DANIEL KELLY
W340S5527 Prairie View Drive
North Prairie, Wisconsin 53153
262.347.4550 (office)
[redacted] (cell)

Office of the Governor
2 E. Main Street
Madison, Wisconsin 53703
By email only

To whom it may concern:

Re: Wisconsin Supreme Court Vacancy

It is an honor to submit for consideration my application for appointment to the Wisconsin Supreme Court. I include under cover of this letter the following documents:

1. Application (Word and PDF versions);
2. Attachment A to the Application (Word and PDF versions);
3. Resume (Word and PDF versions);
4. Writing Sample 1 (Chapter 8 – Rawls and Civil Society); and
5. Writing Sample 2 (Petition for Writ of Certiorari).

To the extent permitted by law, I ask that you keep this application and the supporting material confidential. If this material should be made publicly available, I ask that you redact my home address and telephone number, as they are unlisted and not publicly available.

Should you need additional information, please feel free to contact me at your convenience.

Sincerely,

_____
Daniel Kelly

Encs.

DANIEL KELLY
W340S5527 Prairie View Drive
North Prairie, Wisconsin 53153
262.347.4550 (office)
[redacted] (cell)

Employment

Rogahn Kelly LLC [2014 – Present]

Position: Owner

Kern Family Foundation [2013 – 2014]

Position: Vice-President & General Counsel

Reinhart Boerner Van Deuren, s.c. [1998 – 2013]

Position: Shareholder; Litigation Department.

Leadership positions:

Leader: Appellate Practice Group

Leader: Real Estate Litigation Practice Group

McLario, Helm & Bertling, S.C. [1996 – 1998]

Position: Associate

United States Court of Federal Claims [1994 – 1996]
Office of Special Masters
Washington, D.C.

Position: Staff Attorney

United States Court of Federal Claims [1992 – 1993]
Office of Special Masters
Washington, D.C.

Position: Judicial Law Clerk to the Hon. Richard B. Abell

Wisconsin Court of Appeals [1991 – 1992]
Milwaukee, Wisconsin

Position: Judicial Law Clerk to the Hon. Ralph Adam Fine

Community Involvement

Board Membership

President, Federalist Society, Milwaukee Lawyer's Chapter.

Member, State Advisory Board to the United States Commission on Civil Rights.

Member, Wisconsin Institute for Law and Liberty Litigation Advisory Board.

Other

Participant, Federalist Society, State Courts Initiative.

Member, Carroll University President's Council.

Education

Juris Doctor [1988 – 1991]
Regent University School of Law
Virginia Beach, Virginia
Graduating Class Rank: #3

B.S. in Political Science, Spanish [1982 – 1986]
Carroll College
Waukesha, Wisconsin

SCOTT WALKER
OFFICE OF THE GOVERNOR
STATE OF WISCONSIN

115 EAST STATE CAPITOL
MADISON, WI

APPLICATION FOR JUDGESHIP

(Please attach additional pages as needed to fully respond to questions)

DATE: May 18, 2016

I. Personal Information:

Name (Last, First, Middle Initial)	Home Telephone Number (Area Code)
Daniel Kelly	[redacted]
E-Mail	Work Number (Area Code)
[redacted]	262-347-4550
Court Applying For	Cell Number (Area Code)
Wisconsin Supreme Court	[redacted]
Age	Current Address
52	W340S5527 Prairie View Drive
Place of Birth	City
Santa Barbara, California	Ottawa
Driver's License Active in WI?	County of Residence
Yes ☒ No ☐	Waukesha
Wisconsin Bar Number	State
1001941	WI
Date Admitted to Practice Law in WI	Zip Code
1991	53153
Date Admitted to Practice Law in Another State	Year(s) at Current Address
1993 (Virginia)	12
	Are you registered to vote at this address?
	Yes ☒ No ☐

II. Employment Information

Current Employer Rogahn Kelly LLC	Work Address N16W23233 Stone Ridge Drive, Suite 270
Title Shareholder	City Waukesha
Telephone Number (Area Code) 262-347-4550	County Waukesha
	State WI
	Zip Code 53188

III. Marital Information

Marital Status
Single ☐ Married ☒

If married, please provide the following: Date of marriage, spouse's name, spouse's occupation
August 12, 1989
If ever divorced, please provide the following: Name, former spouse(s)' occupation, and date of divorce(s)
N/A

Please provide the following for any children and stepchildren: Name, state of residence, and occupation

Name	*State of Residence*	*Occupation*
Nathanael Kelly	WI	Student
Abigail Kelly	WI	Student
Rachel Kelly	WI	Student
Sophia Kelly	WI	Student
Anna Kelly	WI	Student
_____	_____	_____

IV. Residential History

List all previous residences for the past ten years

N/A

V. Personal Information Cont.

1) Do you currently have a physical or mental impairment that in any way limits your ability or fitness to properly exercise your duties as a member of the Judiciary in a competent and professional manner?
Yes ☐ No ☒
If yes, explain.

_____

2) In the past ten years have you unlawfully used controlled substances as defined by federal or state laws?
Yes ☐ No ☒
If yes, explain.

_____

3) Since leaving high school, have you, other than for academic reasons, ever been denied enrollment, disciplined, denied course credit, suspended, expelled, or requested to end your enrollment by any college, university, law school or other institution?
Yes ☐ No ☒
If yes, explain.

_____

4) Have you failed to meet any deadline imposed by court order or received notice that you have not complied with substantive requirements or any contractual arrangement?
Yes ☐ No ☒
If yes, explain.
However, I was once 15 minutes late to a scheduling conference.

5) Have you ever been held in contempt or otherwise formally reprimanded or sanctioned by a tribunal before which you have appeared?
Yes ☐ No ☒
If yes, explain.

_____

6) Are you delinquent in your mandatory continuing legal education?
Yes ☐ No ☒
If yes, explain.

_____

7) Have you ever been a party to a lawsuit either as a plaintiff or as a defendant?
Yes ☒ No ☐
If yes, please supply the jurisdiction and/or county, case number, nature of the lawsuit, whether you were the plaintiff or defendant, and disposition of each lawsuit.
Kelly v. McAlpin, Case No. 00CV8042 (Milwaukee County Circuit Court); we were plaintiffs in a breach of contract action against Ray McAlpin. We settled the case.

8) Has there ever been a formal complaint filed against you, a finding of probable cause, citation, or conviction issued against you?
Yes ☐ No ☒
If yes, explain.

_____

9) Are you presently under investigation by the Wisconsin Judicial Commission, the Supreme Court of Wisconsin, the Office of Lawyer Regulation, or any other equivalent, in any jurisdiction?

Yes ☐ No ☒
If yes, explain.

_____

10) If you are a quasi-judicial officer, have you ever been disciplined or reprimanded by a sitting judge?
Yes ☐ No ☒
If yes, explain.

_____

11) In the past five years, have you ever been cited for a municipal or traffic violation, excluding parking tickets?
Yes ☐ No ☒
If yes, explain.

_____

12) Have you ever failed to timely file your federal or state income tax returns?
Yes ☐ No ☒
If yes, explain.

_____

13) Have you ever paid a tax penalty?
Yes ☐ No ☒
If yes, explain.

_____

14) Has a tax lien ever been filed against you?
Yes ☐ No ☒
If yes, explain.

_____

15) Have you ever filed a personal petition in bankruptcy, or has a petition in bankruptcy been filed against you?
Yes ☐ No ☒
If yes, explain.

_____

16) Have you ever owned more than ten percent of the issued and outstanding shares, or acted as an officer or director, for any corporation by which or against which a petition in bankruptcy has been filed?
Yes ☐ No ☒
If yes, explain.

_____

V. Education

High School Education Information

Name of School Arvada West High School
Address: Street, City, State 11595 Allendale Dr, Arvada, CO 80004
Degree Earned High School diploma
GPA I don't recall
Dates Attended 1979-1982

Undergraduate Education Information

Name of School Carroll College
Address: Street, City, State 100 N East Ave, Waukesha, WI 53186
Degree Earned Bachelor of Science
GPA 3.3 (if I recall correctly)
Dates Attended 1982-1986

Law School Education Information

Name of School Regent University
Address: Street, City, State 1000 Regent University Dr, Virginia Beach, VA 23464
Degree Earned Juris Doctor
GPA 3.56
Dates Attended 1988-1991

List and describe academic scholarships, awards, honor societies, extracurricular involvement, and any other related educational information. Note any leadership positions.

(1) Editor-in-Chief, Regent University Law Review

(2) Outstanding Law Student Award

This is Regent University's highest award. It is given to the overall top law student upon graduation, taking into account academic performance, service to the Law School, and extra-curricular activities.

(3) Negotiation/Litigation Award

Awarded by Regent University to the top law student in these subjects.

(4) Who's Who in American Colleges and Universities (1991)

(5) American Jurisprudence Awards - Law Review, Property, Evidence, Bankruptcy, Secured Transactions, Remedies

(6) Pre-Law Student of the Year, Carroll College

VI. MILITARY EXPERIENCE:

List all military service (including Reserves and National Guard).

Service	*Branch*	*Highest Rank*	*Dates*
N/A			

Type of discharge:

List any awards or honors earned during your service. Also list any citations or charges pursued against you under the Uniform Code of Military Justice.

VII. PROFESSIONAL ADMISSIONS:

List all courts (including state bar admissions) and administrative bodies to which you have been admitted to practice, giving the dates of admission, and, if applicable, whether you have ever been suspended or have resigned.

Court or Administrative Body	*Date of Admission*
Supreme Court, State of Wisconsin	September 19, 1991
U.S. Court of Federal Claims	April 22, 1993
Supreme Court, State of Virginia	November 2, 1993
U.S. Supreme Court U.S. District Court, Eastern District of Wisconsin U.S. Court of Appeals, Seventh Circuit U.S. District Court, Northern District of Illinois	April 25, 1995 December 3, 1996 December 13, 1996 February 16, 2016

VIII. NON-LEGAL EMPLOYMENT:

List all previous full-time, non-legal jobs or positions held in the past eight years.

Employer	*Position*	*Date*	*Address*
Kern Family Foundation	Vice-President/General Counsel	2013-2014	W305S4239 Brookhill Rd, Waukesha, WI 53189

IX. LEGAL EMPLOYMENT:

(If you are a sitting judge, answer the following questions with reference to before you became a judge.)

List the names, dates, and addresses of all legal employment, including law school and volunteer work.

Employer	*Position*	*Date*	*Address*
Reinhart Boerner Van Deuren, s.c.	Shareholder	2003-2013	1000 N. Water Street, Suite 1700 Milwaukee, WI 53202

Reinhart Boerner Van Deuren, s.c.	Associate	1998-2003	Same
McLario, Helm & Bertling, S.C.	Associate	1996-1998	N88W16783 Main St., Menomonee Falls, WI 53051
U.S. Court of Federal Claims, Office of Special Masters	Staff Attorney	1994-1996	717 Madison Place, N.W. Washington, D.C. 20005
U.S. Court of Federal Claims, Office of Special Masters	Clerk	1992-1993	Same
Wisconsin Court of Appeals, Hon. Ralph Adam Fine	Clerk	1991-1992	633 W. Wisconsin Ave., Suite 1400 Milwaukee, WI 53203
Volunteer Income Tax Assistance Program	Volunteer	circa 1990	Virginia Beach, Virginia
National Legal Foundation	Intern	1990-1991	Virginia Beach, Virginia

Describe your legal experience as an advocate in criminal litigation, civil litigation, and administrative proceedings.

See Attachment A

In your career, how many cases have you tried that resulted in a verdict or judgment?

Jury:	20 (approx.)	Non-jury:	10 (approx)
Arbitration:	0	Administrative Bodies:	5

How many cases have you litigated on appeal? Provide case names and case numbers. If fewer than twenty cases, describe the nature of each case, your involvement, and each case's disposition.

I have litigated (or am in the process of litigating) 23 cases on appeal, five of which are or were before the Wisconsin Supreme Court or the United States Supreme Court.

Please see Attachment A for the list of cases.

List and describe the three most significant cases in which you were involved; give the case number and citation to reported decisions, if any. Describe the nature of your participation in the case and the reason you believe it to be significant.

Please see Attachment A.

X. PRIOR JUDICIAL EXPERIENCE:

Have you ever held a judicial or quasi-judicial office? If so, state the court(s) involved, position held, and dates of service.

Name of Agency/Court	*Position Held*	*Dates*
N/A		

List the names, phone numbers, and addresses of two attorneys who appeared before you on matters of substance.

Describe the approximate number and nature of cases you have heard during your judicial or quasi-judicial tenure.

Describe the two most significant cases you have heard as a judicial officer. Identify the parties, describe the cases, and explain why you believe them to be significant. Provide the trial dates and names of attorneys involved, if possible.

XI. PREVIOUS PARTISAN OR NON-PARTISAN POLITICAL INVOLVEMENT:

Have you ever held a position or played a role in a judicial, non-partisan, or partisan political campaign, committee, or organization? If so, please describe your involvement.

I was a "kitchen-cabinet" advisor to Justice Rebecca Bradley in her 2016 campaign for the Wisconsin Supreme Court.

List all instances in which you ran for elective office. For each instance, list the date of the election (include both primary and general election), the office that you sought, and the outcome of the election. Include your percentage of the vote.
N/A

List all judicial or non-partisan candidates that you have publicly endorsed in the last six years.

Justice Rebecca Bradley
Justice Patience Roggensack (in her campaign for the position of Chief Justice)
Justice David Prosser

XII. HONORS, PUBLICATIONS, PROFESSIONAL AND OTHER ACTIVITIES:

List any published books or articles, providing citations and dates.

Please see Attachment A.

List any honors, prizes, or awards you have received, providing dates.

Outstanding Service to Milwaukee County Award, 2002 (for service as Special Assistant District Attorney)

List all bar associations and professional societies of which you are a member; give the titles and dates of any office that you may have held in such groups and committees to which you belong or have belonged.

Wisconsin State Bar
Virginia State Bar

Describe any additional involvement in professional or civic organizations, volunteer activities, service in a church or synagogue, or any other activities or hobbies that could be relevant or helpful to consideration of your application.

Federalist Society (Milwaukee Lawyer's Chapter), President

Wisconsin Institute for Law and Liberty, Litigation Advisory Board

United States Commission on Civil Rights, State Advisory Committee, Member

Carroll University President's Council, Member

Describe any significant pro bono legal work you have performed in the last five years.
I am currently representing Margaret Pulera in her case before the Wisconsin Supreme Court (see Attachment A). The Supreme Court appointed me, pro bono publico, to write the briefs and argue the case.

Describe any courses on law that you have taught or lectures you have given at bar association conferences, law school forums, or continuing legal education programs.

Please see Attachment A.

Describe any other speeches or lectures you have given.

Please see Attachment A.

XIII. FINANCIAL INVOLVEMENT:

Are you or your spouse now an officer, director, or otherwise engaged in the management of any business enterprise?
Yes ☒ No ☐

If yes, state the name of the enterprise, the nature of the business, the nature of your duties, and you or your spouse's intended involvement upon your appointment or election to judicial office.

Rogahn Kelly LLC - I am a founder and shareholder of this law firm. If appointed, I will transfer my interest in the firm to my partner.

My wife gives beginner equestrian lessons to young children during the Summer. She will likely continue this activity if I am appointed.

Describe any business or profession other than the practice of law that you have been engaged in since being admitted to the Bar.

After passing the Wisconsin Bar, and prior to starting my clerkship with the Hon. Ralph Adam Fine, I delivered pizzas for Domino's Pizza.

Describe any fees or compensation of any kind, other than for legal services rendered, from any business enterprise, institution, organization, or association of any kind that you have received during the past five years.
None.

XIV. References

Reference 1

Name	Please see Attachment A
Address	
Telephone Number	

Reference 2

Name	
Address	
Telephone Number	

Reference 3

Name	
Address	
Telephone Number	

Reference 4

Name	
Address	
Telephone Number	

XV. ADDITIONAL INFORMATION:

Explain in 500 words or less why you want to become a judge/justice.

Please see Attachment A.

In 500 words or less, name one of the best United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

Please see Attachment A.

In 500 words or less, name one of the worst United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

Please see Attachment A.

In 500 words or less, describe your judicial philosophy.

Please see Attachment A.

If you have previously submitted a questionnaire or application to this or any other judicial nominating commission, please give the name of the commission and the approximate date of submission.
Judicial Selection Advisory Committee, June 20, 2011

Describe any other information you feel would be helpful to your application.

Do you wish to request that your application remain confidential to the extent allowed by law?
Yes ☒ No ☐

Note: Such a request does not ensure that your application will remain confidential. In general, you should expect that all materials submitted will be disclosed to the public upon request under the public records law. The Governor's Office will honor such a confidentiality request to the extent the law allows. A request for confidentiality will not adversely affect your application for appointment.

Please remember to upload your first writing sample, second writing sample, resume, signed signature page, and cover letter.

WAIVER AND AUTHORIZATION:

I hereby authorize any person acting on behalf of the Governor or his staff to seek information related to my interest in appointment as judge. I further authorize any recipient of a request for information from the Governor or his staff to provide such information for consideration of my application.

_____ _____

(Date) (Signature of Applicant)

NOTICE OF DISCLOSURE:

I acknowledge and understand that this application and supporting materials, when submitted to the Governor of Wisconsin, generally become public record. I therefore understand that this means my name, the fact that I have applied to be appointed as a judge, and my application materials could be released to the public.

_____ _____

(Date) (Signature of Applicant)

Please note that under certain, limited circumstances, applications for appointed positions may be exempt from disclosure under the public records law. If you wish your application to remain confidential to the extent allowed by law, please send a request to that effect in writing along with your application.

Such a request does not ensure that your application will remain confidential. In general, you should expect that all materials submitted will be disclosed. The Governor's Office will honor such a confidentiality request to the extent the law allows. A request for confidentiality will not adversely affect your application for appointment.

Attachment A

IX. LEGAL EMPLOYMENT

Describe your legal experience as an advocate in criminal litigation, civil litigation, and administrative proceedings.

Civil

My civil practice over the past 18 years has involved, primarily, complex commercial litigation. Most of my clients are or have been manufacturers, developers, investors, regional/national/world-wide financial institutions, professional services corporations, and technology companies.

This part of my practice touches on all aspects of business relationships, whether vertically (along the manufacturing to customer axis), or horizontally (between financial institutions/investors and business entities). It also covers real estate issues such as ownership/transfer, condemnation, zoning and land use, easements and other encumbrances.

I have also had the opportunity, from time to time, to litigate constitutional issues. I have represented individuals and the government in First Amendment, Due Process, Equal Protection, and Takings Clause cases.

In addition, I have developed a practice in campaign finance and election law. In that segment, I represent and counsel candidates, office-holders, and campaign contributors. Some of the topics include campaign contributions, reporting obligations, redistricting, and recounts.

Appeals

Appellate advocacy is, to my mind, the most satisfying and rewarding part of practicing law. As a result, I made a point (while at Reinhart) of developing the appellate skills and capabilities of its associates and shareholders, as well as its reputation in the community as a strong appellate resource.

While at Reinhart, I served as head of the appellate practice group. In that capacity I worked with those interested in this area to develop their understanding of appellate strategy, hone their written

and oral presentation skills, and assist them in finding opportunities to enhance their reputation as appellate advocates.

Criminal

I started private practice at McLario, Helm & Bertling, S.C. with the agreed purpose of developing a commercial litigation practice. We also had an understanding that I would assist with the firm's criminal defense cases while the commercial practice developed.

During my 18 months at McLario, I represented individuals in both misdemeanor and felony cases. I tried several cases to juries and the bench during that time, and enjoyed considerable success.

After moving to Reinhart and practicing there for approximately 5 years, I had an opportunity to briefly return to the criminal field again, but this time as a prosecutor. Reinhart offers litigators, in the year before they become shareholders, a chance to serve in the Milwaukee County District Attorney's Office as a special assistant district attorney trying misdemeanor and felony cases. I successfully tried several cases to juries during that summer

Administrative

Only a small part of my practice is in front of administrative tribunals. When I have appeared in administrative cases, it has been almost exclusively before the Government Accountability Board (or its predecessor, the State Elections Board).

How many cases have you litigated on appeal?

In re City of Glendale Community Development Authority Condemnation Award, Parcel 14, 303 Wis.2d 1 (2007)

Panel: Abrahamson, Wilcox, Bradley, Crooks, Prosser, Roggensack, Butler
Author: Prosser
Concur: Abrahamson
Concur: Butler

Issue: Who is the proper recipient of the interest accruing on a condemnation award while it awaits distribution?

I was first chair. The Supreme Court held that the interest belongs to the property owner, not the County. This was a unanimous reversal of the Court of Appeals decision.

In re City of Glendale Community Development Authority Condemnation Award, Parcel 14, 295 Wis.2d 493 (App. 2006)

Panel: Wedemeyer, Fine, Kessler
Author: Kessler
Dissent: Fine

I was first chair.

AKG Real Estate, LLC v. Kosterman, 296 Wis.2d 1 (2006)

Panel: Abrahamson, Bradley, Crooks, Prosser, Roggensack, Butler
Author: Prosser
Concur: Abrahamson
Concur: Bradley

Issue: Whether courts have the authority to extinguish an express easement and compel the property owner to accept an alternative access route.

I was first chair. The Supreme Court held that the property owner cannot be compelled to release his property rights to a developer. This was a unanimous reversal of the Court of Appeals decision.

AKG Real Estate, LLC v. Kosterman, 277 Wis.2d 509

Panel: Anderson, Brown, Snyder
Author: Brown

I was first chair.

Freedom from Religion Foundation, Inc. v. Scott McCallum and Faith Works, Milwaukee, Inc., 324 F.3d 880 (7th Cir. 2003).

Panel: Bauer, Posner, Ripple
Author: Posner

Issue: Whether parolees could use AODA, job training, and parenting education vouchers at a faith-based service provider.

I was first chair for the intervening defendant, Faith Works Milwaukee. The 7th Circuit affirmed the District Court's decision that this voucher program was constitutional.

Osborn v. Board of Regents of the University of Wisconsin System, 254 Wis.2d 266 (2002)

Panel: Bablitch, Wilcox, Bradley, Crooks, Prosser, Sykes
Author: Crooks

Issue: Whether certain student performance data, which is incapable of identifying individual students, is subject to release under the Open Records Act.

I was first chair. The Supreme Court held that the UW System may not withhold student performance data that is not capable of identifying individual students. This was a unanimous reversal of the Court of Appeals decision.

Osborn v. Board of Regents of the University of Wisconsin System, 247 Wis.2d 957

Panel: Deininger, Roggensack, Dykman
Author: Roggensack
Dissent: Dykman

I was first chair.

Board of Regents of the University of Wisconsin System v. Southworth, 529 U.S. 217 (2000)

Panel: Rehnquist, O'Connor, Kennedy, Scalia, Thomas, Ginsburg, Souter, Stevens, Breyer
Author: Kennedy
Concur: Souter, joined by Stevens, Breyer

Issue: Constitutionality of mandatory student activity fees used to support speech with which the compelled contributor disagreed.

I was second chair. The Supreme Court reversed the 7th Circuit in part, and remanded in part.

Southworth v. Board of Regents of the University of Wisconsin System, 157 F.3d 1124 (7th Cir. 1998)

Panel: Bauer, Manion, Rovner
Author: Manion

I was second chair.

Cloeren v. Druschel, Case No. 06-949 (United States Supreme Court)

Issue: The nature of the "tie between a cause of action and a defendant's contacts with a forum" that will support "specific" personal jurisdiction over an out-of-state resident.

This was a petition for writ of certiorari to the Wisconsin Supreme Court. The United States Supreme Court denied the petition.

I was lead counsel.

Green for Wisconsin v. State of Wisconsin Elections Board, 300 Wis.2d 164 (2007)

Panel: Abrahamson, Wilcox, Bradley, Crooks, Prosser, Roggensack, Butler
Author: Per curiam
Concur: Crooks
Concur: Prosser

Issue: Original jurisdiction proceeding considering the conditions under which a candidate may transfer funds from a federal campaign account to a state campaign account.

I was second chair.

Pulera v. Town of Richmond, Case No. 15AP1119 (Wisconsin Supreme Court)

On certification of questions presented by District IV Court of Appeals

Issue: Identifying the event that commences the 30-day period within which to seek certiorari review of a highway order.

I have been appointed by the Wisconsin Supreme Court to brief and argue this case on behalf of Margaret Pulera.

Wexford Heights, L.P. v. Town of Lisbon Plan Commission (Wisconsin Court of Appeals, Dist. IV)

Panel: Not yet assigned

Issue: Whether a stipulated dismissal requires the consent of an entity that moved to intervene prior to the stipulation but before disposition of the motion.

I am first chair.

In the Matter of the Rehabilitation of: Segregated Account of Ambac Assurance Company, Case. No. 11AP561 (Wisconsin Court of Appeals, Dist. IV)

Panel: Not assigned when I left Reinhart.

Issue: The procedural and substantive necessities for properly rehabilitating a segregated account of Ambac Assurance Company.

I served as local appellate counsel for Jones Day.

Data Recognition Corporation v. Mazer Corporation, Case No. 23483 (Ohio Court of Appeals, Second Appellate Judicial District)

Panel: Fain, Brogan, Froelich
Author: Fain

Issue: Duty of a receiver to return property not belonging to the receivership estate.

I was first chair.

Milwaukee Mile Holdings v. Wisconsin State Fair Park, Case No. 09AP1913 (Wisconsin Court of Appeals, District IV)

Panel: Vergeront, Higginbotham, Bridge

Issue: Interaction between the right to intervene and judicial estoppel.

I was first chair.

WS Packaging Group, Inc. v. Global Commerce Group, LLC, Case No. 2008-1233 (U.S. Court of Appeals, Fed. Cir.)

Panel: Settled before assignment

Issue: Determining the comprehensiveness of a defendant's concession sufficient to moot a declaratory judgment action.

I was first chair.

BHP Engineers UK Ltd., v. Rexnord Industries, Inc., Case No. 07-2732 (U.S. Court of Appeals, 7th Cir.)

Panel: Ripple, Manion, Evans
Author: Per curiam

Issue: Interpretation of contract language in a dealership agreement.

I was first chair.

Westphal v. Smelser, Case No. 07AP827 (Wisconsin Court of Appeals, District IV)

Panel: Higginbotham, Dykman, Bridge
Author: Dykman

Issue: Standard for summary judgment in context of a claim for maliciously injuring a person's reputation.

I provided appellate strategy and revised and edited briefs as necessary.

Hartford Citizens for Responsible Government v. City of Hartford Board of Zoning Appeals, Case No. 07AP1265 (Wisconsin Court of Appeals, Dist. II)

Panel: Anderson, Snyder, Neubauer
Author: Neubauer

Issue: Timeliness of an appeal from a decision of a board of zoning appeals.

I was first chair.

Carney v. CNH Health & Welfare Plan, Case No. 06AP1529 (Wisconsin Court of Appeals, Dist. I)

Panel: Wedemeyer, Fine, Kessler
Author: Kessler

Issue: Whether contempt requires a showing of intent.

I was second chair.

Betty Andrews Revocable Trust v. Windsor Homes, Inc., Case No. 06AP368 (Wisconsin Court of Appeals, Dist. IV)

Panel: Dismissed

Issue: Timeliness of appeal to Court of Appeals.

I provided appellate strategy and revised and edited briefs as necessary. We successfully obtained dismissal of the appeal for lack of jurisdiction.

First American Title Ins. Co. v. Dahlmann, Case No. 04AP2318 (Supreme Court of Wisconsin)

Panel: Abrahamson, Wilcox, Bradley, Crooks, Prosser, Roggensack, Butler
Author: Crooks

Issue: Whether a substantial encroachment on land constitutes an encumbrance on title to the property such that it implicates a policy of title insurance.

I provided appellate strategy and revised and edited briefs as necessary.

Hillis v. Village of Fox Point Board of Appeals, Case No. 04AP1787 (Wisconsin Court of Appeals, Dist. I)

Panel: Wedemeyer, Fine, Kessler
Author: Kessler

Issue: Whether a property owner whose residence extends beyond a bluff line may construct an addition to the residence.

I was first chair.

Oda v. Port Washington State Bank, Case No. 04AP1799 (Wisconsin Court of Appeals, Dist. II)

Panel: Brown, Nettesheim, Snyder
Author: Per curiam

Issue: Whether there were any disputed material facts with respect to claims of fraud and racial discrimination.

I was first chair.

Lesniak v. Blum, Case No. 03AP3016 (Wisconsin Court of Appeals, Dist. 1)

Panel: Dismissed

Issue: Standard for issuing restraining order. We obtained a dismissal of the appeal for lack of jurisdiction.

I was first chair.

Pritchard v. Madison Metropolitan School District, Case No. 00AP848 (Wisconsin Court of Appeals, Dist. IV)

Panel: Roggensack, Vergeront, Dykman
Author: Vergeront

Issue: Whether providing health insurance benefits to same-sex couples was outside the school district's authority.

I was first chair.

List and describe the three most significant cases in which you were involved.

AKG Real Estate, LLC v. Kosterman, 2006 WI 106, 277 Wis.2d 509, 691 N.W.2d 711 (Case No. 04AP188).

The Kostermans owned an express access easement over property AKG Real Estate, LLC ("AKG") wanted to develop into a subdivision. The Kostermans preferred their easement to the alternative access route AKG offered, and so refused to release their rights. Because the easement decreased the developable land by about 10%, AKG brought suit to extinguish the easement.

The Court of Appeals ruled that the judiciary may reallocate real property rights when doing so will cause a net increase in value: "In the majority of cases, the free market will adequately allocate land to its most desirable uses. . . . In this case, however, the miniscule benefits the Kostermans derive impose aggregate costs far in excess of the sum total of benefits to all concerned parties."

The costs exceeded, that is, the Court's estimation of benefits. It terminated the Kostermans' easement because "[w]e cannot countenance this grossly inefficient allocation of resources." The Court overruled precedent and established a new standard in which the judiciary may distribute property rights when an owner's economic decisions do not meet the court's standard of rationality.

The Wisconsin Supreme Court's AKG decision reversing the Court of Appeals was outstanding. Bad opinions are immediately identifiable for their departure from the judiciary's proper role. Good opinions, on the other hand, are notable mostly for the fact that they break no new ground; and when it is necessary to do so, they create as few waves as possible. They reflect only judicial authority, they follow precedent, they do not sweep broadly. Instead, they go only as far as necessary to resolve the conflict at hand.

The Wisconsin Supreme Court recognized that the judiciary ought not second-guess an owner's decision to keep his property rights. "Even at the risk of sanctioning unneighborly and economically unproductive behavior, this court must safeguard property rights." The opinion embodying that decision restored precedent, went no further than necessary to return property rights to their proper place, reached

the result required by law, and did all this in an elegant and tightly reasoned manner.

It was my honor to represent the Kostermans in the appellate process as lead counsel.

Baldus v. Brennan, (E.D. Wis., Case No. 11-CV-562) (Wood, Stadtmueller, Dow)

In 2011, the Wisconsin Legislature accomplished what it had been unable to do since the 1970 census - pass a bill redistricting all state and federal legislative districts in the State. Nonetheless, the redistricting legislation was challenged in federal court on both constitutional and statutory grounds.

As lead outside counsel, I (in conjunction with the rest of the team) conducted a successful multiple-day trial in which the 3-judge panel affirmed all Congressional districts as written, and all State districts but for two adjoining assembly districts on the south side of Milwaukee (AD 8 and AD 9). The court approved the outer boundaries of the two districts, and simply adjusted the line dividing the two.

Redistricting is a quintessentially political activity, the conduct of which belongs to the political branches of government. This case represented an attempt to replace the judgment of the political branches with the judgment of the judiciary. The panel rejected the overture, and instead affirmed the Legislature's work with the minor exception noted above.

In the Matter of the Recount of Votes for Wisconsin Supreme Court Justice, Case No. 11CV1863 (Dane County Circuit Court).

In a sense, this was not really a case at all, save only for the formal proceedings to determine how the recount would be conducted and when it would end. The essence of the matter involved developing and executing a state-wide strategy to ensure a fair and accurate recount by each of the 72 boards of canvassers.

The public perception of this race, after passage of Act 10, was that it had become a referendum on Governor Walker's vision for the State. But it was equally about whether we should have an activist Supreme Court. The motivating factor for those who backed Joanne

Kloppenburg was, in large part, an understanding that she would be the necessary fourth vote to strike down politically conservative legislation. Electing a jurist to invalidate politically disfavored legislation is a fair definition of judicial activism.

Justice Prosser, on the contrary, had spent the previous twelve years carefully evaluating cases according to the law, without favoring anyone's political agenda. His understanding of the judiciary's proper role has earned him the well-deserved reputation of an impartial, intelligent jurist of integrity and conviction.

Jim Troupis (co-counsel) and I developed the overall strategy for the recount. We then assembled and directed an ad hoc corps of volunteer attorneys that, if it were a law firm, would have been one of the largest in the state. These attorneys worked with and supervised a body of over 300 volunteer staffers who did the hard work of reviewing every ballot cast in this election (approximately 1.5 million), watching for any defects in the process, and ensuring that every vote cast for Justice Prosser was properly counted. In his victory speech, Justice Prosser described my role in this matter as a combination of Generals Omar Bradley and George Patton.

Throughout the process, Mr. Troupis and I continuously adjusted and implemented a strategy designed to (1) protect the verdict delivered by the people of this State, and (2) create a record that would convincingly demonstrate there would be no basis for appealing the recount result to Circuit Court. We, and Justice Prosser, are pleased with the result. And I remain grateful for the opportunity to have served Justice Prosser in this capacity.

XII. HONORS, PUBLICATIONS, PROFESSIONAL AND OTHER ACTIVITIES:

List any published books or articles, providing citations and dates.

Kelly, Daniel. "Rawls and Civil Society", *John Rawls and Christian Social Engagement: Justice as Unfairness* (Forster & Bradley, eds.) (Lexington Books, 2014);

Daniel Kelly, *Does Windsor Strengthen or Weaken Religious Pluralism? A Debate*, FIRST THINGS (March 30, 2015) (http://www.firstthings.com/web-exclusives/2015/03/the-march-kelly-exchange)

HANG TOGETHER (www.HangTogetherBlog.com).

I have been a contributor to this group blog, edited by Greg Forster, between 2012 and 2015. I can provide URLs for each blog post, if the Committee is interested.

I have also written a few newspaper commentary pieces on the topic of the rule of law and judicial elections over the past several years, but I do not have the citations.

Describe any courses on law that you have taught or lectures you have given at bar association conferences, law school forums, or continuing legal education programs.

Public Interest Presentations

- 2010 Wisconsin Supreme Court Conference Review & Preview

  Hosted by Marquette University School of Law
  Presenter, Civil Rights & Liberties Panel

  Survey of the most significant Wisconsin Supreme Court cases from the 2009 term touching on civil rights and liberties.

- 2009 Wisconsin Supreme Court Conference Review & Preview

  Hosted by Marquette University School of Law
  Presenter, Civil Rights & Liberties Panel

  Survey of the most significant Wisconsin Supreme Court cases from the 2008 term touching on civil rights and liberties.

Continuing Legal Education Presentations

- 2008 Lohrman CLE Presentation on effective use of paralegals

  Drafted and presented a two hour course on best practices in incorporating paralegals into a successful complex-litigation team.

- 2007 Lohrman CLE Presentation on effective use of paralegals

  Drafted and presented a two hour course on best practices in incorporating paralegals into a successful complex-litigation team.

- 2007 NBI CLE Presentation on real estate issues

  Drafted and presented a program discussing the most common litigation-inducing errors in drafting easements, and how to avoid them.

Describe any other speeches or lectures you have given.

- Milwaukee Forum, 2008

  I debated the practice of government-required contract set-aside programs.

- Milwaukee Forum, 2003

  I debated the benefits and detriments of affirmative action programs.

XIV. REFERENCES

Mr. James T. Barry, III
Milwaukee, Wisconsin
414-271-1870

Mr. Steve Biskupic
Mequon, Wisconsin
262-241-0033

Mr. Ray Taffora
Madison, Wisconsin
608-263-7400

Justice Rebecca Bradley
Milwaukee, Wisconsin
608-266-1883

Mr. Thomas Shriner
Milwaukee, Wisconsin
414-297-5601

Mr. Andrew Cook
Madison, Wisconsin
(608) 267-1932

XV. ADDITIONAL INFORMATION

Explain in 500 words or less why you want to become a judge/justice.

I want to become a Justice of the Wisconsin Supreme Court because:

- Civilization depends on ordered liberty, functional economics, and individual rights;
- The rule of law is an indispensable foundation for ordered liberty, functional economics, and individual rights;
- The judiciary is uniquely positioned to protect and nurture the rule of law; and because
- None of the above matters unless those entrusted with care for the rule of law are willing and able to consistently apply its first principles in clear and certain terms, even when those principles conflict with their personal policy preferences.

There is no end to the mischief the judiciary causes when it abandons its role of declaring what the law is, and instead arrogates to itself the power to develop new law in place of what it received from the ultimate lawgivers – the people of the State of Wisconsin and the United States.

It is my desire to commit the remainder of my professional career to serving the people of this State by applying, protecting, and preserving the rule of law in the Wisconsin Supreme Court.

In 500 words or less, name one of the best United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

The Anti-Federalists, arguing against adoption of the Constitution, identified the Commerce Clause as a particularly likely source of abuse. The abuse they had in mind was the government's arrogation of all authority concerning commerce, both substantively and procedurally, without respect to whether the activity in question was intra-state or interstate.

Although the Commerce Clause contains, and properly so, its own structural limitations, the Courts have honored them more in the breach than in their observance. And in doing so, they have borne out the Anti-Federalists' prescience.

Those limitations made a welcome, albeit short-lived, reappearance with the Supreme Court's decision in *United States v. Lopez*.

The Court's opinion is significant not just for the fact that it recognized, and applied, a limit on the Commerce Clause, but more for the reasoning that led to the conclusion. The Court started its analysis with first principles. *Real* first principles – like the recognition that the Constitution creates a government of enumerated powers, that those powers are few and defined, and that the federalist principle this represents was adopted to ensure the protection of our liberties.

Although the Court did not reject the "affecting commerce" locution (which had long ago been used to pick the lock that had originally constrained the Commerce Clause's reach), it at least recognized that there must be an outer boundary beyond which Congress would effectively swallow the several States' general police powers.

As an opinion for the Court, therefore, *Lopez* is the best in the last 30 years for its recognition of a structural limitation on the reach of Congressional authority.

I notice that the question posed by the application is broad enough to encompass *any* opinion, so I will spend a few more words on a dissenting opinion that must surely qualify as amongst the very best.

Justice Scalia's deep appreciation for first principles, and impatience with their neglect, was on full display in his thundering dissent from *Obergefell v. Hodges*:

> Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court. The opinion in these cases is the furthest extension in fact—and the furthest extension one can even imagine—of the Court's claimed power to create "liberties" that the Constitution and its Amendments neglect to mention. This practice of constitutional revision by an unelected committee of nine, always accompanied (as it is today) by extravagant praise of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.

Just so. It is said no man is indispensable, and surely that must be true. But we shall not see his equal again. And so this will probably always stand as one of the best opinions for the courage it took to

speak the truth, the ability to do it in clear and compelling terms, and the sheer power of its prose.

In 500 words or less, name one of the worst United States or Wisconsin Supreme Court opinions in the last thirty years and explain why you feel that way.

Kelo v. City of New Lisbon, Connecticut, 545 U.S. 469, 125 S.Ct. 2655 (2005).

When people adopt a constitution, they do two critical things. First, they create a governing body and breathe life into it by delegating to it some of their pre-existing authority. Second, they restrict what that government may legitimately do, either implicitly (by delegating only a limited amount of authority) or explicitly (by specific prohibition).

Errors of constitutional magnitude typically occur when the government either exercises authority the people did not delegate, or acts in specifically forbidden ways. It is the judiciary's duty, upon allegation of such error, to compare governmental action to the constitution and declare whether they are at odds. This it must do even when it contradicts personal political preferences or prevailing public sentiment. The proper measure of an opinion's merit is how closely it adheres to this standard. *Kelo* does not fare well in this light.

In concluding that a private "taking" is justifiable upon the government's belief that the transferee will put the property to a more economically productive use, it exercised legislative – not judicial – authority. And in doing so it simultaneously offended both the implicit and explicit limitations on governmental authority.

The Court abdicated its judicial office so that it might opine on the wisdom of the City's legislative decisions. In describing why "public use" does not actually mean "use," it observed that "[n]ot only was the 'use by the public' test difficult to administer . . . but it proved to be impractical given the diverse and always evolving needs of society." *Kelo*, 125 S.Ct. at 2662. When a court refers to something evolving, it is a sure sign it is about to legislate.

The Court operated as a legislature by making the dispositive question a matter of legislative discretion rather than compliance with a legal standard: "The disposition of this case therefore turns on the

question whether the City's development plan serves a 'public purpose.' Without exception, our cases have defined that concept broadly, reflecting our longstanding policy of deference to legislative judgments in this field." *Id.* at 2663 (emphasis supplied).

The judiciary owes no deference at all to a legislature's position on a question of law. So when the Court deferred to the City's "legislative judgment" that it should have title to the petitioners' properties, it unmistakably signaled that the Takings Clause no longer stands as a legal prerequisite that must be satisfied before exercising the power of eminent domain.

The Court further erred by exceeding governmental authority. No governmental entity in this country has the authority to allocate property rights based on economic utility. To the contrary, the Takings Clause prevents precisely what the *Kelo* Court allowed. For all of these reasons, *Kelo* is the worst opinion in the last 30 years.

In 500 words or less, describe your judicial philosophy.

Our constitutional republic, and the rule of law, can thrive only when the judiciary operates within its proper boundaries. Chief Justice Roberts, in his confirmation hearing, memorably analogized the judicial role to baseball. He observed that "[j]udges are like umpires. Umpires don't make the rules; they apply them." He then promised he would "remember that it's my job to call balls and strikes, and not to pitch or bat." While this is a good and pithy summary of judicial conservatism, its power comes from the truth that lies at its foundation.

As Chief Justice Roberts would surely agree, his admonition will attract few adherents without a compelling explanation of why judges must restrict themselves to that role. The short answer is that judges are umpires because the function of their office admits of little else.

In our tri-partite form of government, each branch has a discrete function that corresponds roughly to the temporal framework within which it works. Thus, it is peculiarly the legislature's province to address the future. It determines what the laws shall be that will govern tomorrow's actions. And the executive concentrates on the present; he decides what shall be done to properly carry the laws into effect today.

The judiciary takes for itself matters of the past. It compares what has already happened against the laws as they existed at the time the acts occurred. It is because of the judiciary's backward-looking function that a judge may legitimately be nothing more than an umpire. Changing the decisional standard after the act has already occurred is, by definition, antithetical to the rule of law. So, for example, it is unjust to change the strike zone after delivery of the pitch because it prevents the pitcher from knowing where to throw the ball.

Post hoc adjustment of the strike zone is the essence of judicial activism. It usurps the legislature's forward-looking function by reading into the past a new rule of decision. It causes the law to lose both its certainty and its predictive capacity. People are no longer able to plan their actions to comport with the law. They are at constant risk that today's lawful behavior may be transformed into unlawful tomorrow should a judge exercise legislative, instead of judicial, authority. Departure from the proper judicial role, therefore, exchanges the rule of law for the rule of man, something that Western political development has been in the process of rejecting for centuries.

8. Rawls and Civil Society

Daniel Kelly

Rawls fostered a rebellion, of sorts, by pitting fairness against justice. He dissolved society and its institutions in the philosopher's crucible, reconstituted them with a bias towards greater sameness, or "fairness," and anointed the result "justice." Thus did fairness and justice abandon their critical alliance to become structural rivals.

Rawls teaches us that, if we want a society focused primarily on fairness, there will be no place in the remade world for some of the elements we find in the crucible. Indeed, when he was done with his remaking, Rawls left behind many of those things that exist without our creation, that are impervious to our commands. Things that, unbidden, bring structure to institutions, method to practice. Things like marriage, and the rule of law. Reality's integrity was compromised as the new world grew up around the philosopher's imagination. And so fairness found itself occupying justice's office, but not fully equipped to meet its responsibilities.

Fairness versus Justice

When I came to Wisconsin, all those many years ago, there was an unspoken understanding that, in crossing the state line, I had taken a great oath: I would support the Green Bay Packers in good times and bad, in winning and in losing, till the stars fall from the sky and the cows come home. And so it came to pass, late of a Monday night a few seasons ago, that I found myself accosting a phosphorescent referee and earnestly explaining why a particular call could not possibly have proceeded from a well-ordered and rational mind. At least that's how *I* remember it. Others recall something about a bellowed "That's not fair!" just before I allegedly stomped from the room in disgust. We've agreed to disagree on the particulars.

Even if I had reacted that way, it was entirely justifiable. The Packers were ahead, it was the end of the game, and those who were supposed to lose had just lofted a last-second "Hail Mary" into the end zone. As the ball descended towards the receiver, it slowed, Matrix-like, while the implications of the next instant ran through everyone's minds: Disrupt the pass, and the Packers walk off the field to the frenzied acclaim of their grateful and adoring fans; otherwise, the scorpion sting of defeat. There followed a mad scramble, a desperate grab, and . . . interception and victory! But then came the unexpected, the irrational, the unacceptable. "Touchdown!" cried the referee who wasn't watching the game.

Packer Nation was in an uproar, and over the remainder of the season, and into the next, fans returned to this blown call time after time. And with each revisiting, you could see their blood pressure rise as they dressed down the referee yet again for the unfairness of what he did.

In all of the roiling discontent, however, there was also a telling silence, something evocative of the dog that didn't bark in the Sherlock Holmes mystery: No one said the Packers' loss was unfair. There was, to be sure, plenty of heartburn over the consequences for the rest of the season. But even the most ardent fans accepted the fact that this game couldn't, and more importantly *shouldn't*, be put in the "win" column.

How is that possible? How can we decry the legitimacy of the referee's decision that caused the loss, without also calling into question the fairness of the loss itself?

I have five children. They are, I assure you, all about fairness. I know this because they tell me so with some frequency. "That's not fair!", for instance, will follow with metaphysical certainty from any suggestion that one of them ought to clean an inch more of the house than the others. And the exactitude with which they divide a cake into pieces would make a NASA engineer tear up. Their sense of fairness is deeply embedded, and insistent.

So what does that have to do with referees' calls and lost games? When we talk about "fairness," we are not always addressing the same thing as we move from one context to another. Sometimes, like my children, we are talking about simple sameness: Am I cleaning more than you? Is my piece of cake smaller than yours?

But at other times, we're talking about something deeper, more involved. It's not about sameness, at least not as an outcome. It is, instead, a question of fidelity to a standard. Or, to name it by its proper name, we are concerned with justice.

Justice is not, as it turns out, the same thing as fairness. Fairness compares me to thee, and nothing more, while justice compares both of us to an external standard, a measuring stick. Fairness requires sameness, justice requires fidelity.

Fairness is indispensable to achieving justice, but it is not justice itself. Nor is fairness the measuring stick. It is, instead, the process of comparing you and me to the external standard in exactly the same way, without favoritism, and without doctoring the markings that give the measuring stick meaning.

That's why the referee's call continues to chafe, while the fact that the game is in the loss column is disappointing, but otherwise unremarkable. Our charge of unfairness was really an assertion that the referee had failed to do justice. His job was to conscientiously enforce the rules governing how the game is played. The outrage was consequent upon the widespread conclusion that he failed to do so. When he measured the Packers' performance on that play, he fudged. He called something a touchdown that the rules said was an interception. He did not accurately apply the measuring stick to the Packers and they-who-were-meant-to-lose, and so he caused an injustice.

There was no similar outrage over the conclusion that the Packers had lost the game. As the highly-paid commentators are fond of saying, "you can't win if you don't put more points on the board than the other team." That's the rule. We accepted the legitimacy of the loss because the officials who certified the result of the game acted with fidelity to the rule. They-who-must-not-be-named scored more points, and so they won. That was an accurate application of the rule. The Packers didn't, and so they didn't. That was also an accurate application of the rule.

But it needn't be that way. We could, if we wished, with a little creative reordering of the terms of the game, force a sameness of outcome. That is, we could dissolve the old order in favor of a new one, one that ensures the game's outcome does not turn on differences in the player's talent, or the coaches' strategic insight. The resulting contest would no longer be recognizable as football, and it would attract no one's interest. But we could do it if we wished, because football is an almost entirely artificial construct – it can be whatever we want it to be.

Societies, however, are not as malleable as sports contests. Can we bend them and their institutions into whatever shape we wish? Or does reality have certain features baked into it that, no matter how hard we try, we cannot ignore without hazarding injury? This is where Rawls' particular contribution to political philosophy comes into play, and it is here that we will discover whether "justice as fairness" requires more plasticity than is available.

Fortunately, Rawls didn't intend the National Football League to adopt his theory of "Justice as Fairness." Unfortunately, he did intend the reinvention of the rest of society around its principles. If sports contests doctored to reach a "fairer" result are unpalatable to you, you'll probably not favor Rawlsian "fairness" in the hands of functionaries in Washington, D.C. or your state capital. And that's the thing about which we are particularly concerned in this chapter – the practical consequences that follow when a dissolved and reconstituted society mistakes fairness for justice.

The Equality Imperative

If we are to accurately identify Rawls' mischief in the legal realm, we must first establish what government is legitimately supposed to do, and account for those permanent things that do not yield to our imagination. Think of it this way: When the Treasury Department teaches its agents how to identify counterfeit bills, it spends most of its time teaching them what legitimate ones look like. Once they have that firmly in mind, fakes will jump out like Monopoly money. Similarly, if you have a decent framework within which to identify the proper parameters of governmental action, intrusions will look as out of place as a Santa Barbara boy in a Wisconsin winter.

In the beginning there was God, so the Bible tells us. And because everything has to come from somewhere, all authority must come from him by virtue of having existed before all else. But he did not stay alone – he made us. In doing so he spread complexity throughout the world. That complexity raised questions about how to live with each other, resolve differences, work cooperatively, and maintain freedom. As the amount and nature of our interactions multiplied, the need to wisely answer those questions grew exponentially. Just figuring out who has the authority to make which decisions in such a society has proven a daunting task for most people throughout history.

We can tease out some of the complexity by observing how our Creator delegated some of His authority. Those things He created, He created with a purpose, and authority followed the purpose. So we have, as His created beings, individual authority. That is, man's duty to honor God by reflecting His character in all of its multitudinous ways through the exercise of his free will. Man, however, was not alone; he had, most immediately, a family. And that family had a purpose: Mutual love and support, and bringing the next generation into being and maturity. There simultaneously arose, therefore, familial authority: A couple's right and obligation to arrange their responsibilities in a way that will foster love and support for one another, and for their children (should there be any).

The families, of course, were not alone either. They combined to form societies, in which they interacted in a variety of complex ways in pursuit of almost infinitely differing ends. So, for example, they organized and employed their talents to create and exchange value in a way that could not be done alone (economics), coalesced around their faith in their Creator so that they might better serve him and others (the church), formed co-operative undertakings with like-minded individuals (philanthropic and fraternal organizations), and so on.

But that is not all the families did when they came together in society. They did something else, something that, in its nature, differed profoundly from all else they had done: They delegated some of their own authority to others. Those in whom they vested this authority have gone by many names over the eons, but we can generically call them "governors." And although the conceptual structures within which they have exercised their borrowed authority has taken many forms, they all answer to the name "government."

What, then, are we to say of a governor's legitimate role? As with all else, the purpose behind creation of a government defines the role and scope of a governor's authority. And that, in turn, depends entirely on who the authority-delegators and authority-borrowers are in relation to each other before the delegation happens.

Because we are each created in the image of God, we are each equal. Not in talents or physical capabilities, of course. But in our essence, that which makes us more than just our physical beings. That equality of essential dignity means no one

has the authority to assert his will against you in a way that would deprive you of your rights; doing so would treat you as if you belonged to a lesser moral order. Thus, for example, when my neighbor comes to take my horse, or car (or whatever) against my will, I may actualize my equality by forcefully preventing his theft. So too with the protection of my life and the lives of those for whom I am responsible. And so on with respect to all of those decisions that I may make consistently with my obligations to my family, to God, and my duty to honor the equality of others' essential dignity. As we will find later in this chapter, this is one of those stubborn pieces of reality that are impervious to the philosopher's crucible.

The trick, then, is to describe a governor's role and corresponding authority that respects the fundamental equality of all individuals as established by our Creator. The document that, over 200 years ago, announced America's leave-taking from a tyrannical government did that better than any people before or after has ever done. The centerpiece of our Declaration of Independence, its living heartbeat, is the unparalleled "Equality Imperative":

> "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."

The Equality Imperative is a stunningly concise and poetic distillation of centuries of development in Western political philosophy. It captures the three truths indispensable to a just government. First, it recognizes that our rights pre-exist government. Second, it accurately describes the purpose of government – securing those pre-existing rights. And then there is the third truth, perhaps the most important of the trio, because it acknowledges the source (and, therefore, the limits) of a governor's authority.

The third truth expressed by the Equality Imperative is that governors have no inherent authority of their own. None. They have only what their co-equal members of society lend them. We are fond of saying we are a sovereign people in this country. It's true, which is why our Constitution's preamble explains that it was "we the people" who established our political union. Governors, therefore, cannot be sovereign because their authority is derivative of, or borrowed from, the people. And because they do not suddenly become superior beings upon taking the position of governor, they have no ability to create additional authority *ex nihilo*. Consequently, it is an unalterable law of nature that their stock of authority can never be greater than what others choose to lend them. In the words of the Equality Imperative, "[g]overnments . . . deriv[e] their just powers from the consent of the governed."

So what authority may the people lend their governors? We can only lend what we have, so anything we delegate to our governors must exist first in ourselves. Thus, when we choose our governors we place in their hands the responsibility – and authority – to enforce some of the rights that were already ours to enforce in our individual capacity. For example, I have the individual authority to prevent someone from trespassing on our property to take our horses. Because that is my authority to exercise, I may delegate it to someone to exercise in my place. Conversely, my neighbor has no authority to make me more charitable than I am, nor does anyone else. It doesn't matter how many people agree that I ought to be more generous, still they cannot engage our governors to make me so because zero authority multiplied by a multitude is still zero. Because there is no generosity-making authority, there is nothing to delegate to our governors.

This structural limitation on a governor's authority is exceptionally important because governors act, always, coercively. That is the whole point of the delegated authority. They compel you to do what you do not want to do, and prevent you from doing what you *do* want to do. Any governmental action, no matter how benign it may appear, will always carry with it some element of coercion. That's a good thing, when constrained by the Equality Imperative. Life would be an uncertain thing if government didn't effectively prevent others from stealing our property or threatening our lives. And driving about town would be a dicey affair if we couldn't compel people to drive on the right side of the road (with apologies to any Imperial readers).

Coercion will always do one of two things, one of them legitimate, the other not. It will either maintain equality by preventing one person from usurping another's rights, or it will destroy that equality by subjugating one person to another. For example, when we compel people to drive on the correct side of the road – even when they might want to do otherwise – we prevent the willful driver from endangering your life. That act of coercion is necessary to maintain equality because no driver has the authority to so threaten you. It is consistent with the Equality Imperative because it preserves the essential equality of everyone involved. The coercion is, therefore, legitimate.

But if we compel you to attend a Protestant service when what you really want is to attend a Catholic Mass (or no religious service at all), then the exercise of the same type of power would lack authority (and, consequently, legitimacy). Your choice of church makes no one less than your equal, and so impinges on no one's rights. Our governors, therefore, lack any justification to intervene because there is no right to vindicate or enforce; there has been no disturbance of essential equality. By intervening in your choice of church in the absence of such a disturbance, the governors' action would itself violate the Equality Imperative because their coercion would make you less than equal to your fellow citizens.

The Equality Imperative, because it derives from and is encompassed by the unalterable fact of our equal moral status, belongs to that realm of reality that is beyond any philosopher's power to dissolve. Every governmental form, regardless of its distinguishing features, must respect that principle. To the extent it does not, that is the measure of its lack of legitimacy.

Thus, when we analyze a governor's action, here is the process we must follow. First, we ask whether the purpose of the proposed intervention is consistent with the Equality Imperative. If it is not, the proposed action will violate the imperative – and any act in derogation of that imperative will be, by definition, illegitimate (because it subjugates you to your peers). If the answer is affirmative, however, then – and only then – we consider what might be the most prudent manner of intervening. The first question is jurisdictional (can we give, and have we given, the governor the authority to act at all?); the second is prudential (out of all the options available, which should he choose to best promote human flourishing?).

Now we are ready to consider Rawls' offering and determine whether conflating justice and fairness promotes the Equality Imperative, or instead represents a counterfeit view of how our governors may operate. We'll do that by analyzing three specific issues that exhibit Rawlsian dynamics. First, we'll consider the institution of marriage so that we may observe the damage consequent to assuming that "sameness" in our societal institutions is more important than the objective realities they were meant to address. Next, we will look at affirmative action to explore how redistributing primary goods to match an idealized image of society necessarily institutionalizes moral inequality. And finally we will address how Rawls' theory would, in practice, erode the rule of law through legislative dereliction, judicial activism, and executive caprice.

Marriage

Sameness can be an extraordinarily powerful leveling impulse. It has no tolerance for complicated terrain in which form follows function. Its insistent command lays all flat before it. Which brings us to marriage and the razing of an institution that traces its origin back to the dawn of all things.

Our entry point for this discussion is the recent drive to institutionalize same-sex marriages. That is just the entry point – the controversy illuminates an issue much broader than whether, upon entering a marriage covenant, the bonds shared by Mary and Jane are of the same type and gravity as those between Tom and Sarah. But we'll start with same-sex marriage because its proponents, in demanding access to marriage on (they say) the same terms as heterosexual couples, are forcing us to figure out whether the terms they offer are compatible with the institution of marriage.

"Fair Wisconsin," aptly named in light of its Rawlsian insistence on equating justice with sameness, is one of the organizations agitating for same-sex marriage as an institution. They say that "LGBT people and their families deserve equal treatment by our state and federal government and the respect and support of their loved ones, communities, colleagues and employers."[1] Well, sure, and who could disagree with equal treatment? But in the context of the institution of marriage, can we treat same-sex couples the same way we treat heterosexual couples, or do certain pieces of reality resist the urge for sameness?

If justice is fairness, the question practically answers itself. Rawls requires equal distribution of all primary goods, and access to all opportunities without regard to differences beyond a person's control. Those in the LGBT community believe themselves to have been born as they are, so the difference in sexual orientation cannot be a basis for treating them differently from those of traditional sexual alignment. Fairness begins its work at that point, compares me to thee, and requires sameness as an outcome.

If, however, justice requires equal application of an external standard to you and me, our inquiry must focus on the standard before we consider its application. In this case the external standard is the nature of the institution of marriage. Justice, at least as I've described it above, requires that we compare same-sex couples and heterosexual couples to that standard in the same way. And that, in turn, requires that we determine what we mean when we refer to the "institution of marriage." Specifically, we must inquire into whether the institution grew up around an unalterable piece of reality, or instead expresses a mere social convention that we may alter at will, like the rules of a football game.

Let's start with this: Under current law, any two or more people who wish to marry may do so, and they don't need a governor's permission. This is true both with respect to the number of people involved and their sexual orientation. If two homosexuals wish, they may engage in a marriage ceremony and thereafter live as a married couple. And they may, to their hearts' content, tell their friends, family and strangers they are married, and hold themselves out as Mr. and Mr. Smith to the end of days if that is what they desire. All of this they can do today, and no law will get in their way.

It is not just the marriage relationship, however, that the same-sex lobby wants. That they can have for the taking. What they want is access to the *institution* of marriage. The book of Ecclesiastes says that "[t]hough one may be overpowered, two can defend themselves[; a] cord of three strands is not quickly broken."[2] Christians have often taken the three-stranded cord as a representation of marriage – one strand each for the man, the woman, and God. With a slight

[1] Fair Wisconsin Annual Report 2011-12.

[2] Eccl. 4:12 (NIV).

modification, this metaphor will do good service in illustrating the institution of marriage, of which the marriage relationship is just a part.

In the institutional sense, marriage is a weaving together of the couple, God, and society. The first strand is the relationship between the married people. It is where they find mutual attraction, develop trust and commitment, pledge their troth one to another. The second strand represents the Creator, and symbolizes the couple's acknowledgement that their union in marriage creates something that did not exist before, and that they are answerable to Him for its care and nurture.

The third strand, the one that transforms "marriage" into "the institution of marriage," is the rest of society. It is in reference to this strand that conservative elements of society tell homosexuals they may not marry because marriage is by its nature something that can obtain only between a man and a woman. It is also where homosexuals argue that their love for one another should enjoy the same legal stature as that of heterosexuals. And so it should, if this were about love, or essential dignity, or the spiritual nature of their union. But it's not.

Marriage, as far as our governors may address it, is entirely functional. They may focus solely on how the couple relates to the community in which they live. They can have no interest in the first strand at all. Marriage license applications do not ask whether the betrothed love each other. Nor do they ask them to affirm that they will derive dignity from the anticipated union, or that they will be proud to be married. If a couple's decision to marry was a coldly calculated means to an otherwise lawful end, instead of the culmination and expression of a passionate love, our governors would proceed with the same impassive inquiry into consanguinity and marriageable age.

Our governors must not take any interest in the second strand either. It is not given to them to mediate the relationship between God and the couple. So even if they could discern whether God approves of a type of marriage arrangement, they would have no authority to speak on the subject.

Our governors' proper role as the third strand – the mediator between the couple and community – is the same as it is everywhere else, *viz.*, to uphold the Equality Imperative. Applying that mandate in the marriage context identifies what the governors can and must do, but it does not change their primary responsibility: To secure rights.

Here, our governors express the Equality Imperative by contributing permanence to the marriage relationship. The government's legitimate interest in marriage stems from our understanding that if Tom and Sarah get together, they might just produce a child. And if they do, someone has to care for the wee little one. That's an obligation the parents owe to the child, and it is a right the child may legitimately demand his parents respect. It's also an obligation the parents owe to

the rest of society. If they do not care for their offspring, the burden falls uninvited on us. Parents do not have a right to compel others to provide for their children, so governors maintain essential equality by making sure parents tend to their own obligations.

The state formalizes the marriage relationship, therefore, in recognition of procreative potentials and the corresponding rights and obligations that arise when a new creation comes to pass. The state's contribution to marriage is the permanence of the relationship for the sake of protecting and providing for the fruit of the union, and preventing parents from shrugging that responsibility off on the rest of society. Absent the stable framework of marriage, children all too frequently become functional wards of the state. And without that framework, children are deprived of their rightful claim on their parents for protection and provision. Our governors, using their borrowed authority, may legitimately cement the marital relationship because in doing so they protect the rights of both the potentially abandoned children, and society's right to not bear the burden of raising someone else's child.

That's the institution of marriage. The third strand, the one that transforms marriage into an institution, does nothing but preserve rights and enforce obligations – and properly so. There can be no broader role for our governors, because going further would lead them outside the Equality Imperative, to where they have no authority to act. A government's reach into marriage does not extend to its spiritual nature, nor is it moved by whether the marriage participants love each other or derive any psychological benefits from their relationship. And although the governors' actions may have some incidental, derivative effects on those subjects, they have no authority to address themselves to such issues.

So what happens in a throw-down between the traditional institution of marriage and one reimagined primarily in terms of fairness? A recent case before the United States Supreme Court shows it's a monumental mismatch: the multi-millennial institution went down without landing a punch. The case was *United States v. Windsor*, and the question before the Court was whether our federal governors may define marriage as something subsisting between one man and one woman. In saying "no," the Court illuminated the power and destructiveness of "justice as fairness" in the legal realm.

The case presented the Court with two options. First, it could pursue justice by comparing same-sex marriage to an external standard, and then faithfully declaring whether the one is compatible with the other. That external standard is, of course, the contours of the three-stranded institution of marriage. Or second, it could pursue "fairness" by comparing same-sex marriage relationships, not to an external standard, but instead to heterosexual marriage relationships with the goal of achieving sameness between the two.

It opted for the latter. Doing so, however, resulted in the effective elimination of the institution of marriage. Here is how it happened.

The language of the third strand – permanence of the union, which is both natural and necessary in the context of heterosexual marriage – is a meaningless jumble in the context of same-sex marriage. Same-sex couples, in fact, present nothing on which the Equality Imperative can act. There is nothing about a same-sex couple's relationship that puts society at risk of shouldering uninvited responsibility. And because no child will ever come of their sexual union, our governors will have no need to enforce a wee one's right of nurture and protection against the couple. Without a right in need of protection, governors have no work to do. But instead of questioning whether our governors have any place in a same-sex couple's business, the Court succumbed to the leveling impulse of fairness-inspired sameness.

Because the institutional aspect of heterosexual marriage makes no sense in the context of same-sex marriages, admitting same-sex couples into the institution requires some redefinition. Square pegs don't fit into round holes unless the peg loses some of its squareness, or the hole gives up some of its roundness.

Our governors' involvement in marriage, the Court concluded, is no longer about the third strand. In fact, it dismissed the significance of that strand entirely, and it did so (as we say in the law) "*sotto voce*." Literally, that means "below the voice," under your breath, a whisper. We use that term to describe a decision based on what a court leaves unsaid. The Court used the cover of silence to excise the institutional aspect from marriage without having to say what it was doing. "[T]hroughout the history of civilization," the Court said, "marriage between a man and a woman no doubt had been thought of by most people as essential to the very definition of that term and to its role and function . . . ."[3] Nowhere in the rest of its opinion did the Court explain, or even recognize, what that historical role and function had been. That was both the beginning and the end of its inquiry into the nature of the institution of marriage.

But that didn't stop it from coming up with a new definition. And by defining marriage without an inquiry into the institution's role and function, the Court effectively ruled they were superfluous. Under its breath, without having said a word.

That left same-sex and traditional marriages on the same footing. By stripping the third strand from the institution of marriage, there was no longer anything distinctive about heterosexual marriages upon which the law could operate. The two remaining strands can comfortably accommodate both styles of marriage (and many more, by the way).

---

[3] *United States v. Windsor*, 570 U.S. ___, 133 S.Ct. 2675 (2013).

This was no consequence-free analytical change. After chiseling enough roundness from the institution of marriage to make same-sex unions fit, the Court was left with a conundrum. If our governors' involvement in marriage is not about making the relationship permanent for the purpose of protecting the rights of any children who might spring from the union, and society's right not to raise them, what, exactly, is their role? Are they supposed to referee the couple's love for each other? Or perhaps declaim on the morality of the marriage relationship as mediators between God and the couple? Those are the only two strands left, so our governors must either address themselves to one of them, or retire from the field entirely.

The Court, perhaps unsurprisingly, was not in a retiring mood, so it searched for a way governors could insert themselves into the two remaining marital strands. After recognizing that most people throughout history had thought marriage was something that, by its nature, could only subsist between a man and a woman, the Court welcomed the rise of a more enlightened people in our midst: "For others . . . there came the beginnings of a new perspective, a new insight."[4] The insight, as it turns out, is that our governors' role is to involve themselves in the personal and spiritual aspects of the marriage relationship, rather than the institutional.

First, the personal. The Court said our governors may rightfully conclude "that same-sex marriage ought to be given recognition and validity in the law for those same-sex couples who wish to define themselves by their commitment to each other."[5] That self-definition will enable them to "live with pride in themselves and their union and in a status of equality with all other married persons."[6]

Governmental involvement in that aspect of marriage, however, is completely unnecessary. A couple does not need a law "to define themselves by their commitment to each other." If that's how they define themselves, one law more or less won't affect it. And pride is consequent upon their personal approval of what they have done, something that is beyond any law's reach.

The real point of involving our governors in this aspect of marriage is to require the approval of others, to normalize their chosen arrangement, to give them a compelled "status of equality with all other married persons." The Court, however, never said when or from where our governors received the authority to address themselves to the personal aspects of the marital relationship.

Second, the spiritual. In addition to what they can do with the personal aspect of marriage, our governors can also, apparently, make spiritual adjustments. Legalizing same-sex marriage, the Court said, recognizes "a relationship deemed by

---

[4] *Id.*

[5] *Id.*

[6] *Id.*

the State worthy of dignity in the community equal with all other marriages."[7] "Deeming," however, is not all the State believes it can do. Our governors understand themselves as capable of actually *providing* dignity. Making same-sex marriages lawful, Justice Kennedy wrote, "conferred on [same-sex couples] a dignity and status of immense import."[8]

Those, however, are the spiritual concerns of the second strand of marriage. Dignity arises from the proper ordering of one's affairs in relation to a system of morality. It is not a commodity capable of distribution, certainly not by our governors. The wizard of Oz famously pretended to hand out courage and intelligence and heart. He had none of that to give, of course, and he ultimately acknowledged that his gifts only pointed out the lion's pre-existing courage, the tin man's compassion, and the scarecrow's native intelligence.

So unless the Court is asserting that our governors are the fount of morality, or have the authority to decide what shall be morally orthodox, this second strand of marriage does not give any warrant for their activity. The Court dodged this critical point – again, *sotto voce* – by assuming that our governors are the source of marital dignity for heterosexual couples as well. It concluded that failing to evenly distribute that dignity would be "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[9]

It's tempting to shrug this off as immaterial philosophizing by a few members of the federal government. What does it matter, after all, if the Supreme Court casts itself as the wizard of Oz by handing out ersatz dignity emblems? They do not detract from the importance, function, or consequences of heterosexual marriages. Heterosexuals will still marry whom they will, they will still honor their marriage commitments or they won't, and the world will go on much as it has.

But when the Supreme Court "confers" dignity, it does not understand itself to be distributing harmless trinkets or making idle pronouncements. If same-sex marriages are to have dignity, then dignity they shall have. And although the esoteric language of the Court makes it sound as though *it* will do the conferring, it's actually referring to *you*. Remember, our governors (in whatever branch they might serve) act always and everywhere by coercion. That is no less true here.

We are still early in this odd new era, but we already have some glimpses of how coerced dignity might work in practice. Elane Photography, a New Mexico company, includes wedding photography amongst its portfolio of services. They were asked to shoot a same-sex union ceremony, but declined because they believe that marriage is between one man and one woman; they did not wish to promote or

---

[7] *Id.*

[8] *Id.*

[9] *Id.*

participate in celebrating same-sex unions. The inevitable lawsuit followed, and the New Mexico Supreme Court found that the same-sex couple had the right to force the company to memorialize the ceremony.[10] The same result obtained when a Colorado baker refused to provide a wedding cake to a same-sex couple.[11] And in the State of Washington, the attorney general has sued a florist for choosing not to provide flowers for a same-sex wedding ceremony.[12]

You *will* afford same-sex marriages the same dignity as heterosexual marriages. *You* will. If our governors are the source of our human dignity, fairness commands no less.

The sentiments expressed in *United States v. Windsor* will eventually rob the institution of marriage of any discernible meaning. Fairness, as a substitute for justice, must always reduce to the least common denominator. By little and little, it will wear away marriage's distinctives. And those aspects of marriage that grew up around pieces of unchangeable reality, that won't readily dissolve upon command, will be left behind in the philosopher's crucible as the Rawlsian rebuilds the institution of marriage. In the name of fairness, we will, in time, recognize other nontraditional arrangements as "marriages," and you will – coerced by law if necessary – dignify them too. Finally, when marriage eventually means anything imaginable, we will find it means nothing at all. All because of an unruly fairness that aspired to the office of justice itself.

Affirmative action

Jobs present a perplexing conundrum for "Justice as Fairness." They involve a potent brew of individual autonomy, experience, education, personality, circumstance and many other factors that, in all their multitudinous permutations, will result in wildly varying amounts of value production. Rawls, however, affirms the importance of two principles related to work that are naturally and necessarily at odds: (a) The individual's right to use his talents and abilities according to what seems best to him, and (b) the equal distribution of primary goods (including income and wealth) without regard to factors outside an individual's control. Reality will not allow these to remain in tension. When theory becomes practice and resolves the dissonance, the result is neither justice nor fairness, but the institutionalization of moral inequality.

Rawls may not be the father of affirmative action, but no Rawlsian world would be complete without it. As the Rawls devotee constructs his ideal original position behind the veil of ignorance, he assumes that members of different sexes,

---

[10] *Elane Photography v. Willock*, Docket No. 33,687 (N.M. S.Ct., Aug. 22, 2013).

[11] *Craig v. Masterpiece Cakeshop, Inc.*, Case No. CR 2013-0008 (Colo. Office of Admin. Cts., Dec. 6, 2013).

[12] *Washington v. Arlene's Flowers, Inc.*, Case No. 13-2-00871-5 (Benton County Sup. Ct, 2013).

races, religious creeds, ages, and degrees of handicap will find themselves scattered through various positions and occupations in a roughly proportional way.[13] That assumption is essential because, without it, the society builders might take into consideration their personal attributes as they do their work, which will impair their ability to develop a world that treats everyone as similarly ("fairly") as possible.

It comes as no surprise, of course, that when we lift the veil we find reality at odds with our imagination. So unless "justice as fairness" is just a paper tiger, our governors must reorder the actual world to bring to life the idealized society formed behind the veil. "Reordering" is really just a polite way of saying our governors would coercively redistribute jobs on societally-approved terms. The result is supposed to approximate a world in which employment decisions are made without reference to such factors as sex,[14] race, religious creed, age, degree of handicap, or anything else beyond an individual's control.[15]

That same reordering impulse lies at the heart of affirmative action programs. Now, to be fair, the impulse in this country developed in reaction to a very ugly bit of our history. It used to be that we instrumentalized one group of people to meet the needs of another. We related to them as we might a machine, or a beast of burden. And in the tumultuous years following our country's independence, our forebears made a political calculation that the only way the newly-minted United States could maintain their tenuous place in the world was to unite themselves into a single political community while tolerating the obscene practice of slavery amongst some of its members. So we muted the Equality Imperative, as far as it related to the sons and daughters of Africa, until that great wash of blood came to remove this natal sin. The post-bellum constitutional amendments started the arduous process of restoring the Equality Imperative's voice by forbidding involuntary servitude (except as punishment for crime), and

---

[13] Although I will concentrate in this brief chapter primarily on matters of employment, the dynamics associated with affirmative action programs apply equally to university admissions, private club memberships, and any other gathering of people that might impact the distribution of primary goods.

[14] I don't pretend to a comprehensive grasp of the multiplying ways in which people define themselves against the traditional binary sexual division. But they are many (Facebook now gives its subscribers 58 options (!) from which to choose), so to save space I will use "sex" to collectively denominate not just male and female, but gay, lesbian, transgender, and so on *ad infinitum*.

[15] We will focus here on the reordering made necessary by the disparity between the real world and the rise of the original position, but reordering would be a constant presence if Rawlsian justice is to survive beyond the first day of implementation. As discussed below (*see* "That Pesky 'Rule of Law' Thing," *infra*), the cumulative differences that follow a profusion of individual decisions will result in the distribution of primary goods along lines that offend Rawlsian norms. Such differences cannot be suffered unless arranged to benefit the least-advantaged, of course, so continual monitoring and reordering will be a permanent fixture in Rawls' world.

requiring the States to guaranty to all of their citizens, without regard to race, the equal protection of the laws.

Sin, however, proved a stubborn thing. For many years, governors at all levels defied the "equal protection" requirement in both large and small ways. It took generations to track down and eliminate the lingering vestiges of slavery from our legal canon. One of the most persistent problems was that government employees would frequently apply even race-neutral laws in a racially-discriminatory manner. So "affirmative action" began as a policy directive that members of the federal government must take proactive steps to ensure that our laws are race-neutral both in their substance and in their application. This is as it must be. The Equality Imperative has no room for our governors to do anything other than relate to us as individuals, with neither favor nor discrimination based on group characteristics or attributes.

Although it is still possible to find, from time to time, government functionaries who will quietly and surreptitiously apply the law in discriminatory ways, it is nowhere possible to find a law that is itself racially discriminatory anywhere in the United States. Except for affirmative action programs.

These programs deserve our attention because they operate on society in the same manner as a Rawls-prescribed redistribution. Watching the curtain go up on Rawls' world would reveal governors scurrying about the stage trying to accomplish the same thing as these programs. That is to say, whether the world is imagined with the assistance of Rawls' veil, or solid Christian principles, we expect that world to look as though race does not figure into who gets what jobs. In comparison to that attractive portrait, the one in which we live looks more like a disjointed Picasso. And whether we denominate the response to that disparity "affirmative action" or "reordering," the purpose is the same: To make reality look like our imagination. Because both employ the same mechanics in service of the same goal, it should come as no surprise that the effects will be the same whether the program is developed by a Rawls aficionado or a civil-rights activist. It is the effect of those mechanics that holds our attention here.

Before we decide whether affirmative action is an admirable expression of a just society or, instead, something less savory, we need to consider what it is that Rawls would have us reorder. Jobs are curious things. We often talk about them like they are either uncaused effects – things that simply are, with no history or provenance – or things we can summon through some semi-ritualistic invocation, such as when politicians promise to "focus like a laser" on "jobs, jobs, jobs." Depending on the philosophical leaning of the promising politician, he is either implying he will directly create the jobs by fiat, or asserting he can cause them to come into being by manipulating the levers of a mysterious something called the "private sector." Either way, the assumption is that jobs are like wild game – they live in the commons, their population rising or falling according to only partly-

understood ecological factors, belonging to no one until we take them for ourselves or others.

If jobs really are wild game, owned in common by society as a whole, it makes sense for the government to use its coercive power to ensure the public enjoys them without distinction based on sex, race, religious creed, age, or degree of handicap. In recognition of the equal dignity of all members of society, jobs would be captured and distributed solely on the basis of whether the recipients can actually perform the required tasks. If that is what jobs are, there's an argument that the government honors the Equality Imperative by ensuring equal distribution. But that's a really big "if."

Rawls, like all redistributionists, depends on the equivalence between jobs – along with all other primary goods – and wild game. Regardless of the ideological banner under which they travel, they all base their work on the same presumption: That we can shuffle goods amongst individuals without regard to the essential attributes of what we are moving around. Rawls' flavor of redistributionism, while marginally more refined than other models, remains ignorant of, and is structurally incapable of accounting for, the transformation wreaked on goods when they are coercively distributed. Goods are not just naked objects without history or meaning. Instead, they are clothed with the nature of their creation, and the relationship in which they stand to those who gave them genesis. Let's call that clothing "ownership." When we distribute goods or services, ownership is as important as the nature of the labor or the good's physical characteristics. And the means of distribution will determine whether that attribute is preserved or destroyed. The redistributionists' failure to recognize ownership, or account for it, is their Achilles' heel.

This is especially important when we are considering the consequences of redistributing jobs. That's because jobs aren't just about the creation and exchange of value. They are, first and foremost, relationships. And that makes coerced redistribution even more problematic than if we were mandating a change in ownership of mere goods.

We assign the term "job" to that particular relationship created when two people agree to associate with each other for the purpose of creating value.[16] The

[16] A job is a personal relationship regardless of whether the employer is an individual (that is, a sole proprietor) or a group of people (whether organized as a partnership, limited liability company, corporation, or some other form). Just as "family" describes a set of relationships between people, so too does "corporation" simply define a different set of relationships between people. No one ever interacts with a "family." One interacts with people who are related as a "family." Similarly, no one ever interacts with a "corporation"; one only interacts with people who define their relationships with others as "corporate." Jobs, notwithstanding how the people who act as the employer relate to each other, are always and ever personal relationships.

employer agrees to pay a mutually agreed-upon wage, the employee agrees to provide a mutually agreed-upon service – value for value.

In its proper form, the employment relationship is, above all, a *voluntary* association. The person who wishes to be an employee does not have to offer a service he does not wish to provide, nor must he accept terms he finds disagreeable. He is his own master. He stands in a position of essential equality with his prospective employer, neither compelling nor being compelled.[17] That might mean, of course, that he doesn't get the job he wants – the employer is also his own master. He need not associate with the prospective employee if he does not wish, nor must he offer any terms of employment other than what he wills. Like the prospective employee, he neither compels nor is compelled.

This is what it means to be equal before the law. Not "equal" in the modern sense of ensuring each negotiating party has the same amount of leverage, or guarantying the employee gets what he wants simply because the employer has something he needs. It is, rather, equal in the sense of preventing one party from coercing the other into an unwanted relationship. It is also equal in that it prevents one party from forcing the other to give up something he owns against his will – either goods (in the form of money), or services. This equality puts the levers of government beyond the reach of any who would use them to transform a voluntary relationship into one consummated by force.[18]

That's the nature of what a Rawlsian world would reorder, and what affirmative action does in fact reorder. So when we talk about manipulating the labor force to match an idealized conception, we are really talking about replacing voluntary relationships with ones formed through coercion, and doing so in enough instances to make society resemble our imagination. Affirmative action accomplishes that goal by intruding on individuals' decision-making processes, putting its thumb on the scales of the employment decision. It compels the employer to hire who *society* thinks he should hire, rather than who *he* thinks he should hire.

In practice we don't much care that we make the employment relationship less than voluntary. We don't care that we compel one person to provide something

---

[17] I am, of course, cognizant of the oftentimes vastly different amounts of leverage enjoyed by employees and employers. But that detracts not an iota from the fact that neither can compel the other. Each has in his possession (at least in a free economy) the nuclear weapon of negotiation – the inalienable and equality-preserving right to say "no."

[18] Naturally, this does not describe the state of things as they are, but as they should be. Government has, over the years, nibbled away significant amounts of voluntariness from the employment relationship via minimum wage laws, mandatory overtime, restrictions on the acceptable bases for discharging an employee, and a host of other regulations and laws that address the prudence of forming or maintaining an employment relationship (as opposed to enforcing the participants' rights).

of value against his will. We don't care, that is, that we use the law to coercively reduce one person to an instrument whose obligation it is to involuntarily benefit another. The reason we don't care is because we are reducing the freedom of the "haves" in favor of the "have nots," and we have forgotten the Biblical command that we relate to people with neither fear nor favor based on their societal status. (*See, e.g.*, James 2:9.) And, more fundamentally, we believe it is more important to get the "right" societal result than it is to respect the essential equality of the employer and employee.

We don't care, but maybe we should. The nature of the employment relationship, and the cumulative impact of employment relationships on society, depends on how they are formed. People are not chess pieces to be moved about the board according to a Grandmaster's clever strategy. It might make complete sense to sacrifice a knight to protect the king, but only if the knight is the player's to sacrifice. A world of independent moral actors, however, does not respond like chess pieces. *How* a person comes to occupy the square on which he stands is just as important as the particular square on which he finds himself. If the knight is forced to stand guard over the king, he will be a much different person from who he would have been if he had put himself there voluntarily.

The manner in which employment relationships form tells us everything we need to know about who the actors believe themselves to be. Voluntary relationships form when the participants understand they are moral equals. They neither compel nor are compelled. They understand that, as created beings, they share the same essential dignity. Involuntary relationships form when that understanding breaks down. When the employer believes himself morally superior to the employee, involuntary servitude becomes possible. On the other hand, when the employee understands himself to be morally superior, affirmative action becomes possible. In both cases one of the parties convinces our governors to instrumentalize the other to meet his needs or wants. And if I am a compelled instrument to meet your needs, it necessarily follows that I can't be your moral equal.

The gravest problem with governmental reordering, then, is the moral injury it visits on everyone it touches. If you force a relationship that by its nature was meant to be voluntary, something has to give. In this case, it's the participants' dignity and stature as independent and equal moral actors. Fortunately, some at the highest level of our legal culture have begun to say this out loud. In a recent affirmative action ruling, Supreme Court Justice Antonin Scalia said that "[t]o pursue the concept of racial entitlement – even for the most admirable and benign of purposes – is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred."[19] What "way of

[19] *Adarand Constructors, Inc. v. Slater*, 515 U.S. 200 (1995) (Scalia, concurring).

thinking" might that be? The one that says one race may instrumentalize another to satisfy a need or want.

Affirmative action and slavery differ, obviously, in significant ways. But it's more a question of degree than principle, for they both spring from the same taproot. Neither can exist without the foundational principle that it is acceptable to force someone into an unwanted economic relationship. Morally, and as a matter of law, they are the same: "I believe that there is a moral and constitutional equivalence between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality."[20]

Although the intent of affirmative action programs may be to benefit select minorities, they can and often do have the opposite effect. When the use of coercion comes unmoored from the Equality Imperative, there is nothing to prevent it from unwittingly damaging those it was meant to assist. As the noted Constitutional scholar Professor Alexander Bickel has recognized, the breakdown in moral equality means the helping hand can become a throttling chokehold before anyone realizes what has happened:

> [A] racial quota derogates the human dignity and individuality of all to whom it is applied; it is invidious in principle as well as in practice. Moreover, it can easily be turned against those it purports to help. The history of the racial quota is a history of subjugation, not beneficence. Its evil lies not in its name, but in its effects: a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant.[21]

When our governors choose to reorder our relationships, they necessarily presuppose that one of the participants occupies a moral realm lower than the one for whose benefit they exercise the coercion. This institutionalized inequality is both demeaning and destructive. Always.

> The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such

---

[20] *Id*. at 240 (Thomas, J., concurring) (citation and internal marks omitted). Note, in particular, Justice Thomas' clear understanding that the government's role is to enforce the Equality Imperative.

[21] Professor Alexander Bickel, The Morality of Consent, at 133 (Yale Univ. Press 1977).

> classifications ultimately have a destructive impact on the individual and our society.[22]

But it must make some difference that affirmative action and Rawlsian reordering pursue admirable goals, mustn't it? Shouldn't we balance the architects' good intentions against the coercion they employ to achieve their ends? Won't that allow the programs to function in a world in which the participants occupy the same moral plane? In a word, no. A forcefully arranged marriage is no less offensive because the father's motivation is purely for his daughter's well-being than it is for the geopolitical or pecuniary gain that might otherwise fill his heart. The action itself is inescapably an expression of moral inequality – the assertion that one has the authority to compel another in a situation that does not involve maintaining essential equality. Good intentions cannot make the premise upon which the action is founded more bearable:

> That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution.[23]

Or, to put it more bluntly: "In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination, plain and simple."[24]

When it comes to understanding the destructiveness of governmental reordering programs, Justices Scalia and Thomas, unfortunately, are in the minority of leading jurists and jurisprudential practitioners. Not, perhaps, in their recognition of the principles, but certainly in their willingness to allow the principles to inform the work they do. In a recent case addressing the constitutionality of a public university's affirmative action admissions program, the Supreme Court's failure to construct a coherent moral argument inadvertently provided a sterling example of why such an argument is impossible:

---

[22] *Grutter v. Bollinger*, 539 U.S. 306, 354 (2003) (Thomas, J., concurring in part, and concurring in judgment) (citation and internal marks omitted).

[23] *Id.*

[24] *Id.*

> The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 2. Because the Fourteenth Amendment protects *persons,* not *groups,* all governmental action based on race—a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. We are a free people whose institutions are founded upon the doctrine of equality. It follows from that principle that government may treat people differently because of their race only for the most compelling reasons.[25]

The juxtaposition of the last two sentences is priceless. They cannot sit cheek-by-jowl without one doing violence to the other. Either we may enshrine racial inequality in the law because we are *not* a free people committed to the doctrine of equality, or we are so committed, in which case we cannot possibly countenance compulsive racial inequality. We must pick one. And if we deduce that legalized racial discrimination (whatever the reasons for it) naturally flows from our devotion to equality, we have lost our minds. It sounds Orwellian, but only because it is. Those two sentences succinctly embody the absurdity of expressing commitment to a principle by affirming its opposite.

But that was not the full extent of the Court's homage to *1984*. According to the Supreme Court, we reach race neutrality by actually *institutionalizing* racism (but only until we don't need to anymore, to be sure): "The requirement that all race-conscious admissions programs have a termination point assures all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."[26]

Let's filter the background noise out of that sentence so we can hear what it's really telling us. The Supreme Court, the highest juridical body in the land, populated by only the brightest graduates of our best law schools, says we must accept "deviation from the norm of equal treatment of all racial and ethnic groups . . . in the service of the goal of equality itself." Yes, freedom is slavery, ignorance . . . strength. Somewhere, Orwell is grimacing.

Our 21st-century minds easily comprehend that using race as a societal organizing principle is patently wrong. We know it isn't right for the federal Grandmaster to tell the black knight what square he ought to occupy simply because he is black. And we are tentatively, by fits and starts, realizing that it is just as bad if the Grandmaster tells the white knight where to go simply because he

---

[25] *Id*. at 326.

[26] *Id*. at 342 (internal marks and citations omitted).

is white. As with other addicts, we know we should stop doing it at some point . . . it just never seems the right time.

But are we prepared to reach the deeper truth that the racial aspect of the reordering is not a full expression of the problem, that it is just a particularized manifestation? What if the Grandmaster directs the queen to a certain square because she is powerful, and the pawn to another because he is not? What does it say about those who accept our governors' assertion of authority to assign them their squares – on *any* basis?

Rawlsian reordering may involve reassignments along racial lines, but only as a matter of happenstance. There is no racial animus or favoritism involved. It simply responds to the difference between reality and imagination. It will occur just as readily when, having removed the veil, the Rawlsian sees unequal distribution based on sex, religious creed, age, degree of handicap, or any other factor that might offend society's protean sense of propriety.

The moral damage described by Professor Bickel and the Supreme Court Justices will follow from our governors using *any* organizational principle to coercively redistribute goods or relationships. And that is because the harm flows not principally from the chosen organizational principle, but from our governors' assertion of moral authority to move others about the chessboard. The Rawlsian would have us so focused on what a grand world would follow from his work that we wouldn't notice that he has set himself up as our moral superior.

And therein lies the heart of the problem. All reordering programs, regardless of the terms on which they take place, require for their legitimacy the moral superiority of those effecting the reordering. Moral equals may exercise coercion against each other, but only in service of the Equality Imperative – to preserve, that is, the essential equality of the people involved. But in the absence of a threat to that essential equality, when no equality-preserving rights require vindication, there can be no legitimate coercion. If our governors are to have the authority to move pieces around the chessboard, it can only be because they occupy a moral plane higher than the rest of us.

It is ironic that "justice as fairness," the goal of which is societal fairness (after a fashion), requires that, in practice, we institutionalize inequality everywhere. It must have inequality between the population and its governors so that one may have the moral authority to organize the other. And it imposes ever-shifting inequality amongst the population as it first instrumentalizes some to meet the needs of others, and then turns the table by instrumentalizing the served to meet the needs of the instrumentalized. "Justice as fairness" has coercive inequality written into its genetic structure; it can neither function nor survive without it.

This is inevitable, really. Our governors simply have no mechanism at their disposal capable of legitimately creating equality of outcomes. This has been one of Justice Thomas' key insights: "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law."[27] That equality pre-exists our institutions, and is impervious to the philosopher's crucible. Governors cannot add to its store, but they may certainly subtract from it, which they do whenever they intrude on private decision-making in pursuit of greater sameness. Each touch that does not address the Equality Imperative introduces more inequality – both between those involved in the decision, and between our governors and the population. Every slide across the chessboard further sculpts us into pieces at the Grandmaster's disposal, going where we do not wish in service of ends we did not choose.

The Rule Of Law

We cannot live free and responsible lives under Rawls' theory. When we decide our own ends in life, and the paths by which we pursue them, we are thereby determining how we create, buy, sell, and use all the "primary goods" that are the focus of Rawls' theory. So if those goods are to find their way to a Rawls-compliant distribution, all our decisions about how we live must come within the superintending jurisdiction of our governors. They must direct, modify, or confirm our judgments, or substitute their own so that we may collectively pursue a "fairer" result. If our governors insert themselves in our decision-making far enough to make a difference, however, the rule of law must give way. And that makes Rawls' hypothetical commitment to freedom a practical impossibility.

"The rule of law" – it's a phrase so dry it nearly demands unkind comparisons to a desert. But if it ever fails, you'll soon cry out for its return as desperately as the parched Saharan traveler begs for a taste of water. The rule of law is the fount of societal stability. It is the promise of method and structure in the relationship between a population and its governors. It is the bane of arbitrariness and the guarantee that reason may inform how we choose to order our affairs. It is the ballast that keeps our lives from being upended by the stormy and unpredictable passions of officeholders and bureaucrats. It is the bringer of order, without which no liberty is possible.

The rule of law is ancient, and yet a mere babe. For several millennia it has struggled for purchase on this world, sometimes successfully, most often not. It enjoyed a fitful relationship with ancient tribes in the Middle East. It rose in Athens, died in Rome, found new life in England and died there too, only to sprout again in the United States and in other scattered places around the globe. It is a precious commodity, and yet where it exists it seems so ordinary that we barely give

[27] *Adarand Constructors, Inc. v. Slater*, 515 U.S. 200 (1995) (Thomas, concurring).

it thought. It will not stay where it is not loved, and it will abandon us the instant our attention falters.

Janus-faced, the rule of law looks both backwards and forwards. When it looks backwards, it is concerned with judging events that have already happened, and doing so according to the laws that existed at the time the events occurred. It is a covenant, a solemn understanding that the authority to act against an individual must find its warrant in rules enacted and publicized prior to the actions under consideration. It protects us against arbitrary second-guessing. Knowing the rules before you act gives you the ability to plan your affairs to reach your desired outcomes.

The other face of Janus, the one that looks to the future, acknowledges that its role is not to achieve a specific, pre-determined distribution of primary goods, but is instead to describe the rules governing the actions you take while pursuing results of your own choosing. It provides a sure foundation on which we may order our affairs. It demands that the law be sufficiently specific that we know what it requires, durable enough that we can plan our affairs into the future for a reasonable amount of time, and publicized broadly enough that we can learn its content and adjust our plans accordingly. By giving us an understanding of the prospective consequences of our actions, we can confidently navigate reality's complicated topography *en route* to our destination.

Because the rule of law is outcome-indifferent, we may exercise our freedom in infinitely varying ways. The consequence will be an unpredictable distribution of goods.

In the microcosm of a football game, for example, the rule of law does not know who will win. But it does know what it requires of the players as they engage in the contest. The rules say that when a play ends with a team possessing the ball in the proper end zone, it scores six points. And if a team intercepts the ball in the opposite end zone, the other team *doesn't* get six points (if you take my meaning). It says nothing, however, about how many touchdowns either side will score. The teams make their plans in the context of the rules, but the rules do not inquire into the wisdom or distributional implications of their choices. They create the process, but leave the outcome to abide by the teams' decisions and skill.

Even in its infancy, the United States understood the centrality of the rule of law to a just and orderly society. In fact, we constructed our government so that it would express this principle in every element. We gave it three distinct branches, each with a discrete function corresponding roughly to the temporal framework within which it works. And we assigned them specific responsibilities that, if honored, would prevent the government from second-guessing the wisdom of our decisions, or engaging in outcome-determinative behavior.

It is, in our system, peculiarly the legislature's province to address the future. It determines what the laws shall be that will govern tomorrow's actions. The unknown-ness of the future acts as a bulwark against legislative outcome-determinative behavior.

The executive concentrates on the present; he decides what shall be done to properly carry the existing laws into effect today. Restricting his authority to enforcing the laws adopted by the legislature (in his domestic responsibilities) prevents him from forcing his preferred results on us.

The judiciary takes for itself matters of the past. It compares what has already happened against the laws as they existed at the time the acts occurred, and then – to the extent possible – it adjusts the parties' circumstances to match what they would have been had they followed the rules. Even this is not outcome-determinative behavior. The court is enforcing adherence to the outcome-neutral laws adopted by the legislature, not deciding the wisdom or desirability of the results produced by following them.

Rawls' theory is incompatible with the rule of law. The backward-facing gaze of Janus condemns the redistribution necessary to arrive at the original position (and enforce the Difference Principle) because it applies today's standards to yesterday's activity. The forward-looking face cannot abide Rawls' inability to provide notice of what the law will be in the future. This incompatibility unjustly prevents us from effectively directing our own lives.

The dissonance begins with the theory's inability to sufficiently comprehend all the activity it so boldly purports to manage. As difficult as setting up a Rawlsian societal order might be, it's child's play in comparison to the daunting task of maintaining it. The "original position," with its equal distribution of primary goods on the first day, is a brittle thing. With morning comes the realization that all of creation is entirely concentrated on confounding that careful arrangement:

> Sleep, that sweet thief, yields.
>
> With joyful giddiness the day surveys her subjects. Twilight, she knows, will ere long o'ertake dawn's promise. For an achingly brief instant she stands poised on the brink of infinity: Possibilities without number, arrayed in their pristine brilliance, eagerly jostle; nothing foreclosed, nothing abridged.
>
> The dew-laden moment evaporates; the raucous cacophony writes its story, knowing no limit but the night.
>
> The magisterial arc now complete, she presents herself, exhausted, to the maker and keeper of days. Gently He adds her, inscribed all over, to the precious strand.

Content, peaceful, she sleeps.

Life is a riot of activity, a constant rush of decisions without end, some planned, others spontaneous, all effervescent. They might spark into existence and fade away with seemingly nothing left behind by which to remember them, or instead light a conflagration that roars across society. But in all their wild diversity, they have this one thing in common – they do not seek preclearance for how they might affect the least advantaged in society. It would be rare enough to find someone with more than a narrow appreciation of what those effects might be. And it would be rarer still to find someone with that knowledge who consciously directs his decisions according to the effect they might have, when aggregated with those of his compatriots, on an anonymous sector of society. But those decisions will create patterns – without any conscious direction – and over time the patterns will run afoul of Rawls' Difference Principle.

It is not possible to accurately predict what one person will do tomorrow, much less what an entire society of them will do over an extended period of time. Every individual is an admixture of family history, personal experience, formal education, moral strengths and weaknesses, religion, physical resources, native talents, and a host of other distinguishing features. That means they are not fungible, and their choices and actions are, consequently, not random or evenly distributed – the truth is, actually, quite to the contrary. Further, the relative dominance of some of those distinguishing factors over others in each individual makes society less than uniform. That is to say, when left to themselves, people will generally arrange their affairs consistently with whichever of those factors they express with the most prominence – and the relative prominence of those factors will constantly shift, each taking its turn in the sun depending on circumstances, timing, exigencies, etc.

We do know, however, that similar seeks similar (birds of a feather, and all that). And those threads of gravitational affinity will, when summed together, lead to societal lumpiness. So we find various ethnic groups keeping close community as they gain the confidence necessary to diffuse into the rest of society; those with similar familial resources congregating together; varying degrees of educational achievement consequent upon its perceived importance by the local community, family or individual; and a swarm of other differences typical of a heterogeneous society. Because these characteristics are inextricably intertwined with the production of primary goods, their distribution becomes as lumpy as society, even if they were evenly distributed in the original position.

Where a classical liberal sees in this activity the natural expression of free moral agents at work, a Rawlsian will see an unacceptable distribution of primary goods. And that presents an existential problem for "justice as fairness." No amount of insight can predict all of the patterns that can and will emerge when

people are free to make decisions according to their own lights. Institutions designed to channel all of this frenetic activity into paths compliant with the Difference Principle will find themselves immediately overwhelmed by the sheer volume of activity they are supposed to oversee and manage. In practice, this means we will see deviations from the principle not through the windshield, but in the rearview mirror.

Reality's complexity always keeps the Rawlsian at least a step behind the myriad decisions that lead to distributions he is unwilling to countenance. And that leaves him with two options. He can concede that the structures developed for the original position cannot make future economic activity produce distributions of primary goods in accord with the Difference Principle, and surrender the long-term viability of the theory. Or he can remedy deviations from that principle after they occur. He will, of course, choose the latter. To do otherwise would be to concede that "justice as fairness" is just an academic exercise with no practical application.

Having boldly ventured into the raucous cacophony, the Rawlsian governor's next task is to sort out those distributions that violate the Difference Principle from those that don't. The first thing he will encounter is an ironic dearth of information. Submerged in data, he doesn't have enough to tell him why things are as they are. "Water, water, everywhere / Nor any drop to drink."[28]

The simple act of buying a cup of pure joy (Starbucks, naturally), prompts human activity and engages economic levers that are almost entirely unknown to the consumer, or the benevolent Rawlsian who would insert himself into the equation. As the customer experiences the rush of well-being with the first sip, he is largely unaware of all the choices that led to that moment. How is he to know anything of the Ethiopian farmer and what caused him to plant, tend, and harvest the coffee beans? Or the distributional implications of the manufacturing and logistical channels for the paper and plastic that went into creating the cup and cap that hold that delectable liquid? Or even the economic consequences of the most immediate link in the chain: The factors that led the barista who performed the culinary magic on the coffee beans to take a position at Starbucks, or be there on that particular day? Because he does not know all of these dynamics, and could exercise little to no control over them even if he did, the customer cannot base his choices on what effects they might have.

Multiply the decisions and circumstances of that one transaction by all the rest of the country's activity and you will approach an understanding of the futility of the sorting task the Rawlsian has set for himself. A few moments in those trenches will be all it takes to convince him that an individualized assessment of deviations from the Difference Principle is a project beyond all hope. His only realistic option is to assume that inequalities experienced by groups definable by

[28] "Rime of the Ancient Mariner," Samuel Taylor Coleridge.

characteristics beyond their members' control must necessarily evidence an institutional defect, and redistribute accordingly.

And so it is that the free decisions of moral equals inevitably call into existence the Bureau of Difference Management. Its charge would be to redistribute primary goods whenever they become allocated inappropriately. It would embody the rejection of everything we have learned about the rule of law. Its *raison d'être* would be second-guessing all our decisions, and redirecting as many as necessary to make the actual distribution of primary goods match our imagination.

To get a feel for the practical consequences of such deep governmental involvement in those decisions, we would normally have to convene the best and brightest economists, political philosophers, and jurists for a differential analysis of possible outcomes flowing from those unending streams of decisions. Here, however, we need only consider the genesis and implementation of Obamacare, formally known as the Patient Protection and Affordable Care Act (PPACA).

Conceptually, this Act hits all the key points of "justice as fairness." It was conceived by those who style themselves as dispassionate experts, concerned not with their own affairs but the well-being of all (behind the veil of ignorance, one might say). It was motivated by a perceived inequality in the distribution of something classifiable as a primary good – effectual access to health care. It engaged in redistribution because reality did not match the designers' imagination. And its design suggests the drafters had one eye glued on the Difference Principle while they wrote the bill.

PPACA is supposed to minimize differences in the distribution of health care insurance (and, derivatively, health care) arising from an individual's financial resources. And what differences remain are allowed because they would subsidize premiums for the least advantaged. Further, by preventing insurance companies from denying coverage based on pre-existing conditions, or basing premiums on traditional underwriting principles, the Act prevented access to health insurance from turning on factors beyond an individual's control.

Whatever else PPACA might be, it has been a frontal assault on the rule of law from the beginning. In fact, it scored a perfect trifecta by besting that principle in each of the three branches of government. It was created through legislative abdication, given the veneer of constitutionalism by judicial activism, and implemented through unending executive caprice. It never would have seen the light of day without these violations, nor would it be even theoretically capable of success in their absence.

The rule of law begins with the legislature, but in the case of the PPACA, the legislature was the beginning of the end. The law as enacted runs to over 900 pages; various versions of the bills that preceded it topped 2,400 pages. The bills

and the law are too long to be consistent with the rule of law, but at the same time much, much too short.

The PPACA's mind-bending length defies the rule of law because it makes it impossible for us to understand what it requires. That's not partisan carping, it's something its champions admitted, and even advocated as a reason for passing it: "[W]e have to pass the bill so that you can find out what is in it away from the fog of the controversy." So said Nancy Pelosi – then Speaker of the House – of the PPACA. If not even those charged with analyzing and voting on the bill know what is in it, what hope is there for the non-legislator?

There are many ways to put knowledge of the law beyond the reach of those it governs. Caligula reputedly did so literally, posting new laws so high on the columns of public buildings that no one could read them. He gave the required notice, but in a way that did not disturb the secrecy of the law. It's also possible to hide the law in the same way you might disguise a drop of water inside a fire hose. Litigators know this tactic well. When required to produce evidence, an attorney will often drown the incriminating one-page memo in the several hundred boxes of documents he sends to opposing counsel. It's there, but nearly invisible.

The PPACA is available at the click of a mouse, but it is simultaneously beyond all reach. We can read the law, but it takes an army of accountants and lawyers to figure out what it changes, mandates, and prohibits. If "notice of the law" means being on the receiving end of a fire hose, then yes, the legislature gave notice. But that's just Caligulan sophistry. The legislature spoke, and we mere mortals still don't know what it said, or how to plan for the future. Neither do the insurance companies, the State insurance regulators, the Medicaid program, doctors, hospitals, employers, pharmaceutical companies, medical equipment manufacturers . . . well, pretty much anyone who has anything to do with health care.

This should come as no surprise. Legislative projects are all about coercively changing how people would otherwise choose to behave. Trying to capture all the activity in 1/6 of our economy with a single law in service of ends the actors did not choose will necessarily call forth a mammoth tome.

Of the two violations of the rule of law within the legislative branch, however, its oppressive volume is actually the less significant. The real problem is that PPACA is impossibly short. Not even Occam could describe in 900 pages all health care-related activity in America. It is absurd to think we can control so many individual decisions with such a skeletal Congressional act. To give everyone the information they need to effectively plan their future actions in this new age of government-managed health care insurance, the delivery instrument wouldn't be a fire-hose, but something more like a tidal wave.

And that brings us to executive caprice and how extemporaneousness defeats the rule of law. Recognizing the impossibility of writing a sufficiently detailed health insurance reform bill, the legislators punted. They identified the goals they wanted to reach, but abandoned their responsibility to draft the actual laws that would get us there. The result was a vague bill that left the real legislative action elsewhere. The PPACA calls into existence at least 46 new boards, offices, panels, and other entities of varying governmental taxonomy – all outside the legislature.[29] That number is just a guess, however, because the Act is so vague it doesn't even identify with certainty who might be responsible for making the actual law that will govern our conduct: "The precise number of new entities that will ultimately be created pursuant to PPACA is currently unknowable, for the number of entities created by some sections is contingent upon other factors, and some new entities may satisfy more than one requirement in the legislation." (*Id.*) Whatever they turn out to be, and in what numbers they will exist, these are the real-life manifestations of the Bureau of Difference Management.

It is in these entities that the volume of laws necessary to control one-sixth of our economy will be generated. Historically, executive-branch entities could only address how the Executive implements the laws passed by the legislature; they couldn't actually *create* law. The Supreme Court's "anti-delegation" doctrine enforced this limitation by ensuring that legislation was not so vague that it simply handed the law-making function to the Executive. That doctrine is pretty much a dead letter today because, as our governors get increasingly involved in determining outcomes, the legislature finds itself unequal to the task of drafting sufficiently detailed laws. So legislators who want credit for attractive sentiments, but not accountability for the messy details, hand off the hard decisions – and the political heat they generate – to the Executive. The courts have concluded that the authority to make those laws must exist somewhere, and because the legislature is not equal to the task it must necessarily fall to the Executive. A pragmatic response, to be sure, but one that causes the rule of law to erode even further.

As PPACA so nicely illustrates, the more a law focuses on mandating an outcome, the more it must depend on the Executive to act as *deus ex machina* to save the legislation from practical meaninglessness. So it is here in these executive agencies that we will find the tens (hundreds?) of thousands of pages of new laws that will tell you how you may satisfy your health-care needs. It is here that the real legislative work takes place, not in the politically-accountable legislature. Here, where civil service laws make bureaucrats largely unanswerable even to the Executive. It is here, in this politically-insulated cocoon, that the unelected and unknown churn out laws without fear that the populace might disapprove and relieve them of their authority. This is where the endless avalanche of laws, which

[29] Copeland, Curtis W., *New Entities Created Pursuant to the Patient Protection and Affordable Care Act* (Congressional Research Service, July 8, 2010.

you will probably never see, much less understand, lives and breathes and has control over your healthcare decisions.

The Bureau of Difference Management is where we discover, in practice, that Rawlsian economic planning is incompatible with the rule of law. Not even the massive law-generating capacity at the executive's disposal can prospectively direct reality to a preset point. Our decentralized, individualistic economy – free enterprise – will do all it can to avoid, or go around or over or under these directives. So after the command is given to behave in a particular way, the executive will spend most of his time trying to wrestle reality into the box he constructed for it, multiplying laws along the way to fence it in.

As PPACA shows us, that wrestling often expresses itself as changing, repealing, or ignoring the laws on which people have already based decisions for their future affairs. Two specific mismatches between reality and legislative/executive goals demonstrate how outcome-determinative law-making defeats the rule of law.

The first is an exercise in paralysis. The PPACA outlawed what the Executive characterized as "garbage policies" – low premium, low benefit plans that were popular with those who couldn't (or wouldn't) spend more on health care insurance. But after these policies were canceled, and those they covered couldn't afford the more-expensive new PPACA-compliant plans, it looked like the law was actually going to decrease the number of insured Americans. So the president changed the law on the fly; he urged insurers to continue offering the now-unlawful policies. That put the insurers in quite the pickle – they don't know whether to obey the law or instead heed the president's appeal to violate it. If they choose the former, they expose themselves to Executive hectoring, which could badly damage their businesses. But if they take the president's lead, they have no idea what the financial consequences might be. PPACA mandates certain minimum benefits in every insurance policy (with a few non-germane exceptions), which are much more generous than the bare-bones policies the president both condemns and encourages. Reissuing those policies, however, may subject them to a policy-holder's lawsuit claiming that the unlawful policies do not provide the level of benefits now required by federal law. And the insurer's shareholders might sue to prevent issuance of unlawful policies out of an understandable concern that doing so would expose the company to enforcement actions by state regulators, or financial ruin at the hands of policy-holders seeking benefits not supported by the premiums they pay. As the Bard might say, "To follow the law, or not to follow the law, that is the question . . . ."

The second example reveals the whack-a-mole dynamic of outcome-determinative legislation. The PPACA requires businesses with 50 or more full-time employees to provide health insurance to their workers. Many companies responded to this mandate by downsizing their workforces to less than 50

employees. Others reduced workers' hours to below 30 per week (the PPACA's definition of "full-time").

This consequence – neither foreseen nor intended by the PPACA architects – necessitated a new law to address the effects caused by the first one. So the Internal Revenue Service is now requiring companies to certify that their employment decisions were not inspired by PPACA. This new requirement will undoubtedly give rise to other unintended and unforeseen consequences, necessitating a new round of law-making when the mole's head pops up somewhere else. If you take decisions that comply with the law today, only to encounter Executive disapproval tomorrow, any long-range planning that involves a significant amount of assets or opportunities becomes a fool's game. That's how the Rawls-friendly PPACA violates the rule of law in the legislative and executive branches – it prevents us from knowing the economic and legal consequences of our decisions, and reorders the ones of which it does not approve.

In comparison to its complicated triumph in the other branches, the PPACA's victory over the rule of law in the judiciary was pretty straightforward. To avoid declaring the law unconstitutional, a slim majority of the Supreme Court seized the legislature's authority and used it to rewrite a key provision of the Act.[30]

The PPACA mandates that everyone in the country purchase a health insurance policy; failure to do so incurs a penalty. The Act used that specific word – "penalty" – 18 times in describing the consequences of not buying a qualifying policy. The Act is entirely dependent on this penalty, and would be incapable of achieving operational lift-off without it. But penalizing someone for not buying a product raises some thorny constitutional problems. So thorny, in fact, that the Supreme Court was on the verge of striking down the entire law. It seems that five of the nine Justices recognize that we cannot call ourselves a free people if our governors have the authority to penalize us for not buying something. But there were only five who understood that, and one of the five really, really wanted to give PPACA a clean bill of constitutional health.

So he did what jurists who do not care for the rule of law always do – he fudged. We call this fudging "judicial activism"; it happens when the Court effectively changes the law – either the Constitution or the legislation under consideration – so that they conform to the jurist's preferences. In this case, it was the latter. The Court rewrote PPACA so the penalty became a tax. And because the Court has long since abandoned nearly all constitutional limitations on the federal government's taxing authority, this was tantamount to a blessing of constitutional fidelity.

[30] *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S.Ct. 2566 (2012).

But judicial activism comes with a price. Such fudging can no more exist in the presence of the rule of law than darkness can survive the sun. One must give way.

The judiciary (embodying the backward-looking face of Janus), protects the most critical aspect of the rule of law. The Court does its work in a museum of sorts. Its mind ranges over things already done, actions that are matters of historical fact before they ever come to the Court's attention. And the laws it applies must be artifacts it finds there too; it must bring nothing into the museum. This commitment ensures that our behavior will be judged only according to the rules of which we had reason to know when we acted. But when the Court replaces the laws it finds in the museum, it banishes the rule of law. Now we are judged by law that did not exist when we chose our actions, making it impossible to know whether today's legal choices will be declared illegal once they become tomorrow's history. That is why a jurist's first commitment must be to never change what he finds in the museum.

The *Sebelius* Court did not honor that commitment. Reordering a sixth of our national economy to reach a predetermined outcome was too important to let the law get in the way, so the Court smuggled a tax into the museum and threw out the penalty. It based its judgment not on the law it found, but on the law it imported. That is, it momentarily stepped into the legislature's shoes, changed the law, then put its robes back on and pretended the amendment was in the museum all along. The judiciary acted just as outcome-determinatively when it changed the law as the legislature did in adopting an Act meant to control our health care decisions, and the executive did in remaking the law when an ungovernable reality refused the fate prescribed for it.

When all of society is organized to achieve a Rawlsian distribution of primary goods, everything that would interfere with that goal must give way. The rule of law is one of those things. Where the rule of law provides the predictability that allows us to make plans for a future of our own choosing, Rawls empowers our governors to substitute theirs instead. Where the rule of law promises that today's legitimate decisions won't be undone tomorrow, Rawls gives our governors the power to reorder the results of our decisions if they fail to produce a "fair" distribution of primary goods.

Conclusion

Our governors were never meant to have the exclusive authority to determine our society's form and function. They have their place, and an important one. But the government exists alongside other institutions that have an equally important impact on the distribution of primary goods: Family, neighborhoods, the economy, church, friends, fraternal organizations, etc. These institutions reflect elements of reality that cannot be dissolved, which means they can never be mere vassals of the

government. But by substituting fairness for justice, Rawls would make them so. In a Rawlsian world, the only "fairness" is a uniform lack of justice.

No. _____

In The

Supreme Court of the United States

PETER F. CLOEREN,

Petitioner,

v.

ROBERT L. DRUSCHEL,

Respondent.

On Petition For Writ Of Certiorari To The Wisconsin Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

DANIEL KELLY
REINHART BOERNER VAN DEUREN S.C.
(*Counsel of Record*)
1000 North Water Street, Suite 2100
Milwaukee, Wisconsin 53202
(414) 298-1000 Fax: (414) 298-8097

Attorney for Petitioner Peter F. Cloeren

QUESTIONS PRESENTED

1. "Relatedness" Between Forum Contacts And Cause Of Action In The Context Of Specific Personal Jurisdiction

When a cause of action arises out of or relates to the *sale* of a domestic corporation to a foreign corporation, are forum contacts that are solely related to the post acquisition *operation* of the domestic corporation sufficiently "related" to the cause of action, as a matter of due process, to support a Wisconsin court's assertion of specific *in personam* jurisdiction over a non-resident employee of the foreign corporation?

2. Fiduciary Shield Doctrine

When a non-resident's forum contacts occur entirely as a representative of his employer, may a Wisconsin court base its assertion of specific, *in personam* jurisdiction on only those contacts?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

ARTICLES

OPINION AND ORDER AT ISSUE IN THIS CASE

Druschel v. Cloeren, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006).

Druschel v. Cloeren, 2006 WI 126, 724 N.W.2d 205 (Oct. 10, 2006).

JURISDICTION OF THE UNITED STATES SUPREME COURT

a. Petitioner seeks review of a decision of the Wisconsin Court of Appeals dated August 1, 2006, where review was denied by the Wisconsin Supreme Court on October 10, 2006.

b. Jurisdiction is conferred by 28 U.S.C. § 1257(a), for an issue arising under the Fourteenth Amendment to the United States Constitution.

The judgment of the Wisconsin Court of Appeals sought to be reviewed was entered on August 1, 2006. A petition for review was filed with the Wisconsin Supreme Court and denied October 10, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any persons of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wisconsin Long-Arm Statute, Wis. Stat. § 801.05(1)(d):

> A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to section 801.11 under any of the following circumstances:
>
> (1) Local Presence or Status. In any action whether arising within or without this state, against a defendant who when the action is commenced:
>
> (a) Is a natural person present within this state when served; or
>
> (b) Is a natural person domiciled within this state; or
>
> (c) Is a domestic corporation or limited liability company; or
>
> (d) Is engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise.

STATEMENT OF THE CASE

Wisconsin resident Robert Druschel haled Peter Cloeren, a Texas resident, into a Wisconsin court to answer for an alleged breach of contract. Mr. Cloeren, however, has insufficient contacts with Wisconsin to subject him to the jurisdiction of a Wisconsin court.

The controversy in this case arose out of the late 1997 sale of Production Components, a Wisconsin corporation, to Cloeren, Inc., a Texas corporation.[1] Shortly before the September 1997 closing of the transaction, Mr. Druschel (a

[1] (App. 57, R. 45 at 1.) At the time of the September 15, 1997 Stock Purchase Agreement, Cloeren, Inc. was known as The Cloeren Company. (App. 57, R. 45 at 1.) We will refer to it herein as the "Corporation." After the sale, Production Components/Chippewa Valley Die, Inc. was called Production Components – Cloeren, Inc. (App. 2; App. 57, 59, R. 45 at 2.) We will refer to it herein as simply "Production Components."

former shareholder of Production Components) insisted that Mr. Cloeren (a shareholder of the Corporation) sign the promissory notes in his personal capacity. Mr. Druschel subsequently breached his contractual obligations to Production Components, thereby giving rise to an offset against further payment of the purchase price, including the amount due under the promissory note signed by Mr. Cloeren. Mr. Cloeren stopped further payment, to which position Mr. Druschel took exception.

The Wisconsin Court of Appeals adopted an extraordinarily broad view of the Due Process Clause when it used contacts related only to the Corporation's post acquisition operation of the Wisconsin company to find personal jurisdiction over Mr. Cloeren. But Mr. Druschel's cause of action addresses, at its broadest, the *sale* of a Wisconsin corporation in 1997. Contacts related to the subsequent *operation* of the new company, therefore, cannot be said to "arise out of or relate to" the sale. Thus, Mr. Cloeren's contacts with Wisconsin (as an agent of the Corporation) resulting from operation of the company cannot serve as a basis for asserting specific jurisdiction in a case related to the sale of the company.

I. Factual Background.

A. Sale Of Production Components To The Corporation.

All shares of Production Components stock, including Mr. Druschel's shares, were sold to the Corporation on September 15, 1997. (App. 49-50, R. 30, Ex. 1; App. 58, R. 45 at 1.) As part of the payment of the purchase price, Mr. Druschel received a promissory note signed by Mr. Cloeren in his personal capacity. (App. 58, R. 45, Ex. 1.) Post closing adjustments to the purchase price led to Mr. Cloeren's execution of a replacement promissory note in favor of Mr. Druschel on February 26, 1998 (the "Replacement Note"). (App. 68, R. 45, Ex. 5.)

B. The Dispute.

Mr. Cloeren's refusal to pay the balance due under the Replacement Note was precipitated by Mr. Druschel's violation of his employment and non-compete agreements with the Corporation. (App. 48, R. 30, Ex. 1.) Mr. Druschel's breaches consisted of acting as an advisor in the formation and operation of a competing business and withholding information about an employee who solicited the company's customers on behalf of a competitor. (App. 78-97, R. 41, Ex. 7 at 114-116, 150, 159-160, 177-179; App. 53, R. 30, Ex. 1.) Mr. Druschel admits he breached his employment agreement by not notifying Production Components of these efforts to harm the company's business interests. (App. 82-84, R. 41, Ex. 7 at 150-51, 161.)

Both the Original Note and Replacement Note provide that, should Mr. Druschel breach his contractual obligations, Mr. Cloeren would be entitled to offset the resulting damages against any amounts remaining due under the notes. Mr. Cloeren exercised his offset right by refusing payment on the Replacement Note.

Mr. Cloeren filed suit in Texas to enforce his offset right. *See Cloeren, Inc. et al. v. Druschel*, Case No. B031037-C (Orange County, Texas, 163rd Judicial District Aug. 28, 2006) (the "Texas Case"). (App. 48, R. 30, Ex. 1.) Mr. Druschel responded by filing his suit in Wisconsin against Mr. Cloeren. The Texas Case remains open and stayed pending the resolution of the case at bar.

II. Mr. Cloeren's Insufficient Contacts.

There are two classes of activity relevant to the jurisdictional inquiry in this case: The first class – the sale of Production Components to the Corporation – gave rise to this cause of action. The second – the Corporation's post sale management of Production Components – has no relationship to the instant cause of action.

Because Mr. Cloeren lacked even minimal Wisconsin contacts with respect to the sale of the company, the trial and appellate courts imported contacts from the post sale

operation of the company to fill that deficit. Not only were those contacts not related to the cause of action, but they were not even contacts in Mr. Cloeren's personal capacity. Rather, his contacts with Wisconsin were in his capacity as a representative of the Corporation.

A. The Sale Of Production Components To The Corporation.

The Production Components shareholders sold their stock to the Corporation, not Mr. Cloeren. (App. 57, R. 45 at 1.) Mr. Cloeren was not the primary contact for the Corporation in those discussions, and he did not travel to Wisconsin to negotiate the terms. (App. 99-102, R. 20 at 99-104.) The deal in principal was reached without any substantive input from him. (App. 99-102, R. 20 at 99-104.)[2]

Mr. Cloeren then executed the transaction documents (on behalf of the Corporation) and the Original Note (in his personal capacity) in Texas. (App. 107-109, R. 16 at 110-111.) The Original Note specifies Texas law as governing, and shows Mr. Cloeren's address as Orange, Texas. (App. 64, 68, R. 45, Ex. 1, at 2, 4.) The Original Note is secured with shares of stock in a Texas corporation held in escrow by Orange Savings Bank. (App. 50, R. 30 at 2-3.)

The Replacement Note (upon which Mr. Druschel based his Complaint) took the place of the Original Note and, like the obligation it supplanted, designates Orange, Texas, as its site, identifies Texas law as governing, and shows Mr. Cloeren's address as Orange, Texas. (App. 71, 75, R. 45, Ex. 5 at 2, 4.)[3]

---

[2] Mr. Cloeren, while not certain, believes it is possible he may have traveled to Wisconsin at one point for due diligence purposes. (App. 102-103, R. 20 at 104-105.)

[3] The Court of Appeals did not find general jurisdiction over Mr. Cloeren. Mr. Cloeren has resided in Texas for the last 25 years. (App. 111-112, R. 12, Interrogs. 1-2.) He does not have an ownership interest in any Wisconsin businesses, and he has no accounts in any Wisconsin financial institution. (App. 113-114, R. 12, Interrogs. 5, 9.)

B. Management Of Production Components After The Sale To The Corporation.

Because of the dearth of contacts between Mr. Cloeren and Wisconsin relating to the sale of Production Components, the trial and appellate courts looked to contacts related to a different transaction, to wit, the Corporation's post sale operation of Production Components. The courts borrowed the following contacts (all of which were accomplished in Mr. Cloeren's representative capacity) to fulfill the "minimum contacts" requirement: Mr. Cloeren visited Wisconsin six to eight times since 1997; spoke to one Wisconsin employee of Production Components approximately each week by telephone; spoke to another Wisconsin employee of Production Components approximately twice per month; and was involved in the management of a Texas corporation which owns a Wisconsin corporation (Production Components); and is actively involved in the management of Production Components. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006). (App. 1, 5.); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005.) (App. 25, 26.)

The Court of Appeals found these contacts should be considered regardless if they were made on behalf of a business. (App. 8.)

III. Procedural History.

Mr. Druschel filed his Complaint on September 17, 2003. (App. 41, R. 1 at 1.) Mr. Cloeren responded with a motion to dismiss for lack of personal jurisdiction. (App. 48, R. 30.)

Mr. Cloeren argued that he had insufficient contacts with the State of Wisconsin to warrant the exercise of either general or specific jurisdiction over his person. He also argued that any of his contacts with Wisconsin were strictly in a representative capacity, and did not constitute personal minimum contacts. The Circuit Court denied the

motion. *See Druschel v. Cloeren*, Order, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005) (App. 25.)[4]

Mr. Cloeren appealed the ruling on January 30, 2006, maintaining again that he lacked the requisite minimum contacts with the State of Wisconsin to support personal jurisdiction. The Court of Appeals affirmed on August 1, 2006, finding sufficient minimum contacts to support specific jurisdiction.

Both courts assessed only those contacts related to the operation of Production Components by the Corporation *after* the sale of the company. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006) (App. 1, 5, 25, 26); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005) (App. 25.) The Court of Appeals assumed, without analysis, that the cause of action related to, or arose out of, those contacts.

Mr. Cloeren timely brought his petition for review to the Wisconsin Supreme Court, asking the court to accept the case for the purpose of resolving, *inter alia*, the same two jurisdictional questions presented in the instant

[4] At the hearing on the Motion to Dismiss, the Circuit Court found that post acquisition contacts were connected and related to the cause of action because "Cloeren failed to pay the balance on a promissory note payable to Mr. Druschel that was used to pay for stock held by Mr. Druschel in Production Components." (App. 33.) In doing so, the court espoused (*sotto voce*) a hybrid model of personal jurisdiction in which specific and general jurisdiction contacts are conflated in circumstances in which an analysis of the contacts under either of the standards independently would not confer jurisdiction. The Seventh Circuit has encountered this approach before: "[Plaintiff] argues, in effect, for a hybrid between specific and general jurisdiction where, though *all* of a defendant's forum contacts would not be relevant for minimum contacts, all of a defendant's contacts *with a specific plaintiff* would be." *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1278 (7th Cir. 1997) (emphasis in original). It also soundly condemned that approach: "We do not think, however, that using such a loose causal connection between a suit and a defendant's forum contacts as the basis for personal jurisdiction comports with fair play and substantial justice." *Id.* The court subsequently entered summary judgment against Mr. Cloeren on the merits of the case on August 29, 2005.

Petition. On October 10, 2006, that court denied the petition, making the published Court of Appeals opinion controlling law throughout the state.[5]

ARGUMENT

This petition presents a jurisdictional question identified, but not answered, by this Court in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 (1984). This Court left open for future consideration how a court ought to determine whether a defendant's contact with a forum state is "related" to the pending cause of action for the purpose of establishing specific personal jurisdiction.[6]

The intervening years have spawned and nurtured a harmful and oft-commented upon division between the United States Courts of Appeals on how to answer that question. It is a conflict that, as one court stated as recently as 2004, "has plagued federal Courts of Appeals and has resulted in divergent rules." *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99 (3d Cir. 2004).[7]

---

[5] App. 39; The Wisconsin Court of Appeals published its opinion in this case on October 10, 2006. Review by the Wisconsin Supreme Court is discretionary. Wis. Stat. § 809.62(1) (2003-04).

[6] Review is, of course, a matter of judicial discretion on a writ of certiorari before this Court. With respect to both of the questions we present in this Petition, we believe the following considerations are applicable: "(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals," and "(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court." Sup. Ct. R. 10. Although the Wisconsin Court of Appeals is not this State's court of last resort, the Wisconsin Supreme Court's denial of the petition for review means the appellate opinion has the same state-wide precedential effect as a supreme court opinion.

[7] Commentators also have taken note of the continuing division and the difficulties it presents. *See, e.g.*, Linda Sandstrom Simard, *Meeting Expectations: Two Profiles For Specific Jurisdiction*, 38 IND. L. REV. 343, 348 (2005) ("Notwithstanding the Court's lack of direction –

(Continued on following page)

The Due Process Clause cannot serve its purpose in such a turbulent and uncertain milieu. That clause is supposed to give the average American the ability to intelligently order his affairs so that he may know where he is subject to a foreign state's jurisdiction. "The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980).

It is currently almost impossible to discern when one's activities will give rise to "specific" personal jurisdiction. Indeed, as discussed below, highly-experienced federal court judges cannot agree on what activities suffice for the exercise of such jurisdiction. In fact, they cannot even agree on what test to apply in making that determination. That leaves little hope for the layman as he attempts to foresee the jurisdictional consequences of his activities.

Foreseeability is the Due Process touchstone for a court's exercise of personal jurisdiction over a non-resident. That foreseeability has vanished, however, as state and federal courts developed, over the last few decades, widely disparate tests to determine when courts may exercise specific *in personam* jurisdiction. The crux of the division lies in how to determine the "relatedness" between the defendant's forum activities and the cause of action. The approaches vary greatly, ranging from a Rube Goldberg-like "but for" test, to a vague "substantial relationship" test, to a more limited and rational "proximate cause" analysis.

---

or possibly because of it – lower courts and commentators have struggled to give meaning to the nexus requirement."). The current jurisdictional picture has variously been described as "unsatisfactory," a "mess," "incoherent," and "in chaos." Charles W. Rhodes, *The Predictability Principle In Personal Jurisdiction Doctrine: A Case Study On The Effects Of A "Generally" Too Broad, But "Specifically" Too Narrow Approach To Minimum Contacts*, 57 BAYLOR L. REV. 135, 139 (Winter 2005).

The practical result is that no one can be certain which, or how many, of his or her activities will confer personal jurisdiction on a foreign state. The Court should grant this petition to restore foreseeability to the application of the Due Process Clause.

This Petition also presents an apt occasion for the Court to address a closely related jurisdictional question, to wit, whether a court may exercise *in personam* jurisdiction over an individual whose only relevant contacts with a forum state are acts in a representative capacity on behalf of a corporate entity. This question is of vital importance both as a matter of federal constitutional law, and as a matter of pragmatism to the increasing number of people whose everyday business is corporate and interstate.

Because this question has not been settled by the Court, and because the lower courts are applying the due process clause in an inconsistent manner, people are left with greater or lesser constitutional protections in and among the several States. This Court should resolve the issue and end the split.

I. The "Minimum Contacts" Question The Wisconsin Court Decided Has Not Been, But Should Be, Settled By This Court.

As this Court well knows, a court may not exercise personal jurisdiction over a non-resident unless that person has "minimum contacts" with the forum state, and the exercise of jurisdiction on the basis of those contacts would be consistent with "fair play and substantial justice." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-77 (1985); *Helicopteros*, 466 U.S. at 414; *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).[8]

[8] Wisconsin's long-arm statute (Wis. Stat. §801.05) reaches to the full extent allowed by the Due Process Clause. *See Allen-Bradley Co., Inc. v. Datalink Techs., Inc.*, 55 F. Supp. 2d 958, 959 (E.D. Wis. 1999). The specific provision invoked by the Chippewa County Circuit Court

(Continued on following page)

In the context of the assertion of "specific" personal jurisdiction, the prospective defendant's contacts with the forum must evidence that (1) "the defendant has 'purposefully directed' his activities at residents of the forum," and (2) "the litigation results from the alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)); *Helicopteros*, 466 U.S. at 414.

A. This Court Specifically Left Unanswered The Question Presented By This Petition.

In *Helicopteros*, this Court expressly left the meaning of the second prong of the "specific" jurisdiction analysis for future consideration:

> [W]e decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) *what sort of a tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists.*

Helicopteros, 466 U.S. at 416 (emphasis supplied). This petition describes the need to resolve the second of those two questions, that is, how "related" a defendant's contacts must be to the plaintiff's cause of action.

The question of "relatedness" serves two essential purposes: "First, relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases. Second, it ensures that the element of causation remains in the forefront of the due process investigation." *Nowak v. Tak How Investments, Ltd.*, 94 F.3d 708, 714 (1st Cir. 1996).

---

states that: "A court of this state having jurisdiction of the subject matter has jurisdiction over a person [who] . . . [i]s engaged in substantial and not isolated activities within this state, whether such activities are wholly interstate, intrastate, or otherwise." Wis. Stat. §801.05(1)(d).

Lacking direction from this Court on the "relatedness" question, however, the United States Circuit Courts of Appeals have adopted a potpourri of conflicting standards, some of which serve the purposes identified by *Nowak*, some of which do not.

The differing standards are outcome determinative inasmuch as *in personam* jurisdiction may or may not exist depending upon which test the court adopts. As a result, not only does the Constitution provide differing levels of due process protection depending on a plaintiff's choice of forum, but non-residents have no way of discerning which of their actions may subject them to a foreign state's jurisdiction.

B. The United States Circuit Courts Of Appeals Are In Disarray.

The split between the United States Circuit Courts of Appeals on how to answer the "relatedness" question was already sufficiently well-developed in 1996 that the *Nowak* court could catalogue the division. The split has shown no sign of resolving since that decision. In fact, it is a division still "plaguing" the courts. *See Miller Yacht Sales, Inc.*, 384 F.3d at 99 (a 2004 case noting the division before succumbing to the plague by abandoning the effort to develop a consistent analysis).

The *Nowak* court found the Circuits generally fall into one of two basic camps. The first applies a "proximate cause" analysis, while the second employs a "but-for" test in assessing whether a defendant's activities in the forum were sufficiently related to the asserted cause of action. It also noted the existence of a nautical-themed "in the wake of" standard, and a "substantial connection" test.

1. Three Circuits Use A "Proximate Cause" Test To Analyze Due Process.

The leading proponent of the "proximate cause" approach to assessing relatedness is the United States Circuit Courts of Appeals for the First Circuit. Other

Circuits using this analytical framework include the Second and Eighth. District Courts in the Third and Tenth Circuit have also appeared favorably inclined to this standard.[9]

The *Nowak* court observed that "relatedness is the divining rod that separates specific jurisdiction cases from general jurisdiction cases[, and it] ... ensures that the element of causation remains in the forefront of the due process investigation. Most courts share this emphasis on causation, but differ over the proper causative threshold." *Nowak*, 94 F.3d at 714 (internal marks and citation omitted).

The "proximate cause" standard forswears specific personal jurisdiction unless it "is premised on a contact that is a legal cause of the injury underlying the controversy – *i.e.,* that form[s] an important, or [at least] material, element of proof in the plaintiff's case. . . . " *Nowak*, 94 F.3d at 715 (internal marks and citation omitted, modifications in original). Application of this concept in the jurisdictional inquiry, however, is not as rigid as when employed in the tort context. "[W]e intend to emphasize the importance of proximate causation, but to allow a slight loosening of that standard when circumstances dictate. We think such flexibility is necessary in the jurisdictional inquiry: relatedness cannot merely be

[9] *Wims v. Beach Terrace Motor Inn, Inc.*, 759 F. Supp. 264, 267, 268 (E.D. Pa. 1991) (In case involving personal injury claim in new Jersey from defendant's negligence, court states, "[w]hile it is true that [plaintiff] might not have visited the motor inn if [she] had not seen the defendant's brochure, the causal link between the brochures and the injury is simply too attenuated to say that the injury arose from Pennsylvania."); *Dirks v. Carnival Cruise Lines*, 642 F. Supp. 971, 975 (D. Kan. 1986) (Although court references but-for analysis, it concludes that "[p]laintiff's cause of action is based on Carnival's duty to exercise due care to its passengers. Such a duty was not owed plaintiff until she became a passenger upon the ship in California. Consequently, Carnival's duty to plaintiff did not originate from its activities in Kansas. Plaintiff's injury was the ending in a fortuitous course of events that began with defendant's advertising of cruises and its selling of tickets.").

reduced to one tort concept for all circumstances." *Nowak,* 94 F.3d at 715.

The First Circuit favors the "proximate cause" approach because of the emphasis on foreseeability. "[P]roximate or legal cause clearly distinguishes between foreseeable and unforeseeable risks of harm. Foreseeability is a critical component in the due process inquiry, particularly in evaluating purposeful availment, and we think it also informs the relatedness prong." *Nowak*, 94 F.3d at 715 (citation omitted).

The emphasis on foreseeability, the *Nowak* court observed, flows directly from this Court's teaching on Due Process Clause fundamentals:

> [The Due process Clause] requir[es] that individuals have "fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign. . . ." [T]his "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum, *and* the litigation results from alleged injuries that "arise out of or relate to" those activities.

Nowak, 94 F.3d at 715 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. at 472) (modifications in original, emphasis supplied).

The Eighth Circuit, while not specifically labeling its test "proximate cause," agrees with the content of the First Circuit's analysis: "[T]he defendant's in-state conduct must form an 'important, or [at least] material, element of proof' in the plaintiff's case." *United Elec., Radio and Mach. Workers of America v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1089 (1st Cir. 1992).[10] The court went on to

[10] The *163 Pleasant Street* court recognized the division between the Circuit Courts and responded by developing what it called "a few, rather abecedarian precepts pertaining to the relatedness requirement." *163 Pleasant Street Corp.*, 960 F.2d at 1089. Surely a Circuit Court's confessed resort to "abecedarian" principles in answering such a fundamental constitutional question is, if nothing else, an invitation for this Court's

(Continued on following page)

explain the relationship between its test and the tort-based standard of causation:

> We have likewise suggested an analogy between the relatedness requirement and the binary concept of causation in tort law under which both elements – cause in fact (i.e., the injury would not have occurred "but for" the defendant's forum-state activity) and legal cause (i.e., the defendant's in-state conduct gave birth to the cause of action) – must be satisfied to find causation sufficient to support specific jurisdiction. In this inquiry, foreseeability is critical.

Id.

The Second Circuit agrees that, at least when contacts are few, those contacts must have proximately caused the injury of which the plaintiff complains. In *Chew v. Dietrich*, 143 F.3d 24 (2nd Cir. 1998), the court said:

> Where the defendant has had only limited contacts with the state it may be appropriate to say that he will be subject to suit in that state only if the plaintiff's injury was proximately caused by those contacts. . . . Where the defendant's contacts with the jurisdiction that relate to the cause of action are more substantial, however, it is not unreasonable to say that the defendant is subject to personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury.

Id. at 29.

The test a court adopts to answer the "relatedness" question is tremendously important because it can be dispositive of jurisdiction. For instance, had the Wisconsin Court of Appeals applied the proximate cause test in this case, it would have stayed its hand. No court or party has ever asserted (or even suggested) that the contacts upon

---

attention. Especially when those precepts conflict with ones developed by other Circuit Courts of Appeals.

which the courts relied were proximately related to Mr. Druschel's cause of action. A more liberal standard, however, such as the "but-for" test, sweeps considerably more broadly, subjecting people to the jurisdiction of foreign states based on only tenuous contacts.

2. Two Circuits Use A "But-For" Test To Analyze Due Process.

The Ninth Circuit carries the banner for the "but-for" test. In *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995), the court unabashedly expressed this standard: "We rely on a 'but for' test to determine whether a particular claim arises out of forum-related activities and thereby satisfies the second requirement for specific jurisdiction." *Ballard v. Savage*, 65 F.3d 1495, 1500 (9th Cir. 1995).[11]

The Ninth Circuit has explicitly recognized the outcome-determinative effect of which "relatedness" test a court adopts. In the *Shute* case, the court used the "but-for" test in approving jurisdiction over the non-resident Carnival Cruise Lines for a slip-and-fall accident occurring in international waters. The court observed:

> Were this court to apply the "arising from" analysis of *Marino* and *Pearrow* to this case, we would conclude that Mrs. Shute's fall did not arise out of Carnival's solicitation of business in Washington. Rather, we would find that her injuries arose out of the negligent failure to maintain a safe passageway through the galley of the TROPICALE.

Shute, 897 F.2d at 383. The *Marino*[12] case to which the court referred is a First Circuit decision employing the

---

[11] The *Ballard* court concluded, correctly we believe, that the Ninth Circuit's employment of the "but-for" test was not disturbed by this Court's reversal of *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1990), in which the Ninth Circuit originally adopted this standard. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991).

[12] *Marino v. Hyatt Corp.*, 793 F.2d 427 (1st Cir. 1986). The *Marino* court construed the Massachusetts long-arm statute. The Massachusetts

(Continued on following page)

"proximate cause" test described above. The *Pearrow*[13] decision (an Eighth Circuit case), adopted the substance of the "proximate cause" test, although it was not labeled as such.

The Fifth Circuit is in the "but-for" camp, although it has wavered. In *Prejean v. Sontrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981), the court claimed the "but-for" mantle in no uncertain terms: "Logically, there is no reason why a tort cannot grow out of a contractual contact. In a case like this, a contractual contact is a 'but for' causative factor for the tort since it brought the parties within tortious 'striking distance' of each other." *Id.* at 1270 n.21.[14] A few years later, the Circuit edged away from its commitment to that test. *See, e.g., Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) ("[T]his court has observed that merely contracting with a resident of a forum state is insufficient to subject the nonresident to the forum's jurisdiction," and although "the contractual relationship between [defendant and plaintiff] may have been cemented in Texas, the significance of this fact is diminished by the contract provision specifying that Oklahoma law would govern the agreement"). It appears to have now returned to the fold. *See, e.g., Trinity Indus., Inc. v. Myers & Assoc., Ltd.*, 41 F.3d 229, 231-32 (5th Cir. 1995) ("There would be no injury or basis for a claim but for the fact that [defendant] represented [plaintiff] in Texas").

---

high court subsequently rejected the "proximate cause" test in favor of the "but-for" standard in evaluating relatedness for purposes of the statutory analysis. *Tatro v. Manor Care, Inc.*, 416 Mass. 763, 771-74 (1995). However, the First Circuit recognized that this has no impact on the constitutional analysis. *Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 207 n.8 (1st Cir. 1994).

[13] *Pearrow v. National Life & Accident Ins. Co.*, 703 F.2d 1067 (8th Cir. 1983).

[14] *Prejean* involved the assertion of widows' tort claims against their late husbands' Algerian employer (and others) arising out of a fatal airplane accident. *Prejean*, 652 F.2d at 1264.

The *Nowak* court identified the principle weakness in the far-reaching effect of this standard: "A 'but for' requirement . . . has in itself no limiting principle; it literally embraces every event that hindsight can logically identify in the causative chain." *Nowak*, 94 F.3d at 715. Far better, *Nowak* said, is the "proximate cause" analysis, which "is likely to enable defendants better to anticipate which conduct might subject them to a state's jurisdiction than a more tenuous link in the chain of causation." *Id.*

3. One Circuit Uses An "In The Wake Of" Test To Analyze Due Process.

The Seventh Circuit's approach does not fit neatly into either of the two primary categories of "relatedness" tests. In substance, however, it lies closest to the First Circuit's "proximate cause" standard.

In *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272 (7th Cir. 1997), the court described its test in distinctly First Circuit-like terms: "To be relevant for personal jurisdiction, however, past contacts involving the forum state should either bear on the substantive legal dispute between the parties or inform the court regarding the economic substance of the contract." *Id.* at 1278.[15] Indeed, the court turned to a First Circuit case to find support for a robust connection between the contacts and the cause of action. "As the First Circuit put it, specific jurisdiction is not appropriate "merely because a plaintiff's cause of

[15] The plaintiff in *RAR, Inc.* advanced a personal jurisdiction argument that appears identical to the Wisconsin Court of Appeals' decision in this case. The *RAR, Inc.* court observed that the plaintiff "argues, in effect, for a hybrid between specific and general jurisdiction where, though *all* of a defendant's forum contacts would not be relevant for minimum contacts, all of a defendant's contacts *with a specific plaintiff* would be." *RAR*, 107 F.3d at 1278 (emphasis in original). The court soundly rejected that approach: "We do not think, however, that using such a loose causal connection between a suit and a defendant's forum contacts as the basis for personal jurisdiction comports with fair play and substantial justice." *Id.*

action arose out of the general relationship between the parties; rather, the action must *directly arise* out of the specific contacts between the defendant and the forum state." *Id.* (citing *Sawtelle v. Farrell*, 70 F.3d 1381, 1389 (1st Cir. 1995)) (emphasis in original).

The Seventh Circuit, however, has suggested that something less than proximate cause will suffice for the exercise of specific personal jurisdiction. In assessing the Illinois long-arm statute, the court said that "[t]he [statute's] 'arising from' requirement is liberally construed – all one need be able to say is that the cause of action lies somehow 'in the wake' of the Illinois transaction." *Heil v. Morrison Knudsen Corp.*, 863 F.2d 546, 549 (7th Cir. 1988). The court was quick to note, however, that "this is not to be taken literally . . . It is not to be supposed that every time a board of directors meets, it makes waves in whose wakes causes of action float. . . ." *Id.*

The *Heil* court found that Illinois' long-arm statute did not reach the accused activity, and so there was no cause to apply the "in the wake of" standard to the Due Process Clause. But a few years previously, in *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984), the court used the same nautical metaphor in justifying the exercise of personal jurisdiction: "The discussions that took place in Illinois between [defendants] played a part in the subsequent negotiations between [defendant] and plaintiff, which led to the contract. . . . The contract under which the plaintiff is suing for breach of warranty thus lies in the wake of [defendant's] commercial activities in Illinois." *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1215-16 (7th Cir. 1984). It thus appears that the Seventh Circuit, while holding to some form of "proximate causation," uses the "in the wake of" metaphor to liberalize the test to some (uncertain) extent.

4. One Circuit Uses A "Substantial Connection" Test.

The Sixth Circuit rejects the proximate cause standard, but does not go as far as the "but-for" test endorsed

by the Ninth Circuit. It says that the "arising from" criterion "does not require that the cause of action formally 'arise from' defendant's contacts with the forum; rather, this criterion requires only 'that the cause of action, of whatever type, *have a substantial connection with* the defendant's in-state activities.'" *Third Natl. Bank in Nashville v. Wedge Group Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989) (emphasis in original).

The Sixth Circuit apparently sees this as a fusion between the "but-for" and "in the wake of" approaches. In *Lanier v. American Bd. of Endodontics*, 843 F.2d 901 (6th Cir. 1988), the court considered a sex discrimination case involving the American Board of Endodontics' refusal to certify a Michigan dentist. After reviewing the Seventh Circuit's "in the wake of" test, it stated: "Clearly the cause of action herein, if one exists, arose from, was 'made possible' by, and lies in the 'wake' of the application process, much of which occurred in Michigan." *Id.* at 909.

It is possible to view this test (and, perhaps, the Seventh Circuit's test) as lying somewhere between the First Circuit's "proximate cause" standard and the Ninth Circuit's "but-for" inquiry. In the Due Process context, however, a middling approach has little merit when all it accomplishes is to further obscure what activity may subject a person to a foreign state's jurisdiction.

5. One Circuit Refuses To Adopt Any "Relatedness" Test.

The Third Circuit, at one point, hewed to an approach similar to the "proximate cause" test, but ultimately resigned the effort at constructing any particular analytical scaffold. It instead resorted to an unhelpful ad hoc determination of relatedness that contains no predictive value whatsoever.

In *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prods. Co.*, 75 F.3d 147 (3d Cir. 1996), the court considered whether the parties' contractual relationship in the 1980s (long since terminated by the time of the dispute) should count towards the necessary minimum

contacts to support jurisdiction in a case addressing an entirely separate contract executed some years later. Leaning on this Court's teaching in *Burger King*, the court said the relevant contacts are those relating to "dealings *between the parties in regard to the disputed contract,* not dealings unrelated to the cause of action." *Id.* at 153 (emphasis in original). The court found no specific personal jurisdiction.

To the extent the *Vetrotex* court adopted the proximate cause test, the Third Circuit expressly jettisoned it in *Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93 (3d Cir. 2004). The court said "we do not agree that we must apply an immediate or proximate cause standard to determine whether a claim arises out of a defendant's contacts with a forum state. . . ." *Id.* at 98.

In abjuring the proximate cause test, the court took note of the void it left behind: "We recognize that our conclusion that a defendant's contacts with a forum need not have been the proximate cause of the plaintiff's injuries in a tort case begs the question of what level of relationship is necessary under the 'arise out of or relate to' requirement." *Id.* at 99-100. Its response to that vacuum was (and is) both unsettling and destructive of the core purpose of the Due Process Clause.

The *Miller Yacht Sales* court denied it had any responsibility to construct (or borrow) an analytical framework within which to decide the "relatedness" question, which it acknowledged "has plagued federal Courts of Appeals and has resulted in divergent rules." *Id.* at 100. Instead, it said: "We have not laid down a specific rule because we have approached each case individually and taken a "realistic approach" to analyzing a defendant's contacts with a forum." *Id.* at 100.

It is anyone's guess what result an ad-hoc "realistic" approach will yield in any given case. That is, after all, the point of rejecting a discernible standard. But one thing is certain – it provides no means by which a non-resident can determine whether his or her activities will give rise to

specific personal jurisdiction in the Third Circuit. This is truly justice by the measure of the chancellor's foot.

* * *

In the context of specific *in personam* jurisdiction, the Due Process Clause no longer performs the salutary function envisioned by this Court. The sometimes vague, sometimes limitless, but ever-conflicting rules by which courts determine relatedness have defeated "the 'orderly administration of the laws. . . .'" *World-Wide Volkswagen Corp.*, 444 U.S. at 297. And the Clause no longer "gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.*

The situation is intolerable and growing more so. The current disagreement amongst the United States Courts of Appeals is a sufficient reason for this Court to address this open question. The Third Circuit's recent surrender to ad hoc rulings, eschewing any guiding analytical framework, suggests the Circuit Courts are reaching a point of exasperation that augurs ill for those over whom they exercise their jurisdiction. While the Third Circuit most starkly illustrates the problem with leaving this question open, the welter of "relatedness" tests amongst the Circuits is no less corrosive of Due Process Clause protections. The Court should grant this Petition and answer the question it identified in *Helicopteros*.

II. The Fiduciary Shield Question The Wisconsin Court Decided Has Not Been, But Should Be, Resolved By This Court.

Under the fiduciary shield doctrine, "an individual's transaction of business within the state solely as a corporate officer does not create personal jurisdiction." *Stuart v. Spademan*, 772 F.2d 1185, 1197-98 (5th Cir. 1985). Until the decision in this case, Wisconsin's courts had neither rejected nor accepted the doctrine, but the Seventh Circuit has treated the matter as one of state law rather than federal due process. *See Hardin Roller Corp. v. Universal*

Printing Machinery, 236 F.3d 839, 842 (7th Cir. 2001) ("Never in that state's history have its courts applied the doctrine – but neither have they definitively rejected the possibility.").

In this case, the lower courts refused to apply the doctrine, holding that state law alone applied to the issue of whether Mr. Cloeren was amenable to personal jurisdiction for actions taken purely in a representative capacity. *See Druschel v. Cloeren*, 2006 WI App 190, 723 N.W.2d 430 (Ct. App. Aug. 1, 2006) (App. 8.); *Druschel v. Cloeren*, Case No. 03CV359 (Wis. Cir. Ct. March 15, 2005.) (App. 25, 31.)

A. The Petition Presents A Ripe Occasion For The Court To Address The Questions Of Due Process Left Open In *Hustler Magazine, Calder, Burger King,* And *Helicopteros.*

In two companion cases issued more than twenty years ago, this Court touched briefly upon the issue of whether the due process clause permits the exercise of personal jurisdiction over a corporate representative acting, at least in part, in a representative capacity. *Keeton v. Hustler Magazine*, 465 U.S. 770, 781 n.13 (1985); *Calder v. Jones*, 465 U.S. 783, 790 (1985). The Court had no need to dwell on the issue because the defendant in each of those cases had individual, as well as representative, contacts with the forum at issue.

Post-*Hustler* and *Calder*, the issue has brewed in the courts below, and has been most problematic where a defendant's contacts are *entirely* representative in nature. Because neither *Hustler Magazine* nor *Calder* dealt with the scenario where the contacts are entirely representative, the lower courts have split in analyzing the issue.

Some courts view representative contacts as part and parcel of a federal due process analysis, and ask whether basing personal jurisdiction upon contacts made in a representative capacity comports with traditional notions of fair play and substantial justice. These courts apply the fiduciary shield doctrine, and find that the due process clause would be offended if contacts made in a representative capacity alone were sufficient to establish jurisdiction

over the person as an individual. Other courts, however, outright reject the notion that contacts in a representative capacity should be viewed any differently – for due process purposes – than contacts made by an individual personally. Still other courts consider representative contacts to be a matter of equity under state law, and therefore do not evaluate the issue under the Due Process Clause at all.

B. The Court Should Further Define The Circumstances Under Which An Employee Acting In A Representative Capacity May Reasonably Expect To Be Haled Into Court On An Individual Basis.

In assessing the fiduciary shield doctrine, courts have relied on a brace of this Court's opinions issued more than twenty years ago. *See Hustler Magazine*, 465 U.S. 770 and *Calder*, 465 U.S. 783. *Calder* involved journalists writing for the National Enquirer Magazine, and *Hustler Magazine*, it could go without saying, involved another publication of questionable repute.

In *Calder*, the Court's analysis turned upon the ultimate inquiry in any personal jurisdiction case: whether the defendant personally, reasonably should have anticipated being haled into court in the forum state. 465 U.S. at 789-90. The defendants in *Calder* – who wrote for the *National Enquirer* – published an allegedly defamatory article on California actress Shirley Jones. *Id.* at 784. When Ms. Jones sued them in a California court, the journalists claimed that the court lacked jurisdiction over their persons since they were merely acting for the paper, and not in their individual capacities. *Id.* at 789.

The Court rejected this defense as a factual matter, not as a matter of law. The Court noted that the reporters' personal "byline" appeared on the published article, *id.* at 785, and thus the "journalistic" piece at issue possessed a personal character.

With regard to their status as employees, the Court noted only that it did not "somehow insulate them from jurisdiction" and re-emphasized the fact that "[e]ach

defendant's contacts with the forum state must be assessed *individually*." 465 U.S. at 790 (emphasis added). *Calder* supports the simple proposition that an employee's actions that possess an individual (as opposed to purely representative) character will not be ignored merely because the defendant is a corporate agent; but *Calder* does not hold that contacts of a purely representative nature are sufficient to satisfy due process.

In *Hustler Magazine*, the companion case to *Calder*, the Court reversed a lower court's decision that it did not have jurisdiction over a corporate publisher in a libel suit. In *Hustler Magazine*, the Court discussed whether the individual owner and publisher of the magazine might also be subject to jurisdiction:

> In *Calder* . . . we today reject[ed] the suggestion that employees who act in their official capacity are somehow shielded from suit in their individual capacity. But jurisdiction over an employee does not automatically flow from jurisdiction over the corporation which employs him.

Hustler Magazine, 465 U.S. at 781 n.13.

Far from announcing a per se rule that employees should be subjected to individual jurisdiction for contacts arising out of performing their job for a corporation, *Hustler Magazine* and *Calder* support the unremarkable proposition that a defendant's actions also possessing an individual (as opposed to purely representative) character will not be ignored merely because the defendant is an employee.

Unanswered by either case, of course, is whether a representative's contacts that are purely representative are sufficient to establish jurisdiction over his person individually. Some courts have cited to *Hustler Magazine* and *Calder* and answered "Yes." Others have cited the same two cases and answered "No." Others sit somewhere in between. This case presents a ripe opportunity for the Court to provide the proper analytical framework for the lower courts to follow.

C. The Lower Courts Give Conflicting Answers To This Constitutional And Jurisdictional Question.

1. Jurisdictions Holding That Representative Contacts Do Not Count.

Many courts recognize that subjecting a defendant to *in personam* jurisdiction for contacts made in a purely representative capacity will often be fundamentally unfair, and therefore discount those contacts in the due process analysis. These courts consider the fiduciary shield doctrine "to be an important sub-issue under a due process analysis." *Saktides v. Cooper*, 742 F. Supp. 382, 385 (W.D. Tex. 1990). Succinctly stated:

> Considering a defendant's purely representative contacts from a due process standpoint, it would offend traditional notions of fair play and substantial justice to force employees who have occasion to do business by telephone or mail with any given number of states, to require that they defend lawsuits in those states in their individual capacity based on acts performed not for their own benefit, but for the benefit of their employer.

Saktides, 742 F. Supp. at 387.

Several Circuit Courts of Appeal have considered the matter as one that must follow "traditional lines of [a] due process analysis." *Columbia Briargate Co. v. First Nat'l Bank*, 713 F.2d 1052, 1065 (4th Cir. 1983); *Lehigh Valley Indus. v. Birenbaum*, 527 F.2d 87, 92-93 (2d Cir. 1975); *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 931 (6th Cir. 1974); *Wilshire Oil Co. v. Riffe*, 409 F.2d 1277, 1280-81 (10th Cir. 1969).

In *Weller*, the Sixth Circuit long ago expressed "serious doubt" that personal jurisdiction over corporate officers acting in a representative capacity would be fundamentally fair under the Due Process Clause. *Weller*, 504 F.2d at 931. In *Wilshire Oil*, the Tenth Circuit did the same. *Wilshire Oil*, 409 F.2d at 1280-81.

Because "the fiduciary shield doctrine and the due process clause are animated by a similar concern for fairness," *McClelland v. Watling Ladder Co.*, 729 F. Supp. 1316, 1321 (W.D. Okla. 1990), other courts have concluded that personal jurisdiction over a person acting in a representative capacity does not comport with the notions of fair play and substantial justice. *See Violanti v. Emery Worldwide*, 847 F. Supp. 1251, 1256 (M.D. Penn. 1994); *Hoag v. Sweetwater Int'l*, 857 F. Supp. 1420, 1426 (D. Nev. 1994); *McClelland*, 729 F. Supp. at 1321; *Flocco v. State Farm Mut. Auto. Ins. Co.*, 752 A.2d 147, 162-63 (D.C. App. 2000).

2. Jurisdictions Holding That Representative Contacts *Do* Count.

Other courts reject the notion that contacts made in a representative capacity should be given any lesser weight than those contacts made in an individual capacity. These courts subject a representative to personal jurisdiction even though his only contacts with the forum are made in a representative capacity for a corporate entity. These jurisdictions treat this as a matter of *state* law, rather than as a Constitutional due process matter.

The Ninth Circuit, for example, has held that representative contacts are to be viewed as a matter of "equity." *See Davis v. Metro Prods., Inc.*, 885 F.2d 515, 521 (9th Cir. 1989) (applying Arizona law and holding that jurisdiction is not "equitably limited") (citing *Calder* and *Hustler Magazine*). The New York Court of Appeals considers the issue one of "public policy." *Kreutter v. McFadden Oil Corp.*, 522 N.E.2d 40, 47 (N.Y. 1988).

Other courts, such as the Eastern District of Arkansas and the Eastern District of Michigan, cite to this Court's decisions in *Calder* and *Hustler Magazine,* but still treat the matter as one of state law. *Torchmark Corp. v. Rice*, 945 F. Supp. 172, 176 (E.D. Ark. 1996); *Superior Consulting Co., Inc. v. Walling*, 851 F. Supp. 839, 844 (E.D. Mich. 1994). *Torchmark* holds that the fiduciary shield doctrine

is simply a "state imposed limitation" that was "removed by the [Arkansas] legislature." *Id.*

Some courts simply fail to afford the doctrine constitutional significance. *See, e.g., Springs Indus., Inc. v. Gasson*, 923 F. Supp. 823, 826 (D. S.C. 1996); *Estabrook v. Wetmore*, 529 A.2d 956, 957 (N.H. 1987); *Norkol/Fibercore, Inc. v. Gubb*, 279 F. Supp. 2d 993, 996 (E.D. Wis. 2003); *Shipley Co. v. Clark*, 728 F. Supp. 818, 821 (D. Mass. 1990); *Seiber v. Campbell*, 810 So.2d 641, 645 (Ala. 2001); *Taylor-Rush v. Multitech Corp.*, 265 Cal. Rptr. 672, 681 (Cal. Ct. App. 1990).

The District of Delaware has predicted that the Delaware Supreme Court would refuse to recognize the fiduciary shield doctrine, though it also recognized that "constitutional fairness concerns" must have their proper role. *Mobil Oil Corp. v. Advanced Envtl. Recycling Techs., Inc.*, 833 F. Supp. 437, 442-43 (D. Del. 1993).

The Kansas Supreme Court is dismissive of the doctrine, holding that jurisdiction over a non-resident corporate representative "is predicated merely upon jurisdiction over the corporation itself." *Anderson v. Heartland Oil & Gas, Inc.*, 249 Kan. 458, 468 (Kan. 1991). Likewise, the Supreme Court of Nebraska has held that – purely as a matter of Nebraska law – personal jurisdiction will lie "regardless of the capacity" in which a defendant has acted. *Holste v. Burlington Northern R.R.*, 592 N.W.2d 894, 909 (Neb. 1999).

3. Other Courts Are Unsure Whether The Rule Is One of State or Federal Constitutional Law.

Other courts somehow view the rule "as an equitable principle," *Allen v. Toshiba Corp.*, 599 F. Supp. 381, 384 (D.N.M. 1984), but nevertheless apply it as one of constitutional dimension. *Id.* at 388 (citing *International Shoe* and *Helicopteros*). Still other jurisdictions use a state law "fairness" test that would mirror a federal due process analysis. *See Marine Midland Bank v. Miller*, 664 F.2d 899, 903 (2d Cir. 1981); *Doe v. Thompson*, 620 So.2d 1004,

1006 (Fla. 1993); *Rollins v. Ellwood*, 565 N.E.2d 1302, 1318 (Ill. 1990). At least one other jurisdiction recognizes the existence of the doctrine, but does not know when it applies, except "in very unusual circumstances that we cannot presently foresee and articulate." *Christian Book Distrib., Inc. v. Great Christian Books,* 768 A.2d 719, 733-34 (Md. App. 2001).

Where the rule governing such a fundamental question of due process and personal jurisdiction cannot be foreseen or articulated, it is in need of repair. This Court may provide the lower courts with guidance on the issue and put an end to the divergent applications of what should be a more simple rule.

D. Why It Is Important To Resolve This Question?

A critical element of a due-process, minimum-contacts analysis is that the exercise of jurisdiction be foreseeable to the defendant; in other words, "the defendant's conduct and connection with the forum are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 296. "[I]n each case . . . there must be some act by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

These basic elements of minimum contacts are lacking where an individual's only contacts with a forum are in a representative capacity, as the person's contacts are not truly his own, but rather are those of his employer. Because none of the defendant's representative acts are his own, they do not amount to the purposeful transaction of business by that defendant individually.

The question left unresolved by *Burger King*, *Helicopteros*, and *Carnival Cruise Lines* is directly related to whether contacts in a purely representative capacity may be attributed to an individual for purposes of personal jurisdiction, as *Burger King* itself referred back to *Hustler*

Magazine in discussing this issue. *See Burger King*, 471 U.S. at 472 (citing *Hustler Magazine*, 465 U.S. at 774). Indeed, the Court has never expounded upon how these factors, or the notions of fair play and substantial justice, should be measured where a person's contacts are in a purely representative capacity.

The Court should clarify how jurisdiction over Mr. Cloeren fits into the statements in *Hustler Magazine* and *Calder* that "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him" and that while an employee *qua* employee is not "somehow insulate[d] from jurisdiction" nevertheless his "contacts with the forum state must be assessed *individually*."[16] This case presents a ripe opportunity for the Court to provide the proper analytical framework for the lower courts to follow.

CONCLUSION

For all the reasons stated above, Mr. Cloeren respectfully asks this Court to grant his Petition.

Respectfully submitted,

DANIEL KELLY
REINHART BOERNER VAN DEUREN S.C.
(*Counsel of Record*)
Attorney for Petitioner Peter F. Cloeren

January 2007

[16] *See Hustler Magazine*, 465 U.S. at 781 n.13; *Calder*, 465 U.S. at 790.