Volume 1 Number 1 Spring 2010

GROVE CITY COLLEGE JOURNAL OF LAW AND PUBLIC POLICY

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Volume 1 Number 1

Spring 2010

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GROVE CITY COLLEGE
JOURNAL OF LAW AND PUBLIC POLICY

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable value. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, and the ethical absolutes of the Ten Commandments and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its conception, Grove City College has consistently been ranked among the best and brightest colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

THE GROVE CITY COLLEGE *JOURNAL OF LAW AND PUBLIC POLICY*

The Grove City College *Journal of Law and Public Policy* was organized in the fall of 2009 by co-founders James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12, and was originally sponsored by the GCC Law Society. The *Journal* is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. The unique, close-knit nature of the College's community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication, which is a national precedent.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and to their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication, as well as to the published work of the undergraduate students, and allows for natural mentoring to take place. This blend of education level and experience, all working toward a single goal, is what makes the *Journal* truly unique and allows it to serve the needs of undergraduate students and benefit its readership at large.

Editor's Preface

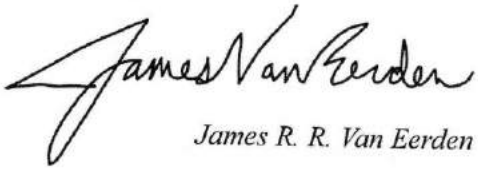
Ideas are powerful tools that shape individuals and societies alike. The art of well-reasoned argumentation, demonstrated specifically in the classical tradition, has been elevated as an ideal for many centuries. Through the integration of grammar, dialectic, and rhetoric one is able to enjoy the fruits of intellectual stimulation and share those fruits with others. In the words of George Bernard Shaw, "If you have an apple and I have an apple and we exchange these apples then you and I will still each have an apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas."

In the spirit of sharing more than apples, I am pleased to introduce to you the inaugural edition of the *Grove City College Journal of Law and Public Policy*. The idea for the *Journal* was sparked in a conversation I had with one of Grove City College's admissions counselors, Stephen Johnson. We were discussing the importance of scholarly writing in an academic community and noted that Grove City College did not yet have a scholarly publication. After additional research and continued discussion with Stephen, I developed a feasibility study and pitched the idea to the officers of the Law Society. The idea was met with great excitement and Kevin Hoffman and Steve Irwin (two of the *Journal*'s co-founders) provided structure and focus to the venture. We met with President Richard Jewell '67, Provost Bill Anderson, and all of the college's vice-presidents to develop a strategic approach for publication. We then recruited a capable team of student, faculty, and alumni editors to begin the selection and revision process as articles were submitted.

The byproduct of this hard work is what you hold in your hands now – the Grove City College *Journal of Law and Public Policy*. The *Journal* is intended to be a publication that addresses issues of law and public policy in a scholarly fashion while cultivating intellectual curiosity and academic rigor. The *Journal* is one of a select few scholarly undergraduate publications of its kind in the nation. Moreover, this publication is highly unique since it features student submissions alongside submissions from alumni, faculty, and other scholars.

Ultimately, I hope that the readers of this publication will actively par-

ticipate in its vision- to expand distribution of the *Journal* to communities, businesses, law firms, colleges, and universities around the nation with the purpose of developing a national dialogue about important issues rooted in meaningful ideas. I view the work we have committed to this publication as a long-term investment. Indeed, we hope that students, faculty, alumni, and others interested in public policy and legal scholarship will benefit from our publication. Perhaps Oliver Wendell Holmes said it best: "One's mind, once stretched by a new idea, never regains its original dimensions." I sincerely hope that the entrepreneurial spirit which led to this publication, as well as the words contained within these pages, will aid you to expand the "original dimensions" of your own mind.



James R. R. Van Eerden

Editor-in-Chief

* The *Journal* could not have been made possible without the support of many people who were either directly or indirectly involved with its publication. The *Journal* staff would like to first thank President Jewell, who supported our efforts from the very beginning and continues to serve the students at Grove City College in extraordinary ways. We would also like to thank Mr. Prokovich for his willingness to meet with us (often on short notice) and for providing assistance regarding distribution and publication of the *Journal*. We are grateful to Dr. DiStasi for providing the computer and printing equipment that has been absolutely essential to our editing process and to Dr. Anderson and Mr. Hardesty for their wisdom and assistance throughout the process. Among others on the *Journal* staff, I would like to specifically thank Kevin Hoffman for his tireless work as Managing Editor. Kevin has been a tremendous friend and a reliable partner at every step along the way – without him, this dream would not be a reality. I would also like to thank our Administrative Editor, Steve Irwin, for the countless calls, e-mails, and meetings he orchestrated on behalf of the *Journal*. The entire *Journal* staff – from copy-editors, lay-out editors, and content editors to all the faculty and alumni who graciously gave their time – deserves recognition for the hard work they dedicated to this first edition. Finally, I would like to thank my siblings (all ten of them), my wonderful parents Jim and Rachel Van Eerden, and my grandparents Dick and Donna Van Eerden for their encouragement to "live life to the fullest." Most important, thanks be to God who is the source of all knowledge and truth.

Forward from the President

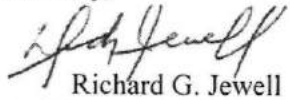
Dear Reader,

I am pleased to write this letter welcoming you to the first edition of the Journal of Law and Public Policy. The idea for this publication comes from the minds of a number of our students, many pre-law students, interested in public policy and the role of law. So, it was their inspiration and also their perspiration in taking the idea to fruition that brings you this publication and future editions.

Inside we see articles by students, alumni and friends of the College. We visit a myriad of interesting topics. Dan Hanson '11 asks, what reforms the World Trade Organization must make to advance more free and open trade world-wide. Another article asks, what are the current implications of the famous Grove City College Supreme Court Case now twenty-seven years after it was decided? Trustee David Lascell, Esq., the lawyer who argued the case on behalf of the College, weighs in. On another subject, most timely, Calderwood School Dean, Dr. John Sparks takes a look at the break-ups in some of our nation's, often called, "main-line" religions. After the break-ups, who owns the property and where do break-up rights lie? Alumnus and former U.S. Marine Capt. and SJAG officer, John Schwab '98 discusses judicial interpretation of "honest services fraud." David Feister '10 takes a look at free speech and the 1917 "clear and present danger" rule enunciated by Justice Holmes in the Schenck Case and the appropriateness of its universal application. And finally, Brittany Foor '10 explains the trends in understanding the framework for human trafficking control, and finally suggests improved definitions and enforcement reform.

So there you are – a potpourri of topics and opinions – just the recipe for an interesting journal and discussion. Please enjoy.

Sincerely,



Richard G. Jewell
President of Grove City College

GROVE CITY COLLEGE v. BELL:

What the Case Means Today

David M. Lascell[1]

Those persons closely connected with Grove City College know well the case the College brought before the Supreme Court of the United States (*Grove City College v. Bell*, 465 U.S. 555 (1984)). What the case means to the College today is critically important but not well understood. This paper will review this significant Supreme Court ruling and explore the resulting issues for Grove City College today as well as looking toward the future.

On November 29, 1983, the Supreme Court of the United States heard arguments in *Grove City College v. Bell*, the College's long-standing lawsuit with the federal government. The *New York Times* described the College's Supreme Court case as "a clash of values," and went on to say that it represented "the American tradition of valuing diversity and autonomy, especially in colleges, where academic freedom could be stifled by pervasive regulation, versus Washington's commitment to bar the use of Federal funds to subsidize discrimination."[2]

At the time of the arguments before the Supreme Court, the case put Grove

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1 David Lascell is a partner in the law firm of Harter Secrest & Emery LLP, Rochester, NY. He received his A.B. degree from Hamilton College and his LLB from Cornell Law School. He has an honorary Doctor of Laws degree from Grove City College. He is a fellow of the American College of Trial Lawyers, and a Life Member of the American Law Institute. In addition to practicing law, he has been chair of Commonfund, an investment firm for colleges and universities, chair of the Association of Governing Boards for college and university trustees, and chair of United Educators, an insurance company created for colleges and universities.

2 *See* Stuart Taylor Jr., *Court Case Yanks on the Whole Ball of Federal-Aid Strings*, N.Y. Times, Sept. 23, 1983, § 4, at 5 (emphasis added).

City College on the front pages of national newspapers, as the lead story on major networks' evening news programs, and as the subject of countless editorials, newspaper and magazine columns, and talk show discussions.

The case began in 1976, when the College received an "Assurance of Compliance" with Title IX of the Education Amendments of 1972 from the federal government's Department of Health, Education and Welfare (the relevant part of which is now the Department of Education). Title IX forbade schools that received federal financial assistance from discriminating based on gender, which Grove City College did not do. It had been coeducational since its founding in 1869. Half its students and many of its faculty were women. The College believed in and practiced a policy of non-discrimination.

The Assurance of Compliance, at that time, required more than just a pledge of non-discrimination, however. More significantly, it required an agreement by the College to abide by all federal regulations, of whatever kind, as they existed in 1976 and forevermore.

The College decided that the federal government asked too much. How would this private college remain efficient and cost effective in the face of significant federal regulation? After all, chair of the board at that time said, there is "no such thing as a little bureaucratic control." The College had never been a direct recipient of federal financial assistance – federal dollars supporting the institution. Federal financial assistance was the lynchpin of federal regulation and without it, no connection between the College and the federal government existed, and no regulation under the terms of Title IX could occur.

The College itself received no direct federal funding in 1976, or ever. A few of its students, however, participated in the Stafford Federal Loan Program, today called Pell Grants. The College was not itself directly involved in those programs. It merely confirmed the participant's status as a student, the same as it did for several private grant or loan programs. It did not administer the programs

in any way, and the government funds went directly to the students. The College declined to sign the "Assurance," and the contest began. From the College's position, the case was about an important principle: refusal to agree to federal entanglement and regulation and not about any intent on the part of the College to allow discrimination.

However, in a 6-3 decision, the College lost its appeal in the United States Supreme Court. The College took comfort in the language of Justice Powell's concurring opinion:

> "[T]he [government] has prevailed, having taken this small independent College, which it acknowledges has engaged in no discrimination whatever, through six years of litigation with the full weight of the Federal Government opposing it. . . .[3] 'It should also be noted that there was *not the slightest hint of any failure to comply with Title IX*, save the refusal to submit an executed assurance of compliance with Title IX. This refusal was obviously a matter of conscience and belief.'"[4]

The Supreme Court determined that by having enrolled students who received Pell Grants, the College was an indirect recipient of federal financial assistance, and thus subject to federal regulation. Not all commentators thought the College had lost, however. According to the Court's decision, only the financial aid/admissions office was subject to federal regulation, not the entire College. The *program* receiving federal assistance was subject to regulation, not the entire institution. To the College, however, that was enough. Tellingly, Congress passed a law four years later, the so-called "Civil Rights Restoration Act of 1988", that expanded the Court's decision and made the entire College subject to federal regulation if a single dollar of federal aid made its way into any part of the College's

3 *Grove City College v. Bell*, 465 U.S. 555, 579 (1984).
4 *Id.* at 578 (citing holding of Administrative Law Judge below).

coffers.

How did the College react to the Court's ruling? Using the roadmap provided by the Court's opinion, the College withdrew immediately from the Pell Grant Program, and in 1996 from the Stafford Federal Loan Program, substituting its own grant and loan programs funded by monies the College raised privately. That remains the status today. The College takes no federal funding, either directly or indirectly, using its own privately funded loan and scholarship programs instead. Although the College's course of action means fewer options for Grove City College students, the important principle of "no federal monies" remains intact.

Turning to the second part of the analysis of the case, how do the rules established by the Court's decision affect the current activities of the College? Does refusing to accept federal funding hurt the College's competitive profile? What effect does the College's stance suggest for its future?

The College is committed to careful management that will not allow uncontrolled costs to determine its future, attempting to keep student costs "affordable." In the upcoming academic year, Grove City College student costs will total approximately $20,000 for tuition, fees, and room and board, with a laptop computer and printer included. This moderate price tag is understandable given the college's mission: to provide a quality, rigorous education at an affordable cost in a thoroughly Christian atmosphere.

The College made a courageous and dramatic choice when it refused to execute the Assurance of Compliance in 1976. The College reaffirmed its decision when it withdrew from the Pell Grant Program and the Stafford Federal Student Loan Program after the Supreme Court decision in 1984 and the "Civil Rights Restoration Act" in 1988. Nevertheless, the College's choices and its sensitive relationship with the federal government have created some difficulties. These include the unavailability of Pell Grants or Federal Stafford loans for Grove City College students, limitations on available federal internships for students, prohibiting them

from getting academic credit while working at the White House or a federal agency, and inhibited faculty from seeking federal research grants. Moreover, increases in government interference with the private sector raise additional areas of concern, *e.g.*, use of governmentally funded research materials or tools. Independence has a very high cost that private funding has to offset if the College is to succeed in the very competitive higher education marketplace.

Consider how deeply this issue intrudes into the life of the College, how it effects the College even in unexpected ways. Only last year, a student production of *La Bête* was judged to be among the best performed student plays in the country, alongside productions from the University of North Carolina at Chapel Hill, the University of Texas at Austin and the University of California, Berkeley. The cast was invited, all expenses paid, to perform the work at the Kennedy Center. The problem the College found was that the Department of Education was underwriting the trip paying all the costs. The College successfully found alternative funding, with cooperation from Kennedy Center administration, but this example shows just how far reaching the tentacles of the federal government can be.

Another example: the College once had a very well respected ROTC program. Because of the College's stance, the ROTC program was discontinued, much to the disappointment of the Department of the Army as well as to those students interested in the program who must now travel to Slippery Rock University to participate. Moreover, what of the veterans who wish to bring government benefits to the College, but cannot do so?

The current academic world, especially at first-class teaching institutions, encourages student and faculty research. Much (even most) of that research is funded with federal dollars, either directly or indirectly. Grove City College students are among those most qualified to perform challenging internships and conduct outstanding student and faculty research, however, their opportunities are limited without additional funding.

You can sense where I am going with this analysis. Because of the College's stand after the Supreme Court case, it is playing with one hand tied behind its back, a consequence it expected because of the position it took. The College is well known and highly regarded for its principled stand, but this College must work to replace, each year, what most institutions receive annually from the federal government in student aid, research grants, or federal contracts.

The College cut itself off from the largest single source of funding in terms of assisting individual students to pay tuition, supporting students and faculty doing research, and even in drama competitions. Making up this deficit requires substantial effort, which is not easy in any economic environment, and is particularly difficult in this current one. Remember also, this College is almost alone in this independence effort in American higher education by choice and principle, so there is little empathy for the College's position from funders or federal agencies. This issue is not one for which the College can expect a broad base of support.

To thrive over the coming decades, the College and its supporters will need to find alternative sources of funds. For the College, that will require significant effort by its leaders, and substantial help from outside the College community. Like so many very worthwhile principles, freedom and independence come with a high cost.

Editor's Note: The College's independence may once again be put to the test – this time more severely – by certain movements afoot in Washington. As these threats become more imminent, we will address them in later issues of the *Journal*.

REFORMING THE REFORM AGENDA:

CRISIS AT THE WTO

DANIEL HANSON[1]

The World Trade Organization (WTO) was originally conceived by its architects to serve as an essential plank of globalization by promoting non-discrimination, free trade, transparency, and assistance to developing nations.[2] While the WTO's processes are incomplete, they have provided a quay on which to anchor the global trade system; by providing large degrees of predictability and stability in interstate relations, the world has grown more interconnected, more productive, and more equitable. Indeed, the World Bank estimates that by 2015 more than one billion people will have been moved out of absolute poverty thanks to the gains of the modern global trade system.[3]

The prospects for world trade agreements in the next decade are troubling, however. In the high stakes game of the international political economy, the system is still thoroughly Westphalian.[4] Employing ever-expanding trade agreements as a way to open markets and settle disputes will inevitably lead to stalemates,

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1 Daniel Hanson is a junior majoring in Political Science, Economics, and Philosophy. He has researched for various public policy think tanks, including, most recently, the Carnegie Endowment for International Peace. In his time at Grove City, his reearch has been featured in academic publications and at academic conferences.

2 BERNARD HOEKMAN, AADITYA MATTOO, AND PHILIP ENGLISH, DEVELOPMENT, TRADE, AND THE WTO: A HANDBOOK (2002).

3 RICHARD NEWFARMER, GLOBAL ECONOMIC PROSPECTS 2007: MANAGING THE NEXT WAVE OF GLOBALIZATION (2007).

4 DAVID P. FORSYTHE, HUMAN RIGHTS IN INTERNATIONAL RELATIONS (2006).

bias, and dissatisfaction. To a troubling extent, the WTO is an antiquated system limping along upon the gains of its predecessor, the General Agreement on Tariffs and Trade (GATT).[5] With the Doha Development Agenda, commonly known as the Doha Round, languishing in perpetual gridlock, one is left to wonder what the future of the international trade system holds.

The heart of this issue is divided. While the desire to foster camaraderie among nations and cast out the demons of poverty in the developing world are key concepts in the current international political climate,[6] Schumpeter's gale of creative destruction is painful[7] and practicality acutely reminds leaders that outsourcing and retrofitting are costly, unpopular, and electorally unwise.[8] For nations to move forward, the liberalization of trade will happen along bilateral and regional lines; the age of so-called "pluri-lateral" agreements has proven ineffective. Lip service to the good of global integration has been followed by a web of confusing international regulations that inhibit virtually every facet of the global economy.[9]

AN ENGINE OF GLOBALIZATION

The current system of trade disciplines has proven widely effective at underpinning international economic relations by promoting free and open markets. The system, embodied in the WTO, was crafted through a series of eight multilateral trade negations (MTN), culminating with the Uruguay Round in 1995. Since its inception, the WTO has sought to make negotiations more transparent while bringing developing countries along in the process. The measurable gains of the WTO as a driver of global integration stand out in four areas.

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5 Gary Clyde Hufbauer, Jeffrey J. Schott, and Woan Foong Wong, *Figuring Out the Doha Round*, (Peter G. Peterson Institute for International Economics Working Paper, 2009).

6 THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS (2008).

7 JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1962).

8 Stanley D. Nollen and Harvey J. Iglarsh, *Explanations of Protectionism in International Trade Votes*, 66 PUBLIC CHOICE (1990).

9 THE WORLD TRADE ORGANIZATION, THE WORLD TRADE REPORT 2008 (2008).

First, new countries have been shepherded into the modern financial system. Twenty-five countries have joined since the signing of the agreement, bringing the total to over 150 members. China's accession to the WTO provided access to one of the world's largest and fastest growing markets that, with 9 percent of world imports, is soon expected to be the largest trading nation.[10] China's membership helped to construct a framework that not only liberalized its own trade, but helped to reshape the global economy along market lines. Three more recent additions – Saudi Arabia, Vietnam, and the Ukraine – each account for more than 0.5 percent of world trade. Additionally, due to the requirements of Article XII, new member nations have largely assumed higher burdens with respect to balance of payment considerations than most of their counterparts.[11]

Secondly, under the General Agreement on Trade in Services (GATS), substantial economic gains have been realized in several important fields. Telecommunications, financial services, and other infrastructure projects have been the focus of many economically significant agreements among a plurality of WTO members.[12] The gains realized from these projects are underestimated; stable infrastructure helps to promote economic growth in many areas.

Thirdly, the WTO has provided effective boundaries to tariff, subsidy, and non-tariff barrier increases. Nations, using the WTO's Dispute Settlement System, have frequently utilized successful arbitration to resolve disagreements. Of the roughly 370 disputes that have been filed, only 84 rulings have been appealed, and most disputes have been settled by the parties in question amiably outside of the formal process.[13] Increasingly, emerging markets have resorted to using the system to leverage their power to protect against exploitation from the developed

10 Data from *Global Trade, Assistance, and Production: The GTAP 8 Database*, (2009).

10 HOEKMAN, *supra* note 1.

12 Horace A. Bartilow and D. Steven Voss, *Market Rules: The Incidental Relationship Between Democratic Compatibility and International Commerce*, 53 INTER. STUD. QUART. (2009).

13 WORLD TRADE ORGANIZATION, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHALLENGES IN THE NEW MILLENNIUM (2004).

world; those emerging markets have been active in 80 percent of all cases.[14] Genuine legal disagreements do exist, but even when the rulings have been against the largest trading nations, most disputes have been settled cordially with compliance or appropriately stated intentions to comply, as in the case of Norway's salmon dispute with the European Union (EU) or Brazil's cotton case against the United States.

Finally, thanks to incessant prodding by Director-General Pascal Lamy, the Aid for Trade initiative, which includes much technical help for the poorest countries, has become a driver of wealth creation in several development agencies.[15] Born out of a resolution at the Hong Kong meeting of finance ministers in 2005, this program has given the WTO a monitoring role in helping to develop infrastructure within emerging nations. By assisting poor nations in the development of their technological capabilities and expansion of their trade capacity, developed countries are realizing more gains to global trade while helping to pull their developing counterparts out of poverty.

These indubitable successes have helped cement the role of the WTO as the engine driving globalization on the level of trade and poverty alleviation. Without the WTO, many of these gains may not have been realized on a nearly comparable scale, since the aforementioned gains were shepherded along in WTO programs. Even in the midst of a global financial crisis, the G20 leaders turned to the WTO Secretariat to help monitor the sharp rise in protectionist measures, provide advice, and stymie the tide of isolationism.

The financial crisis has also underscored the inadequacy of the WTO disciplinary actions in areas ranging from agricultural policy to industrial tariffs and from access to natural resources to antidumping practices to government procure-

14 Self Calculations based on Ibbotson Data. This calculation is a simple percentage based on the number of cases in which an emerging market nation has been present as an official party in a WTO dispute.

15 Personal Interview with Uri Dadush (June 2009).

ment. The recent resurgence of "Buy American" campaigns has highlighted, for example, the shortfalls of a government procurement agreement that does not include Brazil, Russia, India, or China. Leaving these so-called BRIC countries, who have large and fast-growing economies, off the agreement meant that they held no obligations under the treaty, but also no recourse against discriminatory trade practices. The raising of steel tariffs in the EU with facility to combat Chinese antidumping concerns and the analogous move on various products in India illustrates the weaknesses of the antidumping provisions and shows the large disparity between bound and actual tariffs in most developing countries.[16]

The financial crisis has also exposed the dangers of stalling the moves towards WTO extensions in illiberal markets.[17] Here, pressing concerns linger; among others, chief issues include the huge agenda of codifying and opening trade in general services, lowering actual and bound tariffs in developing countries, creating bilateral trade preferences between lower developed countries, and reforming agricultural protections in both industrial and emerging markets.[18]

MINIMAL GAINS AT MAXIMUM COST

Over the past three decades, world trade has boomed, tariffs have plummeted to a fraction of their previous medians, and the GATT/WTO system has acted as a backstop against recidivism in these areas.[19] The interesting observation, however, is that during the fifteen years of the WTO's existence, trade liberalization has taken place in virtually every administrative capital except Geneva. While hundreds of new regional agreements have been signed and unilateral and bilateral tariff cuts have characterized the liberalization, the multi and plurilateral approach

16 Uri Dadush, *WTO Reform: The Time to Start is Now*, 80 CARNEGIE POLICY BRIEF (2009).

17 CHAD P. BROWN AND RACHEL MCCULLOCH, DEVELOPING COUNTRIES, DISPUTE SETTLEMENT, AND ADVISORY POSITIONS ON WTO LAW (2009).

18 ALEJANDRO FOXLEY AND DANIEL HANSON, RECOVERY: THE GLOBAL FINANCIAL CRISIS AND MIDDLE-INCOME COUNTRIES (2009).

19 Eswar Prasad, *Protectionism Exposed*, (Brookings, Working Paper 2009).

has spun its wheels. The last general multilateral accord was signed at the Marrakesh Ministerial in 1994.[20] A recent analysis by the World Bank indicates that, since 1995, the reduction in applied tariffs on goods is attributable predominantly – to the tune of 65 percent – to autonomous reductions, followed distantly by the Uruguay Round at 25 percent and then regional agreements at 10 percent.[21] Essentially, no significant gains in liberalization over the trade of goods or reductions in bound tariffs have come from multilateral accords since the WTO's inception.[22]

Indeed, a review of the eight rounds of MTNs suggests that as a general trend each round takes longer and yields less per month than the preceding round. The first round, held in Geneva in 1947, included twenty-three participants and concluded in less than a year.[23] The reduction in bound tariffs as a result of this meeting was 26 percent from excessively high levels.[24] Uruguay, by contrast, ran from 1986 to 1994 and included 123 members,[25] yet the reduction in bound tariff rates was only 38 percent from significantly lower initial levels.[26] The languishing ninth round, Doha, involves more than 150 countries, and as it spirals into its ninth year, there is no realistic end in sight.

Various explanations have attempted to account for why successive rounds are increasingly difficult and increasingly ineffective. In particular, solutions to the stagnant Doha round are the topic de jure in ministerial meetings. Among the compelling explanations are the increased sensitivity of the issues, the growing diversity among players' interests, the increased assertiveness of emerging markets,

20 REPORT OF THE FIRST WARWICK COMMISSION, THE MULTILATERAL REGIME: WHICH WAY FORWARD? (2007).

21 WORLD TRADE DIVISION, WORLD BANK, INCIDENCE OF TARIFFS IN WTO MEMBERS' TARIFF SCHEDULES AND POSSIBLE APPROACHES TO THE ESTIMATION OF REDUCTION EQUIVALENTS (2008).

22 SUPACHAI PANITCHPAKDI AND PETER SUTHERLAND, THE FUTURE OF THE WTO: ADDRESSING INSTITUTIONAL CHANGES IN THE NEW MILLENNIUM, Report to the Director of the Consultative Board, WTO, (2004).

23 WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO (2009).

24 Self-Calculations based on GTAP data. See note 8.

25 WORLD TRADE ORGANIZATION, *supra* note 22.

26 Self-Calculations based on GTAP data. See note 8.

the growth of regional blocks, the complexity of behind-the-border trade-offs in service regulations, and the instability of reserve currencies.[27] Against this backdrop, finance ministers meet to search for a unanimous consensus on a single, non-optional undertaking. The result is that all progress has come around extremely low common denominators, and private sector players, realizing the effort-to-results ratio is quite low, have failed to show up in support of any particular policy. The politically costly but pragmatically vapid concessions required from larger countries like the United States, India, and Russia have also contributed to the mess.[28]

While commentators argue that concluding the Doha Round successfully is crucial to enshrining the credibility of the WTO, it is nearly impossible to escape the conclusion that the process is obfuscating growing dissatisfaction with the current system. Doha, largely touted as a "development round", has progressively whittled down its estimates of possible annual development gains from $100 billion at the outset to less than $20 billion now.[29] This figure, roughly on par with the cost of bailing out a medium-sized US bank, comes with strings attached; the binding commitments are politically costly and the real gains are virtually inconsequential.

By contrast, if a country is able to deploy 10% of GDP – and more than 80 developing countries of the world do – through the current system in a way that yields an extra 5% above historical central sovereign trade investments, the gain is 0.5% of GDP in free capital to meet national priorities.[30] In clearer terms, the

27 William Shaw, Uri Dadush, and Richard Newfarmer, *Global Economic Prospects 2005: Trade, Regionalism, and Development* (2005).

28 Will Martin and Patrick Messerlin, *Why is it so difficult? Trade Liberalization Under the Doha Agenda*, 23 OXFORD REVIEW OF ECONOMIC POLICY (2007).

29 WORLD TRADE ORGANIZATION, DOHA DEVELOPMENT AGENDA: NEGOTIATIONS, IMPLEMENTATION, AND DEVELOPMENT (2010).

30 Daniel Hanson, *Competition, Cooperation, and Capitalism: An Analysis of Emerging Sovereign Wealth Management*, (2010). (Paper Presented at the Annual Meeting of the Eastern Economic Association).

121 developing countries, as classified by the International Monetary Fund, with excess reserves earn more than $100 billion in excess profit per year above the standard investment scheme of central reserve managers. This amount is small relative to the global economy, but large relative to developing nations. It is 1% of the GDP of this block of countries; it is greater than the developed world's yearly financial assistance to Africa.[31] Additionally, it is a number that has grown at 24% per year since 2001 without costly political ramifications.[32]

The Road Forward

Little agreement about how the process should move forward exists, but the facts present several attractive options that will help sustain growth in the global economy and revive the trend of global economic integration. First, it is necessary to recognize that a problem exists. Negotiations that deal with salient problems cannot begin until Doha ends; as a result, Doha must necessarily be brought to a swift conclusion. Preferably, the outcome would indicate wide support for unilateral, bilateral, and regional trade agreements to buttress the WTO's agenda.[33]

Second, the WTO must recognize that it can no longer afford to be a bastion of isolation in a turbulent sea of evolving trade relations. The single-minded focus on multilateral concessions based on consensus is bearing diseased fruit, and actual liberalization is not taking place. The WTO allows participation from groups of nations – like the EU – while refusing to officially recognize officially the de facto economic influence of other trade blocks, like the Association of Southeast Asian Nations (ASEAN), the North America Free Trade Agreement (NAFTA), or the Southern Common Market (MERCOSUR), despite the obvious economic importance of their input. The WTO can help to foster wide gains in

31 Lawrence Summers, *Opportunities in an Era of Large and Growing Official Wealth, in* Sovereign Wealth Management (Malan Rietveld, ed.,2009).

32 Hanson, *supra* note 29.

33 Aaditya Mattoo and Arvind Subramanian, *From Doha to the Next Bretton Woods: A New Multilateral Trade Agenda*, Foreign Affairs (January/February, 2009).

line with their own objectives by embracing the contributions of these blocks and pushing for reform along similar lines.[34]

Contrary to the prevailing mercantilist rhetoric of international trade negotiations, experience and theory both dictate that the gains to countries that autonomously liberalize far outstrip the costs of liberalization. The WTO can help countries move towards autonomous liberalization by exploiting its Trade Policy Review mechanism to reveal the inefficiencies inherent in the status quo. The instrument is a powerful diagnostic tool, and it has the potential to provide ongoing dialogue for trade reform to the international community.[35]

Plurilateral agreements are politically popular in theory, but damning in practice, as they are always condemned for discrimination, preemption, or inefficiency. The alternatives appear to be worse at first glance, as no one desires a litany of vacuous trade deals that paralyze progress. The reality is that small and poor nations are increasingly finding themselves empowered by latching on to highly specific or localized trade disciplines.

While research has shown that many regional agreements are badly designed and poorly implemented,[36] it has also shown that many – including the EU, the North and Central American Free Trade Agreements (NAFTA and CAFTA, respectively), the Pan-Arab Free Trade Area, the Gulf Cooperation Council, and the Southern Africa Customs Union – have been wildly successful at curtailing protectionism, removing barriers, increasing certainty of openness, and creating genuine trade increases. Regional agreements are more flexible, and consequently, they find themselves better able to deal with behind-the-border impediments to trade. Such agreements are further able to experiment with new ideas and adopt more broad-reaching policies. Most of the business world has begun to view re-

34 Dadush, *supra* note 15.

35 BERNARD M. HOEKMAN AND MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: THE WTO AND BEYOND (2001).

36 Jose Daniel Rodríguez-Delgado, *SAFTA: Living in a World of Regional Trade Agreements*, (IMF, Working Paper 2007).

gional organizations as the new way forward in expanding trade opportunities, but the WTO has continued to see these agreements as a threat.[37]

The WTO holds clout in international circles and fosters tremendous research; both of these tools can be of immense help to the growth of regional agreements. A large body of literature confirms that welfare-enhancing regional agreements utilize low external tariffs, simplified rules of origin, and coverage of all forms of trade, yet many regional agreements still lack one or more of these characteristics. By helping craft agreements that contain these elements – as well as efficient enforcement mechanisms – the WTO can help to foster the accession of poorer countries that have historically been excluded from the benefits of trade. While the long-term goal in this respect should be establishing effective rules and guidelines for the governance of regional agreements, constructive engagement of these processes is a prerequisite for any glimpse of that goal.

Finally, the WTO must explore new avenues in which to be effective. In the chief areas of concern to the international community, such as food and water security,[38] the trade aspects of climate change,[39] illicit weapons trade,[40] capital flows in the aftermath of the current recession,[41] and so forth, the WTO is nowhere to be found. With respect to multilateralizing the principles of the cosmopolitan system, such as most-favored nation status and nondiscrimination, the WTO has failed to realize these exist only in the realm of ideals. A good way not to bring about a global consensus on their pragmatic implications is to have a big, compre-

37 Dadush, *supra* note 15.

38 Daniel Hanson, *Water Scarcity, Hydropolitical Conflict, and the Emerging World*, INTER. CONCILIATION (2009).

39 William Shaw and Uri Dadush, *Global Governance and the Developing Countries*, (forthcoming).

40 Judith Large, *Democracy and Trade: The Impact of the Anti-Terror Agenda*, (IDEAS Centre, Working Paper 2010).

41 Hui Tong and Shang-Jin Wei, *The Composition Matters: Capital Inflows and Liquidity Crunch During a Global Economic Crisis*, (2009). (Paper Presented at the Federal Reserve Bank of Dallas).

hensive trade ministerial.

The smaller multilateral gains the WTO can realize could come by codifying some common themes in regional agreements. A new push might focus on, say, eliminating all tariffs under 3 percent, adopting a unified code for rules of origin, or banning export subsidies in agriculture.[42] Most of these changes could be enacted by formalizing the consensus opinion, and perhaps more importantly, they could happen without a showy international meeting. While such a move would require significant engagements from finance ministers, it would also be much more low-key, and thus be more politically viable and yield a larger economic impact.[43]

This precursory outline for WTO reform is intentionally sparse, for it focuses on reforms needed to remove the crippling blockages to the WTO's mission. A comprehensive treatment would include considering reforms of things the WTO does relatively well, like streamlining the dispute settlement process, rebalancing the accession requirements, and expanding its research functions. Ultimately, these are issues where improvement leads to minimal gains; improvement in other areas will reenergize a stagnating global trade regime.

42 Dadush, *supra* note 15.
43 Martin, *supra* note 27.

WHOSE CHURCH IS THIS?

CHURCH PROPERTY DISPUTES AND THE CIVIL COURTS

DR. JOHN A. SPARKS[1]

I. INTRODUCTION

Current well-publicized disputes over church property bring to the fore many questions about the legal relationship between Christian denominations, individual church congregations, and the state. Therefore, this question ought to be explored: should ecclesiastical disputes be resolved by civil law courts or at the very least, what part should civil courts play in their resolution?

Disputes over church property, beginning in the Civil War era and continuing to the present, often arise because a particular denomination and the individual churches affiliated with that denomination find themselves differing over particular doctrinal matters. Earlier in Christian history, these disputes arose over the issue of slavery. More recently differences over women's ordination, changes in liturgy, the teaching of neo-orthodoxy, various pronouncements made by denominations about social and economic issues, the blessing of same-sex unions, and the ordination of homosexuals have been the cause of strife. The more

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recent "social issue" disputes led Diane Knippers, President of the Institute on Religion and Democracy, to say that we would probably "see a spate of property disputes."[2]

The lawsuits making their way through the courts of Virginia are typical of the pattern of modern schisms. Briefly put, certain Episcopal churches in several Virginia counties disagreed, among other things, with the ordination of Gene Robinson as Bishop of New Hampshire for the Episcopal Church, also known as the Protestant Episcopal Church of the USA (ECUSA). Robinson is a self-proclaimed homosexual living with a same-sex partner. The local churches, by a congregational vote, opted to break their ties with the Diocese of Virginia and the ECUSA and voted to come under the church governance of bishops ordained by various African Anglican Churches in Nigeria. Over 200 other Episcopal churches have "relocated their spiritual guidance offshore...[to] Uganda, Kenya, Rwanda, Bolivia and Argentina . . ." in addition to Nigeria.[3] The local congregations and the denomination have filed many law suits as a result, both laying claim to the local church properties.

The Presbyterian and Methodist denominations have experienced the same division. Over the past thirty years, these denominational disputes produced a large number of state court decisions and several key U.S. Supreme Court decisions, together providing answers, though not entirely satisfying ones, to the question of church disputes and the role of civil courts in them.

This paper will set out the three key civil/legal approaches that have been used historically for settling such disputes, several illustrative cases, and a critique of how state courts have applied the three approaches to resolve disputes.

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2 Kathleen R. Rutledge, *So, Who Owns the Sanctuary?*, CHRISTIANITY TODAY 73, 73-74 (2004)

3 Andrew Higgins, *Divided Flock, Episcopal Church Dissidents Seek Authority Overseas*, THE WALL STREET JOURNAL, Sept. 20, 2007, at A1.

II. THREE APPROACHES TO CHURCH PROPERTY DISPUTES

Though complicated by the variety of fact patterns in each case and despite the complaint by commentators that courts applying the same legal tests have produced varied outcomes, the American civil law courts have followed three distinct approaches to resolving church property disputes. Lloyd Lunceford labeled them as (1) the "implied trust/departure from doctrine approach", (2) the "hierarchical/deference approach" and (3) the "neutral principles of law approach."[4]

A. The Implied Trust/Departure From Doctrine Approach

One approach that American Courts followed until the 1970s, and English courts still use to resolve church property disputes is to award the church property to that entity, either the local church or denomination, that has adhered with the greatest fidelity to the original doctrine, polity and practice of the founders. The case which is usually cited as announcing this method of resolution is an English case, *Craigdallie v. Aikman*. In that 1813 decision, Lord Eldon, who wrote the opinion, made use of the trust concept and the principles surrounding trust law to reach his conclusion. Lord Eldon stated that the church founders and original contributors intended the church to espouse certain beliefs or doctrines and to follow certain practices of church government and that their intentions created an implied trust that the church property be used to further those ends.[5] Therefore, under the *Craigdallie* doctrine, church property ought to be held in an implied trust "for the original principles of the church and should be awarded to those members who subscribed to those principles."[6]

This approach requires the civil courts to determine what the original

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4 A GUIDE TO CHURCH PROPERTY LAW 28 (Lloyd J. Lunceford ed., Reformation Press) (2006).

5 Craigdallie v. Ackman, (1813) 3 Eng. Rep. 606 (H.L.)

6 M.H. Ogilvie, *Church Property Disputes: Some Organizing Principles*, 42 UNIV. TORONTO L.J. 377, 382 (1992).

principles of the church were and then to assess which group of members (in the case of internal disputes) or which entity (in the case of disputes between the denomination and the local church) has more closely adhered to those original principles. This approach was used by English law courts in the rest of the 19th and on into the 20th centuries and according to Professor M.H. Ogilvie "remains today the predominant theory" in common law countries such as the United Kingdom and Canada.[7] Ogilvie points out that Parliamentary intervention and the language in the foundational documents allowing for changes in doctrine, practices, and polity of the church have sometimes modified the pure application of the *Craigdallie* doctrine.[8]

The most notable case in which *Craigdallie* was applied was *General Assembly of the Free Church of Scotland v. Overtoun*, decided in 1905. The case arose out of the merger of The Free Church of Scotland and the United Presbyterian Church in 1900 to form the United Free Church of Scotland. Approximately 30 small Highland congregations from The Free Church of Scotland, often referred to collectively as the "Wee Frees," strongly opposed the union and brought legal action in the civil law courts urging the courts to apply the *Craigdallie* doctrine. According to the dissenting churches, the new denomination resulting from the merger was departing from certain doctrinal principles long held by The Free Church of Scotland.

There were two main points of contention. First, the Wee Frees wanted to continue to maintain a substantial role for the civil magistrate as a preserver of the Church as set out in Chapter 23 of the Westminster Confession. Kenneth Ross points out that ". . . [T]he men who formed the Free Church [of Scotland] in 1843 believed that it was the duty of the State to establish the church."[9] So there was

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7 *Id.* at 381.

8 *Id.* at 384.

9 KENNETH R. ROSS, CHURCH AND CREED IN SCOTLAND, THE FREE CHURCH CASE 1900-1904 AND ITS ORIGINS 55 (Rutherford House Books) (1988).

an issue of establishment or disestablishment because the new merger contained churches what were "voluntarist"[10] that is, churches which were opposed to state established religion.

Second, the Wee Frees wanted to continue adherence to the doctrine of absolute double predestination as set out in chapter 3 of the Westminster Confession. Double predestination is the view that God predestines some to everlasting life and others to everlasting death.[11] The United Presbyterian Churches were viewed as Arminian on this issue.[12] The newly formed merger-church viewed neither doctrine—establishment or double predestination—as fundamental or obligatory.[13] Applying the *Craigdallie* doctrine, the Court in *Overtoun* found in favor of the Wee Frees because, in its judgment, those churches were continuing to hold to the original and essential principles of the denomination while the merger advocates were departing from it. All church properties, some 800 churches, plus three universities and considerable investments were *initially* awarded to the Wee Frees by the House of Lords.[14] Parliament, in response, created a commission under the Churches (Scotland) Act of 1905 which allocated the property between the opposing groups in a fairer and more equitable way.[15] Nevertheless, the *Craigdallie* doctrine, that is, the implied trust/departure from doctrine, was followed in the U.S. until 1871 when another approach was adopted by the Supreme Court in *Watson v. Jones*.

10 Ogilvie, *supra* note 6, at 383.
11 Ross, *supra* note 9, at 74.
12 Ogilvie, *supra* note 6, at 383.
13 *Id.* at 383-384.
14 *Id.* at 384.
15 *Id.*

B. The Hierarchical Deference Approach

The first of the two approaches constitutionally approved by the U.S. Supreme Court was discussed in *Watson v. Jones,* decided in 1871. The case arose as a result of a dispute between the Presbyterian Church in the United States (PCUS) and a local church. The issue was slavery and the support by Southern congregations of the Confederacy during the Civil War. A Louisville, Kentucky congregation, the Walnut Street Presbyterian Church, was affiliated with the Presbyterian Church in the United States, and under the Presbyterian form of government was a part of the presbytery of Louisville and, above that, to the Synod of Kentucky. During the Civil War and again at its conclusion, the General Assembly, the highest body of the PCUS, issued instructions to its presbyteries, missions boards and to the sessions (local boards of elders) of individual churches to require ministers, members, prospective members, and missionaries to repent and forsake as sin, any views they may have held in favor of the War of the Rebellion and in support of slavery. The Walnut Street Church split over whether to follow these instructions. Each of the two competing groups of members as well as the denomination disagreed over what should happen to the church property as a result of the breach. That led to several law suits, one of which found its way to the U.S. Supreme Court.

In its decision, the Court established as constitutionally acceptable a "deference approach" which was quite different from the "adherence to doctrine" approach of *Craigdallie*.

The Court first posited three possible sets of facts and what the judicial response should be to each one. The first two were viewed as *dicta* since the Court made pronouncements about facts not currently set before them. However, the *dicta* did help sort out certain likely fact patterns. The first hypothetical case was one in which there was an express dedication of church property in trust to be used to further a specified set of religious doctrines, e.g. Trinitarian worship and

teaching. According to Justice Miller, who wrote the opinion in *Watson*, the use of that entrusted property could not be diverted to a use contrary to the trustor's intentions such as the promulgation of a Unitarian view of God. The original trustor "has a right to expect that the law will prevent that property from being used. . ." in that way.[16] Presumably, this sort of case would be rare.

The second hypothetical case referred to by the Court in *Watson* is one where the church is independent, that is, congregational in form of government. Congregational government places the rule of the church in the local congregation. The congregation does not share decision-making with any higher body. Therefore, all disputes are intra-congregational disputes and must be settled by ordinary organizational principles such as majority vote of the congregants.[17]

The third type of case referred to by Justice Miller is the one presented by the actual facts of the case in *Watson*. The local church, Walnut Street Church, was part of a larger ecclesiastical organization. The denomination, sometimes referred to "the general church" by commentators, exercised control over all local churches affiliated with the denomination through its church judicatories. In *Watson*, the authority of the PCUS denomination extended through various levels to the Walnut Street Church; in other words, the structure of the PCUS was hierarchical. The Court stated that in disputes involving schisms within hierarchical churches, the civil courts must defer to the findings and determinations of the highest church tribunal.[18] The *Watson* court specifically rejected the *Craigdallie* doctrine indicating that in order for a civil court to determine competing groups' fidelity to religious

16 *Watson*, 80 U.S. at 723.

17 Note that besides congregational government there are usually two other kinds of church government: Episcopal and Presbyterian. Episcopal church government generally relies on the rule of bishops, the purest example being the Roman Catholic Church. Other examples of Episcopal government, but not as pure as the Roman Catholic model, are Anglican, Episcopal, and Methodist churches. Presbyterian government is connective. The local churches are joined together through higher bodies such as presbyteries, synods and general assemblies. These are sometimes called higher judicatories.

18 *Id.* at 727.

doctrines, the court would be in a position of working in areas and with religious doctrines that were largely outside of its realm of expertise.[19] The *Watson* Court did not refer specifically to the limitations imposed by the First Amendment since the Fourteenth Amendment had not applied the First Amendment to the states at this point in time.[20]

The *Watson* decision rested upon what might be called the Court's own prudence as to what it was equipped to decide. Nevertheless, it effectively redirected American courts toward deference when it came to ecclesiastical disputes and their implications for church property cases. It should be noted that in its opinion on another case, *Kedroff v. St. Nicholas Cathedral* in 1952, the U.S. Supreme Court held that the First Amendment required a *Watson*-like deference to the ecclesiastical authorities in church disputes. The dispute was one over the use of St. Nicholas Cathedral in New York City. The Court decided that a specially enacted New York religious corporation law could not constitutionally be allowed to determine the dispute between the American Russian Orthodox Church and the Moscow-based Supreme Church Authority of the Russian Orthodox Church. As the Court concluded, finding in favor of the Moscow administration, "Even in those cases when the property right follows as an incident from decisions of the church custom or law or ecclesiastical issues, *the church rule controls*. This under our Constitution necessarily follows in order that there may be free exercise of religion."[21]

Despite *Watson* and *Kedroff*, some U.S. state courts continued to use the departure from doctrine approach of *Craigdallie* well into the 1960s; this is clear given the next important Supreme Court decision on the subject of church/ denominational disputes - *Presbyterian Church v. Hull Church*. This 1969 case came to the Supreme Court on appeal from the Supreme Court of Georgia and

19 *Id.*
20 *Id.* at 729.
21 Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 121 (1952) (emphasis added).

involved two Georgia Presbyterian churches whose members voted to leave the PCUS.

The issues were many and varied and included the denomination's ordaining of women as ministers and elders, giving support to the removal of Bible reading from the public schools, teaching of neo-orthodoxy, and insistence that member churches remain in the National Council of Churches.[22] The Georgia trial court applied the "departure from doctrine" approach and found in favor of the local church; the Georgia Supreme Court affirmed. The U.S. Supreme Court reversed their decision, stating that "the First Amendment severely circumscribes the role that the civil courts may play in resolving church property disputes."[23] Moreover, the Court, Justice Brennan writing, proscribed the "departure from doctrine" portion of the implied trust approach to such disputes, saying that such a theory "can play no role in any future judicial proceedings."[24] By so doing, the Supreme Court marked the end of the *Craigdallie* doctrine, branding it as unconstitutional.

Brennan objected to the application of the *Craigdallie* doctrine because it would require the courts to determine whether a claimed departure from doctrine was substantial and, secondly, require the courts to assess its importance to the church's theology.[25] Such a determination by the courts, according to Brennan, injects the civil courts into matters of religion which they are not allowed to interpret and assess according to the establishment clause of the First Amendment.[26] Brennan wrote: "Civil courts do not inhibit free exercise of religion merely by opening their doors to disputes involving church property. And there are *neutral principles of law*, developed for use in all property disputes, which can be applied

22 Presbyterian Church v. Hull Church, 393 U.S. 440, 452 (1969)
23 *Id.* at 449.
24 *Id.* at 450.
25 *Id.*
26 *Presbyterian Church*, 393 U.S. at 450.

without 'establishing' churches to which property is awarded."[27] In so holding, Brennan gave life to what became the "neutral principles of law" approach that was subsequently applied by state courts when presented with such cases. In a subsequent case, *Jones v. Wolf*, the Court further elaborated the "neutral principles" theory.

C. *Neutral Principles of Law and* Jones v. Wolf

In 1973, a Georgia Presbyterian church, Vineville Presbyterian Church, decided to separate from the PCUS following a vote of its membership (164-94).[28] The majority of members then joined the Presbyterian Church in America (PCA).[29] The presbytery in which the Vineville Church had resided appointed a commission which found that the minority members were the true congregation of the Vineville Church.[30] The Court, Mr. Justice Blackman writing, referring to an earlier opinion from *Maryland and Virginia Churches* stated that individual states might use "one of various approaches for settling church property disputes so long as [the approach] involves no consideration of doctrinal matters...."[31] The two approaches to which the Court was referring were the "deference to religious authority" approach of *Watson* and the "neutral principles of law" approach.

In *Jones v. Wolf*, the Court outlined the advantages of the latter approach as relying exclusively on "well-established concepts of trust and property law familiar to lawyers and judges" and "flexibility in ordering private rights and obligations to reflect the intentions of the parties."[32] In using the "neutral principles" approach, the courts are to carefully scrutinize the "language of deeds, the terms of the

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27 *Id.* at 449. (emphasis added)
28 Jones v. Wolf, 443 U.S. 595, 598 (1979).
29 *Id.*
30 *Id.*
31 *Id.* at 603. (citing Maryland & Virginia Eldership v. Sharpsburg Church, 396 U.S. 367, 368 (1970).).
32 *Jones*, 443 U.S. at 603.

local church charters, state statutes governing the holding of church property, and the provisions in the constitution of the general church concerning ownership and control of property."[33] The Court went on to emphasize that the outcome of the case using the neutral principles of law approach "is not foreordained."[34] However, the Court maintained that ownership documents can be changed anytime before a dispute arises[35] and that states, churches and individuals should "structure their relationships involving church property so as not to require the civil courts to resolve ecclesiastical questions."[36] This does appear to require the agreement of "the parties"[37] and thus raises question about a trust proviso in favor of the denomination which is simply unilaterally adopted by the general church without the consent of the local congregation.

III. A BRIEF CRITICAL CONSIDERATION OF EACH APPROACH

A. Implied Trust/Departure From Doctrine Considered

The U.S. Supreme Court has regarded the "departure from doctrine" approach as an unconstitutional violation of the proscriptions in the First Amendment against the Establishment of Religion. The Court took the position that if it is asked to look at doctrinal deviance or fidelity of two religious entities (denomination vs. local church or one faction vs. another in a congregational church) it is, in effect, putting its imprimatur upon certain religious views and therefore, establishing one form of religion over another. Such a stance comes very close to hyper-separationism. Basically, a court would need to identify the traditional creedal principles of a denomination and of its constituent churches and determine which entity was closer to those creedal principles. This type of

33 *Id.*
34 *Id.* at 606.
35 *Id.*
36 *Id.* at 604. (citing Presbyterian Church v. Hull Church, 393 U.S. 440, 449 (1969).)
37 *Jones*, 443 U.S. at 605.

determination is not foreign to courts. They often look at the traditional intent of framers of constitutional provisions or amendments, at legislative intent, at the main purposes and principles of drafters of contracts, wills and trusts.

Let us say, for example, that a hypothetical denomination "X" is founded and endorses three creedal distinctives—Scriptural inerrancy, the centrality of Christ's substitutionary death, and a Trinitarian view of the godhead. Could not a court easily identify those doctrinal commitments by looking at creeds, doctrinal statements and historical minutes of the denomination? Once it had made that finding, it would then have to decide whether a denomination had departed from its basic principles. A court that declares that denomination "X" first adhered to three distinctives then departed from them has not endorsed the doctrines of that church. It has embraced, perhaps implicitly, a view that "doctrinal continuity is the essential characteristic of a church" and that doctrinal innovation is not.[38]

Imagine yet another set of facts in which denomination "Y" composed of "free thinkers" was founded on three core dogmas: the Scriptures are a wise guide, Christ is an exemplary teacher and speaker of prudent advice, and a Unitarian view of the godhead. Suppose now, that denomination "Y" through its governing bodies, seeks to move away from those initial distinctives toward a higher view of Scripture, Christ as a Savior and the godhead as three in one. Suppose a local church of the "Y" denomination, wanting to remain true to the founding ideals of the denomination, breaks off from it and wants to maintain its local church property. The court would be required, if it were to apply the departure from doctrine approach, to determine the founding principles of the denomination and whether the denomination or the local protesting churches had moved away from the foundations of the general church. In neither case would a court, by applying the "departure from doctrine" approach, be establishing one set of doctrines over

38 Note, *Judicial Intervention in Disputes Over the Use of Church Property*, 75 HARV. L. REV. 1142, 1147 (1962).

the other. It would be recognizing that doctrines which were held earlier.

Admittedly, there are problems to be faced with the "departure from doctrine" approach. What departures are "fundamental" and what changes are "immaterial"?[39] Here, once again, judging materiality, or what things really matter, is not foreign to judicial determinations. The question is not whether the court thinks an issue is important but whether or not *at the denomination's founding* it was deemed important. To the Covenanters, exclusive psalmody is a distinctive and therefore, material. To a Pentecostal Holiness church, a second baptism with the Holy Spirit is essential and central. The court need not become entangled in what one commentator has called the "unfathomable vagaries" or "theological abstruseness" of the issues[40] to be able to determine the essential principles of the denomination at founding and whether they still remain intact.

A variety of means are available to courts to help them determine this question. Does the church require certain core beliefs for membership? The answers to this question and other simple questions could provide clues as to what the church regards as important basic beliefs. Are there well-established features of the denomination recognized by church historians? For example, Baptists usually insist upon congregational government and believers' baptism. Presbyterians have presbyterian government and infant baptism. Departures from these commonly recognized characteristics could help the court decide the outcome of a dispute.

Nevertheless, the U.S. Supreme Court has effectively eliminated the application of the "departure from doctrine" approach by state or federal courts because of its strict construction of the First Amendment.

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39 *Id.* at 1148.

40 *Id.*

B. The Hierarchical Deference Approach Considered

The hierarchical deference approach requires the civil courts to defer to the highest ecclesiastical authority in a church where there is hierarchical authority. In hierarchical forms of organization, such as the Episcopal and Presbyterian churches, a local congregation is not entirely free to act on its own and must subject itself to the scrutiny of higher entities—presbyteries, synods, general assemblies, diocese, bishops, conferences of bishops. If a local congregation or parish wishes to secede from its church and the higher authority opposes the secession, under the deference approach, the civil courts must honor the decision of the higher ecclesiastical bodies and therefore refuse to permit the secession.

The most obvious criticism of this approach is that it effectively takes away any meaningful challenge by local churches to the general church or denomination since it is unlikely that the general church would approve the withdrawal of their local churches.[41] The deference approach, if universally adopted by the courts, would discourage church disputes from coming into the civil courts once the higher ecclesiastical body had ruled against the attempted secession of the local church. There would simply be nothing to be gained by a local church litigating its claim to church property if compulsory deference became the only approach allowed. Barring its ruling against its own interest, the denomination would always win were the matter to be submitted to a civil court. So the single gnawing question with this approach is: "...why is the ultimate decision [about the rightfulness of separation] ceded to the superior church body?"[42] Isn't it true that "[t]his Procrustean attitude risks giving central bodies more power than the members of some churches have assigned to them?"[43] As Greenawalt puts it, "People join hierarchical churches with the understanding that the highest bodies

41 Ashley Alderman, Note, *Where's the Wall?: Church Property Disputes Within the Civil Courts and the Need For Consistent Application of the Law*, 39 GEO. L. REV. 1027, 1055 (2005).
42 Kent Greenawalt, *Hands Off! Civil Court Involvement in Conflicts Over Religious Property*, 98 COLUM. L. REV. 1843, 1851 (1998).
43 *Id.* at 1864.

will settle matters. But the idea that members give implied consent to whatever the hierarchy does is not tenable for many members of many churches."[44]

There are further problems with the deference approach which belie the claims of some commentators that this approach would be the least likely to entangle the civil courts in matters of religion. A civil court, presented with a complaint from a local church wanting to separate, must make a determination about whether the relationship between the local church and the general church body is truly "hierarchical". Therefore, although it must refrain from examining church doctrines per se under the deference approach, it necessarily must scrutinize the church's internal governance. To do that it must review church constitutions, books of order, and other constituting documents. Therefore, it has ventured into making judgments about the ecclesiastical organization of the church.

There are other issues. When is a church "hierarchical"? More importantly what is the scope of the authority of higher church bodies over local churches? In answer to the first question, one can say with relative certainty that congregational churches are not hierarchical. Though they may join together to sponsor missionaries, hold conferences, or undertake other joint ventures, there is no functional hierarchy. To the extent that individual congregational churches follow any uniform patterns with respect to doctrine and practice, it is because of influence and persuasion but not compulsion.

A more difficult question occurs when churches are a mixture of church forms. For example, "the synods of the United Lutheran Church exhibit mixed presbyterial and congregational characteristics. . . ."[45] In fact, the argument of mixed church government is made by certain historians of the Episcopal Church in the United States even though Episcopal government is usually regarded as a prime example of hierarchical organization, that is, rule by bishops.

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44 *Id.* at 1874.

45 *Where's the Wall?*, *supra* note 42, at 1159.

Lunceford said that the American version of the Anglican church, usually called Episcopalian, is really a combination of traditional Episcopal forms with what must be considered a congregational element.[46] The Anglicanism of early American life incorporated the more participatory, "democratic" forms found in American civil government into Anglican church polity.[47] The American Anglicans were a "lay-led group" with bishops playing a much less prominent role in the activities of the local parish churches.[48] Of course, this was due in part to the end of English Anglicanism in America following the Revolutionary War which left local congregations to continue operating "without a bishop or a centralized system of government to oversee local churches."[49]

Consequently, "the way colonial worshipers related to their churches encouraged a local sense of ownership. This was reflected in a view commonly held into the twentieth century that the parish owned the local church building."[50] The centrality and importance of the local church in the development of American Episcopalianism is emphasized by others as well.[51] With such a mixture of forms, is it correct to describe a church as "hierarchical" merely because there are certain kinds of connections between higher bodies and the local churches? Furthermore, is a hierarchical entity the authority for all matters or merely certain matters, and if so, which matters? If one determines that a local church is part of a larger hierarchy for *spiritual* and *ecclesiastical* purposes, is it necessarily hierarchical

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46 LUNCEFORD, *supra* note 4, at 119-136.

47 *Id.* at 121.

48 *Id.* at 122.

49 Sarah M. Montgomery, Note, *Drawing the Line: The Civil Courts' Resolution of Church Property Disputes, The Established Church and All Saints' Episcopal Church, Waccamaw*, 54 S. CAR. L. REV. 203, 230 (2002).

50 LUNCEFORD, *supra* note 4, at 123.

51 Tim Smith and George Conger, *Parish Is the Basic Unit of the Church in American Anglicanism*, March 2, 2003, http://geoconger.wordpress.com.

concerning property rights?[52] [53] Put another way, does a local church necessarily regard its affiliation with a denomination as a relinquishing of that congregation's power to control its property?[54]

C. Neutral Principle of Law Approach Considered

The neutral principles of law approach requires that a court not automatically defer to the ecclesiastical judgments of a higher denominational judicatory in deciding whether a local church has the right to separate itself from its denomination and keep its property rights. Instead, the court is to look at concepts of trust and property law to determine who is entitled to the local church property. This means examining deeds, state statutes concerning property rights, local church incorporation and charter documents and provisions of the denomination's constitution. Some commentators have complained that courts using this approach have produced widely divergent decisions.[55] This approach was deemed constitutionally allowable and perhaps even preferable in 1979 in the *Jones v. Wolf* opinion. Since state law cases on these matters are relatively infrequent, one should exercise patience so that state courts have time to gradually develop more clarity and uniformity in their decisions.

The Circuit Court for Fairfax County, Virginia Certain recently considered and decided cases involving a number of churches which voted by large super-majorities to disaffiliate from the ECUSA. In these cases, Judge Randy Bellows referred repeatedly to *Jones v. Wolf*, adopting the neutral principles of law approach and finding a long-existing state statute to be constitutional.[56]

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52 Louis J. Sirico, *Church Property Disputes: Churches As Secular and Alien Institutions*, 55 FORD. L. REV. 335, 349-350 (1986).

53 Nathan Clay Belzer, *Deference in the Judicial Resolution of "Intrachurch Disputes: The Lesser of Two Constitutional Evils"*, 11 ST. THO. L. REV. 109, 124 (1998).

54 *Id.* at 125.

55 *Id.* at 135.

56 *In re* Multi-Circuit Episcopal Church Property Litigation, "Letter Opinion of the Constitutionality of Virginia Code section 57-9(A)", Judge Randy I. Bellows, Fairfax County

The statute referred to as Virginia Code section 57-9 was passed by the Virginia legislature just after the conclusion of the Civil War to deal with "schisms generated by disputes over slavery and the Civil War."[57] The statute says that when a division occurs within a church or religious society, members of local churches can vote to affiliate with either branch of the divided church. The local Episcopal churches in Virginia did just that and submitted the result to the county circuit court. The seceding churches then chose to affiliate with a different national church which was also a member of the Anglican Communion World-Wide, the Anglican Church of Nigeria.[58]

Under the Virginia statute, the separating congregations would then have title the church property.[59] Despite the legal challenge by the Episcopal Church USA, Judge Bellows concluded: "Today, this Court finds that 57-9(A), as applied, is constitutional. Specifically, this Court finds that the statute, as applied in the instant case, does not violate the Free Exercise or Establishment Clause of the First Amendment nor does it violate the Equal Protection Clause of the Fourteenth Amendment, nor does it violate the Takings Clause of the Fifth Amendment."[60] At the time of this writing, Judge Bellows' decision is on appeal to the Virginia Supreme Court.[61]

What is clear from the *Jones v. Wolf* decision is the Court's endorsement of the neutral principles approach with clear instructions for church bodies, local and denominational, to clarify the relationship they have with one another concerning

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Circuit Court (VA.) 1, 17-21 (2008).

57 CANA (Convocation of Anglicans in North America) Congregations' Memorandum of Law on the Scope of Hearing on Congregational Determination Pursuant to Va. Code section 57-9. Submitted to the Circuit Court for Fairfax County, Virginia In re: Multi-Circuit Episcopal Church Litigation. 3 (2007).

58 *Id.* at 19.

59 VA. CODE ANN. § 57-9(a).

60 *In re* Multi-Circuit Episcopal Church Property Litigation, *supra* note 57, at 48.

61 The Protestant Episcopal Church in the Diocese of Virginia v. Truro Church et al., Record No. 090682, Appeal to the Supreme Court of Virginia.

local church property in question. In response to the 1979 admonition, various denominations realized that their hierarchical position over local congregations would *not* guarantee their ascendancy in church property disputes and sought to strengthen their positions regarding local church or parish property.

Probably one of the most widely known efforts in this regard was the adoption by the Episcopal Church of an addition to its church law called the "Dennis Canon". The Dennis Canon, found at Title I, Canon 7, section 4, Protestant Episcopal Church Canons, purports to create an express trust over local church property in favor of the Episcopal denomination and the diocese in which the local parish church is located. There is a question about the validity of the original adoption of the Dennis Canon.[62] Leaving that aside, one can fairly ask whether a trust can be unilaterally created by an entity that has not been determined to be the owner of the property in the first place and which did not provide the funding for the purchase of that property.[63] Normally trust law would not allow such a unilateral creation and, if it did, such a trust would likely be revocable by the local parish.

In response to such denominational efforts, local churches in hierarchical organizations are now adopting provisions that seek to make clear that they do not accept implied or express trusts being asserted over their local property. Churches are adopting provisions in their Articles of Incorporation or amended articles which say that they view their property as being without a trust in favor of any other entity and if a trust is implied that it is regarded by the congregation as revoked.[64] How the courts, using the neutral principles approach, will handle the efforts by denominations to shore up their claims and the efforts by local churches to counter those efforts, remains to be seen.

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62 LUNCEFORD, *supra* note 4, at 130-131.
63 *Id.* at 132.
64 *Id.* at 189.

IV. ARBITRATION AND NEGOTIATION: PERHAPS THE BEST SOLUTION

Churches that are separating from their denominations are now often negotiating a release of their church property which is a method that avoids litigation and the pitting of one set of Christians against another. In fact, mainline denominations are providing "Protocols for Departing Denominations."[65] Large church buildings are expensive to maintain, giving local congregations significant leverage. Repairs are costly; utility bills are high. Furthermore, mainline denominations seeking to maintain local properties are often declining in membership. Church buildings are special use structures not especially easy to convert to other purposes, therefore, making resale difficult. The settlements with which this writer is familiar usually require some payment, over a period of years, to the denomination or its subsidiary, the presbytery or diocese. For that payment, the local church's property is allowed to be titled unequivocally to the local congregation. Until the courts have made their approaches understandable, settlement may be the best solution for all concerned.

65 Peter J. Lee, *Protocol for Departing Congregations*, September 28, 2006. Committee to Help Reconcile the Divisions within our Diocese of Virginia, The Episcopal Church.

HOW CLEAR IS THE "CLEAR AND PRESENT DANGER" TEST

David Feister[1]

Punishing someone for falsely shouting "Fire!" in a crowded movie theater is not a complicated restriction of the right to freedom of speech. However, the "clear and present danger" test, which employs this example, has proved to be anything but simple. Established in the landmark case *Schenck v. United States* (1919) by Justice Oliver Wendell Holmes, the clear and present danger rule was the earliest freedom of speech doctrine established by the Supreme Court.[2] Until then, judicial rulings on freedom of speech were rare; the doctrine of laissez faire was dominant when it came to speech.[3] With the passage of the Espionage Act of 1917, the U.S. entry into World War II, and the institution of the draft in June 1917, the stage was set for a First Amendment confrontation.

In *Schenck v. United States*, the Supreme Court upheld Charles Schenck's conviction. Mr. Schenck sent pamphlets urging men who had been drafted to oppose the draft, thereby violating the Espionage Act and obstructing the armed forc-

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2 Martin Shapiro, *Clear and Present Danger*, *in* 2 Encyclopedia of the American Constitution, 426 (Leonard W. Levy and Kenneth L. Karst ed., 2000).

3 Bernard A. Petrie, *Constitutional Law: Civil Rights: First Amendment Freedoms: Reformulation of the Clear and Present Danger Doctrine*, 50 Mich. L. Rev. 451, 453 (1952).

es' recruiting service. This conviction did not violate his free speech rights because his words in this specific circumstancewere "of such a nature as to create a clear and present danger [and would]bring about the substantive evils that Congress has a right to protect."[4] Only eight months later, the interpretation of the clear and present danger test was called into question in *Abrams v. United States*, when the Court, citing Holmes' test, upheld the convictions of Abrams and four other Russian immigrants, while Justice Holmes himself, joined by Justice Louis D. Brandeis, dissented.[5] In fact, throughout the twentieth century, the clear and present danger doctrine has failed to serve as an objective test for determining when free speech should be restricted due to judicial disagreement over how to define the clear and present danger doctrine, questions concerning its use as a universal test, and the question as to whether freedom of speech is fundamentally individualistic or society-focused.

The first obstacle to crafting an objective test to determine the appropriateness of restricting free speech was the Court's failure to adequately define and implement the clear and present danger test. In *Whitney vs. California* (1927), Justice Brandeis stated in his concurring opinion, "This court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present; and what degree of evil shall be deemed sufficiently substantial to justify resort to abridgment of free speech."[6] In general, the clear and present danger test, and the idea behind it, was accepted by the courts and judicial scholars, some judges using it actively as an actual test. Others used it to justify their decisions, as "a peg onto which Court decisions [can be] hung after a decision [has] been reached by other avenues."[7] Most justices acknowledged

4 Schenck v. United States, 249 U.S. 47 (1919).

5 CLEAR AND PRESENT DANGER, IN WEST'S ENCYCLOPEDIA OF AMERICAN LAW, 431 (Jeffrey Lehman and Shirelle Phelps ed., 2005).

6 Whitney v. California, 274 U.S. 357 (1927), *in* 9 CONSTITUTIONAL INTERPRETATION 787, (Craig R. Ducat, 2009).

7 CRAIG R. DUCAT, CONSTITUTIONAL INTERPRETATION 789 (9th ed. 2009).

that if an utterance could be classified as a clear and present danger, whatever the reasoning that led to the classification, then it should be restricted. Some judges, however, attacked the rule for allowing too broad an exception to First Amendment rights (as in the case of the "absolutists" led by Alexander Meiklejohn) or for being too rigid in protecting speech that could be opposed to the state's interests (argued by Justice Felix Frankfurter and others who favored judicial self-restraint).[8] This spectrum of opinion served as the context for the subsequent debate over the danger test.

In order to examine the difficulty of establishing a well defined test, it is necessary to study the evolution of Holmes's original test as the courts have applied it to either restrict or allow speech in diverse circumstances. As a result of *Schenck v. U.S.*, the Court upheld more convictions under the Espionage Act of 1917 based on the clear and present danger doctrine. Starting with *Abrams v. U.S.*, however, Holmes and Brandeis began to almost always take dissenting opinions in free speech cases. Holmes disagreed with the ways in which the Court was applying the test he had crafted.[9]

The *Abrams* case is significant because the dissenting justices provide a much more detailed explanation of their views of the clear and present danger test than they did in *Schenck*. As David M. Rabban points out, "Many scholars have also observed that Holmes' dissent in *Abrams v. United States*, and not his majority opinion in *Schenck*, marked the first time he advocated meaningful judicial protection of speech."[10] For example, in an attempt to clarify the rule that he believed was being wrongly interpreted, Holmes emphasized that intent must be present.[11] Holmes also sought to correct what he believed was an overly broad application of the test. He stressed that the seriousness and imminence of the threat

8 SHAPIRO, *supra* note 1, at 426-427.

9 Abrams v. United States, 250 U.S. 616 (1919), *in* 9 CONSTITUTIONAL INTERPRETATION 785, (Craig R. Ducat, 2009).

10 David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 Yale L.J. 514 (1981).

11 DUCAT, *supra note 6, at* 785.

were twin prerequisites that must be present before the court should restrict free speech. Holmes also wanted to apply the absolutist perspective. He wrote, "We should be eternally vigilant against attempts to check the expression of opinions that we loath . . . unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."[12]

Disputes arise as to whether Holmes himself always held this plain definition of the danger rule. Rabban argues that some of Holmes' letters to other judges and intellectuals reveal otherwise. He also maintains that Holmes and Brandeis were influenced by Zechariah Chafee, a Harvard law professor with whom Holmes exchanged letters and who published a work strongly advocating the protection of free speech between the Court's ruling on *Schenck* and its ruling on *Abrams*.[13] From this point on, "Holmes and Brandeis elevated 'clear and present danger' to constitutional significance and clung to it as the doctrinal peg for libertarian values it did not express when Holmes first used the phrase."[14] A majority of the Court never officially adopted Holmes and Brandeis's definition of the test.

In the next landmark free speech case, *Gitlow v. New York* (1925), the Court's prevailing definition of the danger test shifted even further away from the Holmes/Brandeis view articulated in the *Abrams* dissent. With the two justices again dissenting, the Court upheld the conviction of Benjamin Gitlow on the basis of a New York law; they were convicted for distributing leaflets advocating the overthrow of the government.[15] Justice Edward Sanford, representing the Court, agreed with Holmes and Brandeis that the leaflets had not yet incited any criminal action, but he argued that "a single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."[16] This

12 *Id. at* 787.
13 Rabban, *supra* note 9, at 591.
14 *Id.* at 594.
15 SHAPIRO, *supra* note 1, at 426.
16 Gitlow v. New York, 268 U.S. 652 (1925), *in* 9 CONSTITUTIONAL INTERPRETATION 791, (Craig R.

ruling broadened the clear and present danger test to restrict utterances that violated statutes that prohibited a specific type of *utterance*, in addition to utterances that violated statutes prohibiting a particular type of *conduct*, as the test had previously done in *Schenck* and *Abrams*.[17] The question now became whether particular statements or publications were "abstract doctrine[s] or academic discussion[s] having no quality of incitement to any concrete action" as these were protected speech, or whether those statements or publications had "language advocating, advising or teaching the overthrow of organized government by unlawful means."[18] Holmes strongly disagreed, again emphasizing that words not associated with actions could not be punished, no matter how offensive the words were.[19]

It was also in this case that the imminence requirement was removed from the Court's application of the clear and present danger test. Introducing an idea that would be developed more fully in *Dennis et al. v. U.S.* (1951), Justice Edward Sanford wrote in his *Gitlow* opinion:

> It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency.[20]

Ducat, 2009).

17 *Clear and Present Danger Re-Examined*, 51 COLUM. L. REV. 102 (1951).

18 DUCAT, *supra note 6, at* 790.

19 SHAPIRO, *supra* note 1, at 426.

20 DUCAT, *supra note 6, at* 791.

Rather than operating under the premise that free speech was an undeniable civil right, the justices were more inclined to give priority to public peace and safety. This "bad tendency" test included the "clear danger" criteria but left out the "present danger" requirement.[21] This shifting definition of the rule made it difficult for the danger test to be used as an objective standard.

During the 1930s and 1940s, however, the Court provided a temporary shift towards the more absolutist view of Holmes and Brandeis, which came to be called the "preferred freedoms" approach, since First Amendment freedoms were accorded a "preferred position" during this time.[22] One significant development during this period was a type of form-content distinction with regard to what utterances the law could restrict. A *Columbia Law Review* article published in 1951 observed that in the period between the late 1930s and 1951 (the next major shift in the Court's understanding of the danger test), the Supreme Court struck down every piece of legislation specifically directed against the content of an utterance. On the other hand, legislation that restricted the form of an utterance and only indirectly suppressed its content, met with a more positive reception.[23] This shift in when and how speech might be curtailed further complicated the objectivity of the clear and present danger test.

The nation's political and social environment changed again after World War II. The fear of communism revived Justice Sanford's reasoning in *Gitlow*. Embodying this new period of judicial free speech interpretation, the Court's 1951 decision in *Dennis et al v. United States* established what has been called the "clear and probable danger" test.[24] In the late 1940s and early 1950s, the main actor in the free speech debate became a group, namely the American Communist Party,

21 SHAPIRO, *supra* note 1, at 426.
22 *Clear and Present Danger Re-Examined*, *supra* note 16, at 103.
23 *Id.* at 99-100.
24 Petrie, *supra* note 2, at 456.

rather than an individual and the speech in question was secret conspiracy rather than overt, street-corner speeches that could be easily monitored.[25] Holmes's clear and present danger test seemed, for many, to be insufficient to protect against this new danger. The Supreme Court adopted Circuit Court Judge Learned Hand's solution—to first get rid of the imminence requirement, as *Gitlow* had done to some extent. As Martin Shapiro explains, "The probable danger test held that if the anticipated evil were serious enough the imminence requirement might be greatly relaxed."[26]

In justifying his decision, Justice Fred Vinson wrote in the *Dennis* opinion that Justices Holmes and Brandeis "were not confronted with any situation comparable to the instant one—the development of an apparatus designed and dedicated to the overthrow of the Government."[27] Holmes believed that any interval of time between the advocacy of dangerous ideas and resulting action allowed for free speech and public discussion to counter them.[28] This was why imminence—the lack of time for reasoned counter arguments—was so important to his test. The problem with the *Dennis* case, which convicted eleven communist leaders for advocating the overthrow of the government by force and violence, was that since the speech was secret and not public, there was not an opportunity for public discussion.[29] Following similar reasoning to *Gitlow*, Shapiro said that "it is one thing to wait until the arsonist has struck the match [at which point he can still be prevented] and quite another to wait until the revolution is ready to attack the police stations" when the imminent danger is too advanced to stop.[30]

The Court, however, went slightly further than the *Gitlow* Court by establishing a sort of "balancing test" between the benefits of allowing free speech in

25 DUCAT, *supra* note 6, at 800.
26 SHAPIRO, *supra* note 1, at 427.
27 Petrie, *supra* note 2, at 457. (citing Dennis, et al. v. United States, 341 U.S. 494 (1951).
28 *Clear and Present Danger Re-Examined*, *supra* note 16, at 105.
29 SHAPIRO, *supra* note 1, at 427.
30 SHAPIRO, *supra* note 1, at 428.

a given situation and the potential consequences of that speech to governmental interest, national security, and societal interest. Judge Hand described this balancing test: "In each case, [the courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."[31] Again, the Court's reinterpretation of the clear and present danger test revealed a more utilitarian judicial philosophy. It sought to curb the greater evil while recognizing that neither limited speech nor security threats are desirable, rather than holding to an objective standard that would determine if and when speech should be restricted.

However, even this judicial construct of a danger test was not a permanent standard. In 1969, eighteen years after *Dennis*, the Court returned to an almost Holmesian danger test, although the "clear and present" language was absent. The ruling to overturn the conviction of a local Ku Klux Klan leader in *Brandenburg v. Ohio* (1969) brought back the prerequisite of imminence of danger as well as the direct connection between speech and action before speech could be punished. According to the Court, "The constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[32] Under this decision, it was not enough for a communist party leader to covertly encourage people to revolt against the government, but the Court must find his words to be "likely to produce" unrest or revolt before his free speech can be restricted. For all practical purposes, this case revealed a shift in the Court to the more absolutist view of Holmes and Brandeis expressed in their *Abrams* dissent.

Although the clear and present danger test had been reestablished in spirit, the *Brandenburg* opinion did not seek to revive Holmes's explicit danger rule. Jus-

31 Petrie, *supra* note 2, at 456. (citing Dennis, et al. v. United States, 341 U.S. 494 (1951).

32 Brandenburg v. Ohio, 395 U.S. 444, (1969), *in* 9 CONSTITUTIONAL INTERPRETATION 804, (Craig R. Ducat, 2009).

tices Hugo Black and William Douglas, the greatest proponents of Holmes's clear and present danger test, ironically abandoned it in their concurring opinions. Black wrote, "The clear and present danger doctrine should have no place in the interpretation of the First Amendment."[33] Justice Douglas agreed and added, "When one reads the opinions closely and sees when and how the clear and present danger test has been applied, great misgivings are aroused."[34] This statement was a complete reversal of Justice Douglas's opinion when he dissented in *Dennis*, immediately after which the *Michigan Law Review* reported that "Justice Douglas would retain the clear and present danger test intact even for a great evil."[35] Shapiro argues that both Black and Douglas reasoned that the test had been so corrupted and misused that it no longer retained any power to protect speech.[36] Whether or not Shapiro was correct, this final abandonment of the test itself by those who most firmly held to its ideals was perhaps the most compelling evidence for its apparent past failures and unlikely future ability to serve as an objective test for identifying restricted speech.

The judicial disagreement over the definition and implementation of the test finally ended with the abandonment of the test itself in the late 1960s as a viable method of discerning what types of speech to limit; some have argued that the danger doctrine failed to serve as an objective standard because the test was never meant to be universally applied. Wallace Mendelson proposed that, "inspired by the brilliant rhetoric in which Holmes and Brandeis expressed their thoughts, we have tried to make a universal rule out of a test designed for very limited application."[37] The danger test, he added, was not universal in the sense of being equally applicable to all freedom of speech cases. It was not relevant to requiring

33 *Id.* at 805.
34 *Id.*
35 Petrie, *supra* note 2, at 459.
36 SHAPIRO, *supra* note 1, at 427.
37 Wallace Mendelson, *The Degradation of the Clear and Present Danger Rule*, 15 J. POL. 349, 349-350 (1953).

children to salute the flag or teachers to teach in English.[38] The clear and present danger test, according to Mendelson, only applied to cases of political subversives, like *Schenck v. U.S.*, and the courts had generally applied it as such.

Is the clear and present danger test meant to be universally applied to all political subversion free speech cases? Fred Ragan argued that Zechariah Chafee was displeased with the fact Justice Holmes did not apply the test universally even within this more narrow context, specifically in *Debs v. U.S.*[39] Many Justices who decided cases such as *Gitlow* and *Dennis* applied their own slightly altered standards not because they disagreed with the basic principles of the clear and present danger test, but because they believed the danger doctrine failed to cover all the circumstances of the case. Justice Robert Jackson, for example, accepting the decision in *Dennis*, wrote concerning the danger test, "I would save it unmodified, for application as a 'rule of reason' in the kind of case for which it was devised."[40] But after discussing the foresight, speculation, and "prophesy" necessary for determining if communist propaganda presented a clear and present danger, he concluded, "The authors of the clear and present danger test never applied it to a case like this, nor would I."[41]

Mendelson argues further that the clear and present danger test is too narrow and impractical to be applied universally; this is why the Court never accepted it as a universal standard for all politically subversive speech. To have done so would often have led to results too undiscriminating even for the most libertarian members of the bench. To insist that imminent danger is the sole basis for restricting utterance is to hold that incitement to crime is the only abuse of free expression.[42] It is interesting that Mendelson attributes the fifty years of confusion over

38 *Id.* at 350.

39 Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 J. Amer. Hist. 42 (1971).

40 DUCAT, *supra* note 6, at 802.

41 *Id.*

42 Mendelson, *supra* note 36, at 351.

free speech cases to the lack of an objective standard; the clear and present danger doctrine was not and cannot be applied as a universal test.

The divergence of views over the nature of free speech itself has also contributed to the failure of the clear and present danger test to act as an objective judicial standard. Since the adoption of the First Amendment, freedom of speech has been considered both an individual right and a societal benefit. Seemingly, most contemporary Americans fail to consider this distinction, for as Mendelson argues, "We have tended to emphasize the individual, at the expense of the social, interests which the First Amendment must have been designed to protect."[43] Freedom of speech is not simply an individual civil right; it is crucial to the essence of democratic self-governance. It enables citizens to choose from all available ideas and for truth to prevail.[44] As the *Columbia Law Review* explains, "Freedom of expression is designed to provide the framework for an unfettered interchange of ideas, so that 'vigorous enlightenment' may bring about peacefully those political and social changes responsive to the desires of the people."[45]

This social dimension of free speech significantly increased the difficulty in defining and applying any judicial test on this subject in an objective way, especially one as simple and straightforward as the danger test. Discretion has therefore been left to the courts to protect free speech in such a way as to both uphold an individual's civil rights and to defend its role as a foundation of democratic society. In *Schneider v. State* (1939), the Court described this balance well: "As cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of rights."[46] Justice Frankfurter agreed when he wrote in *Dennis*:

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43 *Id.* at 350.

44 *Id.* at 352.

45 *Clear and Present Danger Re-Examined*, *supra* note 16, at 98.

46 *Clear and Present Danger Re-Examined*, *supra* note 16, at 102. (citing Schneider v. State of New Jersey, 308 U.S. 147, (1939).)

> The demands of free speech in a democratic society as well as the interest in national security are better served by candid and informed weighing of the competing interests, within the confines of the judicial process, than by announcing dogmas too inflexible for the non-Euclidian problems to be solved.[47]

It is not surprising that the history of the clear and present danger test is so convoluted; the courts have more to consider in free speech and politically subversive cases than the individual's right to say what he or she wants and the security of the nation. Courts must also take into account the social benefits of free speech, striving to find a middle ground between restricting free speech too much and allowing potentially dangerous speech, both of which can harm society. With maintaining this delicate balance as their goal, the Supreme Court has failed to find the danger test to be an objective and universal standard for describing the full extent of dangerous speech.

Differing judicial opinions over how to define the danger test, general agreement that the test cannot be applied universally, and the societal aspects of freedom of speech all reveal that Holmes's clear and present danger test is not and was not intended to be an objective standard with which to judge what speech should be restricted. The test has proved too malleable, and the justices concluded that the doctrine does not adequately protect against First Amendment violations.[48] Holmes' test has provided the foundation for many doctrines and rulings that have sought to uphold freedom of speech while protecting the nation from political subversives. It is impossible to capture the complexity of this concept by simply using the example of a false fire alarm; Justice Holmes sought to construct a situational test to govern an issue for which no objective standard can be established.

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47 Petrie, *supra* note 2, at 457. (citing Dennis, et al. v. United States, 341 U.S. 494 (1951).

48 DUCAT, *supra* note 6, at 803.

"Congress Must Speak Clearly, Again" Honest Services Fraud - 18 U.S.C. § 1346

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INTRODUCTION

As interpreted by the judiciary, "honest services fraud" occurs when a public official deprives citizens of their "right" to the official's honest service by accepting bribes or self-dealing. This concept has been extended to the corporate sphere when senior executives deprive shareholders of their "right" to the executive performing his or her job above suspicion. As the case law in this area has evolved, loose interpretations of an already loose statute have resulted in prosecutions for alleged crimes beyond mere bribes and self-dealing. The soft standard that has emerged, in essence, created "the intangible right of the citizenry to good government"[2] although there exists no firm definition of "honest services" or any identifiable source of this "intangible right."

In 1987, the United States Supreme Court invalidated the concept of "honest services fraud" in *McNally v. United States*. The next year, however, Congress passed 18 U.S.C. § 1346 which, in effect, overruled the *McNally* decision. Now, over twenty years later, the U.S. Supreme Court is again confronted with the validity of the current honest services fraud statute. The Court is weighing the merits of 18 U.S.C. § 1346 in three prominent criminal cases: Jeffrey K. Skilling, the Enron Chief Executive Officer who, along with Ken Lay, rode the company into its well-heralded collapse; Conrad M. Black, the former chief executive of a newspaper conglomerate; and Bruce Weyhrauch, an attorney and Alaskan state congressman.

While some federal district courts have expressed concern about the federal statute's vague nature, there is also a split in the courts of appeals as to how to address and interpret the current honest services fraud statute. This paper will examine the honest services fraud statute, the Supreme Court decision in *McNally*, each of the cases currently pending before the Court, and the Court's willingness to act on 18 U.S.C. § 1346 based upon its three oral arguments.

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2 McNally v. United States, 483 U.S. 350, 356, (1987).

I. OVERRULING § 1346'S BIG BROTHER IN *MCNALLY V. UNITED STATES*

In *McNally v. United States*, 483 U.S. 350 (U.S. 1987), while the Supreme Court held that the mail fraud statute clearly protected property rights, but the criminal statute was one that did not "refer to the intangible right of the citizenry to good government."[3] That decision temporarily invalidated the theory that officials' or executives' corruption and misconduct constituted fraud. Based on the legislative history and precedent behind the mail fraud statute, as well as the Court's concerns about the vagueness of this criminal statute, the Supreme Court refused to "construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials."[4]

A. The Facts Behind McNally

In *McNally*, the Supreme Court addressed honest services fraud in the context of both a public official and a private individual.[5] The defendants were James E. Gray, a member of the Cabinet of the Kentucky governor, and Charles J. McNally, a business associate of Gray.[6] The *McNally* story began after Kentucky elected a Democratic governor in 1974. Howard P. "Sonny" Hunt was appointed that year as the Chairman of the Kentucky Democratic Party, a position which gave him the authority to choose the insurance companies from which the Commonwealth would purchase its insurance policies.[7] Hunt devised a scheme with the Wombwell Insurance Company of Lexington, an entity for which Hunt had acted as Kentucky's agent for securing its workmen's compensation policy since 1971,

3 *Id.*
4 *Id.* at 360.
5 *Id.* at 352.
6 *Id.*
7 *Id.*

whereby a portion of all commissions in excess of $50,000 a year would be paid by Wombwell in exchange for a continued agency relationship with him.[8]

Based on this scheme, Wombwell funneled $851,000 to 21 insurance companies chosen by Hunt.[9] One of the recipient companies was Seton Investments, Inc. a company controlled by Hunt and Gray and "*nominally* owned and operated" by McNally.[10] In fact, Hunt and Gray had created Seton Investments after Hunt's appointment as Chairman - but before Gray entered the Kentucky cabinet – for the express purpose of sharing the money gained from the arrangement with Wombwell. Approximately $200,000 was paid by Wombwell to Seton Investments between 1975 and 1979 which was "used to benefit Gray and Hunt."[11] Wombwell also made "payments," at Hunt's direction, to another insurance company which gave money to McNally.[12]

As a result, Gray and McNally were charged with seven counts of mail fraud and one count of conspiracy.[13, 14] However, only one count remained after the other six were dismissed before trial; the final count alleged that the scheme that Gray and McNally devised was to (1) defraud the citizens and government of Kentucky of their "right" to have the Commonwealth's affairs conducted honestly, and (2) obtain, both directly and indirectly, money "and other things of value" by means of false pretenses and the concealment of material facts.[15]

At trial, the jury was instructed of its ability to convict Gray and McNally on either of two theories:

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8 *Id.*
9 *Id.* at 353.
10 *Id.* (emphasis added).
11 *Id.*
12 *Id.* at 353.
13 For his part in the misconduct, Hunt was charged with mail and tax fraud. *Id.* He subsequently pled guilty and was sentence to three years imprisonment. *Id.*
14 *Id.*
15 *Id.* at 353-54.

> (1) that Hunt had de facto control over the award of the workmen's compensation insurance contract to Wombwell from 1975 to 1979; that he directed payments of commissions from this contract to Seton, an entity in which he had an ownership interest, without disclosing that interest to persons in state government whose actions or deliberations could have been affected by the disclosure; and that petitioners, or either of them, aided and abetted Hunt in that scheme; or
>
> (2) that Gray, in either of his appointed positions, had supervisory authority regarding the Commonwealth's workmen's compensation insurance at a time when Seton received commissions; that Gray had an ownership interest in Seton and did not disclose that interest to persons in state government whose actions or deliberations could have been affected by that disclosure; and that McNally aided and abetted Gray (the latter finding going only to McNally's guilt).[16]

Subsequently, Gray and McNally were both convicted on the mail fraud and conspiracy count which was affirmed by the Court of Appeals for the Sixth Circuit.[17] In doing so, the Sixth Circuit relied on other appellate decisions holding that the mail fraud statute prohibited schemes to defraud citizens of their "intangible rights to honest and impartial government."[18] These decisions held that public officials owe a fiduciary to the public, the misuse of which is fraud, and

16 *Id.* at 355.

17 *Id.* (*See* 790 F.2d 1290 (6th Cir. 1986) for the Sixth Circuit's opinion affirming the convictions.).

18 *Id.* (citing United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), *aff'd in relevant part*, 602 F.2d 653 (en banc), *cert. denied*, 445 U.S. 961 (1980)).

private individuals without formal office "may be held to be a public fiduciary if others rely on him 'because of a special relationship in the government' and he in fact makes governmental decisions."[19]

In 1986, the Supreme Court granted certiorari in *McNally* and issued its ruling in the following year.[20] In its decision, it explicitly rejected the concept of "intangible rights" as part of mail fraud:

> Rather than construe [§ 1341] in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[21]

Undeterred, Congress enacted 18 U.S.C. § 1341 in 1988 whereby it stated that a scheme or artifice to defraud included a "scheme or artifice to deprive another of the intangible right of honest services."[22] However, Congress did not see fit to define the concept of "honest services" in § 1346 which has resulted in confusion over the reach of the mail fraud statute.[23]

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19 *Id.* (quoting *McNally*, 790 F.2d at 1296) (At the Sixth Circuit, Hunt was found to be a fiduciary due to his substantial participation in governmental affairs and ability to exercise significant control over the award of insurance contracts to Wombwell and the payment of kickbacks to Seton Investments.).

20 *Id.* at 356.

21 *Id.* (quoting *McNally*, 483 U.S. at 360).

22 *Id.* (citing *Williams*, 441 F.3d at 721-22).

23 *Id.* (citing United States v. Urciuoli, 513 F.3d 290, 294 (1st Cir. 2008)).

B. The History of the Mail Fraud Statute

Created by Congress in 1872 as part of re-codifying postal laws, the mail fraud statute contained a prohibition against using the mail to "initiate correspondence in furtherance of 'any scheme or artifice to defraud.'"[24] Referring to the antifraud provision, the Congressman sponsoring the legislation stated that such measures were required "to prevent the frauds which are mostly gotten up in the large cities ... by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing the innocent people in the country."[25] The nature of the statute's origin led the Supreme Court in *McNally* to state that the original impetus behind the mail fraud statute was to protect citizens from "schemes to deprive them of their money or property."[26]

In 1896, the Supreme Court in *Durland v. United States*, 161 U.S. 306 (U.S. 1896) broadly interpreted the phrase "any scheme or artifice to defraud" insofar as property rights but did not state that the statute possessed a more extensive reach.[27] The Court held that the statute "includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."[28] "[I]t was enacted for protecting the public against all intentional efforts to despoil, and to prevent the post office from being used to carry them into effect."[29]

In 1909, Congress codified the Supreme Court's holding in *Durland* which gave further credence to the *McNally* decision that the purpose of the mail fraud statute was to protect property rights.[30] This codification added the phrase "or for obtaining money or property by means of false or fraudulent pretenses, represen-

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24 *McNally*, 483 U.S. at 356.
25 *Id.* (citing Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)).
26 *Id.*
27 *Id.* (citing Durland v. United States, 161 U.S. 306 (1896)).
28 Durland v. United States, 161 U.S. 306, 306-07 syl. (1896).
29 *Id.*
30 McNally v. United States, 483 U.S. 350, 357 (1987).

tations, or promises" after the original text "any scheme or artifice to defraud."[31] The added phrase was based on the *Durland*'s statement that the mail fraud statute reaches "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."[32]

Congress used the phrase "scheme or artifice to defraud" as opposed to the *Durland* language "everything designed to defraud."[33] As a result, the mail fraud statute criminalized schemes or artifices "to defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representation, or promises."[34] In *McNally*, the Supreme Court admitted that the appearance of the disjunctive in the text of the amended statute could lead courts to construe the two phrases independently and perceive that the requirement for money or property in the latter phrase does not limit "schemes to defraud" to those intended to deprive money or property.

To that end, in *Hammerschmidt v. United States*, 265 U.S. 182, 188 (U.S. 1924), the Supreme Court stated that the words "to defraud" have a limited application:

> It is true that words "to defraud" as used in some statutes have been given a wide meaning, wider than their ordinary scope. They usually signify the deprivation of something of value by trick, deceit, chicane, or overreaching. They do not extend to theft by violence. They refer rather to wronging one in his property rights by dishonest methods or schemes. One would not class robbery or burglary among frauds.[35]

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31 *Id.* (citing Act of March 4, 1909, ch. 321, § 215, 35 Stat. 1130).
32 *Durland*, 161 U.S. at 306-07 syl.
33 *McNally*, 483 U.S. at 358.
34 *Id.*
35 Hammerschmidt v. United States, 265 U.S. 182, 188 (1924).

The *McNally* Court stated that the 1909 codification of *Durland* did not indicate that Congress departed from this basic understanding.[36] The Court went on to find that Congress' addition of the second phrase "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property."[37] The *McNally* Court concluded, in passing the mail fraud statute, that it was Congress' intent to prevent the use of the mail system in furtherance of such schemes.[38] Speaking to the two possible interpretations based on the disjunctive in the statute, the Supreme Court noted its precedent that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language."[39] This concept was echoed in another mail fraud case, *Fasulo v. United States*, where the Supreme Court held that "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case in plainly within the statute."[40]

C. McNally*'s Parting Shot*

Based on this, the Court concluded that the jury instructions in *McNally* permitted a conviction for conduct beyond the reach of § 1341:[41]

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good

36 *McNally*, 483 U.S. at 358-59.
37 *Id.* at 359.
38 *Id.*
39 *Id.* at 359-60 (citing United States v. Bass, 404 U.S. 336, 347 (1971); United States v. Universal C.I.T. Credit Corp., 344 U. S. 218, 221-22 (1952); Rewis v. United States, 401 U. S. 808, 812 (1971).
40 Fasulo v. United States, 272 U.S. 620, 629 (1926).
41 *McNally*, 483 U.S. at 361.

> government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.[42]

II. CONGRESS' HONEST SERVICES FRAUD -18 U.S.C. § 1346

Congress did "speak" soon thereafter when it passed 18 U.S.C. § 1346; in 1988, Congress passed the current honest services fraud statute, 18 U.S.C. § 1341, in direct response to *McNally*.[43] In its present state, § 1346 defines a "scheme or artifice to defraud" under the mail fraud statute as including "a scheme or artifice to deprive another of the intangible right of honest services."[44] However, as Justice Scalia stated in the denial of cert in *Sorich v. United States*, "[w]hether that terse amendment qualifies as speaking 'more clearly' or in any way lessens the vagueness and federalism concerns that produced this Court's decision in *McNally* is another matter."[45] The Supreme Court will determine the fate of § 1346 in the three honest services fraud cases before it: *United States v. Skilling*, *United States v. Black*, and *United States v. Weyhrauch*.

III. THE PRESENT CASES BEFORE THE U.S. SUPREME COURT

A. United States v. Skilling

In *United States v. Skilling*, the defendant enjoys the most notoriety of any defendant in the three cases before the Supreme Court. Skilling, the former Enron CEO, was convicted of conspiracy, securities fraud, making false represen-

42 *Id.* at 360.

43 Sorich v. United States, 129 S.Ct. 1308, 1309 (2009) (SCALIA, J., dissenting in the denial of writ of certiorari).

44 18 U.S.C. § 1341 (1988).

45 *Sorich*, 129 S.Ct. at 1309.

tations to auditors, and insider trading.[46] On appeal, the Court of Appeals for the Fifth Circuit analyzed Skilling's complaints: that the government prosecuted him under an invalid legal theory (honest services fraud); the jury was provided with erroneous instructions; the Houston jury was biased; the prosecutors engaged in unconstitutional misconduct; and his sentence was improper.[47]

1. The Charges Against *Skilling*

In its first indictment, the government alleged that Skilling and Ken Lay, Skilling's predecessor as CEO, led the conspiracy whereby the duo worked to manipulate Enron's earnings in efforts to meet Wall Street's expectations.[48] The government also identified the Chief Accounting Officer, the Chief Financial Officer, and the Treasurer as "key players" in the illegal scheme.[49] In July 2004, the Grand Jury returned a second indictment, superseding the first, alleging that Skilling, Lay, and the Chief Accounting Officer committed conspiracy, securities fraud, wire fraud, and insider trading.[50] Specifically, Skilling was charged with one count of conspiracy to commit securities and wire fraud, fourteen counts of securities fraud, four counts of wire fraud, six counts of false representations to auditors, and ten counts of insider trading.[51]

Weeks before trial, the Chief Accounting Officer pled guilty to one count of securities fraud, which prompted the government to drop four of the counts against Skilling that involved the Chief Accounting Officer.[52] At the close of the government's case at trial, the government dismissed four additional counts against Skilling and Lay.[53] In his case in chief, Skilling asserted that he did not

46 United States v. Skilling, 554 F.3d 529, 534 (5th Cir. 2009).
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.* at 542.
51 *Id.*
52 *Id.*
53 *Id.*

commit any illegal acts; on the contrary, Skilling maintained that he consistently relied on competent legal and accounting advice and that any misrepresentations in his statements were "immaterial in content and context."[54]

Despite this defense, in May 2006, Skilling was convicted of one count of conspiracy, twelve counts of securities fraud, five counts of making false statements, and one count of insider trading. [55, 56] Subsequently, Skilling was sentenced to 292 months of imprisonment, three years of supervised release, and was ordered to pay $45 million in restitution.[57]

2. *Skilling* at the Fifth Circuit

On appeal, the Fifth Circuit addressed Skilling's claim that the "honest-services fraud" theory used to convict him was invalid.[58] The government's theory at trial allowed for three objects of the conspiracy: to commit (1) the securities fraud, (2) wire fraud to deprive Enron and its shareholders of money and property, and (3) wire fraud to deprive Enron and its shareholders of the honest services owed by its employees.[59] However, because the jury returned a general verdict, it was impossible to know which of the three theories that the jury believed had taken place.[60] Quoting the Supreme Court's decision in *Yates v. United States*, 354 U.S. 298, 312 (U.S. 1957), the Fifth Circuit found that where a jury returns a general verdict of guilt resting on even one insufficient legal theory, the jury's verdict must be set aside.[61] This reasoning is based on the consideration that a jury cannot be trusted to choose the legally sufficient theory - and ignore the insufficient one

54 *Id.*
55 *Id.*
56 Skilling was acquitted of nine counts of insider trading. Moreover, Lay was convicted of every count against him.
57 *Skilling*, 554 F.3d at 542.
58 *Id.*
59 *Id.*
60 *Id.*
61 *Id.*

- because jury members "are not generally equipped to determine whether a particular theory…is contrary to law."[62] Applied to Skilling's case, the Fifth Circuit acknowledged that his conviction must be set aside if the general verdict rests on an insufficient theory.[63]

Aside from the text of § 1346, the Fifth Circuit Court of Appeals found that the phrase "scheme or artifice to defraud" is found in the substantive mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, respectively, and includes the substantive crime of depriving another of one's honest services.[64] Because of this, the court concluded that where mail or wire fraud is the vehicle of a conspiracy, there are two possible objects of the conspiracy which can be charged: use of the mail or wire to deprive another of (1) property or money, or (2) honest services.[65] This stands in stark contrast to *McNally* which held that only money or property could be subject of the mail fraud statute.

As addressed by other courts of appeals, the Fifth Circuit acknowledged that § 1346 identifies no definition of "honest services."[66] The *Skilling* court stated that other courts had read the "or" in the phrase "to defraud *or* for obtaining money or property" to indicate two separate objects of the scheme or artifice.[67] Based on this disjunctive, courts had found that money or property could be one object of a conspiracy and, in schemes "to defraud," add an object of the deprivation of intangible rights such as honest services.[68]

In *McNally*, however, the Supreme Court ended prosecutions for honest services fraud as part of mail fraud.[69] *McNally* stated that the disjunctive did not indicate there were two objects in the statute; instead, it was intended to limit

62 *Id.* at 542-43 (quoting Griffin v. United States, 502 U.S. 46, 59 (1991)).
63 *Id.* at 543.
64 *Id.* at 43.
65 *Id.* (citing 18 U.S.C. §§ 1341, 1343).
66 *Id.*
67 *Id.* at 43 (citing *McNally*, 483 U.S. at 358).
68 *Id.*
69 *Id.* at 544 (citing *McNally* at 358-60).

§ 1341 to the protection of property rights.[70] As a result, the Fifth Circuit looked to pre-*McNally* precedent to determine exactly what constituted honest services fraud.[71]

In reaching its decision, the *Skilling* court examined two previous Fifth Circuit decisions construing honest services fraud. In the *United States v. Gray*, 96 F.3d 769 (5th Cir. 1996), the court upheld the conviction of three assistant basketball coaches at Baylor University who conspired to commit mail and wire fraud by depriving the University of their honest services through a scheme to obtain credits and scholarships for players in violation of the National Collegiate Athletic Association ("NCAA") rules.[72] In *Gray*, the defendants argued that they had broken no laws, only rules of a private association, and lacked the intent to obtain personal benefit or harm victims.[73] Nevertheless, the *Gray* court rejected that argument finding that the University's knowledge of their practices was immaterial:

> A breach of fiduciary duty of honesty or loyalty involving a violation of the duty to disclose could only result in criminal mail fraud where the information withheld from the employer was material in that, where the employer was in the private sector, information should be deemed material *if the employee had reason to believe the information would lead a reasonable employer to change its business conduct.*[74]

The court concluded that because the University was unaware of the defendants'

70 *Id.* at 544 (citing *McNally* at 360).
71 *Id.* (citing United States v. Brumley, 116 F.3d 728, 733 (5th Cir. 1997).
72 *Id.* at 544 (citing *United States v. Gray*, 96 F.3d at 772).
73 *Id.* (citing *Gray*, 96 F.3d at 744).
74 *Id.* at 544 (quoting *Gray*, 96 F.3d at 744-75) (emphasis added).

actions, the information was "deemed material" because, had the employer known, it would have changed its business conduct given the applicable NCAA rules.[75]

The second case that the *Skilling* court reviewed was its decision in *United States v. Brown*, another honest services fraud matter. In *Brown*, Enron was again the source of the defendant-employees, albeit different defendants from those in *Skilling*. In the *Brown* case, the defendants arranged for Nigerian energy-producing barges to be "sold" to Merrill Lynch.[76] Through this transaction, Enron fraudulently reported earnings from the barge sale. Despite this, the Fifth Circuit concluded that the low-level employees' conduct did not fall within the bounds of the honest services.[77] The *Brown* court held that such conduct is outside the parameters of honest services fraud:

> Where an employer intentionally aligns the interests of the employee with a specified corporate goal, where the employee perceives his pursuit of that goal as mutually benefiting him and his employer, and where the employee's conduct is consistent with that perception of the mutual interest [].[78]

Nevertheless, the *Brown* court reversed the defendants' convictions because the employees were acting both in the corporate interest and at the direction of higher-level management.[79] The *Brown* court reasoned that because the Enron decision makers in *Brown* sanctioned the specific fraudulent conduct of its employees, the

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75 *Id.* at 544.
76 *Id.* at 544 (citing *Brown*, 459 F.3d 509, 513 (5th Cir. 2006)).
77 *Id.* at 545 (*Brown*, 459 F.3d at 523).
78 *Id.* (*Brown*, 459 F.3d at 522).
79 *Id.* at 545 (citing *Brown*, 459 F.3d at 522).

employees did not deprive Enron of their honest services.[80] Using the reasoning from *Gray* and *Brown*, the *Skilling* court held that lower-level employees following their boss's direction are not liable for honest-services fraud when an employer (1) creates a particular goal, (2) aligns the employees' interests with the employer's interest in achieving that goal, and (3) has higher-level management sanction improper conduct to reach that goal.[81]

Applying this to Skilling's case, the Fifth Circuit held that Skilling's convictions must stand because:

> First, Enron created a goal of meeting certain earnings projections. Second, Enron aligned its interests with Skilling's personal interests, e.g., through his compensation structure, leading Skilling to undertake fraudulent means to achieve the goal. Third – and fatally to Skilling's argument – no one at Enron sanctioned Skilling's improper conduct.[82]

Therefore, because neither the board of directors nor any other decision-maker specifically directed the improper method by which Skilling sought to meet earnings projections, the Court found that there was no way in good faith to assert that anyone had sanctioned his improper conduct, as *Gray* required.[83]

The Fifth Circuit articulated the two elements of honest services fraud as relevant in *Skilling* as (1) a material breach of fiduciary duty imposed under state law, as in *Brumley*, *supra*, including the duties defined by the employer-employee

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80 *Id.* at 546.
81 *Id.* at 545.
82 *Id.* at 546.
83 *Id.*

relationship,[84] which (2) results in a detriment to the employer.[85] The court found that *Brown* created an exception for honest services fraud when the employer specifically directs, and is not just aware of, the fraudulent conduct.[86] Moreover, this causes "a specific detriment" to the employer because of the withholding of material information contrary to his duty of honesty. Therefore, the court concluded that the jury was "entitled to convict Skilling of a conspiracy to commit honest-services wire fraud on these elements."[87] The court held this despite the fact that it was unaware as to which of the three alleged objects of the conspiracy upon which the jury had based its verdict because the jury was entitled to convict on any or all of the three objects.[88]

B. United States v. Black

In *United States v. Black*, 530 F.3d 596 (7th Cir. 2008), the United States Court of Appeals for the Seventh Circuit upheld the conviction of several executives which was based on the theory of honest services fraud.[89] Following a four-month trial, Conrad and his three co-defendants were all convicted of mail and wire fraud. [90, 91]

1. The Charges against Black

Conrad Black was the CEO of an American company, Hollinger International, and his co-defendants were senior executives of Hollinger. Hollinger,

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84 *Id.* (citing United States v. Caldwell, 302 F.3d 399, 409 (5th Cir. 2002); *Brumley*, 116 F.3d at 734).

85 *Id.* at 547.

86 *Id.*

87 *Id.*

88 *Id.*

89 United States v. Black, 530 F.3d 596 (7th Cir. 2008).

90 *Black*, 530 F.3d at 598.

91 In addition to the other charges, Black was also convicted of obstruction of justice in violation of 18 U.S.C. § 1512(c). *Id.* at 598.

through subsidiaries, owned a number of newspapers in the United States and abroad.[92] Hollinger was controlled by a Canadian company, now defunct, called Ravelston which of which Black held controlling interest with 65% of its shares.[93] One of Hollinger's subsidiaries, APC, owned several newspapers it was in the process of selling.[94] The illegal scheme apparently began when APC had only one newspaper left – "a weekly community newspaper in Mammoth Lake, California (population 7,093 in 2000, the year before the fraud)."[95] Hollinger's general counsel prepared, and signed on behalf of APC, an agreement whereby Black, his three co-defendants, and another Hollinger executive would receive a total of $5.5 million in exchange for promising not to compete with APC – owning only a community newspaper - for three years after they ceased working for Hollinger.[96] Although the money was paid by APC, neither Hollinger's audit committee, nor Hollinger's Board of Directors was informed of the transaction.[97] This was problematic because Hollinger's audit committee was required to approve transactions between Hollinger's executives and the company or its subsidiaries due to concerns about conflicts of interest.[98]

2. *Black* at the Seventh Circuit

The *Black* court found that it was "ridiculous" to consider that "Black and the others would start a newspaper in Mammoth Lake to compete with APC's tiny newspaper."[99] Addressing that argument, the defendants argued that the $5.5 mil-

92 *Id.*
93 Black also owned "some stock in Hollinger, but a much higher percentage of the stock of Ravelston, in which [two of Black's co-defendants] also owned stock. So it was in his and their financial interest to funnel income received by Hollinger to Ravelston." *Id.* at 599.
94 *Id.*
95 *Id.*
96 *Id.*
97 *Id.* at 599.
98 *Id.*
99 *Id.*

lion were management fees already owed to Ravelston but had been characterized as compensation in the hopes of avoiding Canadian taxes.[100] Further complicating matters, there was no evidence documenting that the $5.5 million payments were approved by the corporation or credited to the management fee accounts on its books.[101] Although the checks were drawn on APC's accounts, the evidence established that the defendants had no right to management fees from APC and the checks were "*backdated* to the year in which APC had sold most of its newspapers."[102] The government asserted that the backdating was accomplished to a time period when APC owned more newspapers so that the fees for the covenant not to compete would seem less "preposterous."[103] Moreover, the management fees were to be paid to Ravelston but were paid to the defendants personally and were from the proceeds of a newspaper's sale.[104] While a Hollinger executive testified that the audit committee had approved the management fees, members of the actual audit committee testified otherwise.[105] Black and his co-defendants did not disclose the $5.5 million in the 10-K reports required to be filed annually with the Securities and Exchange Commission ("SEC").[106] These executives also caused Hollinger to represent to its shareholders that the payments were made "to satisfy a closing condition."[107]

At trial, the jury was instructed "that it could convict the defendants upon proof that they had schemed to deprive Hollinger and its shareholders 'of their intangible right to the honest services of the corporate officers, directors or controlling shareholders of Hollinger,' provided the objective of the scheme was 'private

100 *Id.*
101 *Id.*
102 *Id.* at 599 (emphasis added).
103 *Id.*
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.* at 599.

gain.'"[108] Simplifying matters greatly, the defendants acknowledged that: (1) Hollinger was entitled to their honest services, and (2) they had sought private gain.[109] However, the defendants argued that their private gain was purely at the expense of the Canadian government as this scheme was only intended to avoid Canadian taxes.[110] Addressing this "no harm, no foul" argument, the court noted that "such arguments usually fare badly in criminal cases."[111]

> Suppose your employer owes you $100 but balks at paying, so you help yourself to the money at the cash register. That is theft, even though if the employer really owes you the money you have not harmed him. You are punishable because you are not entitled to take the law into your own hands. Harmlessness is rarely a defense to a criminal charge; if you embezzle money from your employer and replace it (with interest!) before the embezzlement is detected, you are still guilty of embezzlement.[112]

As applied to *Black*, the court found that if the defendants deprived Hollinger, their employer, of the honest services owed to it then "the fact that the inducement was the anticipation of money from a third party (the anticipated tax benefit) is no defense."[113] The Seventh Circuit in *Black* was troubled by the defendants' argument and stated that avoiding Canadian taxes would not help their case.

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108 *Id.*
109 *Id.* at 600.
110 *Id.*
111 *Id.*
112 *Id.* at 600-01 (internal citations omitted).
113 *Id.* at 601.

> Suppose a third party gives a bribe to a buyer for a department store, and the buyer pockets the bribe but does not carry out the side of the bargain, which was that he would purchase supplies from the principal of the person who bribed him. The buyer has deprived his employer (the department store) of his honest services, and has done so for private gain, but he has conferred no benefit on a third party.[114]

The *Black* court likened this scenario to judges who accept bribes but then invariably argue that their acceptance of the bribe did not influence their decisions.[115] The fact remains that the bribe was accepted and private gain received thereby depriving the employer of the right to honest services.[116] Had Black and his co-defendants disclosed to the audit committee and Board of Directors that their characterization of management fees would result in a higher after-tax income, the committee or board might have decided that this increase in the value of the fees to the defendant warranted a reduction in the size of the fees.[117] The *Black* court acknowledged that not every corporate employee must advise his employer of his tax status, but these defendants had a duty of candor in the conflict of interest situation which they created.[118] The defendants only complicated matters by filing false reports with the SEC, for private gain, which were "bound to get the corpora-

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114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.* at 602. (The court further illustrated its point by an example; "[i]f $10 in tax-free income is worth $15 to the recipient in taxed income, the employer who learns about the tax break may require the employee to accept in tax-free income less than $15 in tax income.").
118 *Id.*

tion in trouble with the third party and the SEC."[119]

The court concluded its discussion of honest services fraud by stating that even if its analysis of honest services is incorrect, the defendants still could not prevail.[120] The court stated that there is no doubt that the defendants received money from APC and that Hollinger was deprived of their honest services.[121] The defendants' intent to avoid Canadian taxes was not an issue at trial, a fact which the defendants had acknowledged in their appellate reply brief.[122] At trial, the government did not assert as its theory that defendants had misused their position for personal gain in the form of Canadian tax benefits, the trial court did not instruct the jury that it had to convict the defendants if their private gain was at the expense of the Canadian government.[123]

On the contrary, the government's honest services theory was that "the defendants had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete."[124] Therefore, the instructions given to the jury did not include discussion pertaining to the avoidance of Canadian taxes.[125] As such, the *Black* court determined that a jury instruction which omits a qualification to make it unambiguously correct is different from submitting a case to a jury on an erroneous theory of criminal liability."[126] As stated above, the trial court's jury instructions merely required a conviction in the event that the jury found that the defendants had sought to deprive Hollinger and its shareholders of their intangible right to honest services and that the object of the scheme was for private gain.[127] Interestingly enough, at

119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.*
123 *Id.*
124 *Id.* at 603.
125 *Id.*
126 *Id.* at 602.
127 *Id.*

trial, the prosecution had requested a special verdict form which would require the jury to make separate findings on money or property fraud and honest services fraud, but the defendants objected, requesting a general verdict.[128] On appeal, however, they asserted that they would have wanted more specific jury instructions despite their objection at trial and request for a general verdict.[129] The *Black* court acknowledged this tactic and stated that Black and his co-defendants "wanted to reserve the right to make the kind of challenge they are mounting in this court."[130] The Seventh Circuit concluded that the defendants were arguing that the judge should have, after receiving the verdict, "told the jury to determine whether it had found both a money or property fraud and an honest services fraud."[131] The *Black* court went on to detail the problem of such a concept:

> The defendants' proposal could if adopted create a nightmare in which the jury renders a general verdict; the jurors are polled and think that they're about to be released from their term of indentured servitude – here for months – and be free to get on with their lives; and then they are told they must take an exam so that the judges and lawyers can know exactly how they evaluated the various theories presented to them in the instructions. Must they resume deliberations? And if they disagree, what then – an *Allen* charge?[132]

Based on this, and the above reasoning, the Seventh Circuit of the Court of Ap-

128 *Id.*
129 *Id.*
130 *Id.* at 603.
131 *Id.*
132 *Id.*

peals affirmed the judgments against Black and his three co-defendants.[133]

C. *United States v. Weyhrauch*

In *United States v. Weyhrauch*, the Court of Appeals for the Ninth Circuit addressed honest services fraud in the context of an Alaskan lawmaker. Defendant Bruce Weyhrauch was a lawyer and a member of the Alaska House of Representatives in 2006.[134] At that time, the Alaska legislature was considering legislation to address how oil production was taxed by the state.[135] In fact, Weyhrauch had a connection with two executives from VECO Corporation, an oil field services company, regarding the legislature's reconsideration of the oil tax.[136] Weyhrauch solicited future legal work from VECO by mail, telephone, and personal contact in exchange for his votes on the oil tax legislation and other actions favorable to VECO in Weyhrauch's capacity as a state legislator.[137] This specifically included Weyhrauch's maneuvering the legislation and reporting information about proposed legislative changes to the VECO executives.[138]

1. The Charges Against Weyhrauch

While the indictment does not allege that Weyhrauch received compensation for benefits from VECO during this period, it does suggest that Weyhrauch took actions favorable to VECO with the understanding that VECO would eventually hire him to provide legal services for the company.[139] The indictment alleged that Weyhrauch devised "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services... performed free from de-

133 *Id.*
134 United States v. Weyhrauch, 548 F.3d 1237, 1239 (9th Cir. 2008).
135 *Id.*
136 *Id.*
137 *Id.* at 1239.
138 *Id.*
139 *Id.*

ceit, self-dealing, bias, and concealment" and attempted to "execute the scheme by mailing his resume to VECO."[140]

In pretrial motions, the government proposed to introduce the following:

> (1) legislative ethics publications concerning excerpts of various Alaska state statutes addressing conflicts of interest and disclosure requirements;
>
> (2) evidence that members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interest on the floor of the Legislature, and that Weyhrauch never disclosed he was negotiating for employment with VECO;
>
> (3) a description of the ethics training Weyhrauch received; and
>
> (4) evidence that Weyhrauch served on the Legislature's Select Committee on Ethics.[141]

The district court in *Weyhrauch* ruled that this evidence related only to duties to disclose a conflict of interest that might be imposed by state law.[142] Because state law did not require Weyhrauch to disclose these conflicts of interest, the district court granted Weyhrauch's motion to exclude the proffered evidence.[143] This decision was based in part on the absence of Ninth Circuit precedent and the

140 *Id.* (citing Count VII of the Indictment).
141 *Id.* at 1239-40.
142 *Id.*
143 *Id.*

district court's adoption of the Fifth Circuit's decision in *United States v. Brumley*, *supra*, which drove the court to conclude that "any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law."[144]

2. *Weyhrauch* at the Ninth Circuit

On appeal, before ultimately overruling the district court's decision, the Ninth Circuit reviewed the respective holdings of other courts of appeals as well as the pre-*McNally* precedent. The *Weyhrauch* court recognized that before the 1987 *McNally* decision, courts had interpreted § 1341 as covering schemes to deprive another, not just of money and property, but also of "intangible rights" including the right of citizens to have public officials perform their duties honestly.[145] However, in *McNally v. United States*, 483 U.S. 350, 360 (U.S. 1987), the Supreme Court rejected the concept of "intangible rights" pursued under mail fraud. Acknowledging that the statute's plain language was inconclusive, the *Weyhrauch* appellate court turned to pre-*McNally* case law and any relevant post-*McNally* decisions for guidance in construing the 1988 statute.[146]

The *Weyhrauch* court noted the divergence of methods amongst the courts of appeals in construing § 1346. For example, the *Weyhrauch* court noted that the Fifth Circuit adopted the "state law limiting principle" which mandated that the government prove that a public official violated an independent state law to support an honest services mail fraud conviction.[147] Similarly, the Third Circuit adopted a similar rule whereby the government is required to prove that a public official violated a fiduciary duty specifically established by federal *or* state law.[148]

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144 *Id.*

145 *Id.* at 1243 (citing United States v. Williams, 441 F.3d 716, 721-22 (9th Cir. 2006); United States v. Sorich, 523 F.3d 702, 707 (7th Cir. 2008)).

146 *Id.*

147 *Id.* at 1243-44 (citing *Brumley*, 116 F.3d at 734-35).

148 *Id.* at 1244 (citing United States v. Murphy, 323 F.3d 102, 116-17 (3d Cir. 2003)).

On the other hand, the Ninth Circuit in *Weyhrauch* recognized that the majority of circuits have held that the definition of "honest services" was governed by a uniform federal standard inherent in § 1346, but did not uniformly define the contours of such a standard.[149] For example, the Seventh Circuit required governments to prove that a public official breached a fiduciary duty with the intent to reap private gain to be convicted of honest services mail fraud.[150] On the other hand, the First Circuit read honest services as requiring that the officials' misconduct must involve more than a mere conflict of interest to support a conviction.[151] The Eighth and Tenth Circuits have read § 1346 to require that a public official's breach of duty must be material and accompanied by fraudulent intent.[152] From their review of the honest services decisions in the various circuits, the *Weyhrauch* court found that these courts have limited, "to differing degrees, the reach of § 1346 into state and local public affairs."[153]

The court in *Weyhrauch* acknowledged that a literal reading of § 1346 might provide government prosecutors with unwarranted influence over state and local public ethics standards.[154] The court felt that such a concern was warranted given the Supreme Court's language in *Cleveland v. United States*, 531 U.S. 12, 25 (U.S. 2000), where it stated, "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes."[155] Equally important, the *Weyhrauch* court found that (1) Congress needs to give public officials fair notice of the conduct that would sub-

149 *Id.* (citing *Sorich*, 523 F.3d at 712; *Urciuoli*, 513 F.3d at 298-99; United States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007); and United States v. Bryan, 58 F.3d 933, 942 (4th Cir. 1994)).

150 *Id.* (citing *Sorich*, 523 F.3d at 708).

151 *Id.* (citing *Urciuoli*, 513 F.3d at 598-99).

152 *Id.* (citing United States v. Cochran, 103 F.3d 660, 667 (10th Cir. 1997); United States v. Jain, 93 F.3d 436, 442 (8th Cir. 1996)).

153 *Id.* at 1244.

154 *Id.* (citing *Brumley*, 116 F.3d at 734).

155 *Id.*

ject them to the federal fraud statutes' serious criminal penalties,[156] (2) a desire to establish firm boundaries lest every dishonest act by public officials lead to federal criminal liability,[157] and (3) the potential for selective enforcement against public officials many of whom engage in partisan political activities.[158]

The Fifth Circuit ultimately declined to adopt the "state law limiting principle" created by the Fifth Circuit, even though it addressed all of these concerns.[159] The court concluded that there was no "basis in the text or legislative history of § 1346 revealing the Congress intended to condition the meaning of 'honest services' on state law."[160] "Congress has given no indication it intended that the criminality of official conduct under federal law to depend on geography."[161] *Id.* The *Weyhrauch* court concluded that because pre-*McNally* case law did not require state law to create an official's duty of honesty to the public and also the plain language of the statute contains no reference to state law, it would not "infer that Congress intended to import a state law limitation into § 1346."[162]

The *Weyhrauch* court's review of pre-*McNally* cases identified two categories of conduct by public officials sufficient to support an honest services conviction: (1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion, and (2) the failure to disclose material information.[163] Similarly, post-*McNally* public official honest services fraud cases also fall into one of these two categories.[164] The common element between the two

156 *Id.* (citing *Urciuoli*, 513 F.3d at 294; and *Williams*, 441 F.3d at 724).
157 *Id.* (citing *Sorich*, 523 F.3d at 707-08; and *Urciuoli*, 513 F.3d at 294).
158 *Id.*
159 *Id.* at 1245.
160 *Id.* (This comports with prior Ninth Circuit holdings. "We were less equivocal in United States v. Louderman, 576 F.2d 1383, 1387 (9th Cir. 1978), quoting that 'state law is irrelevant in determining whether a certain course of conduct is violative of the wire fraud statute…In short, we have never limited the reach of the federal fraud statutes only to conduct that violates state law.").
161 *Id.*
162 *Id.* at 1246.
163 *Id.* at 1247 (citing *Bohonus*, 628 F.2d at 1171).
164 *Id.* (citing *Urciuoli*, 513 F.3d at 295 n.3).

categories of misconduct is the undermining of transparency in the legislative process and other governmental functions.[165] The court stated that it was Congress' intent to bring the two categories of official conduct within the reach of § 1346 when it reinstated the honest services fraud theory in 1998 following *McNally*.[166]

The *Weyhrauch* court said that the allegations against Mr. Weyhrauch "describe an undisclosed conflict of interest and could also support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work."[167] The court found that because Weyhrauch's alleged conduct fell within one of the two categories - bribery or nondisclosure - it did not need to "define the outer limits of public honest services fraud."[168]

Therefore, the Ninth Circuit in *Weyhrauch* permitted the prosecution to proceed on the theory that Mr. Weyhrauch committed honest services fraud by failing to disclose a conflict of interest and by taking official actions with the expectation that he would receive future legal work in exchange for doing so.[169] In doing so, the court overruled the district court's decision requiring that the government prove that state law imposed an affirmative duty on the defendant to disclose a conflict of interest. Interestingly enough, because the government did not appeal the lower court's ruling that the proffered evidence related only to state law, the Ninth Circuit explicitly stated that it offered "no opinion whether the proffered evidence is relevant to proving the government's case under the standard we have announced and leave that determination to the court's sound judgment."[170]

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165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.*
169 *Id.*
170 *Id.* at 1248.

IV. A CHANGE IS COMING - THE SUPREME COURT'S DECISION ON 18 U.S.C. § 1346

In accepting these three cases on honest services fraud, the Court has demonstrated its resolve to take some ameliorative action and address the divergent manner in which the various courts of appeals treat this subject. However, the exact "fix" or standard to be established by the Supreme Court cannot be discerned at this time. But spectators at the oral arguments[171] could certainly glean the leanings of individual justices based on their questions - as well as their editorial comments.[172]

A. Scalia and Sorich

Of his peers, Justice Scalia's vote is the most easily discerned, especially given the dissenting opinion he penned addressing the Supreme Court's denial of certiorari in *United States v. Sorich*, an honest services fraud case from the Seventh Circuit.[173] Scalia was clearly troubled with the Court's refusal to address the "current chaos" brought about by this statute.[174] In his dissenting opinion in *Sorich*, Scalia illustrated his concerns about the potential for the abuse of this vague statute:

> If the "honest services" theory - broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers - is tak-

171 The argument for *United States v. Skilling* was held on March 1, 2010. The oral arguments for *United States v. Black* and *United States v. Weyhrauch* were both held on December 8, 2009. Deputy Solicitor General, Michael R. Dreeben, of the Department of Justice argued for the United States in both *Black* and *Weyhrauch*. In fact, *Black* and *Weyhrauch* were scheduled "back to back" - one at 10:16 AM and the other at 11:19 AM.

172 For the sake of brevity, the remarks of only select Justices will be addressed which highlight the Court's disquiet with § 1346 and the concept of honest services fraud.

173 *See* Sorich v. United States, 523 F.3d 702 (7th Cir. 2008) for the opinion of the Court of Appeals for the Seventh Circuit.

174 *Sorich*, 129 S.Ct. at 1311 (SCALIA, J., dissenting in the denial of writ of certiorari).

> en seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee's recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee's phoning in sick to go to a ball game.[175]

To combat these concerns, Scalia recognized the importance of a "coherent limiting principle" to define the right to honest services, where the right originated, and how the right can be violated; without some judicial action to curtail the reach of the statute, "this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."[176]

Scalia's dissenting opinion presented two concerns also discussed by the *McNally* Court.[177] First, the Supreme Court is unwilling to establish a precedent whereby federal prosecutors or federal courts create ethics codes and set disclosure requirements for local and state officials.[178] It is certainly permissible to enact laws prohibiting corrupt behavior but Congress places itself on shaky ground when it creates "a freestanding, open-ended duty to provide 'honest services' - with the details to be worked out case-by-case."[179]

The second concern Scalia offers is based on the principle that "a crimi-

175 *Id.* at 1309.
176 *Id.* at 1310.
177 *Id.*
178 *Id.*
179 *Id.* (citing Brown, *Should Federalism Shield Corruption?* 82 CORN. L. REV. 225 (1997)).

nal statute must give fair warning of the conduct that it makes a crime."[180] Scalia relayed his concern that § 1346 will serve as an invitation for federal courts to develop a common law crime of unethical conduct.[181] The Justice best articulated the threat of vagueness when he said, "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?"[182] In this vein, Scalia was particularly disturbed by the language used by the Seventh Circuit – also Conrad Black's appellate court – which interpreted § 1346 to criminalize all conduct that is not "in the public's best interest," requiring all conduct to benefit *someone*.[183]

Sorich aside, Scalia's concerns about the vague nature of the statute were plainly seen and heard during the oral arguments of the three pending cases. While other justices were content to inquiry into the prudence of a limiting principle as used by the Fifth Circuit, Justice Scalia was focused on a more fundamental question – constitutionality. In the *Black* oral argument, Scalia conveyed his belief that mere limiting principles do not address the basic failure of the statute.[184] He showed he had little interest in hearing the government's proposed standard which would require a type of economic harm in any honest service fraud prosecution:

> I don't have the heart to inquire into that question if I think that the whole statute is bad...But if I think the whole statute is bad, what -- you know, why should I engage in -- in this exercise?[185]

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180 *Id.* (quoting Bouie v. City of Columbia, 378 U. S. 347, 350 (1964)).
181 *Id.*
182 *Id.* (quoting United States v. Rybicki, 354 F.3d 124, 160 (2d Cir. 2003) (Jacobs, J., dissenting)).
183 *Id.* at 1311 (quoting *Sorich*, 523 F.3d at 711)).
184 Transcript of Oral Argument of *United States v. Black*, United States Supreme Court, December 8, 2009, p. 24.
185 *Id.*

In addition, while the full extent of Justice Scalia's concerns are contained in the *Sorich* dissenting opinion, his conclusion can be seen in a comment made during the *Weyhrauch* oral argument. He stated that if the Court has a principle that a citizen should know when "he is violating a criminal statute" then § 1346 "is just too much."[186]

B. Justice Breyer

But Justice Scalia was not alone in these concerns; he was joined by Justice Breyer, who punctuated the argument with humorous hypotheticals illustrating his unease and reticence to accept § 1346 and the case law in its current state. Most of Breyer's comments and questions focused on the vague nature of the statute; in one instance during the *Weyhrauch* oral argument, the Justice jokingly remarked on this long-standing principle:

> I thought there was a principle that a citizen is supposed to be able to understand the criminal law that was around even before Justice Scalia.[187]

Humor aside, Justice Breyer did acknowledge the relative complexity of the Supreme Court's task in providing a remedy for the split among the courts of appeals. In the *Black* oral argument, Breyer stated that most - if not all - employees owe a fiduciary duty, including that of honesty, to their employer in some manner.[188] As such, limiting honest services to a fiduciary duty is not in actuality any limitation. The Justice did return to humor when he illustrated his unease about

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186 Transcript of Oral Argument of *United States v. Weyhrauch*, United States Supreme Court, December 8, 2009, p. 41-42.

187 *Id.* at 42.

188 Transcript of Oral Argument of *United States v. Black*, United States Supreme Court, December 8, 2009, p. 30.

using only a employer-employee relationship as the source of a fiduciary duty to provide honest services:

> ...Perhaps there are 150 million workers in the United States. I think possibly 140 of them would flunk your test...
>
> "Do you like my hat?" Says the boss.
>
> "Oh, I love your hat," says the worker.
>
> Why? So the boss will leave the room so that the worker can continue to read the racing form... Explain it to me, how your test does not make this statute potentially criminalizing 100 million workers in the United States, or some tens of millions?[189]

Justice Breyer, who is ordinarily not ideologically aligned with Scalia and more conservative Justices, holds considerable influence and his opinion in these three cases will be carefully weighed by his companions on the Court.

C. Chief Justice Roberts

Chief Justice Roberts also expressed concern about the complexity of this area of the law and the ability of citizen to understand the varied precedent. At the *Skilling* oral argument, the Chief Justice commented "[T]hat's where it gets fuzzy.

189 *Id.* at 30-31.

I mean, you need lawyers and research before you get an idea of what the pre-*McNally* state of the law was with respect to...the right of intangible services."[190] Later, Roberts again commented that such a statute with varying and "evolving" precedent places the prospective defendant in "an awfully difficult position."[191] The Chief Justice concluded that series of remarks by concluding, "That doesn't sound like fair notice of what's criminal."[192]

However, in the same oral argument, he appeared to express a contrary view. In questioning Skilling's appellate counsel, Chief Justice Roberts offered the following remarks:

> I don't understand why it's difficult. The statute prohibits "scheme to deprive another of the intangible right of honest services." Skilling owed the Enron shareholders honest services. He acted dishonestly in a way that harmed them. But I don't understand the difficulty.[193]

Shortly thereafter, though, Roberts appeared to concede that the problem lies not in the statute alone, but in Congress' failure to define, or otherwise identify the source of honest services. "[T]here has to be a right to honesty. In other words, it's not just in the abstract."[194]

From the oral arguments, one could get the sense that the Justices were struggling to develop a straightforward standard which could be evenly applied. For example, Justice Kennedy expressed his concern about the difficultly in construing any statute that requires one standard for private individuals and a separate

190 Transcript of Oral Argument of *United States v. Skilling*, United States Supreme Court, March 1, 2010, p. 46.
191 *Id.* at 47.
192 *Id.* at 47.
193 *Id.* at 22.
194 *Id.* at 23.

standard for public officials.[195] In the *Weyhrauch* oral argument, Justice Ginsburg, when addressing the use of state law as a limiting principle as used by the Fifth Circuit, seemed troubled that citizens would be subject to criminal liability in some states - but not in others - merely based on "geography."[196] Similarly, Justice Sotomayor also inquired into the problem of identifying a single standard which would address the various duties contained within local and state laws.[197]

In conclusion, based on the statements made by several of the Justices in their opinions and at the oral arguments in these cases, the Supreme Court will likely fashion a rule which will limit honest services fraud as it currently exists. While a simple and coherent rule using existing precedent and § 1346 appears elusive, the Supreme Court may choose the simplest method by following in the steps of *McNally* and ask Congress, again, to "speak more clearly."

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195 Transcript of Oral Argument of *United States v. Black*, United States Supreme Court, December 8, 2009, p. 19.

196 Transcript of Oral Argument of *United States v. Weyhrauch*, United States Supreme Court, December 8, 2009, p. 7.

197 Transcript of Oral Argument of *United States v. Skilling*, United States Supreme Court, March 1, 2010, p. 53.

HUMAN TRAFFICKING AND FORCED LABOR:

A RECOMMENDATION

BRITTANY FOOR[1]

Only within the last several years that the definition of human trafficking has been expanded to include forced labor in otherwise legal occupational sectors. The Anti Human Trafficking Conventions of 1904, 1933, and 1949, addressed only sexual forms of human trafficking in their definitions. Non-sexual forced labor as a form of human trafficking was absent from international law until 2000. While international community should be proud of expanding the definition of human trafficking, the change presents further legal headaches. A major issue in the discussion of modern slavery, human trafficking, and human smuggling is the absence of clearly defined and consistent terms among international treaties. The legal field requires precision of language and with a lack of harmonious and precise definitions for concepts like "human trafficking," "human smuggling," and "forced labor," the law (and therefore law enforcement) will continue to flounder.

During the 1990s and early 2000s, many countries dealt with human trafficking only in the contexts of prostitution and illegal immigration. Until recent-

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ly, only a few European states, such as Belgium, Poland, and the Ukraine[2] used broader legislation that satisfied the European Council framework. In Holland, illegal trafficking was limited to trafficking for the purpose of prostitution, while in France the regulation of trafficking was only included in the prostitution law, itself.[3] Greek legislation merely prohibited trafficking in female minors, while the UK prohibited illegal entry into the country but had no specific laws about trafficking.

In the United States, federal law enables prosecution of all traffickers and enslavers, and providing protection for all victims. Ann Jordan, formerly the director of Global Rights Initiative Against Trafficking in Persons and a co-founder of Freedom Network, observed that America remained focused on sex trafficking in spite of its encompassing legislation. She said that "the broad scope of the law is being eroded by a U.S campaign that equates prostitution with trafficking, and is redirecting resources to end prostitution rather than to end trafficking."[4] The anti-prostitution faction within trafficking is the most vocal and its influence on the American legislative process, primarily through a faithful lobbying presence of conservative and religious leaders, has been strongly felt. Authors Kevin Bales and Ron Soodalter observe, "The shift in grant funding shows that the [U.S] federal government is collaborating with an anti-trafficking program that heavily emphasizes the issue of sex trafficking, to the detriment of labor trafficking efforts."[5]

In 2000, the UN pushed for a broader policy that would function at the international level. The European Council followed suit in 2002. These coalitions produced two major documents that expanded the scope of human trafficking: the

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2 Article 149, Criminal Code of Ukraine, http://www.legislationline.org/download/action/download/id/1710/file/e7cc32551f671cc10183dac480fe.htm/preview (last visited Feb. 20, 2010)

3 Legislation, Organization for Security and Co-operation in Europe, http://www.legislationline.org/?tid=178&jid=19&less=false (last visited Feb. 20, 2010)

4 Ann Jordan, *Sex Trafficking: The Abolitionist Fallacy*, FOREIGN POLICY IN FOCUS (2009).

5 KEVIN BALES & RON SOODALTER, THE SLAVE NEXT DOOR: HUMAN TRAFFICKING AND SLAVERY IN AMERICA TODAY 111 (1st ed., 2009)

UN Convention on Trans-national Crime and the Council Framework Decision of Combating Trafficking in Human Beings, respectively. Three years later, in May 2005, the Council of Europe's Third Summit of Heads of State and Government adopted a plan that called for the "widest possible ratification" of legislation that would encourage action against human trafficking to "strengthen the prevention of trafficking, the effective prosecution of its perpetrators and the protection of the human rights of the victims."[6] Many summit ambassadors were hopeful that human trafficking would eventually achieve universal jurisdiction.[7]

The aforementioned UN and Council treaties make two significant breaks and hopeful advancements from previous legislation. First, they make a distinction between trafficking victims and smuggling migrants[8]. The differences between smuggling and trafficking are summarized briefly in the table below: [9]

Trafficking	Smuggling
Can take place within the borders of a state	Always a cross-border crime
Illegal border crossing not necessary	Migrants enter illegally
Human rights problem	Migration problem

6 Heads of States and Government of the Council of Europe, Warsaw, *Action Plan: Strengthening the Security of European Citizens II, 1*, CM(2005) 80 final, 17 May 2005.

7 At present (Feb. 2010) universal jurisdiction does not apply to the crime of human trafficking or to the trafficking of women, as it does with slavery. For further information on trafficking as a crime that should receive universal jurisdiction, see Nina Tavakoli, *A Crime that Offends the Conscience of Humanity: A Proposal to Reclassify Trafficking in Women as an International Crime*, 9 Inter. Crim. L. Rev. 77, 77-98 (2009).

8 United Nations General Assembly, 55th Session, Protocol Against the Smuggling of Migrants by Land, Sea, and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, GA. Res. 55/25, Annex III, Supp. 49, at 65, UN Doc. A/45/49 (2001).

9 Harald Haugom Olsen, *The Snake From Fujian Province to Morecambe Bay: An Analysis of the Problem of Human Trafficking in Sweated Labour*, 16 Euro. J. of Crime, C. Law and C. Jus. 11 (2008).

Crime against person	Crime against the state
Involves an exploitative purpose (forced labor is always implicit)	Mutual interest between the smuggler and the smuggled
Profit comes from the sale of trafficked persons [sic] sexual services or labor	Profit comes from the movement of the person
Persons trafficked are victims	Persons smuggled are clients
Involves coercion	Voluntary

Second, the UN and the European Council both include forced labor in their definitions of human trafficking. The legislation is restated below, taken from the UN's Trafficking Protocol in 2000. This was the world's first international definition of human trafficking. The treaty contains three main elements, all of which must be fulfilled for an act to be properly considered human trafficking:

> 1. An action, consisting of: Recruitment, transportation, transfer, harboring or receipt of persons;
> 2. By means of: Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving of payments or benefits to achieve the consent of a person having control over another;
> 3. For the purpose of: Exploitation (including, at a minimum, the exploitation of prostitution and other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude, or the removal of organs.) [10]

10 The only exception is for children to whom the requirements relating to means do not apply. see Trafficking Protocol, *supra* note 11, art. 3(c).

It is notable that the UN does not define the term "forced labor" for itself, deferring instead to definitions previously devised by earlier conventions. The most widely cited definition is found in the International Labour Organization (ILO) Convention Concerning Forced or Compulsory Labour (C029, 28 June 1930), a definition that has also been adopted by the European Court of Human Rights. The ILO defines forced labor as "All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."[11]

It is difficult for the judicial system to ascertain whether or not a person has offered himself voluntarily for work or service two reasons. First, a person's consent could be the result of coercion, deception, fraud, etc. Second, it is not always clear the extent to which individuals have given their consent. One could, for example, have consented to work hard in poor conditions but not to give up personal freedom. According to the European Court of Human Rights, courts must evaluate the validity of consent in light of all the case's circumstances, and even then an individual's consent is not always sufficient to rule out forced labor. Thus, for courts to establish forced labor there must be both a lack of consent to the circumstances as they truly exist and an absence of control over one's own labor. [12]

In 2005, the ILO posited that human trafficking was a subset of forced labor. It assumed that forced labor could be dissected into the following subordinate categories: state-imposed, private-imposed, economic exploitation, and sexual exploitation. In *A Global Al liance against Forced Labor* the ILO stated that "the very concept of forced labor, as set out in the ILO standards on the subject, is still poorly understood."[13] In an attempt to advance the definition of forced labor, the

11 International Labour Organization, Convention Concerning Forced or Compulsory Labor, C029, Art. 2.1, (1930).

12 Van der Mussele v. Belgium, Application No. 8919/80 Eur. Ct. H.R. (1983).

13 International Labour Organization Director-General, *A Global Alliance Against Forced Labor: Global Report Under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work 2005*, 93rd Session of International Labour Conference (2005).

report listed the following criteria for forced labor practices, which is as follows:

Table 21: Identifying Forced Labor in Practice: [14]

The "route into" forced labor:	Actual presence or credible threat of:
1. Birth/descent into "slave" or bonded status 2. Physical abduction or kidnapping 3. Sale of person into the ownership of another 4. Physical confinement in the work location— in prison or in a private detention 5. Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non-compliance 6. Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.) 7. Deception or false promises about types and terms of work 8. Withholding and non-payment of wages 9. Retention of identity documents or other valuable personal possessions	1. Physical violence against worker or family or close associates 2. Sexual violence 3. (Threat of) supernatural retaliation 4. Imprisonment or other physical confinement 5. Financial penalties 6. Denunciation to authorities (police, immigration, etc.) and deportation 7. Dismissal from current employment 8. Exclusion from future employment 9. Exclusion from community and social life 10. Removal of rights or privileges 11. Deprivation of food, shelter, or other necessities 12. Shift to even worse working conditions 13. Loss of social status

As observed by Christal Morehouse, "Only three of the ILO's 2005 criteria do not apply strictly to human trafficking. These are: 'dismissal from current

14 *Id.* at 6.

employment under the menace of penalty', 'exclusion from future employment through menace of penalty', and 'physical confinement in prison.'"[15] Morehouse contends that the ILO's distinction between human trafficking and forced labor may be better understood as "two partially overlapping" categories for several reasons.[16] First, the dismissal from or barring of employment as an unaccompanied factor is not considered severe enough to be a situation of modern enslavement through trafficking. Second, the removal of organs, taking part in a chain of exploitation, and an irrelevance of the victim's consent to exploitation are not considered part of forced labor. Third, the involuntary nature found in forced labor and trafficking is shared. Given these reasons, the international theoretical framework implies that the two crimes are distinct.

While theoretical distinctions are not without merit, research suggests that there are overwhelmingly deep ties between forced labor and human trafficking. Jill Van Voorhout observed that "while it is difficult to estimate the magnitude of this crime due to the illegal nature of this employment and its recent criminalization... [i]t has been clearly demonstrated that human trafficking for labor exploitation occurs on a large scale."[17] According to the ILO, at least 2.45 million people worldwide are currently victims of forced labor as a consequence of trafficking.[18] Several studies confirm this connection, identifying individuals in many nations who were victims of both forced labor and human trafficking.[19] The ILO posits that

15 CHRISTAL MOREHOUSE, COMBATING HUMAN TRAFFICKING: POLICY GAPS AND HIDDEN POLITICAL AGENDAS IN THE USA AND GERMANY 78 (2009).

16 MOREHOUSE, *supra* note 15.

17 International Labour Organization, *supra* note 16.

18 *Id.* at 14.

19 **Germany**: N. Cyrus, *Trafficking for Labor and Sexual Exploitation in Germany*, ILO, Geneva, 2050. **Belgium**: Centre of Equal Opportunities and Opposition to Racism (CEOOR), *Trafficking in Human Beings, Annual Report, Belgian Policy on Trafficking and Smuggling in Human Beings: Shadows and Lights*, 2005. ; and A. Bucquoye & W. Cruysberghs, *International trafficking of humans in Belgium*, 2003. **The Netherlands**: J. van der Leun & L. Vervoon, *Slavery and Forced Labor in the Netherlands*, 2004; and Bureau of the National Report of Human Trafficking, *21st Century: Slaver and Responses*, 2006. **United Kingdom:** B. Anderson and B. Rogaly, Forced

these victims work in a variety of economic sectors including domestic, hospitality, and culinary services, textiles, agriculture and horticulture; automotive and shipping; as well as shoplifting, pick-pocketing, and CD/DVD piracy.[20] Due to the lack of emphasis on this kind of victimization, men and boys, as well as women, not under sexual exploitation, have largely gone unrecognized as separate and astoundingly large categories of victims.

The theoretical framework of the ILO discussed previously demonstrates that human trafficking and labor exploitation are not synonymous in every case. One can see that even though these two issues differ greatly in their respective complexities, substantial overlap exists. The ILO's approach to defining human trafficking as a subset of labor exploitation is narrow.[21] This approach does not reflect that human trafficking is a severe form of labor exploitation which differs from other forms of low-wage exploitation or lesser forms of psychological threats such as termination from employment or being barred from future employment.

In *A Global Alliance against Forced Labor*, the ILO asked the following question: "Are the abusive recruitment and employment practices to which migrant workers are particularly vulnerable best dealt with through providing for the offense of forced labor or that of trafficking in domestic policy frameworks?"[22] While the question is phrased in an either/or manner, it is possible that due to the substantial (yet not total) overlap of the two issues and the absence of a clear institutional mandate on how to fight human trafficking at the global level, the ILO

Labour and migration in the UK. Study Prepared by COMPAS in collaboration with Trades Union Congress, 2005; and UK Home Office, *Tackling Human Trafficking—Consultation on Proposals for a UK Action Plan*, 2006. **Poland and Czech Republic**: T. Obokata, "Trafficking and Smuggling of Human Beings in Europe: Protection of Individual Rights of State's Interests?," *Web Journal of Current Legal Issues*, 2001. **United States:** Patrick Belser, *Forced Labor and Human Trafficking: Estimating the Profits*. Cornell, 2005; and *Free the Slaves, Hidden Slaves: Forced Labor in the United States*. UCal Berkley, 2004.

20 International Labour Organization, *supra* note 16, at 14.

21 MOREHOUSE, *supra* note 15.

22 International Labour Organization, *supra* note 16, at 7.

would best address the issues of human trafficking and forced labor in tandem. Only in respecting the relative complexities of each of these separate issues can great progress be made; yet, the close connections between forced labor and trafficking make it imperative that they be dealt with together. Due to the significant overlap between forced labor and human trafficking, the UN should consider mandating the ILO to be an International Anti Human Trafficking and Forced Labor Organization.