question given the complexity of what Google has built and its persistence in entering adjacent, ancillary markets. A much simpler approach, if you like things that are simple, would be to disallow Google from entering these adjacent markets. OK, you want to be dominant in search? Stay out of the vertical business, stay out of content.

This sort of thinking implies that the harm suffered by competing content providers justifies preventing Google from adopting an entire class of common business relationships on the implicit assumption that competitor harm is relevant to antitrust economics and the ban on vertical integration is essentially costless. Neither is true. U.S. antitrust law requires a demonstration that consumers – not just rivals – will be harmed by a challenged practice. But consumers' interests are absent from this assessment on both sides – on the one hand by adopting harm to competitors rather than harm to consumers as a relevant antitrust standard and on the other by ignoring the hidden harm to consumers from blithely constraining potentially efficient business conduct.

Actual, measurable competitive effects are what matters for modern antitrust analysis, not presumptions about competitive consequences derived from the structure of a firm or harm to its competitors. Unfortunately for its critics, in Google's world, prices to consumers are zero, there is a remarkable amount of investment and innovation (not only from Google but also from competitors like Bing, Blekko, Expedia, and others), consumers are happy, and, significantly, Google is far less dominant than critics and senators suggest. Facebook is now the most visited page on the Internet. Many online marketers no longer view¹⁸ Google as the standard, but are instead increasingly looking to social media (like Facebook) as the key to advertisers' success in attracting eyeballs on the Internet. And at the end of the day, competition really is "just a click away" (OK, a few letters away) as Google has no control over users' ability

¹⁸ www.fantatikole.com/social-media-marketing-more-important-than-seo/.

to employ other search engines, use other sources of information, or simply directly access content, all by typing a different URL into a browser.

Finally, even if there is a concern, there is the problem of what to do about it. Even if Google's critics were to demonstrate that bias is anticompetitive, it is relevant to any analysis that bias is hard to identify, that there is considerable disagreement among users over whether it is problematic in any given instance, that a remedy would be difficult to design and harder to enforce, and that the costs of being wrong are significant.

Tom Barnett¹⁹ – who was formerly in charge of the Antitrust Division at the DOJ and who now represents Expedia and vociferously criticizes Google (including at the Senate hearings in September) – has himself made this point, observing that:²⁰

No institution that enforces the antitrust laws is omniscient or perfect. Among other things, antitrust enforcement agencies and courts lack perfect information about pertinent facts, including the impact of particular conduct on consumer welfare We face the risk of condemning conduct that is not harmful to competition . . . and the risk of failing to condemn conduct that does harm competition . . .

Condemning Google for developing Google Maps as a better form of search result than its original “ten blue links” reflects retrograde economics and a strange and costly preference for the status quo over innovation. Doing so because it harms a competitor turns conventional antitrust analysis on its head with consumers bearing the cost in terms of reduced innovation and satisfaction.

FINDING AND PREVENTING BIASED RESULTS

Benjamin G. Edelman

Professor Wright questions²¹ whether Google biases results towards its own services, and asks whether consumers are harmed even if Google does bias its results. I don't find these questions so

¹⁹ truthonthemarket.com/2011/05/10/barnett-v-barnett-on-antitrust/.

²⁰ www.justice.gov/atr/public/speeches/226537.htm.

²¹ www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.

difficult, and while Professor Wright suggests we'd struggle to identify appropriate remedies, I see some straightforward solutions.

Let's start with the question of whether Google biases its results towards its own services. On a whim, I ran a [search](#)²² for pop superstar Justin Bieber. Google's top-most link promoted Google News (in oversized bold type). Down a few inches came a "Videos" section where three thumbnails and three video titles all linked to YouTube clips. (Less prominent links identified other services showing these same videos – links added only after critics flagged the problem of Google always directing this traffic to its own video site.) Lower, Google presented a block of Google Images results. In the analogous context of extra-prominent links to Google Finance, Google's Marissa Mayer [argued](#)²³ that the company should be permitted to put its own links first. "It seems only fair right, we do all the work for the search page and all these other things, so we do put it first." Marissa doesn't dispute that Google favors its own links – and she couldn't, when Google's links widely appear in prominent ways no other service enjoys.

And what of the consequences of Google's bias? Professor Wright posits an "efficient bias" wherein Google usefully offers consumers its full suite of services. Certainly it's handy to have a single Google password providing access to personalized search, finance, videos, and more. But this misses the serious harms of Google's ever-broadening panoply of services.

Consider an advertiser, say a hotel, dissatisfied with high prices for Google's dominant AdWords advertising service. If Google prominently features links to Expedia and Tripadvisor, the hotel can strike deals with those sites to promote its property – a plausible alternative to high prices for ads from Google. But consider Google's recent changes to its search result format. Where Google used to link to Expedia, Google Hotel Finder now appears front-and-center – pushing Expedia links lower and less prominent. And where Google used to link to Tripadvisor, users now see Google Places – which requires hotels and booking services to pay Google

²² www.google.com/search?q=justin+bieber.

²³ www.youtube.com/watch?v=LT1UFZSbcxE#t=44m50s.

to get direct booking links. (Adding insult to injury, Places also asks a hotel to bid against its competitors for ads on its own Google Place page. If the advertiser bids too low or refuses to participate, Google features competitors instead.) Sending less traffic to alternative advertising venues like Expedia and Tripadvisor, Google can raise prices with greater confidence, and advertisers have little means of escape. There's nothing "efficient" about that; Google raises price above marginal cost, restricts supply, and takes its pound of flesh from advertisers who have little alternative.

Wright suggests we should focus on harm to consumers. In the long run, consumers certainly suffer when innovators can't launch businesses or get financing for fear of Google blocking their opportunities. Who would launch a video sharing site, knowing that Google overwhelmingly sends video-related traffic to YouTube? And if savvy developers envisioned a new mapping site superior to Google Maps, perhaps with better printing or clearer instructions, that team would struggle to reach consumers since Google systematically features its own service whenever a search calls for a map. These foreclosures impede competition, slow innovation, and are a proper subject of antitrust inquiry.

Meanwhile, advertisers continue to suffer a particularly clear-cut harm – and since advertisers' payments fuel Google's \$30+ billion annual revenue, antitrust authorities absolutely must consider their plight. As I argued in my opening piece,²⁴ Google has been thug-like in its imposition of exceptionally harsh terms. Google offers no defense of its take-it-or-leave-it terms; Google knows that even the largest advertisers have no viable alternative.

Professor Wright questions what remedy is appropriate for Google's ever-expanding scope. I recently suggested several remedies for search bias,²⁵ grounded in tried-and-true remedies antitrust authorities have applied in similar circumstances. For example, two decades ago, travel agents used reservation systems that were owned by airlines, and each airline's reservation system favored its own flights – making it hard for travel agents or passengers to find

²⁴ www.acslaw.org/acsblog/google's-dominance---and-what-to-do-about-it.

²⁵ www.benedelman.org/news/022211-1.html.

the flight that actually best met their needs. Department of Justice litigation put a stop to this practice, disallowing reservation systems from sorting flights based on improper factors like carrier identity. The analogue here is that Google shouldn't favor its own services just because they come from Google; putting Google Finance first because it's most popular might be fine if it actually were most popular (it isn't), but Google ought not put its services first just because they come from Google.

More recently, the European Commission required Microsoft to offer a "browser ballot box" to let users easily choose their preferred web browser, even a browser that competes with Microsoft's own offering. Such a choice can also be provided within search results: When a user seeks information that matches a predefined vertical (like video, pictures, finance, or news), a drop-down box or other listing could let the user choose a preferred vendor. A user might choose Google for ordinary web search, but prefer Hulu's video index, Yahoo's stock quotes, Yelp's local results, and Amazon's product search. A bit of AJAX would let users switch their providers any time. Suddenly Google would be far less able to leverage its dominance in search to achieve dominance in other categories. That would be a major benefit to users, advertisers, and the entire online economy.

COMMENTS

Remedies for Search Bias Good for Consumers? CRS Wasn't

Submitted by Josh Wright on October 6, 2011

You describe the remedies as "tried and true" – but were they successful? There has been ample study of the effects of the travel agent CRS remedy you appeal to. Sure, imposing a remedy is easy. But is it any good at improving consumer welfare? Alexander and Lee examine the CRS remedy and find that "[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." It gets worse. CRS regulations appear to have caused serious harm to the competitive process and made consumers worse off. Smith (1999) concludes that "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.” Further, as with Google search, the CRS was imposed despite evidence that it had improved consumer welfare. 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). And in your discussion of the CRS model for regulation, you fail to mention that the DOT terminated the regulation in 2004 in light of its failure to improve competitive outcomes and a growing sense that they were making things worse, not better. Seems like an important fact to consider in the debate.

Two More Points to Consider

Submitted by Josh Wright on October 6, 2011

First, the “do they or do they not” bias results discussion is largely a distraction in modern antitrust analysis. The question is whether Google’s search practices foreclose rivals sufficiently to raise barriers to entry and generate anticompetitive effects. Anecdotal evidence on these points is insufficient. But it is worth correcting the Mayer quote above; to save space, readers are referred to Danny Sullivan’s correction here: <http://searchengineland.com/survey-google-favors-itself-only-19-of-the-t...>²⁶

Second, Professor Edelman gives me far too much credit when he writes “Professor Wright posits an “efficient bias” wherein Google usefully offers consumers its full suite of services.” The idea that vertical integration or discrimination in favor of one’s own products can be efficient is not my own. Credit may properly be attributed to Coase, Klein, Alchian, Hart, Holmstrom, Williamson, and even back to Cournot. These are old ideas. And distinguishing between foreclosure and efficient bias is at the heart of any modern attempt to diagnosis potentially exclusionary conduct under the antitrust laws.

²⁶ searchengineland.com/survey-google-favors-itself-only-19-of-the-time-61675.

It is in this light that the point that not only Google has evolved toward universal results and referral to its own content; but also Microsoft's Bing. Professor Edelman's own work demonstrates this; and subsequent analysis confirms it. But Google has market power one might object! In antitrust, the general conventional wisdom (for good economic reason) is that when firms with and without market power, i.e. when the industry, adopts a particular practice it is highly likely to be efficient. Such is the case here.

PUTTING CONSUMER WELFARE FIRST IN ANTITRUST ANALYSIS OF GOOGLE

Joshua D. Wright

Professor Edelman's opening post²⁷ does little to support his case. Instead, it reflects the same retrograde antitrust²⁸ I criticized in my first post.

Edelman's understanding of antitrust law and economics appears firmly rooted in the 1960s approach to antitrust in which enforcement agencies, courts, and economists vigorously attacked novel business arrangements without regard to their impact on consumers. Judge Learned Hand's infamous passage in the Alcoa decision comes to mind as an exemplar of antitrust's bad old days when the antitrust laws demanded that successful firms forego opportunities to satisfy consumer demand. Hand wrote:

we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel.

Antitrust has come a long way since then. By way of contrast, today's antitrust analysis of alleged exclusionary conduct begins with (ironically enough) the *U.S. v. Microsoft* decision. *Microsoft* emphasizes the difficulty of distinguishing effective competition from exclusionary conduct; but it also firmly places "consumer welfare" as the

²⁷ www.acslaw.org/acsblog/google's-dominance---and-what-to-do-about-it.

²⁸ www.acslaw.org/acsblog/retrograde-antitrust-analysis-is-no-fit-for-google.

lodestar of the modern approach to antitrust:

Whether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad. The challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts, which reduce social welfare, and competitive acts, which increase it. From a century of case law on monopolization under § 2, however, several principles do emerge. First, to be condemned as exclusionary, a monopolist's act must have an "anticompetitive effect." That is, it must harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice.

Nearly all antitrust commentators agree that the shift to consumer-welfare focused analysis has been a boon for consumers. Unfortunately, Edelman's analysis consists largely of complaints that would have satisfied courts and agencies in the 1960s but would not do so now that the focus has turned to consumer welfare rather than indirect complaints about market structure or the fortunes of individual rivals.

From the start, in laying out his basic case against Google, Edelman invokes antitrust concepts that are simply inapt for the facts and then goes on to apply them in a manner inconsistent with the modern consumer-welfare-oriented framework described above:

In antitrust parlance, this is tying: A user who wants only Google Search, but not Google's other services, will be disappointed. Instead, any user who wants Google Search is forced to receive Google's other services too. Google's approach also forecloses competition: Other sites cannot compete on their merits for a substantial portion of the market – consumers who use Google to find information – because Google has kept those consumers for itself.

There are two significant errors here. First, Edelman claims to be interested in protecting users who want only Google Search but not its other services will be disappointed. I have no doubt such consumers exist. Some proof that they exist is that a service has already

been developed to serve them. Professor Edelman, meet [Googleminusgoogle.com](http://googleminusgoogle.com).²⁹ Across the top the page reads: “Search with Google without getting results from Google sites such as Knol, Blogger and YouTube.” In antitrust parlance, this is not tying after all. The critical point, however, is that user preferences are being satisfied as one would expect to arise from competition.

The second error, as I noted in my [first post](#),³⁰ is to condemn vertical integration as inherently anticompetitive. It is here that the retrograde character of Professor Edelman’s analysis (and other critics of Google, to be fair) shines brightest. It reflects a true disconnect between the 1960s approach to antitrust which focused exclusively upon market structure and impact upon rival websites; impact upon consumers was nowhere to be found. That Google not only produces search results but also owns some of the results that are searched is not a problem cognizable by modern antitrust. Edelman himself – appropriately – describes Google and its competitors as “information services.” Google is not merely a URL finder. Consumers demand more than that and competition forces search engines to deliver. It offers value to users (and thus it can offer users to advertisers) by helping them find information in increasingly useful ways. Most users “want Google Search” to the exclusion of Google’s “other services” (and, if they do, all they need do is navigate over to <http://googleminusgoogle.com/>³¹ (even in a Chrome browser) and they can have exactly that). But the critical point is that Google’s “other services” are methods of presenting information to consumers, just like search. As the web and its users have evolved, and as Google has innovated to keep up with the evolving demands of consumers, it has devised or employed other means than simply providing links to a set of URLs to provide the most relevant information to its users. The 1960s approach to antitrust condemns this as anticompetitive foreclosure; the modern version recognizes it as innovation, a form of competition that benefits consumers.

Edelman (and other critics, including a number of senators at last

²⁹ googleminusgoogle.com/.

³⁰ www.acslaw.org/acslawblog/retrograde-antitrust-analysis-is-no-fit-for-google.

³¹ googleminusgoogle.com/.

month's hearing) hearken back to the good old days and suggest that any deviation from Google's technology or business model of the past is an indication of anticompetitive conduct:

The Google of 2004 promised to help users "leave its website as quickly as possible" while showing, initially, zero ads. But times have changed. Google has modified its site design to encourage users to linger on other Google properties, even when competing services have more or better information. And Google now shows as many fourteen ads on a page.

It is hard to take seriously an argument that turns on criticizing a company simply for looking different than it did seven years ago. Does anybody remember what search results looked like 7 years ago? A theory of antitrust liability that would condemn a firm for investing billions of dollars in research and product development, constantly evolving its product to meet consumer demand, taking advantage of new technology, and developing its business model to increase profitability should not be taken seriously. This is particularly true where, as here, every firm in the industry has followed a similar course, adopting the same or similar innovations. I encourage readers to try a few queries on <http://www.bing-vs-google.com/>³² – where you can get side by side comparisons – in order to test whether the evolution of search results and innovation to meet consumer preferences is really a Google-specific thing or an industry wide phenomenon consistent with competition. Conventional antitrust analysis holds that when conduct is engaged in not only by allegedly dominant firms, but also by every other firm in an industry, that conduct is presumptively efficient, not anticompetitive.

The main thrust of my critique is that Edelman and other Google critics rely on an outdated antitrust framework in which consumers play little or no role. Rather than a consumer-welfare based economic critique consistent with the modern approach, these critics (as Edelman does in his opening statement) turn to a collection of anecdotes and "gotcha" statements from company executives. It is worth correcting a few of those items here, although when we've

³² www.bing-vs-google.com.

reached the point where identifying a firm's alleged abuse is a function of defining what a "confirmed" fax is, we've probably reached the point of decreasing marginal returns. Rest assured that a series of (largely inaccurate) anecdotes about Google's treatment of particular websites or insignificant contract terms is wholly insufficient to meet the standard of proof required to make a case against the company under the Sherman Act or even the looser Federal Trade Commission Act.

- It appears to be completely inaccurate to say that "[a]n unsatisfied advertiser must complain to Google by 'first class mail or air mail or overnight courier' with a copy by 'confirmed facsimile.'" A quick search, even on Bing, leads one to [this page](#),³³ indicating that complaints may be submitted via web form.
- It is likewise inaccurate to claim that "advertisers are compelled to accept whatever terms Google chooses to impose. For example, an advertiser seeking placement through Google's premium Search Network partners (like AOL and *The New York Times*) must also accept placement through the entire Google Search Network which includes all manner . . . undesirable placements." In actuality, Google offers a "[Site and Category Exclusion Tool](#)"³⁴ that seems to permit advertisers to tailor their placements to exclude exactly these "undesirable placements."
- "Meanwhile, a user searching for restaurants, hotels, or other local merchants sees Google Places results with similar prominence, pushing other information services to locations users are unlikely to notice." I have strived in vain to enter a search for a restaurant, hotel, or the like into Google that yielded results that effectively hid "other information services" from my notice, but for some of my searches, Google Places did come up first or second (and for others it showed up further down the page).
- Edelman has noted [elsewhere](#)³⁵ that, sometimes, for some of the

³³ support.google.com/adwords/bin/request.py?&contact_type=aw_complaint.

³⁴ support.google.com/adwords/bin/topic.py?hl=en&topic=1713963&from=15911&rd=1.

³⁵ www.benedelman.org/searchbias/.

searches he has tested, the most popular result on Google (as well, I should add, on other, non-“dominant” sites) is not the first, Google-owned result, but instead the second. He cites this as evidence that Google is cooking the books, favoring its own properties when users actually prefer another option. It actually doesn’t demonstrate that, but let’s accept the claim for the sake of argument. Notice what his example also demonstrates: that users who prefer the second result to the first are perfectly capable of finding it and clicking on it. If this is foreclosure, Google is exceptionally bad at it.

The crux of Edelman’s complaint seems to be that Google is competing in ways that respond to consumer preferences. This is precisely what antitrust seeks to encourage, and we would not want a set of standards that chilled competition because of a competitor’s success. Having been remarkably successful in serving consumers’ search demands in a quickly evolving market, it would be perverse for the antitrust laws to then turn upon Google without serious evidence that it had, in fact, actually harmed consumers.

Untethered from consumer welfare analysis, antitrust threatens to re-orient itself to the days when it was used primarily as a weapon against rivals and thus imposed a costly tax on consumers. It is perhaps telling that Microsoft, Expedia, and a few other Google competitors are the primary movers behind the effort to convict the company. But modern antitrust, shunning its inglorious past, requires actual evidence of anticompetitive effect before condemning conduct, particularly in fast-moving, innovative industries. Neither Edelman nor any of Google’s other critics, offer any.

During the heady days of the Microsoft antitrust case, the big question was whether modern antitrust would be able to keep up with quickly evolving markets. The treatment of the proffered case against Google is an important test of the proposition (endorsed by the Antitrust Modernization Commission³⁶ and others) that today’s antitrust is capable of consistent and coherent application in innovative, high-tech markets. An enormous amount is at stake. Faced

³⁶ govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

with the high stakes and ever-evolving novelty of high-tech markets, antitrust will only meet this expectation if it remains grounded and focused on the core principle of competitive effects and consumer harm. Without it, antitrust will devolve back into the laughable and anti-consumer state of affairs of the 1960s – and we will all pay for it.

COMMENTS

Google's contracts are as I say they are

Submitted by Ben Edelman on October 6, 2011

Lots of interesting discussion here. But to set the record straight on a few key points where Professor Wright's factual errors are exceptionally clear-cut –

Professor Wright links to a Google complaints page where advertisers can send their complaints. Indeed. But for a complaint to be a valid notice within the meaning of advertisers' contracts with Google, Google's non-negotiable contract requires the advertiser to submit the complaint in the remarkable fashion I flagged in my first post. The form Joshua links will not suffice, under the plain language of Google's own contract.

Professor Wright links to a Google Site and Category Exclusion Tool. But that's a tool for the Display Network. (Check the breadcrumbs at the top of the page: "Display Network Placements.") That tool does nothing to address the key bundling problem I flagged, wherein Google requires advertisers to accept the entirety of its Search Network if they want any of its Search Network partners (whose search traffic Google has of course locked up through exclusive contracts such that advertisers can't access these placements any other way).

A few thoughts

Submitted by Josh Wright on October 7, 2011

As I said in the beginning, for the purposes of antitrust analysis I'm quite sure this is already descending into negative marginal product; but nonetheless:

First, Google's AdWords Terms and Conditions only require – according to standard legal practice – that legal papers be served in

writing. As I understand it, North American legal notices are directed to Google's California headquarters, while non-U.S. legal notices are typically directed to the advertising legal support team in Ireland.

Second, and most importantly, Microsoft's AdCenter Terms and Conditions (section 10), as well as Yahoo's advertising Terms and Conditions (section 12), contain the same requirement that legal complaints be submitted in writing:

o Microsoft: "All notices to Microsoft shall be sent via recognized overnight courier or certified mail, return receipt requested, to the Microsoft adCenter contract notice contacts."

o Yahoo: "You will send all notices to us via recognized overnight courier or certified mail, return receipt requested, to: General Counsel, Yahoo! Inc., 701 First Avenue, Sunnyvale, California 94089."

Again, this is well outside the antitrust domain and Professor Edelman doesn't really make much of an effort to make the connection. But – I'd happily wager the FTC or any private plaintiff would not survive a motion to dismiss.

Third, the search syndication argument can be rejected quite easily. Professor Edelman contends that Google has "locked up through exclusive contracts" the search traffic of its network partners. But it's just not the case that Google has locked up a majority of search syndication deals. Compare the Google deals with AOL and Ask.com (say, 5% of search queries) to Microsoft's deal with Yahoo – which runs about 16-20% of search queries! Of course, I've got no problem with vigorous competition between Microsoft and Google for these deals, no matter who wins them. They come up for renewal on a regular basis and Google wins some and loses some – but the idea that Google controls the non-Google and non-Bing search space doesn't square with the facts.

Bottom line: a consumer welfare focused antitrust analysis of Google's conduct just doesn't meet the bar set by the relevant legal precedents nor modern economic analysis. //

FROM: GENDER & SEXUALITY LAW BLOG

COURT OF APPEALS PROP 8 RULING

TREATING MARRIAGE AS A LICENSE,
NOT A SACRAMENT

Katherine Franke[†]

Rainbow flags and corsages were waving high in front of the Stonewall Inn in Greenwich Village last night. There's much to celebrate about the 9th Circuit's ruling issued yesterday¹ confirming the lower court finding that Proposition 8 was unconstitutional. As I noted yesterday² and Nan Hunter pointed out as well in her reading of the opinion,³ the reasoning used by the court minimizes the likelihood that the Supreme Court will take it up on appeal.

But what's even more interesting about the opinion, now that I've had overnight to think about it, is the degree to which the 9th Circuit's ruling amounts to a pretty definitive slap down of the Boies and Olson strategy in litigating the case. Recall that one of the main approaches taken at the trial by the so-called "dream team" was to paint a picture of marriage as the most sacred, revered, mature

[†] Isidor and Seville Sulzbacher Professor of Law, Columbia Law School. Original at blogs.law.columbia.edu/genderandsexualitylawblog/2012/02/08/court-of-appeals-prop-8-ruling-treating-marriage-as-a-license-not-a-sacrament/ (Feb. 8, 2012; vis. July 5, 2012). This is a repost from the Columbia Law School's Gender & Sexuality Law Blog.

¹ blogs.law.columbia.edu/genderandsexualitylawblog/files/2012/02/10-16696_Documents2.pdf.

² blogs.law.columbia.edu/genderandsexualitylawblog/2012/02/07/9th-cir-affirms-district-court-in-prop-8-case-narrowly/.

³ hunterofjustice.com/2012/02/9th-cir-perry-.html.

form of adult coupling, thus denying access to marriage for same-sex couples is a constitutional injury because of the fundamentalness and sacredness of marriage.

Instead, the reasoning used in Judge Stephen R. Reinhardt's opinion marks a triumph for the fabulous and smart Therese Stewart, the lawyer in the San Francisco City Attorney's office who has shined time and again in oral argument⁴ and in briefs filed in the marriage equality litigation in California.

Judge Reinhardt chose Stewart's argument, not that of Boies and Olson, as the ground on which to base the affirmance of Judge Walker's lower court opinion. Indeed, he even said so explicitly on page 33 of the opinion. Her argument was that the wrong of Proposition 8 lie in how "it singles out same-sex couples for unequal treatment by *taking away* from them alone the right to marry, and this action amounts to a distinct constitutional violation because the Equal Protection Clause protects minority groups from being targeted for the deprivation of an existing right without a legitimate reason."

The case, in Stewart's and the 9th Circuit's view, turned on the fact that Prop 8 withdrew from same-sex couples a right that California had already granted them. This creates a different constitutional injury than refusing to grant the right in the first place. In the court's words, the problem under this framing is "the targeted exclusion of a group of citizens from a right or benefit that they had enjoyed on equal terms with all other citizens."

The wisdom of this approach, to my mind, is that the constitutional problem turns on the *withdrawal* of the right, not on the *sanctity* or *fundamental-ness* of the right withdrawn.

Reinhardt is clear about this: "The constitutional injury . . . has little to do with the substance of the right or benefit from which a group is excluded, and much to do with the act of exclusion itself."

What's wonderful about this approach is that it not only minimizes the likelihood of Supreme Court review, but it avoids the

⁴ blogs.law.columbia.edu/genderandsexualitylawblog/2010/12/07/whats-marriage-equality-about-law-morality-in-the-prop-8-argument-in-the-9th-cir/.

kind of sermonizing about the sanctity of the marital relation⁵ that characterized Olson and Boies' approach as well as that of a number of courts that have addressed the marriage equality issue. The court can find a constitutional problem with Prop 8 while remaining agnostic on the question of marriage and on the question of whether the state should be in the marriage business at all. In this respect, the 9th Circuit and Stewart figure marriage as akin to any other state licensing regime: you may not have a constitutional right to the license in the first place (such as a fishing license), but once you start issuing the licenses you can't then target a particular group, such as catholics, Romanians, or gay people, and take away their right to the license.

I've railed on in other places (here,⁶ here,⁷ and here⁸ for starters) about the difference between the fundamental rights argument and the "marriage as license" approach, clearly preferring the latter. I'm thrilled that the 9th Circuit's opinion in Perry has joined the less moralistic side of the argument, rejecting the tactic taken by Boies and Olson at trial.

Let's hope that if and when the case is appealed, wiser minds let Terry Stewart take the lead in framing the question on appeal. //

⁵ *Id.*

⁶ www.law.harvard.edu/students/orgs/jlg/vol331/313-320.pdf.

⁷ www2.law.columbia.edu/faculty_franke/Franke%20Final.pdf.

⁸ www2.law.columbia.edu/faculty_franke/SS%20Marriage%20Essay%20Final.pdf.

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CLARITY ABOUT SUPER PACS, INDEPENDENT MONEY AND CITIZENS UNITED

Samuel Issacharoff[†]

It is almost two years since the Supreme Court handed down *Citizens United*. In that time, the opinion has come to serve as a popular shorthand for all that is wrong with the campaign finance system. With the emergence of Super PACs as the latest vehicle for sidestepping contribution limitations, the overwhelming temptation is to attribute this latest money pit to the Supreme Court's contributions to this woeful area of law. For example, just today, the *New York Times* intones, "A \$5 million check from Sheldon Adelson underscores how a Supreme Court ruling has made it possible for a wealthy individual to influence an election."

From the *Times*, one does not necessarily expect further legal analysis – and one does not get it. The article goes on to claim only the following: "The last-minute injection underscores how last year's landmark Supreme Court ruling on campaign finance has made it possible for a wealthy individual to influence an election. Mr. Adelson's contribution to the super PAC is 1,000 times the \$5,000 he could legally give directly to Mr. Gingrich's campaign this year."

The simple concern is that this compressing of campaign finance law misrepresents the problematic holding of *Citizens United*, a

[†] Bonnie and Richard Reiss Professor of Constitutional Law, New York University School of Law. Original at electionlawblog.org/?p=27675 (Jan. 10, 2012; vis. July 5, 2012). © 2012 Samuel Issacharoff.

case that addressed the use of corporate and union treasury funds for electioneering activity. Nothing in BCRA at issue in *Citizens United* would have addressed Mr. Adelson's outpouring of money into the latest permutation of third-party control over campaign activities. At best, *Citizens United* provided indirect legal cover for Mr. Adelson by reaffirming the long-standing (from *Buckley v. Valeo*) narrow definition of corruption to cordon off all uncoordinated uses of money that cannot be deemed in sufficient proximity to candidates or political parties.

But the more difficult problem is the flip-side of the inquiry. The activities of Mr. Adelson reveal just how thread-bare have become the legal covers for money in politics. To the extent that the concern is that a contribution of \$5 million directly from Mr. Adelson to Mr. Gingrich would invite corruption or the appearance of corruption, can anyone believe that this one-step remove alleviates the problem? Will Mr. Gingrich be any less likely to take a phone call from Mr. Adelson, or any less likely to be influenced by the needs of Mr. Adelson's pursuits than if he had received the money directly?

It is more than a decade since Pam Karlan and I wrote about the "hydraulics" of circumvention in the political arena. Among the concerns was the redirection of money into the hands of putatively independent third-party actors, ones who can dominate campaign debate without putting themselves directly before the voters. No better example is necessary than Mr. Romney's claims at one of the New Hampshire debates that he had no responsibility for the independent attacks of his Super PAC on Mr. Gingrich, followed by his use the electoral platform to endorse those same attacks.

The rise of the Super PACs is a real problem for the shaky system of campaign finance as it now exists. But the problem is not *Citizens United* – there is scant evidence, even anecdotally, of corporate or union treasuries being the source of funding at issue for the new candidate-specific Super PACs. By contrast, there are genuine concerns for transparency of donations, and for accountability of the relation of the donors to the candidates before and after the elections. Super PACs are only the latest of the institutional forms

CLARITY ABOUT SUPER PACS

of circumvention, a list that runs through ordinary PACs, 527s, 501(c)(4)s, and so forth. But they are a particularly virulent form of circumvention because of the proximity they offer between candidates for office and lobbyists, patronage seekers, and contractors for government services. The issue is one that requires a serious regulatory response, not the incantation of *Citizens United*. //

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FROM: THE VOLOKH CONSPIRACY

NONLEGAL ARGUMENTS FOR UPHOLDING THE INDIVIDUAL MANDATE

Ilya Somin[†]

Both sides in the individual mandate litigation have developed a wide range of legal arguments to support their position. Some defenders of the mandate have also emphasized several nonlegal reasons why they believe the Court should uphold the law. These arguments have gotten more emphasis since the Supreme Court oral argument seemed to go badly for the pro-mandate side.¹ The most common are claims that a decision striking down the mandate would damage the Court's "legitimacy," that a 5-4 decision striking down the mandate would be impermissibly "partisan," and that it would be inconsistent with judicial "conservatism."

Even if correct, none of these arguments actually prove that the Court should uphold the mandate as a legal matter. A decision that is perceived as "illegitimate," partisan, and unconservative can still be legally correct. Conversely, one that is widely accepted, enjoys bipartisan support, and is consistent with conservatism can still be wrong. *Plessy v. Ferguson* and *Korematsu*² are well-known examples of terrible rulings that fit all three criteria at the time they were decided.

In addition, all three arguments are flawed even on their own terms.

[†] Associate Professor of Law, George Mason University School of Law. Original at www.volokh.com/2012/05/21/nonlegal-arguments-for-upholding-the-individual-mandate/ (May 21, 2012; vis. July 5, 2012). © 2012 Ilya Somin.

¹ www.volokh.com/2012/03/27/thoughts-on-the-individual-mandate-oral-argument/.

² www.law.cornell.edu/supct/html/historics/USSC_CR_0323_0214_ZO.html.

I.
A DECISION STRIKING DOWN THE MANDATE IS
LIKELY TO ENHANCE THE COURT'S LEGITIMACY
MORE THAN IT UNDERMINES IT.

Claims that a decision striking down the mandate will undermine the Court's "legitimacy"³ founder on the simple reality that an overwhelmingly majority of the public wants the law to be invalidated.⁴ Even a slight 48-44 plurality of Democrats agree, according to a Washington Post/ABC poll.⁵ Decisions that damage the Court's legitimacy tend to be ones that run contrary to majority opinion, such as some of the cases striking down New Deal laws in the 1930s. By contrast, a decision failing to strike down a law that large majorities believe to be unconstitutional can actually damage the Court's reputation and create a political backlash, as the case of *Kelo v. City of New London* dramatically demonstrated.⁶

Striking down the mandate will damage the Court's reputation in the eyes of many liberals and some legal elites. But a decision upholding it will equally anger many conservatives and libertarians, including plenty of constitutional law experts. There is not⁷ and never has been⁸ an expert consensus on the constitutionality of the mandate. Any decision the Court reaches is likely to anger some people, both experts and members of the general public. But more are likely to be disappointed by a decision upholding the law.

Ultimately, the Court should not base its decision in this case on "legitimacy" considerations. If the justices believe that the mandate is constitutional, they should vote to uphold it despite the possible damage to their reputations. But it would be a terrible signal if key

³ www.tnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy.

⁴ www.volokh.com/2012/03/19/public-opinion-the-individual-mandate-and-the-supreme-court/.

⁵ www.washingtonpost.com/blogs/behind-the-numbers/post/toss-individual-health-insurance-mandate-poll-says/2012/03/18/glQAaZtpLS_blog.html.

⁶ papers.ssrn.com/sol3/papers.cfm?abstract_id=976298.

⁷ www.volokh.com/2012/03/23/the-individual-mandate-case-is-not-easy/.

⁸ www.volokh.com/2009/12/23/the-myth-of-an-expert-consensus-on-the-constitutionality-of-an-individual-mandate/.

swing justices refused to strike down a law merely because their reputations would be damaged in the eyes of a small minority of the public and a vocal faction of the legal elite. It would certainly call into question their willingness to make unpopular decisions that are compelled by their duty to uphold the Constitution, including in cases where they must strike down unconstitutional laws that really do enjoy broad public support.

II. AN IMPERMISSIBLY “PARTISAN” DECISION?

Any decision striking down the mandate is likely to pit the five conservative Republican justices against the four liberal Democrats. Some commentators, such as Larry Lessig⁹ and Jonathan Cohn,¹⁰ claim that such a result would be impermissibly “partisan,” creating a perception that the Court is only willing to strike down “liberal” laws.

This sort of argument urges judges to engage in genuinely political decision-making in order to avoid the mere appearance of it. If a Republican-appointed justice votes to uphold a law he believes to be unconstitutional in order to avoid the appearance of “partisanship,” he would be allowing political considerations to trump his oath to uphold the Constitution.

Even if there is a judicial duty to avoid the appearance of a partisan split, why doesn’t it fall on the liberal justices just as much as the conservatives? If one or more of the liberal justices were to join the five conservatives in striking down the mandate, that would diminish the appearance of partisanship just as much as a conservative “defection” to the liberal side would.

Finally, this line of criticism overlooks an important reason why decisions enforcing limits on congressional power often have an ideological division: the Court’s liberals have consistently voted against

⁹ www.theatlantic.com/national/archive/12/04/why-scalia-might-uphold-obamacare/255791/.

¹⁰ www.nnr.com/blog/jonathan-cohn/102204/supreme-court-roberts-kennedy-health-mandate-legitimacy.

nearly all structural limits on congressional power¹¹ under the Commerce Clause, the Necessary and Proper Clause, and the Tenth Amendment. Thus, the Court enforces such limits only in those cases where the five conservative justices can agree among themselves. The only way for the conservatives to avoid the appearance of partisanship in this area would be complete abdication of judicial enforcement of structural limits on congressional power.

III. CONSISTENCY WITH JUDICIAL “CONSERVATISM.”

Jeffrey Rosen¹² and others have argued that a decision against the mandate would be inconsistent with “conservative” attacks on “judicial activism” and deference to legislative judgment. Judicial conservatism is not a single, unitary entity. All sorts of decisions can potentially be justified on “conservative” grounds.

However, one major strand of conservative legal thought over the last thirty years¹³ has been the need to enforce constitutional limits on federal government power. This idea would be completely undercut by a decision upholding the mandate, since all of the government’s arguments in favor of the mandate amount to a blank check for unconstrained congressional power.¹⁴ As I explain in detail in this amicus brief¹⁵ for the Washington Legal Foundation and a group of constitutional law scholars, the government’s various “health care is special” arguments collapse under close inspection.

Conservative support for judicially enforced limits on federal power is in some tension with loose conservative rhetoric about “judicial activism,” which is one reason why I have long been criti-

¹¹ www.volokh.com/2012/04/15/larry-lessig-on-the-politics-of-the-supreme-courts-federalism-jurisprudence/.

¹² www.tnr.com/article/politics/103090/magazine/conservative-judges-justices-supreme-court-obama.

¹³ www.volokh.com/2010/03/25/federalist-society-types-were-committed-to-judicial-enforcement-of-federalism-long-before-obamacare/.

¹⁴ www.scotusblog.com/2011/08/will-the-supreme-court-give-congress-an-unlimited-mandate-for-mandates/.

¹⁵ www.wlf.org/upload/litigation/briefs/11-398bsacWashingtonLegalFoundation.pdf.

cal¹⁶ of such rhetoric. However, for most on the right, “judicial activism” is not coextensive with any judicial overruling of statutes, but rather with departures from the text and original meaning of the Constitution.¹⁷ And the originalist case against the mandate¹⁸ is very strong.

Conservatives and others can disagree among themselves as to how much deference should be given to Congress in any given case. In considering this issue, they should weigh two points that Rosen advanced in his important 2006 book *The Most Democratic Branch: How The Courts Serve America.*¹⁹

Although generally advocating judicial deference to Congress, Rosen notes two important exceptions to this principle. The first is that “When Congress’s own prerogatives are under constitutional assault (in cases involving legislative apportionment or free speech, for example), it may be less appropriate for judges to defer to Congress’s self-interested interpretations of the scope of its own power.” Obviously, there are few more “self-interested” interpretations of “the scope of its own power” than one that would give Congress virtually unlimited power to impose any mandate it wants.

Second, Rosen suggests that “[f]or the Court to defer to the constitutional views of Congress, Congress must debate issues in constitutional (rather than political) terms” (pg. 10). In order to deserve deference, Congress needs to take the relevant constitutional issues seriously. In the individual mandate case, congressional Democrats notoriously demonstrated utter contempt for the constitutional issues, and plenty of ignorance to boot.²⁰

In fairness, their performance was no worse than that of the GOP when they controlled Congress during the Bush years. Far from generating serious constitutional deliberation in the legislative branch, the judiciary’s tendency to defer to Congress on federalism

¹⁶ www.volokh.com/archives/archive_2007_10_28-2007_11_03.shtml.

¹⁷ www.volokh.com/posts/1184022611.shtml.

¹⁸ www.davekopel.com/HEW/Incidental-unconstitutionality.pdf.

¹⁹ www.oup.com/us/catalog/general/subject/Law/ConstitutionalLaw/?view=usa&ci=9780195174434.

²⁰ www.volokh.com/2012/03/28/democratic-congressman-and-senators-on-constitutional-authority-for-the-aca/.

issues has had the opposite effect. Both parties give short shrift to constitutional limits on federal power because judicial deference has created a political culture in which almost anything goes. More careful judicial scrutiny of Congress' handiwork might lead Congress to start taking the Constitution seriously again. That result should be welcomed by conservatives, libertarians, and liberals alike.

A nondeferential posture by the Court wouldn't necessarily lead to the invalidation of the mandate. It merely means that the justices should give little weight to Congress' "self-interested" interpretations of its own power and instead come to their own independent judgment on the constitutional issues at stake.

Ultimately, the Court should not decide the individual mandate case based on these sorts of nonlegal considerations. It is more important that its decision be right than that it be perceived as legitimate, nonpartisan, or conservative. But even on its own terms, the nonlegal case for upholding the mandate is not as impressive as its advocates claim.

UPDATE: Ed Whelan makes some relevant points [here](#).²¹ //

²¹ www.nationalreview.com/bench-memos/300630/intimidation-today-leaks-tomorrow-ed-whelan#.

FROM: CONCURRING OPINIONS

THE DISCONNECT BETWEEN WHAT PEOPLE SAY AND DO ABOUT PRIVACY

Joseph Turow[†]

In the course of my research I've been fortunate to be able to speak at length with media planning executives and practitioners. They spend much of their time figuring out how to use data to send commercials to targeted segments and individuals online. When the conversation turns to privacy issues, they invariably dispute that the public is genuinely concerned with the topic. "When they respond to your surveys people may claim to worry about privacy issues," the industry practitioners tell me. "But look at what they actually do online. People will give up personal information just to get a discount coupon. And look what they reveal about themselves on Facebook! The disconnect between what people say and do shows that policymakers and academics misjudge the extent to which the public really cares about the use of data about them by marketers."

It's an interesting argument and one that must be taken seriously. One response I give is that people are indeed complex, but their behavior doesn't mean they are two-faced when it comes to privacy. Rather, findings from national telephone surveys (conducted by me and with colleagues) going back to 1999 show that the majority of Americans are deeply unaware about what goes on with their in-

[†] Robert Lewis Shayon Professor of Communication, Annenberg School for Communication, University of Pennsylvania. Original at www.concurringopinions.com/archives/2012/02/the-disconnect-between-what-people-say-and-do-about-privacy.html (Feb. 8, 2012; vis. July 5, 2012). © 2012 Joseph Turow and Concurring Opinions LLC.

formation about them online. They know companies follow them, but they have little understanding of the nature of data mining and targeting. They don't realize companies are connecting and using bits of data about them within and across sites. They think that the government protects them regarding the use of their information and against price discrimination more than it does. And over four surveys, about 75% of adult Americans don't know that the following statement is false: "When a website has a privacy policy, it means that the site won't share information about you with other companies without your permission."

"Why don't Americans know such things?" industry practitioners often ask me after I recite such findings. "And why don't they use anonymizers and other technologies if they are so concerned about leaking data about themselves?" My answer to that typically takes the form of "people have a life." Learning ins and outs about the online world can be complex, and people have so many priorities regarding their families and jobs. Too, when they go online, whether to Facebook, YouTube or a search engine, they want to follow their needs and leave. In moments of rational contemplation they may well indicate web wariness. But online their need to accomplish particular goals and often engage in emotional relationship-building may trump rationale calculation. Chris Hoofnagle, Jennifer King, Su Li, and I inferred this pattern even from young adults – men and women 18-24 who common wisdom suggests wouldn't care a whit about privacy.¹

There is an additional explanation for people's lack of knowledge about how data about them are treated under the internet's hood. Unfortunately many of the most prominent digital-marketing actors engage in a kind of doubletalk about their use of information. It's a consistent pattern of public faux disclosure that may simultaneously encourage people's confidence in the firms' activities and obfuscate the privacy issues connected with those activities. And some of the

¹ Chris Jay Hoofnagle, Jennifer Kinng, Su Li, and Joseph Turow, "How Different are Young Adults from Older Adults When it Comes to Information Privacy Attitudes and Policies?" August 14, 2010. Report available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1589864&download=yes, accessed February 8, 2012.

biggest players engage in this privacy-doublespeak dance.

Consider how Google recently told its users about its decision to link information about their activities across its most popular services and multiple devices beginning March 1. The consolidation was clearly a response to a number of developments. Strategically, Google wanted to use its previously siloed data in ways that would be competitive to its increasing competitor, Facebook.² More tactically, Google was motivated by the firm's need to meet a European-Union directive that beginning May 1 all advertisers must obtain consent from their customers to allow websites to set cookies. In the words of the U.K. trade magazine *New Media Age*, "Consolidating its multiple privacy policies, of which it has over 60, for all its accounts will mean consumers only have to give consent once for it to be effective across all Google products."³

In the U.S. Google faced a major risk with the data consolidation. The company had to know that some would see the action as violating last year's agreement with Federal Trade Commission not to change its handling of people's data without their explicit permission. In fact, the Electronic Privacy Information Center filed a complaint with the FTC insisting Google's new approach violates the deal.⁴ Perhaps to blunt such criticism, the company shouted out its new privacy regime to broad publics. For several days Google emblazoned its search page and the landing pages of its other holdings with statements such as "We're changing our privacy policy" followed by blunt signals of seriousness – for example, "This stuff matters" or "Not the same yada yada." But if you clicked the link to learn more, you found essentially the same yada yada. The urgency evaporated. The language gave no sense that beginning March 1, to quote the *Los Angeles Times*, "the only way to turn off the data sharing

² Byron Acohido, Scott Martin, and Jon Swartz, "Consumers in the Middle of Google-Facebook Battle," *USA Today*, January 26, 2012, <http://www.usatoday.com/tech/news/story/2012-01-25/google-facebook-competition/52796502/1>, accessed February 8, 2012.

³ "Google to consolidate privacy data to bolster ad targeting," *New Media Age*, January 25, 2012. Thanks to Jeffrey Chester for pointing out this article to me.

⁴ Byron Acohido, Scott Martin, and Jon Swartz, "Consumers in the Middle of Google-Facebook Battle," *USA Today*, January 26, 2012, <http://www.usatoday.com/tech/news/story/2012-01-25/google-facebook-competition/52796502/1>, accessed February 8, 2012.

is to quite Google.”⁵ Instead, clickers saw the comforting statement that the change was all good. The privacy policy would be “a lot shorter and easier to read.” It would reflect “our desire to create one beautifully simple and intuitive experience across Google.”⁶

Google certainly isn’t alone in this purposefully confusing, often two-faced approach to the public. Consider how Amazon makes it seem that its data mining is transparent with respect to its visitors. On its landing page the firm is straightforward in letting you know that it is connecting what it previously saw of your site behavior with what others who did similar things bought. But a trudge through the privacy policy will reveal that Amazon’s seemingly open approach to visitors’ data on the home page actually obscures a far broader and impenetrable use of their data for the company’s own and others’ marketing purposes. Check out Pandora for a similar pattern of transparency and non-transparency in data-handling. Or visit the Digital Advertising Alliance’s opt-out area and note the disconnect between the availability of the opt-out choice and the rhetoric around it that makes its selection seem slightly absurd.

This sort of doublespeak may be endemic to the approach data-driven marketers are taking to the public. As Wall Street Journal columnist Al Lewis recently noted, “Mark Zuckerberg says Facebook’s IPO is not about the money. But he then says it’s about creating a liquid market so his employees and investors can get their money – proving the maxim that it’s always about the money.”⁷ Such corporate “explanations” of their activities add yet another reason for the public’s failure to understand the dynamics of big data in their lives. //

⁵ Jessica Guynn, “Google to Expand Its Tracking of Users,” *Los Angeles Times*, January 25, 2012, B1.

⁶ “Google Policies & Principles,” <http://www.google.com/policies>, accessed February 8, 2012.

⁷ Al Lewis, “Facebook, Dead of Alive,” *Wall Street Journal*, February 5, 2012, http://online.wsj.com/article/SB10001424052970203889904577199481841403756.html?mod=WSJ_hp_mostpop_read, accessed February 8, 2012.