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A. BENJAMIN SPENCER

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Relevant. Sophisticated. Attentive to the public good. Each of the three outstanding scholars profiled in this nineteenth volume of the Virginia Journal exemplifies those characteristics. Leslie Kendrick, Thomas Nachbar, and Benjamin Spencer have different substantive interests. Yet all three examine specific rules both on their own and in broader contexts in order to reveal their systematic operation and effects. Ultimately, the goal of each scholar is to improve his or her area of the law in the interests of the larger public good. Kendrick, Nachbar, and Spencer all ask classic questions of American legal inquiry and come up with new methods of analysis, new conclusions, and new ideas about what the law should be. Kendrick does this with the rules governing free speech under the First Amendment. Nachbar with the question of how to allocate regulatory authority. And Spencer with the rules of civil and military procedure. Like many on our faculty, they each exemplify the best marriage of the scholarly and the lawyerly, the carefully reasoned and the practically important. We are proud to call them our own.

**LESLIE KENDRICK** cares deeply about words. As a former student of literature and now a scholar of the First Amendment, she cares both about whether and under what circumstances words are protected and about what words are used to describe that protection. Kendrick takes words that have become symbols and talismans—words like “content discrimination,” “intent,” and “chilling effect”—and gives them new meaning through deep exploration. She has found that content regulation doctrine is more coherent than we had thought, but that chilling effect doctrine does far less work than we previously understood. With a series of sophisticated and careful papers on specific aspects of First Amendment doctrine behind her, Kendrick has recently taken up questions of what constitutes speech in the first place. Her scholarship goes to the heart of the First Amendment, entering into debates about the relationship between speech rights and economic rights that have their roots in the *Lochner* era of a century ago. Kendrick is the rare scholar who can parse the legal doctrine carefully and also ask the big questions: Is speech special? Should it be treated as such? Why? Her answers to such questions are penetrating, provocative, and always productive.

For **THOMAS NACHBAR**, two age-old legal questions animate scholarly inquiry: “Who decides?” and “Who decides who decides?” In answering those questions, Nachbar probes deeply into how regulation works across a broad swath of the law. His is a systemic approach, asking when legal regulation is warranted and when it is not; who should determine the existence and contours of that legal regulation; and how institutions should interact to best provide for a functioning society. Nachbar has explored those questions in the context of intellectual property, antitrust, and communications law. After joining the U.S. Army Judge Advocate General Corps as a reservist, Nachbar asked such questions with more urgency when he encountered the conflicts in Iraq, Afghanistan, and other parts of the Middle East. Though the legal systems, the social contexts, and the specific questions were all different, Nachbar’s incisive and thoughtful analysis remained a constant. Nachbar’s ability to move across fields of legal scholarship and from high theory to the most practical on-the-ground military issues reflects his nimble mind, his boundless intellectual curiosity, and his deep sense of professional and national service.

**BENJAMIN SPENCER** has spent his career improving the fairness of our legal system. Initially, his scholarship aimed to increase equity and access to justice through close scrutiny of the federal rules of civil procedure and judicial interpretations of them. Spencer has identified myriad ways in which those rules have made it harder for plaintiffs over the last several decades, focusing on thorny issues of personal jurisdiction in a changing and increasingly digital age and ever-more-restrictive pleading standards. Spencer is intent not only on identifying but on fixing such problems, and he has put his substantial intellectual prowess toward reform of the system. Spencer’s concerns with fairness and access to justice have also led him to think hard about how we educate lawyers in the first place, about both the importance of and the best approaches to legal education. Like his colleague Nachbar, Spencer has recently become a reservist in the JAG Corps, which has continued to expand his scholarly horizons. The military, and indeed all of us, will benefit as he turns his keen eye for details and his ambition for systemic solutions to the way military lawyers are trained.

Risa L. Goluboff
Dean
Leslie Kendrick joined the faculty in 2008. She teaches and writes about torts, property, and constitutional law. Kendrick’s scholarship is marked by both creativity and care, and it has received wide recognition for its nuanced assessments. She is particularly adept at choosing topics ripe for consideration within First Amendment law. Indeed, most of her scholarly work examines the freedom of speech, revealing the oddities of First Amendment doctrine and the problem of singling out free speech from the backdrop of all other activities. Her articles often reconsider the justifications for widely accepted rules in a way that provides insight for specific questions while also opening new avenues for the consideration of even broader questions of free speech law. The work consistently displays a powerful, penetrating intelligence and makes important and original contributions to the fast-developing and often murky topic of free speech.

Kendrick’s path to this set of legal questions began long before she joined the faculty in 2008, even before she attended UVA as a law student.

Born in the mountains of Eastern Kentucky, Kendrick grew up around her father’s law practice. William Kendrick had attended law school on the GI Bill at the University of Louisville and returned to his hometown, where he developed a specialty in mineral and property law. Kendrick remembers tagging along to depositions from the age of 5 and later summarizing depositions and looking up cases along with her two younger sisters.

Kendrick’s mother, Leatha Kendrick, was a poet and creative writing instructor. Leatha and Will met while studying English literature at the University of Kentucky, and later Leatha received an MFA in poetry from Vermont College. Through her mother, Kendrick was exposed to writers and to writing as a craft and occupation.

Kendrick says that being the daughter “of a poet and a property lawyer” primed her interest in both speech rights and property rights.
More broadly, she wants to explore how rights like these are defined and how we distinguish them from each other.

Kendrick’s educational path followed that of both her parents. She studied classics and English as a Morehead Scholar at the University of North Carolina at Chapel Hill. She then completed a master’s and Ph.D. in English literature at the University of Oxford on a Rhodes Scholarship. She applied to law school while completing her dissertation and, after visiting Charlottesville on a fine April weekend, chose to come to UVA on a Hardy Cross Dillard Scholarship.

Kendrick came to UVA for the well-balanced and rigorous legal education it offers. As it happened, she also found a bridge between her literary background and the law. Vincent Blasi, a First Amendment scholar and then a member of the UVA faculty, was researching John Milton’s Areopagitica, the first modern defense of freedom of speech. Kendrick had written her dissertation on Milton and had spent some time studying Areopagitica and its political and religious context. Kendrick signed up for Blasi’s class, “Ideas of the First Amendment.”

In class, Kendrick encountered a host of arguments about why speech was (or was not) important enough to be protected by its own special right. One set of arguments held that only speech directly related to the political process was protected, and that art and literature were not.

“I remember having a very strong reaction to that line of argument,” Kendrick recalls. “I had just spent all this time studying literature, and I thought, how could that not be protected? I also thought that the line between political and non-political speech was very hard to draw. Paradise Lost was literature and religion and politics all rolled up into one.”

At the same time, however, this coursework exposed Kendrick to the problems of defining rights and distinguishing activities that fall within a right from activities that do not. She received more exposure to these and similar questions in classes on rights with John Simmons, on tort theory with Blasi and Ken Abraham, and on property rights with Lillian BeVier and Julia Mahoney. Kendrick also benefited from the arrival of Fred Schauer at UVA in the same year she joined the faculty. One of the world’s preeminent scholars of freedom of speech and jurisprudence, Schauer has criticized as unreflective many typical paens to free speech and has expressed skepticism about whether speech is justifiably distinguishable from other activities.

Drawing on these influences, Kendrick questions the structure of free speech law at every level, from particular doctrines to underlying premises. In one set of papers, she considers a central doctrinal feature of free speech law: the distinction between content-based and content-neutral regulation. As a first approximation, content-based regulation regulates on the basis of what a speaker says; content-neutral regulation regulates without regard to what the speaker says. The Supreme Court subjects content-based regulations to strict scrutiny, while it gives content-neutral regulations only cursory review. Thus, much depends on whether a law is classified as content-based or content-neutral. Some scholars have criticized the Supreme Court for applying these labels inconsistently.

In “Content Discrimination Revisited,” 98 Va. L. Rev. 231 (2012), Kendrick counters this common conception of the Court’s First Amendment jurisprudence. Kendrick suggests that the real confusion stems from the fact that “content-based regulation” could mean many things—regulation based on viewpoint, subject matter, message, form of communication, and still other possibilities. The Supreme Court has never been very clear about what forms of “content-based” regulation are suspect, which has led to confusion. Nevertheless, Kendrick argues, an exhaustive analysis of the case law shows that the Court’s jurisprudence on content discrimination is actually quite orderly, though that order is latent rather than patent.

In “Nonsense on Sidewalks: Content Discrimination in McCullen v. Coakley,” 2014 Sup. Ct. Rev. 215, Kendrick examines the application of content discrimination rules in a case involving regulation of abortion clinic protests. She argues that the highly charged context of abortion was a stress test for the Supreme Court’s rules about content discrimination, one which they largely survived. But the case highlights that different judges will find different forms of regulation suspect. Doctrinal rules are an imperfect, though possibly necessary, proxy for those gut intuitions about discrimination.

Kendrick has also written repeatedly on the role of intent in free speech cases. When examining whether speech can constitutionally be penalized, it is common for courts to inquire into the state of mind, or intent, of the speaker being punished. For instance, a speaker can only be held liable for defamation of a so-called “public figure” if the speaker had “actual malice”: The speaker either knew, or recklessly disregarded the possibility, that the statement made was false. First Amend-
ment law is rife with such intent rules, but what purpose do these rules serve?

The standard explanation is that the use of intent standards can mitigate chilling-effect problems that might arise when speakers refrain from protected speech out of concern that it will erroneously be punished as unprotected speech. In other words, intent rules serve to avoid chill by factoring in the speaker’s state of mind. We may be more willing to speak our minds if we know that the intent in doing so is taken into consideration.

In “Speech, Intent and the Chilling Effect,” 54 Wm. & Mary L. Rev. 1633 (2013), Kendrick questioned whether chilling effects could really serve as a sound justification for intent rules. She did this by examining the role that intent plays in constitutional law more generally—not just in defamation. By looking at how intent is used throughout the full range of First Amendment cases, the article found very little empirical support (in either the case law or the empirical literature) to justify reliance on the chilling effect. Indeed, Kendrick showed that a chilling effect is both under- and over-inclusive as a justification for the treatment of intent in First Amendment law because intent is not treated identically in all First Amendment cases: Defamation standards are different from incitement standards. By looking carefully at the different ways that intent is used in this area, Kendrick demonstrated that justification of an intent standard was a much more complex endeavor.

She continued this work in “Free Speech and Guilty Minds,” 114 Colum. L. Rev. (2014), which offered a general theory about how intent rules in speech regulation could and should be justified. By breaking down the various harms that potentially flowed from speech—and describing how those harms connect to a speaker's intent in different contexts—Kendrick argued that an autonomy-based theory of speech (referring to the basic sense of individuals’ capacities, rational and otherwise, to form thoughts and beliefs for themselves) served as a better justification for how and why intent should be used in the law. For example, First Amendment law forbids punishment of incendiary statements without considering the intent of the speaker. Kendrick argues that this is likely not because of a concern about chilling valuable discourse—after all, the speech at issue is objectively incendiary. If the speaker’s state of mind deserves attention, it is likely because it seems unjust to punish someone who does not mean to stir up illegality or violence but instead is pursuing a legitimate communicative endeavor.

More recently, Kendrick has examined the increasingly disparate array of legal claims that are often brought under the mantle of free speech. Today’s courts encounter free speech claims from a motley array of litigants, including meat producers, tobacco companies, mining companies, Internet service providers, tattoo parlors, search engines, and pornographic actors. In an information economy, more and more activities can be described as speech, and the line becomes even harder to demarcate.

“A big tension that used to exist and has flared up again is the tension between speech rights, which get a lot of protection, and economic rights, which today do not,” said Kendrick. In the Lochner era of the early twentieth century, the same tension existed in the opposite direction. “There is Justice Brandeis in the 1920s saying to his colleagues, ‘This speech claim that you’re rejecting from a newspaper publisher could be reframed as an economic rights claim and you’d be all for it.’ Speech rights and economic rights, speech and property—these concepts overlap, but our constitutional system treats them differently.”

This set of problems has led Kendrick to think about how rights are defined and what structure they have. One solution to the tension between speech and other activities is to conclude that speech is no different from other activities and therefore deserves no higher protection. Taking any other route—trying to distinguish speech from economic activity, or activity generally—involves defining the criteria for just how distinct speech must be and then considering whether it meets those criteria.

Ultimately, Kendrick argues, our practice of singling out speech is defensible. But it requires much more reflection and precision than it often receives. Concepts such as speech rights and property rights are complex and may inevitably overlap to some degree. But careful thinking about these rights is necessary for their appropriate recognition.
When it comes to the scope of the First Amendment, there are only two clear rules: either no speech is covered, or all speech is covered. Every other position is somewhere in the mushy middle. The first clear rule—no speech is covered—suggests that speech is not distinguishable from other activities, or that “the freedom of speech” is not distinguishable from some other freedom that covers a broader range of activities. This position, while it garners some support in the theoretical literature, seems unlikely to be adopted as a tenet of constitutional law.

The second clear rule is that all speech is covered, sometimes called the “all-inclusive approach.” This may seem equally unpalatable. After all, everyone has intuitive examples of speech that simply cannot receive First Amendment protection. Any rule that all speech is covered is going to have to involve a heavy amount of defining out, presumably by employing some sort of test to conclude that, while all speech is nominally within the scope of the First Amendment, some of it ultimately receives little to no protection.

But this option must be compared with the alternatives. Any theory of free speech between “no coverage” and “all coverage” will be nuanced and complex. This is certainly true of any pluralistic theory, which identifies multiple purposes which freedom of speech serves. It is also true of any unified theory, which assigns importance only to one value, such as the search for truth or democratic participation. Even if only one value is involved, a theory must take account of all of the different activities in the world that serve that value and how they relate to “the freedom of speech.” Such a theory should probably also explain how various activities that involve “speech” in the everyday sense either do or do not further the chosen value and thus how they do—or do not—relate to “the freedom of speech.” Certainly courts are going to want to know the answer to this question when faced with applying “the freedom of speech” to particular activities.

Even at their best, such theories will involve complexity, they will involve nuance, and they will go on for pages. At their worst, given all the innumerable things that speech does, and all the ways that particular values either are or are not furthered by speech activities, listening to somebody else’s First Amendment theory is like listening to somebody else’s dream—an obscure, convoluted trek that is at its most satisfying when it is avoided. As Henry James said, “Tell a dream, lose a reader.”

Any actual First Amendment theory, then, will function as more of a standard than a rule. Even the hardest and clearest of theories will require much explication in order to bring it down to the level of particular activities in particular disputes. Rather than deal with these complexities, some courts and some scholars opt for the “all-inclusive approach.” They prefer defining out to defining in. The all-inclusive approach cannot avoid the difficult questions: some activities will have to be defined out, and some set of values will have to govern that process. But it feels clearer and easier to start with the presumption that everything is in and work from there. And along the way one may conclude that the easiest course of all is just to leave the NLRB Notice, the tattoos, and the food labels in after all.

Of course, it need not be thus. European courts, for example, seem quite happy with standards, as do some American judges. But for many American courts, rules seem to exert a magnetic pull. Theorists who are working to develop a comprehensive First Amendment theory not only have their work cut out for them generally, but they are fighting against this magnetic pull. Even the world’s best First Amendment theory would still have to contend with judges’ desire for what Learned Hand described, in the context of subversive speech, as “a qualitative formula, hard, conventional, difficult to evade.” And if this pull exerts itself in the First Amendment context, it is likely, at least at this point, to pull toward “all coverage” rather than “no coverage.”

First Amendment expansionism is likely a product of many factors. It does, however, highlight challenges intrinsic in formulating and propagating a workable understanding of “the freedom of speech.” The pull of both everyday language and clear rules undercuts the best efforts to bring a full conception of the First Amendment to legal decisionmaking. Such a conception—one which can comprehensively explain the relationship between “speech” and “the freedom of speech”—is precisely what courts need to address.
the diverse and often novel claims that First Amendment opportunism brings their way. It is a paradox that a complex understanding of the First Amendment is exactly what legal decisionmaking requires and exactly what it shuns.

NONSENSE ON SIDEWALKS: CONTENT DISCRIMINATION IN McCULLEN v. COAKLEY
2014 Sup. Ct. Rev. 215

What does it mean to say that the government may not “restrict expression because of its message, its ideas, its subject matter, or its content?” Whatever it means, how would one determine when it has occurred? First Amendment law has wrestled with these questions for more than forty years, and if McCullen v. Coakley is a reliable indicator, the debates have only become more fractious.

The Massachusetts Reproductive Health Care Facilities Act prohibited knowingly standing on a “public way or sidewalk” within 35 feet of the entrances or driveways of facilities, other than hospitals, where abortions were performed. The law exempted people entering or leaving a facility; facility employees “acting within the scope of their employment;” municipal agents, such as police officers, firefighters, and so forth, in the scope of their duties; and people crossing the sidewalk solely to reach a destination.

The question for the Supreme Court was whether this law impermissibly discriminated against anti-abortion speakers or merely maintained public safety and preserved access to health care facilities. In this regard, the Court inquired into the purpose behind the law. A subsidiary question was, if the law served the latter goals, did it do so without treading too heavily on the expressive opportunities of anti-abortion speakers. In this regard, the Court inquired into the effects of the law. These inquiries, into purpose and effects, are aspects of the standard First Amendment jurisprudence of “content discrimination,” a term that describes both the principle that targeting speech for its content is highly suspicious and the various doctrinal tools used to determine when that is happening. Ultimately, the Court, with the Chief Justice writing for a five-person majority, determined that the law had no discriminatory purpose but its burdensome effects on speakers were not justified. In two concurrences in the judgment, Justice Scalia and Justice Alito also concluded that the law was unconstitutional but did so on the ground that it discriminated against anti-abortion speech.

In their several approaches to content discrimination, the Justices’ opinions demonstrated that the question of how to approach the issue is somewhat of a chameleon: it is likely to match the contentiousness of the factual context that surrounds it. Given that the context in McCullen was abortion, matters became controversial indeed. At several points, both jurists and advocates viewed a single phenomenon in strikingly different terms, beginning with the facts, continuing through both the mechanics and the results of the purpose inquiry, and ending with the assessment of the law’s effects. These conflicts demonstrate both the potential benefits of clear rules in the content discrimination context and their lurking futility.

... Although the majority managed to hold, consistently with precedent, that the 2007 Act was content-neutral, it then made a departure of its own, one whose ramifications have yet to be determined. After having concluded that the 2007 Act was content-neutral, it went on to invalidate it under the standard for content-neutral laws, which the Court has sometimes called “intermediate” scrutiny. This standard has historically required that the law be “narrowly tailored to serve a significant governmental interest” and that it leave open “ample alternative channels of communication.” The Court has never rejected a proffered government interest as not “significant,” and it has specified that “narrowly tailored” in this context need not be a least restrictive means and may be underinclusive, though not substantially overinclusive. The vast majority of laws subjected to this standard by the Supreme Court have passed, to the point that it has been likened to rational basis review.

The majority in McCullen departed from this past practice and applied the tailoring requirement with a newfound stringency. The Court took quite seriously the challengers’ assertions that the 2007 Act reduced their ability to reach patients for quiet conversations and to hand them literature. The majority quoted extensively from the challengers’ testimony on these matters and admonished that “[t]he Court of Appeals and respondents are wrong to downplay these bur-
dens on petitioners’ speech.” At the same time, the majority was skeptical of the Commonwealth’s arguments that the law was important for advancing its interests. The Court listed a number of alternative approaches that other jurisdictions had taken and was unimpressed with the Commonwealth’s imagined reply of, “We have tried other approaches, but they do not work.”

Although no members of the Court dissented from this tailoring analysis, one could imagine a dissent that accused the majority’s tailoring analysis of inconsistency with the same vitriol that the concurring opinions reserved for its content-neutral analysis. Content-neutral scrutiny has historically been enormously deferential. This is why so few laws have failed it. Any hard look would have turned up questions about whether Congress really needed to ban draft card burning for administrative reasons; whether the Postal Service had to ban solicitation of alms and contributions on postal premises to preserve its patrons from “the potentially unpleasant situation created by solicitation”; or whether the city of Los Angeles had to ban all written communication on all sidewalks, light posts, and myriad other public properties in order to advance its “substantial” government interest in “esthetic values.” In past cases, the Court has shown great deference to the government’s understanding of its own agenda; suddenly, it is anything but deferential.

While the government received less credit than usual, the speakers received more. All content-neutral laws affect speech opportunities. All the content-neutral laws previously upheld by the Supreme Court were challenged precisely because they interfered with a particular speaker or speakers’ ability to communicate in their desired way. For O’Brien and many others, burning a draft card expressed their message in a way that nothing else could. For advocates for the homeless, being unable to stage a sleep-in demonstration in Lafayette Park, across the street from the White House, removed an irreplaceable method of expressing their message. For Hare Krishnas, being unable to solicit passersby at the airport or a state fair was a frustration to their expressive, indeed their religious, mission. For countless speakers, being denied the ability to express themselves at a particular place or in a particular method fundamentally alters the power of what they are saying, the substance of what they are saying, or both. If it is wrong to downplay these effects in one case, it is wrong to downplay them in others.

It remains to be seen whether McCullen’s new approach will take hold for all content-neutral laws or whether instead it will become an abortion-specific standard. ... If the decision signals a new interest in the effects of content-neutral laws generally, this development would be, in some respects, praiseworthy. These effects on speaking opportunities are real enough, and past jurisprudence has undoubtedly given them short shrift. But this is just to say that these effects have been a casualty of the Court’s past preference for a rule—one in which the government’s interests and choice of remedy are given heavy presumptive weight. Once again, there are costs to revoking this rule. One is the fact, noted above, that all content-neutral laws have effects on speech opportunities; indeed, all laws affect speech opportunities. And such effects are difficult, if not impossible, to measure. If the Court intends to make it its business to police laws for their speech effects, it has its work cut out for it.

A related drawback is the fact that, given their unquantifiability, any assessments of speech effects are bound to be approximate, intuitive, and ultimately subjective. They are likely to be fraught in the same way as the parties’ debates about the facts, or the Justices’ debates about content neutrality. It will be extremely difficult to cabin these inquiries with rules, and in their rulelessness they will appear wholly subjective. In McCullen, five Justices thought the toll of the 2007 Act was too great. What this means for the myriad buffer zones that governments use in other contexts, from political conventions, to funerals, to the regulation of panhandling—or for content-neutral laws generally—is anyone’s guess. One might worry that the Court would perceive the trade-offs differently when it comes to certain laws. The statute prohibiting demonstrations on the Supreme Court grounds essentially insulates the Court’s building and members in their own buffer zone. When eminent personages, such as Supreme Court Justices, make public appearances on campuses and elsewhere, demonstrators and gawkers are often kept far from their path, whether through permanent so-called “free speech zones” or through specialized security measures. It would be interesting to know how the Justices would balance access and safety in such contexts against speakers’ interests in their preferred methods of speech.
V. CONCLUSION

The notion of content discrimination is ultimately about identifying suspicious governmental action. This task is complicated by the facts that (1) the “real” objects behind governmental regulation are, on many levels, unknowable, and (2) everyone is suspicious of different things. To meet these problems, content discrimination doctrine has developed a series of rule-like proxies that attempt to triangulate legislative purpose in a somewhat predictable way. *McCullen*, like some cases before it, subjects this framework to the stress test of the abortion context, and unsurprisingly, it shows some strain. With regard to both content-discrimination analysis and content-neutral scrutiny, the opinions in *McCullen* show some Justices ready to jettison rule-like frameworks and rely upon their own sense of what the Massachusetts legislature did, or what effects it had. In this, the case demonstrates both the need for rules and their potential futility in highly polarized contexts. In the end, the Court seems no more able than the litigants to rise above the level of the sidewalks and their confusing, cacophonous din.

BIBLIOGRAPHY


HOW SHOULD WE UNDERSTAND, DEVELOP, AND ALLOCATE REGULATORY AUTHORITY?

WHAT DO WE MEAN when we say that law “regulates” an activity? Although this might at first appear to be an abstract question, it is an immensely practical one as well. Laws against burglary prevent theft, but so do locked doors. Speed limits encourage safe driving, but so does automobile design. International law limits the reach of state power, but so do policy interests. When a society chooses to control behavior through law rather than through some other means, it makes a series of choices, many of them implicit. Just how contingent those choices are—and the meaning those choices carry—becomes apparent only when one considers the alternatives to legal regulation of activity.

Tom Nachbar first confronted these questions years before he began law school, when he was a young systems analyst designing computer systems for manufacturing. This activity did not start with computer programming; it started, more fundamentally, with mapping the process a business used, analyzing whether that process was optimal, and only then codifying that business process into computer software. This type of holistic system design allowed the business to decide which process was the best and then enshrine that decision in computer code that would control the behavior of the business’s employees—to literally codify the preferred process. Just a few days into law school, in Contracts, Nachbar discovered the same was true for law: Parties could make their own law (a “private law”) to regulate their shared conduct. With that realization, Nachbar began a career studying how law is used (and by whom) to shape and control behavior.
When Nachbar was a recent law school graduate, the relationship between law and systems design was the subject of widespread debate. Computer system design could (and must) include not only purely technical considerations, but social, moral, and political ones as well. The Internet was designed for technical reasons (reflecting political ones: the threat of nuclear war) as a fault-tolerant network—one that required no centralized control structure. That technical design decision had profound political ramifications, as it became clear that no one (and especially no government) “controlled” the Internet. At the same time, anyone who could successfully propagate a piece of computer code could, through that code, achieve some degree of social or political control through the Internet. In the heady days of the first Internet boom, many recognized the way in which changing technologies had altered the balance between technologists and governments (that, as Lawrence Lessig put it, “code is law”), and some argued that governments would lose control over “cyberspace” and with it, a fair amount of “real” space as well.

As would be the case with most of his scholarship, Nachbar’s response was to push back against such sweeping claims and challenge dominant thinking. His initial interest in Internet regulation prompted his first major paper, “Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character,” 85 Minn. L. Rev. 215 (2000). Turning the then-conventional paradigm on its head, he suggested that, far from losing their power, governments could use the Internet to spread their regulatory influence beyond their borders. Nachbar’s interest in Internet regulation would eventually evolve into a broader interest beyond what marks effective regulation, and focus on the nature of regulatory power. He explored what it means to regulate, and how controlling behavior through state regulation is different than controlling behavior through other means. Soon after he joined the Law School faculty in 2001, these questions came to a head in the field of intellectual property, when several constitutional challenges were mounted against revisions to the Copyright Act. Nachbar devoted his first years as a scholar to the question of regulatory choice (constitutional or statutory; congressional or judicial) in copyright before expanding his research to the fields of communications law and antitrust, areas of law that reflect the same types of regulatory choice. In the process, he developed a deep scholarship in the intellectual and constitutional history of trade regulation. That work continues today with his paper “The Rationality of Rational Basis Review,” 102 Va. L. Rev. (forthcoming 2016), which deals with the same constitutional questions of regulatory choice on a general scale.

Although happily ensconced in academia, Nachbar also felt a strong pull toward public service. Moved in part by the nation’s response to the September 11 attacks (and with the U.S. Army Judge Advocate General’s Legal Center and School next door to the Law School serving as a reminder of the legal-military connection), Nachbar joined the U.S. Army Reserve in the fall of 2005 as a judge advocate. He did not envision finding a strong connection to his teaching and scholarship, but it turned out that the Army had a regulatory problem of its own: helping to establish the “rule of law” in Iraq and Afghanistan in the days following coalition invasions of both countries. Nachbar’s work in that area would require a much more practical approach (the primary guidance he received regarding his first Army publication was that it must fit into the cargo pocket of the Army combat uniform), but one that touched upon the same fundamental issues of the role of law and regulation in society.

THE CONSTITUTION AND REGULATION

In January of 1999, Eric Eldred and a number of publishers filed a constitutional challenge to the Sonny Bono Copyright Term Extension Act of 1998, which had (as the name suggests) extended copyright terms. The statute did not just extend terms generally, but it did so in previously existing works. Eldred complained that term extension in existing works violated a limitation in the Patent and Copyright Clause of the Constitution, which gave the power to Congress to grant copyrights for “limited Times.” This was hardly the first time Congress had done so; Congress had extended copyright terms several times since the founding, and each time it had applied the extension to existing works. But this was the first time there was a serious constitutional challenge to such an extension, and agreement was widespread among most intellectual property scholars that such an extension was both bad policy (for giving authors a longer copyright term without getting anything in return) and unconstitutional. The former argument was advanced based on the economics of copyright; the latter on the history of intellectual property regulation, a history pre-dating the Constitution itself.

Recognizing that the dominant thinking was based on a story about copyright, Nachbar wanted to know if that story was true. He set out to
write one paper on the topic and wrote five. Many historical legal giants (from Coke to Mansfield) had suggested that copyright (and patents) were different than most regulation because of the ability to use them to grant “monopolies,” which were generally abhorrent to the common law and to all right-thinking people as demonstrated by two seventeenth-century precedents: *Darcy v. Allen*, a common-law case outlawing a royal playing card monopoly, and the Statute of Monopolies, which had reputedly outlawed monopolies in England. Claims about the significance of those precedents depended on context, though, and Nachbar provided that context in a series of papers starting with “Constructing Copyright’s Mythology,” 6 *Green Bag 2d* 37 (2002), which used the example of Noah Webster’s campaign to have copyright laws promulgated in a series of states prior to the adoption of the Federal Constitution to demonstrate that the current conceptions of copyright were just that: current. The sequential adoption of copyright laws (and their application to Webster’s previously published dictionary) demonstrated just how contingent modern claims about copyright actually are. In “Judicial Review and the Quest to Keep Copyright Pure,” 2 *J. Telecom. High Tech. L.* 33 (2003), Nachbar showed that attempts to judicially protect a “pure” form of copyright—essentially what the *Eldred* litigants were seeking—were less an attempt to protect any fundamental understanding of copyright than an attempt to shift the venue for making copyright policy from the legislature to the judiciary. In essence, the *Eldred* plaintiffs were making an institutional argument about the proper locus of copyright policy, and Nachbar sought to refute that institutional claim on institutional grounds based in constitutional law while demonstrating that arguments for giving judges more of a role in making copyright policy were historically contingent ones. To do so, Nachbar pointed out how one of the most fundamental, judicially created tenets of U.S. copyright law—the prohibition against copyright in facts—was itself largely a modern invention rather than a historical part of copyright. The Court, as it turned out, was a poor guardian of “pure” copyright. What Nachbar’s research revealed was that most of the historical and constitutional claims being made about copyright and copyright policymaking were largely the product of modern thinking superimposed on history. The Court agreed, citing Nachbar in both its decision upholding copyright term extension in *Eldred* itself and again nine years later in *Golan v. Holder*, when deciding a similar constitutional challenge.

Having focused on the specific question of copyright, Nachbar expanded his work into a broader inquiry about the constitutional nature of trade regulation. In “Intellectual Property and Constitutional Norms,” 104 *Colum. L. Rev.* 272 (2004), he addressed a question suggested but not decided by the *Eldred* litigation: whether Congress could avoid the “limited Times” language of the Patent and Copyright Clause by relying on its commerce power as an alternative source of power. Nachbar determined the question was again one of institutional and constitutional choice rather than anything specific to intellectual property, and that question had been answered by a series of cases about the taxing power dating from the early twentieth century. In “Mercantilism, Monopoly, and the Politics of Regulation,” 131 *Va. L. Rev.* 1313 (2005), Nachbar deconstructed historical claims about *Darcy v. Allen* and the Statute of Monopolies by closely examining the history of both events and revealing that neither reflected a broad rejection of monopolies but rather were part of a broader political struggle between Parliament and Crown over revenue and regulatory design, not trade policy. A “monopoly” (or in the parlance of modern intellectual property, an “exclusive right”) provides the same type of exclusive regulatory authority enjoyed by government, and the history shows that monopolies were frequently granted (and opposed) as delegations of royal authority rather than merely as the product of rent-seeking, as many have claimed. In both papers, Nachbar combined rigorous historical research with modern public choice theory to provide a deeper understanding about the role of legislatures in regulating trade. Although legislatures are (and have always been) subject to the influences of public choice, judicially imposed constitutional limits on legislatures’ ability to regulate trade are (and were) a cure worse than the disease. It is a role that courts have avoided, the high-sounding claims of judicial proponents such as Coke notwithstanding.

Intellectual property has a common historical origin with both antitrust and communications law—all three systems have historically been used to allocate regulatory authority. Just as the “exclusive rights” of intellectual property can effectuate a regulatory delegation, antitrust and the law of common carriage similarly address the relationship between private firms and state regulation of the economy. Like recipients of exclusive rights under the old English system, common carriers, including operators of communications infrastructure, have been charged with a “public” function. In “The Public Network,” 17 *CommLaw Conspecs* 67 (2008), Nachbar explored the nature and justifications for imposing additional obligations on businesses “affected with a public
interest,” like railroads, grain elevators, and communications providers. The dominant narrative is that public interest obligations are imposed by virtue of the market power that many “natural monopolies” (such as railroads) enjoy. Relying again on historical perspectives, Nachbar’s research revealed that monopoly was neither a necessary nor a sufficient condition for imposing such obligations, undermining many arguments for and against imposing common carriage obligations on many service providers, with particular salience for the Internet service providers potentially subject to “network neutrality” regulation by the FCC. During this period he co-authored (with colleague Glen Robinson) the casebook *Communications Regulation* (West, 2008).

“The Antitrust Constitution,” 99 *Iowa L. Rev.* 57 (2013), explored further the allocation of regulatory power between public and private entities, situating the antitrust laws as a statutory converse to the constitutional state action doctrine: a statutory prohibition on private regulation of markets that works hand-in-hand with constitutional limitations on public regulation of markets. Modern thinking on antitrust is focused entirely on the economic effects of competitor conduct, but the antitrust laws have historically reflected a much broader purpose. Although such a “political” purpose for the antitrust laws has been lost in the post-Chicago School era of antitrust, it was front-and-center in early Supreme Court antitrust cases such as *United States v. Socony-Vacuum Oil Co.* and *Fashion Originators Guild of America v. FTC*. The public/private distinction underlying those antitrust cases was also the motivating force behind constitutional cases like *Schechter Poultry* and *Carter v. Carter Coal*, a connection between constitutional law (which is understood to regulate the state) and antitrust (which is understood to regulate private conduct) that has been forgotten by many.

Nachbar’s work on the nature and meaning of regulation continues with his latest work, “The Rationality of Rational Basis Review,” which is excerpted here. In that paper, he considers the Supreme Court’s “rational basis test,” which requires that all legislation have a rational relationship to a legitimate governmental interest. The test is well-known to, if not necessarily beloved of, constitutional law students since the 1960s. Many have suggested the test is not really a test at all, but the Court’s invocation of “rationality” as the standard it applies carries with it particular weight as appealing not to the Justices’ political preferences but rather to some objective understanding of rationality. Closer examination, though, reveals that the Court only applies a very limited understanding of rationality—a utilitarian, instrumental one. Doing so ignores other forms of rationality, including “value-rational” acts that carry significant political meaning, with far-reaching consequences for both the Court and litigants.

**REGULATION AS COUNTERINSURGENCY**

If law is the exclusive province of the state, what does that mean for a state that is unable to maintain the rule of law?

That question has been presented many times in the wake of armed conflict. Recently, coalition forces found themselves confronting this concern when they faced an insurgency following the invasions of Iraq and Afghanistan. The question was doubly important because law was necessary not only for the normal operation of the state but also for responding to the insurgency itself. The legitimacy of both countries was being challenged from within, and the very legitimacy being challenged was one of the tools necessary to deal with that challenge. Coalition military commanders, lacking the resources or knowledge to help establish a criminal justice system to try and punish insurgents, turned to the closest lawyers they had: their military judge advocates.

Although he entered the military expecting to practice law rather than publish, in the spring of 2007, Nachbar (then a recently minted first lieutenant in the U.S. Army) was asked to help draft a handbook for those judge advocates, who had not received training in establishing domestic, civilian criminal justice systems. The effort drew upon expertise from a variety of agencies and non-governmental organizations and resulted in the first *Rule of Law Handbook: A Practitioners’ Guide for Judge Advocates*. The handbook, as its title suggests, was designed for practitioners, but it addressed one of the most abstract concepts in law: What is the “rule of law”? The chapter Nachbar drafted eventually became his first paper on the topic: “Defining the Rule of Law Problem” (2009); it attempted to boil down centuries of highly contested legal thinking into a bullet list defining “the rule of law” for judge advocates in the field.¹ The *Handbook* has continued in multiple editions, the latest in 2015.

¹ The seven-point list: 1) The state monopolizes the use of force in the resolution of disputes. 2) Individuals are secure in their persons and property. 3) The state is itself bound by law and does not act arbitrarily. 4) The law can be readily determined and is stable enough to allow individuals to plan their affairs. 5) Individuals have meaningful access to an effective and impartial legal system. 6) The state protects basic human rights and fundamental freedoms. 7) Individuals rely on the existence of legal institutions and the content of law in the conduct of their daily lives.
The counterinsurgency operations in both Iraq and Afghanistan raise a host of both practical and theoretical questions. What role does law have in counterinsurgency? How does a state build its legitimacy when its power to regulate is challenged? Is it appropriate to use law as a means (as opposed to a regulator) of armed conflict like counterinsurgency?

Nachbar tackled these and other questions in a series of papers in 2012 and 2013: “Counterinsurgency, Legitimacy, and the Rule of Law,” Parameters, Spring 2012, 27-38; “The Use of Law in Counterinsurgency,” 213 Mil. L. Rev. 140 (2012); and “The U.S. Military’s Role in Rule of Law Development,” a book chapter in Promoting the Rule of Law: A Practitioner’s Guide to Key Issues and Developments 143 (ABA Section of International Law, 2013). The questions appealed to the same sensibilities that drew Nachbar to his work on regulation generally: What does it mean, both for the state and for the people, to say that a state regulates through law? Analysis of successful (and unsuccessful) practices reveals some consistency. Those seeking to build the legitimacy of a state under pressure are most successful when they focus on the process of legal adjudication, not its substance. Conceptions of fair process are far more widely held, and are less likely to stoke partisan divides already present in a country subject to insurgency, than major substantive reforms. Applying that approach to the specific problem of counterinsurgency, Nachbar described four ways in which law can be used in counterinsurgency to simultaneously defeat insurgents and build legitimacy for a state subject to insurgency. A marriage of high theory to practice, this branch of Nachbar’s work provides concrete, substantive guidance for practitioners and policymakers seeking not only to carry out counterinsurgency operations, but also to train for them.

In the fall of 2012, Nachbar (then a captain) was asked to put some of his research into practice, deploying to Jerusalem and the West Bank as legal advisor and security justice program manager to the Office of the U.S. Security Coordinator for Israel and the Palestinian Authority, a U.S. three-star military officer who reports directly to the secretary of state. During his deployment, Nachbar worked with uniformed Palestinian lawyers to help them build the capacity of the Palestinian security justice apparatus, which handles cases originating in the Palestinian Security Forces. Although outside the context of counterinsurgency, the experience drew heavily on the research he conducted on Iraq and Afghanistan, where the same kind of institutional questions (how to train and organize new justice institutions during a period of turmoil) animated coalition programs. Again, Nachbar saw how decisions (both explicit and latent) about the development and allocation of regulatory authority, within and outside of the law, were often as important as the substantive development of legal rules.

CONCLUSION

Whether in the halls of the Law School in Charlottesville or the streets of Ramallah, Nachbar has remained inspired by a fundamental set of questions: What does it mean to say that a society is governed by law? What is it that sets law apart and how does regulating through law change a society? What kinds of institutions and social understandings are necessary for a society governed by law? The answers to these questions take many forms and are found in a variety of places, from the detailed provisions of the Copyright Act to the legislative history of the English Parliament to the rules of engagement for armed forces battling insurgents. There may be no single answer to many of these questions, but the questions are still worth asking.
From 1782 through 1786, a small group of authors successfully lobbied twelve of the thirteen States to adopt America's first general copyright laws. An important member of that group was Noah Webster.

While Webster was active in matters of policy and government, his efforts on behalf of copyright were not those of a disinterested citizen. Webster was motivated by his desire to secure copyright protection for his three-volume text, the Grammatical Institute. In 1782, while working on revisions to the first volume, Webster visited Philadelphia and on the way planned to petition the legislatures of Pennsylvania and New Jersey to adopt general copyright laws. He followed up his trip by drafting a memorial to the General Assembly of Connecticut with a proposal for a private bill granting him the copyright in his recently completed The American Instructor, the book that eventually became the first two volumes of the Grammatical Institute. The request was presented too late in the session to be acted upon, and before he could submit a new petition, Webster's need for a private bill was superseded in 1783 by Connecticut's adoption, at the behest of others, of a general copyright statute. He made the same request of the New York Legislature in early 1783 (with the book now called the American Spelling Book and Grammar).

By the end of 1783, six States had adopted general copyright laws. At the same time, another politically active author, Joel Barlow, obtained from the Continental Congress a resolution calling for the adoption of copyright legislation by each of the States. By the end of 1784, the number was up to eight. Although Webster's accomplishments were profound, it's not at all clear that the adoption of general copyright laws in these early States is among his achievements. Others were working toward the same end, several States adopted copyright in direct response to the congressional resolution (with which Webster was not involved), and the most comprehensive account we have of Webster's influence is from Webster himself, who was hardly bashful in his self-promotion.

Of the five copyright laggards—Delaware, Georgia, New York, North Carolina, and Virginia—four were in the southern half of the country. The Grammatical Institute was a success in the north, leading Webster to consider publishing it in the south. In 1785 and 1786, Webster toured the southern States, visiting state legislatures to make the argument for copyright in person. The trip was a success; by the end of 1786 twelve of the thirteen States had adopted general copyright laws, with Delaware the lone holdout. There is little doubt that, in these States, Webster's lobbying was critical.

Webster’s approach was methodical; he went from State to State, gradually expanding the geographic reach of American copyright law and with it the geographic reach of the Grammatical Institute’s publication. It was in this way that statutory copyright protection became part of the American legal landscape, so much so that a specific provision authorizing Congress to grant exclusive rights in writings was included in the Constitution, and, early in its tenure, Congress passed the first national copyright statute.

The 1790 copyright act granted a fourteen-year initial copyright term with an additional fourteen-year renewal option. Thirty-six years later, Webster sought the assistance of his cousin, Daniel Webster, in having the term of federal copyright extended to perpetuity. Congressman Webster declined, perhaps recognizing the constitutional barrier to a perpetual grant. But five years after that, William Ellsworth, representative from Connecticut and Noah's son-in-law, reported an overhaul of the 1790 copyright act that included an extension of the initial term of copyright from fourteen to twenty-eight years. When the bill stalled in the House, Noah returned to his tried-and-true approach: He traveled to Washington and lobbied Congress himself.

And so began a long tradition of authors asking Congress for extensions of the copyright term for their previously published works. In 1906, Mark Twain, among others, appeared before Congress to testify in favor of extending the then-forty-two-year copyright term to a term of life-plus-fifty years. Twain got an extension, but not the one he wanted. Congress extended—to both new and
existing works—the duration of the renewal term by an additional fourteen years, bringing the total term up to fifty-six years. There it stood until 1962, when Congress started periodically granting short extensions in anticipation of copyright’s overhaul in the 1976 Copyright Act. And it was in 1976 that, after receiving testimony from a number of authors and composers, Congress finally granted Twain’s request of a life-plus-fifty-year term, a term that was applied to both new and existing works.

Thus, Congress’s hearings in 1995 on the twenty-year extension for both new and existing works that eventually became the Sonny Bono Copyright Term Extension Act of 1998 (CTEA) were nothing new. They were the continuation of a tradition—started by the father of American copyright himself—of copyright holders seeking from Congress an increase to the duration of their existing copyrights. When one considers Congress’s long tradition of granting such extensions, some of the scholarly criticisms of the CTEA—for example that the CTEA is “a recent response to intense interest group pressure, which might have suppressed [Congress’s] historic constitutional good sense in the intellectual property context”—are likely as mistaken in their condemnation of modern Congresses as they are in their romanticization of past ones.

But the 1831, 1909, and 1976 extensions of the copyright term in existing works were never the subject of a Supreme Court case challenging their constitutionality. On October 9, 2002, after this issue went to press but before its publication, the Supreme Court heard oral argument in *Eldred v. Ashcroft*, a case raising just such a challenge. In support of their various arguments, the petitioners in *Eldred* claim that an extension of the copyright term for an existing work cannot “promote the Progress of Science and useful Arts,” as is required by the language of the Copyright Clause. That contention reflects a theory that has become dominant over the last half of the 20th century: that the primary purpose of copyright is not to enrich authors but rather to give them an incentive to create works of authorship, which in turn increases society’s well-being. The ultimate goal of copyright under this theory is not to vindicate any natural right the author may have to compensation for the product of his labor but rather to further society’s interest in the creation of new works. Thus construed, copyright should be given only as a *quid pro quo*—an exchange for the author’s contribution to society. To grant exclusive rights without demanding something in return would further the author’s interests, but not society’s. Any exclusive rights granted by Congress, the *Eldred* petitioners argue, “must promote ‘creative activity’ to satisfy the limits of the constitution.”

I would like to focus on a problem that I think is evidenced by the form of the arguments advanced by the *Eldred* petitioners: It is the danger inherent in relying on broad assertions about the essential features of copyright and its central place in the Framers’ vision of government, a problem readily demonstrated by returning to the two great copyright-related accomplishments of Noah Webster.

Webster’s more famous lobbying effort, the pursuit of state copyright protection prior to the adoption of the Constitution, was motivated by the desire to obtain protection for a single work: his three-volume text, the *Grammatical Institute*. Volume I of the *Grammatical Institute*, a speller, was first offered for sale in Connecticut in October 1783; the second volume, a grammar, appeared in March 1784; and the third volume, a reader, was published in February 1785. But Webster’s quest for state copyright protection spanned a period of approximately four years, from the Fall of 1782 to the Spring of 1786. By October 1783, when the first volume of the *Institute* was published, only four States, Connecticut, Massachusetts, Maryland, and New Jersey, had copyright laws. The rest of the twelve States to enact copyright laws did so gradually until New York, the last State to adopt a general copyright law, did so on April 29, 1786. If copyright may only be given as an incentive to create, how could Webster have received copyright protection for the first volume of the *Grammatical Institute* in the States that adopted copyright laws after October of 1783?

The answer is a simple one that any copyright lawyer who has been in practice for more than 26 years would immediately know: American copyright statutes, both state and federal, have traditionally based copyright not on a work’s creation but rather on its publication. The place that publication has held in statutory copyright—beginning with the English precursor to American copyright, the Statute of Anne—is so strong that one commentator has even argued that the 1976 Act may be unconstitutional because it protects works upon their creation.

Thus Webster’s post-creation odyssey to obtain copyright protection. The date of the creation of Webster’s works was irrelevant to
In capital-strapped early America, it was publication, not creation, that drove both the economic and regulatory realities of copyright. The modern tendency to focus on creation as the object of copyright also ignores the high value the framing generation placed on books as focal points for an independent American culture; that value was served not so much by the creative content of any particular book as by the wide dissemination of American books of any kind.

Indeed, the state copyright laws being enacted at roughly the same time as the framing of Constitution call the ubiquity of the quid pro quo theory of copyright—as an exchange for either creation or publication—into doubt. In the state acts, authors’ natural rights are mentioned as frequently as society’s benefit as the justification for protection. We’ll likely never know what model the Framers had in mind for copyright because neither view of copyright was exclusively or even dominantly held at the time of the framing.

But one thing is for certain: The scope of copyright protection existing at the time of the framing is inconsistent with claims that copyright “must promote ‘creative activity’” in order to be valid. The requirement that a work even be creative was not settled until the 1990s. Any attempt to locate with the Framers the proposition that copyright may be given only as a reward to creativity is an exercise in revisionist history; the central place that creativity occupies in copyright is a feature of modern copyright law.

**COUNTERINSURGENCY, LEGITIMACY, AND THE RULE OF LAW**

*Parameters: The U.S. Army War College Quarterly, Spring 2012*

Law features more prominently in warfare today than in any time in memory. Stories about the legality of detaining “unlawful combatants” or “unprivileged belligerents” in Guantanamo Bay are in the headlines weekly. Questions of venue, a question usually considered to one of the most technical questions in legal procedure, have reached the American popular consciousness in the form of debates over whether to try suspected terrorists in civilian courts or military commissions. The current set of conflicts may prove to be the most heavily litigated in human history.

The current conflicts have seen an even greater expansion of law’s role in war, though: law as means of warfare. Law’s ascendance as a means of warfare is tied to the ascendance of counterinsurgency as a form of warfare.

**A MODEL OF LEGITIMACY FOR COUNTERINSURGENCY**

Like the problems faced by those attempting to define the “rule of law,” the “legitimacy” question is essentially a problem of applied jurisprudence. As with any abstract concept, there are a number of possible definitions of legitimacy; the problem for counterinsurgents is to pick a model of legitimacy that informs thinking about counterinsurgency in a helpful way.

As a competition between competing claims to govern, insurgency necessarily has a strong ideological component. Any workable definition of legitimacy should therefore include the ideological basis underlying a particular government. As Herbert Kelman put it succinctly:

> [I]t is essential to the effective functioning of the nation-state that the basic tenets of its ideology be widely accepted within the population. This does not necessarily mean a well-articulated, highly structured acceptance of the ideology at a cognitive level. It does mean, however, that the average citizen is prepared to meet the expectations of the citizen role and to comply with the demands that the state makes upon him, even when this requires considerable personal sacrifice.

Of course, the nature of that ideological component is itself somewhat contingent. It may be an ideal (as were many of the claims of our own insurgency against the British) or it may represent a normative commitment to some other concept, such as religious, ethnic, or clan identity, all of which have been important in the current conflict in Afghanistan and Iraq. The point is not to identify any specific ideology that legitimacy must be tied to but rather to recognize the necessity of ideological narrative as a component of legitimacy. That may seem like an uncontroversial point, but it is not. Arguments to allow
government to devolve to warlordism, for instance, are arguments premised in a view of legitimacy limited to efficacy (or even consent) but devoid of concern over the ideological basis for rule. At some level, debates over whether to follow counterinsurgency or counterterrorism strategies in Afghanistan are about whether to include ideology as a component in our war effort.

Legitimacy is also important to counterinsurgents for its ability to generate compliance. A regime subject to an insurgency that is unable to secure compliance with its laws loses credibility, which further reduces compliance, devolving into a descending cycle. Consequently, a model of legitimacy for counterinsurgency must include compliance as both an objective and a component of that legitimacy.

But the problems faced by counterinsurgents—and the opportunity presented by the concept of legitimacy—go beyond mere compliance. A government facing an armed insurgency is asking its citizens to choose it as the governing authority; those choices have important, practical consequences for citizens, including consequences for social connections and even the possibility that members of the population will be asked to take up arms against (or suffer attacks from) insurgents. What counterinsurgents require is something more akin to commitment in order to induce not only credibility-enhancing compliance but a willingness to make personal sacrifices in support of the government. “In times of national crisis the state demands sacrifices from individual citizens that they would not normally make if they were acting purely in terms of their personal interests—at least their short-run interests.”

Indeed, if given the choice, counterinsurgents would likely take commitment over compliance. Whether the legitimacy of the government is increased more by the credibility it gets through increased compliance or by a committed but disobedient populace is an empirical and culturally contingent matter. If the regime can claim what H.L.A. Hart called the “internal aspect”—a commitment to the government as the source of rules—the battle for legitimacy is largely won, even if most citizens frequently ignore the law. A regime is legitimate when it is viewed as such, not when people comply with its rules. Compliance is likely when the regime is viewed as legitimate, but it needn’t be. For instance, the cultural practice in a particular country could be that national law is only enforced intermittently.

LAW’S CENTRAL ROLE IN LEGITIMACY

Unlike many other objects of development in counterinsurgency, law is central to the act of governing. Regulation by law is not only a necessary role of the state, it is one the state must engage in exclusively in order to maintain its claim as the legitimate government. In many places, trash collection (for instance) is a purely private activity conducted by contractors rather than the government. More importantly for counterinsurgents focused on legitimacy, even where the government operates services like trash disposal, a competing trash hauling company does not threaten the legitimacy of the government. The same is not true of regulation by law. Arresting, trying, and punishing criminals, is a function that separates governments from other actors. The same would be true of a parallel civil dispute resolution system operating outside the auspices of the state, such as is the case with Taliban in Afghanistan. Indeed, a monopoly on the use of force in the resolution of disputes is the essence of a government—a government that does not wield that power exclusively is likely a government in name only. What separates governments from other providers of goods and services is the ability to promulgate and enforce law, and so “rule of law” programs rightly claim a preeminent role in the contest for legitimacy that defines counterinsurgency. The state as a source of legal rules must not only provide material benefit to the population, it must do so well enough to displace its competitors.

THE RATIONALITY OF RATIONAL BASIS REVIEW

102 Va. L. Rev. (forthcoming 2016)

INTRINSIC RATIONALITY AND VALUE-RATIONAL ACTS

As the structure of rationality review suggests, law is commonly understood to be instrumental to some other end—a “social purpose.” There is little argument for law for the sake of law—society adopts laws in order to serve some other end. But law doesn’t serve rationality writ large; it serves a somewhat more specific, political rationality that supplies the social purposes for law. And if the legal system exists to serve social, political ends, legal rationality must at some level be
subject to the social purposes it serves.

A legal system inconsistent with social purpose would be irrational given that social purpose, but so long as the legal system is ordered according to reasons made cognizable by social purpose, it is intrinsically, if not instrumentally, rational. Max Weber accepted instrumental rationality as a form of “social action,” but he also acknowledged another form of rationality, one unrelated to efficacy, in the form of “value-rational” acts:

value-rational (wertrational), that is, determined by a conscious belief in the value for its own sake of some ethical, aesthetic, religious, or other form of behavior, independently of its prospects for success

Entirely outside the means-ends structure of instrumental rationality, value-rational acts are intrinsically rational social acts. The rationality of a value-rational act is not in “the achievement of a result ulterior to it, but in carrying out the specific type of action for its own sake.” Weber posited that value-rational acts are rational by virtue of both their internal rationality (their systemization) and their reasoned connection to social purpose.

A POVERTY OF IDEAS AND A WEALTH OF REVIEW

The privileged place that instrumentalism has come to enjoy in the Supreme Court’s approach to rationality review has major consequences for the constitutional order and for rationality review itself. Most directly, the Court’s instrumentalist focus fails to adequately accommodate ends that are either difficult to state in instrumentalist terms, such as retributive justice or the regulation of morally charged institutions like marriage, or simply are not instrumentalist in the first place, such as value-rational acts. Instrumental rationality does not ignore value-rational reasoning, it affirmatively rejects it. From the perspective of instrumental rationality, “value-rationality is always irrational. Indeed, the more the value to which action is oriented is elevated to the status of an absolute value, the more ‘irrational’ in this sense the corresponding action is.” If we think there is a sphere of legitimate social action that fits Weber’s concept of value-rationality, then it will require a conscious commitment on the part of the Court to accommodate it within rationality review.

The Court’s focus on utilitarian justifications also forces parties (and the Court) to re-state normative ends as utilitarian ones, leading either to the sort of contorted reasoning exhibited by treatise writers attempting to explain morals legislation in terms of nuisance or to intellectual dishonesty, or both, what Hans Linde called “a labyrinth of fictions.” One can explain the prevention of animal cruelty in farming as encouraging the consumption of meat, but doing so deprives the law of both clarity and content. The tendency to shift away from normative justifications (and their problems) is likely to affect both legislators and the Court. Legislators, for their part, will be tempted to either misstate their normative ends as utilitarian ones or, more likely given the willingness of the Court to supply utilitarian ends in the absence of any stated legislative ends, simply provide no information at all about their ends. The Court, by focusing on the rational relationship of an act to a set of invented but uncontroversial utilitarian ends, can avoid difficult conversations about what are and are not legitimate governmental interests. That is problematic in its own right, since it obfuscates debate and makes it difficult to police the Court’s reliance on principles with controversial constitutional meaning. But the consequences for the rationality of rationality review are doubly troubling. An approach to crediting ends driven by the desire to reach a particular outcome rather than by ordered reasoning renders rationality review inherently irrational.

INTRINSIC RATIONALITY, CONSTITUTIVE RULES, AND SOCIAL MEANING

Intrinsic rationality has the capacity of accommodating non-instrumental ends while retaining a commitment to rationality. What rationality review requires, then, is a better conception of how intrinsic rationality can operate legitimately in a legal system.

Intrinsic rationality is a prominent feature of rules that define a practice—what John Searle called “constitutive rules.” A constitutive rule (as opposed to a “regulative” rule) defines and regulates new behaviors rather than regulating existing behaviors. The rules of chess, for instance, are constitutive rules, which both define the game of chess and regulate its play. Such rules may be instrumental to a principle outside the practice to which they apply, but they needn’t be in order to be rational—chess is internally rational as chess although, Weber would press the distinction somewhat in cases of social acts,
in which the intrinsic rationality of the act must maintain some connection with social purpose more generally. Chess in which the victor summarily decapitates the loser would be irrational in practically any modern society because, even if a game is internally reasoned and ordered, the social purpose of games does not generally extend to the violent death of one of the players.

Law both regulates and defines behavior, and regulatory rules themselves can redefine behavior by what they express through the way they regulate—that is why imprisonment, for instance, redefines behavior in a different way than fines might. But law does not only alter social meaning as a matter of what it expresses—law can alter the social meaning of a practice by virtue of the change in the practice it brings about.

For example, a ban on smoking in restaurants can alter the social meaning of smoking in several ways. The existence of the ban can express social condemnation of smoking. The existence of ban can also provide information about the wisdom of smoking—that smoking is dangerous to both the smoker and those around him (much as warning labels do). But the banning of smoking also alters the social meaning of smoking by altering the geography of smoking. Merely providing smoking and non-smoking sections allows both smokers and non-smokers to coordinate their behavior and reinforce their preferences by segregating themselves from each other. An absolute ban goes even further, reinforcing the preferences of non-smokers and making smoking less apparent. Those of us who have lived through an era of increasing regulation of smoking might be likely to emphasize the expressive effects of smoking regulation, but today’s children (at least those growing up in non-smoking households), who are growing up in a world in which smoking in restaurants is uncommon, may simply not witness smokers on a regular basis, making the behavior less available to them than if they had witnessed it frequently.

These examples demonstrate that rules can be instrumental to altering social meaning, but they needn’t be in order to exhibit constitutive rationality. In the United States, it is illegal to “take” a bald eagle, the national symbol of the United States. Even if it were found that the statute did not have the effect of increasing the number of bald eagles, or that the statute was unnecessary because bald eagles are not in any serious danger from hunting, prohibiting the taking of bald eagles could exhibit constitutive if not instrumental rationality. The act of defining the bald eagle as outside the proper scope of hunting would be a constitutive, value-rational end of the statute.

Of course, many if not most provisions will have a mix of instrumental and constitutive ends. When Congress dropped the prohibition against homosexuals in the U.S. Armed Forces, it could have had a mix of instrumentalist and constitutive ends. At an instrumental level, Congress may have been seeking to make the armed forces a more effective fighting force by expanding the pool of potential servicemembers or by altering the culture of the armed forces to make them more open to diversity of all kinds. But dropping the exclusion also likely changed the social meaning of what it means to be both a servicemember and a homosexual in the United States. The question is whether one or the other of those ends is either constitutionally privileged or constitutionally prohibited.
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“Paradox and Structure: Relying on Government Regulation to Preserve the Internet’s Unregulated Character,” 85 Minn. L. Rev. 215 (2000).
THE SET OF RULES that govern litigation in the U.S. federal courts were originally promulgated in 1938 as part of an effort to move the courts away from a rigid, hyper-technical system that often entrapped the unwary toward a system that permitted litigants to resolve their disputes on their merits, unfettered by procedural obstructions. Today, many question whether the rules of litigation in the federal system remain true to that original vision. Benjamin Spencer’s focus has been to examine various aspects of that system with this question in mind: Does this rule or doctrine vindicate or thwart the effort to achieve justice for litigants in each case and across the full range of cases generally? Over the span of his career, he has identified a range of procedural topics—including the reach of personal jurisdiction and the introduction of heightened pleading standards—that challenge this vision of unfettered access to the courts. By placing the spotlight on subtle developments in these areas, Spencer presses for fairness in federal civil litigation while also contributing to our broader understanding of how to think about optimal access to justice in the federal courts.

Spencer’s interest in federal civil procedure began in law school, under the tutelage of Harvard Law School Professor Arthur Miller. Miller made certain that his students understood from the beginning that procedure made the key difference in most cases: “If you let me control the procedure, I will win every time,” he told Spencer’s class. As Spencer entered practice through summer clerkships, he quickly saw how right Miller was. “Far from top of mind were the merits of each case; what consumed the activity on both sides were procedural battles over jurisdiction, pleadings and discovery,” Spencer said. He found these concepts fascinating, and seeing their importance solidified Spencer’s determination to work full-time in litigation.
After graduating from law school, Spencer clerked for one year at the U.S. Court of Appeals for the D.C. Circuit and then began working as an associate in the Litigation Department at Shearman & Sterling in Washington, D.C. Spencer spent most of his first year there responding to lawsuits filed against clients of the firm, developing arguments questioning some aspect of the suits’ procedural soundness, and drafting motions to dispose of those cases. His second year was spent focusing more on the discovery process, managing document reviews, responding to discovery requests, defending depositions, and assessing and asserting claims of privilege and work-product protection.

Over time, as his work continued to substantiate the notion that litigation focused primarily on pretrial procedure rather than the merits of each case, Spencer thought his time would be better spent exploring how to improve civil procedure and training the next generation of lawyers to master and deploy civil procedure in the interest of justice. He decided to enter academia.

In the initial phase of his scholarly career, Spencer focused on jurisdictional doctrine, exploring how the Supreme Court’s interpretation of the constitutional requisites of personal jurisdiction affected the ability of litigants to find a court that would be able to hear their case. The Due Process Clause of the U.S. Constitution places constraints on the ability of state courts to render judgments that will be treated as binding on persons with whom those states do not have sufficient contacts. The requisite contacts can be citizenship, corporate management activity, or conduct that gave rise to the dispute, for example.

Personal jurisdiction can get tricky, however, when the defendant commits more of a “virtual” offense from one state that has harmful effects in another, such as online defamation or copyright infringement. “It is unclear what level of contacts a person must have with a state to permit it to exercise jurisdiction when the Supreme Court’s doctrine is based on increasingly outdated notions of physical presence and traditional wrongs,” Spencer said.

Two of his early articles directly addressed this conundrum. His article “Jurisdiction and the Internet,” 2006 U. Ill. L. Rev. 71 (2006), confronted this issue most directly by arguing that emerging approaches to personal jurisdiction in cases involving Internet-mediated conduct were inappropriately limiting the ability of remote victims to bring suit against perpetrators in the victim’s home court. For example, under the dominant approach to such cases, if a newspaper defames a person on its website, the victim would have to travel to the home of the newspaper and sue it there rather than sue the newspaper in the victim’s home jurisdiction, where the defamation and harm occurred. To Spencer, this makes little sense and, more importantly, compromises the ability of victims to access courts to vindicate their rights.

The law’s struggle to apply traditional jurisdictional standards to ever-changing circumstances ushered in by the Information Age revealed deeper inadequacies with personal jurisdiction doctrine. Spencer explored this deficiency and proposed an overhaul of how personal jurisdiction is determined in his article “Jurisdiction to Adjudicate: A Revised Analysis,” 73 U. Chi. L. Rev. 617 (2006). He ultimately concluded that the notion of minimum contacts, which has traditionally served as the primary basis for establishing personal jurisdiction, should be cast aside in favor of a state interest analysis: So long as a defendant is afforded the requisite notice and the opportunity to be heard that due process demands, states may exercise jurisdiction over disputes in which their legitimate governmental interests are implicated. For example, a state’s interest can be based on the residency of the defendant, the fact that the dispute arose out of an incident or transaction within the state, or that persons, property, or relationships have been impacted within the state by conduct that may have occurred elsewhere. According to Spencer, issues pertaining to the convenience and burdens on parties litigating in a given jurisdiction should be resolved by alternative procedural doctrines, such as venue and forum non conveniens. Moreover, as Spencer argued in “Nationwide Personal Jurisdiction for our Federal Courts,” 87 Denver L. Rev. 325 (2010), the federal courts should not be constrained to the same extent as their host states when seeking to assert jurisdiction over litigants. After all, federal courts purport to represent the interests of the entire nation.

Spencer is also known as a leading commentator on recent developments in federal pleading standards. Pleading refers to the process of stating and presenting one’s claims to the court for adjudication. The Federal Rules of Civil Procedure govern this process, and require that a plaintiff provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” Although for decades this requirement was interpreted—consistent with the original spirit of the 1938 Federal Rules revolution—to require little more than a generalized articulation of the wrong alleged and the harm done, the Supreme Court in recent years reinterpreted this language to impose a more stringent
requirement of demonstrating that one's claim is “plausible” before being able to proceed any further in court. This move was initiated in the landmark case of Bell Atlantic Corp. v. Twombly. Spencer has explored and critiqued the new plausibility standard in a series of articles.

The first, “Plausibility Pleading,” 49 Boston Col. L. Rev. 431 (2008), highlighted the inconsistency of the Court’s new doctrine with its own precedent and with other rules of the Federal Rules of Civil Procedure. It also identified several problematic policy implications of the revision. By raising the bar for stating a claim, the Court had made it more difficult for litigants lacking access to the details that animated their claims to get into court. For example, to make an allegation of employment discrimination plausible, one must include allegations that reveal some sort of discriminatory intent, or at least that make the inference of discrimination more than speculative. It may be, though, that the victim of such discrimination lacks evidence—prior to discovery—that would support the inference of discrimination. Plausibility pleading makes surviving a motion to dismiss the complaint for failure to state a claim a much more challenging prospect.

As the Court doubled down on plausibility pleading in Ashcroft v. Iqbal, Spencer continued his critique in several pieces, including articles published in the Michigan Law Review and the UCLA Law Review. These articles argued the Court had indeed revised and tightened the general pleading standard—something that it and others denied—and that this new standard was adversely impacting plaintiffs with potentially legitimate claims by keeping some of their claims out of court and by making other plaintiffs endure an additional and costly battle over the sufficiency of their claims before being allowed in.

Having observed various doctrinal developments over the years emanating from the Court or via amendments to the Federal Rules, Spencer began to notice an important trend: The collection of recent procedural reforms tended to favor civil defendants and stymie plaintiffs from presenting and vindicating their claims in the federal courts. Spencer explored this thesis in his essay, “The Restrictive Ethos in Civil Procedure,” 78 George Wash. L. Rev. 822 (2010). As opposed to the liberal ethos that pervaded the set of procedural rules crafted for the federal courts in 1938, developments since the 1970s through the present day steadily reflected a restrictive ethos—a bias against plaintiffs that combined to restrict access to federal courts. As the essay detailed, these restrictions stem not only from developments in jurisdictional and pleading doctrine, but also from changes related to summary judgment, discovery, and class-action litigation.

Spencer delved more deeply into two of these areas in more recent articles. In “Class Actions, Heightened Commonality, and Declining Access to Justice,” 93 Boston U. L. Rev. 441 (2013), Spencer challenged the Supreme Court’s decision to decertify a large employment discrimination class by developing a more stringent requirement for class commonality than the Federal Rules support. In “The Preservation Obligation: Regulating and Sanctioning Pre-Litigation Spoliation in Federal Court,” 79 Fordham L. Rev. 2005 (2011), and “Rationalizing Cost Allocation in Civil Discovery,” 34 Review of Litigation 769 (2015), Spencer argued in favor of approaches to two important discovery issues—the punishment of spoliation and the responsibility for costs in discovery—that would support the efforts of plaintiffs to hold defendants accountable for their wrongdoing. Specifically, in “The Preservation Obligation” Spencer articulated a way that courts could respond to the culpable loss of discoverable information in a way that would deter and minimize such losses, while in “Rationalizing Cost Allocation” Spencer argued forcefully against suggestions that requesters of information in civil discovery—rather than producers—should be responsible for bearing the costs of producing such information. Given the importance of discovery to plaintiffs seeking to prove their claims, preventing the unwarranted loss of evidence and preserving the ability of plaintiffs to obtain such evidence from their adversaries without having to pay for it are important issues to keep an eye on in the debate over access to justice.

Going forward, Spencer continues to monitor developments on the pleading front through his work as an author of the pleading volumes of the renowned Wright & Miller treatise, Federal Practice and Procedure. He also will look back on areas of civil procedure that have claimed his attention in the past to continue advocating for procedure that is fair to litigants and provides them the best chance of obtaining justice.

But Spencer’s scholarship is also starting to broaden into new spheres as a result of his prior work as a law school administrator and his current service as an officer in the U.S. Army Judge Advocate General’s Corps as a reservist. Spencer remains interested in studying how we provide legal education in this country and in developing strategies for better pedagogy, a topic he treated comprehensively in his article “The Law School Critique in Historical Perspective,” 69 Wash. & Lee L. Rev. 1949 (2012). Spencer has also pursued this interest during his four-
year tenure as chair of the Virginia State Bar’s Section on the Education of Lawyers.

Spencer’s service as a JAG officer has led him to develop an interest in providing better materials to support military law practitioners, which he will seek to do in a forthcoming book on military law. Once this work is complete, Spencer hopes to dedicate a portion of his scholarship to exploring some of the more thorny issues facing military lawyers. This work echoes Spencer’s consistent and driving theme of improving fairness in our legal justice system, even as it moves into more specific areas of application.

EXCERPTS

THE RESTRICTIVE ETHOS IN CIVIL PROCEDURE


Those of us who study civil procedure are familiar with the notion that federal civil procedure under the 1938 Rules was generally characterized by a “liberal ethos,” meaning that it was originally designed to promote open access to the courts and to facilitate a resolution of disputes on the merits. Most of us are also aware of the fact that the reality of procedure is not always access-promoting or fixated on merits-based resolutions as a priority. Indeed, I would say that a “restrictive ethos” prevails in procedure today, with many rules being developed, interpreted, and applied in a manner that frustrates the ability of claimants to prosecute their claims and receive a decision on the merits in federal court. In this Essay, after discussing some of the familiar components of the liberal ethos of civil procedure, I hope to set forth some of the aspects of federal civil procedure that reflect the restrictive ethos, following up with some thoughts on whether a dialectical analysis can help us understand the nature of the relationship between civil procedure’s liberal and restrictive components.

I. THE LIBERAL ETHOS

The liberal ethos in civil procedure generally refers to those aspects of federal procedure that tend to promote access and merits-based or accurate resolutions of civil disputes. That the Federal Rules were originally designed to promote access cannot be denied. The very notion of uniformity itself was an innovation designed to make the civil justice system more accessible to litigants. Also promoting the vision of open access espoused by the drafters was the introduction of simplified “notice pleading,” which was designed to minimize greatly the number of cases dismissed on the pleadings. With notice pleading replacing the cumbersome and “archaic fact-pleading[, m]ore people
with legal grievances could gain entry into the system.” In many respects, the commitment to access endures; for example, the current post-1993 version of Rule 11—with its safe-harbor provision, emphasis on deterrence, and allowance for innovative legal arguments—was meant to complement simplified pleading by ensuring truthful allegations without deterring litigants from asserting what some may view as tenuous claims.

The innovation of modern discovery ushered in by the rules further promoted access by enabling plaintiffs to initiate their claims without having to have full and complete information. Relatedly, delaying the test of the factual sufficiency of one’s claim until after discovery is completed is supposed to give plaintiffs sufficient ability to investigate their claims under the aegis of the courts rather than prior to filing. Liberal joinder rules, as well as the class-action device, have promoted access by enabling parties with substantially related claims to prosecute together claims that they might otherwise have been unable to sustain individually.

That the Federal Rules were originally imbued with a clear preference for merits-based, accurate resolutions of disputes is also clear. Simplified pleading and broad discovery were designed to promote resolution of disputes on the substantive merits as opposed to procedural technicalities. Liberal amendment rules permit parties to cure errors or omissions by amending their pleadings to add claims, defenses, or parties as necessary. The motion for judgment as a matter of law, the motion for new trial, and the motion for relief from judgment each provide litigants with an opportunity to seek a just, accurate resolution of their cause where the conclusion of the jury seems clearly inconsistent with the truth. Judicial discretion is rooted in the concern that disputes be resolved on their merits rather than procedural technicalities, resulting in a group of civil rules that permit judges to exercise significant discretion in the interest of justice. The disinclination of courts toward default judgments further indicates the preference for merits-based judgments over those obtained through procedural technicalities.

To the above-mentioned attributes of access and accuracy I would add another value to which the Federal Rules have generally aspired: the promotion of private efficiency and inexpensiveness. Indeed, a core value embodied in much of procedural law is the promotion of the efficient and inexpensive resolution of disputes between parties. Notice pleading permits litigants to assert claims without incurring the delay and expense that would accompany an obligation to plead detailed facts. The obligation under Rule 12 to consolidate or waive certain preliminary procedural challenges is at least intended to prevent dilatory tactics to some extent. Initial disclosures—added to the Rules in 1993—were designed to save litigants the cost and hassle of having to pry such information from their adversaries, while the compelled-discovery system in general, coupled with the American rule requiring responding parties to cover their own discovery expenses, permits plaintiffs to have formal access to relevant information from defendants without ordinarily having to cover the expense of production.

In shaping the scope of an action, the broad joinder rules are designed to permit the action to be crafted in a way that permits most related claims to be litigated together, an innovation away from the rigidity of the common-law pleading system. The compulsory-counterclaim rule is an example of not only permitting the assertion of related claims within a single action but compelling it: “The requirement that counterclaims arising out of the same transaction or occurrence as the opposing party’s claim ‘shall’ be stated in the pleadings was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters.” Of course, supplemental jurisdiction supports this liberal joinder system by allowing jurisdictionally insufficient claims to be heard in federal court on the basis of their relationship with other claims in the action. In sum, claim and party joinder have as their principal rationale the avoidance of multiple lawsuits pertaining to similar and closely related matters, something which in most instances promotes the private economic interests of litigants. We see, then, that the liberal ethos favors access to courts, resolution of disputes on their merits, and the inexpensive and timely prosecution and defense of claims.

II. THE RESTRICTIVE ETHOS

Although the values that comprise the liberal ethos—access, accuracy, and private efficiency—are familiar, they may seem quaint to the practitioner or serious student of civil procedure. Not that these values were not in view of the drafters of the Rules or do not reflect
some part of their nature today; rather, it turns out that there are additional values that animate civil procedure, albeit in a contrary manner than those of the liberal ethos. These counter-values, if you will, form what I refer to as the restrictive ethos in civil procedure.

The major counter-value within the restrictive ethos is a threshold skepticism that yields an interest in excluding or discouraging claims rather than supporting and encouraging them. The open-access approach of the Federal Rules was not a welcome development in the eyes of all observers. Many jurists, particularly after the strengthening of the damages-class device under Rule 23 and the stream of public-rights legislation in the 1960s, felt that too many meritless claims were flooding the courts: “Relatively low barriers to entry have ... generated an undesirable result—a deluge of frivolous or vexatious claims filed by the uninformed, the misinformed, and the unscrupulous.” The response was a so-called “counterrevolution” that asserted that “the underlying ideology of liberality of pleading, wide-open discovery and attorney latitude was no longer feasible” and sought to use procedural reforms to “keep out the worthless, the trivial, and those litigations which ... ought not to be in the courts[.]” Specifically, as a solution to the litigation explosion and perceived abuses of discovery and the civil process in general, this group of reformers promulgated a series of rule changes and practices that sought to clamp down on frivolous filings.

In 1983, Rule 16 was amended to empower judges to manage litigation more actively during the pretrial phase and to pare off meritless claims as they saw fit. Many judges obliged, using pretrial case management techniques to expedite proceedings, impose sanctions for abusive conduct, and coax parties toward settlement. Rule 11 was amended that same year to make sanctions mandatory and to eliminate the “good-faith” standard for judging the pre-filing inquiry that supports the allegations in a pleading. Changes in this and other aspects of the rule could chill some litigants from bringing meritorious claims. In fact, it is by now commonly felt that prior to the amendment to its current form in the early 1990s, Rule 11 was disproportionately used to sanction plaintiffs’ counsel in civil rights actions.

The history of the imposition of heightened pleading standards to frustrate the prosecution of certain types of cases, most notably antitrust and civil rights claims, has also been well documented. Although the Supreme Court had steadfastly rejected this practice, more recently—as a result of its decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal—the Court has signaled that its commitment to notice pleading has waned. Congress has even gotten involved; in passing the Private Securities Litigation Reform Act of 1995, it imposed heightened pleading standards on claimants asserting securities-fraud claims. Beyond stricter pleading standards, plaintiffs still face difficulty in having amendments to those pleadings relate back when they seek to change unknown defendants to identified defendants, a rule that seems to impact victims of alleged law enforcement misconduct the most. Those claimants making it to the summary judgment stage face significant hurdles as well, particularly in light of the ease with which defendants may raise such challenges in the wake of the Celotex trilogy of cases. Indeed, if the amendments to Rule 56 currently under consideration take effect in their current form, plaintiffs may face even more difficulty and expense in resisting the termination of their case on summary judgment.

On the class-action front, plaintiffs have faced challenging class-certification standards for classes seeking primarily money damages. For example, Rule 23(b)(3) requires that common questions of law or fact predominate over questions affecting only individual class members and multistate classes requiring the application of disparate state legal rules typically will not pass that test. Further, the costs of proceeding as a class seeking money damages may at times be prohibitive given the plaintiffs’ obligation to pay for notice to class members. That federal class-certification standards are stringent has been recognized by Congress, which cited those strict standards as a primary rationale for moving more putative classes from state into federal court through the Class Action Fairness Act passed in 2005. Ultimately, a restrictive interpretation of class-certification standards tends to preclude classes from proceeding to a resolution of their claims on the merits.

Certainly, efforts to constrain discovery, most notably through amending Rule 26 to limit the scope of discovery to material related to claims or defenses in the action rather than the subject matter of the action, reflect a desire to discourage “fishing expeditions” that might yield additional claims and to protect litigants—mainly defendants—against the high costs associated with complex discovery. These efforts were spurred in part by longstanding concerns about
“predatory discovery” or “discovery abuse”—the perception that plaintiffs were using their ability to impose discovery costs on their opponents as a means of coercing them into early settlements. Although the Supreme Court at one time seemed to endorse the idea that “fishing expeditions” were allowed under the discovery rules, lower courts and even the Supreme Court itself seem to have settled on the contrary view. The new electronic-discovery rules, which permit producing parties to withhold information that is not reasonably accessible and allow the sharing of costs associated with burdensome production, reflect a prioritization of cost control over the interests of accurate resolution of disputes.

Finally, the restrictive ethos finds a voice in jurisdictional rules and doctrines. Personal jurisdiction doctrine seems tilted against plaintiffs given its excessive concern with convenience to defendants and tendency to preclude plaintiffs from bringing cases against out-of-state defendants in the plaintiffs’ home state where they may have been harmed, particularly in the Internet context. Aspects of federal subject-matter jurisdiction are access-restrictive as well. Although diversity jurisdiction in some ways has expanded (such as, in a backhanded way, via the Class Action Fairness Act or the corporate-citizenship rule), the amount-in-controversy requirement continues to be increased periodically to exclude smaller claims from federal court. Additionally, the doors of the federal courts are closed completely to those seeking a federal forum for the enforcement of child- or spousal-support obligations even though such disputes otherwise might qualify for diversity jurisdiction. It is also worth noting that appellate-court jurisdiction was recently restricted by treating a statutory time limit for appeal as jurisdictional, preventing a plaintiff who had relied on a district-court extension beyond the time limit from having his appeal heard.

In sum, from this cursory survey of contemporary civil procedure and its major pressure points we can see that a collection of procedural rules and reforms reflect a restrictive ethos, characterized by a desire to discourage certain claims and to keep systemic litigation costs under control.

III. RESOLVING THE TENSION: A DIALECTICAL ANALYSIS

As we have seen, there are two sides to civil procedure. The first is access-promoting and favors resolution of disputes on the merits. The other is more restrictive and cost-conscious, creating various doctrines that frustrate the assertion and prosecution of potentially meritorious claims. In other words, much of procedure is expressly directed not at the traditional goal of facilitating accurate outcomes, but rather is designed and applied to frustrate or at least subordinate accuracy in certain contexts where efficiency of some sort or the interests of certain litigants are at stake.

These two sides of procedure coexist, although their opposing tendencies create a tension that cries for resolution. Resolution of this tension may be found in realizing that the liberal ethos and the restrictive ethos are dialectically related. That is, the basic thesis of procedure, its liberal ethos, yields its antithesis, the restrictive ethos, and the two can be reconciled through a synthesis that helps us understand how these seemingly contradictory attitudes cooperate toward a unified, more fundamental goal.

... Given the simultaneous presence of a dominant restrictive ethos and the visible vestiges of the liberal ethos within civil procedure, I would describe the synthesis of the two not merely as a checks-and-balances relationship. Rather, the restrictive ethos enables the civil justice system to survive by reducing the number of disfavored actions that burden the system while the more popularly known liberal ethos takes on the role of generating and sustaining the legitimacy of, and faith in, the civil justice system in the eyes of the public at large. In other words, procedure’s central thesis (the liberal ethos) and antithesis (the restrictive ethos) can be synthesized into a concept I refer to as ordered dominance: procedure’s overarching, unified goal is to facilitate and validate the substantive outcomes desired by society’s dominant interests; procedure’s veneer of fairness and neutrality maintains support for the system while its restrictive doctrines weed out disfavored actions asserted by members of social outgroups and ensure desired results.

... The idea of ordered dominance that I have described is certainly an oversimplification and likely fails to describe the whole of civil procedure accurately. However, it cannot be gainsaid that procedure
today is recognized by all the relevant players—the rulemakers, the judiciary, members of Congress, interested lobbyists—as being vitally connected with substantive policy interests and that some of those same players have consciously tinkered with (or manipulated) procedural rules or doctrines with a clear understanding of their likely impact on certain substantive policy ends. Given that fact, it does not take much more investigation to reach the ordered-dominance thesis; none of the aforementioned players represent members of societal out-groups but rather are drawn from or represent privileged elites. Although some among this group may fight for the interests of the out-groups when waging procedural battles, the restrictive regulatory and doctrinal outputs of procedural reform do not reveal much evidence in support of such a notion. To the contrary, modern procedural reforms, either through rulemaking, congressional intervention, or judicial interpretation, have bent towards the restrictive ethos, which undeniably has favored society’s dominant interests as defined above.

CONCLUSION

Many may chafe at the idea of ordered dominance, given its seeming inconsistency with our traditional rhetoric of fair play, due process, and a day in court. Indeed, members of societal out-groups who are disadvantaged by the contemporary procedural regime may find the suggestion that civil procedure’s restrictive ethos dominates its advertised liberal components particularly disheartening. But despondency is not the proper response to developing an understanding of the regime of ordered dominance revealed above. To the contrary, enlightenment is empowering; with a clear view of procedure one can articulate and advocate for appropriate reforms or, more likely, resist those reforms that are likely to further entrench the regime of ordered dominance.

CLASS ACTIONS, HEIGHTENED COMMONALITY, AND DECLINING ACCESS TO JUSTICE

93 B.U. L. Rev. 441 (2013)

III. HEIGHTENED COMMONALITY AND THE RESTRICTIVE ETHOS IN CIVIL PROCEDURE

In a previous article, I described what I call the “restrictive ethos” in civil procedure—to be contrasted with the “liberal ethos” of the Progressive-era civil rulemakers—as the contemporary theme underlying certain procedural doctrines and rule interpretations that deserve access to civil justice. Specifically, restrictive procedural doctrines are those reflective of a bias against claimants from societal outgroups asserting disfavored claims against members of the dominant class. This bias manifests itself in a threshold skepticism that raises the bar for entry into the judicial system in these cases, frustrating the ability of such claimants to reach an authoritative resolution of their claims on the merits. In Walmart v. Dukes we have a new specimen of this phenomenon that both buttresses and helps to further explicate the restrictiveness thesis. It does so in three ways.

A. THRESHOLD SKEPTICISM

The Dukes majority indicated that a “rigorous” analysis of the evidence supporting commonality was necessary, with the employment discrimination context demanding “significant proof” of a general policy of discrimination. By endorsing a “rigorous” probe into the proofs offered by the plaintiffs of their collective claims, the Dukes majority demonstrated threshold skepticism, using its prejudgments about the merits as a guide to its resolution of the procedural question before it. Threshold skepticism demands that before a court permits defendants to be subjected to the litigation process itself—which is generally derided as being so expensive as to coerce undeserved settlements—claimants must demonstrate, up front, that their claims have merit. The majority exhibited such skepticism in Dukes by
assessing the value and weight of the evidence presented by the class members regarding their discrimination claims and found the evidence completely wanting: “Because respondents provide no convincing proof of a companywide discriminatory pay and promotion policy, we have concluded that they have not established the existence of any common question.”

The problem with this approach is that it seems to run counter to the Court’s previous pronouncement in *Eisen v. Carlisle & Jacquelin* that “nothing in either the language or history of Rule 23 ... gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.” Further, no matter how “rigorous” such merits reviews are purported to be, in truth they are cursory quick peeks that not only fail to measure up to the thorough consideration of the merits that district courts can provide, but they also improperly displace them. Even in the class context, appellate courts are not in the position to provide de novo review of factual evidence, giving their own assessments without regard to the findings of the district court. This is especially so at the certification stage, where an appellate court may cherry-pick facts from an underdeveloped factual record in support of its commonality assessment. Though an appellate-level merits review is inevitably less thorough and sound than that which can be provided by the district court, the *Dukes* majority engaged in what it considered to be a “rigorous” search for “significant proof” of a general policy of discrimination. That meant a heightened evidentiary standard was being imposed in the context of a preliminary, yet appellate, review of the facts, something that was unfair to the plaintiffs. To the extent the *Dukes* majority is endorsing a rigorous review of factual questions that otherwise would warrant jury treatment, this approach echoes the jury-displacing effects of the Court’s restrictive moves in the areas of summary judgment and pleading doctrine. In making this endorsement, the *Dukes* majority acknowledged that a likely post-certification settlement will preempt most jury trials in the class action context. In any event, merely requiring such proof at the certification stage raises the cost of certification and diminishes the chance of successful certification.

What is more fundamentally wrong with this threshold skepticism is its infusion into the commonality analysis. A court may rightfully be skeptical of class certification and take all necessary steps to ensure that claims have merit before permitting them to proceed, provided that the procedural hurdle at issue makes the merits relevant. But resting such skepticism on the back of a requirement as simple and straightforward as one that asks only for “questions of law or fact common to the class” is going too far. And that is the point: Threshold skepticism is not objectionable per se; what makes it illegitimate is when innocent provisions are conscripted into service of its ends. As the Court at another time concluded, it would be better to use the process for formally amending the rule than to infuse it with an alien reading to suit its members’ policy prerogatives, even if such policy is to make sure that the consequential decision of permitting a class to go forward is only done when there is some assurance that the plaintiffs’ claims are meritorious. In the end, what is troubling about this kind of threshold skepticism and the restrictive ethos in general is that it operates *sub terra*. Rules are not formally amended so that movement in the desired direction can be debated and vetted, transparent and democratic; rather, rules are contorted to mean what they do not say to dictate a result desired by their interpreters, not their drafters. Two plus two equals five.

**B. DISFAVORED ACTIONS**

The second way in which *Dukes* exemplifies the restrictive ethos in civil procedure is that it heightens entry standards in the context of discrimination claims, a type of claim that historically has been treated as disfavored, particularly when advanced by members of outgroups. From motions for sanctions under Rule 11, to summary judgment motions, to pleading standards, employment discrimination claims have faced a gauntlet of procedural hurdles that otherwise do not apply to civil actions. Why are discrimination claims disfavored? At bottom, it appears that jurists who disfavor these claims do so because they do not believe in them. They seem to espouse a deep suspicion of, or at least a doubt concerning, claims of mistreatment tied to a person’s race or gender, believing that the vast majority of people do not discriminate and instead treat each other fairly. Explicit evidence of racial animus is demanded before this presumption can be overcome. This is a Pollyannish, counter-factual worldview but appears to be widely held. For example, Chief Justice John Roberts’s remark that “[t]he way to stop discrimination on the basis
of race is to stop discriminating on the basis of race” evinces his obliquity to the existence of covert or unintentional discrimination that is preconscious, mediated by some other trait, or derivative of classifications or assumptions that are neither gender- nor race-based.

... By ratcheting up commonality to require central common questions and then defining what that question must be in the employment-discrimination context, the Dukes majority was able to operationalize its doubt-of-group-bias perspective under the guise of the common question requirement and forestall the prosecution of these disfavored claims.

C. ANTI-CLAIMANT BIAS AND OUTGROUPS AS CLASS CLAIMANTS

A final but lesser point related to the treatment of disfavored claims is that Dukes seems to confirm that component of the restrictiveness thesis that posits a bias against the types of plaintiffs who typically bring such claims: members of societal outgroups. Members of societal outgroups are “those outside the political and cultural mainstream, particularly those challenging accepted legal principles and social norms. ... [T]hose raising difficult and often tenuous claims that demand the reordering of established political, economic and social arrangements, that is, those at the system’s and society’s margins.” The restrictive ethos thesis suggests that when plaintiffs from such groups are pitted against societal insiders, procedure is interpreted in ways that thwart the plaintiffs’ efforts. That is fairly descriptive of what happened in Dukes, which involved female employees complaining of discrimination in pay and promotion decisions by managerial personnel of Wal-Mart, the largest corporation in the world. Women have historically been discriminated against in the employment context and continue to endure pay disparities and glass ceilings. Thus, in Dukes, when a massive group of working-class women presented quite plausible support for the idea that gender discrimination permeates the pay and promotion practices of a company the size of Wal-Mart, a majority of the Court found a way to thwart their claims. The Court did so not by confronting them on the merits, but by using an adulteration of the common question requirement for the task. And that is what characterizes the restrictive ethos: insider bias against claimants from societal outgroups feeds into interpreting procedure to raise the standards for entry in a way that aborts outsider claims ab initio. Certainly, this point regarding anti-claimant bias could be rightly characterized as an intuition; the point here, however, is to highlight Dukes as an additional data point in the ongoing analysis of whether such a bias indeed exists. Time will tell, but for now suffice it to say that Dukes fits this aspect of the restrictiveness critique.

... Dukes is merely the latest in a series of cases moving civil procedure in a restrictive direction. In J. McIntyre Machinery, Ltd. v. Nicastro, the Court used a heightened personal jurisdiction doctrine to protect a foreign corporate defendant against a suit by an individual plaintiff who had been severely injured by a product of the defendant shipped to the victim’s state. The Court did so despite the fact that the defendant intentionally shipped its product—a shearing machine for the production of scrap metal—to its distributor in Ohio for sale across the entire United States, including New Jersey, the largest market for scrap metal. Iqbal's and Twombly's respective heightenings of the general pleading standard under Rule 8 has already been mentioned and is treated more extensively elsewhere, as are other recent moves toward restrictive procedure. Only time will tell whether these cases portend a permanent shift away from access to justice. In any event, heightened commonality nicks away at access in ways that serve to provide some confirmation of the restrictive ethos thesis and move us further in the anti-access direction.
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