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Men and Women Sharing a Chosen Profession and a Common Heritage

THE DIGEST

Two-Thousand and Nine

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Restrictions on Freedom of Expression Imposed by Servitudes

JAMES CHARLES SMITH[1]

This article examines an important type of contractual restriction on an individual's freedom of expression: restrictions imposed on interests in real property pursuant to the law of servitudes. These private land-use controls, traditionally described as real covenants and equitable servitudes, affect millions of United States families, who have purchased or rented homes subject to servitudes regimes. Homeowners associations enforce rules set forth in recorded instruments, and they often have the ability to enact new regulations. Sometimes the rules have a substantial inhibiting effect on the ability of individuals to engage in freedom of expression.

I. THE COURTS: PRIVATE LAW OR CONSTITUTIONAL LAW?

Let's consider two cases that illustrate the tension between servitude regimes and freedom of expression. The first case, from Virginia, reflects the usual outcome when servitudes are evaluated under the private-law norms based on the contract theory of consent through recordation of the covenants. In *Wyndham Foundation, Inc. v. Oulton*, homeowners Richard and Ava Oulton installed a permanent flagpole with an American flag in their yard.[2] Their property owners' association objected, claiming that the flagpole was a "structure" under the recorded covenants, for which they needed approval of the association.[3] The trial court held that the association had the right to require removal of the flagpole.[4] The Oultons appealed, asserting that the association's action violated their freedom of expression. They said that property owners' associations have a broad range of powers that allow them to function like governmental entities, and therefore state action exists for purposes of the First Amendment.[5] But the Virginia Supreme Court disagreed, affirming the trial court, and the U.S. Supreme Court declined to grant certiorari.[6]

The second case, from New Jersey, reflects the analysis that may result from evaluating servitudes under a constitutional regime. *Committee for a Better Twin Rivers v. Twin Rivers Homeowners' Association* concerns a large planned

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1. John Byrd Martin Professor, University of Georgia School of Law
2. Wyndham Found., Inc. v. Oulton, 56 Va. Cir. 217 (Va. Cir. Ct. 2001), (appeal denied at Va. Ct. App. in an unpublished decision), *cert. denied*, 537 U.S. 1001 (U.S. Nov. 4, 2002) (No: 02-292).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

unit development in East Windsor, New Jersey.[7] Twin Rivers covers about one square mile and has 2,700 homes, occupied by about 10,000 residents.[8] The governing documents are typical of what is found in most modern community associations. Membership in the Twin Rivers Homeowners' Association (the "Association") is mandatory. The Association is a non profit corporation, run by a Board of Directors, which the owners elect. Each owner is obligated to pay monthly fees. The Association has the power to adopt rules and regulations. If an owner violates a rule, the Association can levy a fine, ranging from $50 to $500.

Three Twin Rivers resident-owners brought a nine-count complaint against the Association. Three of the counts relate to expression; the other six relate to governance issues. The "expression counts" seek the right: (1) to post "political signs on the residents" property "and on common elements under reasonable regulation,"[9] (2) to use "the community room in the same manner as other similarly situated entities,"[10] and (3) to include their views in the monthly community newspaper, known as *Twin Rivers Today*.

The trial court disposed of a number of claims on summary judgment based on an "overarching" ruling that the Association was not subject to the constitutional limitations imposed on state actors.[11] Based on this premise, the trial court applied the business judgment rule as the measure for the legality of the Association's rules and conduct.

The Appellate Division reversed this ruling.[12] It concluded that the owners have a right of expression under the New Jersey Constitution with respect to the sign regulations and the other rules in question. The court did not rely on the federal constitution. It relied principally on two New Jersey Supreme Court cases: one holding that Princeton University cannot exclude from campus an outsider who distributed political literature;[13] the other holding that a regional shopping center cannot ban leafleting on issues of public import.[14] Both of

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7. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006) *rev'd*, 929 A.2d 1060 (N.J. 2007).

8. *Id.* at 953. Twin Rivers is a large community. Its common areas include parks, swimming pools, and ball fields. There are commercial uses within the Twin Rivers' boundaries: gas stations, banks, and dry cleaners. The Association provides an impressive range of services for the residents. It employs over 20 full-time and 50 more seasonal workers. In 2001, homeowners' maintenance fees exceeded $3 million, and the annual budget was $3.5 million.

9. *Id.* at 951.

10. *Id.* at 951. Plaintiffs challenged Resolution 2002-8 and prevailed at the trial court on the ground that the Resolution was "vague and unreasonable" and thus could not survive under the business judgment rule. The appellate court agreed. *Id.* at 970.

11. *Id.* at 952.

12. *Twin Rivers*, 890 A.2d at 959-960.

13. State v. Schmid, 423 A.2d 615, 633 (N.J. 1980), *appeal dismissed sub nom.*, Princeton Univ. v. Schmid, 455 U.S. 100 (1982).

14. New Jersey Coalition Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 782-783 (N.J. 1994). The court also relied on *State v. Shack*, 277 A.2d 369 (N.J. 1971) (holding that a

these "public access" cases applied a balancing test, which the Appellate Court endorsed for the context of expression within a community association:

> [W]e conclude, in balancing the interests of the parties, that, in the circumstances presented by this matter, plaintiffs' rights to engage in expressive exercises – including those relating to public issues in their own community, such as with regard to the election of candidates to the TRHA Board, or broader issues of governmental and public policy consequence, or matters of general interest – must take precedence over the TRHA's private property interests.[15]

Although this part of the court's opinion appeared to reach judgment as to the proper balance, subsequently the court explained:

> . . . we do not rule upon the merits of any of the claims plaintiffs have made bearing upon their fundamental rights under the New Jersey Constitution; only that, in resolving those claims on summary judgment, the trial court applied an inappropriate standard. Accordingly, we remand for reconsideration by (sic) the proper standard of the claims based upon the expressive rights guarantees of [the New Jersey Constitution]. We recognize that such rights, while fundamental, are not absolute. They are subject to reasonable and proper limitations having to do with *the time, place and manner* of their exercise.[16]

In 2007, the Supreme Court of New Jersey reversed the Appellate Division's judgment, reinstating the trial court decision.[17] It did not, however, embrace the trial court's reasoning, which found no state action and thus eschewed the application of constitutional norms. Instead, the Supreme Court in *Twin Rivers* appeared to reject the rule adopted in the majority of states, which immunizes community associations from constitutional scrutiny on the basis that they are not state actors. Rather, the Supreme Court concluded that the association's rules were constitutional because they were reasonable as to time, place, and manner and the association had not invited the public to use its property.[18] In effect, the Supreme Court thought that the record was sufficient for it to rule on the merits of the plaintiffs' claims, balanced against the community's interests, without the need for a remand for the trial court to gather additional facts.

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farm owner has no right to exclude government workers who seek to interact with migrant farm workers).

15. *Twin Rivers*, 890 A.2d at 959 (N.J. Super. Ct. App. Div. 2006).

16. *Id.* at 971 (citing *JMB. Realty Corp.*, 650 A.2d 757 (N.J. 1994); *Schmid*, 423 A.2d at 615 (N.J. 1980), (emphasis added).

17. Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060 (N.J. 2007).

18. *Id.* at 1072-74.

II. EVALUATING RESTRICTIONS ON EXPRESSION

A. THE SPECIAL STATUS OF HOMEOWNERS COMPARED TO OUTSIDERS AND TENANTS

In *Twin Rivers*, both appellate courts discussed the freedom of expression issues in terms of a conflict between the Association and plaintiff owners, not as a conflict between two sets of neighbors (the owners in control of the homeowners association vs. dissident owners). In *Twin Rivers*, the homeowners' association argued that the New Jersey "public access" precedents were distinguishable because they "were based on the private property owners' express or implied invitations to the public to enter and use the premises at issue."[19] With no meaningful analysis, the New Jersey appellate courts rejected this distinction. They chose to apply the balancing rule of the public access cases. In so doing, the court accepted the underlying logic of the public access cases. It treated the homeowners' association as the landowner, and the plaintiffs as if they were outsiders (members of the general public), wanting to use the association's property for expressive purposes. The court paid no attention at all to the special status of the plaintiffs as landowners. *Twin Rivers* really represents a conflict between two sets of neighbors – a point the opinions wholly ignore.

In attempting to distinguish the New Jersey "public access" cases, the Twin Rivers defendants' point, obviously, was that the residents were entitled to *less* protection than members of the public. At first, it seems ironic if members of the public with no ownership stake have greater freedom of expression rights than co-owners. Could that possibly be right? Can *less protection* for owners be justified? First, arguably the owner residents agreed to the restrictions in question. This is the underlying point of allowing the creation of community associations, with discrete rules of ownership that are published ahead of time. Second, as members of the community, they have a voice in governance, and thus they may participate in the processes that set the rules that bear on expression.

I contend, however, that owners merit greater rights of expression. Their property rights include fee simple estates in their residences and an undivided interest in common properties, and this justifies *more protection* than members of the general public. This is an important variable. It should be the basis for protection.

Heightened protection for homeowner's expression rests upon two important interests. The first is the promotion of *personal autonomy*. A person's home is closely connected to the person's sense of identity. Where a person chooses to

19. *Id.* at 962. The Twin Rivers community is not gated, but the homeowners' association did not open any of its facilities to the general public. They were reserved for the exclusive use of residents and guests. *Id.* at 953.

live – the neighborhood, the style of house, the appearance of the house and yard – are all highly personal decisions. Once a person makes a decision and buys a particular house, that person should have the right to use and enjoy the house as she sees fit, subject only to limitations that are necessary to protect rights of neighbors and other members of society. Part of the use and enjoyment of a house is the ability to make changes that express the owner's values. For this reason, a homeowner's speech rights are more important than the speech rights of an owner of commercial property, although it is worth noting that the Supreme Court has afforded significant First Amendment protection for the "commercial speech" of owners of commercially used land.

The second interest justifying the protection of homeowners is *efficiency*. If a community association passes new, unanticipated restrictions on expression, and these restrictions are sufficiently burdensome so that the owner no longer desires to continue in occupancy, this owner may be faced with a difficult decision. If she sells her home and buys another residence, which is not subject to similar restrictions, she will incur sizeable transaction costs. In addition to a broker's fee and other out-of-pocket expenses, such as moving services and title fees, there are substantial indirect costs, including the time and effort necessary to select a suitable, affordable replacement residence. The concern here is that when an association passes new restrictions, over the objection of a minority of the homeowners, the costs imposed on the minority are externalities. The proponents of the restrictions presumably are not planning to move out of the community and they have concluded that, for them, the benefits outweigh the costs, but they have not considered the effects on owners who view themselves as substantially aggrieved by the change.

In addition to homeowners and outsiders, a third group to consider is residential tenants. If homeowners deserve special protection from servitudes restrictions that impinge upon freedom of expression, what about tenants who live in community associations? They are not "outsiders," the same as members of the general public. What should be their freedom of expression rights? The issue did not come up directly in *Twin Rivers*, but the case brushes the issue because the plaintiffs challenged the Association's voting rules. The Twin Rivers' documents allow only owners to vote, with the votes weighted by property value. Most community associations in the United States do the same thing.[20] The plaintiffs complained both about the weighting (they wanted a "one person, one vote" rule) and the disenfranchisement of tenants, calling for the application of constitutional law election norms to the homeowners' association. The court rejected both challenges, agreeing with the trial court's observations:

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20. Other communities sometimes weigh votes by other factors, such as unit size, which usually serve as a proxy for value.

> While tenants of Twin Rivers properties may wish for more influence over the way their community is run, the fact that their landlords provide them with the benefits of the Association does not entitle them to a voice in the affairs of the Association. Twin Rivers' tenants are entitled to no more control over their community than are the thousands of other tenants of property in New Jersey. Like other tenants, Twin Rivers tenants "vote with their feet" by choosing to lease the properties.[21]

Tenants, like homeowners, can form a strong attachment to their home. That attachment correlates to duration of tenure, and most tenants move more frequently than homeowners. Tenants therefore have a personal autonomy interest in wanting to be able to express themselves with how they decorate and constitute their house, but for many tenants this interest is not as strong as for homeowners. Similarly, tenants who terminate their lease and relocate necessarily incur transactions costs, but they are seldom as significant as those incurred in selling a home. Thus, for reasons both of personal autonomy and efficiency, there is less justification for protection for tenants who object to restrictions on expression. They occupy an intermediate position, between homeowners and outsiders (members of the general public).

B. PRESUMPTION OF VALIDITY FOR RESTRICTIONS CLEARLY SET FORTH IN ORIGINAL COVENANTS

Courts should apply a strong presumption of validity for restrictions on expressive activities that are specified and contained in the original recorded covenants. Buyers have the opportunity to evaluate and understand the restrictions at the time of purchase. Such a buyer is in a similar position to a person seeking employment, who agrees to speech limitations as a condition to employment. A restriction on speech in the original documents should be evaluated under a rational relationship test. For example, suppose a developer forms a community named "Apolitical Estates," with a covenant stating: "There shall be absolutely no signs placed on yards and houses, including political signs and 'for sale' signs." This should pass muster under a rational relationship test, even though some people (perhaps many people), including judges, would consider such a rule to be unreasonable.

C. HEIGHTENED SCRUTINY FOR SUBSEQUENTLY ADOPTED RULES

In most modern community associations, the documents expressly authorize amendments to the covenants and the addition of new rules and regulations, either by a majority or supermajority vote of the owners or by a vote of the association's board of directors. Through such vehicles, new restrictions often are imposed. Some new restrictions have the effect of restricting the speech or

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21. *Id.* at 977.

expressive behavior of homeowners. Such restrictions raise significant policy concerns. They are generally contrary to the owner's expectations, formed at the time of purchase of the dwelling unit. Moreover, such new restrictions impinge upon the owner's autonomy to express herself, and they may impair efficiency when the burdens of the restrictions exceed the measurable benefits stemming from the restrictions.

These concerns justify the application of heightened scrutiny to such subsequently adopted restrictions. A presumption of invalidity should attach to a new restriction that limits a homeowner's expressive activity, if it takes place on the owner's individual property. The community association should have the burden of demonstrating a strong community interest to be served by the measure, coupled with a showing that a less restrictive rule cannot accomplish the objective. Such a standard would parallel an emerging trend in the law of servitudes, which subjects new rules to a reasonableness filter but allows enforcement of original rules unless arbitrary and capricious.[22] For example, suppose a new rule passed at a meeting of a homeowners' association restricts the placement of signs and flags in the front yards of the properties. Under heightened scrutiny, the rule is invalid if the purpose is aesthetic, but valid if the purpose is safety-related – to preserve sightlines for street traffic.

Heightened scrutiny should apply only to new rules affecting expression that apply to the owner's dwelling unit and any other property under the owner's exclusive control. The expectations of owners with respect to engaging in speech and other forms of expressive behavior within the community's common spaces are not as strong. The community as a whole should have a greater right to modify rules for common property. New rules that govern usage of the common elements and facilities, even when they impact expression, should be subject to judicial review under the "arbitrary and capricious" standard. If the measure does not discriminate against particular viewpoints or owners, then it should almost always withstand challenge.

If heightened scrutiny is appropriate due to the owner's lack of notice at the time of purchase, a problem arises when homes are sold after the community association enacts a new rule that limits expression. The seller could have challenged the rule prior to selling, but did not do so. Should the buyer step into the shoes of the seller and have the right to challenge the new rule under the same exacting standard given to the original owner? The newcomer may have had actual notice of the rule when buying, and could be said to have agreed to it. If the newcomer lacked actual notice, the normal principle of constructive notice should apply – a buyer who exercises due diligence should seek to obtain and review post-enactment rules and regulations, even if they are not recorded in the

22. *See* Nahrstedt v. Lakeside Village Condominium Ass'n, 878 P.2d 1275, 1290 (Cal. 1994) (enforcing "no cats or dogs" rule in original covenants because it is not arbitrary).

real property records. The issue is not an easy one. The solution that best fits with general property theory is to allow the buyer to step into the seller's shoes and challenge the rule on the sale basis available to her predecessor. This allows the owner to transfer all of her "bundle of sticks" and makes property more alienable.[23]

D. TIME, PLACE, AND MANNER REGULATIONS

First Amendment law has developed a "time, place, and manner" doctrine, which balances claims to speech with government regulations that limit such speech. Such balancing applies directly in First Amendment jurisprudence, but it can be translated into private law as a criterion for determining whether a servitude is "reasonable" or passes some other private-law test. In *Twin Rivers*, the court held that the homeowners' association had the right to impose time, place, and manner restrictions on the residents' expressive activities. This is partially right. With respect to the plaintiffs' claim that they wanted to post political signs on the common elements of the community and to use the community room for meetings, application of "time, place, and manner" analysis is sensible.

With respect to the plaintiffs' asserted right to put signs on their homes (their own exclusive property), the *Twin Rivers* court made a misstep. The "time, place, and manner" test is inapposite to speech on private property by the owner of that property. Time, place, and manner restrictions were developed to resolve issues of conduct taking place in a public forum or on other property, such as a school, where the would-be speaker and other persons have shared rights of use and enjoyment. In contrast, when a speaker engages in expressive conduct on her property, this is a "place" where the speaker has an absolute right to be present. She has the right to exclusive possession of the place and is not sharing use with others who may not want to listen to the message.

E. RULES THAT DISCRIMINATE BASED ON VIEWPOINT OR CONTENT

Community associations may pass restrictions that discriminate based on the viewpoint, subject matter or content of the speech, message or expressive conduct. Suppose a developer with a fondness for Texas sets up a community where the only permitted flags are the Texas flag (the Lone Star Flag) and the American flag. Owners who want to fly a military flag, an Iraqi flag, and a Confederate flag are prohibited from doing so.[24] Suppose a community allows a homeowner to put up a Christmas Nativity scene in her front yard, but not a secular holiday display (or vice versa). This is viewpoint discrimination, and clearly would be unlawful if accomplished by municipal regulation. Is it valid

23. *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).
24. *See* discussion *infra* Part III.

under the private law of servitudes, assuming a court refuses to treat the community association as a governmental actor?

Association rules may avoid discrimination based on viewpoint, but might still discriminate based on subject matter or content. For example, an association might bar political signs, but permit advertising or personal signs ("Happy Birthday, Jim"). Such measures, if public laws, are suspect under the First Amendment, although they are more likely to be upheld than laws that favor a particular viewpoint.

Discriminatory restrictions on expression, even though founded on private contract, are troubling. They implicate important policy concerns. If they are not part of the original covenants, but are enacted subsequently using the association processes for new regulations, they merit the highest level of scrutiny. Rarely, if ever, should they be upheld. Conversely, when discriminatory restrictions are contained in the original covenants, so that each buyer has the opportunity to review and understand them before making the decision to enter the community, then the restrictions sometimes should be upheld. Courts should intervene only when the nature of the discrimination raises serious public policy concerns.

III. THE LEGISLATURES: OVERRIDING RESTRICTIONS ON SPEECH

On July 24, 2006, President Bush signed the "Freedom to Display the American Flag Act."[25] He called the act "an important measure to protect our citizens' right to express their patriotism here at home without burdensome restrictions."[26] The core provision, Section 3 of the Act, states:[27]

> A condominium association, cooperative association, or residential real estate management association may not adopt or enforce any policy, or enter into any agreement, that would restrict or prevent a member of the association from displaying the flag of the United States on residential property within the association with respect to which such member has a separate ownership interest or a right to exclusive possession or use.

The next section of the Act, titled "Limitations" reads:

> Nothing in this Act shall be considered to permit any display or use that is inconsistent with:
>
> (1) any provision of chapter 1 of title 4, United States Code, or any rule or custom pertaining to the proper display or use of the flag of the United States

25. Freedom to Display the American Flag Act of 2005, Pub. L. No. 109-243, 120 Stat. 572 (2006). Rep. Roscoe Bartlett (R – Maryland) introduced the bill, H.R. 42, which passed both houses unanimously. For a general discussion of the Act, see Brian Craig, Construction and Constitutionality of the Freedom to Display the American Flag Act, 36 REAL EST L.J. 7 (2007).

26. Press Release, President George W. Bush, Statement Signing the 'Freedom to Display the American Flag Act of 2005" (July 24, 2006) 2006 WL 2051750.

27. Freedom to Display the American Flag Act of 2005 § 3.

> (as established pursuant to such chapter or any otherwise applicable provision of law);[28] or
>
> (2) any reasonable restriction pertaining to the time, place, or manner of displaying the flag of the United States necessary to protect a substantial interest of the condominium association, cooperative association, or residential real estate management association.[29]

When introducing the bill in the House, Representative Bartlett explained:

> It is a very simple bill. It simply says that a homeowner or condominium owner cannot be prohibited from flying the flag of his country. It also says that the association may place reasonable limits on the time and manner of displaying the flag. We think that this is a commonsense accommodation of the rights of the associations to maintain the value of their properties and the rights of Americans to fly the flag.[30]

Although the Act is short and sweet, a good number of questions could come up as to its validity, scope, and interpretation. With respect to validity there are two potential problems. First, the source of Congressional authority to override restrictions in common interest communities may rest on the commerce clause, but this is not completely free from doubt.[31] Second, the Act discriminates on the basis of viewpoint because it protects only the American flag, and under the first amendment a law tainted by viewpoint discrimination rarely survives judicial scrutiny.[32] Here the locus of the expression is not public property – it's private space, initially regulated by private actors including the community association. Thus, an argument can be made that the viewpoint-discrimination standard should not apply. The government has not acted to limit speech rights; instead it has expanded speech rights on private property (a private forum). But for the government action, there would be less free speech, not more.

The Federal Flag Act may raise a number of interpretation issues. This article will consider only two. Both of these problems are probably due to the drafters

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28. The Code specifies a large number of customs. For example, display of the flag only during daylight hours, 4 U.S.C. § 6(a); the flag should not be draped over any part of a vehicle, 4 U.S.C. § 7(b); no other flag or pennant should be higher than the U.S. flag; 4 U.S.C. § 7(c); the flag should never touch anything beneath it, 4 U.S.C. § 8(b); and the flag should never be used for advertising purposes, 4 U.S.C. § 8(i).

29. Freedom to Display the American Flag Act of 2005 § 4.

30. 152 CONG. REC. H4574 (statement of Rep. Bartlett).

31. The Constitution does not give Congress the express power to protect the American flag. The legislative history makes no mention of the source of authority. Presumably the justification is the commerce clause. Is it important how many American flags are articles of interstate commerce? If the drafters considered the issue of enforcement of covenants by neighbors, rather than by the community association, they may have limited the Act's scope based on an evaluation that a federal restriction on neighbor-to-neighbor enforcement was vulnerable to a commerce clause challenge.

32. *See Note, Speech Exceptions*, 118 HARV. L. REV. 1709, 1725 (Mar. 2005) (discussing Illinois flag act).

not having a clear understanding of the legal nature of common interest communities.

First, what happens if a resident displays a flag in violation of a rule, and the association does not seek to enforce the rule, but a neighbor objects and seeks to enjoin the use? Although the intent of the Act is to give owners the right to fly the flag, this appears to be a hole in the drafting. The Act does not say that unreasonable flag restrictions are unenforceable. Rather, it prohibits associations from taking enforcement measures. This may be understandable, given the background for the Act. The press coverage of disputes over flag flying, which prompted the legislation, all consisted of associations taking the lead in restricting flag displays.

Second, does the Flag Act apply to restrictions contained in the original recorded covenants for common-interest communities? The Act states that a community association cannot "adopt or enforce any policy, or enter into any agreement" that restricts display of the flag. Two of the terms, "adopt . . . any policy" and "enter into any agreement," clearly point to action of the association as the source of the restriction. As written, they are prospective in outlook. If an original covenant restricts flag displays and the association seeks to enforce that covenant against an offender, is the association enforcing "any policy"? Ordinarily, lawyers would not think of the word "policy" as including a contract right, covenant, or servitude. This prong of the Act may only mean that the association cannot enforce a flag restriction policy previously adopted by the association (i.e., before passage of the Act).

European Union Habitat Conservation Activities and Individual Property Rights: Law and the Meaning of LIFE

KAREN MORROW[1]

I. INTRODUCTION

A. CONSERVATION ON THE EUROPEAN UNION LAW AND POLICY AGENDAS — CONTEXTUAL DEVELOPMENTS

Naturally enough, the original European Community ("EC") Treaties, signed in 1957, before the rise of modern environmentalism made no reference to the environment. Nonetheless, the Community did grasp the opportunity offered by the United Nations' ("UN") Stockholm Conference on Human Development in 1972 to develop its own distinctive environmental agenda. This was politically expedient – the environment had, in a relatively short space of time, become a cause for popular concern and it provided a useful source of momentum at a time when the Community's initial energy was arguably flagging. There were also practical reasons for developing a Community environmental agenda – the transboundary nature of many environmental problems, together with their ability to influence the operation of the internal market, ensured that the area was ripe for action. Thus in 1973, the Community adopted its first policy on the environment, known as the First Environmental Action Programme (1EAP).[2]

However, the adoption of a policy, even as the result of consensus among the Member States, was not in and of itself sufficient to move the environmental agenda forward. In order to be valid, all EC legislation must be rooted in the treaties and at this point there was no direct coverage for environmental matters. As a result, improvisation was required in order to translate the policy commitments in 1EAP into law. Articles 94[3] and 308[4] were pressed into service to support environmental legislation. This approach was supported by the European Court of Justice (ECJ).[5]

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2. First Environment Actiuon Programme, 1973 O.J. (C 112) 1 (adopted by Council Declaration on the Programme of Action of the European Communities on the Environment).

3. Treaty Establishing the European Community, Mar. 25, 1957, art. 94, *available at* http://eur-lex.europa.eu/en/treaties/dat/12002E/htm/C_2002325EN.003301.html (concerning approximation of laws to facilitate the functioning of the common market).

4. *Id.* art. 308 (concerning legislation to meet Community objectives with reference to the common market).

5. *See*, for example, Case 120/78, Rewe-Zenetra AG, 1979 E.C.R. 649, Case 240/83, ADBHU 1985 E.C.R. 531; Case 302/86, Comm'n v Den. 1988 E.C.R. 4607.

It was only with the passing of the Single European Act (SEA) in 1986, that the Treaty finally gained specific coverage for the environment in Articles 174-176.[6] In the Maastricht Treaty in 1992, the environment was identified in Article 2 as one of the general objectives of the Community. In a further significant development, the Amsterdam Treaty in 1997 added the concept of "Sustainable Development" to this list of objectives; this is particularly important in that the EU tends, in common with much of the developed world, to accord a key role of the environmental facet of sustainability in its law and policy initiatives.

It would be fair to say that these bursts of momentum in the development of EU environmental law originated in large part from the revitalised approach to this area that was being demonstrated in international law more generally. This is also true for the nature conservation policy agenda which is rooted firmly in international discussion, notably in Principle 4 of the Stockholm Declaration. While nature conservation emerged rather later on in the EU's environmental agenda than other areas in the field, it has subsequently has evolved relatively rapidly and grown comparatively swiftly in depth and sophistication as a result of concentrated research and dialogue. Thus the EU adopted its Biodiversity Conservation Strategy in 1998, in its Communication from the Commission to the Council and the European Parliament on a European Community biodiversity strategy, at least in part, in response to the UN Convention on Biodiversity in 1992.[7] Subsequently, in response to the World Summit on Sustainable Development 2002 and the Millennium Development Goals, and in the face of continued erosion of biodiversity within its borders, the EU recognised that its policy, however far it had come, still left a great deal to be desired.[8] A conference was held a Malahide in 2004 which took a combined stakeholder and ecosystem approach to furthering biodiversity policy. This reflected a broader maturing of the EU agenda, as demonstrated by the statement:

> Global concern of biodiversity loss largely involves the loss of species and genetic diversity which, for the most part, is caused by loss and fragmentation of natural and semi-natural habitats, by intensive agriculture, unsustainable forestry and river use and fishing practices, mining, tourism, desertification, freshwater acidification and other sorts of pollution, and by the introduction of invasive alien species.[9]

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6. Single European Act, July 1, 1987, Formerly Articles 130 (r)-(t), Official J.L. 169.

7. *Commc'n from the Commission to the Council and the European Parliament on a European Cmty. Biodiversity Strategy.* Com/98/0042 (Feb. 4, 1998), *available at* http://ec.europa.eu/environment/docum/pdf/com_98_42_en.pdf.

8. The number of EU species featuring in the IUCN Redlist is still increasing. *See* http://www.iucnredlist.org/.

9. *Biodiversity and the EU- Sustaining Life Sustaining Livelihoods* (Jan. 7, 2008), *available at* http://biodiversity-chm.eea.europa.eu/stroies/STORY1081427703.

The 'Message from Malahide' was the key outcome of the 2004 Conference.[10] This message was also instrumental in updating the EU's Biodiversity Strategy in the Biodiversity Communication 2006 and Action Plan: 'Halting the loss of Biodiversity by 2010 - and beyond'.[11]

Although the development of the nature conservation agenda has oftentimes proved both politically and legally contentious over the years, at the very least it can be said that, in the last three and a half decades, environmental concerns generally have migrated from comparative obscurity to enjoying a relatively high profile role within the EU.

B. RIGHTS, PROPERTY AND THE NATURE CONSERVATION AGENDA – POTENTIAL PITFALLS

Arguably, it is highly significant that in EU law, as in domestic law, nature conservation has brought up the rear in the development of environmental law in the areas of pollution control[12] and public health initiatives.[13] There are a number of extremely sensitive issues in environmental law; specifically concerning tensions between long established individual property rights and the emerging recognition and pursuit of a wider public interest in biodiversity. These tensions exemplify the difficulty and problematic issues involved in the often vexing area of environmental law.

While domestic law pollution control and public health law regulating and controlling the environment in a broad sense have been interfering with individual rights and behaviour on a wide scale for almost a century and a half, the interference required for nature conservation is arguably of a rather different order.[14] In public health law, individuals and their property do occasionally bear the brunt of the indirect and usually unintended, effects of environmentally motivated (put broadly) interference. In contrast, where pollution control is concerned, interference is usually direct and intended but in this case, those whose activities are regulated would not normally claim that they had rights to pollute that had been interfered with by the imposition of regulation.

Nature conservation on the other hand is distinctive in that it often involves a direct and intentional interference with long established property rights. The right to enjoy land is fundamental to many legal systems and for this reason

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10. Final Message from Malahide, *Halting the Decline of Biodiversity- Priority Objectives and Targets for* 2010 (May 25-27, 2004), *available at* http://www.jncc.gov.uk/PDF/Final-message-from-Malahide.pdf.

11. Europa, *EU Biodiversity Action Plan: Halting the lost of Biodiversity by 2010* (Dec. 17, 2008) *available at* http://ec.europa.eu/environment/nature/biodiversity/comm2006/index_en.htm.

12. The Alkali Act 1863 was the first nationally applicable pollution control statute in the U.K.

13. The Public Health Act 1875 represented the first U.K. national initiative in this area, although it took its inspiration from earlier local initiatives.

14. *See* Sean Coyle and Karen Morrow, *The Philosophical Foundations of Envtl. Law: Property, Rights and Nature*, Hart Publishing, Oxford (May 2004).

amongst others, it merits and indeed requires particularly careful consideration. In the past, in this area, the United Kingdom has tended to rely on making payments to landowners in respect of nature conservation regimes in order to make interference with property rights a more palatable proposition. There are however, limits to what may be achieved by voluntarism, both in principle and in practice as discussed below, and ultimately a shift to more compulsive legislative initiatives has been emerging.[15] The transition is proving a difficult one.

As nature conservation is arguably shifting to a more invasive form of regulation, there are potentially valuable parallels to be drawn from other areas of experience. Possibly, the most immediately enlightening in terms of comparison of issues arising from regulation is the introduction of a system of comprehensive state controls of land use under the Town and Country Planning Act 1947. One of the areas that proved to be particularly controversial in shaping this regime was the fact that it 'nationalised' the right to develop land, interfering, directly and intentionally, with a plethora of established property rights and raising the vexed question of compensation.[16] In addition to the rights and compensation issues in common with planning control, where nature conservation is concerned interference with the way in which individuals use their property represents an ongoing interference with a landowner's interests in their property. Having said this, the interference in the latter context is often of a significantly greater magnitude than that which would normally be imposed by planning permission, intimately affecting every day activities on site in a way that is more akin in practical terms to the operation of pollution control regimes. In light of this, a brief consideration of the application of pollution control to a sector that heavily influences traditional property usage may prove enlightening in considering the implications of the application of a more invasive style of regulation than has, hitherto, been the case to nature conservation law.

Traditionally the regulation of pollution in agriculture has been approached very differently from more mainstream industrial pollution. This long remained the case, despite huge changes in the nature of the farming sector in the period following World War II. As farming became more industrialised, its environmental impact intensified, but in the U.K. (and also to a considerable extent under the EU's Common Agricultural Policy (CAP)) the response to this was not initially to impose a typical regulatory regime on farmers. Instead, farmers were effectively paid not to pollute (obviously the antithesis of the polluter pays principle) by subsidising pollution preventing works (e.g. in respect of slurry storage). In like fashion, farmers were effectively paid to preserve natural resources as a by-product of the bid to tackle agricultural surpluses by taking land

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15. *See* C.P. Rodgers, *Protecting Sites of Special Scientific Interest: The Human Rights Dimension*, J. PLAN & ENVTL. L. 997-1009 (2005).

16. *See* Raymond Cocks, *Enforced Creativity: Noel Hutton and the New Law for Dev. Control, 1945-47* J. LEGAL HIST. 21-22 (2001).

out of production under set aside initiatives system.[17] These types of payments for legal interference, in the broader public interest, with what an individual does with their land would seem to have close links to the notion of payment for habitat and species preservation.

In more recent times, however, attitudes towards the regulation of pollution from agriculture in both the EU and the U.K. seem to be changing, as evidenced by the new regime, underpinned by regulatory offences, to tackle water pollution from nitrates.[18] These provisions appear to be more akin to mainstream pollution control law than has, hitherto, been the case. There is a real possibility that this hardening of attitudes to pollution in this context could ultimately facilitate a change of view on resource issues attached to land, including nature conservation.

Long experience in the domestic development of nature conservation law has shown that there is an inevitable conflict between at least some aspects of nature conservation law and policy and individual property rights. Payment to preserve is obviously one way of dealing with potential discontent arising from the infringement of an individual's property rights in order to facilitate nature conservation. The fact is that in the U.K., property owners have not, on the whole, shown themselves to be hostile to nature conservation when interference with their property rights has been the subject of compensation rather than compulsion. A change in the regulatory approach has, however, fuelled litigation that is proving significant in terms of both quantity and quality. This is demonstrated very clearly in the Court of Appeal's decision in *R (Trailer and Marina (Leven) Ltd) v Sec'y. of State for Envr., Food and Rural Affairs and Natural England.*[19] The claimants owned a length of canal that they wanted to use for business purposes. The area was ultimately designated as a Site of Special Scientific Interest (SSSI) under Section 28 of the Wildlife and Countryside Act 1981 (WCA). The claimants' activities on the site were curtailed as a result, and they received substantial payments for the impact that this had on their business. Section 28 was amended by the Countryside and Rights of Way Act 2000 (CROWA) and subsequently SSSI designations did not require the payment of compensation in cases such as the one in question, where projected, rather than ongoing activities were controlled.[20] As Rodgers points out, this represented a

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17. Currently contained in Council Reg. No. 1782/2003 (as amended) and the Common Agric. Policy Single Payment Scheme (Set Aside) (England) Regulations 2004 No. 3385 (as amended). Note that and conservation gains are incidental to the prime purpose of the set-aside initiative and they are vulnerable to the vagaries of that regime.

18. Currently contained in Directive 91/676/EEC concerning the protection of waters against pollution by nitrates from agricultural sources and the Action Programme for Nitrate Vulnerable Zones Regulations 2008.

19. R (Trailer & Marina (Leven) Ltd. V. Sec'y of State for Envr., Food and Rural Affairs and Natural England, PLAN & ENVTL. L. 1086 [2005].

20. SSSIs had been very weak in their original form, offering little more than moral pressure to avoid damage to sensitive sites through voluntary agreements in respect of them. *See, Sern. Water*

profound change in the operation of the SSSI system[21] and the claimants saw the interference as a breach of their rights to enjoy their property under Article 1 to the First Protocol of the European Convention on Human Rights (ECHR) and sought from the court a declaration of incompatibility in respect of the CROWA amendments under the Human Rights Act 1998 (HRA). Their claim failed at first instance as the Court of Appeal took the view that this case did not concern deprivation of property, which requires compensation in order to be an ECHR compliant, but rather involved control of use (which does not normally require compensation to fulfil Convention obligations).[22] Importantly, in this context, the Court stated, *obiter*, that if Article 1 to the First Protocol gave rights to compensation in cases where use of property was merely restricted, this would:

> . . . cripple the legislature's freedom to introduce . . . socially beneficial legislation.[23]

The Court made further useful observations about the compensation issue – which has been little discussed in the context of the 'fair balance' concept that underpins Article 1 to the First Protocol. Where compensation has been awarded under the Convention regime in respect of what may be loosely termed 'environmental' claims, it has been with regard to Article 8 involving the right to privacy and family life - the instant case, where the claimants here were not unhappy with the SSSI designation, *per se*, but the impact of regulatory changes on their compensatory income, did not fall within Article 8.[24]

Thus domestic case law on the application of the ECHR showed that the courts did not regard the issue of compensation as decisive in this context. In addition, EU case law on the direct effect of directives also shows that the European Court of Justice (ECJ) is not squeamish about interfering, even substantially, with property rights based on what may be broadly termed 'environmental' grounds. This has been the case in the context of Environmental Impact Assessment (EIA) as stated in *R (Delena Wells) v Sec'y. of State*:

> . . . mere repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a Directive against the Member State concerned.[25]

Authority v Nature Conservancy Council [1992] 3 All ER 481. The changes introduced by CROWA have considerably enhanced the protection offered to SSSIs.

21. Rodgers, *supra* note 15, 998-99.

22. *See infra;* Protocol One to the European Convention for the Prot. of Human Rights and Fundamental Freedom, Mar. 20, 1952, Europ.T.S. No. 1, at art. 1, http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf [hereinafter EHCR].

23. *See* Human Rights Act of 1998, ch. 42, *available at* http://www.opsi.gov.uk/ACTS/acts1998/ukpga_19980042_en_1 (last visited Feb. 22, 2009) [hereinafter HRA].

24. As, for example, in *S v. Fr.* [1990] 65 DR 250.

25. R (Alconbury Devs. Ltd.) v. Sec'y. of State for Envr., Transp. and the Regions, (2003) 2 A.C. 295.

II. LEGAL DEVELOPMENTS IN NATURE CONSERVATION IN THE EU

Having considered in principle some of the problems raised by clashes between nature conservation law and property rights and, in particular, the fact that these are going to become more central as nature conservation law continues to evolve, it is now time to consider the EU provisions that apply in this area and the domestic law that gives effect to them in the U.K. While the EU's policy in this area is very clearly grounded in science, its realisation in practice requires an effective legal regime, as de Sadeleer observes:

> The scientific selection of sites . . . is only meaningful where it leads to the implementation of an appropriate legal regime which provides for the respect of the appropriate qualitative objectives, setting out both incentives and binding measures.[26]

The core EU legislation directly focussed on species conservation comprises the partially overlapping[27] Directive 79/409/EEC on the Conservation of Wild Birds (hereafter the Birds Directive)[28] and Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (hereafter the Habitats Directive).[29] In comparison to other areas of EU environmental law, this is, on the face of it, an extremely modest legislative platform – though it is fair to say that its implications are in fact much more far-reaching than they would at first appear to be. The operation of the law in this area is exceedingly complex and opaque to non-experts. This is borne out by the European Environment Agency's (EEA) observations on the many complaints (1268 from 1999-2003, comprising 40% of the case load) and infringement proceedings (146 cases brought under Article 226, comprising 11.51% of the total) originating in this area in the information paper: 'The State of Biological Diversity in the European Union' for the Malahide Conference.[30] Nonetheless, the EEA was just as concerned that funding, as well as problems with the legal regime, was hampering progress in the biodiversity sector.[31]

The Birds Directive, with the particularly obvious transboundary concerns that avian species raise, and the well established vested interests that arise in the

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26. *Id.* at para. 46.

27. *See, e.g., S v. Fr.*, (1990) 65 D.R. 250; *see generally,* ECHR, *supra note* 22, at art. 8.

28. R (Wells) v. Sec'y. of State for Transp., Local Gov't. and the Regions, 1 CMLR 31 (2004) Env L.R. 528.

29. Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 OJ L 206 at 7, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML (last visited Feb. 22, 2009)[hereinafter Habitats Directive].OJ L 206 22.07.1992, p7.

30. The State of Biological Diversity in the EU, STAKEHOLDERS CONFERENCE: BIODIVERSITY AND THE EU – SUSTAINING LIFE, SUSTAINING LIVELIHOODS, MALAHIDE/INF2, (European Env't. Agency; Malahide, Ir.) May 25-27, 2004, *available at* http://www.jncc.gov.uk/PDF/MALAHIDE-INF-2.pdf (last visited Feb. 22, 2009).

31. Stakeholders Conf., *supra* note 30.

sector both in exploitation and preservation was a logically appealing first step. It is geared towards the protection, management, and control of avian species naturally present in the EU. The Directive covers both settled and migratory species and part of the protection that it offers focuses on their habitats. To that end, the Birds Directive requires Member States to designate Special Protection Areas (SPAs) for wild bird species. Member States are under obligations to avoid pollution and the deterioration of habitats as well as the disturbance affecting birds on those sites. The U.K. was so slow, for a variety of reasons, in designating SPAs that it ended up before the ECJ on this issue in *Comm'n v. U.K.*[32]

The Habitats Directive is further reaching and arguably more sophisticated than the Birds Directive and in combination with it, creates a network of Special Areas of Conservation (SACs), constituting a 'coherent European ecological network' known as Nature 2000.[33] SACs are designed to protect species of 'Community interest', i.e. those that are identified as: endangered; vulnerable; rare; or endemic[34] and endangered; regressing; outstanding; or characteristic natural/semi-natural habitats.[35] SACs are either designated by Member States in consultation with the Commission, in a more elaborate but similar process to that applied to SPAs, or the Commission can initiate the designation process, although this requires the unanimous approval of the Council. Where most SACs are concerned, the potential effect of proposed activities is required to be assessed prior to legal permission being granted for carrying them out. Permission should not be given if the integrity of the site will be compromised. The Directive does provide that, in the absence of alternatives and the presence of an overriding public interest (including social and economic interests) permission may be granted.[36] In such cases, the State is required to both inform the Commission and to ensure that 'compensatory measures' are adopted to secure the overall integrity of the Natura 2000 network.

Natura 2000 protected areas aim to deliver "in site management and conservation" of "Europe's most remarkable fauna and flora species and habitats."[37] In this respect, the network has strong international characteristics and can thus address the needs of migratory species and ensure that decisions on nature conservation, for premium habitats and species at least, are not parochial. There

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32. Comm'n. v. U.K. [2005] ECR I-9017.

33. *Id.*

34. *Id.* at 7.

35. *Id.*

36. For priority natural sites and priority species only human health, public safety, and beneficial consequences of primary importance to the environment or another over-riding public interest can justify giving permission for activities that would affect the site; the ECJ takes a narrow view of what constitutes an overriding public interest – *see* Case C-57/89 Comm'n. v. F.R.G. [1989] ECR 2849.

37. LIFE homepage, http://81.188.27.167/environment/life/life/nature.htm (last visited Feb. 19, 2009).

are aspects in this approach of a common heritage type approach to at least some aspects of biodiversity, which have proved exceedingly controversial, in particular allied to a strong Community role in the designation process (this is only one facet of a much more complex problem). As a result of this, the EU has attempted to address these concerns by underlining the role of Member States in this context, stating that while Natura 2000:

> . . .promotes the conservation of natural habitats and the habitats of wild fauna and flora [it does so] while taking into account the economic, social and cultural requirements and specific regional and local characteristics of each Member State.[38]

Thus although the approach is a pan-Community one, it is tempered to a degree by a number of considerations that are particular to the host States. Natura 2000 operates primarily on a system of local contracts between regulators and landowners/occupiers. As such, the scheme explicitly acknowledges the necessity of stakeholder engagement for its success and therefore emphasises the importance of consultation in the site designation process, with regulation underpinning the system, should a contractual approach fail.[39] Such an approach is necessitated by the fact that Natura 2000 sites are not exempt from human activities – these may in fact be necessary to maintain the habitat in question in optimum condition – rather it is concerned with ensuring that an accommodation is reached between human activities and the preservation of biodiversity.

III. NATURE CONSERVATION DESIGNATIONS IN UK LAW

In UK law both SPAs and SACs are usually protected as Sites of Special Scientific interest (SSSIs) under Section 28 of the Wildlife and Countryside Act 1981, as amended by the Countryside and Rights of Way Act 2005.[40] Under CROWA, SSSI protection now offers a greater range of enforcement options than SPA/SAC designation alone and the Courts ensure that regulators enjoy a considerable degree of latitude with respect to both designation, as confirmed in *R (on the application of Western Power Distribution Investments Ltd) v Countryside Council for Wales*[41]; and control, as held in the *Trailer and Marina* case, above.

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38. The LIFE Programme –a brief history of EU envtl. financing, http://www.catsg.org/iberianlynx/03_programmes/3_7_funding/European_Commission_website_-_LIFE-_What_is_-_History_of_LIFE.pdf (last visited Feb. 19, 2009).

39. A European ecological network: Natura 2000, http://81.188.27.167/environment/life/life/natura2000.htm (last visited Feb. 19, 2009).

40. Changes were in part to satisfy the requirements of EU law, and also the Convention on Biodiversity, 1992 as well as in response to widespread domestic criticism of the ineffectiveness of the existing regime.

41. JPL 2007 at 1085-1086.

The SSSI regime is amended with regard to SACs by the Conservation (Natural Habitats etc) Regulations 1994 SI1994/2716 – European sites can, in addition to SSSI status, be protected by a Special Nature Conservation Order under Regulation 22.

Under the original version of Section 28, SSSIs were afforded only very limited protection, as, in effect, all that site owners or occupiers had to do was notify English Nature (the former incarnation of Natural England[42]) that they intended to carry out potentially damaging operations/operations likely to damage (PDOs/OLDs).[43] A four month period then commenced during which the regulator would seek to negotiate a management arrangement (this could include payment) with the site owner to protect the SSSI.[44] If no agreement was reached, the operations could go ahead once the four months had elapsed.[45]

Under the reformed regime, Natural England must consent to PDOs/OLDs before they can be carried out, section 28(E), acting without such a consent is an offence under section 28(P), attracting a fine of up to £20,000 on summary conviction and an unlimited fine on indictment.[46] Section 28(J) of the new regime makes provision for detailed and enforceable management agreements to be applied to SSSIs[47] and a management notice may be issued under section 28(K) if no agreement is reached, or if one is breached.[48] Under section 28(M) of CROWA, payments may still be made to landowners, occupiers and now others under the current regime for the conservation or restoration of designated features and in support of management agreements.[49] Section 29 provides for compulsory purchase of SSSIs by Natural England if no management agreement can be reached or one that is in place has been breached.[50]

In summary, the SSSI designation under CROWA has the potential to significantly affect the rights of landowners and has the capacity to extend well beyond what may be achieved by voluntary co-operation arrangements. However, while at first glance, the changes instituted appear on paper to be quite marked, in practice their impact is likely to be considerably ameliorated by that fact that the Department for Environment, Food and Rural Affairs (DEFRA), Natural England and even the House of Commons Select Committee on the Environment all take the view that voluntary management arrangements should be used

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42. Natural Env't. and Rural Cmty's. Act, 2006, (Eng.). (Natural England came into being following the Natural Environment and Rural Cmty's Act 2006. It comprises the former English Nature, Rural Development Service and Countryside Agency Landscape, Access and Recreation Division.)

43. Wildlife Countryside Act, 1981, § 28, (Eng.).

44. *Id.* at § 28(F)(2)

45. *Id.*

46. *Id.* at § 28(P)(6)(b)

47. *Id.* at § 28(J)

48. *Id.* at § 28(K)

49. Countryside and Rights of Way Act, 2000, § 28(M) sched. 10 (Eng.).

50. *Id.* at § 29

as a matter of preference, with the more compulsive powers serving to underpin them.[51] On closer examination of the supporting context, this deference to landowners is even implicit in the operation of CROWA itself, despite the seemingly draconian nature of the provisions outlined above, with paragraph 206 of the Explanatory Memorandum attached to the Act stating that Natural England:

> If they withdraw or modify an existing consent to carry out operations, must offer a payment to an owner or occupier if he suffers loss as a result.[52]

IV. KEY CASE LAW ON EU HABITAT DESIGNATIONS IN THE U.K.

The *Trailer and Marina* case, discussed above, has been but one case among many of late concerning SSSIs. Another interesting set of issues is presented by *R (Aggregate Industries U.K. Ltd) v. English Nature*.[53] This case discussed EN's application, after initial reluctance to do so, of nature conservation designations beyond wild and semi-wild habitats to cultivated land.[54] Forbes J found that while Government guidance authorised such designations they should be approached 'with care and caution'.[55] This issue resurfaced in *R (Fisher) v English Nature*,[56] which is in many ways typical of the type of case that arises in the U.K. when nature conservation law comes into conflict with private property rights. In this case, the Claimants, who owned a large private estate, sought judicial review in respect of the Natural England's (EN) change of policy leading to the imposition of a SSSI designation on intensely farmed arable land in order to protect a migratory species, the stone curlew.[57] The site in question had originally been protected by voluntary measures, and EN recognised that designation would be likely to generate a hostile reaction from the claimants.[58] With this in mind, the OLDs identified in the designation were designed not to interfere with existing activities on the site and, as a result, the complaint did not focus on them.[59] Nonetheless, the landowners in question felt that they had been 'penalised' by the designation[60] through legal costs of contesting it and an alleged devaluation in their land through the 'loss of freedom of action'[61] that designation entailed. They saw the designation as a "bureaucratic shackle" and

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51. Select Comm. on the Env't., Food and Rural Affairs, Sites of Special Scientific Interest: Conserving the Jewels of England's Natural Heritage and the Gov't's, 2004-5, H.C. 1255. .

52. Countryside and Rights of Way Act, 2000, Explanatory Notes, par. 206., (Eng).

53. R v. English Nature, [2002] EWHC (Admin) 908 (Eng.).

54. *Id.* (The relevant statutory provisions do not differentiate between these types of land.)

55. *Id.*

56. R v. English Nature, [2004] EWCA (Civ) 663 (Eng.).

57. *Id.*

58. *Id.* at 51.

59. *Id.*

60. R v. English Nature, [2004] EWCA (Civ) 663, at 63 (Eng.).

61. *Id.* at 71.

"remained fundamentally opposed to the designation whilst firmly committed to the conservation of the stone curlew."[62] They argued that the SSSI designation was an unwarranted interference with their property rights. The claim had failed at first instance and the initial decision was upheld in the Court of Appeal.[63] A number of the arguments made by the claimants raised the right to protection of property encapsulated in Article 1 to the First Protocol of the European Convention on Human Rights 1950.[64] This states that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.[65]

The claimants' Article 1 arguments concerned the restrictions imposed on their use of their land by the SSSI designation. While they acknowledged that nature conservation represented a legitimate public interest, they argued that the interference with individual rights was disproportionate and that therefore the "fair balance" implicitly required by Article 1 had not been arrived at.[66] It was this issue that went to the Court of Appeal. The Court dismissed the appeal unanimously, taking the view that the claimants' arguments on this issue were weak, there being no actual or deemed taking of property. The "control" or restriction on use imposed by the SSSI designation[67] was not thought to be disproportionate as it only involved the need to seek EN's consent before carrying out certain activities on the land.[68]

Despite the absence of environmental considerations in their own right in the ECHR, it will be apparent that the regime has come to give cognisance to environmental factors both as underpinning individual causes of action, in a line of cases beginning with *S. v. Fr.*[69] and *Lopez Ostra v. Spain*,[70] and as a justification for State interference with individual rights. In *Hatton v. U.K.*[71] the European Court of Human Rights (ECHR) deemed environmental protection to be within the state's margin of appreciation under the Convention – the same margin of appreciation as applied more generally:

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62. *Id.* at 65.

63. R (The Hon. Patrick Fisher) v. English Nature [2003], EWHC (Admin) 1599 (Eng).

64. *Id.* at para. 4.

65. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe, Art. 1, (1952).

66. The Hon. Patrick Fisher, *supra* note 63 at para. 46.

67. At the time, the site was also a candidate SPA.

68. Ackroyd v. Mersey Care NHS Trust [2003], EWCA [Civ.] 663 [147] (Eng).

69. S. v. France [1990] 65 DR 250.

70. Lopez Ostra v. Spain, 20 Eur.Ct.H.R. 277 (1994).

71. Hatton v. U.K., 37 Eur.Ct.H.R. 28 (2001).

> . . . it would not be appropriate for the Court to adopt a special approach in this respect by reference to a special status of environmental Human Rights. In this context the court must revert to the question of the scope of the margin of appreciation available to the state when taking policy decisions of the kind at issue.[72]

In this context, it is not only the interests of the affected individual that must be considered but also those of other individuals and the community as a whole, in issues such as biodiversity. Thus, the margin of appreciation for state action is a wide one – dependent, in part, on local knowledge and conditions – where environmental matters, including nature conservation, are concerned. This type of complex multi-faceted issue is likely to be more suited for a political forum than for the courts.

In summary, case law to date demonstrates that under the ECHR regime, environmental concerns written broadly can act both as sword (providing landowners with a basis to litigate interference with property rights on the one hand) and as shield (providing regulators with a justification for that interference on the other).

The next case for consideration under U.K. law is the complex litigation that began with *Newsum v. Welsh Assembly (No. 1)*.[73] The claimants in this case were the trustees of the Duke of Westminster's estate.[74] They sought judicial review of a refusal of a license sought under regulation 44(2)(e)[75] of the 1994 Regulations to translocate a population of protected greater crested newts from an SSSI in order to make use of a long established grant of planning permission to quarry on the site.[76] The site was subsequently notified, first as a candidate, and then as a confirmed SAC.

The claimants did not require the license in order to work the site, but they were in danger of committing an offense under regulation 39 of the 1994 regulations if they harmed the newts as a result of their activities.[77] In order to obtain the necessary licence the claimants had to establish that there was an "imperative reason of overriding public interest" in favor of moving the newts.[78] The application had been based on the need to preserve the species itself providing such an interest. The Welsh Assembly Government (WAG) disagreed and refused the license; they also stated that the claimants had not estab-

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72. *Id.* at para. 122.

73. Newsom v. Welsh Assembly (No. 1), EWHC Admin 50.

74. *Id.* at para. 1

75. Habitats Directive, *supra* note 33, at 44(2)(e).

76. *Newsum,* 2004 Env. L.R. 39, at para. 1. It was argued that the licence sought should have been from the Countryside Council for Wales under Reg. 44(2)(c). *See Newsum,* 2004 Env. L.R. 39, at para. 33. (Such an application was subsequently made and refused).

77. *Newsum,* 2004 Env. L.R. 39, at para. 14-15; *see also* Habitats Directive, *supra* note 33, at reg. 39.

78. *Newsum,* 2004 Env. L.R. 39, at para. 21-22.

lished any need for the site to be worked.[79] Both of these grounds were found to have been irrelevant by the court at first instance and the decision was quashed.[80]

The case went to the Court of Appeal in *R (on the application of Newsum) v. Welsh Assembly Gov't.*[81] The court took the view that the WAG had no authority to grant a translocation license under regulation 44(2)(e) of the 1994 Regulations.[82] In this case, preservation of the species itself is not an adequate "other imperative reasons" as referred to in that provision.[83] This would be covered by a Section 44(2)(c) license from the Countryside Council for Wales (CCW).[84]

The matter did not rest there however and subsequently *R (on the application of Newsum v. Welsh Assembly (No. 2)*[85] came before the courts.[86] This case sought to challenge the designation of the contested site as a candidate SAC.[87] The claimants argued that the decision to designate was procedurally flawed on the basis of the consultation process.[88] They also argued that it was irrational and had failed to take relevant considerations - notably, the existing planning permission - into account.[89] The WAG countered that confirmation of the SAC designation made the action moot.[90]

The application was dismissed. The court found the lengthy[91] and elaborate[92] consultation exercise, taken as a whole to be 'more than adequate.'[93] The WAG was found to have acted rationally by taking into account scientific information on the presence of protected plant and animal species.[94] Although the site in question was added to the U.K.'s candidate SAC list only after the Commission threatened legal action because the initial list did not sufficiently represent certain types of protected habitat and species, this was not found to be 'quota driven' as the claimants alleged.[95]

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79. *Id.* at para. 116.
80. *Id.* at para. 122.
81. R (on the application of Newsum) v. Welsh Assembly Gov't., [2005] EWCA (Civ) 1565 , [1], 2005 Env. L.R. 16.
82. *Id.* at para. 18.
83. *Id.* at para. 28.
84. *See* Habitats Directive, *supra* note 33, at 44(2)(c).
85. R (on the application of Newsum) v. Welsh Assembly (No. 2), [2005] EWHC (Admin) 538, 2006 Env. L.R. 1.
86. *Id.*
87. *Id.* at para. 2. It had subsequently been confirmed as one.
88. *Id.*
89. *Id.*
90. The site was confirmed as a SAC on Dec. 7, 2004 and designated a SSSI by the WAG, as were all other such sites, on Dec. 13, 2004. *See id.*
91. Over two year had elapsed with regular exchanges between the parties throughout the period.
92. Due to time pressure caused by a threat of infraction proceedings against the UK by the Commission, the usual SSSI process was not followed.
93. *Newsum (No. 2)*, 2006 Env. L.R. 1 at para. 67
94. Newsom (No. 2), *supra* note 93 at para. 20, 109.
95. *Id.* at para. 106, 109.

Insofar as the planning permission was concerned, the Court ruled that - while it was part of the relevant information to be considered - it did not provide good reason not to list a site as a SAC. Richards J went on to comment:

> It would turn the scheme of the Directive on its head if the existence of a consent could be relied on as a reason for not protecting a site in the first place.[96]

Once the site became a SAC, Regulations 10 and 48-57 of the 1994 Regulations required the planning permission to be reviewed.[97]

The claimants then took their case to the European Court of First Instance, contesting the SAC designation on the basis of inadequate consultation and a failure to take into account their private property rights, in application T -57/05.[98] The case in substance is the same as that brought against the WAG. The action was removed from the register on October 5th, 2005.

The *Newsum* case also featured, in the broad ranging and partially successful infraction proceedings brought against the UK by the Commission, over the implementation of the Habitats Directive in *Case C-6/04 Comm'n v. U.K.*.[99] One of the key grounds upon which the case was upheld was that the U.K.'s implementation, relying as it did on a catch-all clause obliging regulators to comply with the Habitats Directive, was not sufficiently clear and precise to give effect to the U.K.'s obligations in the context of a particularly complex Directive.[100] The ECJ found that, in the circumstances, this type of approach was problematic because it would require individuals to consult the Directive in order to ascertain their rights and obligations and thus it failed to satisfy the requirements of specificity, precision and clarity. *Newsum* was discussed as illustrating the problems in implementing Article 16 of the Directive on what constituted 'lawful operations' in respect of derogations from the species protection provisions of the Directive. Advocate General Kokott took the view that the U.K.'s approach to the latitude provided by 'lawful operations' here was too broad to satisfy Article 16 – an overriding public interest would also be required.

V. PARALLEL INITIATIVES – FUNDING

As in other areas of Community environmental activity, nature conservation law operates a dual approach, comprising a mix of regulation and financial

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96. *Id.* at para. 102.

97. *Id.* at para. 96.

98. There is, however, no duty under the Habitats Directive or the 1994 Regulations to consult those who may be affected by a designation.

99. Env. L.R. 29 to Colin T. Reid & Michael Woods, Implementing EC Conservation Law, 18 J. Envtl. L. 135, 137 (2006).

100. This is so much the case that all but one of the EU's Member States has been subject to the threat of infraction proceedings on the Habitats Directive – *see* 18 J. Envtl. L. at 137.

mechanisms. Both law and policy in this area is supposed to be underpinned by the principles that support Community environmental policy more generally, including: the precautionary and polluter pays principles; and preventative action.

The production of nature conservation policy has been rather more prolific than law making in this area, reflecting the operational importance of EU funding of habitat and species conservation within the framework provided by the legal initiatives alluded to above. All the while that the Community was legislating for nature conservation, there were parallel initiatives under way supporting nature conservation goals through funding. These began with a passing reference to co-financing of SPAs in the Birds Directive.

Although on one level, funding is fundamentally important, in that it tends to deal with strategic elements of nature conservation, it normally throws up comparatively little to concern the lawyer on a day-to-day basis, essentially requiring negotiation between landowners/occupiers and regulators to reach binding agreements within clearly defined parameters. In such circumstances, the courts play a minimal role, unless things go wrong, as alluded to above. However, recent developments in the funding mechanisms applied to nature conservation in the EU ensure that, to borrow terminology from economics, in addition to raising legal issues at the micro level, they are also set to raise questions at a macro level – though whether these will ultimately prove to be justiciable is moot. These will be discussed briefly below.

The first raft of funding (subsequently known as) Pre-ACE began in 1982 with ad hoc financing for a small number of nature conservation projects.[101] The mid—1980s saw this put on a more formal footing in the Action Communautaire pour L'Environment (ACE) initiative introduced by Regulation No 1872/44. The ACE scheme concentrated on three areas, including habitat protection for endangered species as identified in the Birds Directive. ACE funding ran until 1991. Fifty-three habitat protection schemes were financed during this period as a whole, with the EU providing 41M€ - 44.5% of the total cost.[102] In addition, and outside the ACE scheme, from 1988 onwards the Commission provided an additional 3M€ to finance 'urgent actions for endangered species'.

The next (short-lived) funding initiative in this area was Actions by the Community for Nature – ACNAT, introduced by Regulation 3907/91, which was designed both to augment funding already in place under the Birds Directive and to assist the implementation of the 1992 Habitats Directive.

The LIFE scheme was introduced in 1992 and served to consolidate the Community's funding activities in this area, including the protection of habitats and nature, the implementation of the Birds and Habitat's Directives and the devel-

101. The EU Online, http://EUROPA.eu – Environment – LIFE – What is – History of LIFE.
102. *Id.*

opment and operation of the NATURA 2000 network of SACs. This initially accounted for 45% of the budget.[103] The Community stated the objectives of the LIFE as, contributing to "[t]he implementation, development and enhancement of the Community environmental policy and legislation as well as the integration of the environment into other EU policies." LIFE also explicitly linked funding for nature conservation to the Community's main environmental policy, the Environmental Action Plan (EAP). Since its inception, LIFE continued to evolve from LIFE II onwards featuring three main funding streams: LIFE–Environment; LIFE-Nature; and LIFE-Third Countries. The second stream, LIFE-Nature, will provide the focus of discussion here.

LIFE-Nature historically involved a merits (rather than quota) based application process for match funding. The EU usually contributed up to 50% of the cost of eligible projects, though for 'priority natural habitats' and 'priority species', the Community contribution could amount to as much as 75%.[104] One example of a LIFE funded project in the U.K. was the removal of American Mink from the Hebrides where they were threatening ground nesting birds.[105]

The sums detailed in the following table illustrate the considerable and ongoing significance of LIFE funding for nature conservation.[106] In the period from 1992-2006, 2751[107] projects were supported by the LIFE initiative 970 of which fell into the LIFE-Nature category.

Programme	**Amount of Funding for Nature Conservation**
LIFE I (1992-1995)	400M€
LIFE II (1996-1999)	450M€
LIFE III (2000-2004)	640M€,
LIFE III Extension (2005-2006)	317M€
LIFE+ (2007-2013)	1.9B€

Agreeing the current round of LIFE funding proved rather controversial, as the Commission and Member States favoured increased subsidiarity in this regard, whilst the European Parliament advocated firm central control.[108] Following the application of the conciliation process (which as its name suggests is designed to facilitate negotiation and foster agreement amongst the Community

103. *Id.* In LIFE 2, this rose to 46%.

104. *Id.*

105. *Id* at 4.

106. *Id.*

107. *Id.*

108. EP Plenary Vote on LIFE+, 24 October 2006, *avaliable at* http://europarl.europa.eu/sides/getDoc.do?type=ta&language=en&reference=P6-TA-2006-0431.

institutions in problematic cases), LIFE+ 2007-2013 was finally agreed in March 2007 under EC Regulation No 614/2007 concerning the Financial Instrument for the Environment (LIFE+).[109] While the Parliament secured its aim of continuing central control over the management of LIFE+ by the Commission, the Council (which is made up of representative ministers of Member States) managed to secure greater Member State involvement in the LIFE process through the identification of national priorities, ostensibly to 'enable the proposed projects to respond to their various national and regional environmental needs'.[110]

Another hugely significant change in LIFE+ is that, for the first time the funding on offer for nature conservation[111] will be allocated in proportion to Member States population size and density and nature and biodiversity (note that this is the order in which these priorities are set out in the Regulation – a point that is, at the very least, of symbolic significance).[112] While these changes are doubtless politically expedient, they do give rise to real concerns that activities under the LIFE+ programme will themselves become politicised, and this is unlikely to help in securing the environmental goals that are being pursued.

LIFE+, like LIFE III, will comprise three streams, namely: LIFE+ Nature and Biodiversity; LIFE+ Environment Policy and Governance; and LIFE+ Information and Communication.[113] The funding on offer, reflecting the increased priority enjoyed by nature conservation on the EU agenda, will amount to almost 1.9B€, 78% of which will be dedicated to 'project action grants' that offer 'value added' to other Community activities, with a minimum of 50% of this sum to be spent on the nature and biodiversity stream.[114] Where LIFE+ Nature and Biodiversity is concerned, funding will focus on best practice and demonstration projects under the Habitats and Birds Directives and in supporting Natura 2000 (amongst other things).[115] LIFE+ as a whole will be tied to the four priority areas of 6EAP: climate change; nature and biodiversity; health and quality of life; and natural resources and waste.[116] This in itself demonstrates a maturing of the policy agenda as it aspires to increased integration of the complex and cross cutting issues that comprise the Community's environmental

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109. Comm'n Reg. No. 614/2007 of 6 June 2007, OJ (L 149).

110. Press Release, *Env't.: Comm'n welcomes final political agreement on LIFE+*, 28 Mar. 2007, at http://www.europa.eu/rapid/.

111. Comm'n Reg. No. 614/2007, *supra* note 79 at 4–6. (Funding is available to public and/or private actors – Article 7 and takes the form of grants or public procurement contracts – Article 5).

112. *Id.* at 5.

113. *Id.* at 4.

114. *Id.* at 5.

115. *Id.* at 3.2.

116. Comm. Reg. No. 614/2007, *supra* note 79 at 3.1.

agenda – and it is of course hugely significant that nature and biodiversity are identified as priorities at this fundamental level.

VI. CONCLUSIONS

It is arguable that, despite its almost thirty years in existence, the full implications of the EU's involvement in nature conservation have yet to be fully worked out. Although the Birds Directive referred in its preamble to the status of migratory species as those which 'constitute a common heritage', and to their preservation as 'a trans-frontier environmental problem entailing common responsibilities'[117], in order to justify Community legislation in an area that still lacked a specific Treaty competence, what has become known as the 'common heritage' approach has been the subject of considerable discussion in the realm of broader international law, with species gaining general recognition as a common heritage issue in part as a result of the Rio Convention on Biodiversity in 1992. Arguably the International community, through a long series of species specific treaties and the trade based CITES regime were creating a climate in which the application of a common heritage approach in this area was becoming almost inevitable.

The EU has continued on its own exploration of the common heritage path in the preamble to the Habitats Directive, with its 4th and 11th recitals referring to threatened species and habitats as 'part of the European Community's natural heritage' and to their conservation as the 'common responsibility of all Member States'.[118] This approach is also favoured by the ECJ, as in Case C-6/04, in which the court commented:

> . . .faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories.[119]

This type of concept has proved extremely controversial in international law in and common heritage and common concern, along with the concurrent justice and equity issues that they bring with them arguably playing a central role in every modern multilateral environmental agreement and likely to continue to do so for the foreseeable future. These issues are not likely to prove any less problematic in EU law in the future in particular, as continued Community enlarge-

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117. Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, Apr.2, 1979, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31979L0409:EN:HTML.

118. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, para. 25, May 21, 1992, http://eur-lex.europa.eu/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML.

119. Case C-252/85 Comm'n v. French Republic at ¶ 53, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0252:EN:HTML (*citing* Case 262/85, Comm'n v. Italy at ¶ 39, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61985J0262:EN:HTML). *See also* ¶ 11 of the Advocate General's opinion in the instant case.

ment increases the social, economic and indeed environmental diversity of Member States. The impact of common heritage arguments in the sphere of nature conservation of course ultimately makes itself felt in domestic law. In this context, the common heritage approach arguably provides the prime (if under-articulated) rationale for interference with individual property rights in the public interest in biodiversity for the purposes of nature conservation. It would appear that, as biodiversity has come to gain greater acceptance as a concern that forms part of the common heritage, it has engendered the shift to a more invasive and prescriptive approach to its regulation, discussed *infra*. However, a failure to fully articulate the reasons for this change and to adequately consider the clash of rights and interests that inevitably results has forced discussion of this area into the sphere of human rights law, where, with its more profound implications from a sustainability point of view, it does not necessarily sit all that easily with more established majority versus minority interest arguments. At the very least, it could be argued that an approach so heavily influenced by human rights concepts to these problems represents only a partial and indeed a profoundly unsatisfactory one, amplifying an anthropocentric bent to what are increasingly being viewed as a bio-centric issues. The deep clash of cultures between dominant and individualistic human rights based thinking and emerging collective (and even bio-centric)[120] ways of looking at environmental issues raises huge questions which have only been touched upon briefly here, but which will require serious engagement from legal scholars in the immediate future if law as a discipline is to respond adequately to the huge problems posed by what science is telling us about our relationship with our planet and the other species that we share it with.[121] The continuing depletion in biodiversity in Europe, despite the legal and policy initiatives that have been put in place in this regard serves to throw into sharp relief how far we still have to go in the quest for effective engagement with even one aspect of the ecological crisis that we currently face.

120. *See*, ENVTL. ETHICS, R Elliott ed., (Oxford Univ. Press, Oxford, 1995).
121. *See*, J. ALDER & D. WILKINSON, ENVTL. LAW AND ETHICS (Macmillan, London, 1999).

Pennsylvania v. Dunlap: Just Another Day in the Office. . . According to Whom?

ASHLEY BRICKLES

INTRODUCTION

Chief Justice Roberts wrote a particularly interesting dissent to a denial of certiorari in *Penn. v. Dunlap*. This dissent is unique for several reasons. First and foremost, Supreme Court Justices generally do not write dissents nor comment on cases in which they refuse to hear.[1] Not only did Chief Justice Roberts comment on this denial for writ of certiorari, but he also wrote his dissent with a dramatic flair and in a unique literary style known as black-noir.

The black-noir genre, otherwise known as America's hard-boiled school of crime writing, developed a different and innovative approach to the crime fiction novel, or in this case, the dissenting rationale to a denial for a writ of certiorari. This genre is described as a lean and direct writing style consisting of stories detailing the gritty realism of the criminal world. Black-noir literature revolves around a non-sequitur narrator who describes a storyline arising from "modern crime and detection, fresh from the newspaper headlines of the day."[2] Generally, authors who adhere to this literary style, create protagonist heroes whose vigor and hard-lined dedication stem from utopian ideals of saving America from crime, corruption and foul play by any means possible.[3]

Chief Justice Roberts' dissent to the denial of certiorari in *Penn. v. Dunlap* can be defined as writing consistent with the black-noir genre. Chief Justice Robert's elaborates upon the case facts from the narrator's position, although not personally involved, he attempts to describe the situation from an almost third-party omniscient perspective. The scene of the arrest and the surrounding neighborhood is described as "Tough as a three-dollar steak."[4] The protagonist hero in this narration is Officer Devlin, an undercover narcotics officer introduced as man who had been "five years on the beat, nine months with the Strike Force" who had made "fifteen, twenty drug busts in the neighborhood."[5] During his morning shift, Officer Devlin perceives a "lone man on the corner" followed by another man approaching him: a "quick exchange of words" con-

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1. Mark Sherman, *Chief Justice Adds Some Pulp to this Written Dissent*, Virginia Pilot and Ledger-Star, Oct. 19, 2008.
2. IAN OUSBY, THE CAMBRIDGE GUIDE TO LITERATURE IN ENGLISH at 253 (2nd ed. 1993).
3. *Id.*
4. *Com. v. Dunlap*, 941 A.2d 671 (Pa. 2007), *petition cert. denied*, 129 S.Ct. 448 (U.S. Oct. 14, 2008) (Roberts, J., dissenting *in mem.*) [hereinafter *Penn v. Dunlap*].
5. *Id.*

cludes with "cash handed over; small objects handed back."[6] According to Chief Justice Roberts, Officer Devlin instinctively "knew" that the "guy wasn't buying bus tokens" and was actually purchasing drugs.[7] Therefore, Officer Devlin's subsequent arrest of the lone man was warranted and his decision to "head downtown and book him" was "just another day in the office."[8]

Although this dissent is entertaining and uniquely unconventional, this playful narration may have several significant long-term effects upon our criminal justice system. Most legal critics have condemned this dissent as merely a flamboyant literary stunt which was the result of a lost wager or a self-indulgent attempt to create a new genre style for Supreme Court decisions.[9]

Unfortunately, most legal scholars have allowed the dissent's literary style impact the importance and legal significance attached to this opinion. If one reads between Chief Justice Robert's playful lines, it quickly becomes apparent that this dissent may subsequently influence the interpretation of Fourth Amendment rights, specifically may limit the remedies available to the criminal defendant whose constitutional rights have been violated.

THE FACTUAL BACKGROUND

In the spring of 2001, Officer Devlin, a narcotics officer with the Philadelphia Police Department, arrested Nathan Dunlap for the possession of illegal drugs.[10] Officer Devlin who was working in a high-crime neighborhood observed a brief conversation between the defendant and an unidentified man who was given small objects in return for money.[11] After this exchange, police officers arrested the defendant and subsequently searched his person finding three packages containing crack-cocaine.[12] Prior to trial, the defendant filed a motion to suppress the evidence alleging that the police lacked probable cause to conduct the warrantless arrest and subsequent search.[13]

Officer Dunlap, who was an experience narcotics officer, testified that he had arrested the defendant based upon several factors. Officer Devlin believed that the transaction he observed involved legal drugs based not only upon his experience, but also because of the characterization of the neighborhood which was a "residential area that suffered from a high rate of nefarious activity, including drug crimes."[14]

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6. *Id.*
7. *Penn v. Dunlap*, *supra* note 4.
8. *Id.*
9. *Sherman*, *supra* note 1.
10. *Com. v. Dunlap*, 941 A.2d 671, 673 (Pa. 2007).
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*

SUMMARY OF CASE

Both the Pennsylvania trial and appellate courts found probable cause supporting the warrantless arrest and search of Dunlap. The Pennsylvania Supreme Court, in a divisive decision, overthrew the lower court rulings and held that a "single, isolated transaction in a high-crime area was insufficient to justify the arrest."[15] Because of the divisive nature of this decision, the State of Pennsylvania petitioned the Supreme Court for a writ of certiorari.

The divisive nature of this decision was due, in part, to Pennsylvania's unique and somewhat divergent approach to the federal rights delineated within the Fourth Amendment. Because the Pennsylvania Supreme Court developed one of the most active and independent state constitutional analysis, there is a greater "divergence between state and federal constitutional protections" in cases involving Article 1, section 8 of the Pennsylvania Constitution.[16]

Under Article 1, Section 8, Pennsylvania's Constitution provides "different, greater, or more heightened protection than that of the Fourth Amendment."[17] As a result of this divergence, the Pennsylvania Supreme Court has consistently "rejected conclusions of the United States Supreme Court with regard to dog searches, the automobile exception, and the good faith exception to the warrant requirement, among others."[18] Therefore, the legality of Officer Devlin's actions could not cohesively and definitively be determined by Pennsylvania's Supreme Court, and as such, made an application for a writ of certiorari review by the Supreme Court.

ANALYSIS OF PROBABLE CAUSE

The Fourth Amendment provides each person with the right to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[19]

Traditionally, probable cause exists when the facts and circumstances within an officer's personal knowledge, and of which he has reasonable trustworthy information, are sufficient in themselves to warrant a person of reasonable caution in the belief that in the case of an arrest, an offense has been committed and the person to be arrested committed the crime.[20] This probable cause standard

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15. *Penn v. Dunlap*, *supra* note 4.
16. Francis McCarthy, *Counterfeit Interpretations of State Constitutions in Criminal Procedure*, 58 Syr. L. Rev. 79, 81 (2007).
17. *Id.* at 88.
18. *Id.* at 89.
19. U.S. CONST. amend. XIV.
20. *Brinegar v. U.S.*, 338 U.S. 175, 176 (1949).

is the bedrock used to determine whether a police search or seizure is in violation of the Fourth Amendment.

Although the Supreme Court has refused to give an exact definition of what constitutes probable cause, it has implemented a totality-of-the-circumstances standard as elaborated in their holding in *Gates v. Illinois.* In this case, the Court held that the veracity or reliability of evidence and the basis of knowledge are all factors which must be taken into consideration when establishing probable cause.[21] The Court described probable cause as a "fluid concept-turning on the assessment of probabilities in particular factual contexts-not so readily, or even usefully, reduced to a neat set of legal rules."[22]

Because of the difficulty courts face when determining whether probable cause is present, the Supreme Court included within its determining factors: the circumstances of the events leading up to the search and the circumstances present that validate the arrest from the viewpoint of an "objectively reasonable police officer."[23]

THE EXCLUSIONARY RULE

If a search is determined to be unreasonable, the primary remedy for such a violation is exclusion of any evidence obtained during the illegal search. In 1914, the Supreme Court in *Weeks v. U.S.* defined for the first time the exclusionary rule and held that evidence which had been illegal seized could not be introduced at trial.[24] The Court declared that the Fourth Amendment's purpose was to limit and restrain the exercise of law enforcement power and authority and to forever secure their Fourth Amendment rights.[25] These "who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . should find no sanction in the judgments of this court."[26]

In the *Dunlap* case, the Pennsylvania Supreme Court refused to include police training and experience within the factors constituting the "totality of circumstances" necessary for probable cause. When an officer arrest's a suspect solely based upon police training and experience, this factor may not be included within the "quantum of evidence [used] to determine if probable cause exists. Instead, police experience should be used as a lens through which courts view the quantum of evidence observed at the scene."[27]

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21. *Gates v. Illinois*, 462 U.S. 213, 233 (1983).

22. *Id.*

23. *Ornelas v. U.S.*, 517 U.S. 690, 696 (1996).

24. *Weeks v. U.S.*, 232 U.S. 383 (1914).

25. *See id.*

26. Bray Lammon, *The Practical Mandates of the Fourth Amendment: A Behavioral Argument for the Exclusionary Rule and Warrant Preference*, 85 Wash. U. L. Rev. 1101 at 1112 (2007).

27. *Com. v. Dunlap*, *supra* note 10.

The Pennsylvania Supreme Court refused to determine the presence of probable cause solely based upon an experienced officer's subjective suspicions. They feared that by only using this one factor, the probable cause standard would be distorted and the "constitutional barrier between the privacy of the citizen and unwarranted governmental intrusions" would be totally undermined.[28] If a law enforcement officer has almost absolute discretion in determining when probable cause is present, an officer may be able to "bootstrap a hunch based on constitutionally insufficient objective evidence simply by adverting to his experience as the foundation of his suspicion.[29] In order to protect the constitutional liberties, "these long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime."[30] Furthermore, probable cause standards and the exclusionary rule are "historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property."[31]

THE EXCLUSIONARY RULE'S EFFECTIVENESS

The exclusionary rule was premised upon the belief that if a "conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded . . . the courts themselves [would become] accomplices in willful disobedience of law."[32]

Justice Brandeis, an advocate for the protection of individual rights, articulated the dire need for such a measure:

> [The] existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.[33]

If the Supreme Court continues to narrow its application of the exclusionary rule than Chief Justice Robert's analysis within *Dunlap* can be considered a foreshadowing of how the U.S. legal system will treat evidentiary rules and Fourth Amendment issues in the coming future. In addition to the provocative

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28. *Com. v. Dunlap*, *supra* note 10.
29. *Id.*
30. *Brinegar*, *supra* note 20 at 170.
31. *Id.* at 174.
32. *Elkins v. U.S.*, 364 U.S. 206, 223 (1960).
33. *Olmstead v. U.S.*, 277 U.S. 438, 485 (Dissenting opinion).

statements articulated within this dissent, the current Supreme Court, as a whole, has increasingly held an unfavorable view of the exclusionary rule. In the recent decision of *Hudson v. Mich.*, the Supreme Court held that "knock-and-announce violations which violated the Fourth Amendment, does not require the exclusion of evidence obtained in the search."[34] Erwin Chemerinsky, a prominent legal scholar, argued that the Court's majority opinion in *Hudson* foreshadows the "willingness of four justices- Roberts, Scalia, Thomas, and Alito—to overrule decades-old precedents and eliminate the exclusionary rule certainly gives a sense that major changes are likely ahead in constitutional law in the years to come."[35]

If the exclusionary rule was abolished, how could constitutional violations be deterred? Critics of the exclusionary rule argue that it does not nor cannot function as a deterrence function.[36] For the most part, violations of the Fourth Amendment occur as a result of an officer's good faith misunderstanding or as a result of an incorrect interpretation of facts relating to a search or seizure.[37]

Even if the exclusionary rule theoretically deters intentional violations of the Fourth Amendment, it is a "too indirect and attenuated form of punishment to do its job adequately."[38] Because of the fact that most constitutional violations are not litigated, and those that are litigated are hardly ever successful, the benefits of the exclusionary rule actually become a burden to defense attorneys.[39]

In addition to theoretical arguments, many critics believe that the exclusionary rule protects the wrong people and its societal cost outweighs any benefits gained from its implementation. The exclusionary rule permits distortion of the "truth finding process by excluding reliable evidence" and as a result of this suppression, the exclusionary rule often frees the guilty.[40] By excluding evidence, criminal defendants are allowed to go free, and receive the benefit of not being punished for her crime while society pays an undue cost resulting from freeing a guilty criminal.[41]

Furthermore, critics of the exclusionary rule argue that this protection is no longer an effective or necessary mechanism needed to deter Fourth Amendment violations. As a result of increases in police professionalism and stricter internal police disciplines, illegal conduct is deterred and the exclusionary rule mechanism no longer serves such a necessary purpose within criminal law.[42]

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34. *Lammon, supra* note 26 at 1114.
35. *Id.* at 1115.
36. JOSHUA DRESSLER, *Exclusionary Rule: Should It Be Abolished?, In* UNDERSTANDING CRIMINAL PROCEDURE 379 (4th ed. 2006).
37. *Id.* at 339.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Lammon, supra* note 26 at 1116.
42. *Lammon, supra* note 26 at 1115.

Those opposed to the exclusionary rule offer § 1983 and Biven suits, both forms of constitutional torts remedies as an alternative approach for deterring Fourth Amendment violations.[43]

Proponents of the exclusionary rule argue that this rule is necessary to protect all men from constitutional violations of their Fourth and Sixth Amendment.[44] Our adversarial system accepts the fact that even if there is clear evidence proving a defendant's guilt, it should be suppressed if it is illegally obtained.[45] The rationale behind the exclusion of evidence is that every defendant should be able to cross-examine the witness in front of a jury who will be able to judge the credibility of the witness. By only admitting evidence which is given under oath and at a court proceeding, there is a greater guarantee that the evidence was given in good faith and genuine in fact.

On a broader level, the exclusionary rule deters unconstitutional police conduct by promoting professionalism and sensitivity towards civil liberties within the police force and by better training officers on the proper use of force, constitutional law and by developing internal guidelines which reduce the likelihood of unreasonable arrests or seizures.[46]

ANALYSIS OF CHIEF JUSTICE ROBERTS' DISSENT

If factors such as police training and experience where used to determine whether probable cause is present than the definition of what one's rights and protections are under the Fourth Amendment right would be greatly limited. Chief Justice Roberts has advocated the narrow tailoring of these protections since he began working as a lawyer in the Regan administration. In 1983, he wrote a memorandum arguing for the amendment or abolishment of the exclusionary rule.[47] In his memorandum, Chief Justice Roberts states that a study showing that the exclusionary rule resulted in the release of 29% of felony drug arrestees in Los Angeles in one year would be "highly useful in the campaign to amend or abolish the exclusionary rule."[48]

Chief Justice Roberts' 1983 memorandum is the basis for the legal reasoning asserted in his dissent. Chief Justice Roberts argues that the Devlin, the undercover police officer, had probable cause to arrest Dunlap. In support of his argument, Roberts cited to several cases which define the probable-cause standard and when police officers have sufficient grounds for arrest. The probable-cause standard is a "nontechnical conception that deals with the factual and

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43. *Id.*

44. DRESSLER, *supra* note 36 at 458.

45. Matthew King, *Security, Scale, Form and Functions: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 Int'l Legal Persp. 185, 188 (2002).

46. DRESSLER, *supra* note 36 at 458.

47. Adam Liptak, *Justices Step Closer to Repeal of Evidence Ruling*, N.Y. Times, Jan. 30, 2009.

48. John Roberts, *New Study on Exclusionary Rule*, Jan. 1, 1983, p.2.

practical considerations of everyday life on which reasonable and prudent men, not legal technicians act."[49]

According to Chief Justice Roberts, the police had probable cause because of the circumstances pertaining to the arrest: an officer saw two men, who had no apparent familiarity, make a quick hand exchange of cash for small objects.[50] This exchange took place in a high-crime neighborhood specifically known for drug activity.[51] Because of these circumstances, the officer reasonably, according to Justice Roberts, determined that the exchange was not for any legitimate business purposes. Even if the officer could not "eliminate all innocent explanations for a suspicious set of facts," there was sufficient evidence necessary to amount to probable cause. If an officer has reasonable suspicion based upon his experience, than he has a valid "objective basis for suspecting the person stopped of criminal activity"[52]

In support of his argument, Chief Justice Robert's sites to the *Gates* decision which held that a determination of probable cause should be based upon "the degree of suspicion that attaches to particular types of non-criminal acts."[53]

If officers do not have a greater discretion in determining when probable cause is present, it will be more difficult for police officers to conduct drug investigations in high-crime areas.[54] Unlike the Pennsylvania Court, both the New Jersey and Rhode Island Supreme Courts reached this conclusion and held that an experienced narcotics officer has probable cause to make an arrest in circumstances similar to the ones arising in the *Dunlap* case.

CONCLUSION

Although there are many practical arguments for abolishing the exclusionary rule, without the creation of an alternative checks and balances system there will be no limiting fact to deter or control law enforcement behavior. The consequence of abolishing the exclusionary rule is of immense importance and a decision which should not be taken lightly. In his dissent, Chief Justice Robert's does not seriously take into consideration many of the merits and reasons for the exclusionary rule and through his black-noir narration playfully portrays this arrest and subsequent case as "just another day in the office."[55]

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49. *Penn v. Dunlap*, *supra* note 4.
50. *Id.*
51. *Id.*
52. *Ornelas*, *supra* note 23 at 696.
53. *Penn v. Dunlap*, *supra* note 4 at 448.
54. *Id.*
55. *Id.*

Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.: A Shift in Approach to Tribal Sovereignty Rights over Commerce on Tribal Lands

SAM DAVIS[1]

INTRODUCTION

In *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc*[2], the Supreme Court limits the scope of tribal adjudicative jurisdiction to regulate commercial transactions by expanding the previous holding in *Montana v. United States*.[3] The issue presented to the Court was whether Indian Tribal Courts have authority to decide a civil lawsuit that involves business dealings between a company owned by a member of the tribe, and a non-tribal bank that owns land on a reservation.[4]

Chief Justice Roberts, writing for the majority, overturned an Eighth Circuit decision that held Tribal Courts have jurisdiction over a business conducted on tribal land by a non-tribe member proprietor.[5] Justice Robert invoked a long-held principle that tribes do not have jurisdiction over non-Indians conducting activity on a non-Indian fee simple, unless it threatens the welfare of the tribe.[6]

This case comment will analyze the Court's narrow reading of the *Montana* Doctrine[7] and the impact of this decision on tribal jurisdiction on commerce-related causes of action. This decision abridges tribal sovereignty and asserts the United States' supremacy on refereeing how sovereign Indian Nations resolve disputes with non-tribal business. The scope of this decision may shape policy with respect to gaming, tobacco, and energy industries.

THE FACTUAL BACKGROUND

This case concerned the sale of a fee simple land on tribal reservation in South Dakota owned by a non-Indian bank (Plains Commerce Bank) to non-Individuals.[8] Plains Commerce Bank owned the land, located on the Cheyenne River Sioux Indian Tribe's reservation. Previously, the Long Family Land and

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* J.D. Candidate, Syracuse University College of Law, 2010.

2. See *Plains Commerce Bank v. Long Family Land & Cattle Co, Inc.*, 128 S.Ct. 2709 (2008).
3. See *Montana v. U.S.*, 101 S.Ct. 1245 (1981).
4. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, at 2720.
5. See *Montana v. U.S.*, 101 S.Ct. 1245 (1981).
6. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, at 2720.
7. See *Montana v. U.S.*, 101 S.Ct. 1245 (1981).
8. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, at 2720.

Cattle Company, a South Dakota company leased this property from the Plains Commerce Bank with an option to purchase.[9] The Longs, members of the Cheyenne River Sioux Indian Tribe, used the property for ranching and farming purposes and were incorporated in South Dakota.[10]

The Longs and Plains Commerce Bank established an exclusive business relationship on the tribal land that extended many years.[11] When Longs began negotiating with the bank regarding a company debt owed to the bank left by the deceased father Kenneth Long, the relationship became contentious. After several months of negotiations, the parties reached an agreement on the mortgage; Plains Commerce Bank agreed to cancel some of the company's debt, and make additional operating loans. The parties eventually agreed to a two-year lease, which is the subject of the lawsuit. The terms of the two-year lease include 2,230 acres, deed over to the bank, with an option to purchase the land at the end of two years for $468,000.[12]

The Long's claim is that underlying this agreement was conduct that demonstrated bad faith on the part of Plains Commerce Bank. They assert that the Bank rescinded the original deal with much more favorable terms, including a 20-year contract for the deed.[13] The Bank claimed that a factor for the rescission were concerns over "possible jurisdictional problem" that may have been caused by a Tribal –owned entity on the reservation.[14]

Nevertheless, the Longs and Commerce Bank came to terms on the lease, until the Longs defaulted on the lease. The lease default was blamed on the loss of livestock, specifically 500 cattle during the extreme weather and blizzard conditions of the winter of 1996-1997.[15] Because of loss of revenue from this event, the Longs were unable to secure the funding to exercise the option to purchase the land when the lease contract expired in 1998. This is when the Long's became "holdover" tenants and refuse to leave.[16]

The occupation notwithstanding, the bank sold the first 320 acres of the 2,230 acres to a non-Tribal couple, and in June 1999, the remaining 1,910 acres to two other non-members. As these transactions commenced, the Longs continued to occupy 960 acres of the land. Finally, they filed suit in Tribal Court to prevent the eviction. In addition, they asked the Tribal Court to reverse the sale of the land to non-Tribal members.[17]

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9. *Id.*
10. *Id.*
11. *Id.*
12. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, at 2716.
13. *Id.* at 2713.
14. *Id.* at 2710.
15. See *Id.*
16. *Id.*
17. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, at 2710.

Officially they filed a discrimination claim in tribal court and were asking for relief in the form of an injunction against the sale of the land to non-tribal members.[18] The petition claimed the terms offered to nonmembers were more favorable to than offered to the Long family.[19] The Long's asserted discrimination, breach-of-contract, and bad faith claims against the bank. The Bank counterclaimed and contended that the Tribal Court lacked jurisdiction.[20]

The Tribal Court dismissed the jurisdiction issue, and denied the Bank's motion for summary judgment on its counterclaim. The seven-member jury found for the Longs on the discrimination claim, and awarded a$750,000 judgment plus interest.[21] In addition, the supplemental judge further reinstated the option to purchase the 960 acres of land they continued to occupy and nullified the previous sale of the land to non-Indians.[22]

The Plains Commerce Bank first appealed to the Cheyenne River Sioux Tribal Court of Appeals, which affirmed the trial court. Next, the Bank filed suit in Federal District Court, then the Court of Appeals for the Eighth District seeking to void the Tribal Court decision on grounds of lack of jurisdiction. Both the District and Court of Appeals upheld Tribal Court decision.[23]

The District Court reasoned that the Plains Commerce Bank and the Longs entered into a consensual relationship and thus, was within the first category of tribal civil jurisdiction over nonmembers according to the *Montana* exception.[24] The Court of Appeals concluded that the Tribal Court has authority to regulate the business conduct of persons who "voluntarily deal with tribal members," including the sale of a nonmembers fee land.[25]

THE LEGAL FRAMEWORK

Chief Justice Roberts, joined by Justices Scalia, Kennedy, Thomas and Alito, made a very narrow distinction in the opinion, which effectively served to abridge Indian sovereignty rights. In doing so, they distinguish *Montana*, based on the transactional elements of sales of fee land by non-Tribal members on the Reservation.[26] The justification was based on the premise that the Tribal courts have no regulatory authority over activities by non-Indians on fee lands, even if they involve Tribe's sovereign interests.[27]

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18. *Id.*
19. See *Id.*
20. *Id.* at 2714.
21. *Id.*
22. *Id.*
23. *Id.*
24. See *Montana v. U.S.*, 101 S.Ct. 1245 (1981).
25. *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, at 2718.
26. See *Id.*
27. See *Id.*

The first issue the Court addressed was "whether a tribal court has adjudicative authority over nonmembers is a federal question."[28] Whether jurisdiction exists over a claim against a non-tribal member defendant is not a matter of tribal law, or a matter of state law. The Court did concede and acknowledge that Indian tribes are "distinct, independent political communities,"[29] and that they are "qualified to exercise many of the powers and prerogatives of self-government."[30]

The majority reasoned that since the discrimination claim "is tied specifically to the sale of the fee land" – land alienated from tribal trust land and removed from tribal control – the Tribe has no authority to regulate the terms upon which the land can be sold, even if those terms are discriminatory and favor non-Indians over Indians.[31]

Lacking authority to regulate fee land sales, the Court found the Tribe has no adjudicatory authority over claims based on such sales since a Tribe's adjudicatory authority cannot exceed its regulatory authority.[32] The majority circumvented the issue of whether the Tribal Court had jurisdiction over the Longs' breach of contract and bad faith claims, where the Bank had not appealed those claims.

However, the Court calculatedly, but imprecisely defined the attributes of sovereignty that the tribes retain, "many" is definitely not "all."[33] The Court noted that it has long held that the "sovereignty that the Indian tribes retain is of a unique and limited character."[34] Tribal sovereignty is limited to tribal reservation land and to tribal members within the reservation. The Court also noted that "tribes retain authority to govern both their members and their territory, subject ultimately to the will Congress."[35] The Court rationalized that the Tribal court's power is limited since it based on premise the scope of tribal sovereignty.[36]

The Court clearly outlines the rule that Tribal Courts do not have adjudicative authority over claims against non-Indians, even when non-tribal members come within the borders of a tribal reservation.[37] The Court drove the point home by stating the tribes lost " 'the right of governing . . . persons within their limits except themselves,' " by virtue of the tribes' incorporation into the American

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28. *Id.* at 2716.
29. *Id.* at 2718.
30. *Id.*
31. See *Id.*
32. *Id.*at 2716.
33. *Id.*
34. *Id.*, quoting *Wheeler*, 435 U.S. at 323.
35. *Id.*, quoting *Mazurie*, 419 U.S. at 557.
36. *Id.*
37. *Id.* at 2718-19.

republic.[38] Furthermore, the Court limited the Tribal Court jurisdiction over claims, like this case, against a non-tribal member defendant when the subject of the dispute is land owned in fee by the defendant.[39]

In evaluating the *Montana* Court's two exceptions to the general rule that tribal courts have no jurisdiction over claims against non-tribal members, the Court attempted to interpret the intent of the exceptions.[40] According to the opinion, a tribe ". . . may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements".[41] A small concession, the Court did state that a tribe might have authority over the conduct of ". . . non-Indians on fee lands within the reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[42] This was a deliberate attempt of the Court to not have the *Montana* exceptions read too broadly concerning Tribal courts.

Moreover, the Court stated that the *Montana*'s exceptions to the general rule that Tribal Courts have no jurisdiction over claims against non-tribal members may be applied only to "conduct inside the reservation that implicates the tribe's sovereign interests."[43] The Court reasoned that the first exception was limited to the "activities of nonmembers,' . . . necessary 'to protect tribal self-government to control internal relations."[44] The majority further made the distinction between sale of the land and conduct on it by stating, ". . . it is well-established in our precedent . . . and entirely logical given the limited nature of tribal sovereignty and the liberty interests of nonmembers."[45]

Here, the Bank sold fee land and thus, the land itself was no longer reservation land. The Court articulated the tribe had no authority to regulate the terms or conditions of the sale of that land.[46] Consequently, the Tribal Court lacked jurisdiction over the tribe's discrimination claim against the Bank under the limitations of the first Montana exception.[47]

The second Montana exception that may apply to non-Indians' conduct that infringes or harms the "political integrity, the economic security, or the health or welfare of the tribe," the Court only if such exercise of tribal power was

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38. *Id.* at 2719, quoting *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 209 (1978).
39. See *Id.* at 2720.
40. See *Id.*
41. *Id.*, quoting *Montana*, 450 U.S. at 565.
42. *Id.*
43. *Id.* at 2723.
44. *Id.*
45. *Id.*
46. *Id.* at 2719.
47. *Id.* at 2726.

"'necessary to avert catastrophic consequences."[48] Here, the Court concluded that the sale of fee land would not have a "catastrophic" effect on the tribe and therefore, the sale formed no basis for the exercise of tribal court jurisdiction over a claim against a non- tribal member defendant under Montana's second exception.[49] Requiring that a non-tribal defendant's conduct have a catastrophic effect on the tribe before a tribe could regulate that conduct under Montana's second exception, placed a very strict limit on tribal use of the second *Montana* exception.

Justice Ginsberg, joined by Justices Stevens, Souter and Breyer, dissented, finding the majority's position "perplexing."[50] The dissent juxtaposed the contradiction made by the majority regarding issues, which arose out of the same transaction. For example, since the Tribal Court has jurisdiction over the breach of contract and bad faith claims, then why not giving them jurisdiction over discrimination arising out of those same transactions.[51]

The dissent further question that the ". . . case, at heart, is not about 'the sale of fee land to non-Indian individuals, "rather, this case is about the power of the Tribe to hold nonmembers like the Bank to a minimum standard of fairness when they voluntarily deal with tribal members."[52] The Majority did reaffirmed that tribal sovereignty is "'outside the basic structure of the Constitution."[53] Most significantly, the Court pointed out "the Bill of Rights does not apply to Indian tribes."[54]

The Indian Tribes existed long before the Europeans came to the shores. The tribes had characteristics "self-governing sovereign political communities."[55] Now, we recognize their political position as pseudo- nation-states, where they do not have complete sovereignty, as would a sovereign nation, but still maintain some level of power. Nevertheless, this power allows the tribes to regulate relationships and affairs within their territory, albeit limited.

IMPLICATIONS

Plains Commerce Bank marks the first Roberts' Court case analyzing Indian Law sovereignty issues. Chief Justice Roberts, joined by Justice Alito swiftly deteriorated any notion of tribal sovereignty relating to commerce. In doing so, they ignored the relationship of the Bank and its transactions on the Reservation, including its successful use of the Tribal Court as a plaintiff in other cases

48. *Id.* ad 2726.
49. *Id.*
50. *Id.* at 2722.
51. See *Id.*
52. *Id.* at 2729.
53. *Id.* at 2724.
54. *Id.*
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against tribe members. While the long-term effects of the decision are unclear, decisions such as this that clearly violate and limit tribal sovereignty rights are one-sided and an evolutionally leap backwards for establishing respect and harmony between Indian Nations and the United States of America.

James LaRue v. DeWolff, Boberg, & Associates: Changing the Understanding & Application of ERISA for the 21st Century

MICHELLE POMERANTZ

INTRODUCTION

The Supreme Court's holding in *James LaRue v. DeWolff, Boberg, & Associates* deals with ERISA and the ability of individual pension plan holders to recover civil damages from the plan administrators that resulted from fiduciary breaches. *LaRue* represents a modern interpretation of ERISA, and the concept that in order to uphold the purpose of ERISA as a protective measure, certain provisions must be read based on the changes in society, such as the prevalence of individual defined contribution plans. In *LaRue*, the Supreme Court examined the reach of §502(a) of ERISA and the ability of an individual to bring a civil suit against plan administrators for damages.

Through the determination that an individual can maintain a cause of action under §502(a) against plan administrators for breach of fiduciary duties, the Supreme Court recognized the prevalence of individual pension plan holders, and the importance that ERISA protects the rights of those individuals against fiduciary breaches. *LaRue's* holding represents a key change in the interpretation of ERISA provisions and the understanding that in order to carry out the true purpose, ERISA provisions must be read in light of the times.

I. UNDERSTANDING ERISA

ERISA, the Employment Retirement Income Security Act, was enacted in 1974 to set minimum standards for pension and health plans in the private industry.[1] Congress enacted ERISA to safeguard American workers and their ability to plan for retirement. ERISA's declaration of policy states that the purpose was to protect the interests of participants and their beneficiaries, by requiring disclosure and reporting to participants, "establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans," and providing appropriate relief.[2]

A vital aspect of ERISA is the imposition of fiduciary duties on those charged with managing and controlling the plan assets. §409(a) imposes fiduciary obligations in the management, administration, and investment of fund assets. In pertinent part, §409(a) states:

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1. U.S. Dept. of Labor, http://www.dol.gov/dol/topic/health-plans/erisa.htm.
2. Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1001 (b) (2009).

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate. . .[3]

LaRue implicated this provision, alleging that DeWolff breached a fiduciary responsibility in the management of his individual plan when he disregarded LaRue's instruction to make changes to the plan's investments.

§502(a)(2) provides instances of when and by whom civil enforcement can be brought. The text, however, gives no clear right of individual injuries, distinct from plan injuries. Instead it states that a civil action can be brought by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief.[4]

§502(a)(3) says that a civil action can be brought "by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan."[5]

The above ERISA provisions and the congressional intent are vital to the holding and understanding of the Supreme Court's decision in *LaRue*. Based on the statements in the declaration of policy and the Court's statutory interpretation of the above provisions, some clarity has been given to the remedies available for breaches in fiduciary responsibilities.

II. CASE SUMMARY

James LaRue held a 401k pension plan that was administered through his prior employer, DeWolff, Boberg, & Associates. LaRue's pension plan was a "defined contribution plan," which promised an individual account available upon his retirement. The amount available at retirement was based upon LaRue's contributions and the investments made by the plan administrators, DeWolff in this case. LaRue alleged that between 2001 and 2002 he directed DeWolff to make certain changes to his plan's investments, but his wishes were not carried out.[6] As a result of DeWolff's failure to make the requested changes, LaRue alleged that his account was depleted by $150,000.[7]

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3. Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1109 (a) (2009).
4. Employee Retirement Income Security Act of 1974, 29 U.S.C.A. § 1132 (a) (3) (2009).
5. 29 U.S.C.A. § 1132 (a) (2).
6. LaRue v. DeWolff, Boberg, & Assoc. 128 S. Ct. 1020, 1022 (US, 2008).
7. LaRue 128 S.Ct. at 1023.

LaRue brought suit against DeWolff under §502(a)(3) of ERISA in which he sought equitable relief for the depletion of his account. In the suit, LaRue stated that he wanted to be made whole and have his account reflect the amount of money that would have been in the account, had DeWolff not breached a fiduciary duty by dismissing LaRue's direction. DeWolff filed for judgment on the pleadings because LaRue's claim was for monetary relief, which was not covered by §502(a)(3). DeWolff's motion was granted.

The Court of Appeals relied on language from *Massachusetts Mut. Life Ins. Co. v. Russell* which stated that recovery under §502(a) was to protect the rights of the entire plan, not the rights of individual beneficiaries, such as LaRue.[8]

On appeal to the Supreme Court, the rationale of the *Russell* holding was used to reach a different result based on equity and the purposes of ERISA legislation.

III. HOLDING

In a unanimous opinion, the Supreme Court reversed the Court of Appeals, and held that ERISA provided a remedy to James LaRue against DeWolff, his pension plan's administrators, for breach of their fiduciary duty. Justice Stevens wrote for the majority of the Court, which held that LaRue had a cognizable claim for relief under ERISA §502(a)(2) resulting from DeWolff's fiduciary breach. While the Court recognized that §502(a)(2) does not provide remedies for individual injuries distinct from plan injuries, recovery was authorized for fiduciary breaches that impaired the value of plan assets in a participants individual account.[9] In reaching this conclusion, the Court looked at the differences between defined benefit plans and the newer, more common, defined contribution plans. The differences in these two accounts was found to be essential to the fiduciary obligations under §409(a), and thus the impact of breaches on the value to the plan holders and beneficiaries.

IV. ANALYSIS

The Supreme Court previously dealt with ERISA § 502(a)(2) and the right to bring suit in *Massachusetts Mutual Life Insurance Co. v. Russell* in 1985. The *Russell* Court denied plaintiff consequential damages, relying on the concept that the "entire plan," not merely an individual account was required to sustain harm. The Court of Appeals relied on the *Russell* Court's "entire plan" language to find that LaRue was not entitled to any relief. While the Supreme Court recognized *Russell's* "entire plan" language, it was not found to be determinative in LaRue's case because the harm he suffered did not harm any other account holders, yet still negatively impacted his "plan." Jackson stated that the

8. Id.
9. Id. at 1021.

Court in *Russell* stated that while §502(a)(2) provided remedies for entire plans, not individuals, and thus recovery must benefit the plan as a whole, that conclusion is consistent with the current holding in *LaRue* because *Russell's* rationale merely supports the opposite result in this case.[10] The reason for finding a different result is because of the type of plan and the benefits that are delivered based upon the plan. In *Russell*, even with the alleged fiduciary breach, the plaintiff received the entire benefit to which was contractually obligated.[11] Because LaRue's 401k plan was a defined contribution plan, however, the breach by DeWolff depleted the funds in LaRue's account only, and he therefore lost value that was contractually obligated to him.

Before the Court was able to find a cognizable claim under the applicable ERISA provisions, it was necessary to look at the harm suffered by LaRue and how his "defined contribution plan" was essential to that harm. A "defined contribution plan," such as the one held by LaRue, promises the participant the value of an individual account at retirement, which is based on the investment performance of the participant's contributions.[12] Alternatively, a "defined contribution plan" promises a fixed amount of income upon retirement that is based upon the employee's years of service and employment.[13] The Court expressed the following about "defined benefit plans."

> Misconduct by the administrators of a defined benefit plan will not affect an individual's entitlement to a defined benefit unless it creates or enhances the risk of default by the entire plan. It was that default risk that prompted Congress to require defined benefit plans (but not defined contribution plans) to satisfy complex minimum funding requirements.[14]

LaRue's "defined contribution plan," on the other hand, has a different impact than "defined benefit plans" because an individual account can be affected through the actions of account managers. It was this impact that led the Court to move away from the "entire plan" language requirement in *Russell.*

While LaRue's claim for civil liability is rooted in §502(a)(2), the right to a remedy arose from DeWolff's fiduciary breaches, which are established in §409(a). Congress purposely provided redress for plan participants and beneficiaries stemming from the failures of those charged with maintaining plan funds. However, the debate arose concerning whether Congress intended a plan participant to recover damages that only affected his individual account, or whether the entire plan needed to affected. The Court found the latter result to go against the purpose and intent of ERISA to safeguard the rights of the American workers.

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10. Id. at 1022.
11. Id. at 1024.
12. Id. at 1022.
13. Id.
14. Id. at 1025.

Jackson reiterated the changes in society from the Court's holding in *Russell* to the holding in *LaRue*, which helps explain why the Court read §502(a)(2) to allow recovery to LaRue. It was important to the Court that when ERISA was enacted, and later when *Russell* was decided, "defined benefit plans" were "the norm of American practice."[15] "Defined benefit plans" are no longer the norm in retirement plans. Today the majority of the workforce holds "defined contribution plans." It is estimated that $3 trillion of the nation's assets are held in "defined contribution plans."[16] This influx of money and the purpose of ERISA to safeguard the American workforce make clear that the "entire plan" language needed to be modified for the times. ERISA has not had any drastic changes to the fiduciary provisions in §409(a) or to the remedies offered in §409(a), since it was enacted in 1974.[17] This fact has made it difficult for courts to uphold the rights of pension plan holders and provide appropriate remedies.

The holding in *LaRue* is not completely distinct from that in *Russell*, but instead distinguished based upon the "defined contribution plan" language versus the "defined benefit plan" language. The Court held that,

> Although §502(a)(2) does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize recovery for fiduciary breaches that impair the value of plan assets in a participants individual account.[18]

The above recognizes the importance of reading §502(a)(2) with an understanding of the pension plan market, and thus upholding the intent of the drafters.

V. FUTURE IMPLICATIONS OF *LARUE* DECISION

The Supreme Court's holding in *LaRue* moves ERISA into the 21st century by interpreting §502(a)(2) to allow individual pension plan holders the ability to recover against account holders for fiduciary breaches. Prior to this holding, the Court had required that recovery was only available to the "entire plan." The refusal to extend recovery to individuals to damages to their individual account does not seem equitable in light of the importance of retirement planning, and the reliance of individuals on the assets that should be available to them upon retirement.

In light of the new landscape and increasing popularity of "defined contribution plans," the Supreme Court has, in effect, dictated new responsibilities to pension plan account managers and fiduciaries. Since individuals now have a

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15. Id., See, J. Langbein, S. Stabile, & B. Wolk, Pension and Employee Benefit Law 58 (4th ed.2006).

16. Board of Governors of the Federal Reserve System, Flow of Fund Accounts of the United States: Flows and Outstanding, Third Quarter 2006 at 112 (2007), http://www.federalrelease.gov/releases/Z1/current/z1.pdf

17. DANA MUIR, ERISA and Investment Issues, 65 Ohio St. L.J. 199, 247 (2004).

18. LaRue 128 S.Ct. at 1026.

cause of action against their account holders for breach of fiduciary responsibility, such as failure to make changes to the individual's investment account, those charged with managing pension plans will be more cognizant of their actions and the impact on individual account holders.

While the extension of §502(a)(2) to allow recovery for damages to an individual's "defined contribution plan," will hopefully make account managers more diligent, it seems likely that problems may result, such as an influx in cases claiming fiduciary breaches. The determination as to whether the account manager actually breached a fiduciary duty, which depleted the individual account is a difficult inquiry. It requires second guessing and analyzing what the value of the account would be had the manager acted as directed by the plan participant.

The possible influx of cases claiming fiduciary breaches seems likely in light of the previous number of cases brought by employees against plan administrators for issues relating to breaches in fiduciary duties. However, before the decision in *LaRue*, most of these cases were dismissed if the claim simply called for benefits under the plan.[19] In light of *LaRue*, it is likely that many individuals who previously thought about bringing cases for benefits relating to fiduciary breaches but feared dismissal may think otherwise. It is yet to be seen what the ramifications of *LaRue* will be, but many find the decision hopeful, especially based on the belief that *Russell* was outdated.[20]

CONCLUSION

A unanimous Supreme Court held that James LaRue had a cause of action under §502(a)(2) against DeWolff, the administrator of his "defined contribution plan." This conclusion was based on the perceived purpose of ERISA legislation, as a protective measure. ERISA was enacted to protect the American workforce and the increased prevalence of "defined contribution plans" over "defined benefit plans," has changed the way that certain provisions must be read to maintain the initial purpose and goals. The Court based a large part of its reasoning on the damages that inure to an individual account as a result of fiduciary breaches. In LaRue's case, the alleged $150,000 depletion did not harm any other plan holders, only him. Based on the purposes of ERISA, the Court's interpretation, and subsequent reasoning in *Russell*, the Court held that Congress did not intend to restrict recovery to situations where only the "entire

19. TERRENCE D. BROWN, ERISA Disability Claim in the Eighth Circuit, 57 Drake L. Rev. 51, 56 (2008).

20. MARIA O'BRIEN HYLTON, Together We Can:* Imagining the Future of Employee Pensions: Feviewing Teresa Ghilarducci & Christian E. Weller, eds. Employee Pensions: Policies, Problems & Possibilities, 12 Empl. Rts. & Employ. Pol'y J. 383, 390 (2008).

plan" was harmed. This decision is important to bring ERISA protection into the 21st century and protect the retirement assets of those who choose to contribute funds to private retirement accounts.

The *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* Aftermath: Reliance, Recession and Politics

DAVID WAGNER

I. INTRODUCTION

In January of 2008 the Supreme Court ruled on Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.[1] Many hailed the case as one which would shape the legal aspect of business decisions for years to come.[2] The case would shape decisions because it limited the liability of ancillary companies involved in fraudulent schemes.

Less than one year later, the nation stands torn apart by a massive recession. The recession was brought on, in part, by many fraudulent activities in which different members of the business community had engaged. People are demanding that those responsible be held accountable for their actions. This case is one which shifts the burden and the blame away from companies who helped engage in fraud.

This decision is still very much in its infancy and how it will be handled by courts, Congress, and businesses for years to come is up in the air. A new administration has recently taken office and is backed by Congress which shares the administration's interest in fixing the economy. The courts also understand the gravity of the economic situation and saw how poor business decisions led to millions of dollars being lost. The manner in which government will react to this court decision and how the courts will interpret this case in the future are unknown answers.

II. FACTS

The investors of Charter Communications, Inc. brought suit against Charter alleging it engaged in sham transactions with investors and falsified its financial numbers.[3] Investors have a private right of action against the company under § 10(b) of the Securities Exchange Act of 1934.[4]

Charter Communications did business with the respondents Scientific-Atlanta, Inc. and Motorola, Inc. The court questioned these companies' actions in

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1. Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc., 128 S.Ct. 761 (2008).
2. Brian Wingfield, *Stoneridge And The Court, available at* http://www.forbes.com/2008/01/15/lawsuits-stoneridge-investing-biz-beltway-cx_bw_0115scotus.html (last visited May 3, 2009).
3. *Supra,* note 1.
4. *Id.*

question in this case.[5] The facts in the case were not in dispute. After Charter executives realized that they were going to fall short of their projected cash flow numbers in late 2000 by $15 to $20 million they decided to alter arrangements with the respondents.[6] Respondents sold digital cable set top boxes to Charter and they arranged to overpay them $20 each for the sets with the understanding the respondents would return that overpayment by purchasing advertising from Charter later in the year.[7] Charter would then later record those advertising purchases as capital, boosting their cash flow revenue.[8] This practice was in violation of generally accepted accounting principles (GAAP) and it would also deceive Charter's auditors.[9] There were written agreements in place between Charter and the respondents to engage in this behavior.[10] The end result of such behavior was that Charter's investors were misled into believing that the company was making its financial projections.[11]

III. PROCEDURAL HISTORY

Stoneridge Investment Partners, LLC, the petitioner here, filed this case in the United States District Court for the Eastern District of Missouri.[12] The court dismissed the action after it granted the respondent's motion to dismiss for failure to state a claim on which relief can be granted.[13] The United States Court of Appeals for the Eighth Circuit affirmed this decision.[14] The court claimed that allegations did not show the respondents made misstatements relied upon by the public, that they violated a duty to disclose and that there was no violation under § 10(b).[15] The court also affirmed the District Court's denial of petitioner's motion to amend the complaint.[16] The court reasoned the revised pleading would not change the court's conclusion on the merits.[17] The Supreme Court then granted certiori and affirmed the decision.[18]

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5. *Id.* at 766.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 767.
11. *Id.*
12. *Id.* at 766.
13. *Id.* at 767.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*

IV. HOLDING

The primary issue in this case is whether the companies who aided Charter Communications, Inc. in deceptive acts can have liability imposed on them as well under § 10(b) of the Securities Exchange Act of 1934.[19] The court's decision here dictates that the companies who aided in Charter Communications, Inc. fraud cannot be held liable.[20] The court says that those companies are subject to the same standards of § 10(b) of the Securities Exchange Act of 1934.[21] As such, aiders and abettors of fraud are not automatically liable unless their actions meet the same requirements to punish an entity under § 10(b) of the Securities Exchange Act of 1934.[22] Here, the aiders and abettors actions are not sufficient to satisfy § 10(b) of the Securities Exchange Act of 1934.[23]

V. COURT'S REASONING

In its analysis the court examines the language of § 10(b) of the Securities Exchange Act and heavily relies on *Central Bank v. United States*.[24] In *Central Bank* the court analyzed § 10(b) and determined that it did not extend to aiders and abettors.[25] The court here relies on this analysis § 10(b). For a party to be found liable under § 10(b) it must meet all of its conditions and the respondents do not meet all of the conditions here.[26] Since there is no liability under § 10(b), the investors could not have relied on the actions of the respondents and cannot be liable.[27] The court also declares that the respondents had no duty to disclose their actions to the public.[28]

The court also looks at the Congressional history revolving around § 10(b) and found that Congress originally sought to add an aiders and abettors section after the *Central Bank*, but it did not.[29] The court here interprets Congress' inaction as not wanting to punish aiders and abettors.[30] The court guards against the expansion of judicial interpretation by extending liability in this case.[31]

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19. *Id.*
20. *Id.* at 774.
21. *Id.*
22. *Id.* at 768, 769.
23. *Id.* at 769.
24. *Id.* at 768.
25. *Id.*
26. *Id.* at 769.
27. *Id.* at 769-73.
28. *Id.* at 769.
29. *Id.* at 771.
30. *Id.* at 772.
31. *Id.*

VI. ANALYSIS

A. THE FUTURE

This case is another important voice in how businesses will be regulated in the 21st century. It has already been hailed by many major news outlets as one of the most important security fraud cases in U.S. history.[32] This case comes after a tumultuous ten years in the business community. The business community has gone through scandals, the implementation of the Sarbanes-Oxley Act, and the deregulation of many industries.

Stoneridge made an immediate splash in courts just days after it was handed down. The court denied certiorari to former Enron shareholders in *Regents of the University of California v. Merrill Lynch Pierce Fenner & Smith, Inc.*, where petitioners argued for an exception for financial services companies in the reliance rule.[33]

Both of these decisions came just months before the economic collapse of the fall of 2008 and *Stoneridge* could be a prominent decision in the collapse's aftermath. The Supreme Court's recent rulings have construed recent securities law cases narrowly and left the enforcement of securities law up to the SEC.[34] *Stoneridge* affected the litigation of *Regents*, but opinions may change in the wake of the collapse. There are two main things to focus on to see how this case will impact the future: if the case springs new legislation; and how the case is handled by courts.

After the financial collapse people are pointing fingers at who is to blame. The calls for more regulation and oversight in business seem to be needed now more than ever in the wake of the financial collapse. The court's decision here trends against such increased regulation in the business community. Increased regulation can still occur though. The court here talks about how Congress failed to implement any regulation for aiders and abettors after the *Central Bank* decision and this might change.[35] The new Congress and administration might be much more apt to push for regulation which would prevent aiders and abettors from escaping fault.

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32. Linda Greenhouse, *Supreme Court Restricts Securities Lawsuits*, http://www.nytimes.com/2008/01/15/washington/15cnd-scotus.html?_r=1 (last visited May 3, 2009).

33. Robert Yates, *BIG DEALS // VERDICTS // SETTLEMENTS*, CHICAGO LAWYER, Mar. 2008, *available at* http://www.lexis.com/research/retrieve?_m=2439ccd69842047f7a8d82b3991fea81&docnum=20&_fmtstr=FULL&_startdoc=11&wchp=dgLzVtz-zSkAb&_md5=c584c70ac08a5e611d1ee79e20391e67 (last visited May 3, 2009).

34. John A. Neuwirth & Stacy Nettleton Weil, *The Supreme Court In Stoneridge Refuses To Extend § 10(b) Securities Fraud Liability To Secondary Actors*, METROPOLITAN CORPORATE COUNSEL, Mar. 2008, *available at* http://www.lexis.com/research/retrieve?_m=4d9231768a2351bb31088d48d52749cf&docnum=22&_fmtstr=FULL&_startdoc=21&wchp=dgLzVtz-zSkAb&_md5=bd578edf5b8c1353dcfb4c6a09ef1056 (last visited May 3, 2009).

35. *Supra*, note 1 at 772.

People have lost millions in the collapse and they want somebody to blame. Lawsuits are sure to follow. This case will surely be a benchmark for many cases which are brought to court. But, the outcome of this case will make it more difficult for any plaintiff to succeed.[36] Despite ill feelings towards big business, *Stoneridge* is now an authority on security law cases.[37] *Stonridge's* narrow interpretation of reliance makes it difficult to bring those ancillary parties to justice.

The majority here seems to ignore an obvious lack of responsibility and proper oversight at many organizations. This court decision would seemingly allow many organizations to get off scot-free. The court here says that since investors are not relying on the ancillary companies who do business with the ones they directly invest with those ancillary companies have no fault.[38]

The court here says that the investors cannot pursue a civil route in bringing the ancillary organizations to justice, but an end result of this case is that criminal prosecution might become more prominent with such cases.[39] The court does not preclude the possibility of criminal prosecution and writes on how they are a strong deterrent to such behavior.[40] Given that the court specifically speaks on the criminal aspect, while declining to push the civil route an increase in criminal prosecution by the Securities Exchange Commission (SEC) is a strong possibility.[41] The new administration also might be more apt to push this agenda in the wake of this case and the financial collapse.

B. INTERPRETING RELIANCE

The argument of the dissent in this case makes a very strong point that may lead to a different future for securities fraud cases in the future as well.[42] The majority here says that the standard to analyze whether Motorola and Scientific-Atlanta are liable is whether the shareholders had reliance on their actions.[43] The majority chooses to focus on reliance instead of the type of conduct which was engaged in.[44] The type of conduct engaged in, is what is typically focused on during criminal prosecutions during SEC investigations. The majority

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36. Kimberly Atkins, *The subprime mortgage meltdown hits securities law*, THE MINNESOTA LAWYER, Mar. 17, 2008, *available at* http://www.lexis.com/research/retrieve?_m=2439ccd69842047f7a8d82b3991fea81&docnum=19&_fmtstr=FULL&_startdoc=11&wchp=dgLzVtz-zSkAb&_md5=c584c70ac08a5e611d1ee79e20391e67 (last visited May 3, 2009).

37. *Supra*, note 1 at 772.

38. *Id.* at 774.

39. *Id.*

40. *Id.* at 773.

41. J. Robert Brown, Jr., *Stoneridge and the Legislative Role of the Supreme Court, available at* http://blogs.law.harvard.edu/corpgov/2008/01/17/stoneridge-and-the-legislative-role-of-the-supreme-court/ (last visited May 3, 2009).

42. *Supra*, note 1 at 775.

43. *Id.* at 770.

44. *Id.*

chooses to ignore this type of behavior here.[45] The court does cite SEC law when invoking reliance, but ultimately their interpretation of it is is what defines this case.[46]

The majority opinion revolves around whether there was reliance and their definition of reliance is arguably subject to interpretation. Courts might be apt to interpret reliance differently in the future. Courts generally adhere to stare decisis in their decisions. The court here made a ruling which was quite dependent upon the specific facts of the case and could be subject to change based on the case. The court said that ancillary partners in the fraud must go through the same standards as the organization at the center of the fraud and show that there was reliance. Courts also might be more apt to look upon the facts with less scrutiny than the court did here and interpret reliance differently. The fraud that was perpetrated on the economy which has been a factor in the financial collapse also might play in future judge's minds when interpreting reliance.

The court here mentions how Congress did not act after *Central Bank*, but that may change in the wake of the financial collapse.[47] If future courts look at the action taken by Congress to punish those ancillary companies responsible for fraud, they might adjust their standards as well. Aside from interpreting reliance in a looser manner, they may look to the dissent here and focus on the type of conduct engaged in.

C. POLITICS

The politics of the Supreme Court are in question when decisions such as the one in this case come down. Conservative politics have recently sided with big business and the same goes for the traditionally conservative members of the court. In 2006, twenty-six cases dealing with businesses or business interests came before the Supreme Court.[48] Of those twenty-six cases, seventeen cases were ruled in favor of business.[49]

This decision was a 5-3 decision where the traditionally conservative members of the court were in the majority. What is worrisome here is some of the specific language used by Justice Kennedy in his decision. At times, the majority's language smacks of politics more than jurisprudence.[50] Justice Kennedy warns of the following concerning a ruling for the plaintiffs: "Overseas firms

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45. Larry Ribstein, *The Stoneridge opinion*, http://busmovie.typepad.com/ideoblog/2008/01/the-stoneridge.html.

46. *Supra*, note 1 at 770.

47. *Supra*, note 1 at 771.

48. Melissa Maleske, *Pro-Business Myth; Much has been made about a business-friendly Supreme Court. But is the depiction accurate?*, INSIDE COUNSEL, Sept. 2008, *available at* http://www.lexis.com/research/retrieve?_m=2439ccd69842047f7a8d82b3991fea81&docnum=12&_fmtstr=FULL&_startdoc=11&wchp=DGLzVtz-zSkAb&_md5=c584c70ac08a5e611d1ee79e20391e67 (last visited May 3, 2009).

49. *Supra*, note 1 at 772.

50. *Supra*, note 45.

with no other exposure to our securities laws could be deterred from doing business here. . . . This, in turn, may raise the cost of being a publicly traded company under our law and shift securities offerings away from domestic capital markets."[51] This seems to be something which is more of the concern of the Congress, SEC and business leaders, rather than the Supreme Court.

Stoneridge's outcome may have had to do with politics outside of the court as well. The Justice Department prepared a friend-of-the court brief on behalf of the SEC for the case.[52] That brief was never filed following a complaint to the White House by former Treasury Secretary Henry Paulson. When asked about the action taken by the Bush administration former SEC staffer Meyer Eisenberg said, "As far as any of us can recollect, and I've been around a long time, the White House has never before interfered in a securities case."[53] The Bush administration certainly had a pro-big business record, but the executive branch is entering dangerous territory when it interferes with the judicial branch.

In the past few years a dramatic shift in the political leanings of those in charge in the government occurred. The Supreme Court still leans towards a conservative philosophy, but both houses and the executive are now occupied by more liberal-minded Democrats. Democrats traditionally push for a more hands-on government and are in favor of more regulation. Increased regulation over the type of issues dealt with in this case is what the nation might be in store for. With Democrats in power and the economy reeling from a series of catastrophic decisions by the unchecked business community, those at fault even if they are ancillary players in the fault might see a more watchful eye cast over them.

VII. CONCLUSION

This case was decided at a landmark period in our nation's history. With the economy in shambles and everyone trying to figure who is to blame, this case will help shape how our economy is regulated. People must have faith that Wall Street will play by the rules and that justice will be served if they do something illegal. Currently, this decision provides much speculation on how that justice will be dispensed. Whether that justice will come in a purely criminal forum for those who aide and abet in fraud or whether there is a civil future for such fraud has yet to play out.

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51. *Supra*, note 1 at 772.

52. Terry Carter, *How Lawyers Enabled THE MELTDOWN And how they might have prevented it*, ABA JOURNAL, Jan. 2009, *available at* http://www.lexis.com/research/retrieve?_m=7d2f78678c64f3499b657904c34dc9a3&docnum=1&_fmtstr=FULL&_startdoc=1&wchp=dgLbVlb-zSkAl&_md5=c94ad813e5c92cd969ce3510ebc63d55 (last visited May 3, 2009).

53. *Id.*