

# The Post

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# The Post

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# INTRODUCTION

*Anna Ivey*<sup>†</sup>

“I don’t think you’ll be able to publish this in an academic journal,” someone said. He thought it was more like something you’d read in a magazine. Was that a compliment, a dismissal, or both? It’s hard to say.

– Joshua Rothman, *Why Is Academic Writing So Academic?*, *The New Yorker*, February 21, 2014<sup>1</sup>

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The most stinging dismissal of a point is to say: “That’s academic.” In other words, to be a scholar is, often, to be irrelevant.

– Nicholas Kristof, *Professors, We Need You!*, *The New York Times*, February 15, 2014<sup>2</sup>

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No editor of any ISA journal or member of any editorial team of an ISA journal can create or actively manage a blog unless it is an official blog of the editor’s journal or the editorial team’s journal.

– Proposal by the International Studies Association, since tabled<sup>3</sup>

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<sup>†</sup> President, Ivey Consulting, Inc.

<sup>1</sup> [www.newyorker.com/online/blogs/books/2014/02/why-is-academic-writing-so-academic.html](http://www.newyorker.com/online/blogs/books/2014/02/why-is-academic-writing-so-academic.html).

<sup>2</sup> [www.nytimes.com/2014/02/16/opinion/sunday/kristof-professors-we-need-you.html](http://www.nytimes.com/2014/02/16/opinion/sunday/kristof-professors-we-need-you.html).

<sup>3</sup> [www.insidehighered.com/news/2014/01/29/international-studies-association-proposes-bar-editors-blogging](http://www.insidehighered.com/news/2014/01/29/international-studies-association-proposes-bar-editors-blogging).

Some faculty members wondered if the proposal [was] a response to a controversy last summer on the blog *The Duck of Minerva*,<sup>4</sup> when contributor Brian Rathbun wrote that professional networking made him feel like “an ugly slut who no one even wanted to sleep with.” The blog was created by Georgetown University professor Daniel H. Nexon, who last fall became editor of *International Studies Quarterly*.

– Carl Straumsheim, *Is Blogging Unscholarly?*,  
*Insider Higher Ed*, January 29, 2014<sup>5</sup>

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Q: Chief Justice John Roberts, among others, has criticized law reviews for publishing articles on obscure subjects that offer little assistance to the bar and bench. I understand you agree – but have [you] found a substitute[?]

A: Professors are back in the act with the blogs. Orin Kerr, one of my former clerks, with criminal procedure [and] the internet area, Mike Dorf, Jack Goldsmith. So the professors within 72 hours have a comment on the court opinion, which is helpful, and they are beginning to comment on when the certs are granted. And I like that.

Q: So you’re reading blog posts after cert grants?

A: I have my clerks do it, especially with the ones when we’ve granted cert, to see how they think about what the issues are.

– Jess Bravin, *Justice Kennedy on Law School, Blogging, and Popular Culture*, *The Wall Street Journal Law Blog*, October 10, 2013<sup>6</sup>

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<sup>4</sup> [www.whiteoliphant.com/duckofminerva/](http://www.whiteoliphant.com/duckofminerva/).

<sup>5</sup> [www.insidehighered.com/news/2014/01/29/international-studies-association-proposes-bar-editors-blogging](http://www.insidehighered.com/news/2014/01/29/international-studies-association-proposes-bar-editors-blogging).

<sup>6</sup> [blogs.wsj.com/law/2013/10/10/justice-kennedy-on-law-school-blogging-and-popular-culture/](http://blogs.wsj.com/law/2013/10/10/justice-kennedy-on-law-school-blogging-and-popular-culture/).

FROM: ACA DEATH SPIRAL

# A ROADMAP FOR LEGAL ATTACKS ON THE EMPLOYER MANDATE DELAY

*Seth J. Chandler*<sup>†</sup>

**A**fter going through notice and comment rulemaking, the Internal Revenue Service and the Department of the Treasury announced a “final rule”<sup>1</sup> Monday that the employer mandate tax contained in the Affordable Care Act (26 U.S.C. § 4980H<sup>2</sup>) will not apply at all to large “bubble” employers with between 50 and 99 workers until after December 31, 2015, and that employers with 100 or more workers can avoid the § 4980H tax from December 31, 2014 to December 31, 2015, by offering compliant health insurance coverage to 70% of its employees. These provisions amend previous IRS rulings that the employer mandate tax would start for plan years beginning after December 31, 2014, and that a large employer would need to offer health insurance coverage to 95% of its employees before it would be exempt from the potentially steep taxes imposed by section 4980H. Both the new final regulations and the earlier ones contradict the language of the Affordable Care Act, which states that the tax kicks in for plans beginning after December 31, 2013, and that an employer must offer

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<sup>†</sup> Foundation Professor of Law, University of Houston Law Center. Original at [acadeathspiral.org/2014/02/12/a-roadmap-for-legal-attacks-on-the-employer-mandate-delay/](http://acadeathspiral.org/2014/02/12/a-roadmap-for-legal-attacks-on-the-employer-mandate-delay/) (Feb. 12, 2014; vis. Mar. 4, 2014). © 2014 Seth J. Chandler.

<sup>1</sup> [s3.amazonaws.com/public-inspection.federalregister.gov/2014-03082.pdf](https://s3.amazonaws.com/public-inspection.federalregister.gov/2014-03082.pdf).

<sup>2</sup> [www.law.cornell.edu/uscode/text/26/4980H](http://www.law.cornell.edu/uscode/text/26/4980H).

health insurance coverage to “all” of its employees, not 95% and certainly not 70%, before it could escape this form of taxation.

In this blog entry, I want to accomplish three goals. I want to educate on the legal issues created by the recent regulation. I want to suggest both a conventional path to challenge the regulation and an unconventional path. And, I want to advocate. I want to implore the readers of this blog who are predisposed to think highly of President Obama to really question the precedent they let be set by permitting an Executive to refuse to collect a tax for years in circumstances where it is crystal clear that Congress has directed that it be done. There is a serious risk that future leaders may not share the same priorities as President Obama or themselves. Immunizing non-collection decisions from judicial correction will lead to collapse of government programs those sympathetic to our current President believe are worthy. It could also lead subsequent Congresses to refuse to enact government programs that make sense only if payment for them can not be subverted by a recalcitrant executive branch. In short, the people who should be most disturbed about what the President has done are his many friends who support not just the now-gutted employer mandate but who believe that the federal government has a major role in, as with the ACA, redistributing wealth acquired through the market. I would be very impressed if they mustered the courage to stand up to their friends.<sup>3</sup>

A CONVENTIONAL PATH  
TO CHALLENGE  
THE EMPLOYER MANDATE DELAY

Here are some plausible book moves in the legal chess game that likely lies ahead for the decision yesterday to modify the times and conditions under which the employer mandate will be enforced.

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<sup>3</sup> [www.imdb.com/title/tt0241527/quotes](http://www.imdb.com/title/tt0241527/quotes).

*Standing*

Opponents will hunt for a plaintiff. As others<sup>4</sup> have noted, due to a doctrine called “standing,” this will not be so easy. Under Supreme Court precedent,<sup>5</sup> the plaintiff is going to have to show (a) that the failure to enforce the employer mandate caused the plaintiff’s employer not to provide health insurance, (b) that the employer would provide the requisite form of health insurance if the tax were being enforced, and (c) that the plaintiff has actually been damaged by the failure of their employer to provide health insurance. If, for example, the employer says it is not sure what it would do if the tax were imposed, a case challenging the delay is likely to fail for lack of standing. Or if it could be shown that the failure of the employer to provide health insurance actually permitted the employee to purchase equally good and similarly priced health insurance on an individual Exchange, a case challenging the most recent IRS rules would likewise likely fail for lack of standing.

On the other hand, there may well be plaintiffs out there with standing to sue. There are about 18,000 firms with more than 50 employees in the United States. While some might make decisions on whether to provide health insurance that would be unaffected by the tax, if even 5% would admit to being affected by the tax – whose whole point, after all, is precisely to cause the result plaintiff will need to show – that would represent a universe of 900 potential businesses that almost surely employ more than 50,000 employees. It takes only one employee with standing to bring suit in order to challenge the legality of the President’s latest actions.

The best plaintiff would be an employee of a large corporation that has not provided “minimum essential coverage” (a/k/a/ health insurance) but which says, without equivocation, that it would do so if the employer mandate were in place. It would be best if the insurance the employer would have provided would cost the employee less than alternatives made available on the individual Exchanges.

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<sup>4</sup> [www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/11/another-day-another-illegal-obamacare-delay/](http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/02/11/another-day-another-illegal-obamacare-delay/).

<sup>5</sup> [www.law.cornell.edu/supremecourt/text/504/555](http://www.law.cornell.edu/supremecourt/text/504/555).

Perhaps, for example, the employee worked for an employer that had extraordinarily healthy employees – a large gymnasium chain filled with youthful, mostly male,<sup>6</sup> low-health-cost physical trainers, for example – and could thus provide even minimally acceptable coverage via self insurance for less than the amount the employee could obtain on an individual Exchange.

*Violation of the Administrative Procedures Act*

Plaintiff's argument

Once the standing hurdle is overcome, expect a challenge based on violation of section 702 of the Administrative Procedures Act (5 U.S.C. § 702<sup>7</sup>). This law states: “A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” The plaintiff will argue that Congress has spoken with crystal clarity on the issue of when section 4980H was supposed to take effect: it was supposed to take effect for plan years beginning after December 31, 2013. There is nothing ambiguous about that date. There is nothing for the Supreme Court – let alone the Internal Revenue Service – to interpret.

Saying the year 2013 means the year 2015 is completely and totally absurd. The 2013 date chosen by Congress did not encompass the idea of “sometime in the kind of nearish future.” Congress balanced many factors, including the difficulty of complying with the statute and the desirability of having the employer mandate coordinate with many other provisions of the ACA that take effect starting in 2014. Moreover, given the enormous costs of the ACA, even in the reduced form taken by original projections, the \$10 billion per year<sup>8</sup> in tax revenues the employer mandate was expected to generate, was another reason to call for adoption in 2013. Under these circumstances, Congress did not choose to give large employers 5 years and 9 months to figure out how to finance and acquire health insurance for their employees; Congress thought 3 years and 9 months of “transi-

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<sup>6</sup> [acadeathspiral.org/2014/01/25/gender-equity-and-the-affordable-care-act/](http://acadeathspiral.org/2014/01/25/gender-equity-and-the-affordable-care-act/).

<sup>7</sup> [www.law.cornell.edu/uscode/text/5/702](http://www.law.cornell.edu/uscode/text/5/702).

<sup>8</sup> [www.cbo.gov/publication/44465](http://www.cbo.gov/publication/44465).

tional relief” was perfectly adequate. Congress did not want the goal of reducing the number of uninsureds subverted by letting employers off the hook or, perhaps, the burdens on the subsidized Exchanges exacerbated by large employers not pulling their weight.

The situation is no better, plaintiffs will argue, for the Obama administration’s decision in the regulations to distinguish amongst different sorts of large employers, letting employers with between 50 and 99 employees off the hook in the year 2015 while compelling at least some employers with more than 100 employees to provide health insurance in the same year. The statute carefully defined large employers in this context to mean more than 50 employees and deliberately chose 50 as the point at which to balance the importance of employer-provided insurance against the administrative and financial burdens of forced provision. Congress did not choose, for example, to stage imposition of the employer mandate first on the biggest of the large employers and a year or so later on the smaller within that group.

Finally, even if there was some basis for staging imposition of the mandate, plaintiffs will argue, the Obama regulations have butchered the provision of 4980H that calls for imposition of a large tax unless the employer offers insurance to all eligible employees. Conceivably the agency could stretch the “all” concept to 95% as it did before. Perhaps 95% could be justified as a bright line proxy for the sort of honest mistakes that Congress would not have wanted to serve as a predicate for a hefty tax. But when the Executive branch goes from “all” to 70% it can not be said with a straight face that anyone is speaking about providing a safety zone against honest mistakes. Now we are talking an entirely different regulatory regime. The Administrative Procedures Act does not give the Executive branch the power to legislate; and if it did so, the APA would itself be unconstitutional.

#### The Chevron Deference rebuttal

Expect the defendants to fight back with something known in the law as “Chevron deference.”<sup>9</sup> This widely cited doctrine emerges

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<sup>9</sup> en.wikipedia.org/wiki/Chevron\_U.S.A.,\_Inc.\_v.\_Natural\_Resources\_Defense\_Council,\_Inc.

from the observation that executive agencies actually have a lot of expertise in interpreting statutes in their area. Therefore, it should be assumed that Congress would have wanted the agency to have considerable leeway in interpreting statutes. So long as the agency follows the right procedures in developing its rules, such as the “notice and comment” rulemaking that preceded the recent pronouncement on the employer mandate, the rules developed by the agency are lawful and binding even if the court would itself not have interpreted the statute the way the agency does. The main caveat – and it is the big “Step 1” in the Chevron process – is that the agency’s interpretation has to be a reasonable interpretation of the statute, a “permissible construction.”

But, the plaintiff will argue – and I believe with great success – “Chevron deference” does not exist where the statute is really not subject to interpretation at all. As the Supreme Court said in Chevron, USA v. Natural Resources Defense Counsel, Inc.,<sup>10</sup> “If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” And it is hard to imagine anything clearer than “December 31, 2013.” It is hard to imagine a construction of “all” – particularly in a context in which alternative taxes (4980H(b)) are placed on employers that offer compliant health insurance to at least some of their employees– that could mean 70%. It is just not a reasonable construction.

“But wait,” I hear some judge asking. “Are you saying that the IRS could not give a company a few extra weeks to get health insurance? Are you saying that the IRS could not give companies any leeway in obtaining health insurance and saying that if a single employee goes uninsured the company is subject to a \$2,000 per employee (minus 30) tax?” No, not quite. As to the few weeks grace period, I do not believe the IRS can interpret the statute to permit such to occur automatically. I understand giving a select company a few extra weeks if there were extraordinarily circumstances – a natural disaster, an unintentional failure of communications – but Congress (a) already

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<sup>10</sup> [www.law.cornell.edu/supremecourt/text/467/837](http://www.law.cornell.edu/supremecourt/text/467/837).

gave the companies more than a three year grace period to get health insurance for their employees and (b) assesses the tax on a monthly basis, \$166.67 per employee per month, so that the company would not in fact be hit with a \$2,000 whammy. And as to whether the IRS could give companies some leeway, again, if there were a factual showing that it would be easy for a company to mess up on a small percentage of employees and that some accommodation was necessary in a particular case, I do not believe some leniency would subvert the intent of Congress. But I see no evidence from the IRS that a 30% mistake zone is necessary; instead, this appears to be a way of simply mellowing out a tax regime that the Executive branch now believes (perhaps rightly) is too harsh without, however, asking Congress, who might actually agree were the case respectfully put to them, to assist with a modification of the statute.

#### The Prosecutorial Discretion rebuttal

The better argument the Obama administration will muster goes under the name “prosecutorial discretion.” The idea, buttressed by many cases, including the 1985 Supreme Court decision in Heckler v. Chaney,<sup>11</sup> is that the Executive branch needs lots of leeway in determining enforcement priorities and there is therefore a very strong presumption against judicial review of decisions not to prosecute and not to pursue agency enforcement actions. And while, to be sure, most of these cases arise where the government is less transparent about its enforcement priorities, surely the government should not be restricted in its otherwise existing discretion just because it sought notice and comment before deciding what to do and was transparent enough to publish the basis on which it would make decisions.

Here are some quotes from *Chaney* which the Obama administration’s attorneys are likely to throw in the face of any potential challenger to its regulations.

- “[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess

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<sup>11</sup> [supreme.justia.com/cases/federal/us/470/821/case.html](http://supreme.justia.com/cases/federal/us/470/821/case.html).

whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved."

- "In addition to these administrative concerns, we note that, when an agency refuses to act, it generally does not exercise its coercive power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect.
- "[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict – a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3."
- "The danger that agencies may not carry out their delegated powers with sufficient vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this aspect of their performance."

Sounds bad for our plaintiff!

There is, however, the noteworthy footnote 4 in *Chaney* that should give plaintiffs some hope. After all, *Chaney* articulates the doctrine of agency discretion as a strong presumption, not an irrebutable one. Here is what Justice Rehnquist said:

*We do not have in this case a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction. Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to*

## ATTACKS ON THE EMPLOYER MANDATE DELAY

amount to an abdication of its statutory responsibilities.” See, e.g., *Adams v. Richardson*, 156 U.S.App.D.C. 267, 480 F.2d 1159 (1973) (en banc). Although we express no opinion on whether such decisions would be unreviewable under § 701(a)(2), we note that, in those situations, the statute conferring authority on the agency might indicate that such decisions were not “committed to agency discretion.”

In other words, plaintiffs may be able to argue that this is not a case where the agency is in fact making enforcement decisions based on budgetary priorities or the probability of success. Few if any of the reasons behind the discretion doctrine exist here; the doctrine of discretion should not exist for its own sake precisely because it derogates from popular sovereignty exercised via Congress. There should be enough of a paper trail for the plaintiff to show persuasively that, the agency is making an enforcement decision based on a sense that the statute is unfair or unwise or, if someone has left a smoking-gun email around, pure political considerations.

The facts of *Adams* bear some resemblance to the facts here. Just as here there is a statute calling on the IRS to levy a tax starting in 2014, in *Adams*, there was a statute that directed certain federal agencies to terminate or refuse to grant assistance to public schools that were still segregated. Just as here the agency in charge (the IRS) is apparently going to refuse to pursue that tax in 2014 (and 2015) as a matter of policy, in *Adams* the federal agency in charge (Health, Education and Welfare) effectively adopted a policy of refusing to stop funding segregated public schools. The fact that there was general non-enforcement as a matter of policy distinguished the case, in the view of the *Adams* court, from conventional prosecutorial discretion.

The other hope for plaintiffs would be to use the extreme example of this case as a way of infusing contemporary doctrine on review of agency inaction with some thoughts from Justice Thurgood Marshall in his concurring opinion in *Heckler v. Chaney*. Marshall’s thoughts might have particular appeal to Justice Elena Kagan, for example, who, in addition to being fair minded, was one of Marshall’s clerks close to the time *Chaney* was decided. Marshall, who perhaps unfortunately took an expansive view of the majority opinion in order to criticize it, and who appears to have drafted without

noting its cautionary footnote 4, wrote several quotations that might prove helpful if introduced gently.

“[T]his ‘presumption of unreviewability’ is fundamentally at odds with rule-of-law principles firmly embedded in our jurisprudence, because it seeks to truncate an emerging line of judicial authority subjecting enforcement discretion to rational and principled constraint, and because, in the end, the presumption may well be indecipherable, one can only hope that it will come to be understood as a relic of a particular factual setting in which the full implications of such a presumption were neither confronted nor understood.”

“But surely it is a far cry from asserting that agencies must be given substantial leeway in allocating enforcement resources among valid alternatives to suggesting that agency enforcement decisions are presumptively unreviewable *no matter what factor caused the agency to stay its hand.*” (emphasis in original)

Moreover, conceivably traction might be gained in an attack on the employer mandate regulations by limiting the theory of the case to agency failure to enforce a regulation as opposed to decisions of prosecutors not to pursue criminal charges. As Justice Marshall wrote:

“A request that a nuclear plant be operated safely or that protection be provided against unsafe drugs is quite different from a request that an individual be put in jail or his property confiscated as punishment for past violations of the criminal law. Unlike traditional exercises of prosecutorial discretion, “the decision to enforce – or not to enforce – may itself result in significant burdens on a . . . statutory beneficiary.” (citing *Marshall v. Jerrico, Inc.*, 446 U.S. 238,<sup>12</sup> 446 U.S. 249<sup>13</sup> (1980)).

Nonetheless, plaintiffs will have to contend with the fact that (a) Thurgood Marshall’s ideas on prosecutorial and agency discretion were not shared by the remainder of the court and (b) the extreme conditions found in *Adams* have not been found in other cases in which such “footnote 4” claims have been brought. The presumption established by *Heckler v. Chaney* has clearly remained a very strong one.

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<sup>12</sup> [supreme.justia.com/cases/federal/us/446/238/case.html](https://supreme.justia.com/cases/federal/us/446/238/case.html).

<sup>13</sup> [supreme.justia.com/cases/federal/us/446/238/case.html#249](https://supreme.justia.com/cases/federal/us/446/238/case.html#249).

A Tax Whistleblower action:  
An unconventional path for challenging  
the employer mandate delay

The greatest difficulty for those disturbed by the Obama administration's regulatory subversion of its own law is the prosecutorial discretion argument discussed above. Almost everyone thinks there should be some degree of prosecutorial discretion and the case law strongly and pretty persuasively supports the idea that the judicial branch should at least seldom be able to force prosecutors or agencies to more forcefully enforce laws, particularly where Congress has the ability to coerce the Executive branch to do so through aggressive techniques such as appropriations or, I suppose, in the most egregious cases, impeachment. The tension will be whether and under what circumstances the Executive branch under the rubric of "prosecutorial discretion" can completely subvert the language and intent of a statute through a refusal to collect a tax.

So, might there be another path for attacking the regulation, one either already in existence or one created by Congress? Perhaps. There is a remedy on the books already that might at least make the Obama administration squirm. It would do so because it might make clear that what was going on was not an exercise in prosecutorial discretion at all, but rather an effort to rewrite the statute. The idea is to for anyone at all to be a whistleblower under 26 U.S.C. § 7623 and to advise the IRS via a Form 211<sup>14</sup> that a particular large employer, preferably one that had over 1030 employees and therefore could owe more than \$2,000,000 in 4980H taxes, had failed to provide health insurance to its employees and had failed to pay any of the taxes created in section 4980H. The whistleblower does not need to show fraud to file a Form 211. The whistleblower merely needs to show that there has been an underpayment of tax. Of course, to protect against claims of bad faith, the Form 211 should disclose that the claimant knows that the employer is relying on IRS regulations as a defense but that the claimant asserts that those regulations are unlawful.

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<sup>14</sup> [www.irs.gov/pub/irs-pdf/f211.pdf](http://www.irs.gov/pub/irs-pdf/f211.pdf).

SETH J. CHANDLER

<b>Form 211</b> (Rev. December 2007)	Department of the Treasury - Internal Revenue Service		OMB No. 1545-0409
	<b>Application for Award for Original Information</b>		Date Claim Received:
Claim No. (completed by IRS)			
1. Name of individual claimant	2. Claimant's Date of Birth Month Day Year		3. Claimant's SSN or ITIN
Principaled Liberal	7 4 1980		XXX-XX-XXXX
4. Name of spouse (if applicable)	5. Spouse's Date of Birth Month Day Year		6. Spouse's SSN or ITIN
7. Address of claimant, including zip code, and telephone number			
Main Street, USA xxxxxx xxx-xxx-xxxx			
8. Name & Title of IRS employee to whom violation was reported		9. Date violation reported:	
Any IRS Agent		1/1/2015	
10. Name of taxpayer (include aliases) and any related taxpayers who committed the violation:		11. Taxpayer identification number(s) (e.g., SSN, ITIN, or EIN):	
The Large Corporation		xxx-xx-xxxx	
12. Taxpayer's address, including zip code:		13. Taxpayer's date of birth or approximate age:	
14. State the facts pertinent to the alleged violation. (Attach a detailed explanation and all supporting information in your possession and describe the availability and location of any additional supporting information not in your possession.) Explain why you believe the act described constitutes a violation of the tax laws.			
This employer has more than 50 full time equivalent employees and did not offer health insurance to them. It did not pay the tax required by 26 USC 4980H. I know this because the company president admitted in news reports that it was grateful for an IRS ruling that it did not have to pay the tax. This IRS ruling, however, is unlawful because it is contrary to the express language of the Affordable Care Act.			
15. Describe how you learned about and/or obtained the information that supports this claim and describe your present or former relationship to the alleged noncompliant taxpayer(s). (Attach sheet if needed.)			
I learned about this from public admissions by the taxpayer.			
16. Describe the amount owed by the taxpayer(s). Please provide a summary of the information you have that supports your claim as to the amount owed. (Attach sheet if needed.)			
On information and belief, the employer has 1031 employees and therefore owes \$2,020,000 in taxes under 26 USC 4980H.			
<b>Declaration under Penalty of Perjury</b> I declare under penalty of perjury that I have examined this application, my accompanying statement, and supporting documentation and aver that such application is true, correct, and complete, to the best of my knowledge.			
17. Signature of Claimant		1/1/2015	18. Date
<b>MAIL THE COMPLETED FORM TO THE ADDRESS SHOWN ON THE BACK</b>			
Form 211 (Rev. 12-2007)	Catalog Number 16571S	publish.no.irs.gov	Department of the Treasury-Internal Revenue Service

Now, I would not expect the IRS to then take a customary next step of pursuing the non-paying large employer for the 4980H taxes. I would not expect the IRS to provide any award to the whistleblower that would be available if the IRS had actually collected any money as a result of the Form 211 filing. But it is this failure of the IRS to do anything or to pay anything that might trigger the right of

the Form 211 claimant to bring a legal action in which the legality of the Obama administration's delay of the employer mandate could be challenged. Section 7623(b)(4) of the Internal Revenue Code permits "any determination regarding an award" to be appealed to the Tax Court, which has jurisdiction over such appeals.

Again I would not expect the IRS to take such an appeal lying down. The IRS will claim that it has complete discretion over whether to pursue a taxpayer brought to its attention under Form 211. A decision to the contrary could create the potential for massive, expensive litigation. Moreover, the IRS will say, the appeal permitted by section 7623(b)(4) is one over the size of any award not over whether the IRS decides to proceed with any administrative or judicial action based on information contained in a Form 211.

These will be strong arguments. They may well persuade the Tax Court. They may well persuade a Circuit Court of the United States to which an adverse decision of the Tax Court can be appealed. But what they will expose is that the IRS does not regard the regulatory changes it has made as merely ones of prosecutorial discretion – deciding where and how to expend its resources detecting underpayments. Here, that work has already been done for them. Instead, they constitute a substantive rule on the circumstances – none for 2014 and few for 2015 – under which a large employer that fails to provide health insurance should be liable for taxes that Congress demanded be paid under section 4980H. Perhaps, therefore, the Tax Court, or, on appeal, an Article III appellate court or the Supreme Court might summon up the courage to say, kind of like the suggestion in footnote 4 in *Chaney*, that, although the IRS may have broad discretion, it does not have "discretion" to abdicate its statutory responsibilities. It can not fail to pursue obvious tax deficiencies brought to its attention by a third party when the only reason for so declining is an unlawful regulation promulgated by the IRS in a usurpation of legislative powers. Whatever one thinks of the merits of the employer mandate, such a decision, in my view, would be a healthy restoration in the balance of power among the federal branches of government.

One other note

It was suggested by a friend that Congress could overcome such exercises of prosecutorial discretion by an expanded use of “qui tam” lawsuits. This remedy, which dates back to the 13th Century and has seen a resurgence over the past 20 years in the United States, allow a private citizen to bring a civil action in the name of the government and collect some of the money otherwise owed to the government. Qui tam litigation is a broad and complex subject on which I do not pretend great expertise. But, as I understand it, qui tam lawsuits generally permit a private party to go forward only if the Executive branch either supports the private party’s efforts at supplemental enforcement of a regulatory norm or at least acquiesces to it. Under 31 U.S.C. 3730(c)(2)(A)<sup>15</sup> and case law<sup>16</sup> interpreting one of the major branches of qui tam actions, the government can basically kill a qui tam lawsuit to which it objects even if the underlying claim is meritorious. It would therefore take a special qui tam statute that expressly squelched this veto power in order for such action by Congress to permit an attack on the delay of the employer mandate. More fundamentally, however, the probability of a gridlocked Congress enlarging qui tam rights to facilitate judicial overturning of the Obama administration’s delay of the employer mandate and doing so over a presidential veto is about zero.

CAUTION

I’m forging some new ground here and laying out arguments without weeks of legal research in order to get them on the table. I am likely missing things or even, perchance, getting things wrong. My hope, however, is that what I’ve written is intelligent and helpful enough to get others to discuss further and potentially take action on the serious legal issues involved when a President decides not to collect taxes that Congress has clearly demanded be paid.

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<sup>15</sup> [www.law.cornell.edu/uscode/text/31/3730](http://www.law.cornell.edu/uscode/text/31/3730).

<sup>16</sup> [scholar.google.com/scholar\\_case?case=4486425499165060593&q=318+f.3d+250&hl=en&as\\_sdt=6,44](https://scholar.google.com/scholar_case?case=4486425499165060593&q=318+f.3d+250&hl=en&as_sdt=6,44).

*Acknowledgement*

This blog post benefited greatly from a conversation with Professor Sapna Kumar,<sup>17</sup> an expert on administrative law. I, of course, am responsible solely for any mistakes made herein and I have no idea what Professor Kumar – whose main focus is the intersection of administrative law and intellectual property – thinks about the Affordable Care Act or its implementation. So, if you don't like the post or there is something wrong, don't blame her. //

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<sup>17</sup> [www.law.uh.edu/faculty/main.asp?PID=4715](http://www.law.uh.edu/faculty/main.asp?PID=4715).

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FROM: PRAWFSBLAWG

# GETTING LAW REVIEW FANS OUT OF THE CLOSET

LIPTAK ON JACOBS AND WAXMAN

*Gabriel J. Chin*<sup>†</sup>

In a column today,<sup>1</sup> Adam Liptak discusses some familiar criticisms of law reviews. I believe law review articles are often high quality, useful and influential, as is reflected by my recent series of interviews with authors<sup>2</sup> of articles cited in the U.S. Supreme Court. Liptak quotes Second Circuit Judge Dennis Jacobs as saying in 2007 “I haven’t opened up a law review in years. No one speaks of them. No one relies on them.” Former SG Seth Waxman is quoted as saying in 2002 that “Only a true naïf would blunder to mention one at oral argument.” Do not believe either of them for a second; the record suggests that these cynics are closet idealists who regularly enjoy a good law review article.

As for Judge Jacobs, a Westlaw search shows he has cited law reviews dozens of times in his years on the bench. In 2005, he cited a law review article for a point of sentencing law, and then as an “accord,” cited a Stevens and Souter dissent. *See Guzman v. United States*, 404 F.3d 139, 143 (2d Cir. 2005). That is, Judge Jacobs cites the views of two U.S. Supreme Court justices to buttress the conclusions of a law review article. The next year, in *At Home Corp. v. Cox*

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<sup>†</sup> Professor of Law, UC Davis School of Law. Original at [prawfsblawg.blogs.com/prawfsblawg/2013/10/getting-law-review-fans-out-of-the-closet-liptak-on-jacobs-and-waxman.html](http://prawfsblawg.blogs.com/prawfsblawg/2013/10/getting-law-review-fans-out-of-the-closet-liptak-on-jacobs-and-waxman.html) (Oct. 21, 2013; vis. Mar. 4, 2014). © 2013 Gabriel J. Chin.

<sup>1</sup> [www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?hp&\\_r=0](http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html?hp&_r=0).

<sup>2</sup> [prawfsblawg.blogs.com/prawfsblawg/scholarship-in-the-courts/](http://prawfsblawg.blogs.com/prawfsblawg/scholarship-in-the-courts/).

*Communications*, 446 F.3d 403, 409-10 (2d Cir. 2006), he string-cited three law review articles to explain the realities of leveraged buyouts.

In truth, Judge Jacobs obviously – *obviously* – loves law review articles. How can we tell? He likes to cite articles raising interesting legal wrinkles, but which were not raised or precisely presented by the facts. *See* *Briscoe v. City of New Haven*, 654 F.3d 200, 208 n.13 (2d Cir. 2011) (citing article offering novel reading of a recent Title VII case); *Carvajal v. Artus*, 633 F.3d 95, 109 n.10 (2d Cir. 2011) (citing article raising novel reading of full faith and credit clause); *Pescatore v. Pan Am*, 97 F.3d 1, 13 (2d Cir. 1996) (citing articles dealing with “decades-old controversy over choice of law doctrine”). He also likes empirical work. *See, e.g., United States v. Whitten*, 610 F.3d 168, 201 n.25 (2d Cir. 2010).

Judge Jacobs has cited articles written by students, judges and scholars, century-old chestnuts and brand new work, he cites celebrities like Akhil Amar and William Stuntz writing in the *Harvard Law Review* and the *Yale Law Journal*, and lesser-known scholars writing in less fancy venues. In short, the record shows that he relies on law review articles when he concludes their research and analysis makes them worth relying on, which is exactly what judges should do.

As for Seth Waxman, of course it would be extremely rare for an advocate to mention an article in oral argument, just as it would generally be silly to waste much time emphasizing the fact that a unanimous state supreme court or en banc circuit court agreed with your position. He is quite right if his point is that by the time the case is in the Supreme Court, naked appeals to authority (other than binding Supreme Court decisions) are unlikely to help. And yet, a search of the Supreme Court brief database on Westlaw shows that Waxman authored 149 briefs citing law review articles, and 423 briefs in total. So more than a third of the time, he concluded that citation of a law review article would be more persuasive than simply incorporating the article’s cases and argument in the brief (which would be fair game – briefs and opinions need not be original). His choice to rely on articles is the clearest possible vote of confidence in the utility of scholarly research. On behalf of the legal academy, I say to Mr. Waxman: “You’re welcome.” //

FROM: MCSWEENEY'S INTERNET TENDENCY

# THE SUPREME COURT ISSUES A 5-4 DECISION ON WHERE TO ORDER LUNCH

*Eric Hague*<sup>†</sup>

JUSTICE GINSBURG  
DELIVERS THE OPINION OF THE COURT

From time to time, this Court must preside over controversies so divisive and so morally ambiguous that we Justices – nine mortal men and women – feel somewhat ill-equipped to discern the issues' deeper truths and mete out justice accordingly. Never is this concern more palpable, and never is our duty as jurists more daunting, than when we have to stand around and figure out which restaurant we're going to order lunch from.

It is therefore with great solemnity that we hand down the majority opinion in the case of *Domino's v. That One Greek Place Over on N Street*.

There are meritorious arguments for both proposals. Pizza, as some members of the Court have contended, is a lunch cuisine with deep foundations in the history of the United States Supreme Court's break room kitchenette. Further, our unanimous opinion in *Domino's v. Sbarro*, 540 U.S. 891 (2003), stands for the proposition that Domino's never skimps on the toppings, and that their Cinna Stix are pretty good too, especially if you eat them when they're still warm.

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<sup>†</sup> Eric Hague is a writer living in Philadelphia. He has also written satire for the *New Yorker* and the *Wall Street Journal*. Original at [www.mcsweeney.net/articles/the-supreme-court-issues-a-5-4-decision-on-where-to-order-lunch](http://www.mcsweeney.net/articles/the-supreme-court-issues-a-5-4-decision-on-where-to-order-lunch) (Mar. 29, 2012; vis. Mar. 4, 2014). © 2012 Eric Hague.

While those Justices in favor of that Greek joint have argued that Gyros are, in many respects, way tastier than pizza (see Scalia, J., dissenting, *infra*), they have failed to cite to any relevant Federal Statutes or Law Review articles for support. As another matter, the Court isn't even sure whether the Greek place will deliver all the way to the Supreme Court Building – and Breyer is the only Justice with a car, and he doesn't really feel like driving.

Several Justices have also noted that we ordered Pizza last Thursday. We reject this argument, however, since last Thursday was oral arguments for that dicey affirmative action case, and a bunch of us had to recuse ourselves and so couldn't partake in the pizzas. Additionally, secondhand testimony that there are still a couple of leftover slices in the fridge is inadmissible as hearsay under the Federal Rules of Evidence.

We therefore rule that the Court will have Domino's. We remand only for further fact-finding as to whether everyone is cool if we get extra cheese.

It is so ordered. (Or will be, anyway, when one of our clerks calls it in.)

SCALIA, J.,

WITH WHOM THE CHIEF JUSTICE AND JUSTICES  
ALITO AND THOMAS JOIN, DISSENTING

Our decision today flies in the face of more than a quarter century of the Court's lunchtime jurisprudence. The majority thoughtlessly dismisses the notion that Mediterranean food is extremely yummy, despite a persuasive amicus brief from Professor Richard Posner, and even though everyone seemed to enjoy the shawarmas we got from that Lebanese food truck a few weeks back.

Moreover, this decision represents a disturbing affirmation of the kind of majoritarian tyranny the Court has sought to abrogate in the years since it handed down its controversial opinion *In re Burger King*, 474 U.S. 1352 (1985), in which the Court voted 8-1 to strike down Justice Stevens's preference for BK fries.

Therefore, I respectfully dissent from the Court's judgement – and no, I am not cool with extra cheese.

KENNEDY, J.,  
CONCURRING IN PART, DISSENTING IN PART,  
HUNGRY IN FULL

As Chief Justice John Marshall very nearly wrote in his opinion in *Marbury v. Madison*, “It is emphatically the province of the Judicial Branch to say [where we order our lunch from].”

But neither that seminal decision nor our mandate in Article III, Section I of the Constitution prescribes the specific processes by which we should determine where we get our takeout. In truth, the Court’s longstanding requirement that all the Justices order food from the same restaurant is as artificial as our policy of not tipping the delivery guy if he takes more than 30 minutes.

So while I join the majority in their conclusion that a couple of pizzas would really hit the spot right now, I fully support the prerogative of the dissenters to go ahead and separately order their pitas or whatever – even though this would mean the Court can’t use its coupon for three large, one-topping pizzas and thus get a free two-liter of Mountain Dew.

The Supreme Court stands for nothing if not the democratic principle of ideological compromise. If we can put this matter behind us, we’ll be able to turn our attention to vastly less controversial matters, like that healthcare case we’ve got this afternoon. That’s something we’ll all be able to agree on, right? //

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FROM: HERCULES AND THE UMPIRE

# HAPPY NEW YEAR AND FAREWELL

*Richard G. Kopf*<sup>f</sup>

This blog started in February of 2013. It is now January 1, 2014. During this time, I have written 416 posts and there have been about 425,000 page views by readers. Roughly 3,700 comments have been made.

Yesterday, the *Wall Street Journal* published a very interesting article in which this blog was prominently mentioned. See Joe Palazzolo, Jurist Prudence? Candid Judges Speak Out,<sup>1</sup> *Wall Street Journal* (December 31, 2013.) That in turn generated a thoughtful post by my friend, Pat Borchers, the former dean of Creighton Law School. See “Talking judges”<sup>2</sup> on *The Way I see it*, posted by Patrick J. Borchers at 12:12 PM on December 31, 2013. This attention generated over 4,400 pages views of *Hercules and the umpire* just yesterday.

In short, *Hercules and the umpire* has exceeded my wildest expectations. And so – it is time to kill it. In this forum, I have written all that I want to write and then some. It is that simple. My decision is final.

Before I conclude this last post, I wish to make several points:

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<sup>f</sup> Judge, U.S. District Court, District of Nebraska. Original at [herculesandtheumpire.com/2014/01/01/happy-new-year-and-farewell/](http://herculesandtheumpire.com/2014/01/01/happy-new-year-and-farewell/) (Jan. 1, 2014; vis. Mar. 4, 2014). I *don't* claim a copyright on any of the stuff I have written or will write in the future on this blog. If (for reasons that I cannot fathom) you want to reprint, republish or re-anything-else any of my thoughts posted on this blog, feel free to do so.

<sup>1</sup> [stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-415839/](http://stream.wsj.com/story/latest-headlines/SS-2-63399/SS-2-415839/).

<sup>2</sup> [patrickborchers.blogspot.com/2013/12/talking-judges.html](http://patrickborchers.blogspot.com/2013/12/talking-judges.html).

- I am not quitting because of ethics concerns. Such problems are real, but vastly overblown. A thoughtful judge has about the same chance of violating the Code of Conduct when writing a book, giving a speech, authoring a law review article or writing a blog post.
- Conspiracy buffs need not fret and anti-judge nuts need not cheer. No one has given me the slightest trouble about expressing myself here. I am quitting voluntarily and without a nudge from anyone.
- Although I am truly worn out, I am OK. I am not quitting because of health reasons.
- This is a powerful medium for, among other things, making federal trial judging transparent and for trying to wrap one's arms around the conundrum of judicial role. I hope some other federal trial judge takes up that hard but enormously satisfying labor.
- I look forward to commenting on other blogs now that I am out of the biz.
- To my astonishment, I have made several, perhaps many, friends along the way. I will maintain the e-mail address for the site, and I welcome hearing from these kind, smart (Oxford comma coming but just for fun), and thoughtful people. But, I don't promise to respond as quickly as before. The foregoing said, you and each of you have my sincere thanks. Readers have taught me many valuable lessons about how to become a better judge and human being.
- I will keep the blog "alive" for archival purposes, but nothing more. I will shut down the comment section in a week or so.
- The photo below is how I picture myself today. That is, I am one lucky, old dog.

All the best.

*The end.*

FROM: CREDIT SLIPS

# A LAWYER AND PARTNER, AND ALSO BANKRUPT . . .

FOR REASONS THAT HAVE NOTHING TO DO WITH  
BEING A NON-EQUITY PARTNER . . .

*Adam J. Levitin*<sup>†</sup>

It's all the rage these days to beat up on law school as a bad investment and to moan about the economic travails of the legal profession. There are some reasonable critiques that can be leveled at the shape of legal education and its costs and there are clearly important changes going on in the economics of the legal profession. But in a NY Times column, James Stewart has tried to connect these important issues with the sad story of the bankruptcy of Gregory Owens,<sup>1</sup> a former equity partner in Dewey LeBoeuf who is now a non-equity service partner at White & Case.

Owens has filed for bankruptcy and for Stewart, Owen's case is informative about "why law school applications are plunging and [why] there's widespread malaise in many big law firms". There's just one problem. Owen's case has no connection with either of these things. Owens' story is one of the expenses of divorce. It is not a tale of legal education debt. And it is only a story of the chang-

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<sup>†</sup> Professor of Law, Georgetown University Law Center. Original at [www.creditslips.org/creditslips/2014/01/a-lawyer-and-partner-and-also-bankruptfor-reasons-that-have-nothing-to-do-with-being-a-non-equity-pa.html](http://www.creditslips.org/creditslips/2014/01/a-lawyer-and-partner-and-also-bankruptfor-reasons-that-have-nothing-to-do-with-being-a-non-equity-pa.html) (Jan. 24, 2014; vis. Mar. 4, 2014). © 2014 Adam J. Levitin.

<sup>1</sup> [www.nytimes.com/2014/01/25/business/partner-in-a-prestigious-law-firm-and-bankrupt.html?hpw&rref=business&\\_r=0](http://www.nytimes.com/2014/01/25/business/partner-in-a-prestigious-law-firm-and-bankrupt.html?hpw&rref=business&_r=0).

es in the legal economy to the extent that Owens' problem is that he's earning only \$375,000, not \$3.75 million. If Stewart weren't so eager to get his licks in on the law school economy, he might see that there's a very different story here.

I want to be clear: nothing I write here is meant to reflect a judgment of Mr. Owens. I do not normally comment on the finances of real individuals, in part because I know that there are so many complicated details that I am unlikely to know. I don't know Mr. Owens' circumstances beyond the Stewart article and a glance at Mr. Owens' chapter 7 petition. I also feel frankly uncomfortable discussing the finances of a real named individual on this blog. Had Stewart not cast Owens into the public light, I would not be commenting on him. Instead, my point is that the information that Stewart provides (and which one can get from Owens' bankruptcy petition<sup>2</sup>) does not support Stewart's story. Tell the story of the changes in the legal profession. Tell the story of the challenges facing legal education. But tell them properly. A more detailed analysis is below.

## (1) WHY IS OWEN HAVING TROUBLE MAKING ENDS MEET?

The simple answer is divorce, not legal education expenses or anything to do with the profitability of the legal profession.

Owen's pulling in about \$375k annually. That's not huge for NYC, but it's not nothing either. From a quick glance at Owens' budget as Stewart presents it, there are two big problems. The first is that Owen is paying \$10,517/month in child support. Divorce is expensive. But it has nothing to do with the profitability of the legal profession. Perhaps the child support decree was set at the peak of Owens' earnings a few years back when he was making \$500k/year. If so, there's a tenuous link to the fate of the legal profession – but the real issue isn't the income level on which the child support decree was based, but that there is a child support decree. Put another

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<sup>2</sup> [www.scribd.com/doc/200129951/Gregory-Owens-Chapter-7-Bankruptcy-Petition](http://www.scribd.com/doc/200129951/Gregory-Owens-Chapter-7-Bankruptcy-Petition).

way, Owens' financial problem isn't that he's a non-equity partner. It's that he got divorced.

Relatedly, one might also question why Owens' transportation expenses are \$550/month. He lives in a city with amazing public transit options and can probably bill a client for a car service home most weekdays. My point isn't to nickel and dime his expenses, but to wonder whether some of Owens' transportation expenses might relate to visitation of his son. If so, that underscores the divorce expense problem.

A second problem is that Owen is making a huge monthly contribution (\$5,900) to his retirement plan. Stewart characterizes it as a "mandatory" contribution. There's not enough detail to really understand what this means, but it's unlikely that Owens is required to participate in a 401(k). It's just that if he doesn't, he won't get an employer match. (I leave open the possibility that there is some requirement as part of his partnership agreement, but if so, that's not a generic problem of the economy of law firms. Instead, that's a problem with the particular partnership agreement Owens' signed.)

Note that between the child care and the mandatory retirement savings, that's nearly \$200,000 a year from Owens' \$375,000 pre-tax income. With another \$90,000 in taxes, he's got \$85,000 to spend on rent, transportation, food, insurance, etc. Manhattan's expensive, but based on my own finances as an associate supporting a family of three with education debt and significantly higher rent, I'm a bit surprised that this is strapping a single person who living in a not particularly fancy area. Remember that the median *household* income in the US is around \$51,000.

Critically, Owens is not paying any education debt. But for his divorce expenses, Owens would be doing pretty well. He might be spending a roughly equivalent amount on his child, but he might also be in a two-income household, which would really improve his financial picture. Nothing in Owens' story indicates that going to law school was his mistake or that his financial problem stems from being de-equitized.

## (2) WHY IS OWENS FILING FOR BANKRUPTCY?

Curiously, Stewart never tells us. People don't just file for bankruptcy because they're having trouble making ends meet. Most people in financial distress *don't* file for bankruptcy. Instead, people usually file for bankruptcy because something spurs them to act or because the dunning calls, etc. get too much and they have managed to save up for bankruptcy.<sup>3</sup> This filing cost Owens nearly \$5,000. He had to have a reason to spend that. Put another way, what is Owens hoping to gain from filing for bankruptcy?

As far as I can tell, the only thing that bankruptcy will help Owens with are his business debts relating to his liability in the Dewey LeBoeuf bankruptcy. There are no personal debts scheduled – no credit card debt, no back rent, no mortgage, no car payments, no student loans, no medical debt. (Because it's business debt, Owens isn't means tested out of Chapter 7 . . .) One can point to the Dewey debt as evidence of trouble with the BigLaw business model, but Dewey is one of a handful of big law firms to collapse. Most have not, in part because they have deequitized partners, deleveraged on associates, etc. But is Owens really the way to tell that story?

Owens doesn't seem to have any assets that his Dewey creditors are likely to be able to grab. At most, then it would seem he is protecting his wages from garnishment by his Dewey creditors, but there's no indication that his wages are being garnished yet. Critically, Owen is not going to be able to get out of most of his obligations, including his child support obligation. What this means is that if Owen gets a bankruptcy discharge, he will still have the very same financial problems he had when he filed: living expenses plus child support obligations that are greater than his income. All bankruptcy is likely to do is to prevent some additional claims on his income, but Owens' finances are still a problem.

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<sup>3</sup> [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1540216](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1540216).

(3) OWENS REDUCED INCOME HURTS,  
BUT HE'S STILL MAKING GOOD MONEY.

Obviously, if Owens were earning more, he'd be in a better position. And Stewart is right to point out the growth of the second-class citizens of non-equity partners (he could add to this the expansion of "counsel" positions and the lengthening of the associate track at many firms). But this doesn't really seem to be Owens' problem. Owens still has a job and one that pays quite well, even if it isn't paying him like a top equity partner. Only in a world of 1 percenters is \$375,000 annual income cause for pity. If the deal being offered to prospective law students was paying \$150,000 over three years to have a future annual income of \$375,000, law school would be a no-brainer decision for lots of people. The law school investment paying off doesn't depend on earning millions annually.

All of which is to say: James Stewart, what does Gregory Owens story actually have to do with plunging law school applications and malaise in big law firms?

*P.S. It occurs to me that my demotion to an "Occasional," is a form of de-equitization. Apparently I wasn't earning my keep on the Slips. //*

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FROM: LEGAL ETHICS FORUM

STEPHEN GLASS,  
SITUATIONAL FORCES, AND THE  
FUNDAMENTAL ATTRIBUTION  
ERROR

*W. Bradley Wendel*<sup>†</sup>

Two Stephen Glasses appeared before a California State Bar Court hearing judge. One was a serial liar – a fabulist, to appropriate the title of his *roman à clef* – who made up dozens of articles for *The New Republic* and other magazines out of whole cloth, in what the Newseum in Washington, D.C. called one of the worst examples of misconduct in the history of journalism. The other Stephen Glass was a young person trying to cope with intense pressure from his family to achieve professional success, who embarked on a pattern of deception that led to his disgrace, and has slowly but steadily turned his life around with the help of therapists, friends, and a new career aspiration as a lawyer. Which of these characters is the real Stephen Glass, and what can we infer about what that person will do in the future? The trouble is, we have no idea. Given the complex interaction between character and situational factors, at this point in time we can do no better than guesswork if we try to predict whether admitting Glass to practice law is likely to result in harm to clients.

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<sup>†</sup> Professor of Law, Cornell University Law School. Original at [www.legalethicsforum.com/blog/2014/02/brad-wendel-stephen-glass-situational-forces-and-the-fundamental-attri-bution-error.html](http://www.legalethicsforum.com/blog/2014/02/brad-wendel-stephen-glass-situational-forces-and-the-fundamental-attri-bution-error.html) (Feb. 4, 2014; vis. Mar. 4, 2014). © 2014 W. Bradley Wendel.

One of the central findings of behavioral psychology is that situational forces are much more significant determinants of behavior than personality or character. The Milgram Experiments on obedience to authority and the Stanford Prison Experiments famously showed that ordinary people will do terrible things given the right group dynamics and social forces. The explanation of why people do bad things is often *not* that they are bad people but that they are ordinary people in situations that are productive of wrongdoing. However, another well documented feature of human psychology is the fundamental attribution error (FAE) – we tend to attribute the explanation of wrongdoing to character traits or dispositions, not features of the situation. Asked to explain the Milgram results, people will often say the subjects must have been sadists. The same effect can be observed outside the laboratory. Ask people for an explanation of the decision to launch the space shuttle *Challenger*, the collapse of Enron, the Abu Ghraib abuses, or the failure of the ratings agencies or the risky financial transactions leading up to the 2007 financial crisis, and you will probably hear an explanation in terms of the greed, dishonesty, or cruelty of key players – the “bad apples” account. It turns out, however, that the vast majority of participants are not bad apples, but are ordinary people whose ethical decision-making is subtly influenced by group dynamics such as in-group favoritism, pluralistic ignorance, induction effects that evaluate conduct in terms of previous similar actions, and subtle influences on the way people construe unfamiliar or ambiguous circumstances.

This is not to deny that people react to situations differently. In his book, *Eat What You Kill*, Mitt Regan gives an explanation of the decision of a bankruptcy partner at a major New York law firm to falsify a disclosure of the firm’s representation of another party in a Chapter 11 proceeding. His story is rich and nuanced, but a reader may ask (as I did in a review of the book) why it was only John Gelene who lied to the court. Other lawyers, including a litigation partner who urged disclosure, did the right thing in the case. Social psychologists do not deny that people have personality traits. The claim, rather, is that “people [do not] typically have highly general personality traits that effect behavior manifesting a high degree of

cross-situational consistency.” John M. Doris, *Lack of Character: Personality and Moral Behavior* (2002), p. 39. The determinants of behavior include both character traits and situational factors, but people commit the FAE when they overestimate the predictive value of character traits. We tend to have a significantly higher degree of confidence than is warranted in our attribution of dispositions (e.g. saying Stephen Glass is a liar) and our predictive judgments (e.g. estimating that it is likely that Glass will commit dishonest acts in the future). It is difficult to overcome the tendency to explain behavior in trait terms, leading to the FAE, because it appears to be a product of unconscious coding and confirmation bias.

John Gellene might have been more predisposed than other lawyers to falsify the document, but before he started working on the case, there would have been no way to know with any significant degree of reliability. *Ex post* we feel confident in our judgment that “John Gellene is dishonest” is the best explanation of the act of falsifying the document. Research shows, however, that this is nothing more than hindsight bias – that is, the tendency to significantly overestimate the *ex ante* likelihood of an event. (See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571 (1998) for the details.) As a torts teacher, I am constantly reminding students not to assume that just because an accident occurred, it was the result of the defendant’s failure to use reasonable care. Humans are unfortunately just not very good at making predictive judgments about risk in general, and when that deficiency is combined with the FAE, the result is gross overconfidence in the reliability of our judgments about when a person’s past acts are predictive of future behavior.

I get the general reaction to Stephen Glass. I have subscribed to *The New Republic* since my undergrad days, and felt betrayed when I learned that the articles of his I had enjoyed were fabrications. My off-the-cuff assessment of him would be “sleazeball” or “liar.” I understand this kind of evaluation from a reader [comment](#)<sup>1</sup> on Andrew Sullivan’s blog:

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<sup>1</sup> [dish.andrewsullivan.com/2014/01/29/can-you-repair-a-shattered-glass-ctd/](http://dish.andrewsullivan.com/2014/01/29/can-you-repair-a-shattered-glass-ctd/).

This is a person who has demonstrated, time and time again, that *he is morally and ethically challenged* – much more so than a person who has committed petty offenses or who has a drug conviction, in my opinion, but someone who literally cannot be trusted to tell the truth.

(Emphasis added.) The FAE is an ingrained tendency, and it is a deeply counterintuitive claim that past wrongdoing does not reliably support an inference to character traits, the existence of which enables one to make reliable predictions of future behavior. But the same is true of many of the findings of cognitive psychology. I love the story of the “hot hand” study by Tom Gilovich (of the Cornell psychology department), which disproved the folk wisdom of basketball fans that players sometimes tended to get on a hot streak and make a series of field goals or foul shots with unusual success. When hundreds of hours of game films were studied, however, it turned out that the sequence of made and missed shots were within the range of random distribution. But this didn’t satisfy former Boston Celtics head coach Red Auerbach, whose reaction to the study was “Who is this guy? So he makes a study. I couldn’t care less.” As Daniel Kahneman puts it: “The hot hand is a massive and widespread cognitive illusion. . . . The tendency to see patterns in randomness is overwhelming – certainly more impressive than a guy making a study.” Daniel Kahneman, *Thinking, Fast and Slow* (2011), p. 117.

While the stakes are obviously much higher, an analogous problem is the use of expert testimony to predict future dangerousness for the purposes of capital sentencing. The American Psychiatric Association has stated in amicus curiae briefs<sup>2</sup> that psychiatrists should not testify as an expert that a defendant has a long-term likelihood of committing future acts of serious violence, because there is simply no scientifically reliable method for making this prediction. (See, e.g.,) The familiar “reasonable degree of medical certainty” standard for expert testimony accordingly cannot be satisfied. Faced with this evidence, however, prosecutors sound like Red Au-

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<sup>2</sup> [www.apa.org/about/offices/ogc/amicus/fields.aspx](http://www.apa.org/about/offices/ogc/amicus/fields.aspx).

erbach responding to the hot hand study. The ABA Journal<sup>3</sup> quotes one district attorney who said, “common sense and 23 years of experience as a lawyer have convinced him that such predictions can reliably be made.” Who needs scientific evidence when you’ve got common sense and 23 years of experience? So some guy made a study – so what?

The California Supreme Court held that Glass had not carried his burden of demonstrating his fitness to practice, in part because of his lack of candor in the admission process, both in California and, earlier, in New York. Any evasiveness, partial disclosure, or game-playing with the process is the kiss of death in the character and fitness evaluation. I always advise students this is not the place to try out Bill Clinton’s techniques for avoiding answering hard questions. One gets the sense, however, that the result would have been the same if Glass had disclosed each and every instance of fictionalizing articles. Some commentators on the case have argued that the California court’s decision is justified by the allocation of the risk of error: On the one hand, false positive – i.e. an erroneous prediction that Glass will offend in the future – will affect only Glass; on the other hand, a false negative may result in harm to clients. Isn’t it better that the risk be borne by the concededly sleazy Glass than by an innocent client? Stated in this form, the argument is a version of the precautionary principle, which is, when in doubt, avoid doing anything that will create a risk of harm. Or, in cases of doubt, better safe than sorry. Problems with the precautionary principle are well known, however. For one thing, it considers only harms on one side of the equation. While courts have repeatedly stated that admission to the bar is a privilege not a right (and thus Glass has no *Mathews v. Eldridge*-type claim to be judged on the more competent evidence), there still seems to be a moral right on Glass’s part to have his application considered fairly, given the significant investment he has made in his legal training. “In real-world controversies, a failure to regulate will run afoul of the precautionary principle because potential risks are involved. But regulation itself will cause potential risks,

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<sup>3</sup> [www.abajournal.com/magazine/article/a\\_dangerous\\_assessment/](http://www.abajournal.com/magazine/article/a_dangerous_assessment/).

and hence run afoul of the precautionary principle too.” Cass R. Sunstein, *Risk and Reason: Safety, Law and the Environment* (2002), p. 103.

Maybe observers aren't particularly sympathetic to the risk posed to someone like Glass. If you're a lying sleazeball, you risk not being admitted to the bar – too bad for you. This, of course, depends on our confidence that we can determine that someone is, in fact, a lying sleazeball. What if the truth of the matter is that the real Stephen Glass is the second character described above, who screwed up royally, realized it, and has spent the last ten years trying to make it right. It's a long, unsteady process, and maybe he didn't do everything someone else would have done as part of a process of rehabilitation, but do we not believe in the possibility of redemption? It's at least conceivable that the character of the real Stephen Glass is that of someone who made a big mistake but has since turned his life around. My view of the psychological evidence is that we simply do not know enough about the character of *either* Stephen Glass – either the serial liar or the rehabilitated person – and its cross-situational stability to justify making a predictive judgment of his future dangerousness. But for those who are less persuaded by Milgram, Darley, Batson, Zimbardo, Nisbett, Ross, and the rest of the social psychologists who believe that situational factors are more important than character as determinants of behavior, what makes you so inclined to believe that Glass isn't on the right road at this point in his life? Presumably the answer is that he fudged the truth on his New York application. I'll grant that is a very bad fact indeed. But I still get the feeling the California court would have denied his admission anyway, and that's troubling for someone who believes in the possibility that anyone can make a new beginning.

If the character and fitness requirement is justified primarily as a prophylactic means of protecting the future clients of a lawyer like Stephen Glass, I think it has to be abandoned. As Deborah Rhode showed in her classic article, the bar tends to articulate a public protection rationale for the character and fitness screening process. As one bar spokesperson rather colorfully put it, the objective is “eliminating the diseased dogs before they inflict their first bite.” Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 *Yale L.J.*

491, 509 (1985). (Rhode's article, pp. 555-59, provides an overview of the behavioral psychology literature summarized above.) The theory for denying Glass's application for admission is that he is a diseased dog. But the situationalist critique of the FAE shows that we are all *potentially* diseased dogs. A better approach to regulation would be to aim at mitigating the situational factors that tend to produce unethical behavior. The Gellene case is a good example. Bankruptcy Rule 2014 requires disclosure of any connection with a creditor or other party in interest; it does not employ language similar to that of Model Rule 1.7(a)(2), requiring action only where the concurrent client relationship is a material limitation on the representation. The bankruptcy rule therefore avoids the judgment calls that lawyers must make in evaluating conventional conflicts of interest and makes it less likely that these judgments will be influenced by self-serving cognitive biases. There might have been an argument that the firm's concurrent representation of a principal in an investment firm that was a creditor in the Bucyrus-Erie restructuring proceeding was not a material limitation on the representation of the debtor (although I think that would be a pretty dubious argument), but there was no argument that there was no connection. By providing less latitude for judgment, the bankruptcy rule is less vulnerable to abuse by lawyers who may feel a great deal of pressure to keep clients, or other lawyers in the firm, happy by not disclosing a concurrent representation.

I understand the symbolic and signaling function of the character and fitness requirement. As one of the comments on Andrew Sullivan's post noted, a student just beginning law school usually hears at orientation that he or she is entering a profession with high ethical standards, which makes demands above and beyond simply complying with law and expects its practitioners to satisfy demanding requirements of honesty and trustworthiness. Without the character and fitness process, would the law become, or at least seem to be, just another trade or business? (As I've written elsewhere, I'm a bit uncomfortable with this tacit dissing of the ethics of businesspeople, not only because it sounds sanctimonious by lawyers, but also because it tends to reinforce the attitude that business ethics is nothing

more than the morals of the marketplace + maximizing shareholder value.) I'm all in favor of symbolically reaffirming our profession's commitment to ethics, but it is more than merely symbolic when someone who has invested three years and probably in excess of \$150,000 in tuition and living expenses to become a lawyer is denied admission because of prior acts of dishonesty. If we're going to deny someone access to a valuable privilege (n.b. not saying it's a right), we had better be confident in the reliability of our decision-making process. //