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CASE COMMENTS

CONSTITUTIONAL LAW—*UNIVERSIDAD CENTRAL DE BAYAMON V. NATIONAL LABOR RELATIONS BOARD*: JURISDICTION OVER RELIGIOUS COLLEGES AND UNIVERSITIES—THE NEED FOR SUBSTANTIVE CONSTITUTIONAL ANALYSIS

In *Universidad Central de Bayamon v. National Labor Relations Board*,¹ the United States Court of Appeals for the First Circuit refused to enforce a National Labor Relations Board (NLRB or Board) order requiring a Catholic university to bargain with a faculty union. The United States Supreme Court's confusing treatment of the first amendment religion clauses and the circuit court's inability to agree on the proper application of *NLRB v. Catholic Bishop of Chicago*² prompted the First Circuit's evenly split decision.

Part I of this comment discusses the Supreme Court's decision in *Catholic Bishop*. Part II summarizes the First Circuit's application of that decision to the facts of *Universidad Central*. Part III argues that *Catholic Bishop* should not apply to *Universidad Central* and therefore reviews applicable Supreme Court interpretations of the religion clauses. Part IV refutes the excessive entanglement arguments proposed by the First Circuit in *Universidad Central*. Part V concludes that the First Circuit should have permitted NLRB jurisdiction over the faculty at *Universidad Central de Bayamon*.

I. NLRB Jurisdiction Over Religious Schools: *NLRB v. Catholic Bishop of Chicago*

Attempting to promote industrial peace in interstate commerce, Congress in 1935 enacted the National Labor Relations Act (NLRA or Act).³ The Act encouraged the formation of the labor union, which was to be the voice for the individual worker in labor/management relations. The NLRB, empowered to enforce the Act,⁴ began in 1975 to assert jurisdiction over Catholic secondary school employers.⁵ In *NLRB v. Catholic Bishop of Chicago*,⁶ however, the United States Supreme Court restricted the exercise of NLRB jurisdiction over lay teachers in two Roman Catholic parochial schools because it saw a "significant risk" of infringing on the establishment clause of the first amendment.⁷

In *Catholic Bishop*, Chief Justice Burger's majority opinion focused on the function of the parochial school teacher and noted:

In recent decisions involving aid to parochial schools we have rec-

1 793 F.2d 383 (1st Cir. 1986).

2 440 U.S. 490 (1979).

3 29 U.S.C. §§ 151-169 (1982).

4 29 U.S.C. § 153(a) (1982).

5 See Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975).

6 440 U.S. 490 (1979).

7 *Id.* at 502.

ognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What we said of the schools in *Lemon v. Kurtzman* is true of the schools in this case: "Religious authority necessarily pervades the school system." The key role played by teachers in such a school has been the predicate for our conclusions that governmental aid channeled through the teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools.⁸

Rather than confront the "serious First Amendment questions that would follow . . . from the Board's exercise of jurisdiction over teachers in church-operated schools,"⁹ the Court chose a construction of the jurisdiction section of the NLRA¹⁰ that would permit it to avoid resolving the case on constitutional grounds.¹¹ The Court found "no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act."¹² Accordingly, the Court held that the NLRB lacked statutory authority under the NLRA to exercise jurisdiction over the teachers in these "church-operated schools."¹³

II. *Universidad Central de Bayamon v. NLRB*

In November 1979, the full-time faculty of Universidad Central de

⁸ *Id.* at 501 (citations omitted).

⁹ *Id.* at 504.

¹⁰ The NLRA does not explicitly list which employees it covers. Rather, it purports to protect the rights of all employees except those that fall within an exception. Section 7 of the Act, 29 U.S.C. § 157 (1982), states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . ." Section 2(3) of the NLRA, 29 U.S.C. § 152(3) (1982), defines "employee" as "any employee" except:

[A]ny individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . or by any other person who is not an employer as herein defined.

Finally, § 2(2) of the NLRA, 29 U.S.C. § 152(2) (1982), states that "employer" also means "any person acting as an agent of an employer, directly or indirectly . . ." and concludes with exceptions to the broad "employer" category. Besides the employees specifically excluded from coverage under § 152(3), the only employees not covered are those who work for:

[T]he United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

¹¹ *Catholic Bishop*, 440 U.S. at 500. The Court cited *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), in which Chief Justice Marshall held that the courts ought not construe an Act of Congress to be unconstitutional if any other construction is possible. However, Justice Brennan, joined by Justices White, Marshall, and Blackmun, dissented in *Catholic Bishop*, arguing that "the interpretation of the National Labor Relations Act announced by the Court today is not 'fairly possible.'" *Catholic Bishop*, 440 U.S. at 511. Brennan urged:

[T]he Act covers all employers not within the eight express exceptions. The Court today substitutes amendment for construction to insert one more exception—for church-operated schools. This is a particularly transparent violation of the judicial role: The legislative history reveals that Congress itself considered and rejected a very similar amendment.

Id. The dissenting Justices noted that in adopting the Taft-Hartley Act in 1947, Congress refused to accept a provision that would have excluded from the term "employer" those organizations operated exclusively for "religious, charitable, scientific, literary, or educational purposes." *Id.* at 513 (emphasis omitted).

¹² *Catholic Bishop*, 440 U.S. at 504.

¹³ *Id.* at 507.

Bayamon in Bayamon, Puerto Rico formed a union. The "Union de Profesores Universitarios" sought certification from the NLRB. After the required hearings and an election, the Board certified the union. The university, however, refused to bargain with the union, claiming it had no obligation to do so. The union responded by filing an unfair labor practice charge with the NLRB.¹⁴ At the subsequent NLRB proceeding, the university defended on the ground that it was exempt from the requirements of the NLRA because of the Supreme Court's holding in *NLRB v. Catholic Bishop of Chicago*.¹⁵

The NLRB administrative law judge rejected the university's defense and ordered it to bargain with the union.¹⁶ The judge believed that *Catholic Bishop* was not controlling because, unlike the parochial high school defendant in that case, Universidad Central de Bayamon was neither church controlled nor pervasively sectarian. The judge also relied on NLRB decisions limiting application of *Catholic Bishop* to "parochial elementary and secondary schools."¹⁷ On review a three-member appellate panel of the NLRB, citing *Catholic Bishop*, exempted the university's seminary from NLRA coverage, but affirmed the administrative law judge's decision in all other respects.¹⁸

The NLRB subsequently sought an order from the First Circuit to enforce its decision. After hearing the case en banc,¹⁹ the circuit court split on the proper application of the *Catholic Bishop* holding to the facts of *Universidad Central*. Because no majority position could be reached, the First Circuit denied the NLRB request for an enforcement order.²⁰

The court filed two opinions differing on the proper reading of *Catholic Bishop*. Judge Breyer wrote the opinion denying the NLRB request for enforcement.²¹ According to Judge Breyer, the crucial issue in *Universidad Central* was whether *Catholic Bishop* applied to church-operated colleges as well as parochial preparatory schools.²² Based on four factors, Judge Breyer concluded that *Catholic Bishop* applied to this university.

First, Judge Breyer argued that the language of *Catholic Bishop* made no distinction between colleges and lower institutions of learning.²³ The Supreme Court simply referred to the general category of religiously af-

14 Universidad Central de Bayamon, 273 N.L.R.B. No. 138 (1984).

15 440 U.S. 490. The University also claimed that its employees were managerial in nature and thus exempt under *NLRB v. Yeshiva Univ.*, 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

16 *Universidad Central*, 273 N.L.R.B. No. 138, at 1.

17 See *Barber-Scotia College, Inc.*, 245 N.L.R.B. 406 (1979) (citing *Tilton v. Richardson*, 403 U.S. 672 (1971)) (allowed public aid to religiously affiliated universities on the basis that they were significantly different from church-related elementary and secondary schools, and did not present the same first amendment problems). See also *Lewis Univ.*, 265 N.L.R.B. No. 157 (1982); *Duquesne Univ. of the Holy Ghost*, 261 N.L.R.B. No. 587 (1982); *Thiel College*, 261 N.L.R.B. No. 580 (1982); *College of Notre Dame*, 245 N.L.R.B. No. 44 (1979).

18 *Universidad Central*, 273 N.L.R.B. No. 138, at 3-4.

19 A three judge panel voted 2-1 for enforcement, but the full court vacated that order and reheard the case en banc, see *FED. R. APP. P.* 35(a); six judges sat on the en banc panel in light of a senior circuit judge sitting, 28 U.S.C. § 46(c) (1976).

20 *Universidad Central*, 793 F.2d at 399.

21 Chief Judge Campbell and Judge Torruella joined Judge Breyer's opinion.

22 *Universidad Central*, 793 F.2d at 401.

23 *Id.*

filiated "schools" as being affected by its decision.²⁴ Because the *Catholic Bishop* Court purportedly based its holding on an interpretation of the NLRA, and used no limiting language in the opinion, Judge Breyer saw no reason for limiting the Court's holding to preparatory schools.

Second, Judge Breyer indicated that the true reason for the result reached in *Catholic Bishop* was the Court's fear that the state would become impermissibly entangled with religion.²⁵ Addressing this concern, Judge Breyer declared that the risk of state entanglement with religion in a university setting was just as substantial as it was in the preparatory school context of *Catholic Bishop*. Such entanglement might occur, according to Judge Breyer, if the religiously affiliated college dismissed a teacher allegedly for religious reasons and the teacher filed an unfair labor practice complaint. He believed that in such a situation the NLRB would be forced to determine whether the dismissal was for religious reasons or was actually an unfair labor practice. Not only would such a substantive determination infringe on first amendment guarantees but the mere process of inquiry into university practices and "allegedly religious motive[s]" would bring the Board into conflict with religious authority.²⁶ Accordingly, because the first amendment concerns in *Catholic Bishop* were just as apparent to Judge Breyer in the facts of *Universidad Central*, he believed that *Catholic Bishop* exempted the university from NLRB jurisdiction.²⁷

Next, according to Judge Breyer, failure to apply *Catholic Bishop* to universities would undercut the very purpose and rationale behind that case. The Supreme Court in *Catholic Bishop* rejected the NLRB's argument that there should be a distinction between "completely religious schools," such as a seminary for training clergy, and schools that are "merely religiously associated," such as a parochial high school where religious training per se is not the primary function.²⁸ Judge Breyer noted that the inquiry process needed to determine whether a school was "completely religious" would force the regulatory body to intrude into the university's religious affairs. Such a result would create the state entanglement with religion that *Catholic Bishop* expressly attempted to avoid.²⁹

²⁴ *Catholic Bishop*, 440 U.S. at 507.

²⁵ *Universidad Central*, 793 F.2d at 401.

²⁶ *Id.* See also *Catholic Bishop*, 440 U.S. at 502. The NLRB investigation of unfair labor practice charges, for example, would require the Board to question the clergy-administrators and inquire into the religious motives behind employment decisions. But see *infra* text accompanying footnotes 115-30.

²⁷ *Universidad Central*, 793 F.2d at 401. Judge Breyer noted that theological and philosophical issues are more likely to arise in an educational institution than in another church-run enterprise, such as a hospital or farm, because of the mission to educate students on moral issues. In this manner Judge Breyer rebutted the argument that *Catholic Bishop* should not be extended to colleges because it does not apply to all other church-run operations, especially since propagation of the faith is at least one of the missions of the university, which is not true of all church operations. *Id.* at 402. But see *infra* text accompanying notes 131-32.

²⁸ *Id.* The Supreme Court rejected this argument because such a distinction was too simplistic to provide a workable guide for the exercise of jurisdiction. *Catholic Bishop*, 440 U.S. at 495.

²⁹ *Universidad Central*, 793 F.2d at 401-02. This argument seems to presuppose that *Catholic Bishop* was decided on constitutional grounds, a reading that Chief Justice Burger in *Catholic Bishop* expressly disavows. *Catholic Bishop*, 440 U.S. at 502.

Finally, Judge Breyer distinguished the cases relied on by the NLRB. The cases cited by the Board³⁰ dealt with federal financial aid to religious schools and drew a distinction between preparatory and collegiate levels of education. Judge Breyer argued that concerns about the promotion of religion through financial aid differ fundamentally from problems of interference through labor board regulation. Judge Breyer maintained that the issuance of financial aid does not precipitate the type of federal regulation that attends the assertion of NLRB jurisdiction. Financial aid to a religiously affiliated college could be channelled specifically into nonreligious areas while regulations governing labor/management relations would necessarily impact on both religious and nonreligious aspects of the college. Consequently, NLRB regulation would necessarily require the regulatory board to intrude into all areas of the college, whether religious or secular.³¹

Because Judge Breyer determined that the *Catholic Bishop* exemption from NLRB jurisdiction must apply to religious universities as well as elementary and secondary schools, the only question remaining was whether Universidad Central de Bayamon qualified as a "religious school." Several factors suggested to Judge Breyer that the university was religiously controlled. The Dominican Order of the Roman Catholic church founded the university and continued to use it as part of an integrated educational system throughout Puerto Rico including elementary and secondary schools operated by the Dominicans. The Catholic church retained administrative control over the university. The President of the university and a majority of the Board of Trustees were required to be Dominican priests, as were a majority of the Executive Committee. The administration had near absolute control over the university, much more so than at most universities. The faculty possessed very little power. Under such a managerial structure, the clergy-administrators were in a position to control virtually all aspects of university life.³²

Additionally, in accordance with an agreement between the university, the Archdiocese of Puerto Rico, and the educational office of the Catholic Church in Rome, the university had declared that, in addition to its mission of secular education, it actively promoted the tenets of the Catholic faith.³³ The university held itself out as a Catholic university, encouraged religious observance among its students, and reserved the right to discipline members of the faculty for "offenses to the Christian morality."³⁴ It also required all students to take courses in theology and philosophy taught from a "Catholic orientation."³⁵

30 *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton v. Richardson*, 403 U.S. 672 (1971).

31 *Universidad Central*, 793 F.2d at 402. Judge Breyer also noted that *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980), stands for the proposition that a university may receive federal aid and yet still be beyond the reach of the labor laws. 793 F.2d at 403.

32 *Universidad Central*, 793 F.2d at 399-400, 273 N.L.R.B. No. 138 at 11.

33 The role of the Bishop, the governing local official of the Catholic Church, was limited, however, to purely religious matters. *Universidad Central*, 273 N.L.R.B. No. 138 at 7.

34 *Universidad Central*, 793 F.2d at 400.

35 *Id.* Neither teachers nor students must be Catholic, and no religious activity is required. *Id.* at 8.

After considering these factors, Judge Breyer found that the university had a primarily secular mission, but remained a religious institution. As such, he argued that *Catholic Bishop* must be applied to the *Universidad Central* case, that the university was therefore exempt from the operation of the NLRA, and that enforcement of the NLRB order must be denied.

Three judges of the en banc panel disagreed with Judge Breyer's interpretation of *Catholic Bishop* and voted to enforce the NLRB order. Writing for this group,³⁶ Judge Coffin argued that the Supreme Court based its holding in *Catholic Bishop* on the critical role of the teacher in parochial elementary and secondary schools.³⁷ Judge Coffin believed that *Catholic Bishop* held that teachers at parochial preparatory schools were essentially servants of the church, and therefore exempt from the Act, because of the church-related nature of their responsibilities. Judge Coffin's opinion emphasized the secondary school teacher's crucial role in propagating the faith and stressed that such propagation was an integral element of his or her teaching duties.³⁸ Thus, the establishment of a union at such a parochial preparatory school would impermissibly inject government into the day-to-day operation of religion.³⁹

Judge Coffin characterized the controlling issue as whether the teachers seeking to unionize at the university performed the same role that the high school teachers fulfilled in *Catholic Bishop*. This approach, like the one used by the Supreme Court in *Catholic Bishop*, focused the inquiry on the religious nature of the employee, rather than merely the religious nature of the employer. Using such an approach and relying heavily on a line of Supreme Court cases distinguishing between federal aid to colleges and federal aid to preparatory schools, Judge Coffin found that university and parochial school teachers did not perform similar roles.⁴⁰

Judge Coffin noted the Supreme Court's distinction in *Tilton v. Richardson*,⁴¹ a case upholding a grant of money to a church-sponsored college in which the Court stated that there were "significant differences between the religious aspects of church related institutions of higher

36 Judge Bownes and Senior Circuit Judge Aldrich joined Judge Coffin's opinion.

37 "The key role played by teachers in such a [church-operated] school system has been the predicate for our conclusions . . ." *Catholic Bishop*, 440 U.S. at 501.

38 Propagating the faith has been described as the "raison d'être of parochial schools." *Universidad Central*, 793 F.2d at 404 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring)).

39 The state would impermissibly intrude into religion because mandatory subjects of collective bargaining include terms and conditions of employment. Consequently, the NLRB would necessarily assume jurisdiction over the actions of the clergy-administrators. As one court stated: "mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the formerly autonomous position of management." *Pennsylvania Labor Relations Bd. v. State College Area School Dist.*, 461 Pa. 494, 504, 337 A.2d 262, 267 (1975).

40 The NLRB asserted several reasons why *Universidad Central* should not have been treated as a Catholic university. The NLRB noted that hiring standards at the university are the same as at most nonreligious colleges, and these standards do not consider religion. The NLRB also pointed out that teachers at the university are not expected to propagate the faith. *Universidad Central*, 793 F.2d at 404.

41 403 U.S. 672 (1972). See also *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985) and cases cited *supra* note 17.

learning and parochial elementary and secondary schools."⁴² In reaching his decision, Judge Coffin also noted the higher degree of academic freedom present at colleges.⁴³

Judge Coffin criticized the other panel for reading *Catholic Bishop* so broadly.⁴⁴ Based on the difference in the role of the teachers at this university from that of the secondary school teachers in *Catholic Bishop*, Judge Coffin concluded that the *Catholic Bishop* exemption should not be extended to the teachers' union at Universidad Central, and that the NLRB order should have been enforced.⁴⁵

III. Analysis of *Universidad Central*

A. *The Inapplicability of Catholic Bishop*

Judge Breyer concluded that *Catholic Bishop* held that the first amendment bars NLRB jurisdiction over religious schools in general. As Judge Coffin pointed out, however, *Catholic Bishop* does not per se prevent the NLRB from asserting jurisdiction in this context. Rather, on its facts, *Catholic Bishop* only bars NLRB jurisdiction over teachers in religious elementary and secondary schools.⁴⁶ In *Catholic Bishop*, the Court did not consider university faculties. The Court has noted, however, that university teachers provide a form of education that differs substantially from that provided in a parochial school because "the 'affirmative if not dominant policy' of the instruction in pre-college church schools is 'to assure future adherents to a particular faith by having control of their total education at an early age.'"⁴⁷

⁴² *Tilton*, 403 U.S. at 686.

⁴³ *Universidad Central*, 793 F.2d at 404.

⁴⁴ Judge Coffin's opinion argued that moral and theological disputes between the NLRB and the religious administration could just as easily arise in other religious institutions, such as hospitals or farms. Judge Coffin cited the example of the moral issue of abortion counseling at religious hospitals. If the Supreme Court decision is read as expansively as Judge Breyer reads it, according to Judge Coffin, it follows that these other institutions should also be affected by the decision in *Catholic Bishop*. This result would run contrary to the decisions of other circuit courts of appeals that have extended NLRB jurisdiction to many other religious institutions since *Catholic Bishop*. See, e.g., *Volunteers of America-Minnesota-Bar None Boys Ranch v. NLRB*, 752 F.2d 345 (8th Cir.), cert. denied, 105 S. Ct. 3502 (1985) (children's center); *Denver Post of the Volunteers of Am. v. NLRB*, 732 F.2d 769 (10th Cir. 1984) (temporary care centers); *St. Elizabeth's Hosp. v. NLRB*, 715 F.2d 1193 (7th Cir. 1983) (hospital); *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436 (9th Cir. 1982) (hospital); *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3d Cir. 1982) (children's home).

⁴⁵ *Universidad Central*, 793 F.2d at 405-06.

⁴⁶ The Court in *Catholic Bishop* refers to church-operated schools as "parochial schools." 440 U.S. at 502 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971)). A parochial school is defined as "an elementary or high school maintained and operated by a religious organization." *RANDOM HOUSE COLLEGE DICTIONARY* 968 (rev. ed. 1982). Other sources define parochial school as "a school maintained by a religious body [usually] for elementary instruction." *WEBSTER'S THIRD INTERNATIONAL DICTIONARY* 1643 (1976). Some *Catholic Bishop* commentators, however, interpret the confusing language to mean that the statutory exemption created by the opinion applies to the entire school, not just to the teachers. See, e.g., A. COX, D. BOK & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 96 (1986): "To the excluded categories of employers specifically listed in the Act, the Supreme Court, in a 5-4 decision, has added secondary schools operated by the Roman Catholic Church."; Note, *NLRB v. Catholic Bishop: Lay Teachers Seek More Than Good Shepherd to Protect Their Rights*, 32 *MERCER L. REV.* 655, 660 (1981): "[T]he NLRA was not intended to extend to religiously operated schools . . ." If these readings are correct, even janitors or cafeteria workers who are not involved in religious indoctrination would be denied protection under the NLRA.

⁴⁷ *Tilton*, 403 U.S. at 685-86 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 671 (1970)). The

In addition, the Court decided *Catholic Bishop* on the basis of congressional intent, not constitutional doctrine. Through this holding, the Court created a limited exception—for parochial school teachers—to the broad coverage of the Act, and ignored the fact that Congress intended to protect the bargaining rights of all employees not specifically excluded.⁴⁸ Judge Breyer would extend the Supreme Court's questionable statutory construction to religiously affiliated colleges or universities without examining Congress' intent as to such schools. But when the Supreme Court narrowly construes a statute, it is a mistake to apply the construction broadly. Therefore, courts should not cloak universities in the blanket NLRA exception that *Catholic Bishop* provided to parochial schools.

Instead, when confronted with an assertion of NLRB jurisdiction over the faculty at a religiously affiliated college or university, courts must rule on the basis of the substantive constitutional analysis traditionally required under the religion clauses of the first amendment.⁴⁹

B. Constitutional Analysis

The religion clauses of the first amendment impose two distinct restrictions on governmental activity.⁵⁰ One restriction, embodied in the free exercise clause, prohibits the government from impeding or burdening an individual in the free exercise of his religion.⁵¹ The other restriction, embodied in the establishment clause, provides that the federal government cannot advance one religion over another or actively support religion in general.⁵² Because these restrictions are independent,

Court also noted that "there is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination" than elementary or secondary school students. *Tilton*, 404 U.S. at 686.

48 See *supra* note 10.

49 Furthermore, while the *Catholic Bishop* majority maintained that it was not resolving the issue of whether NLRB jurisdiction would result in an unconstitutional government entanglement in the affairs of religious schools, the Court in dicta engaged in sufficient constitutional analysis for it to have concluded that an extension of jurisdiction to such schools would have given rise to "serious First Amendment questions." *Catholic Bishop*, 440 U.S. at 504. In *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985), the Second Circuit addressed state labor relations board jurisdiction over parochial schools. Not bound by the National Labor Relations Board decision in *Catholic Bishop*, the Second Circuit answered the question avoided by the Supreme Court in *Catholic Bishop* and held that New York State Labor Relations Board jurisdiction over parochial schools did not violate the first amendment. Because *Universidad Central* and similar cases should not be decided on the basis of the *Catholic Bishop* precedent, the question of NLRB jurisdiction over religious college or university faculty can be resolved only by determining whether there are any first amendment barriers to the Board's exercise of its jurisdiction in this arena. See *infra* note 100. As to the extent of NLRB jurisdiction, see *infra* notes 83 & 84.

50 The first amendment provides in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. 1.

51 See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

52 Modern interpretation of the establishment clause stems from the Supreme Court's decision in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). In *Everson*, the Court upheld a statute which authorized local school districts to reimburse parents for money spent sending their children to school by public transportation. Taxpayers who challenged the statute argued that because parents of children attending parochial schools also benefitted, the state was supporting religion in violation of the establishment clause of the first amendment, made applicable to the states by the fourteenth amendment. The Court held that such a general program which benefitted all students equally did not violate the Constitution even though it helped children attend church-operated schools. The Court stated that the first amendment "requires the state to be neutral in its relations with groups of reli-

any governmental action must conform with both in order to be constitutional.

1. Free Exercise Clause

When confronted with an alleged free exercise clause violation, the Supreme Court weighs the interest of the individual in the free exercise of his religion against the interest of the government in achieving valid state goals.⁵³ When applying this balancing test, the Supreme Court first considers whether the government's action actually interferes with the practice of religion or the holding of a sincere religious belief.⁵⁴ The Supreme Court has repeatedly stated that in order for government regulation to amount to a free exercise violation, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."⁵⁵ If state action is found to burden religious belief or practice, the Court requires that the action further a compelling state interest which will justify the interference with religious beliefs and practices.⁵⁶ The Court usually requires that any governmental interference be minimal, asking if the same objectives can be achieved in a less burdensome manner.⁵⁷

Catholic doctrine, however, does not prohibit forming or bargaining with a labor union. Therefore, the facts in *Universidad Central* can be distinguished from those found in free exercise cases such as *Sherbert v. Verner*,⁵⁸ *Wisconsin v. Yoder*,⁵⁹ and *Thomas v. Indiana Employment*.⁶⁰ In those opinions, the Supreme Court held that personal free exercise rights had been abridged only after finding that the particular state regulation violated a specific religious belief.⁶¹ The Court does not consider legislation with a valid secular purpose to be violative of the free exercise clause

gious believers and non-believers; it does not require the state to be their adversary." *Id.* at 18. The Court later noted in *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970), that "[f]or the men who wrote the Religion Clauses of the First Amendment the establishment of religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

53 See, e.g., *Yoder*, 406 U.S. at 221; *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

54 See *Yoder*, 406 U.S. at 215. In *Yoder*, the parents of Amish students objected to a state statute which made secondary school attendance compulsory. The parents claimed that by sending their children to high school, they were violating basic tenets of their religion. The Supreme Court held that the statute interfered with the free exercise of religion of both the children and the parents.

55 *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 222-23 (1963). See also *Tony & Susan Alamo Found. v. Secretary of Labor*, 105 S. Ct. 1953, 1963 (1985) ("It is virtually self-evident that the free exercise clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights."); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968).

56 See *Sherbert*, 374 U.S. at 406; *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

57 See *Braunfeld*, 366 U.S. at 607.

58 374 U.S. 398 (1963).

59 406 U.S. 205 (1972).

60 450 U.S. 707 (1981). If an individual asserts that he cannot in good conscience follow a governmental regulation because of his religious beliefs, a court may be able to inquire into the individual's sincerity in asserting the claim. The courts, however, should not try to determine whether the individual has properly interpreted the tenets of the faith which he or she asserts because "courts are not arbitrators of scriptural interpretation." *Id.* at 716.

61 See *supra* note 54. In *Sherbert*, a Seventh Day Adventist refused to work on Saturdays because her religious beliefs required rest on that day. In *Thomas*, the employee asserted that working in production of war materials was against his religious beliefs.

if it only imposes an indirect burden on one's religious beliefs and does not amount to coercion or compulsion against the practice of those beliefs.⁶² Rather, the Court chooses to examine such indirect conflicts under the entanglement prong of establishment clause analysis.⁶³

2. Establishment Clause

To ensure that a governmental action does not violate the establishment clause, the Supreme Court has generally used the three prong test developed in *Lemon v. Kurtzman*.⁶⁴ Under the *Lemon* test, a statute does not violate the establishment clause if it: (1) has a valid secular purpose;⁶⁵ (2) has a primary effect which neither advances nor inhibits religion;⁶⁶ and (3) does not foster excessive governmental entanglement with religion.⁶⁷

a. Secular Purpose

The secular purpose prong of the *Lemon* test is probably the easiest

62 *Braunfeld*, 366 U.S. at 607.

63 Many "nonlawyers" looking at the issue in *Universidad Central* and the words of the Constitution would argue that the free exercise clause, and not the establishment clause, should be dispositive. The Supreme Court, however, chooses to resolve many of these facially free exercise disputes under the establishment clause because of its belief that the two clauses are often necessarily contradictory and a view that a "wall of separation" will resolve controversy to the satisfaction of both clauses. For criticism of this idea, see Justice Stewart's dissent in *Abington*, 374 U.S. at 308. For general criticism of the Court's treatment of the religion clauses, see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980); Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147; Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1979); Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980). For two articles critical of the entanglement concept with contrary views as to NLRB jurisdiction over religious schools, see Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981); Warner, *NLRB Jurisdiction Over Parochial Schools: Catholic Bishop of Chicago v. NLRB*, 73 NW. U. L. REV. 463 (1978).

64 403 U.S. 602 (1971). In *Lemon*, the Supreme Court applied its three prong test to a Rhode Island statute which authorized salary supplements to teachers in nonpublic schools and a Pennsylvania statute which authorized reimbursements to nonpublic schools for secular educational services including teachers' salaries. The Supreme Court, using the three part analysis, held both statutes unconstitutional. The Court derived its three prong test from the basic premise behind its decision in *Everson v. Board of Educ.*, 330 U.S. 1 (1947). See *supra* note 52. In *Everson*, the Court held that the Constitution requires the government to remain neutral with respect to religion and religious organizations. The Court recognized, however, that even when the government remains essentially neutral, it might in some way affect religion. *Everson*, 330 U.S. at 17, 18. The *Lemon* test developed as the Court tried to determine to what extent the government could affect religion before a neutral act became an unconstitutional interference with, or advancement of, religion.

65 403 U.S. at 612. The Supreme Court examined the secular purpose of legislative actions as early as *Everson*. See also *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).

66 403 U.S. at 612. Both secular purpose and primary effect were first expressly designated as criteria to be used in analyzing the establishment clause in *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 222 (1963). In *Abington*, the Court declared unconstitutional a state statute which required students to hear readings from the Bible at the beginning of each school day. The Court held that the primary effect of the statute was to advance religion in violation of the first amendment.

67 403 U.S. at 613. The Supreme Court derived the excessive entanglement prong from *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). In *Walz*, the Supreme Court upheld a statute that granted tax exemptions to religious organizations for property used for religious purposes. The Court held that elimination of the tax exemption would result in a high degree of state involvement because evaluation and confrontation by tax authorities would then be necessary.

of the three prongs to satisfy. According to the Court, valid secular purposes include supporting higher education,⁶⁸ expanding educational opportunities,⁶⁹ advancing the moral and mental state of the community,⁷⁰ and improving the health, safety, recreation, and general well-being of society.⁷¹ When applying the secular purpose prong, the Court has generally looked at the intent of the legislature in enacting the legislation. If the legislative action applies uniformly to all religious groups and appears neutral as to religious matters, the Court has usually held that it has a valid secular purpose.⁷²

Consistent with this analysis, the NLRA, with its provision for NLRB regulation of the relationship between employers and employees, unquestionably has a religiously neutral secular purpose: to equalize bargaining power between employees and employers through "protection by law of the right of employees to organize and bargain collectively"⁷³ with the hope of promoting "industrial peace."⁷⁴ The NLRA represents Congress' attempt to resolve the national problems of industrial strife created by the industrial revolution.⁷⁵ During that period, tension and strife between labor and management threatened to impede the free flow of commerce. Fulfilling its duty as guardian of the general well-being of the public, Congress responded to the problem by enacting the NLRA.

b. *Primary Effect*

The Supreme Court has recognized, however, that even a facially neutral statute with a valid secular purpose may indirectly advance or inhibit religion.⁷⁶ The second prong of the *Lemon* test determines whether this advancement rises to such a level that its effect can no longer be characterized as indirect.⁷⁷ Where state regulation is involved, courts also use the primary effect prong to examine whether the government's actions so substantially inhibit a particular religion that the government is effectively supporting other religions.⁷⁸ If a governmental

68 *Roemer v. Board of Pub. Works*, 426 U.S. 736, 754 (1976); *Hunt v. McNair*, 413 U.S. 734, 741 (1973).

69 *Mueller v. Allen*, 463 U.S. 388, 395 (1983); *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971); *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

70 *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970).

71 *McGowan v. Maryland*, 366 U.S. 420, 444-45 (1961).

72 *See Walz*, 397 U.S. at 672-73.

73 *See supra* note 10. *See also* *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1441 (9th Cir. 1983) ("The purpose of the National Labor Relations Act is clearly secular—to minimize industrial strife burdening interstate commerce by protecting employees' rights to organize and bargain collectively.") (citation omitted).

74 *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1936). In upholding the constitutionality of the NLRA, the Court stated:

Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife.

Id. at 42.

75 *See generally* C. MORRIS, *THE DEVELOPING LABOR LAW* 3-65 (2d ed. 1985).

76 *See, e.g., Everson*, 330 U.S. at 17.

77 *See Abington Township School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

78 Most of the courts that have examined the primary effect of a challenged statute have looked at whether the statute advances religion. *See, e.g., Board of Educ. v. Allen*, 392 U.S. 236, 244 (1968);

action has a primary effect that either advances or inhibits religion, it violates the establishment clause.⁷⁹

When applying the primary effect prong, the Court has generally taken a two-step approach. First, the Court examines the nature and intended direct effect of the statute.⁸⁰ The Court usually infers this direct effect from the text of the challenged statute. The effect can be expressed as the amount and kind of aid the statute provides, the type of power it confers, or the kind of regulation it creates.⁸¹ If the statute has a direct secular effect, it satisfies the first part of the primary effect analysis.

The NLRA neither advances nor inhibits religion. As one court resolving a similar issue stated: "The Act's primary effect is to require collective bargaining and reduce labor disruptions, rather than to promote or deter acceptance of the Catholic faith."⁸²

Furthermore, on its face the Act applies uniformly to all religious groups. Only two unquestionably secular requirements limit the extent of the NLRB's jurisdiction: (1) the particular enterprise's activities must affect commerce⁸³ and (2) the enterprise must attain a certain minimum level of gross annual revenues as set by the Board.⁸⁴ Due to such neutral regulation and noncontent-based selection criteria, the NLRA does not threaten to advance or inhibit a religion.⁸⁵

Under the second step to the primary effect analysis, the Court examines whether the nature of an affected institution is so pervasively sectarian that even though a governmental action has a direct secular effect, the action will inevitably advance or inhibit religion. The Court must determine whether the secular aspects of the institution can be separated from its sectarian attributes. If the institution is pervasively sectarian, then even a governmental action with a facially secular purpose may promote or impede religion.⁸⁶ Although *Lemon* dealt with aid to church-affil-

Abington Township School Dist. v. Schempp, 374 U.S. 203 (1963). The question of inhibition arises more often in the free exercise context. See *supra* text accompanying notes 53-63.

79 *Lemon*, 403 U.S. at 612. See also *Allen*, 392 U.S. at 244.

80 For example, if the statute provides financial aid to a church-operated school, the Court examines the terms of the aid to ensure that it affects only the secular aspects of the school. See *Tilton*, 403 U.S. at 678-79.

81 See *Tilton*, 403 U.S. at 678-79. See also *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982); *Allen*, 392 U.S. at 244; *McGowan v. Maryland*, 366 U.S. 420, 445 (1961).

82 *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1441 (9th Cir. 1983).

83 Section 10(a) of the NLRA authorizes the Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a) (1982). See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (Court held that the Act gives the NLRB jurisdiction to the fullest extent permitted by the commerce clause.). Accord *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963).

84 The NLRB has not chosen to extend its authority to the constitutional limit allowed under the commerce clause and instead has set discretionary jurisdictional standards expressed as a minimum level of gross annual revenues. For example, "[t]he Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources . . . of not less than \$1 million." 29 C.F.R. § 103.1 (1985).

85 An exemption from NLRB jurisdiction could be construed as advancing the interests of the exempted religion. See, e.g., *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (The Court invalidated a tax benefit for parents incurring expenses relating to the education of a child in a nonpublic school. The Court found that the primary effect of such legislation is to aid one religious group in preference to others.).

86 See *Meek v. Pittenger*, 421 U.S. 349, 366 (1975).

iated schools, the distinctions which the Court has drawn between colleges and universities on the one hand, and primary and secondary schools on the other, prove useful for resolving state regulation cases as well.

In the area of aid to church-operated elementary or secondary schools, the Court frequently has found that a statute, although facially neutral, still may have a primary effect that advances or inhibits religion.⁸⁷ In such cases, the Court has usually determined that the church-affiliated elementary or secondary school has a "substantial religious mission."⁸⁸ Therefore, almost any governmental aid to such a school violates the establishment clause. Employing this reasoning, the Court has declared unconstitutional statutes authorizing loans of instructional material to such schools,⁸⁹ reimbursing expenses incurred in the examination and testing of their students,⁹⁰ granting funds for maintenance and repair of such schools' facilities,⁹¹ and subsidizing teachers in such institutions.⁹²

In contrast, similar aid has been upheld when the benefitting institution is a church-affiliated university or college and when such aid has a statutorily stipulated secular purpose and effect.⁹³ The Court has determined that religiously affiliated institutions of higher learning are not so pervasively religious that their sectarian qualities cannot be distinguished from their secular activities.⁹⁴

c. *Excessive Entanglement*

Inquiry into the nature of the institution affected by certain governmental actions is also necessary when applying the third prong of the *Lemon* test. In analyzing whether a statute creates excessive governmental entanglement with religion, courts examine "the character and purpose of the institution affected, the nature of the activity engaged in or mandated by the government, and the resulting relationship between the government and the religious organization."⁹⁵ Where the church-gov-

87 See, e.g., *Lemon v. Kurtzman*, 403 U.S. 613 (1971).

88 In *Lemon*, 403 U.S. at 616, the Supreme Court stated:

The various characteristics of the schools make them a powerful vehicle for transmitting the Catholic faith to the next generation. This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of pupils in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

89 E.g., *Meek v. Pittenger*, 421 U.S. 349 (1975).

90 *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

91 *Id.*

92 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

93 See, e.g., *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (Court upheld state grants to private religious colleges where the grant stipulated that the funds could not be used for sectarian purposes); *Hunt v. McNair*, 413 U.S. 734 (1973) (Court upheld a statute that permitted the issuance of revenue bonds to help finance construction of a religious college's facilities if the facilities were to be used exclusively for secular activities); *Tilton v. Richardson*, 403 U.S. 672 (1971) (Court upheld a state statute that provided construction grants to colleges and universities for buildings and facilities to be used exclusively for secular educational purposes).

94 See *Tilton*, 403 U.S. at 687.

95 *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971). Aside from considerations of the specific relationship that fosters excessive government entanglement with religion, the Court, when applying the *Lemon* test, also looks at a more general societal effect which it terms "divisive political potential." *Id.* at 622. The Court defines political divisiveness as the division of political forces along religious

ernment relationship that results involves excessive interaction or has the potential for excessive entanglement, the Court has held that the governmental action violated the establishment clause.⁹⁶

In cases of state aid to religiously affiliated institutions, the Court has found that when the institution is so pervasively religious that its secular activities cannot easily be separated from its sectarian actions, increased governmental monitoring may be necessary to ensure that the government affects only secular activities so as not to violate the establishment clause.⁹⁷ Similarly, if the governmental action broadly applies throughout a religious institution, continuous surveillance may be necessary to ensure that the action applies only to the institution's secular functions. Whether such monitoring is necessary and, if so, how much monitoring will be required depends not only on the character of the institution, but also on the nature of the governmental action.⁹⁸ Thus, in *Universidad Central*, the character and purpose of the university and the nature of NLRB intrusion will determine whether entanglement is excessive.

IV. Excessive Entanglement Analysis Applied to *Universidad Central*

A. Character and Purpose

An examination of the character and purpose of Universidad Central de Bayamon must consider the essential differences between religiously affiliated universities and parochial schools in the degree of religious permeation. The Court based its previous recognition of this distinction in *Tilton v. Richardson* on its findings that college students are less susceptible to religious indoctrination than younger students, that by their na-

lines that might result were government to become excessively entangled in the affairs of a religious organization. The Court has been particularly wary of the potential for political divisiveness in cases in which statutes provide for direct financial subsidies, as well as cases in which the statute allows the religious organization to become involved in the governmental process. See *Meek v. Pittenger*, 421 U.S. 349, 370 (1975). See also *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (Court held unconstitutional a state statute which provided that premises located within a 500-foot radius of a church or school would not be licensed for the sale of alcoholic beverages if the governing body of such church or school filed a written objection.).

96 The Court has refused to find excessive entanglement, however, when the statute is such that very little monitoring would be necessary or when the institution is such that the secular can easily be separated from the sectarian. See, e.g., *Mueller v. Allen*, 463 U.S. 388, 403 (1983) (Court upheld a state statute allowing parents to deduct the cost of their children's tuition, textbooks, and transportation.).

97 The Court found in *Lemon* that continuous surveillance of state-subsidized teachers would be necessary to ensure that they did not teach religious principles in their secular courses. According to the Court, this surveillance would constitute excessive governmental entanglement with religion. *Lemon*, 403 U.S. at 619. See also *Meek v. Pittenger*, 421 U.S. 349, 372 (1975) (Court held that a statute providing instructional material and nonideological auxiliary services violated the establishment clause because of the need for continuous surveillance.).

98 While the Court has repeatedly used the *Lemon* test in establishment clause analysis, it is important to note that the Court does not intend for it to be applied with scientific precision. The Court has stated that the *Lemon* principles should be "no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973). *Lemon* analysis serves as a guide to upholding the spirit and intent of the establishment clause. In any analysis, the primary focus is on the establishment clause itself and the protections it embodies. See *Meek v. Pittenger*, 421 U.S. 349, 358-59 (1975) ("It is well to emphasize, however, that the tests must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired.").

ture college and post-graduate courses limit opportunities for sectarian influence, and that a high degree of academic freedom often exists at church-affiliated colleges and universities.⁹⁹

Those distinctions found in *Tilton* turn upon the differences between the roles teachers play in a religiously affiliated university and teachers' roles in religiously affiliated primary and secondary schools.¹⁰⁰ The nature of the faculty and its responsibilities indicate the extent of sectarianism in a school and the resulting entanglement that unionization might engender.¹⁰¹

Under Universidad Central's by-laws, a candidate for faculty admission must "possess the appropriate academic degrees, be of a sound moral character and show traits of pedagogical qualities."¹⁰² As Judge Coffin pointed out, such requirements "are no different from those at most universities across the country"¹⁰³ regardless of religious affiliation. The teachers are not expected to provide their students with "the intense inculcative religious experience" that is the norm at parochial schools.¹⁰⁴

99 *Tilton*, 403 U.S. at 686. The Court also noted that in contrast to the complete control over the educational process sought by the administrators of parochial schools, "many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students." *Id.* at 686.

100 *Universidad Central*, 793 F.2d at 404. The Board itself has recognized the vital distinctions between teachers at parochial schools and teachers at universities in upholding its jurisdiction over professors in a church-related college. See *Barber-Scotia College, Inc.*, 245 N.L.R.B. 406 (1979). But see *Trustee of St. Joseph's College*, 282 N.L.R.B. No. 9 (1986) (Board denied jurisdiction asserted by regional director.). In *St. Joseph's* the Board stated:

We cannot conclude based on generalizations about the difference between secondary and postsecondary education that Board jurisdiction over a postsecondary school can never pose the risk to first amendment freedom foreseen by the Court in *Catholic Bishop*. Rather, we find that we can more properly accommodate first amendment concerns by considering the application of *Catholic Bishop* to all educational institutions on a case-by-case basis. Accordingly, to the extent that *Barber-Scotia* and similar cases stand for the proposition that *Catholic Bishop* does not apply to colleges and universities, they are overruled.

See also *infra* text accompanying notes 107-08.

101 The NLRB has asserted jurisdiction over religious faculty members, as well as lay members, when the religious teachers were not affiliated in any manner with their employer except in their capacity as faculty members signing a standard employment contract. *D'Youville College*, 225 N.L.R.B. 792 (1976). But see *Seton Hill College*, 201 N.L.R.B. 1026, 1027 (1973) (Faculty nuns were excluded from a bargaining unit because they were members of the religious order that owned and administered the college and thus were "in a sense part of the employer" with ties of allegiance and obedience to the order that might place them, as members of a bargaining unit, in a position of conflicting loyalties.).

102 *Universidad Central*, 793 F.2d at 405.

103 *Id.* The faculty members' functions are also similar to those of faculties at colleges or universities in general: "[T]eaching classes, giving and grading examinations, handing in grades on time, orienting students, participating actively in the university life, doing research work and seeking his professional development, and any others assigned by the academic Dean." *Id.*

104 *Id.* See also *Cuesnongle v. Ramos*, 713 F.2d 881 (1st Cir. 1983). *Universidad Central* was found to be less pervasively religious than a parochial school, thus allowing the Department of Consumer Affairs to assert jurisdiction over the university to complain of breach of contract by students. The court noted:

This is different from a true parochial school which not only is run directly by the church, but has attributes such as integration of secular and religious instruction, mandatory religious instruction, religion based admissions policies, has as a central purpose the inculcation of religious values . . . with other similar features . . . [Universidad Central], however, is a true liberal arts university . . . [and] [h]owever much some of its high officers and a small percentage of its teachers are priests devoted to the principles and concepts of the Catholic Church, [Universidad Central] is not primarily carrying on a religious activity in the First Amendment sense.

Because religious indoctrination is not the central purpose or activity of Universidad Central or of its teachers, the risk that NLRB jurisdiction will result in excessive entanglement is substantially reduced. Because of the secular nature of the faculty,¹⁰⁵ employment controversies will seldom involve religious issues. Consequently, there is a diminished need for government surveillance of the NLRB's relationship with the school¹⁰⁶ and a lessened likelihood that entanglement issues will arise.

In fact, the NLRB found no excessive entanglement in asserting jurisdiction over the faculty of a religious college when no evidence indicated "that religious doctrine affect[ed] the teaching of courses offered for credit towards a degree."¹⁰⁷ Under this circumstance, the NLRB was "not confronted with the serious first amendment difficulties envisioned by the Supreme Court in *Catholic Bishop*" and properly rejected the argument that its assertion of jurisdiction would constitute an impermissible entanglement of government with religion.¹⁰⁸

B. *The Nature of NLRB Intrusion*

When examining the second excessive entanglement inquiry, the nature of the NLRB's intrusion, courts should note that the NLRB has statutory authority to perform only two functions: "[T]he prevention and remedying of unfair labor practices and the determination of questions concerning employee representation."¹⁰⁹ If a court finds that NLRB jurisdiction results in excessive entanglement of the government with religion, the court must have concluded that the exercise of at least one of these two NLRB functions would have led to a first amendment violation.

Governmental entanglement in the affairs of religious institutions is inevitable; to be unconstitutional, the entanglement must be excessive.¹¹⁰ Certification of a union, however, presents no excessive entanglement problem. In the certification process, the university becomes involved only after the NLRB determines that it meets the religiously neutral interstate commerce standards set for jurisdiction—involvement in interstate commerce with "gross annual revenue from all sources . . . exceed[ing] \$1 million."¹¹¹ Although such an inquiry may require the university to open its books, this minimal intrusion does not violate the letter or spirit of either religion clause.

Id. at 883.

¹⁰⁵ *Universidad Central*, 793 F.2d at 405.

¹⁰⁶ See *Tilton*, 403 U.S. at 687.

¹⁰⁷ *Barber-Scotia College*, 245 N.L.R.B. 406, 407 (1979). *Barber-Scotia* and *Universidad Central* are similar in several respects. First, each school's primary mission is to provide a secular education. *Barber-Scotia*, 245 N.L.R.B. at 406; *Universidad Central*, 793 F.2d at 386, 400. Second, the schools do not stress the teaching of religious principles in their curriculums. *Barber-Scotia*, 245 N.L.R.B. at 407; *Universidad Central*, 793 F.2d at 405. Third, in teaching theology and philosophy courses the teachers are not required to pursue a specified religious course, but rather cover a variety of religions and ways of thinking. *Barber-Scotia*, 245 N.L.R.B. at 407; *Universidad Central*, 793 F.2d at 386. Finally, while religious services are offered on both campuses, attendance by the students is not mandatory. *Barber-Scotia*, 245 N.L.R.B. at 407; *Universidad Central*, 793 F.2d at 386.

¹⁰⁸ *Barber-Scotia*, 245 N.L.R.B. at 407.

¹⁰⁹ L. MODJESKA, *NLRB PRACTICE* 7 (1983).

¹¹⁰ *Lemon*, 403 U.S. at 613.

¹¹¹ See *supra* note 84.

Additionally, the election of a union at Universidad Central involves only the faculty members¹¹² who the court found to be nonmanagerial employees, and therefore not exempt under *NLRB v. Yeshiva University*.¹¹³ Thus, the election process and certification activity will be isolated from the religious management of the school.¹¹⁴

Judge Breyer also saw the potential for an entangling Board inquiry if the NLRB were to investigate an unfair labor practice charge.¹¹⁵ But Board inquiry begins only after the filing of an unfair labor practice charge,¹¹⁶ after which the Board may conduct an investigation.¹¹⁷ "This activity on the part of the Board is quite different from the continuous auditing surveillance feared by the Supreme Court in *Lemon*"¹¹⁸ and seen by the Court as a prime example of excessive entanglement.¹¹⁹ Instead of continuous surveillance, NLRB jurisdiction will produce only incidental intrusion by requiring examination of Universidad Central's actions "only with respect to specific charges which may be filed in the limited area of collective bargaining and labor relations."¹²⁰

A more complicated situation may arise if a faculty member is dismissed allegedly under a Universidad Central regulation providing that a professor may be terminated for "offenses to the Christian morality."¹²¹ If the fired teacher asserts that the dismissal was actually due to an unfair labor practice, Judge Breyer believed that the NLRB, which has exclusive jurisdiction over unfair labor practice charges, would impermissibly enmesh itself in church doctrinal matters.¹²²

It is well settled, however, that courts defer to religious authorities on matters of religious doctrine.¹²³ Religious authorities have the power "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."¹²⁴ But in various ways the government has asserted limited jurisdiction over religiously affiliated schools without violating the first amendment. For example, a

112 Beyond providing a list of employees eligible to vote, a university is not required to participate in the union election process. See generally L. MODJESKA, NLRB PRACTICE 228-50 (1983).

113 582 F.2d 686 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980).

114 Since the faculty is not managerial in nature, it is removed from the places of power in the university and therefore is in greater need of labor law protection.

115 *Universidad Central*, 793 F.2d at 401-02.

116 *Id.* at 388 (citing *Radio Officers' Union v. NLRB*, 347 U.S. 17, 53 (1954)).

117 *Id.* (citing *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308 (1959)).

118 See *Lemon*, 403 U.S. at 619 ("A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these [government] restrictions are obeyed and the First Amendment otherwise respected.").

119 See *supra* text accompanying notes 95-98.

120 *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1442 (9th Cir. 1983).

121 *Universidad Central*, 793 F.2d at 405.

122 *Id.* at 401.

123 See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). See also *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *U.S. v. Ballard*, 322 U.S. 78 (1944); *Reardon v. Lemoyne*, 122 N.H. 1042, 1047, 454 A.2d 428, 432 (1982) ("In religious controversies involving property or contractual rights outside the doctrinal realm, a court may accept jurisdiction and render a decision without violating the first amendment.").

124 *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). See also *Milivojevich*, 426 U.S. 696; *United States v. Ballard*, 322 U.S. 78, 87 (1944) (In criminal prosecution for mail fraud, the district court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of the respondents.).

state civil rights commission "violates no constitutional rights by merely investigating the circumstances of [a discharge], if only to ascertain whether the ascribed religious reason was in fact the reason for the discharge."¹²⁵ Similarly, the Equal Employment Opportunity Commission may not continue to investigate a faculty discharge once the religious institution "presents convincing evidence that [a] challenged employment practice resulted from discrimination on the basis of religion"¹²⁶ The investigation allowed under such jurisdiction does not proceed beyond an acceptable minimal burden on the religious aspects of the school.¹²⁷

A similar situation would arise if the NLRB adjudicated a faculty dismissal dispute at Universidad Central. The NLRA only makes it unlawful to discharge an employee for reasons related to the employee's union or protected concerted activities.¹²⁸ If a discharge for an alleged religious reason occurs, the university satisfies its burden of proof by showing that sincerely held¹²⁹ religious beliefs or practices motivated the dismissal.¹³⁰ If the school meets the burden, the Board investigates no further, keeping the intrusion into the realm of religion at an acceptable minimum level. In any case, the Board would never inquire into the doctrinal correctness of beliefs. In such a manner, the church-government relationship resulting from NLRB jurisdiction over the university's faculty would not violate the excessive entanglement prong of the establishment clause.

Finally, the NLRB decides which "other conditions of employment" become mandatory subjects of bargaining. Judge Breyer argued that requiring the university to accept a union meant that the Board would determine the issues over which the university would be required to negotiate—inevitably including matters of religion in violation of the establishment clause.¹³¹ However, permitting bargaining by the faculty at

125 *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S. Ct. 2718, 2724 (1986).

126 *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981). Section 702 of Title VII exempts from the application of Title VII religious educational institutions "with respect to the employment of individuals of a particular religion to perform work connected with carrying on by such . . . educational institution . . . of its activities." 42 U.S.C. § 2000e-1 (1982).

127 *Mississippi College*, 626 F.2d at 488.

128 See 29 U.S.C. § 158 (1982). See also *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 394 (1983).

129 The Supreme Court does not find that civil adjudication violates the first amendment when the investigation involves a person's sincerity in asserting that his religious beliefs required an exemption. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 859-63 (1978).

130 See *Transportation Management Corp.*, 462 U.S. at 401-02 (In an unfair labor practice proceeding by the Board, burden of proof is on the employer to prove that absent improper motivation the employer would have acted in the same manner.). See also *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274 (1977) (Plaintiff had burden of proving that employer's disapproval of his first amendment protected expression caused employer to discharge him. The burden then shifts to defendant employer to show by a preponderance of the evidence that it would have reached the same dismissal decision even if not motivated by a desire to punish plaintiff for his speech.); *Catholic High School Ass'n. of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1168-69 (2d Cir. 1985) (The court determined that the Board may not inquire into whether a religiously based reason given for a discharge is truly part of church dogma. Rather, the Board may only determine whether the reason is part of a "dual motive" for the discharge.).

131 *Universidad Central*, 793 F.2d at 402.

a religiously affiliated university with a primarily secular purpose is similar to allowing it at religiously affiliated hospitals and service organizations. Courts of appeals uniformly have held that NLRB jurisdiction does not pose significant entanglement problems at these institutions for precisely the same reason that jurisdiction should not in most religiously affiliated universities: These types of institutions "do not pose the risk of entanglement that exists in precollege schools where teachers play such an all-encompassing role."¹³² Rather, like Universidad Central, religiously affiliated hospitals have a secular primary purpose. For hospitals that purpose is the same as that of any secular hospital—providing medical care for the sick.¹³³ Similarly, Universidad Central's primary purpose is the same as at any secular university—providing "a humanistic education at an academic level."¹³⁴ Because the teachers have little to do with religion, most aspects of employment over which the faculty and the university would negotiate would have nothing to do with religion.

If the university felt that a subject of bargaining entered the religious realm in violation of the first amendment, the university could still assert its rights by refusing to bargain in order to seek judicial review where precedent mandates deference to all religious beliefs and practices asserted in good faith.

V. Conclusion

When analyzing the issue of NLRB jurisdiction over religiously affiliated universities, courts must recognize the essential differences in religious orientation between teachers in parochial schools and faculty members of post-secondary schools. Such distinctions help determine whether NLRB intrusion into the labor affairs of the university will violate the first amendment religion clauses. Because the Supreme Court's holding in *Catholic Bishop* should generally be limited to teachers in religiously permeated elementary and secondary schools, it does not control the issue of NLRB jurisdiction over the faculty of church-affiliated colleges and universities. Courts facing postsecondary unionization issues must go beyond a simple application of the *Catholic Bishop* holding and delve into substantive constitutional analysis to determine whether NLRB jurisdiction threatens to violate the religion clauses of the first amendment. This analysis will involve an examination of the character and purpose of the affected institution, the intrusion into the religious realm that will result from NLRB investigations and rulings, and the religious or secular nature of the disputes that the NLRB might encounter.

The First Circuit's decision in *Universidad Central* was the result of confusion regarding the applicability of *Catholic Bishop*. The court should have refused to extend *Catholic Bishop* beyond its facts and instead should have applied traditional religion clause analysis. Under such analysis,

¹³² *Id.* at 406.

¹³³ See, e.g., *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193, 1196 (7th Cir. 1983); *St. Elizabeth Community Hosp. v. NLRB*, 708 F.2d 1436, 1441 (9th Cir. 1983).

¹³⁴ *Universidad Central*, 793 F.2d at 386, 405.

NLRB jurisdiction over the lay faculty at Universidad Central de Bayamon would be appropriate.

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ANTITRUST LAW—WESTMAN COMMISSION CO. v. HOBART INTERNATIONAL, INC.: REFUSAL TO FIND PER SE ILLEGAL A MANUFACTURER'S TERMINATION OF A DISTRIBUTOR AT THE BEHEST OF A COMPETING DISTRIBUTOR—A TREND TOWARD ABOLISHMENT OF THE PER SE RULE IN ALL VERTICAL RESTRAINTS?

Federal courts have traditionally applied a rule of reason analysis to vertical antitrust claims not involving price-fixing. Where the alleged antitrust violation stems from a manufacturer's termination of a distributor at the request of a competing distributor, however, courts disagree on the applicable standard. In this situation, some courts have varied from the traditional application of the rule of reason and have adopted a per se illegality analysis. The United States Court of Appeals for the Tenth Circuit addressed this dilemma in *Westman Commission Co. v. Hobart International, Inc.*¹ In *Westman*, the Tenth Circuit applied the rule of reason analysis to a manufacturer's refusal to grant a distributorship at the behest of another distributor. In upholding the manufacturer's action under section one of the Sherman Act,² the court criticized a Third Circuit decision that would have applied the per se rule.³

In applying the rule of reason, however, the court relied heavily on the economic theories of judges and scholars who advocate the abolition of the per se rule in *all* vertical restraint cases. The court also adhered to the rationale of a Supreme Court decision which has been questioned. This analysis illustrates the present confusion in this area of antitrust law. Circuit courts have espoused conflicting opinions concerning the propriety of distributor terminations. In accordance with their perspective, courts will characterize facts and use precedent in confusing and conflicting fashions in order to effectuate the "desired" outcome. This leaves business executives without reliable legal guidance in making important business decisions. The cost of mistakes (treble damages) in this area is too great for uncertainty to continue.

Part I of this comment traces the relevant judicial development of vertical restraint analysis. Next, Part II sets forth the facts and holding of *Westman* in light of this history. Part III suggests that application of the

1 796 F.2d 1216 (10th Cir. 1986).

2 The statute reads: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ." 15 U.S.C. § 1 (1982).

3 The *Westman* court criticized the Third Circuit's decision in *Cernuto Inc. v. United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). See *infra* notes 25-28 and accompanying text.

In antitrust analysis, courts consider three factors: (1) whether there is a "conspiracy"; (2) whether price fixing is involved; and (3) whether the restraint imposed is vertical or horizontal. A horizontal restraint results when competitors at the same level of the market structure form a combination in restraint of trade. When persons at different levels of the market structure act in concert, as in the case of a manufacturer conspiring with a distributor, the restraint is vertical in nature. *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1971).

The court in *Westman* was concerned with the last two factors. Once the court found that a nonprice vertical restraint existed, it then had to determine whether to apply the rule of reason or the per se rule. The per se rule had traditionally been applied only to horizontal restraints and vertical restraints involving price fixing and tying arrangements.

rule of reason will lead to correct adjudication of this type of restraint and posits that *Westman* may indicate a trend toward the abolishment of the per se rule in *all* vertical restraint cases.

I. An Analysis of Vertical Restraints

An analysis of vertical restraints in antitrust law begins with the concept that certain business relationships are per se illegal.⁴ In *Northern Pacific Railway Co. v. United States*,⁵ the Supreme Court noted that the per se rule is applicable to price-fixing,⁶ division of markets,⁷ group boycotts,⁸ and tying arrangements.⁹ Section one of the Sherman Act specifically prohibits such concerted action designed to achieve a monopoly. Absent a combination or conspiracy, however, manufacturers may limit their dealings without violating this provision.¹⁰ Thus, the Act acknowledges a party's right to *unilaterally* refuse to deal.¹¹

Typically, courts scrutinize restraints of trade which do not fall into one of the specifically prohibited categories under the rule of reason. Under this standard, courts consider the competitive effect of the restraint. A manufacturer violates section one if the restraint imposed hinders or destroys competition. Conversely, if the restraint regulates or enhances competition, the manufacturer is not liable under section

4 The Supreme Court explained the per se doctrine in *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958): "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiries as to the precise harm they have caused or the business excuse for their use."

5 356 U.S. 1 (1958).

6 *Id.* at 5 (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210 (1940)). In attempting to define what is considered price-fixing under the Sherman Act, the Supreme Court has noted: "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing commerce is illegal per se." 310 U.S. at 223.

7 356 U.S. at 5 (citing *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211 (1899)). Division of markets is defined as "an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition." *Topco*, 405 U.S. at 608.

8 356 U.S. at 5 (citing *Fashion Originators Guild of Am. v. Federal Trade Comm'n*, 312 U.S. 457, 668 (1941)). Group boycotts are defined as "concerted refusals by traders to deal with other traders." *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959).

9 356 U.S. at 5 (citing *International Salt Co. v. United States*, 332 U.S. 392 (1947)). A tying arrangement is defined as "an agreement by a party to sell one product (the tying article) but only on the condition that the buyer also purchases a different (or tied) product." *Id.*

10 *United States v. Colgate & Co.*, 250 U.S. 300 (1919). In *Colgate*, the Court noted that: "In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *Id.* at 307.

11 The Supreme Court has diminished the effect of this right by broadly interpreting what constitutes a combination or conspiracy under § 1. In *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), the Court found that a manufacturer violated the Sherman Act by refusing to deal with a wholesaler unless the wholesaler withheld sales of the manufacturer's product from retailers. Specifically, the Court held that:

When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, . . . he has put together a combination in violation of the Sherman Act. Thus, whether an unlawful combination or conspiracy is proved, is to be judged by what the parties actually did rather than by the words they used.

Id. at 44.

one.¹²

Aside from the generally accepted view that price-fixing arrangements are illegal per se, courts have enunciated few other guidelines which test vertical restraints allegedly violating the Sherman Act. Specifically, the line of demarcation between the application of the per se rule or the rule of reason has become increasingly cluttered. The Supreme Court exhibited this judicial uncertainty in *United States v. Arnold Schwinn Co.*¹³ In *Schwinn*, the Court, without considering whether the form of the transaction significantly affected intrabrand or interbrand competition (a critical consideration in any vertical restraint analysis),¹⁴ evaluated the manufacturer's (Schwinn's) two distribution systems by different standards. In Schwinn's first system, the distributor acted as wholesaler, buying and reselling bicycles. Title and risk of loss passed fully to the distributor. The Court found that nonprice restrictions in this system were per se illegal. In Schwinn's second system, the distributor obtained its inventory through a consignment plan with Schwinn. The distributor then sold directly to a retailer. Here, however, the Court analyzed the contested restraints under a rule of reason.¹⁵ In differentiating the distribution systems, the Court focused on the status of title and the risk of loss. The Court found that once a manufacturer relinquished title, it had no right to restrict the sale of the product. In striking down the restraints associated with the first distribution system, the *Schwinn* Court found a per se illegality for a nonprice vertical restriction.¹⁶

The Supreme Court reconsidered the *Schwinn* decision in *Continental T.V., Inc. v. GTE Sylvania, Inc.*¹⁷ In *Sylvania*, the court overruled *Schwinn*'s per se illegality holding, signaling a change in its economic analysis. The *Sylvania* Court held that vertical restraints have economic utility, and, as such, should not be subjected to a rule of per se illegality.¹⁸ However, the Court left open "the possibility that particular applications of vertical

12 Justice Brandeis classically stated the rule of reason approach in *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918):

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be obtained, are all relevant factors.

13 388 U.S. 365 (1967).

14 In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the Supreme Court delineated the difference between interbrand and intrabrand competition:

Interbrand competition is the competition among the manufacturers of the same generic product and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors—wholesale or retail—of the product of a particular manufacturer.

Id. at 52 n.19.

15 388 U.S. at 379-80.

16 In dicta, the Court emphasized that, absent price-fixing, the manufacturer has broad discretion in creating his distribution system. 388 U.S. at 376.

17 433 U.S. 36 (1977).

18 *Id.* at 38.

restrictions might justify per se prohibition."¹⁹

Following *Sylvania*, it appeared that the per se rule would only apply to vertical restraints occurring in price-fixing types of arrangements.²⁰ The Seventh Circuit adopted this interpretation in *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Cos.*²¹ In *Products Liability*, the distributor claimed that a supplier terminated its distribution agreement at the request of another distributor.²² The court stated that:

[I]n the absence of any evidence of intent to raise prices . . . an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se. To prevail in such a case the plaintiff must show that the refusal to deal is likely to reduce competition.²³

This approach to a nonprice vertical restraint parallels the *Sylvania* Court's finding that the anticompetitive effects of a vertical restraint "can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under § 1 of the Act."²⁴

The Third Circuit, however, established a different approach to dealer termination controversies in *Cernuto, Inc. v. United Cabinet Corp.*²⁵ The court in *Cernuto* appeared to adopt a view that a supplier, who terminates a distributor because of another distributor's complaints, changes the vertical restraint into a restraint "primarily horizontal in nature in that one customer is seeking to suppress its competition by utilizing the power of a common supplier."²⁶ Therefore, although the termination in such a situation is, itself, a vertical restraint, the desired impact is horizontal and on the dealer, not the manufacturer, level."²⁷

The court's recharacterization of a vertical restraint as a horizontal restraint appears to add a new category of restraints to antitrust law—those which are actually vertical but apparently horizontal in nature. Ap-

19 *Id.* at 59. This caveat has been the source of much of the confusion surrounding the applicability of the per se rule with vertical restraints.

20 See *supra* notes 6-9 and accompanying text.

21 682 F.2d 660 (7th Cir. 1980).

22 *Products Liability* involved an insurance broker who claimed an insurance agency and another insurance broker had conspired to exclude him from the insurance business in violation of the Sherman Act. The trial court granted summary judgment for the defendants. On appeal, Judge Posner held that the plaintiff had failed to show a conspiracy; and, even if such a conspiracy existed, the plaintiff had not shown any harm to competition. Therefore, the defendants had not violated the Act. *Id.*

23 682 F.2d at 663.

24 433 U.S. at 59.

25 595 F.2d 164 (3d Cir. 1979). *Cernuto* involved a kitchen cabinet manufacturer who allegedly terminated a discounting distributor after complaints by another distributor. The district court granted summary judgment for the defendants, but the Third Circuit reversed and remanded the case for trial on the belief that a per se violation might be found. *Id.*

26 The opinion in *Cernuto* contains ambiguous passages and some other circuits have interpreted the case to require that proof of a price-fixing arrangement be present in order to find a per se violation. See, e.g., *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465 (9th Cir. 1983); *Products Liability*, 682 F.2d 660; *Alloy Intern. Co. v. Hoover-NSK Beaming Co.*, 635 F.2d 1222 (7th Cir. 1980). However, the Third Circuit's subsequent opinion in *Tunis Bros.*, *infra* notes 37-38 and accompanying text, appears to indicate that a vertical restraint will be judged by the per se rule if its "true" effect is horizontal.

27 595 F.2d at 168.

plying the per se rule to this type of restraint makes distributor terminations in the Third Circuit a risky venture. If a distributor's termination is not completely unilateral, the "application of a per se rule may be warranted,"²⁸ and a manufacturer might be liable for a treble damage judgment.

The Supreme Court completely ignored this "new" restraint category in *Monsanto Co. v. Spray-Rite Service Corp.*²⁹ In *Monsanto*, the Court detailed two preliminary distinctions which are critical in adjudicating dealer termination cases. First, the Court distinguished concerted actions from independent actions, emphasizing that "unilateral action is not proscribed."³⁰ Secondly, the Court distinguished concerted action to set prices, "[which has] been per se illegal since the early years of national antitrust enforcement,"³¹ from concerted action on nonprice restrictions, "[which] are judged under the rule of reason."³² Thus, the court recognized that concerted action on a vertical restraint must include a price element before the court will apply the per se rule.

This analysis appears to undermine the *Cernuto* contention³³ that a refusal to deal, prompted by dealer complaints,³⁴ could subject a manufacturer to judgment under the per se rule³⁵—even absent price fixing. Indeed, the Court in *Monsanto* stated that "[n]othing in our decision today undercuts the holding of *Sylvania* that nonprice restrictions are to be judged under the rule of reason."³⁶

Despite this guidance from the Supreme Court, the Third Circuit continues to refer to a "hybrid configuration" that exists in dealer termination cases involving competitor complaints.³⁷ The Third Circuit emphasizes that the horizontal impact of vertical restraints extends the per se rule's application to nonprice cases. This analysis directly opposes the position adopted by the Supreme Court³⁸ and the Tenth Circuit.

II. *Westman Commission Co. v. Hobart International, Inc.*

*Westman*³⁹ involved three independent businesses: Hobart Interna-

28 *Id.* Thus, *Cernuto* seized upon the possibility of the application of the per se rule to vertical restraints left open in *Sylvania*. See *supra* note 19 and accompanying text.

29 104 S. Ct. 1464 (1984) *rev'g* 684 F.2d 1226 (1982). *Monsanto* dealt with the burden of proof required for a plaintiff to survive a motion for a directed verdict. The case, however, contains dicta which clarifies the applicability of the per se rule in cases involving dealer terminations which result from an agreement between a manufacturer and another distributor.

30 104 S. Ct. at 1469.

31 *Id.*

32 *Id.*

33 See *supra* notes 25-28 and accompanying text.

34 It should be emphasized that these claims complaints must create an agreement between the manufacturer and distributor in order to create the concerted action required for a violation of § 1 of the Sherman Act. For a discussion of what constitutes an agreement, see *Monsanto*, 104 S. Ct. at 1471.

35 *Cernuto*, 595 F.2d at 168.

36 104 S. Ct. at 1468 n.6.

37 *Tunis Bros. Co. v. Ford Motor Co.*, 763 F.2d 1482, 1498 (3d Cir. 1985) *rev'g in part* 587 F. Supp. 267 (E.D. Pa. 1984), *vacated*, 106 S. Ct. 1509 (1986).

38 The Supreme Court vacated and remanded *Tunis Bros.* The Court, however, based its rationale on the evidentiary burden of production necessary to avoid summary judgment instead of relying on the per se issues. See *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986). See also *supra* notes 25-28 and accompanying text.

39 796 F.2d 1216 (10th Cir. 1986).

tional, Inc. (Hobart), a major manufacturer of commercial kitchen equipment; Westman Commission Co. (Westman), a Denver-area distributor of commercial kitchen equipment; and, Nobel, Inc. (Nobel), another distributor located in the Denver area. In 1978, Hobart sold its products to approximately 540 of approximately 1,600 independent restaurant equipment distributors in the United States.⁴⁰ As of January, 1976,⁴¹ Hobart supplied goods to eight distributors in the highly competitive Denver-area market.⁴² Of these distributors, Nobel accounted for forty to fifty percent of Hobart's sales in this market between 1973 and 1977.⁴³

In 1973, Westman entered the market by purchasing the assets of a restaurant equipment supply division.⁴⁴ This division had previously participated in an informal arrangement with Hobart to distribute its products. The relationship continued for approximately fourteen months after Westman's purchase.⁴⁵ During this time, Hobart never offered Westman a formal distributorship. In July, 1974, and again in January, 1976, Hobart notified Westman that it would not grant Westman a distributorship.⁴⁶ Additionally, Hobart informed Westman that it would no longer sell equipment to Westman on a casual basis.

Westman sued Hobart under section one of the Sherman Act⁴⁷ claiming that Hobart and Nobel had conspired to prevent Westman from competing in the Denver-area market.⁴⁸ Westman did not allege either a tying arrangement⁴⁹ or price-fixing.⁵⁰ Rather, Westman merely maintained that Nobel, seeking to avoid competition from Westman, convinced Hobart to terminate its relationship with Westman.⁵¹

The United States District Court for the District of Colorado held that Hobart committed a per se violation of section one of the Sherman Act.⁵² The court stated that "a conspiracy to exclude a competitor from the trade is, in and of itself, the substance which the Sherman Act is intended to prohibit."⁵³ The court further declared that, even under a rule of reason analysis,⁵⁴ Hobart's action constituted a section one violation.⁵⁵ After hearing testimony that Hobart's products were not matched with equivalent goods from competitors in the market, the court concluded that trade was restrained and competition was impoverished if a

40 *Id.* at 1219.

41 In January, 1976, Hobart reaffirmed that it would not sell equipment to Westman on a casual basis. *Id.*

42 796 F.2d at 1219.

43 *Id.*

44 Westman purchased the WE-4 Division of Wilscom Enterprises, Inc. Prior to 1973, Westman sold only grocery items on a commercial level. *Id.*

45 796 F.2d at 1219.

46 *Id.*

47 *See supra* note 2.

48 796 F.2d at 1219.

49 *See supra* note 9.

50 *See supra* note 6.

51 796 F.2d at 1219.

52 *Id.* *See Westman Comm'n Co. v. Hobart Corp.*, 461 F. Supp. 627, 636 (D. Colo. 1978). *See also supra* note 4 and accompanying text.

53 461 F. Supp. at 636.

54 *See supra* note 12 and accompanying text.

55 461 F. Supp. at 636.

dealer did not have access to Hobart goods at a comparable price.⁵⁶

The United States Court of Appeals for the Tenth Circuit reversed the trial court's decision. Noting that "the purpose of the antitrust laws is the promotion of *consumer* welfare,"⁵⁷ the court analyzed the restraint based on "its effect on *consumers*, not on *competitors*."⁵⁸ Thus, the Tenth Circuit felt compelled to look beyond Nobel's anticompetitive motive, which triggered the restraint.

Recognizing that the "applicability of the per se test [was] in a state of evolution,"⁵⁹ the majority held that Hobart's termination of Westman was not per se illegal. Rather, the court, following the rationale of the Seventh Circuit, stated that "in the absence of any evidence of intent to raise prices . . . an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal per se."⁶⁰ The Tenth Circuit thus rejected the view adopted in other circuit courts⁶¹ that a manufacturer's refusal to deal with a distributor is a per se antitrust violation if that refusal is made at the behest of a competing distributor.

The *Westman* court cited *Monsanto*⁶² as Supreme Court authority for its rejection of the per se rule in this case. The court read *Monsanto* as requiring an allegation of some form of price-fixing to invoke per se illegality.⁶³ Since the trial court record revealed no such allegation, Hobart's action was not per se illegal.⁶⁴

In applying the rule of reason, the Tenth Circuit stressed manufacturer discretion and "sound economic theory." Initially, the court adhered to the decisional flexibility espoused in *Schwinn*.⁶⁵ In *Schwinn*, the Court stated that a manufacturer of a competitive product ought to have

56 *Id.* at 636-37. See also *infra* note 67.

57 796 F.2d at 1220 (emphasis added).

58 *Id.* (emphasis added). Recall that the court in *Cernuto* stressed the impact of the vertical restraints on the market participants. See *supra* notes 25-28 and accompanying text.

59 796 F.2d at 1222.

60 *Id.* at 1223 (quoting *Products Liab. Ins. Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660, 663 (7th Cir. 1982)). See *supra* notes 21-23 and accompanying text. See also *Hennessey Indus., Inc. v. FMC Corp.*, 779 F.2d 402, 404 (7th Cir. 1985). The Fifth Circuit adopted this reasoning in *Business Elec. Corp. v. Sharp Elec. Corp.*, 780 F.2d 1212 (5th Cir. 1986).

61 See *supra* notes 25-28 and accompanying text. In addition to the Third Circuit, the Sixth, Eighth and Ninth Circuits have applied the per se rule to a manufacturer who terminates a distributor at the request of a competing distributor. See, e.g., *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466, 469 (8th Cir. 1985); *Zidell Explorations, Inc. v. Conval Int'l, Ltd.*, 719 F.2d 1465, 1470 (9th Cir. 1983); and *Dunn & Mavis, Inc. v. Nu-Car Drivaway, Inc.*, 691 F.2d 241, 245 (6th Cir. 1982). These courts reasoned that such a restraint, "although actually a vertical restraint, 'becomes primarily horizontal in nature' because of the participation of the distributor who seeks to 'suppress its competition by utilizing the power of a common supplier.'" 796 F.2d at 1223 (quoting *Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979)). See *supra* note 27 and accompanying text. The *Westman* court distinguished these cases, however, on the ground that most of them involved price-fixing motives. 796 F.2d at 1223.

62 See *supra* notes 29-36 and accompanying text.

63 796 F.2d at 1224. The *Westman* court, quoting a portion of a Fifth Circuit decision, stated: "[T]he language of *Monsanto* can only indicate the Court's belief that a price fixing agreement is a requirement for per se liability in distributor termination cases." *Id.* (quoting *Business Elec. Corp. v. Sharp Elec. Corp.*, 780 F.2d 1212, 1214 n.9 (5th Cir. 1986)) (emphasis added by *Westman*).

64 796 F.2d at 1224.

65 Recall that *Schwinn* was partially overruled by *Sylvania*. See *supra* notes 13-19 and accompanying text.

wide latitude in selecting its customers.⁶⁶ Under this theory, a manufacturer may also restrict product distribution, even in the absence of equivalent brands in the market,⁶⁷ unless the manufacturer enjoys "market power."⁶⁸ This determination requires a court to employ a market analysis, focusing on whether products, which a purchaser can substitute when faced with relevant price increases, exist in the market place.⁶⁹

Additionally, the majority concluded that "sound economic theory supported the cases that have allowed suppliers wide latitude in selecting their distributors."⁷⁰ Citing to various economic and legal scholars⁷¹ and to *Sylvania*,⁷² the court stated that "[t]he only real incentive a manufacturer has to restrict distribution of its product is to make its product more competitive."⁷³ Although a refusal to deal with certain distributors may reduce intrabrand competition, Posnerian analysis suggests that it will ultimately benefit consumers by increasing interbrand rivalry.⁷⁴

66 "[A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may 'franchise' certain dealers to whom, alone, he will sell his goods." *Westman*, 796 F.2d at 1225 (quoting *Schwinn*, 388 U.S. at 376). See also *supra* note 16 and accompanying text. Although *Westman* did not involve a franchise arrangement, the court felt that this general reasoning should be extended to allow manufacturers to restrict distribution of their products. 796 F.2d at 1225.

67 Testimony in the trial court indicated that the market lacked acceptable alternatives to Hobart's products at an equivalent price. An expert in food facilities design testified that he could not recall any specifications that he had prepared in which the customer had not requested some Hobart items. 461 F. Supp. at 628. The circuit court, however, downplayed this evidence. The majority felt that the "trial court's approach subjected Hobart to especially strict antitrust treatment simply because it produced high quality products and sold them at a price lower than that demanded for competing products of equal quality." 796 F.2d at 1225.

68 796 F.2d at 1225. The court defined market power as "the ability to raise prices above those that would be charged in a competitive market." *Id.* at n.3. See *NCAA v. Board of Regents of Univ. of Okla.*, 104 S. Ct. 2948, 2965 n.38 (1984), where the majority distinguished "market power" from "monopoly power," which is the ability to control prices and exclude competition. For a discussion of "monopoly power," see *Shoppin' Bag of Pueblo, Inc. v. Dillon Co.*, 783 F.2d 159, 163-64 (10th Cir. 1986). Market power requires a lesser showing of evidence on the part of the plaintiff. This lesser showing is justified because a manufacturer may be able to maintain a supracompetitive price without directly being able to exclude competition.

69 The court explained that this requires a determination of product competition pursuant to two factors:

- (a) The reasonable interchangeability of use to which two or more products can be put. This factor, in turn, is satisfied when two or more products (i) have essentially similar physical characteristics, or (ii) can be put to use for the same purpose.
- (b) The cross elasticity of demand, i.e., the extent to which consumer preference shifts freely between two or more products.

796 F.2d at 1226.

70 *Id.*

71 *Id.* at 1226-27 (citing Bork, *An Economist Appraises Vertical Restraints*, 30 ANTITRUST BULL. 117, 120-21 (1985); Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171, 180-81; Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 140-53 (1984); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 23 (1981)).

72 See *supra* notes 17-19 and accompanying text.

73 796 F.2d at 1226 (citing Posner, *supra* note 71, at 23).

74 796 F.2d at 1227. The court listed four reasons why limiting intrabrand competition would benefit the consumer:

- (1) limiting the number of its distributors reduces a manufacturer's distribution costs by allowing each distributor to achieve economies of scale and to spread out fixed costs over a large amount of products; (2) new manufacturers are invited to enter the market through the encouragement of distributors making the necessary investment to carry a new manufacturer's product; (3) distributors are encouraged to offer promotional activities, consumer information, and product service without fear of being underpriced by a "free-rider;" and

Finally, the court criticized the trial court's failure to undertake a "thorough" rule of reason analysis. The court posited that such an approach would have found that Hobart's refusal to grant a distributorship to Westman did not reduce interbrand competition in the Denver-area restaurant equipment supply market.⁷⁵ Although this flawed application of the rule of reason, standing alone, would normally require a remand to the trial court, the circuit court found remand unnecessary since "Hobart's refusal to grant Westman a distributorship did not violate section one of the Sherman Act"⁷⁶

III. Defining the Rule of Reason

Westman asserts that the rule of reason represents the proper standard for adjudicating nonprice dealer termination cases. This holding is consistent with the Supreme Court's pronouncements on the issue, which now indicate that the per se rule never applies to nonprice vertical restraints.⁷⁷ Still, terminated dealers plead for, and some lower courts apply, per se illegality treatment where complaints from a competing dealer accompany a dealer termination.⁷⁸ In asserting that this type of vertical restraint becomes horizontal in nature, the *Cernuto* line of cases emphasizes that the restraint is based solely on the anticompetitive motive of the competitor.⁷⁹ On its face, this argument seems valid. Further analysis, however, reveals that the rule of reason effectively adjudicates nonprice dealer terminations.

As *Westman* indicated, antitrust laws were enacted for the protection of the consumer. Any antitrust claim must be judged by "its effect on consumers, not on competitors."⁸⁰ Consequently, the anticompetitive desire of a competing dealer carries less weight if the restraint has no adverse impact on the consumer's choices in the market.⁸¹ In a nonprice

(4) a manufacturer reduces its transaction costs by dealing only with distributors with whom it feels it can enjoy a smooth working relationship.

Id. See also *supra* note 14.

⁷⁵ 796 F.2d at 1228. The majority failed to specifically delineate, however, the various factors which would encompass a "thorough" rule of reason analysis. The decision stated that the district court properly explained the rule of reason, yet failed to sufficiently apply it. Apparently, the Tenth Circuit agreed with the trial court's characterization that "[t]he rule of reason requires a complex determination of the effect of a given business arrangement or agreement on competition and the possible justifications of any adverse effects." 461 F. Supp. at 636.

⁷⁶ 796 F.2d at 1228.

⁷⁷ See *supra* notes 5-20 & 29-36 and accompanying text.

⁷⁸ See *supra* notes 25-28, 37-38 & 52-56 and accompanying text.

⁷⁹ See *supra* notes 27 & 61 and accompanying text. See also Piraino, *Distributor Terminations Pursuant to Conspiracies Among a Supplier and Complaining Distributors: A Suggested Antitrust Analysis*, 67 CORNELL L. REV. 297 (1982). Piraino suggests a two step analysis to adjudicating these types of restraints. First, the terminated dealer must prove the existence of an agreement between the supplier and the complaining dealer. If this is shown, the burden of proof shifts to the supplier to show a legitimate business motive for initiating the termination independent of the anticompetitive desire of the complaining dealer. The per se rule would apply if the restraint would not have been effected "but for" the complaints of the competing distributor. If the supplier had an independent justification, the rule of reason would be the proper analysis. *Id.* at 319-20.

⁸⁰ 796 F.2d at 1220. See *supra* notes 57-58 and accompanying text.

⁸¹ The anticompetitive desire of a competing dealer is only one element of the rule of reason while the per se test considers it to be dispositive. See *supra* notes 4 & 12 and accompanying text and *infra* text accompanying notes 82-83.

dealer termination case, then, the crucial inquiry focuses on the restraint's impact on the consumer market. Courts which invoke the per se rule often fail to address this important issue.⁸² The rule of reason, however, satisfies this inquiry.⁸³ Therefore, *Westman* was correct in refusing to find the termination per se illegal.

Beyond the facts of the case at issue, *Westman* may also represent a trend that advocates a radical change in antitrust law. The Tenth Circuit cites articles written by Judge Posner,⁸⁴ Judge Easterbrook,⁸⁵ and economist Betty Bock⁸⁶ as authority for its holding. These three authors have called for the abolition of the per se rule with respect to *all* vertical restraints.

This view, also accepted by the Justice Department,⁸⁷ posits that price and nonprice terms for transactions are interrelated and should not be treated differently.⁸⁸ By this theory, every restricted dealing arrangement has as its basis the desire to influence price.⁸⁹ Even the Supreme Court, in *Monsanto*, recognized the difficulty in distinguishing between the two arrangements.⁹⁰ Thus, a unified approach to all vertical restraints would end much of the current confusion present in the courts.

Economic theory forms the foundation of this analysis. The theory assumes that a manufacturer will only impose restraints which will increase its competitiveness and, therefore, help the consumer.⁹¹ Because the focus of antitrust law is the consumer,⁹² most vertical arrangements, based on the assumptions of this theory, will withstand a section one challenge.⁹³

Section one of the Sherman Act is not designed to interfere with unilateral acts by a manufacturer.⁹⁴ Rather, a conspiracy must exist.⁹⁵ A manufacturer may unilaterally restrict its price to help its business; however, it may not employ the same price restriction if it acts in concert with a distributor. This action constitutes a per se violation of the Sherman Act. Given the ease with which courts will find a conspiracy,⁹⁶ however, even an arguably unilateral restriction may be deemed per se illegal.

The abolitionists view this as a serious dilemma for business executives. If a distributor alerts a manufacturer that another distributor is acting adversely to its interests, the manufacturer is limited in possible responses to the complaint. Once it receives the complaint, it may have

82 See *supra* note 4.

83 See *supra* note 12 and accompanying text.

84 Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 CHI. L. REV. 6 (1981).

85 Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135 (1984).

86 Bock, *An Economist Appraises Vertical Restraints*, 30 ANTITRUST BULL. 117 (1985).

87 See Baxter, *Vertical Restraints and Resale Price Maintenance: A 'Rule of Reason' Approach*, 14 ANTITRUST L. ECON. REV. 13 (1982).

88 See Bock, *supra* note 86, at 123.

89 Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 14 (1984).

90 104 S. Ct. at 1470. See *supra* notes 29-32 and accompanying text.

91 Bock, *supra* note 86, at 122-23.

92 See *supra* notes 57-58 and accompanying text.

93 Easterbrook, *supra* note 85, at 158.

94 See generally *Colgate*, *supra* note 10.

95 See *supra* note 2.

96 See *supra* note 11 and accompanying text.

to abandon any restrictions, price or nonprice, because any action taken subsequent to a complaint may be seen as an agreement to fix prices under a *Cernuto* analysis.⁹⁷ This uncertainty results in an inhibition of internal business communication. Thus, the per se rule arguably impedes important business functions.

Even if this theory is not accepted in its entirety, the underlying rationale clearly supports abolition of the per se rule to nonprice distributor terminations. One must assume that the manufacturer who terminates a distributor for reasons other than to restrain prices does so to strengthen his position in the market.⁹⁸ Through the creation of a more efficient distribution process, the manufacturer benefits the consumer by reducing overhead costs and encouraging distributors to actively promote the product.⁹⁹ In order to determine whether these assumptions are correct, courts must apply the rule of reason analysis.¹⁰⁰ Courts can determine whether the termination actually benefits or harms consumers by scrutinizing the restraint with an eye toward its effect on competition. Such a consideration is not possible under a per se analysis.

IV. Conclusion

Westman holds that the per se rule does not apply to nonprice distributor termination cases. Rather, the rule of reason represents the proper standard for adjudicating such claims. *Westman* also indicates a possible trend in antitrust law toward abolishing the per se rule in all vertical arrangements—price as well as nonprice. Whether or not this broad theory is adopted, its rationale clearly supports the conclusion that the per se rule should not apply in cases of nonprice dealer terminations. Although current thinking applies the rule of reason analysis in nonprice vertical restraint cases, plaintiffs still successfully plead and prove per se liability in some federal courts. The circuit court decision in *Cernuto* and the trial court decision in *Westman* are prime examples of this inconsistency.

Antitrust laws are designed to benefit the consumer. Therefore, dealer terminations must be judged by their effect on the market. The per se rule fails to fully scrutinize impact on the consumer. The rule of reason analysis is the only test which provides adequate inquiry into a restraint's economic impact on the consumer. Therefore, the rule of reason should be the only standard invoked to adjudicate cases alleging a nonprice dealer termination.

Brian M. English
Susan M. Faccenda
Jeffrey D. Linton
John J. O'Shea

97 Posner, *supra* note 84, at 13.

98 See *supra* notes 73-74 & 91-93 and accompanying text.

99 See *supra* notes 73-74 and accompanying text.

100 See *supra* notes 81-83 and accompanying text.

TORT LAW—BARRETT v. UNITED STATES: ABSOLUTE IMMUNITY WRONGFULLY EXTENDED TO ASSISTANT ATTORNEY GENERAL DEFENDING THE STATE IN A CIVIL ACTION

The Supreme Court has held that government officials performing certain critical functions should receive immunity from civil liability.¹ Attorneys general have traditionally been among those government officials able to claim some degree of immunity.² Like most officials, attorneys general can receive either absolute or qualified immunity if acting within the scope of their authority.³ Although it is well established that state officials prosecuting criminal cases receive absolute immunity,⁴ the Supreme Court has not yet addressed what degree of immunity a state attorney general requires while defending the state in a civil action.⁵

1 See *Briscoe v. LaHue*, 460 U.S. 325 (1983) (witnesses); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (president); *Butz v. Economou*, 438 U.S. 478, 508 (1978) (administrative officials); *Stump v. Sparkman*, 435 U.S. 349 (1978) (judges); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (prosecutors); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (legislators); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (legislators).

2 *Mitchell v. Forsyth*, 105 S. Ct. 2806 (1985); *Henderson v. Lopez*, 790 F.2d 44 (7th Cir. 1986); *Mother Goose Nursery Schools, Inc. v. Sendah*, 770 F.2d 668 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986); *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), *cert. denied*, 105 S. Ct. 810 (1986); *Mancini v. Lester*, 630 F.2d 990 (3d Cir. 1980).

3 Courts conduct a functional analysis to determine what type of immunity to grant government officials, including attorneys general. The key factor is whether the government attorney is performing a prosecutorial function. In *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976), the Supreme Court granted immunity to attorneys performing prosecutorial functions. See *infra* note 51 and accompanying text. The Court left open the question of whether absolute immunity extends to "those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer," and thus outside of his role as a prosecutor. *Imbler*, 424 U.S. at 430-31. Subsequently, courts have generally ruled that attorneys general are not entitled to absolute immunity for acts taken in their investigative or administrative capacity. See, e.g., *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979), *rev'd in part on other grounds*, 446 U.S. 754 (1980); *Mancini v. Lester*, 630 F.2d 990 (3d Cir. 1980); *Safeguard Mut. Ins. Co. v. Miller*, 456 F. Supp. 682 (E.D. Pa. 1978). The Supreme Court has implicitly accepted this distinction "in extending absolute immunity to executive officials when they are engaged in quasi-prosecutorial functions." *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.16 (1982).

4 *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Siano v. Justices of Mass.*, 698 F.2d 52 (3d Cir.), *cert. denied*, 464 U.S. 819 (1983); *Norton v. Liddel*, 620 F.2d 1375 (10th Cir. 1980); *Taylor v. Nichols*, 558 F.2d 561 (10th Cir. 1977); *Cerborne v. County of Westchester*, 508 F. Supp. 780 (S.D.N.Y. 1981); *Voytko v. Ramada Inn of Atlantic City*, 445 F. Supp. 315 (D.N.J. 1978).

5 The Sixth Circuit Court of Appeals addressed this issue in *Ellison v. Stephens*, 581 F.2d 584 (6th Cir.), *cert. denied*, 439 U.S. 1051 (1978). In *Ellison*, the administrator of an estate brought a § 1983 action against the state attorney general. The § 1983 claim arose from the attorney general's defense of the state against the estate's wrongful death action. In defending this action, the attorney general raised the doctrine of sovereign immunity, asserting that it barred the claim against the commonwealth. The court held that the state attorney general could not be sued under § 1983 for raising sovereign immunity as a defense to a civil action. This decision, however, is not persuasive in comparison to *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986). The attorney general in *Ellison* raised a legal defense to a civil claim. The court noted that this action did not infringe upon any constitutional provision or federal law when asserted. Consequently, the court found the action to be an "integral part of the judicial process" under *Imbler*. See *infra* note 51 and accompanying text. In contrast, the attorney general in *Barrett* did not raise a recognized legal defense on behalf of the state. Rather, he conspired with the federal attorneys, suppressed evidence, and suborned perjury. *Barrett*, 798 F.2d at 576-77. These actions clearly infringe on constitutional rights and state laws and thus are not within the scope or intent of the *Ellison* decision.

The Court of Appeals for the Second Circuit recently faced this issue in *Barrett v. United States*,⁶ when the Assistant Attorney General for the State of New York participated in a cover-up as he defended the state in a civil action for damages. The court of appeals, in granting absolute immunity to the state attorney general, applied the Supreme Court's functional analysis improperly and failed to consider a recent Supreme Court decision which eliminated the need for absolute immunity in circumstances similar to the *Barrett* situation.

Part I of this comment outlines the facts and holding of *Barrett*. Part II briefly sketches the development of common law and statutory immunity for government officials involved in the judicial process. Part III summarizes the court's reasoning in *Barrett* and criticizes the court's analysis. Finally, Part IV concludes that the extension of absolute immunity to a state attorney general defending a state in a civil action is unwarranted.

I. *Barrett v. United States*

Elizabeth Barrett, successor representative of the Harold Blauer estate,⁷ sued certain state and federal attorneys under 42 U.S.C. section 1983⁸ to recover damages resulting from the attorneys' alleged misconduct in connection with a wrongful death suit filed by Mr. Blauer's estate in 1953.⁹ Elizabeth Barrett alleged that defendant attorneys deliberately deprived the estate of its property right in the 1953 Court of Claims action by "covering up" the facts and circumstances of Mr. Blauer's death.¹⁰

Mr. Blauer, a patient at the New York State Psychiatric Institute (NYSPI), died in January 1953 after receiving a series of injections of a mescaline derivative.¹¹ The United States Army Chemical Corps sup-

6 798 F.2d 565 (2d Cir. 1986).

7 Amy Blauer, decedent Harold Blauer's estranged wife, originally represented Mr. Blauer's estate. Mrs. Blauer filed suit against the State of New York in 1953 after she received notice that her husband had died while receiving treatment at the New York State Psychiatric Hospital. *Id.* at 567.

8 42 U.S.C. § 1983 (1982) provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

9 Elizabeth Barrett, daughter of Harold Blauer, originally filed the § 1983 suit in 1975, following an announcement by the Secretary of the Army that Harold Blauer had died while unknowingly serving as a test subject for an Army Chemical Corps experiment. The District Court for the Southern District of New York dismissed the suit as barred by the statute of limitations. *Barrett v. Hoffman*, 521 F. Supp. 307 (S.D.N.Y. 1981). The Court of Appeals for the Second Circuit reversed the district court decision on the theory that Barrett's cause of action did not accrue until 1975, because Barrett was innocently unaware of the claim until that time. *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982).

10 *Barrett*, 798 F.2d at 575.

11 The injection that caused Blauer's death was the fifth in a series to which Blauer had reacted unfavorably. *Id.* at 575. Medical records disclosed to the estate during discovery stated that Blauer had been subjected to a drug study "for diagnostic and therapeutic purposes," and that his death resulted from an "unexpected and totally atypical response." *Id.* at 569. Although the NYSPI supervising doctor knew that the purpose of the injections was to test the drug's effects for chemical warfare, the NYSPI staff did not inform Blauer or his family of this purpose. The New York City

plied the drug to NYSPI pursuant to a secret contract to test the drug's suitability for chemical warfare purposes.¹² Mr. Blauer's estranged wife, as administratrix of the estate, sued the State of New York in the New York Court of Claims in 1953. Mrs. Blauer was not aware of the Army's drug testing program. Her suit alleged negligent misconduct by the state-employed personnel at NYSPI.¹³ The state assigned then Assistant State Attorney General David Marcus to defend the case. His investigation revealed the Army Chemical Corps' involvement in Blauer's death.¹⁴ Recognizing that the Army classified much of the relevant information as secret, Marcus arranged a meeting with the Army litigation division in January 1954 to discuss the case. The federal government agreed to pay one half of any settlement Marcus negotiated with the estate.¹⁵

Marcus again met with representatives of the federal government in July 1954.¹⁶ At this meeting, the federal attorneys insisted that Marcus not reveal the Army Chemical Corps' chemical warfare experiments.¹⁷ Instead, a Department of Justice attorney told Marcus to limit the legal proceedings to the medical aspects of the case.¹⁸ The federal attorneys instructed Marcus that if it became necessary to reveal that the Army had supplied the mescaline derivative which caused Blauer's death, he should identify the Army Medical Corps, and not the Army Chemical Corps, as the source of the drug.¹⁹ To avoid disclosing the Army Chemical Corps' drug testing contract with NYSPI, Marcus repeatedly postponed the pretrial depositions of NYSPI doctors.²⁰

Marcus negotiated a \$15,000 settlement with the estate,²¹ and the matter proceeded to a Court of Claims settlement hearing. Prior to this hearing, Marcus secretly met with the Court of Claims judge to inform him of the United States Government's involvement in Mr. Blauer's death.²² He persuaded the judge to conceal this information in the inter-

Medical Examiner's death certificate listed the cause of Blauer's death as "[c]oronary arteriosclerosis; sudden death after intravenous injection of a mescaline derivative." *Id.* at 567.

12 The contract contained a provision forbidding any disclosure of the drug testing agreement. *Id.* at 567.

13 *Id.* at 568.

14 *Id.*

15 Marcus reached an agreement with the federal attorneys in which he would attempt to settle the case and keep secret the Army's role and purpose in supplying the drug. In exchange, the federal government agreed to pay half of any settlement Marcus negotiated with the estate. *Id.* at 567.

16 Marcus attended a conference in Washington on July 12, 1954. The federal attorneys, several of them appellants here, included Harris J. North, then an attorney with the United States Army Judge Advocate General Corps, Herbert K. Greer, then Legal Advisor to the Chief Chemical Officer, Army Chemical Corps, and George S. Leonard, then first assistant to the Assistant Attorney General for the Civil Division, United States Department of Justice. *Id.* at 568.

17 The federal attorneys threatened to prosecute, under the Federal Espionage Act, anyone (including Marcus) who revealed the Army Chemical Corps' involvement. *Id.* at 577. Mr. Leonard "forcibly informed" Marcus that pretrial discovery and any other further proceedings should be limited to the medical aspects of the case. He objected strongly to disclosure of the Army-NYSPI contract, its purpose, and the results of the experiment. *Id.* at 568-69. *See also* Barrett v. United States, 689 F.2d 324, 328 (2d Cir. 1982).

18 Barrett, 798 F.2d at 568.

19 *Id.*

20 *Id.* at 569.

21 *Id.*

22 *Id.*

est of national security.²³ At the settlement hearing, Marcus handed certain NYSPI medical records to the judge but did not turn them over to the estate's counsel.²⁴ Dr. Hoch, an NYSPI physician, testified at the settlement hearing that the injection of the drug was not in accordance with generally accepted medical practice.²⁵ Dr. Hoch did not reveal the purpose of the injection or the Army Chemical Corps' role in supplying the drug.²⁶ Marcus prepared the settlement agreement which released the state and the "governmental body" or agency which had furnished the drug from liability. The plaintiff, Mrs. Blauer, signed the release, assuming that an agency of the State of New York had supplied the drug.²⁷

In her section 1983 suit, plaintiff Elizabeth Barrett alleged that Marcus misled the estate about the cause of Mr. Blauer's death by knowingly giving the estate inaccurate medical records, ignoring a court order for discovery of other relevant medical records classified as secret by the Army, and deliberately concealing material evidence.²⁸ The district court granted absolute immunity to David Marcus and dismissed the claim against him. The court granted qualified immunity to the federal attorneys and refused to dismiss the claim against them. The Court of Appeals for the Second Circuit affirmed.²⁹

II. Development of Tort Immunity for Government Officials

A. *Doctrine of Immunity*

Courts have granted immunity from tort liability to certain classes of federal and state employees based on their status as government officials. When a court grants immunity to an official, it does not deny the existence of the tort. Rather, it holds that the plaintiff cannot subject the

23 See the discussion of the facts of this case in *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), where the Court of Appeals reversed the district court's dismissal of Ms. Barrett's action on statute of limitations grounds.

24 Upon learning of the nature of the Army's involvement, the judge increased the settlement amount to \$18,000. *Barrett*, 798 F.2d at 569. The Department of the Army paid \$9,000 to the State of New York to cover one half of the settlement. *Id.* at 570.

25 "[W]hile conceding that the injections were not in accordance with generally accepted medical routine, Hoch testified falsely before the New York Court of Claims that the drug was a derivative compound commonly used by the profession for the purposes of diagnosing certain types of psychiatric ills . . ." *Id.* at 576. In fact, Dr. Hoch and Marcus both knew that the newly developed compound was being administered as an experiment to study its effects for chemical war purposes. *Id.*

26 Dr. Hoch testified that Blauer received a commonly-used, well-known, safe drug so that his condition "could best be diagnosed and treatment thereafter given." *Id.* at 576. In contrast, Dr. Hoch stated to Marcus and the others present at the July 12, 1954 meeting that "he would not have used the new compound for experimental purposes but for the NYSPI's contract with the Army." He also stated that the "experimental nature of the treatment made it a departure from acceptable medical practice." *Id.* at 568.

27 *Id.* at 570.

It is alleged that the concealment was further effectuated by Marcus' knowing participation in an alleged fraud upon the estate through . . . his inducement of the estate to sign a release prepared by him which barred claims against the "government body" supplying the lethal derivative with which Blauer was injected without revealing that the "government" supplier was not the State of New York, as the estate assumed, but the Army Chemical Corps.

Id. at 577.

28 *Id.* at 570.

29 *Id.*

alleged tortfeasor to suit because of the defendant's function as a government official.³⁰

Courts have recognized both absolute and qualified immunity. An official cloaked with absolute immunity from liability is not amenable to a tort action if his actions are within the scope of his duties as a government official, *even if* he acts intentionally or with malice.³¹ An official with qualified immunity, however, is not amenable to suit if he acts within the scope of his duties *and* acts in good faith.³²

The procedural impact of granting immunity varies according to the type of immunity granted.³³ If the court determines that the defendant-government official has absolute immunity, the plaintiff's complaint is dismissed, precluding discovery.³⁴ Thus, such actions never continue beyond the pleading stage, and the defendant-government official does not have to defend his actions in court. Qualified immunity allows the plaintiff to continue his suit until the court determines as a matter of law that the official did not violate a known constitutional right.³⁵

B. Immunity from Common Law Liability

Courts gave judges,³⁶ grand jurors,³⁷ and prosecutors³⁸ absolute immunity from common law liability in tort. Claimants subjected these offi-

30 RESTATEMENT (SECOND) OF TORTS, Chapter 45A, Introductory Note (1979).

31 *Imbler*, 424 U.S. at 418 n.12. See *infra* note 51 and accompanying text.

32 "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct." *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). The Supreme Court modified this standard, at least with regard to qualified immunity from liability in § 1983 actions, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). See *infra* notes 109-17 and accompanying text.

33 The defendant-government official may either raise the absolute immunity defense in a motion for summary judgment (FED. R. CIV. P. 56(b)) or in the responsive pleading (FED. R. CIV. P. 12(a)). If raised in the responsive pleading, the defendant then may make a motion for judgment on the pleadings (FED. R. CIV. P. 12(c)).

34 Since the question of whether a defendant is entitled to absolute immunity is one of law, the court will dismiss a suit upon granting absolute immunity. See, e.g., *Nixon v. Fitzgerald*, 457 U.S. 731 (1982).

35 See *infra* notes 109-17. Before *Harlow*, 457 U.S. 800, if the court determined that a particular defendant was entitled only to qualified immunity from liability in a common law tort action, the action usually proceeded to trial. Most courts held that the question of an official's good faith was one of fact and thus a jury question. Procedurally, a question of fact is not disposable on summary judgment. *Id.* at 816. *Harlow* altered this good faith standard in regard to qualified immunity in § 1983 actions, thus lessening the procedural differences between the types of immunity.

36 *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872). In *Bradley*, the plaintiff, one of the attorneys for John H. Suratt in Suratt's trial for the murder of Abraham Lincoln, alleged that defendant, the presiding judge at the trial, had with malice struck plaintiff's name from the roll of attorneys practicing in the court. The Court granted the defendant judge absolute immunity. *Id.* at 354.

37 *Turpen v. Booth*, 56 Cal. 65 (1880).

38 *Griffith v. Slinkard*, 146 Ind. 117, 44 N.E. 1001 (1896). *Griffith* represents the first American case to deal with the issue of prosecutorial immunity. The first such case to come before the United States Supreme Court was *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927). In *Yaselli*, the court of appeals held that:

[T]he Attorney General of the United States, in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury.

The immunity is absolute, and is grounded on principles of public policy.

Id. at 406.

cials most frequently to such tort actions as malicious prosecution³⁹ and defamation.⁴⁰ The courts did not grant this immunity to protect the intentional wrongdoer. Rather, courts granted this immunity to protect the public interest in having officials perform their duties without fear of lawsuit.⁴¹ The courts afforded absolute immunity to grand jurors, prosecutors, and judges because all of these officials exercised discretion in evaluating evidence,⁴² and thus might likewise be subject to suit by a dissatisfied litigant.

C. Immunity From Section 1983 Liability

On its face, section 1983 grants no immunities.⁴³ Since 1951, however, the United States Supreme Court has held that certain government officials performing particular functions should be afforded immunity from liability in section 1983 actions.⁴⁴ The Supreme Court has afforded absolute immunity from section 1983 liability to judges,⁴⁵ witnesses,⁴⁶ prosecutors,⁴⁷ and officials performing adjudicatory functions within administrative agencies.⁴⁸ The Court has found that the reasons which jus-

39 *Yaselli*, 12 F.2d 396 (2d Cir. 1926). In *Yaselli*, plaintiff alleged that defendant and others had maliciously procured an indictment of the plaintiff using false evidence. At the criminal trial, the court directed a verdict of not guilty against plaintiff (who was one of the defendants at that time).

40 *Barr v. Matteo*, 360 U.S. 564 (1958) (federal official who was acting director of the Office of Rent Stabilization granted absolute privilege in a defamation action); *Spalding v. Vilas*, 161 U.S. 483 (1896) (the Postmaster General granted absolute privilege).

41 *Imbler*, 424 U.S. at 418 n.12. See *infra* note 51 and accompanying text.

42 *Id.* at 423 n.20. Such officials' conduct and the immunity which the courts afforded them were termed "quasi-judicial" for this reason. Courts afforded prosecutors absolute immunity from common law liability because of "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Id.* at 423.

43 Justice William O. Douglas has argued for a strict reading of the statute, which would allow no immunities. See *Pierson v. Ray*, 386 U.S. 547, 558 (1967) (Douglas, J., dissenting); *Tenney v. Brandhove*, 341 U.S. 367, 383 (1951) (Douglas, J., dissenting) ("It was indeed the purpose of this civil rights legislation to secure federal rights against invasion by officers and agents of the states. I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain.").

44 *Tenney v. Brandhove*, 341 U.S. 367 (1951).

45 *Pierson v. Ray*, 386 U.S. 547, 554 (1967) (Court regarded judicial immunity as essential to protect the integrity of the judicial process). See also *Stump v. Sparkman*, 435 U.S. 349 (1978) (judge whose actions are related to those normally performed by a judge and whom the parties expect is acting in a judicial capacity is absolutely immune from liability in a § 1983 action). Cf. *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970) (judge who presides at county fiscal board meetings not entitled to immunity). For a history of judicial immunity, see Block, *Stump v. Sparkman and the History of Immunity*, 1980 DUKE L.J. 878.

46 *Briscoe v. LaHue*, 460 U.S. 325 (1983). In *Briscoe*, the Court held that a state convicted defendant cannot sue a police officer in a § 1983 action based on allegations of perjury because the Court found nothing in the legislative history of § 1983 which revealed an intention to abrogate common law witness immunity, especially for police officers.

47 *Imbler v. Pachtman*, 424 U.S. 409 (1976). See *infra* note 51 and accompanying text. However, the Supreme Court has held that a public defender is entitled to no immunity. *Ferri v. Ackerman*, 444 U.S. 193 (1979). See also *Tower v. Glover*, 467 U.S. 914 (1984) (state public defender likened to the English barrister, who has never been granted immunity from liability for intentional misconduct).

48 *Butz v. Economou*, 438 U.S. 478 (1978). *Butz* involved a suit against federal officials of the Department of Agriculture in which the plaintiff alleged deprivation of constitutional rights. The Supreme Court has held that the same standards of immunity should apply to both state officials sued under § 1983 and federal officials "sued on similar grounds under causes of action founded directly

tify absolute immunity from liability in common law tort actions apply equally to section 1983 actions.⁴⁹

By far, most court decisions regarding immunity of government officials from section 1983 liability have involved prosecutors and other officials with functions which the courts have termed "quasi-judicial."⁵⁰ With regard to prosecutors, the Supreme Court has held that the public interest in allowing the prosecutor to freely execute his duties outweighs the injury to the genuinely wronged criminal defendant deprived of his liberty by a prosecutor's actions. On this basis, the Court granted a prosecutor absolute immunity from liability in section 1983 actions.⁵¹

III. Absolute Immunity: An Inquiry Based on Scope of Authority, Function, and Public Policy

A. *Scope of Authority*

The *Barrett* court extended absolute immunity to an assistant attorney general defending the state in a civil suit. In cases where immunity is at issue, courts have generally used a two-step inquiry.⁵² The first step is whether the defendant is entitled to any immunity whatsoever. This de-

on the Constitution." *Economou v. United States Dep't of Agriculture*, 535 F.2d 688, 695 n.7 (1976). In *Butz*, the Supreme Court first applied *Imbler's* absolute prosecutorial immunity to a government official not acting as a prosecutor. See *infra* note 51 and accompanying text. The plaintiff in *Butz* alleged that certain members of the Department of Agriculture, by initiating administrative proceedings against him without proper notice, denied him due process of law. Those named as defendants included the Judicial Officer, the Chief Hearing Examiner, and the attorney who had prosecuted the enforcement proceeding. 438 U.S. at 508. The Supreme Court refused to grant all of the individual defendants absolute immunity, ruling that federal officials who "seek absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope." *Id.* at 506. The Court held that federal executive officials are entitled only to qualified immunity, "subject to those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Id.* at 507. The Court later relied on *Imbler*, concluding that since the adjudication process within a federal administrative agency has many of the characteristics of the judicial process, and several of the officials performed functions similar to those of prosecutors and judges, these officials should be absolutely immune from liability. *Id.* at 516.

49 *Imbler*, 424 U.S. at 418 ("[S]ection 1983 is to be read in harmony with general principles of [common law] tort immunities and defenses rather than in derogation of them.").

50 See *supra* note 42 and accompanying text.

51 In *Imbler*, the Supreme Court first addressed the question of what type of immunity from § 1983 liability should be granted to a state prosecuting attorney acting within the scope of his prosecutorial duties. Paul Imbler had been convicted of felony murder. After his conviction, Imbler filed a § 1983 action, alleging prosecutorial misconduct. Imbler argued that a prosecutor, as a member of the executive branch, could claim only the qualified immunity afforded other members of the executive branch, and not the absolute immunity usually afforded the judiciary. The Court rejected this argument, stating that it did not grant immunity predicated on the particular branch of government of the official, but rather on a "considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." 424 U.S. at 421. In articulating its holding, the Supreme Court clearly delineated the boundaries of its decision, stating:

We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.

Id. at 430-31 (footnotes omitted). See also *infra* notes 87-89 and accompanying text.

52 Although the Supreme Court has not explicitly outlined this two-step inquiry, the analysis is implicit in its decisions. See *Butz*, 438 U.S. at 492; *Spalding v. Vilas*, 161 U.S. 483, 498 (1896); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872).

termination depends on whether or not the defendant was acting within his authority when he committed the violation in question. If he was not acting within his authority, he is not entitled to any immunity.⁵³ Only after the court determines this threshold issue should it determine what type of immunity, qualified or absolute, to grant the defendant.

The *Barrett* court failed to address this threshold issue. Rather, the court assumed that the defendant was entitled to some form of immunity and simply proceeded to determine whether that immunity should be qualified or absolute. By doing this, the *Barrett* court departed from the general rule that a federal official may not ignore the limitations which the controlling law places on his powers.⁵⁴

This general rule originated as a means of protecting federal officials in the execution of their federal statutory duties from criminal or civil actions based on state law.⁵⁵ Thus, a federal official was protected only if his acts were authorized by controlling federal law.⁵⁶ Although this rule originated in regard to federal officials, it applies equally to state officials. The Supreme Court has made it clear that it would be untenable to draw a distinction between federal and state officials for the purposes of determining immunity.⁵⁷

An analysis of the facts in *Barrett* supports the contention that Assistant Attorney General Marcus was not acting within the scope of his authority when he violated section 1983. Although Marcus purportedly acted for the benefit of the state he was defending,⁵⁸ his actions violated New York Penal Laws⁵⁹ regarding conspiracy to obstruct justice,⁶⁰ suppression of evidence,⁶¹ and subornation of perjury.⁶² Marcus attended the July 12, 1954 meeting where the federal attorneys planned their strategy for ensuring Mr. Blauer's estate would not discover the Army

53 *Butz*, 438 U.S. at 494 (citing *Spalding v. Vilas*, 161 U.S. 483 (1896)) (circular issued by Postmaster General not beyond the scope of his official duties); *Barr v. Matteo*, 360 U.S. 564, 574 (1959) (press release within agency director's discretionary authority).

54 *Butz*, 438 U.S. at 489.

55 *Id.* See also *Bates v. Clark*, 95 U.S. 204 (1877); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 865-66 (1824); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

56 "To make out his [the official's] defence [sic] he must show that his authority was sufficient in law to protect him." *Cunningham v. Macon & Brunswick R.R. Co.*, 109 U.S. 446, 452 (1883).

57 The Court reasoned that if a distinction was made between state and federal officials for purposes of immunity law it would create a system in which the Bill of Rights monitored the conduct of state officials more closely than it did that of federal officials. To do this, said the Court, would "stand the constitutional design on its head." *Butz*, 438 U.S. at 504.

58 Petitioner's brief disputes this point, contending that Marcus' fraudulent concealment of facts, subornation of perjury and conspiratorial actions were taken with and for the benefit of non-parties to the lawsuit he was defending. Specifically, Petitioner's brief argued that Marcus conspired with representatives of the federal government in order to prevent disclosure of the federal government's role in the death of Harold Blauer. Petitioner contended that Marcus acted solely for the benefit of the federal government, in order to forestall a second lawsuit against the government. Consequently, Petitioner suggested that applying absolute prosecutorial immunity in this context broke new and "uncalled for" ground by expanding the limited privilege to a degree detrimental to the governmental system. Brief for Plaintiff-Appellee and Plaintiff-Cross-Appellant at 42, 44-45, *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986).

59 Curiously, the *Barrett* court only discussed these penal law violations in its discussion of the federal attorney defendants. *Barrett*, 798 F.2d at 575-76.

60 N.Y. PENAL LAW § 580 (McKinney 1944).

61 N.Y. PENAL LAW § 814 (McKinney 1944).

62 N.Y. PENAL LAW § 1620 (McKinney 1944).

Chemical Corps' involvement.⁶³ At this meeting Marcus learned that the federal attorneys planned to identify the Army Medical Corps as the source of the mescaline compound if necessary, that the federal attorneys intended to remove the Chemical Corps' contract with NYSPI to Maryland where they would be beyond the estate's subpoena power, and that the unclassified records he would later release to the estate were false.⁶⁴ At this meeting, Dr. Hoch stated that he would not have used the compound but for the NYSPI's contract with the Army and that the treatment's experimental nature was a departure from accepted medical practice which, if disclosed, would support a finding of negligence. In contrast, the classified records stated that Mr. Blauer had been subjected to a "drug study for diagnostic and therapeutic purposes" which resulted in an "unexpected and totally atypical response."⁶⁵

Although Marcus may have been initially reluctant to take part in this plan,⁶⁶ he ratified his position as a coconspirator by repeatedly postponing the pretrial examination of NYSPI doctors, by eliciting Dr. Hoch's false testimony during the settlement hearing, and by furnishing, upon request for discovery, only the unclassified NYSPI records he knew to be false.⁶⁷

These criminal violations clearly place Marcus' actions beyond the scope of his authority. For any court to suggest otherwise would be incongruous. Instead, it is apparent that Marcus ignored an express statutory limitation on his authority.⁶⁸ The Supreme Court has never

63 *Barrett*, 798 F.2d at 569. See *supra* note 16 and accompanying text.

64 See *supra* notes 16-19 and accompanying text.

65 *Barrett*, 798 F.2d at 569. See *supra* notes 25-26 and accompanying text.

66 According to a "Chronological Statement of Facts" prepared by the Army's office of the Judge Advocate General, at the meeting of July 12, 1954, Marcus was "forcibly informed" that he should limit the proceedings to the medical aspects of the case. *Barrett*, 798 F.2d at 568. Moreover, Marcus' deposition testimony indicated that the federal attorneys forced him to take part in the illegal activities by threatening him personally with prosecution under the Federal Espionage Act. *Id.* at 577. See also *supra* notes 17-19 and accompanying text.

67 In addition to Marcus' criminal violations, the estate would have had a private cause of action against him in 1953 for violation of the New York Penal Laws. NEW YORK PENAL LAW § 273 (McKinney 1944), superseded by N.Y. JUD. LAW § 487 (1967), authorized treble damages recovery against an attorney "guilty of any deceit or collusion with intent to deceive the court or any party." As the *Barrett* court noted when it discussed the federal defendants, § 273 was construed as providing a civil remedy to parties injured by a deceitful attorney. *Barrett*, 798 F.2d at 576. See *In re Bregoff*, 258 A.D. 551, 557, 17 N.Y.S.2d 816, 821 (1940); *Nones v. Security Title and Guar. Co.*, 4 Misc. 2d 1057, 162 N.Y.S.2d 761 (Sup. Ct. 1956); *Fields v. Turner*, 1 Misc. 2d 679, 147 N.Y.S.2d 542 (Sup. Ct. 1955).

68 Not only did Marcus exceed statutory limitations but he exceeded ethical limitations as well. Both the American Bar Association and the Supreme Court have recognized the danger of presenting false evidence or otherwise violating the law in advocating a case. Two different codifications of uniform standards of professional responsibility contain provisions limiting the scope of representation to lawful conduct. Disciplinary Rule 7-102 of the MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980), entitled "Representing a Client Within the Bounds of the Law," provides:

"(A) In his representation of a client, a lawyer shall not:

... (4) Knowingly use perjured testimony or false evidence.

... (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent."

Similarly, the more recent MODEL RULES OF PROFESSIONAL CONDUCT (1983) provides:

"Rule 1.2 Scope of Representation

... (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent"

Moreover, both codes require the disclosure of perjury even if the disclosure compromises the client's confidence. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(c)(3) (1980); MODEL

purported to immunize those officials who ignore limitations on their authority imposed by law.⁶⁹ Consequently, by failing to examine Marcus' actions in terms of scope of authority, the *Barrett* court did not satisfy the threshold issue of the two-step inquiry and should not have granted Marcus any immunity.⁷⁰

B. *Misapplication of the Supreme Court's Functional Analysis*

Even if Marcus had acted within the scope of his authority, he was not entitled to absolute immunity. Courts generally hold that qualified immunity provides sufficient protection for most government officials.⁷¹ Absolute immunity is limited to the "rare and exceptional"⁷² circumstances where public policy considerations outweigh the plaintiff's interest in access to the courts. Thus, the decision to grant absolute immunity depends on a balancing test.⁷³

This balancing test for absolute immunity does not depend on the official's job title, rank, or branch of government.⁷⁴ Rather, the Supreme Court has developed a test which examines the specific function the offi-

RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983). The Supreme Court recognized these limitations on advocacy in *Nix v. Whiteside*, 106 S. Ct. 988, 995 (1986), stating that: "[A]n attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; [the standards] specifically [ensure] that the client may not use false evidence." The Court reasoned that the prevention and disclosure of fraud was necessary for the administration of justice. *Id.* at 996.

69 *Butz*, 438 U.S. at 489-94. In *Butz*, the Supreme Court inferred from its previous decisions in *Barr v. Matteo*, 360 U.S. 564 (1959), and *Spalding v. Vilas*, 161 U.S. 483 (1896), *supra* note 40, that an official will not be excused from liability "if he failed to observe obvious statutory or constitutional limitations on his powers or if his conduct was a manifestly erroneous application of the statute." *Butz*, 438 U.S. at 494.

70 Judicial integrity requires that Marcus not be granted absolute immunity. As Justice White explained in his concurring opinion in *Imbler*, 424 U.S. at 432 (White, J., concurring), absolute immunity in the context of suits charging suppression of evidence is not necessary nor even helpful in protecting the judicial process. Absolute immunity is designed in part to encourage the production of evidence. *See, e.g.*, *Briscoe v. LaHue*, 460 U.S. 325 (1983), *supra* note 46. In *Briscoe*, the Court held that a witness has absolute immunity from § 1983 liability based on the substance of his trial testimony. The Court expressly limited this immunity to testimony given in judicial proceedings in order to encourage witnesses to testify completely and to the best of their knowledge. The Second Circuit recognized this reasoning in *San Filippo v. United States Trust Co. of N.Y., Inc.*, 737 F.2d 246, 254 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) stating that "no court has yet held that absolute immunity from prosecution for false testimony extends to conspiracy with public officials to present false testimony." *Accord* *Nix v. Whiteside*, 106 S. Ct. 988, 994 (1986) ("Plainly, . . . [counsel's] duty is limited to legitimate lawful conduct compatible with the very nature of a trial as a search for truth."). Absolute immunity, however, is no longer beneficial when the information is withheld from the fact-finder. In the context of suppressing or withholding information, immunity would discourage precisely the disclosure of evidence that was encouraged by giving prosecutors immunity. Correspondingly, denying immunity in this context would encourage such disclosure.

71 "Our cases make plain that [for executive officers in general] qualified immunity represents the norm." *Harlow*, 457 U.S. at 807. The most recent statement of this principle appears in *Malley v. Briggs*, 106 S. Ct. 1092, 1096 (1986) ("As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). Courts prefer qualified immunity because, ideally, it shields officials from non-meritorious claims without denying redress through the courts for legitimate claims. *See infra* notes 108-21 and accompanying text. *See also Butz*, 438 U.S. at 507-08.

72 *Cleavinger v. Saxner*, 106 S. Ct. 496, 501 (1986).

73 "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow*, 457 U.S. at 813-14.

74 *Mitchell v. Forsyth*, 105 S. Ct. 2806, 2813 (1985). *See supra* note 76.

cial was performing at the time of the alleged unconstitutional act.⁷⁵ Courts use this "functional analysis" to limit the grant of absolute immunity to those few job functions which actually require such broad protection.⁷⁶ In order to qualify for absolute immunity, a state official "must bear the burden of showing that public policy requires an exemption" from personal liability for unconstitutional conduct.⁷⁷

In *Mitchell v. Forsyth*,⁷⁸ the Supreme Court balanced these interests by conducting the functional analysis in terms of three specific factors: (1) whether a historical or common law basis exists for the immunity in question; (2) whether the performance of the function subjects the official to the same obvious risks of vexatious litigation as does the performance of judicial or quasi-judicial functions; and (3) whether the official performing the function at issue is subject to other checks that help prevent abuses of authority from going unredressed.⁷⁹ The *Barrett* court purported to follow the *Mitchell* analysis.⁸⁰ Balancing the relevant factors, however, reveals that the function performed by Marcus, defending the state in a civil tort suit, is not a "special function" for which public policy requires absolute immunity.⁸¹

Applying the first factor in the *Mitchell* analysis, the *Barrett* court found a historical and common law basis for extending absolute immu-

75 "[A]n executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station." *Harlow*, 457 U.S. at 812. See *Briscoe*, 460 U.S. at 342 ("The common law principles and public policy considerations of immunity analysis rest on functional categories, not on the status of the defendant."); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

76 Past cases make the distinction between type of function and type of official very clear. See e.g., *Butz*, 438 U.S. at 511 ("In each case where a governmental official has claimed that he is entitled to governmental immunity we rely not on that official's position in the government, but on the examination of the nature of the function he was performing in the case."); *Mitchell*, 105 S. Ct. at 2813 ("Our decisions in this area leave no doubt that the Attorney General's status as a Cabinet officer is not in itself sufficient to invest him with absolute immunity . . ."); *Barr v. Matteo*, 360 U.S. 564, 573-74 (1959) (quoting *Spalding v. Vilas*, 161 U.S. 483, 498 (1896)) ("It is not the title of his office but the duties with which the particular officer sought to be made to respond in damages is entrusted—the relation of the act complained of to 'matters committed by law to his control or supervision,' which must provide the guide in delineating the scope of the rule which clothes the official acts of the executive officer with immunity . . .").

77 *Butz*, 438 U.S. at 506. See *supra* note 48.

78 105 S. Ct. 2806 (1985). See *infra* note 98 and accompanying text.

79 *Id.* at 2812-14. Throughout its analysis of these factors, the Court emphasized that the grant of absolute immunity depends on the specific function the official was performing at the time of the allegedly unconstitutional act. The fact that the Attorney General would be absolutely immune when performing the prosecutorial function did not determine the degree of immunity governing any other function within his scope of duties:

Mitchell's claim, then, must rest not on the Attorney General's position within the Executive Branch, but on the nature of the functions he was performing in this case. Because Mitchell was not acting in a prosecutorial capacity in this case, the situations in which we have applied a functional approach to absolute immunity questions provides scant support for blanket immunization of his performance of the "national security function."

Id. at 2813 (citations omitted). Since Marcus was not performing the function of a prosecutor, common law cases granting absolute immunity to prosecutors cannot provide a basis for his claim for absolute immunity. See also *Gravel v. United States*, 408 U.S. 606, 625 (1972) (Senators and their aides held absolutely immune only when performing "acts legislative in nature," and not when performing other acts even "in their official capacity."); *Butz*, 438 U.S. at 507-08.

80 *Barrett*, 798 F.2d at 571-73.

81 Absolute immunity applies only to "those exceptional situations where it is demonstrated that absolute immunity is essential for the conduct of the public business." *Butz*, 438 U.S. at 507.

nity to Marcus.⁸² But no common law or historical basis exists to afford absolute immunity to an attorney defending the state against a civil suit. At common law, sovereign immunity completely shielded the state from tort liability.⁸³ Attorneys general performed prosecutorial functions and brought actions against citizens to enforce the state's laws.⁸⁴ Since states did not employ attorneys to defend civil suits, there is no common law role analogous to that performed by Marcus.

Because no common law basis exists for affording a *defense* attorney absolute immunity, the *Barrett* court found it necessary to use absolute *prosecutorial* immunity as one basis for granting immunity to Marcus.⁸⁵ The court compared a prosecutor to a government attorney defending a civil suit, and concluded that Marcus' function was enough like the prosecutorial function to require absolute immunity.⁸⁶ This comparison ignores the rationale underlying prosecutorial absolute immunity as articulated by the Supreme Court in *Imbler v. Pachtman*.⁸⁷ In *Imbler*, the Court granted absolute immunity to state prosecuting attorneys acting within the scope of their duties in initiating and pursuing a criminal prosecution and in presenting the state's case against a criminal defendant.⁸⁸

82 *Barrett*, 798 F.2d at 571-73.

83 "Though the notion of sovereign immunity might seem best suited to a government of royal power, the doctrine was nevertheless accepted by American judges in the early days of the republic, and the law of the United States has ever since been that, except to the extent the government consents to suit, it is immune." W. KEETON, D. DOBBS, R. KEETON & D. OWEN, *PROSSER AND KEETON ON TORTS* § 131, at 1033 (5th Ed. 1984).

84 See 3 BLACK. COM. 256-57, 260-66; *People v. Ingersoll*, 58 N.Y. 1, 17 Am. Rep. 178 (1874). See also *People v. Hopkins*, 182 Misc. 313, 47 N.Y.S.2d 222 (1944) ("The duties, obligations and authority of the attorney general are those specifically set forth by statutes."). Attorneys general have been held absolutely immune when acting outside their prosecutorial capacity but within their statutory authority. *Mother Goose Nursery Schools, Inc. v. Sendak*, 770 F.2d 668, 671 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 884 (1986) (Indiana Attorney General required by state law to review state contracts held absolutely immune for unconstitutional acts in the course of doing so.); *Campbell v. Patterson*, 724 F.2d 41, 43 (6th Cir. 1983) (*per curiam*, *cert. denied*, 465 U.S. 1107 (1984) (Michigan Attorney General obligated by statute to render opinions interpreting law at the request of state agencies was granted immunity for errors arising out of this function.)).

85 *Barrett*, 798 F.2d at 572.

86 *Id.* at 571-72. The *Barrett* court did not initially subject Marcus to the *Mitchell* test. Instead, the court analogized Marcus' function to that of the prosecutor, and applied the test to the prosecutorial function. Only after attempting this comparison did the court purport to apply the test to Marcus.

87 424 U.S. 409 (1976).

88 "Attaining the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence." *Id.* at 426. See *supra* note 51. The function of a prosecutor in initiating and pursuing a criminal prosecution is often described as "quasi-judicial." *Id.* at 423 n.20. The *Barrett* court interpreted the term "quasi-judicial" to include all activities related to the conduct of litigation. *Barrett*, 798 F.2d at 572. This interpretation extends existing precedent. The cases which use the term address only criminal prosecutions and proceedings which closely resemble criminal prosecutions. See *Butz*, 438 U.S. at 515-17 (administrative proceedings); *Imbler*, 424 U.S. at 426; *McSurely v. McClellan*, 697 F.2d 309 (D.C. Cir. 1982); *Briggs v. Goodwin*, 569 F.2d 10 (D.C. Cir. 1977), *cert. denied*, 437 U.S. 904 (1978) (absolute immunity under *Imbler* extends only so far as necessary to protect a prosecutor's decision with respect to the initiation and conduct of particular criminal cases.); *Yaselli v. Goff*, 12 F.2d 369, 404 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927) ("The public prosecutor, in deciding whether a particular prosecution shall be instituted or followed up, performs much the same function as a grand jury."). See *supra* notes 38-39. Cf. *Cleavinger v. Saxner*, 106 S. Ct. 496 (1985) (members of federal prison's Institution Discipline Committee entitled only to qualified immunity). The public prosecutor has a direct responsibility to the public to prosecute criminals and enforce criminal laws. The attorney defending the state in a civil suit has only an indirect responsi-

The Court focused on the prosecutor's role in the criminal justice system and the concern that civil suits would divert the prosecutor's attention from the duty of enforcing the criminal law.⁸⁹ Marcus, however, was *not* performing a prosecutorial function, but was defending the state in a civil action. The interests implicated by his activities differ greatly from the criminal justice interests implicated by the prosecutorial function. Therefore, absolute prosecutorial immunity cannot provide a common law basis for affording Marcus absolute immunity under the first factor in the *Mitchell* analysis.

In addressing the second prong of the *Mitchell* analysis, the *Barrett* court acknowledged that the risk of vexatious litigation against Marcus, a defense attorney, was less than it would be in situations where a government attorney instituted suit.⁹⁰ Nonetheless, the *Barrett* court decided that plaintiffs who are angered or offended by the assertion of affirmative defenses pose a risk of retaliatory lawsuits.⁹¹ Thus, the court found that Marcus had fulfilled his burden of proof on this factor.⁹²

The court's analysis of the second factor in *Mitchell* was incomplete. The court failed to balance the interests involved⁹³ and instead assumed that the analysis was complete once it determined that the official showed some risk of vexatious litigation. When utilizing a balancing test, the results of the test change as the weight of various factors change. When the risk of vexatious litigation is reduced, society's interest in affording absolute immunity is reduced. As a result, interests on the other side of the balance weigh more heavily. Applying this test to the facts in *Barrett* reveals that the risk of vexatious litigation is small, and the countervailing considerations against absolute immunity are great.

The *Barrett* court compared Marcus' function to a prosecutor's function and found that, like a prosecutor, Marcus was subject to a risk of vexatious litigation.⁹⁴ The initial common law basis for prosecutorial absolute immunity was to protect prosecutors from malicious prosecution

bility to the public to protect taxpayers from paying for judgments against the state. "The public generally has a lesser interest in ensuring that the prosecutor is not deterred from enforcing the civil law than it does as respects the criminal law." *Martin Hodas, E. Coast Cinematics v. Lindsay*, 431 F. Supp. 637, 643 (S.D.N.Y. 1977).

89 The public policy underlying prosecutorial absolute immunity serves to "insulate prosecutors from unfounded, retaliatory lawsuits by angry defendants: such lawsuits would deter vigorous prosecution of cases, deflect prosecutors' energies, and ultimately harm the judicial process." *Joseph v. Patterson*, 795 F.2d 549, 554 (6th Cir. 1986). See also *Imbler*, 424 U.S. at 424-25 ("Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."); *Windsor v. The Tennessean*, 719 F.2d 155, 164 (1983), cert. denied, 469 U.S. 826 (1984).

90 *Barrett*, 798 F.2d at 572.

91 *Id.*

92 *Id.*

93 No single factor is determinative.

[T]he recognition of a qualified immunity defense for high executives reflected an attempt to balance competing values: not only the importance of a damages remedy to protect the rights of citizens . . . but also "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."

Harlow, 457 U.S. at 807 (citing *Butz*, 438 U.S. at 504-06).

94 *Barrett*, 798 F.2d at 572-73.

suits.⁹⁵ This justification is not relevant when the government does not initiate the suit.⁹⁶ A defense attorney does not prosecute the plaintiff. Further, malicious prosecution suits are likely to arise from the strong sense of personal moral outrage engendered by a criminal prosecution.⁹⁷ In contrast, the risk of such an intense emotional reaction to an asserted affirmative defense is small. Thus, any risk of retaliatory suits against an individual performing a civil defense function is minimal.

In analyzing the second factor in *Mitchell*, the *Barrett* court also failed to consider the nature of Marcus' conduct. When alleged unconstitutional conduct consists of concealing facts or taking private action to deceive, litigation regarding the conduct is unlikely.⁹⁸ Significantly, the

95 See *supra* note 89 and *infra* note 97.

96 Although it is obvious the risk of suit to a civil attorney defending the state does not implicate the concerns of the criminal system, the *Barrett* court puts a great deal of emphasis on the term "advocate," as used in *Butz*, to justify granting Marcus absolute immunity for the function he was performing. *Barrett*, 798 F.2d at 572. *Butz*, however, did not use this term as an extension of the normal immunity afforded to prosecutors performing prosecutorial functions. The Court used the term because the officials who initiated the action for violation of the Department of Agriculture's statutes were not technically prosecutors, but were administrative attorneys and judges. However, upon conducting the functional analysis, the *Butz* Court concluded that their functions were analogous to those of prosecutors because they initiated proceedings against people who offended statutory law. See *Butz*, 438 U.S. at 515-17. See also *supra* note 48.

97 A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and conducting them in court. The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. *Imbler*, 424 U.S. at 424-25. See also *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), *aff'd mem.*, 275 U.S. 503 (1927), *supra* notes 38-39; *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872), *supra* note 36.

98 In *Mitchell*, Attorney General John Mitchell authorized a warrantless wiretap allegedly in violation of the fourth amendment and the Omnibus Crime Control Act. 105 S. Ct. at 2810. Mitchell justified the wiretap on national security grounds. The *Mitchell* Court applied the three factor functional analysis and denied absolute immunity to Mitchell, a United States Attorney General acting in the interest of national security. First, Mitchell had cited no common law or historical basis for granting absolute immunity to an official performing a national security function. Second, the Court noted that "[n]ational security tasks . . . are carried out in secret . . ." *Id.* at 2813. Therefore, the risk of vexatious litigation is small: "[I]t is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." *Id.* Finally, the Court found an absence of checks on the exercise of the national security function, and concluded that "[t]he danger that high federal officials will disregard constitutional rights in their zeal to protect the national security is sufficiently real to counsel against affording such officials an absolute immunity." *Id.* at 2814.

Irrespective of the *Mitchell* three factor analysis, the holding in *Mitchell* should prevent absolute immunity for Marcus. Marcus and the federal attorneys involved believed that they were performing a national security function by hiding the Army Chemical Corps' involvement in Blauer's death. By threatening Marcus with prosecution under the Espionage Act, the federal attorneys indicated their belief that national security necessitated the "cover up." Marcus convinced the Court of Claims judge in the 1953 suit that national security required continuing secrecy regarding the purpose of the experiment and the circumstances surrounding Blauer's death. See also *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982). Like *Mitchell*, Marcus cited no common law or historical basis to support a grant of absolute immunity to a state attorney general performing a national security function. Like *Mitchell*, Marcus performed his tasks in secret, thus making the risk of vexatious suits for such actions almost non-existent, and the risk of undiscovered abuses severe. Finally, Marcus, like *Mitchell*, disregarded constitutional rights in his desire to protect national security. The fact that Marcus' allegedly unconstitutional conduct was neither discovered nor challenged until the commencement of the *Barrett* suit points to an obvious lack of restraints on an assistant attorney general performing a national security function. This also parallels the lack of sufficient alternative restraints on the United States Attorney General's performance of the national security function. The reasoning followed by the *Mitchell* Court in determining that the United States Attorney General is not

Mitchell court found that tasks performed in secret create the risk that abuses will remain undiscovered rather than a risk of vexatious litigation.⁹⁹ Since Marcus performed the challenged conduct secretly, *Barrett* calls for a similar result.

The *Barrett* court also examined the third factor of the *Mitchell* analysis (availability of alternative remedies) in terms of the perceived similarity between Marcus' function and the prosecutorial function.¹⁰⁰ The *Barrett* court simply stated that an alternative remedy for abuse exists in the availability of professional disciplinary proceedings.¹⁰¹ The court granted Marcus absolute immunity based in part on this assertion.¹⁰²

A prosecutor fulfills the third *Mitchell* factor because the criminal defendant has the alternative remedies of appeal, release on habeas corpus, and administrative discipline against the prosecutor involved.¹⁰³ However, the argument that victims of unconstitutional conduct by prosecutors have alternative remedies does not apply to a civil case. These alternative remedies are of little worth to plaintiffs who seek civil redress for a government official's misconduct in the defense of a civil case which deprives them of their property rights.¹⁰⁴ First, an appeal will not provide an effective remedy. In a case where evidence is suppressed, the gravamen of the aggrieved party's complaint is that essential evidence could not be considered by the lower court because the evidence was suppressed.¹⁰⁵ The appellate court cannot review what does not appear on the record from the court below. Second, a writ of habeas corpus is simply irrelevant in a civil case where the aggrieved party has not been deprived of liberty.¹⁰⁶ Finally, a disciplinary action against the government official does nothing to compensate the estate for what it has suffered—the loss of a property right due to the arbitrary conduct of the official. The aggrieved party thus has no remedy but damages for the property lost.¹⁰⁷

C. *An Objective Standard*

The *Barrett* court's extension of immunity might suggest that the Second Circuit endowed government attorneys with more immunity than they enjoyed even at common law. The *Barrett* decision, however, proba-

entitled to absolute immunity when performing a national security function parallels the reasoning the *Barrett* court should have used.

99 *Mitchell*, 105 S. Ct. at 2813.

100 *Barrett*, 798 F.2d at 573.

101 *Id.*

102 *Id.* at 572-73.

103 Further, "a prosecutor stands perhaps unique among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers." *Imbler*, 424 U.S. at 429.

104 Remedies like those available in criminal cases "are useless where a citizen not accused of any crime has been subjected to a completed constitutional violation." In such cases, "it is damages or nothing." *Mitchell*, 105 S. Ct. at 2814 n.7 (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 410 (1971)). See also *Butz*, 438 U.S. at 506 ("In situations of abuse of office, an action for damages against the responsible official can be an important means of vindicating Constitutional guarantees.").

105 See *supra* note 70 and accompanying text.

106 See *supra* note 104 and accompanying text.

107 *Id.*

bly does not reach so far. Rather than refusing immunity to an attorney who was involved in litigation, the court took the more established route of denying immunity to attorneys who were not involved in the litigation.¹⁰⁸ The court, however, failed to consider the reduced necessity of absolute immunity under a recent Supreme Court decision, *Harlow v. Fitzgerald*.¹⁰⁹ *Harlow* eliminated the policy reasons in favor of absolute immunity as opposed to qualified immunity in all but the most compelling situations.¹¹⁰

In *Harlow*, the Supreme Court fundamentally altered the qualified immunity defense available to government officials. After *Harlow*, government officials are shielded from liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known."¹¹¹ This decision created a purely objective standard, a significant departure from prior law. Previously, a plaintiff could rebut a defendant's qualified immunity defense by introducing evidence showing the defendant lacked the requisite "permissible intentions"¹¹² or good faith.¹¹³ Courts considered this subjective element a question of fact inherently requiring resolution by the jury.¹¹⁴ The obligatory fact-finding associated with this subjective element effectively precluded any possibility of resolving insubstantial claims on summary disposition.¹¹⁵ Thus, the subjective element of good faith carried with it substantial costs. The risks of trial distracted them from their official duties, inhibited discretionary action, and deterred people from public service.¹¹⁶

108 The *Barrett* court rejected the federal attorneys' claim of absolute immunity because the attorneys did not act as counsel for any of the parties in the litigation. The attorneys primarily attempted to avoid the involvement of the federal government. According to the court, their actions went beyond the outer boundary of the absolute protection afforded government attorneys defending civil suits. *Id.* See also *Harlow*, 457 U.S. at 812 ("[A]n executive official's claim to absolute immunity must be justified by reference to the public interest in the special functions of his office, not the mere fact of high station.").

109 457 U.S. 800 (1982). Even though *Harlow* involved a violation of constitutional rights by presidential aides, it is nonetheless relevant to *Barrett*. The Supreme Court has stated that it would be "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials." *Butz*, 438 U.S. at 504 (1978). See *supra* note 57.

110 See *supra* note 89.

111 *Harlow*, 457 U.S. at 818.

112 *Wood v. Strickland*, 420 U.S. 308, 320 (1975).

113 See Friedman, *The Good Faith Defense in Constitutional Litigation*, 5 HOFSTRA L. REV. 501, 511-12 (1977) (discussing the ambiguity of the good faith requirement).

114 See, e.g., *Harlow*, 456 U.S. at 814; *Imbler*, 424 U.S. at 419 ("The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions as established by the evidence at trial.").

115 Rule 56(c) of the Federal Rules of Civil Procedure authorizes summary judgment if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." The operation of this rule in immunity cases is not altered by *Harlow*. Rather, the *Harlow* court refashioned the immunity defense to avoid routine conflict with Rule 56. Consequently, the potential for factual disputes is significantly reduced under the objective test. See *supra* notes 33-35. See, e.g., *Landrum v. Moats*, 576 F.2d 1320, 1329 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978); *Duchesse v. Sugarman*, 566 F.2d 817, 823-33 (2d Cir. 1977).

116 *Harlow*, 456 U.S. at 814. *Accord* *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974); *Barr v. Matteo*, 360 U.S. 564, 571-72 (1959); *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950). See also Comment, *Harlow v. Fitzgerald: The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV. 901, 913-15 (1984) (discussing qualified

The *Harlow* court consciously sought to avoid these costs by focusing on the violation of a "clearly established" right and foreclosing inquiry into an official's state of mind. This approach transformed the issue of qualified immunity from a mixed question of law and fact to a pure question of law amenable to summary disposition.¹¹⁷

The *Barrett* court should have considered this effect of the *Harlow* decision. Instead, the *Barrett* court advanced the same argument in justifying its grant of absolute immunity that the Supreme Court had rejected in *Harlow*.¹¹⁸ Specifically, the *Barrett* court cited the risk of vexatious litigation against the government attorney by a dissatisfied plaintiff.¹¹⁹ This risk, the court argued, could inhibit the attorney general's faithful performance of duties, thus violating his public trust.¹²⁰ However, *Harlow* radically reduced this risk by providing a means for the dismissal of insubstantial litigation on a motion for summary disposition.¹²¹ Consequently, these vexatious lawsuits no longer carry the same costs as they did prior to *Harlow*. Thus, the need to insulate government attorneys with absolute immunity should rarely be necessary. Rather, the attorney general defending a civil suit should only be given qualified immunity.

IV. Conclusion

In *Barrett*, the Court of Appeals for the Second Circuit held that an assistant attorney general defending a state in a civil action was entitled to absolute immunity. The *Barrett* court erred for three reasons. First, the court failed to address the issue of whether Assistant Attorney General Marcus acted within the scope of his authority. Second, the court misapplied the functional analysis articulated by the Supreme Court to determine whether the official was performing a "special function" requiring absolute immunity. Third, qualified immunity, as determined by

immunity and the competing goals of compensation, deterrence, and official liability in civil rights litigation).

117 In order to facilitate summary disposition of insubstantial claims against government officials, appellate review of a denial of a motion for summary disposition is available. *Mitchell*, 105 S. Ct. at 2816-17 ("Denial of a claim of qualified immunity . . . is an 'appealable final decision' within the meaning of 28 U.S.C. § 1291 . . ."). This procedure ensures that government officials are fully protected against unnecessary trials under qualified immunity on the same basis as for absolute immunity. *McSurely v. McClellan*, 697 F.2d 309, 316 (D.C. Cir. 1982). Alternatively, in circuits not recognizing this procedure, litigants can use 28 U.S.C. § 1292(b)'s certification procedure. *McSurely*, 697 F.2d at 316 n.12. This section permits a district court to certify an order for appellate review if the court is:

[O]f the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation . . . [We] may thereupon, in [our] discretion, permit an appeal to be taken from such order . . . [p]rovided, however, [t]hat application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or [this court] shall so order.

28 U.S.C. § 1292 (b) (Supp. III 1986) (emphasis in original). See also *Katz v. Blanche Corp.*, 496 F.2d 747, 753-56 (3d Cir.) (en banc), cert. denied, 419 U.S. 885 (1974).

118 *Harlow*, 456 U.S. at 816. See *supra* notes 90-97 and accompanying text.

119 *Barrett*, 798 F.2d at 572.

120 *Id.* at 572-73.

121 For purposes of review, no reason exists to distinguish between summary judgment and dismissal under the Federal Rules of Civil Procedure. Both raise the question whether a public official is immune from suit as a matter of law.

Harlow's objective test, adequately protects state officials from litigation challenging discretionary actions and deters unconstitutional or illegal conduct.

Absolute immunity has the drastic effect of defeating *all* claims against immune officials. Plaintiffs with meritorious claims against immune officials are denied their only means of civil redress. The risks associated with defending a state in a civil case do not justify absolute immunity. The *Barrett* court's grant of absolute immunity shielded Marcus from ever answering for his possibly unconstitutional or illegal behavior at the expense of denying Elizabeth Barrett access to the courts to redress claims arising from her father's death. The facts of *Barrett* illustrate the extreme misconduct and injury that may result when a government official is allowed to escape responsibility for his tortious and unconstitutional actions.

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