RECENT DEVELOPMENTS

EXTENSION OF THE RIGHT TO COUNSEL: *Minnick v. Mississippi*, 111 S. Ct. 486 (1990).

In *Miranda v. Arizona*,[1] the Supreme Court set forth a number of procedural safeguards to protect the Fifth Amendment right against self-incrimination of individuals suspected of criminal activities. The *Miranda* Court ruled that

> prior to any questioning, the [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The [suspect] may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently.[2]

Although the Fifth Amendment does not specifically require this prophylactic rule, the Court reasoned that the rule was necessary to overcome the inherent coercion of the custodial police setting, which can produce compelled, self-incriminating statements.[3] In *Edwards v. Arizona*,[4] the Court expanded the scope of the Fifth Amendment protection in ruling that once a suspect invokes the right to counsel, all police questioning must cease until counsel has been made available to him, unless the suspect himself initiates further communication with the police.[5]

Recently, in *Minnick v. Mississippi*,[6] the Court further broadened a suspect's right to counsel under the Fifth Amendment.[7] Claiming merely to be following the logical implications of *Miranda* and *Edwards*, the Court held that once a suspect requests counsel, "interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."[8]

Neither the U.S. Constitution nor the *Miranda* and *Edwards* decisions required the broad, prophylactic rule adopted by the

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1. 384 U.S. 436 (1966).
2. *Miranda*, 384 U.S. at 444.
3. *See id.* at 467.
4. 451 U.S. 477 (1981).
5. *See Edwards*, 451 U.S. at 484-85.
6. 111 S. Ct. 486 (1990).
7. The Court did not reach the Sixth Amendment issues in its decision. *See Minnick*, 111 S. Ct. at 489.
8. *Id.* at 491.

Minnick Court. The Court, by focusing on the need to ensure the voluntariness of confessions rather than on a suspect's ability to make a knowing and intelligent waiver of his rights, ignored the justification for the extension of the right to counsel originally provided in *Edwards*. *Minnick* also creates a disparity between the protection provided to a suspect who invokes the right to remain silent (police are allowed to reinitiate questioning at a future time),[9] and one who invokes the right to counsel (police may not reinitiate questioning).[10] Combined, these criticisms demonstrate that the decision in *Minnick* has no basis in the Constitution or the reasoning of prior cases.

Minnick involved the trial of Robert Minnick for murder in Mississippi. Minnick and a fellow prisoner had escaped from a county jail in Mississippi. They broke into a mobile home in search of weapons and subsequently shot the owner and a friend. The two fled to Mexico, but Minnick proceeded to California, where he was arrested four months after the murders. He was initially interrogated by FBI agents. He answered some questions but refused to sign a waiver form. The interrogation ceased when Minnick requested a lawyer.[11] Minnick consulted with his lawyer a number of times within the next few days. Two days after the initial interrogation, a sheriff from Mississippi arrived in California to question Minnick. After reminding Minnick of his *Miranda* rights, the sheriff asked Minnick questions concerning his escape. Minnick gave a statement that implicated him in the murders at the mobile home.[12]

At trial, Minnick moved to suppress the statements made to the sheriff. The trial court denied this motion, and, on appeal, the Mississippi Supreme Court affirmed the decision.[13] Relying on language in *Edwards* stating that the prohibition against po-

9. *See* Michigan v. Mosley, 423 U.S. 96 (1975). In *Mosley*, the Court held that after a suspect invokes the right to remain silent, police can reinitiate questioning, provided they have fully respected the suspect's right to terminate questioning. *See id.* at 104.

10. Arguably, this disparity existed before *Minnick*. After *Edwards*, police could not reinitiate questioning once the suspect had invoked the right to counsel until counsel was made available. *Mosley* allowed police to reinitiate questioning, provided they had fully respected the suspect's right to cut off questioning. *See Mosley*, 423 U.S. at 104. *Edwards* and *Mosley* can be reconciled because *Mosley* requires police to allow the suspect to effectuate his right to remain silent. A suspect invoking the right to counsel cannot effectuate this right until counsel has been provided.

11. The information Minnick gave to the FBI was suppressed at Minnick's trial and was therefore not at issue in the case. *See Minnick*, 111 S. Ct. at 489.

12. *See id.* at 488-89.

13. *See* Minnick v. State, 551 So. 2d 77 (Miss. 1988).

lice interrogation applies "until counsel has been made available,"[14] the court held that "[s]ince counsel was made available to Minnick, his Fifth Amendment right to counsel was satisfied."[15]

The Supreme Court reversed the decision of the Mississippi Supreme Court. Writing for the majority, Justice Kennedy[16] stated that "the Fifth Amendment protection of *Edwards* is not terminated or suspended by consultation with counsel."[17] Justice Kennedy argued that the *Edwards* and *Miranda* decisions focused on the presence of counsel, rather than the mere availability of counsel. He noted that the *Miranda* decision provides that, once a suspect asserts his right to counsel, "interrogation must cease until an attorney is present."[18] In *Edwards*, the defendant's conviction was overturned because the defendant had not waived his right "to have counsel *present* during custodial interrogation."[19] Justice Kennedy cited a number of cases that are consistent with this emphasis on the presence of counsel during interrogation.[20] The rationale for this emphasis, Justice Kennedy stated, derives from *Miranda*, in which the Court stated that " '[t]he presence of counsel . . . would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the [Fifth Amendment] privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.' "[21] Accordingly, Minnick's statements, made after he had invoked the right to counsel but without his attorney present, should have been suppressed, notwithstanding the prior consultations he had with his attorney.

Justice Kennedy also argued that the benefits of this bright-line rule outweigh any burdens it places on police interrogation. As with other bright-line rules, Justice Kennedy observed,

14. Edwards v. Arizona, 451 U.S. 477, 484-85 (1981).

15. Minnick v. State, 551 So. 2d at 83.

16. Justice Kennedy was joined by Justices White, Marshall, Blackmun, Stevens, and O'Connor.

17. *Minnick*, 111 S. Ct. at 489.

18. *Id.* (quoting Miranda v. Arizona, 384 U.S. 436, 474 (1966)).

19. *Id.* at 490 (quoting Edwards v. Arizona, 451 U.S. 477, 482 (1981) (emphasis by the *Edwards* Court)).

20. *See, e.g.*, Patterson v. Illinois, 487 U.S. 285, 291 (1988); Arizona v. Roberson, 486 U.S. 675, 680 (1988); Shea v. Louisiana, 470 U.S. 51, 52 (1985); Oregon v. Bradshaw, 462 U.S. 1039, 1043 (1983).

21. *Minnick*, 111 S. Ct. at 490 (quoting *Miranda*, 384 U.S. at 466).

the *Minnick* rule provides specificity by which courts can judge police conduct.[22] In addition, Justice Kennedy noted a number of vagaries that adoption of the rule would prevent. First, Fifth Amendment protection will not "pass in and out of existence multiple times."[23] Without the *Minnick* rule, each consultation with counsel would remove the protection guaranteed in *Edwards*. Second, under *Minnick*, courts will not have to make determinations concerning the existence or adequacy of consultations.[24] Third, like *Edwards*, the new rule will "conserve judicial resources which would otherwise be expended in making difficult determinations of voluntariness."[25] Finally, the rule will provide equal protection to suspects, because a suspect whose attorney reached the police station quickly and consulted with the suspect would continue to receive the same protection as the suspect whose counsel was more tardy.[26]

Justice Scalia dissented.[27] He decried the Court's establishment of "an irrebuttable presumption that a criminal suspect, after invoking his *Miranda* right to counsel, can *never* validly waive that right during any police-initiated encounter, even after the suspect has been provided multiple *Miranda* warnings and has actually consulted his attorney."[28] Rather than focusing on the right to have counsel present during questioning, a right he did not deny, Justice Scalia argued that the Court should have focused on the circumstances in which a suspect could waive that right. Justice Scalia pointed to language in *Johnson v. Zerbst*,[29] which defined a waiver as "an intentional re-

22. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 718 (1979) (explaining the rationale underlying the *Edwards* rule):

> Whatever the defects, if any, of this relatively rigid requirement that interrogation must cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible. This gain in specificity, which benefits the accused and the State alike, has been thought to outweigh the burdens that the decision in *Miranda* imposes on law enforcement agencies and the courts [because of the suppression of truthful evidence].

23. *Minnick*, 111 S. Ct. at 492.

24. *See id.*

25. *Id.* at 489.

26. *See id.* at 492.

27. Justice Scalia was joined in his dissenting opinion by Chief Justice Rehnquist. Justice Souter took no part in the consideration or decision of the case.

28. *Id.* at 492 (Scalia, J., dissenting) (emphasis in original).

29. 304 U.S. 458 (1938).

linquishment or abandonment of a known right or privilege."[30] Justice Scalia stated that the Court should allow the government to prove a waiver, as the Court had ruled in many previous cases,[31] rather than create a category of confessions that are involuntary per se.[32]

In addition, Justice Scalia thought that the establishment of this bright-line rule would do more harm than good. He argued that "[t]he value of any prophylactic rule . . . must be assessed not only on the basis of what is gained, but also on the basis of what is lost."[33] One negative consequence that Justice Scalia noted is that the prohibition against using waivers obtained from police-initiated conversations would extend perpetually, regardless of when police reinitiated questioning,[34] and in cases in which there is no doubt that the suspect made a voluntary and knowing waiver.[35] Another consequence is that the rule would decrease the number of admissions of guilt, which are "essential to society's compelling interest in finding, convicting, and punishing those who violate the law."[36] Addressing the Court's fears of what would happen if it did not adopt a bright-line rule, Justice Scalia commented that a specific definition of consultation is not necessary, because any discussion between a suspect and an attorney would "eliminate the suspect's feeling of isolation" and "assure him the presence of legal assistance."[37] Less protection for suspects whose lawyers are diligent is acceptable, according to Justice Scalia, because once a suspect has consulted with his lawyer, he does not require the additional protection.[38] Justice Scalia also argued that, in the absence of the majority's new rule, *Edwards* would not pass in and out of existence multiple times, but would sim-

30. *Zerbst*, 304 U.S. at 464.

31. *See, e.g.*, Fare v. Michael C., 442 U.S. 707, 723-27 (1979); North Carolina v. Butler, 441 U.S. 369 (1979); Michigan v. Mosley, 423 U.S. 96 (1975).

32. Justice Scalia argued that *Edwards* had already created such a category of confessions. *See Minnick*, 111 S. Ct. at 495 (Scalia, J., dissenting). The discussion above, *see supra* note 10, suggests that *Edwards* merely provided that a confession obtained after denial of a right to counsel is a violation of *Miranda* rights. Thus, *Edwards* did not create a new category of involuntary confessions, but merely reiterated the presumption of involuntariness raised in *Miranda*.

33. *Minnick*, 111 S. Ct. at 495 (Scalia, J., dissenting).

34. *See id.* at 496 (Scalia, J., dissenting).

35. *See id.* at 495 (Scalia, J., dissenting).

36. *Id.* (Scalia, J., dissenting) (quoting Moran v. Burbine, 475 U.S. 412, 426 (1986)).

37. *Id.* at 497 (Scalia, J., dissenting).

38. *See id.* (Scalia, J., dissenting).

ply cease to exist once consultation occurred.[39]

Throughout his dissent, Justice Scalia was troubled by the Court's apparent lack of authority to adopt the rule. He stated that the rule in *Minnick* is supposedly "needed to avoid 'inconsisten[cy] with [the] purpose' of *Edwards*' prophylactic rule, which was needed to protect *Miranda*'s prophylactic right to have counsel present, which was needed to protect the right against *compelled self-incrimination* found (at last!) in the Constitution."[40] Although Justice Scalia accepted *Miranda*'s prophylactic rule as necessary to prevent the "inherently compelling pressures"[41] of police custody from producing violations of suspects' rights under the Fifth Amendment, he saw nothing in the Fifth Amendment that should preclude a suspect from waiving his right to counsel. In addition, he saw nothing in the Constitution to prevent police from simply asking suspects to reconsider their decision not to confess, and yet, the rule in *Minnick* does just that, under the guise of prohibiting coercion.[42] Justice Scalia stated that "this protective enterprise is beyond our authority under the Fifth Amendment or any other provision of the Constitution . . . ."[43]

Justice Scalia was correct in observing that the rule adopted by the Court in *Minnick* has no foundation in the United States Constitution, nor did the *Miranda* and *Edwards* decisions require adoption of the rule. There is no language in the Fifth Amendment that requires the government to provide a suspect with counsel.[44] The Court in *Miranda* believed that the right to counsel was necessary to uphold the Fifth Amendment right against compelled self-incrimination. Any further extension of the *Miranda* rule must accordingly be justified not on the basis of whether it is necessary to protect the suspect's right to counsel, but whether it is necessary to protect the individual's right against compelled self-incrimination. Arguably, the rule in *Edwards* is necessary to protect against compelled self-incrimination. It is a rare case when a confession obtained after a request

39. *See id.* (Scalia, J., dissenting).

40. *Id.* (Scalia, J., dissenting) (emphasis in original) (quoting majority opinion, 111 S. Ct. at 491).

41. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

42. *See Minnick*, 111 S. Ct. at 496 (Scalia, J., dissenting).

43. *Id.* at 498 (Scalia, J., dissenting).

44. The Fifth Amendment provides, in part, that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. V.

for counsel, but before that counsel arrives, is not the product of some police overreaching or coercion. As the Court stated in *Michigan v. Harvey*,[45] the *Edwards* rule was specifically designed "to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights."[46] The *Minnick* rule would apply, however, in instances where there is no evidence of coercion. In the absence of coercion, the suspect's statement is not compelled, and thus does not violate the Fifth Amendment. The traditional standard advanced under *Miranda* to determine the voluntariness of a waiver and confession can be applied where voluntariness is at issue, but the Fifth Amendment does not require the expansive prophylactic rule adopted in *Minnick*.[47]

The Court's reasoning in *Minnick* is flawed because it focuses on the voluntariness of the confession, rather than on the suspect's ability to give a knowing and intelligent waiver.[48] In *Edwards*, the Court assumed that the suspect's confession was voluntary. The Court reached its holding on the basis that Edwards had not made a knowing and intelligent waiver of his rights, because counsel was not made available to him upon his request.[49] Any extension of the *Edwards* rule must be predicated upon a showing that additional protection is needed to ensure a knowing and intelligent waiver. The *Minnick* decision, however, focuses on the need to protect against "badgering,"[50] "compulsion,"[51] and "coercive pressures."[52] The Court ignored the obvious fact that once consultation with counsel has taken place, a suspect will understand his rights, because the attorney will explain them to him. If afterwards, the suspect

45. 110 S. Ct. 1176 (1990).

46. *Harvey*, 110 S. Ct. at 1180.

47. Similar criticism can be raised concerning any prophylactic rule, that is, that it sweeps too broadly and outlaws permissible conduct. The difference between the rule in *Minnick* and the rule in, for example, *Miranda*, is that in *Miranda*, the Court thought the rule was necessary to protect against violations of the Constitution. In *Minnick*, no such constitutional foundation or necessity was present.

48. In *Edwards*, the Court said that "the voluntariness of a . . . [confession] on the one hand, and a knowing and intelligent waiver on the other, are discrete inquiries." Edwards v. Arizona, 451 U.S. 477, 484 (1981).

49. Although the Court did not question the state courts' determination of voluntariness in the case, the Court reversed the Arizona Supreme Court's decision because none of the state courts considering the case "undertook to focus on whether Edwards understood his right to counsel and intelligently and knowingly relinquished it." *Id.*

50. *Minnick*, 111 S. Ct. at 489 (quoting *Harvey*, 110 S. Ct. at 1180).

51. *Id.* at 490 (quoting Miranda v. Arizona, 384 U.S. 436, 466 (1966)).

52. *Id.* at 491.

chooses to waive those rights, there can be no doubt that the waiver was intelligently and knowingly given. Of course, if the suspect can show that police coercion made the subsequent waiver involuntary, any statements he made following the waiver will be suppressed. However, such a determination can be made under traditional tests of voluntariness, without need for the *Minnick* rule, which raises an irrebuttable presumption of involuntariness.[53]

The holding in *Minnick* establishes incongruous standards for those suspects who invoke the right to remain silent and those who invoke the right to counsel. In *Michigan v. Mosley*,[54] the Court held that once a suspect has expressed a desire to remain silent, police may reinitiate interrogation, provided that they have allowed for an adequate "cooling-off" period and readvised the accused of his *Miranda* rights. The *Mosley* Court rejected any blanket prohibition of obtaining voluntary statements from suspects.[55] In *Minnick*, however, the Court held that *Miranda* and *Edwards* did allow the creation of a "*per se* proscription of indefinite duration."[56] There is no rationale for this disparity. There is no reason to believe that police reinitiation of interrogation after counsel has been provided is any more coercive than reinitiation after the "cooling-off" period. In fact, there may be less coercion after counsel has been provided because, in that case, the suspect has received legal advice. The ultimate result of *Minnick* is to provide a suspect with vastly different levels of protection, depending on which part of

53. The Court argued that a suspect, " 'having expressed his desire to deal with the police only through counsel,' " was not subject to further interrogation unless counsel was present. *Id.* at 490 (quoting *Edwards*, 451 U.S. at 484). The idea that a suspect can limit all contact with police by insisting on communicating through counsel can be inferred from *Miranda*. However, unless the suspect is incompetent, that is, unable to make an intelligent and informed decision for himself, there is no logic in also inferring that a suspect can not retract this limitation. Only in those rare cases where a suspect's lack of mental capacity requires the actual *presence* of counsel is there a justification for prohibiting a suspect from waiving that right.

54. 423 U.S. 96 (1975).

55. [A] blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity, and deprive suspects of an opportunity to make informed and intelligent assessments of their interests. Clearly, therefore, neither this passage nor any other passage in the *Miranda* opinion can sensibly be read to create a *per se* proscription of indefinite duration upon any further questioning by any police officer on any subject, once the person in custody has indicated a desire to remain silent.

Mosley, 423 U.S. at 102-03.

56. *Id.*

his *Miranda* rights he invokes.[57]

We should not ignore the fact that a large majority of people whom the police interrogate are the poorly educated and minorities, persons for whom the police station presents an extremely coercive environment. Unwittingly, these people may confess to crimes when, if fully informed, they would refrain from speaking to the police. Perhaps for this reason, the Supreme Court has adopted prophylactic rules that tend to suppress truthful confessions but serve the important function of protecting the individual's constitutional rights. In *Minnick*, however, the Court established a prophylactic rule without showing how it was necessary to further constitutional rights. The Court extended the *Edwards* rule based on reasoning totally divorced from the justification underlying that rule. The result is the creation of an irreconcilable contradiction in the Court's jurisprudence that will cause as much confusion as the bright-line rule of *Minnick* was intended to prevent. In sum, the Court's reasoning in *Minnick* fails to justify this extension of Fifth Amendment protection for criminal suspects.

Stephen L. Coco

REGULATION OF RACIST SPEECH: *In re Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991).

Judicial treatment of extremist speech under the First Amendment has traditionally held fast to two related principles: a refusal to evaluate the ideas expressed on their merits,[1] and a refusal to deny protection for those ideas because of their

57. One possible distinction may derive from the Court's opinion in Arizona v. Roberson, 486 U.S. 675 (1988), in which the Court stated that "the presumption raised by a suspect's request for counsel . . . [is] . . . that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Id.* at 683. The Court stated that a suspect's decision to cut off questioning does not raise the same presumptions. Invoking the right to remain silent could mean that a suspect feels comfortable dealing with the police on his own. On the other hand, it could mean that the suspect invoking the right to remain silent does not understand enough to ask for counsel. Such speculation about the mental states and capacities of numerous and unknown suspects provides a very flimsy basis for creating such disparate levels of constitutional protection.

1. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

tendency to offend others.[2] Because they safeguard the rights of unpopular groups to criticize the existing order and put forward agendas for change, these principles have been considered critical to the liberation of oppressed groups. The problem of racist speech, however, brings the interests of free speech and protection of minorities into conflict. In response both to a perception that racial harassment is on the rise in America[3] and to a growing body of empirical work that documents the physical, psychological, and social harms of racist speech,[4] many traditional supporters of free speech have begun to advocate restrictions on speech that harasses or degrades members of minority groups.[5] The courts, however, have not been nearly so willing to abandon First Amendment orthodoxy.[6] In *Doe v. University of Michigan*,[7] a federal district court struck down a university policy aimed at harassment of members of minority groups as unconstitutionally overbroad and vague. In its opinion, however, the court noted that a more narrowly-drawn regulation might be constitutional under the "fighting-words" doctrine, which holds that words that "by their very utterance inflict injury or tend to incite an immediate breach of the peace"[8] are not protected by the First Amendment.

The Supreme Court of Minnesota recently pursued this approach in the case of *In re Welfare of R.A.V.*,[9] in which the court

2. *See* Street v. New York, 394 U.S. 576, 592 (1969) (citations omitted) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.").

3. *See generally* Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 431-34; Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2326-33 (1989); Recent Development, *Bringing Hate Crime Into Focus—The Hate Crime Statistics Act of 1990*, 26 HARV. C.R.-C.L. L. REV. 261, 261-62 (1991).

4. For reviews of this literature, see Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 135-49 (1982); and Matsuda, *supra* note 3, at 2336-41.

5. *See* Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383. For convenience, this Recent Development refers primarily to racist speech, although much of the discussion also applies to harassment based on religion, ethnicity, gender, or sexual orientation.

6. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

7. 721 F. Supp. 852 (E.D. Mich. 1989).

8. *Doe*, 721 F. Supp. at 862 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

9. 464 N.W.2d 507 (Minn. 1991) (*R.A.V.*).

construed a general bias-motivated disorderly conduct statute narrowly to prohibit only conduct that could be characterized as "fighting words" or incitement to imminent lawless action. Nevertheless, the Minnesota court failed to confront directly the controversy that has arisen since *Chaplinsky* over the meaning of the "fighting-words" standard; successful use of the "fighting-words" doctrine to combat racist speech requires a careful reappraisal of the doctrine itself.

The events that gave rise to the *R.A.V.* case began when Russell and Laura Jones, a black couple with five children, moved into a predominantly white, working-class neighborhood on the east side of St. Paul, Minnesota.[10] The Joneses were subjected to a pattern of harassment that included slashed tires and racial epithets directed toward the children by white "skinheads" on the street and culminated in the burning of a cross on the Joneses' lawn in the early morning of June 21, 1990.[11] Subsequently, a seventeen-year-old boy was arrested[12] and charged with violating a St. Paul ordinance providing that

> [w]hoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm, or resentment in others on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.[13]

The trial court dismissed the charges on the ground that the ordinance prohibited expressive conduct protected under the First and Fourteenth Amendments, and was thus unconstitutionally overbroad.[14] The city appealed the ruling, arguing that

10. *See Burning Cross Greets Black Family on St. Paul's East Side*, Minneapolis Star Tribune, June 22, 1990, at 1A, col. 5.

11. *See id.*

12. *See Ordinance on Cross Burnings is Upheld*, Minneapolis Star Tribune, Jan. 18, 1991, at 1B, col. 6.

13. ST. PAUL, MINN., LEG. CODE § 292.02 (1990).

14. *See R.A.V.*, 464 N.W.2d at 508. Under the Supreme Court's overbreadth doctrine,

> an individual whose own speech or expressive conduct may validly be prohibited or sanctioned is permitted to challenge a statute on its face because it also threatens . . . those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). If the challenged provision is substantially overbroad, "the law may not be enforced against anyone, including the party before the court, until it is narrowed to reach only unprotected activity, whether by legislative action or by judicial construction . . . ." *Id.* at 503-04.

its ordinance could be narrowly construed to reach only conduct that falls outside First Amendment protection.[15] The Minnesota Supreme Court agreed, holding that the ordinance could withstand constitutional challenge if read to apply only to conduct that constitutes "fighting words" or incitement to imminent lawless action.[16] "So interpreted," the court stated, "the ordinance is a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order . . . and therefore is not prohibited by the first amendment."[17]

In its holding, however, the *R.A.V.* court failed to come to grips explicitly with the controversy that surrounds the meaning of the "fighting-words" standard. The court defined "fighting words" only by quoting the classic formulation of *Chaplinsky*: "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[18] Originally, this standard was believed to be based on the content of the speech itself; the legislature was allowed to presume that certain words would almost certainly bring about the outbreak of violence without close examination of the context in which they were uttered.[19] More recent Supreme Court decisions, however, show a trend toward a standard that focuses on the context in which the speech occurs[20] and protects offensive speech unless it is actually likely to cause a breach of the peace.[21]

15. *See R.A.V.*, 464 N.W.2d at 508. Statutes are generally voided for overbreadth only if they cannot be narrowed in order to restrict only unprotected speech. As the Supreme Court noted in Broadrick v. Oklahoma, 413 U.S. 601 (1973), facial invalidation is "strong medicine," to be applied "sparingly and only as a last resort. Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." *Id.* at 613.

16. *See R.A.V.*, 464 N.W.2d at 510.

17. *Id.* at 511 (citations omitted).

18. *Id.* at 510 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

19. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-10, at 850 (2d ed. 1988).

20. *See* Gooding v. Wilson, 405 U.S. 518 (1972). In *Gooding*, the Court invalidated a Georgia statute that prohibited the use of "opprobrious words or abusive language tending to cause a breach of the peace." *Id.* at 519. One factor that the Court cited as demonstrating the statute's overbreadth is that the statute had been interpreted by the Georgia courts to permit the conviction of a speaker even if the abusive language was directed to "one who, on account of circumstances or by virtue of the obligation of office, can not then and there resent the same by a breach of the peace." *Id.* at 526. *See also* Hess v. Indiana, 414 U.S. 105, 107 (1973) (shouting "We'll take the f—ing street later" was not fighting words where the expression was not directed at any particular person).

21. *See* L. TRIBE, *supra* note 19, § 12-10, at 850-51; Note, *The Fighting Words Doctrine—Is There a Clear and Present Danger to the Standard?*, 84 DICK. L. REV. 75, 86-90 (1979).

The *R.A.V.* court's treatment of "fighting words" shows an implicit preference for the content-based approach.[22] This preference is evident in the court's statement that

> [b]urning a cross in the yard of an African American family's home is deplorable conduct that the City of St. Paul may without question prohibit. The burning cross is itself an unmistakable symbol of violence and hatred based on virulent notions of racial supremacy. It is the responsibility, even the obligation, of diverse communities to confront such notions in whatever form they appear.[23]

Although the court referred to some aspects of the context in which the city may "without question prohibit" cross-burnings, it did not seem to require any further inquiry into the circumstances in order to determine whether R.A.V.'s act was actually likely to bring about a breach of the peace. It would not seem to make a difference, for example, whether Mr. Jones was home at the time, although an actual violent response would presumably be more likely to result if he was present. Similarly, the court ignored the fact that the identity of the perpetrator was unknown at the time of the incident, indicating that R.A.V. and the Joneses never came into such close contact as to risk actual violence.[24] Moreover, the court's application of the standard of *Brandenburg v. Ohio*[25] to situations in which the speaker incites violence against himself signifies that the court intends "fighting words" to represent a content-based analysis, while "incitement" represents a context-based analysis of the likelihood of actual violence.[26] By making contextual analysis an explicitly separate category, the court reserved a content-based meaning for "fighting words."

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22. Use of the terms "content-based" and "context-based" with reference to alternative approaches to "fighting words" should not be confused with the distinction between "content-based" restrictions, which regulate speech based on the nature of what is said, and "facially neutral" restrictions, which regulate the time, place, and manner of speech based on a governmental interest independent of the content of the speech itself. Both "fighting-words" approaches are "content-based" in this second sense of the term. *See* L. TRIBE, *supra* note 19, § 12-2, at 789-94, § 12-10, at 837-41.

23. *R.A.V.*, 464 N.W.2d at 508 (footnote omitted).

24. As of the day following the cross-burning, police had not identified R.A.V. as the responsible party. *See Burning Cross Greets Black Family on St. Paul's East Side*, Minneapolis Star Tribune, June 22, 1990, at 1A, col. 5.

25. 395 U.S. 444 (1969).

26. The *Brandenburg* standard has traditionally been applied to situations in which the speaker incites violence by his supporters against others. Some commentators argue, however, that the trend toward context-based analysis of "fighting words" imports the *Brandenburg* idea of "clear and present danger" into the area of "fighting words." *See* Note, *supra* note 21, at 95.

If the goal is to protect people from racist attacks, then a content-based "fighting-words" standard has clear advantages over a standard that focuses on the actual likelihood of a violent response. Focusing on the content of the speech avoids a situation in which the victim's right to protection depends on his propensity or ability to resort to violence. It seems counter-intuitive, for example, that Mr. Jones should be protected from being called a "nigger" by virtue of his ability to carry out a violent response, while his wife or small children should not be so protected.[27] The children in particular seem most in need of protection despite their inability to credibly threaten violence against the speaker. Even for adults, the unique psychological impact of racist epithets and symbols on a person who has experienced racial oppression may intimidate the victim rather than provoke him to violence. As Matsuda observes, "the effect of dehumanizing racist language is often flight rather than fight. Targets choose to avoid racist encounters whenever possible, internalizing the harm rather than escalating the conflict. Lack of a fight and admirable self-restraint then defines the words as nonactionable."[28]

The argument for a content-based standard rests on the understanding that the real harm to be prevented in restricting certain types of "fighting words" is not physical violence but the damage inflicted by the words themselves. *Chaplinsky* apparently allows restriction of those words that "by their very utterance inflict injury," as well as those that "tend to incite an immediate breach of the peace."[29] No court, however, has ever explicitly based a restriction on the "injury" prong of the *Chaplinsky* test, and some commentators have dismissed it as dictum.[30] Moreover, restriction of speech because of its emo-

27. The context-based version of the standard has been criticized as "a paradigm based on a white male point of view" because it assumes "an encounter between two persons of relatively equal power who have been acculturated to respond to face-to-face insults with violence." Lawrence, *supra* note 3, at 453-54 (footnote omitted).

28. Matsuda, *supra* note 3, at 2355-56 (footnotes omitted). *See also* Balkin, *supra* note 5, at 421 (*Brandenburg* and *Chaplinsky* "do not concern speakers who browbeat their opponents into silence"). A more simple explanation for a passive response to racist speech is that "[i]t is both uncommon and unlikely that whites will insult minorities with racial epithets in contexts where they are outnumbered or overmatched." Lawrence, *supra* note 3, at 454 n.94. Again, it seems unfair to protect the speaker's abuse simply because he has taken care to assemble a gang of fellow thugs.

29. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

30. *See* Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 508 (emphasizing that the New Hampshire statute at issue in *Chaplinsky* had been

tional impact upon the listener appears to fly in the face of the longstanding refusal to prohibit speech simply because "the ideas are themselves offensive to some of their hearers."[31] Nevertheless, the Supreme Court has never squarely rejected the "injury" prong of *Chaplinsky*.[32] The question, then, is under what circumstances can a content-based standard be reconciled with the more general trend in First Amendment doctrine toward protecting offensive speech?

A closer look at three cases that are representative of this trend can provide the beginning of an answer. In *Street v. New York*,[33] the United States Supreme Court reversed the conviction of a man who protested the shooting of civil rights leader James Meredith by burning an American flag. In *Cohen v. California*,[34] the Court reversed the conviction for disturbing the peace by "offensive conduct" of a man who appeared in a Los Angeles courthouse wearing a jacket with the words "F— the Draft" emblazoned on the back. Finally, in *Collin v. Smith*,[35] the Seventh Circuit struck down an ordinance passed by the predominantly Jewish Village of Skokie in anticipation of a march by American Nazis; the ordinance prohibited all public demonstrations that "incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation."[36] What is important about these cases is that none of them involved face-to-face harassment directed at particular individuals.[37] De-

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construed so as to prohibit only those words that had a direct tendency to cause acts of violence by the addressee).

31. Street v. New York, 394 U.S. 576, 592 (1969). *See also* Texas v. Johnson, 491 U.S. 397 (1989); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Terminiello v. Chicago, 337 U.S. 1 (1949).

32. In Rosenfeld v. New Jersey, 408 U.S. 901 (1971), Justice Powell argued that "the exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience." *Id.* at 905 (Powell, J., dissenting from decision to vacate and remand). Similarly, Professor Tribe acknowledges that "[t]he Constitution may well allow punishment for speaking words that cause hurt just by their being uttered and heard." L. TRIBE, *supra* note 19, § 12-10, at 856.

33. 394 U.S. 576 (1969).

34. 403 U.S. 15 (1971).

35. 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

36. *Collin*, 578 F.2d at 1199 (quoting SKOKIE, ILL., ORDINANCES No. 77-5-N-994, § 27-56(C)). *See also* Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 373 N.E.2d 21 (1978) (striking down injunction that prohibited Nazis from displaying the swastika in their march).

37. In *Street*, the defendant was making an overtly political statement directed to the public in general. Similarly, in *Cohen*, the court refused to hold that the defendant's use

spite the latitude given to offensive speech in recent decisions, then, the possibility of restricting direct verbal or symbolic assaults on particular individuals remains an open question.[38]

In the absence of controlling precedent, this question may be resolved by appealing to the principles that are embodied in the First Amendment.[39] Legal scholars have articulated a number of philosophical justifications for free speech. Two of these—the "free marketplace of ideas"[40] and the notion of "self-government"[41]—assume that free speech takes place in the form of rational dialogue; the only sort of speech that is protected is "communication in which the participants seek to persuade, or are persuaded . . . ."[42] "It is reasonable to distinguish," according to Professor Tribe, "between contexts in which talk leaves room for reply and those in which talk triggers action or causes harm without the time or opportunity for response. It is not plausible to uphold the right to use words as projectiles where no exchange of views is involved."[43] Direct verbal attacks have exactly this effect of preempting any further exchange of views; according to Professor Lawrence, such speech "functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow

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of vulgarity was "fighting words" because no one "could reasonably have regarded the words on appellant's jacket as a direct personal insult." *Cohen*, 403 U.S. at 20. The district court in *Collin* likewise noted that the Skokie ordinance was "clearly not aimed solely at personally abusive, insulting behaviour." Collin v. Smith, 447 F. Supp. 676, 690 (N.D. Ill. 1978).

38. A direct verbal assault on an individual *was* at issue in Gooding v. Wilson, 405 U.S. 518 (1972), in which the defendant was convicted for using abusive language. The defendant told police officers: "White son of a bitch, I'll kill you," "You son of a bitch, I'll choke you to death," and "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." *Id.* at 519 n.1. The Court did not reach the constitutionality of punishing such statements, however, voiding the statute as overbroad on its face because the Georgia courts had construed it to prohibit language that was merely "harsh and insulting," including even statements such as "You swore a lie." *See id.* at 525-27. Moreover, the Court indicated that, had it not disposed of the case on overbreadth grounds, the defendant's speech might have been protected because the addressee was a police officer. *See id.* at 519 n.1, 526.

39. For a jurisprudential defense of this method of resolving formally indeterminate or "hard" cases, see R. DWORKIN, TAKING RIGHTS SERIOUSLY 81-130 (1977).

40. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . . . [T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . ."). *See also* J.S. MILL, ON LIBERTY 19-67 (C. Shields ed. 1956).

41. *See* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) ("[T]he fact that the citizens of the United States must decide political questions by universal suffrage means that they cannot be denied access to any political argument, right or wrong, that might aid their deliberations.").

42. L. TRIBE, *supra* note 19, § 12-8, at 837.

43. *Id.*

is struck, it is unlikely that dialogue will follow."[44] Racist verbal assaults thus inhibit the operation of both the free marketplace of ideas and democratic self-government.

Two additional rationales for free speech, however, do not necessarily depend on dialogue. The first focuses on the value of free speech to individual self-fulfillment,[45] while the second emphasizes that free speech may teach the virtue of tolerance by restraining members of society from silencing offensive speakers.[46] If self-fulfillment is the value behind the First Amendment, though, there is no reason that the fulfillment of the speaker should outweigh that of the listener, which is hampered by racism.[47] The tolerance theory, on the other hand, fails to provide a reason why other values, such as equality and respect for others, may not outweigh tolerance in particular cases.[48] Moreover, it seems possible to teach tolerance by requiring that racist *ideas* be tolerated, while protecting civility by disallowing them in the form of direct assaults on particular individuals.[49]

Burning a cross in front of a black family's home thus invokes none of the values associated with the First Amendment, despite the fact that immediate violence is unlikely to result. The

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44. Lawrence, *supra* note 3, at 452.

45. *See* T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 5 (1963) ("[E]xpression is an integral part of . . . the affirmation of self. The power to realize [man's] potentiality as a human being begins at this point and must extend at least this far if the whole nature of man is not to be thwarted."). The Supreme Court has recognized that even vulgarities like "F— the Draft" can advance this goal; as Justice Harlan wrote in *Cohen*, expression "conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well." Cohen v. California, 403 U.S. 15, 26 (1971).

46. *See* L. BOLLINGER, THE TOLERANT SOCIETY 10 (1986) ("[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.").

47. *See* Matsuda, *supra* note 3, at 2339-40; Delgado, *supra* note 4, at 136-43. Professor Delgado argues that the speaker's self-fulfillment is hampered as well, because "[b]igotry . . . reinforc[es] rigid thinking, thereby dulling [his] moral and social senses and possibly leading to a 'mildly . . . paranoid' mentality." *Id.* at 140 (footnotes omitted) (quoting Allport, *The Bigot in Our Midst*, 40 COMMONWEAL 582 (1944), *reprinted in* ANATOMY OF RACIAL PREJUDICE 161, 164 (G. Huszar ed. 1946)).

48. *See* Delgado, *supra* note 4, at 141 ("The failure of the legal system to redress the harms of racism, and of racial insults, conveys to all the lesson that egalitarianism is not a fundamental principle; the law, through inaction, implicitly teaches that respect for individuals is of little importance.").

49. *See* D. DOWNS, NAZIS IN SKOKIE: FREEDOM, COMMUNITY, AND THE FIRST AMENDMENT 6-8 (1985). Downs's argument for civility is much stronger with respect to direct assaults than in the context of the Skokie case itself. On the general necessity of civility and good manners to the functioning of society, see E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 86-88 (T. Mahoney ed. 1955) (1790).

case demonstrates that it makes sense to use a content-based standard for "fighting words" in cases of direct verbal or symbolic assault. It is also important, however, that the lines be drawn as narrowly as possible. The content-based standard should cover only a narrow set of racial epithets, as well as such symbols as the burning cross and swastika. These words and symbols are uniquely harmful because of their historical association with oppression and violence; as Justice Jackson wrote in *Kunz v. New York*:

> These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. . . . They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles . . . .[50]

A general prohibition may be further limited by allowing the application of a content-based standard only if certain contextual factors are present that strengthen the interests of the listener in avoiding the speech. For instance, the Supreme Court has recognized that these interests may become compelling when the listener is in his own home,[51] when he is a "captive audience" outside the home,[52] or when children are likely to be exposed to the speech.[53]

Whatever the shape of the standard eventually adopted, it is important that it be clearly delineated so as to avoid the potentially "chilling" effects of an ambiguous rule. Moreover, a renewed emphasis on the content-based approach to "fighting words" would mark a shift in First Amendment law that should be accompanied by thorough consideration of the issues and a well-articulated judicial rationale. The issue thus deserves a far

50. Kunz v. New York, 340 U.S. 290, 299 (1951) (Jackson, J., dissenting).

51. *See* Federal Communications Comm'n v. Pacifica Found., 438 U.S. 726, 748-49 (1978) (upholding Commission's authority to proscribe radio broadcasts that it finds "indecent but not obscene," in part because the broadcast intrudes into the privacy of the home); Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding ordinance proscribing the operation of sound trucks in a "loud and raucous" manner, in part because the sound intrudes into the home without the owner's consent).

52. *See, e.g.*, Lehman v. City of Shaker Heights, 418 U.S. 298, 307 (1974) (Douglas, J., concurring) (commuters are captives of advertising on municipally-owned buses).

53. *See Pacifica*, 438 U.S. at 749-50; *id.* at 758-59 (Powell, J., concurring) (Federal Communications Commission's authority to restrict indecent speech on the radio also upheld in part because of potential exposure of children). Racist speech is particularly harmful to children, who "possess even fewer means for coping with racial insults than do adults." Delgado, *supra* note 4, at 147.

more thorough treatment than it was given by the Minnesota Supreme Court in *R.A.V.*

Nevertheless, *R.A.V.* is an important first step. Reflexive rejection of "even a symbolic or perceived diminution of our impartial commitment to free speech"[54] is faithful neither to the values that undergird free speech nor to the precedents; as the Supreme Court noted in *Cantwell v. Connecticut*,[55] "[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[56] Although the difficulty of drawing lines should caution courts to move slowly and carefully in this area, Minnesota's attempt to protect both speakers and listeners is worth pursuing.

Ernest A. Young

SANCTIONING CLIENTS UNDER RULE 11: *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922 (1991).

Rule 11 of the Federal Rules of Civil Procedure was amended in 1983 in response to increasing concern over frivolous litigation, pre-trial abuses, and mounting caseloads. Part of a package of changes designed to curb abuse of the litigation process, the amended rule has generated tremendous controversy, commentary, and litigation.[1] Recent commentators have expressed hope that the Supreme Court would bring a measure of clarity and uniformity to Rule 11 jurisprudence and resolve some of the more persistent conflicts generated by the rule.[2] The Court's decision in *Business Guides, Inc. v. Chromatic Communica-*

54. Strossen, *supra* note 30, at 522.

55. 310 U.S. 296 (1940).

56. *Cantwell*, 310 U.S. at 309-10.

1. Rules 7, 16, and 26 were also revised in 1983. Amended Rule 11 has been by far the most controversial of these, generating 688 reported cases at the district court and court of appeals levels by the end of 1987. In 1988 alone, 387 Rule 11 cases were reported at the district court level, and 75 at the appellate level. *See* Nelken, *Has the Chancellor Shot Himself in the Foot? Looking for a Middle Ground on Rule 11 Sanctions*, 41 HASTINGS L.J. 383, 388 (1990). These figures do not include the many Rule 11 decisions that are not published.

2. *See* Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925 (1989). Between 1983 and 1991, the Supreme Court decided only two Rule 11 cases: Cooter & Gell v. Hartmarx, 110 S. Ct. 2447 (1990), and Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989).

tions Enterprises, Inc.,[3] however, is likely to prove disappointing. The majority's holding does little to dispel the confusion surrounding the rule, and invites the same criticisms that have plagued it since its revision.

The most important change made to Rule 11 in 1983 was the adoption of a more stringent standard of behavior for attorneys. The old rule required simply that an attorney have a subjective, good-faith belief that a signed document had a sound legal and factual basis.[4] Under the amended rule, attorneys must make an objectively reasonable inquiry to make sure that a document is well grounded in fact and law and advanced for no "improper purpose."[5] The amended rule also authorizes courts to sanction parties represented by attorneys. The rule does not explicitly state, however, whether represented parties are to be held to the same objective standard of reasonable inquiry or to a less strict, subjective standard. This is the question addressed in *Business Guides*.

The ambiguity arises from the juxtaposition of four key sentences in Rule 11. The rule provides in pertinent part:

> [1] Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. [2] A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address . . . . [3] The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose . . . . [4] If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable at-

3. 111 S. Ct. 922 (1991).
4. *See* FED. R. CIV. P. 11 (1938).
5. FED. R. CIV. P. 11.

torney's fee.[6]

Read in isolation, sentence [3] appears to hold *any* signer of a paper filed with a federal court to an objective standard of reasonable inquiry. In the context of the rule as a whole, however, the reach of the term "signer" is much less broad. Sentences [1] and [2] require papers to be signed by an attorney or, where a party is unrepresented, by the pro se litigant. There is no signature requirement for parties represented by attorneys. Viewed in context, sentence [3] thus seems to place a duty of reasonable inquiry only on those whose signatures are required by sentences [1] and [2]. Because clients are not required to sign, they are not "signers" for the purposes of the rule, and the duty of reasonable inquiry does not apply to them. The disjunction in sentence [4] between "person who signed" and "represented party" supports the conclusion that the writers of the amended rule did not view represented parties as "signers." Sentence [4] does state that if a signer violates the rule, not only the signer, but also the signer's client, may be sanctioned. No standard is provided, however, for determining when such a sanction is appropriate.

Only two circuits have dealt directly with the question of what standard applies to represented parties under Rule 11. In *Calloway v. Marvel Entertainment Group*,[7] the Second Circuit Court of Appeals held that a subjective, good-faith standard is the appropriate one for represented parties. It ruled that represented parties may be sanctioned only when they have "actual knowledge" that a paper contains false statements or is filed for an improper purpose.[8] In its consideration of *Business Guides*, the Ninth Circuit held that the objective standard is the correct one for represented parties as well as attorneys.[9] In its review of *Business Guides*, the Supreme Court agreed with the Ninth Circuit's position, holding that "Rule 11 imposes an objective standard of reasonable inquiry on represented parties who sign papers or pleadings."[10]

6. *Id.* The sentences are numbered to facilitate references to the rule's language in the text.

7. 854 F.2d 1452 (2d Cir. 1988), *rev'd in part on other grounds sub nom.* Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989).

8. *See Calloway*, 854 F.2d at 1474.

9. *See* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 892 F.2d 802, 811 (9th Cir. 1989), *aff'd*, 111 S. Ct. 922 (1991).

10. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 111 S. Ct. 922, 934-35 (1991).

Business Guides arose out of a copyright infringement suit by Business Guides, Inc., a publisher of trade directories, against a competitor, Chromatic Communications Enterprises (Chromatic).[11] Business Guides alleged that its 1984 directory of computer products and services had been copied by Chromatic, and sought a temporary restraining order (TRO) to prevent the promotion and sale of the Chromatic guide. In a departure from usual practice, the TRO application was signed by the president of Business Guides, as well as by the company's attorney.[12]

Business Guides supported its complaint by alleging that Chromatic's guide duplicated errors that had originally appeared in the Business Guides directory. Business Guides routinely plants such errors, known as "seeds," in its own directories to help it detect copying, and it claimed that the only way Chromatic's guide could have contained precisely those errors was for it to have copied entries from the Business Guides directory. Before the TRO hearing, however, the court discovered that the entries alleged to be copied contained no incorrect information,[13] and thus, Business Guides's claim lacked a factual basis. Although a magistrate concluded that Business Guides "did not take part in any intentional misrepresentation or coverup,"[14] the district court ordered the firm to

11. *See* Business Guides, Inc. v. Chromatic Communications Enters., Inc., 119 F.R.D. 685 (N.D. Cal. 1988).

12. Personnel from Business Guides also signed affidavits accompanying the TRO application. It is not clear from the Supreme Court's opinion whether the relevant signature was the one on the TRO application or the one on the affidavit. As the dissent noted, this makes an important difference to the clarity and impact of the majority's holding. If affidavits are now "papers" for the purposes of Rule 11, then they must henceforth be signed by an attorney. Because affidavits are evidentiary documents, though, it would be meaningless to inquire whether they are "well grounded in law." In addition, this extension of Rule 11 would make Rule 56's "good faith" standard for affidavits superfluous. *See Business Guides*, 111 S. Ct. at 938-39 (Kennedy, J., dissenting).

13. One of the entries did contain false information; indeed, the entire entry was fictitious, and it was never satisfactorily explained how this listing got into Chromatic's directory. Chromatic alleged that Business Guides had "planted" the false entry in Chromatic's guide by filling out and mailing to Chromatic a false questionnaire. The district court found that Business Guides's failure to deny this charge was a "tacit admission" of its truth. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 121 F.R.D. 402, 404 (N.D. Cal. 1988). According to petitioner's brief, however, Business Guides was unable to refute the charge because it was given no opportunity for discovery. *See* Reply Brief for Petitioner at 3-4, Business Guides, Inc. v. Chromatic Communications Enters., Inc., 111 S. Ct. 922 (1991) (No. 89-1500). There is some hint in Justice O'Connor's opinion that the Court believed Business Guides had acted in bad faith, but this conclusion was not necessary for purposes of the holding. *See Business Guides*, 111 S. Ct. at 927.

14. Business Guides, Inc. v. Chromatic Communications Enters., Inc., 119 F.R.D. at

pay Chromatic's legal expenses and out-of-pocket costs. It held that Business Guides "failed to conduct a proper inquiry, resulting in the presentation of unreasonable and false information to the court."[15] The Ninth Circuit affirmed.

Business Guides challenged the appellate decision on two grounds. First, it claimed that the Ninth Circuit wrongly applied an objective standard to represented parties, rather than the subjective, good-faith standard of *Calloway*. Second, it argued that the use of Rule 11 to require a client who acts negligently, but in good faith, to pay attorney's fees exceeds the authority of the Rules Enabling Act.[16]

In a five-to-four decision, the Supreme Court affirmed. The majority opinion, written by Justice O'Connor,[17] relied heavily on the language of Rule 11, and touched only briefly on policy issues. Justice O'Connor rejected as "unnatural" the view that only attorneys and pro se litigants are "signers" for purposes of the rule. While represented parties are not usually required to sign court papers, she conceded, this does not mean that when they do so voluntarily they are not bound by the rule's duty of reasonable inquiry. If the Advisory Committee had intended to hold represented parties to a different standard, she said, it would have done so explicitly.[18] Although Justice O'Connor invoked the "plain meaning" of the rule,[19] she focused almost entirely on the language of a single sentence—the sentence designated above as sentence [3]. Key to her analysis was her belief that the rule is directed primarily to signatures: "The essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously."[20] The idea that a represented party's signature has less "merit" than a pro se litigant's simply because it is voluntary, Justice

687. The district court accepted Business Guides's explanation that it had relied in its allegations on "seeds" prepared using a faulty method—a method that was not discovered until well after the suit was filed. *See Business Guides*, 111 S. Ct. at 926.

15. *Business Guides*, 111 S. Ct. at 927. Chromatic also moved for, and was granted, sanctions against Business Guides's counsel, but withdrew the motion after the law firm went bankrupt.

16. 28 U.S.C. § 2072 (1988).

17. Chief Justice Rehnquist joined in the majority opinion, as did Justices White, Blackmun, and Souter. Justice Kennedy wrote a dissenting opinion in which Justices Marshall and Stevens joined. Justice Scalia joined in Parts I, II, and IV of the dissent.

18. *See Business Guides*, 111 S. Ct. at 930.

19. *See id.* at 928.

20. *Id.* at 930.

O'Connor contended, conflicts with this reading of the rule.[21]

Justice O'Connor argued that the authority to sanction represented parties who fail to make a reasonable inquiry is also required by Rule 11's main purpose, deterring frivolous litigation. Often—as in this case, Justice O'Connor contended—it is the client, not the attorney, who is in the best position to make an inquiry into the facts underlying a claim. A good-faith standard for represented parties would create a "safe harbor" in those cases, because it would prevent sanctions when an attorney reasonably relies on the negligent statements of a client.[22] Justice O'Connor recognized that clients are often less able than attorneys to investigate the *legal* bases of documents, but she claimed that the objective standard is flexible enough to accommodate the difference in expertise. " 'What is objectively reasonable for a client may differ from what is objectively reasonable for an attorney,' "[23] she stated, quoting the Ninth Circuit decision. The correct standard is one of "reasonableness under the circumstances."[24] Justice O'Connor did not elaborate on what the relevant "circumstances" might be.

Finally, Justice O'Connor ruled that holding clients to an objective standard does not exceed the authority of the Rules Enabling Act. The Act authorizes the Court to "prescribe general rules of practice and procedure," so long as these do not "abridge, enlarge, or modify any substantive right."[25] Business Guides had claimed that the majority's interpretation of Rule 11 modifies substantive rights in two ways: (1) by impermissibly shifting attorney's fees,[26] and (2) by creating a federal tort of malicious prosecution.[27] Justice O'Connor based her argument

21. *See id.* at 931.

22. *See id.* at 932-33.

23. *Id.* at 933 (quoting Business Guides, Inc. v. Chromatic Communications Enters., Inc., 892 F.2d 802, 810 (9th Cir. 1989)).

24. *Id.*

25. 28 U.S.C. § 2072 (1988).

26. Professor Stephen Burbank has argued that because amended Rule 11 allows awarding of attorney's fees for negligence, not merely bad faith, it goes beyond the intent of Congress, which, in its 1980 amendment to Section 1927 of Title 28, forbade fee-shifting absent a finding of bad faith. *See* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 HOFSTRA L. REV. 997 (1983). In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), the Court struck down an award of attorney's fees to a litigant acting as a private attorney general. Under the American rule, the Court held, prevailing parties are not entitled to collect attorney's fees; only Congress, not the courts, can authorize an exception to this rule. *See id.* at 247, 249.

27. *See* Cooter & Gell v. Hartmarx, 110 S. Ct. 2447, 2454 (1990).

on *Burlington Northern Railroad Co. v. Woods*,[28] in which the Court held that "rules which *incidentally* affect litigants' substantive rights" do not exceed the authority of the Act if they are "reasonably necessary to maintain the integrity of [the] system of rules."[29] The primary purpose of Rule 11, Justice O'Connor argued, is neither to shift attorney's fees nor to compensate victims of frivolous litigation, but to deter baseless filings. Any effects on substantive rights are merely "incidental"[30] to this purpose. The majority's holding, she concluded, does not exceed the authority of the Act.[31]

In his dissent, Justice Kennedy rejected the majority's interpretation of the rule's "plain meaning." In his view, the signature requirements set out in the first two sentences of the rule clearly limit its scope to attorneys and pro se litigants. "If the Rule 11 certification requirements were intended to apply to represented parties," he argued, "its provisions would require them to sign papers covered by the Rule, not leave it as an option."[32] Justice Kennedy noted that the majority's reading makes Rule 11 coverage for represented parties essentially voluntary. Informed clients will simply "opt out" of the rule by choosing not to sign. Those who are "caught" will be the rare few who are required to sign, as well as persons who sign in ignorance of the rule and its standards. The resulting arbitrariness undermines the majority's claim that its holding will have a deterrent effect.[33] Instead, Justice Kennedy feared, the holding is likely to have a severe chilling effect on legitimate litigation, an effect that will be even greater if the Court chooses to extend the duty of reasonable inquiry to clients who do not

28. 480 U.S. 1 (1987).

29. *Business Guides*, 111 S. Ct. at 934 (emphasis in original) (citing *Burlington Northern*, 480 U.S. at 5). In *Cooter & Gell*, the Court found Rule 11 necessary to maintain the integrity of the system of procedural rules. *See Cooter & Gell*, 110 S. Ct. at 2454.

30. *Business Guides*, 111 S. Ct. at 934.

31. *See id.* Justice O'Connor also pointed out that because Congress participates in the rulemaking process, any Rules Enabling Act challenge faces an initial burden of showing that "Congress erred in its prima facie judgment that the Rule . . . transgresses neither the terms of the Enabling Act nor constitutional restrictions," *id.* at 933, a burden Business Guides failed to carry.

32. *Id.* at 938 (Kennedy, J., dissenting). Justice Kennedy argued that his reading, unlike the majority's, is consistent with the Court's reasoning in Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456 (1989). In that case, the Court held that law firms could not be sanctioned under Rule 11 because the rule's signature requirement specifies individual attorneys. If the same reasoning were used here, Justice Kennedy suggested, the Court would have to exclude represented parties from the reach of the objective standard. *See Business Guides*, 111 S. Ct. at 935-36 (Kennedy, J., dissenting).

33. *See Business Guides*, 111 S. Ct. at 938 (Kennedy, J., dissenting).

sign.[34] Justice Kennedy also expressed concerns about the fairness of applying rules to represented parties who are not aware of their content.

The primary purpose of Rule 11, Justice Kennedy argued, is "to control the practice of attorneys, or those who act as their own attorneys, in the conduct of litigation in the federal courts."[35] In Justice Kennedy's view, a represented party may be sanctioned under Rule 11 only derivatively, when an *attorney*'s duty of reasonable inquiry is violated, and even then, the client should be judged by a subjective rather than an objective standard.[36]

Although Justice Kennedy stopped short of claiming that the majority's holding exceeds the authority of the Rules Enabling Act, he did argue that it "raises troubling concerns with respect to both separation of powers and federalism."[37] Holding attorneys to an objective standard of reasonable inquiry is well within the Court's power to regulate federal practice and procedure, Justice Kennedy acknowledged. But the Court approaches the limits of its authority when it extends this standard to clients. Justice Kennedy argued that these concerns weigh in favor of a more conservative reading of the rule, a reading that is in any event more consistent with the text than that of the majority.[38]

Amended Rule 11 is one of the most controversial of the judicial tools used to curb abuse of the litigation process. Critics have charged, among other things, that it chills legitimate advocacy, creates excessive "satellite litigation," and is applied in an inconsistent and arbitrary way.[39] In *Business Guides*, the Supreme Court had an opportunity to lend some consistency to

34. *See id.* at 941 (Kennedy, J., dissenting).

35. *Id.* at 935 (Kennedy, J., dissenting).

36. *See id.* at 942 (Kennedy, J., dissenting). Justice Kennedy cited the Advisory Note to the Rule in support of this interpretation: "[E]ven though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances to impose a sanction on the client." *Id.* at 937 (Kennedy, J., dissenting) (quoting FED. R. CIV. P. 11 advisory committee's note).

37. *Id.* at 940 (Kennedy, J., dissenting). Justice Kennedy argued that the majority's holding created a new tort of "negligent abuse of process," the authority for creation of which resides in the Congress, not the Court. He also argued that the majority by its decision authorized fee-shifting in a way indistinguishable from that struck down in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975). *See supra* note 26. Justice Scalia did not join this part of the dissent.

38. *See Business Guides*, 111 S. Ct. at 942 (Kennedy, J., dissenting).

39. For an overview of the main criticisms of the rule, see 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1332 (2d ed. 1990).

the rule and to address these persistent problems. Instead, hiding behind a "plain meaning" analysis, the majority issued an opinion that does little to clarify Rule 11 jurisprudence and is likely to increase criticism of the rule.

Since Rule 11's revision, commentators have warned of its potential chilling effect on meritorious claims.[40] The Advisory Committee took this fear seriously enough to include in its Note a statement that Rule 11 "is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."[41] Unless this statement is taken seriously by judges interpreting the rule, however, it becomes meaningless. In *Business Guides*, the Supreme Court had an opportunity to give effect to the Advisory Committee's intent, but failed to do so.

Fear that Rule 11 will over-deter becomes particularly grave when sanctions under the rule are extended to represented parties. As the dissent in *Business Guides* points out, most citizens are unfamiliar with the contents of the Federal Rules of Civil Procedure. Even after they have been made aware of a duty of inquiry, they are unlikely to understand what kind of inquiry is legally required. A "reasonable inquiry" into the basis of a claim requires an understanding of not only the facts, but also the legal significance of the facts. While attorneys have this understanding, clients for the most part do not. Holding clients to a duty of "reasonableness" they do not understand, and requiring them to pay large attorney's fees if they transgress, is likely to discourage them from legitimate attempts to vindicate their rights. The risk of chilling is much less if sanctions are available only for breaches of good faith.

The majority claimed that the objective standard is one of "reasonableness under the circumstances," and thus takes account of a client's lesser legal expertise. This contention is unpersuasive because Justice O'Connor failed to give any content to this formula. Indeed, the Court's failure to suggest circumstances that might be relevant to the objective reasonableness of a client's behavior may heighten the chilling effect of the holding, because it creates a zone of uncertainty into which clients will be hesitant to venture.

40. *See, e.g.*, Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Nelken, *supra* note 1.

41. FED. R. CIV. P. 11 advisory committee's note.

One of the purposes of amended Rule 11 was to reduce the bulk of litigation and relieve over-burdened federal courts. The rule defeats this purpose if, as has frequently been charged, it generates more litigation than it prevents.[42] The Court's holding in *Business Guides* is likely to add to the level of "satellite litigation," and thus runs counter to the purpose of the rule. Because the standard is one of "reasonableness under the circumstances," a determination that a client has violated the rule requires an examination of the relevant circumstances and an expenditure of judicial resources. The inquiry is complicated by the fact that judges are less well equipped to assess the reasonableness of clients' behavior than they are that of attorneys. Judges and attorneys share a professional background. Both are officers of the court. Clients, in contrast, have widely divergent backgrounds and levels of expertise. In *Business Guides*, three hearings were required before a magistrate concluded that the firm had failed in its duty of reasonable inquiry. A good-faith standard for clients would be far more efficient.

One of the most serious criticisms of amended Rule 11 is that it has been inconsistently and arbitrarily applied.[43] What one judge perceives as frivolous, another may see as a legitimate claim. Inconsistency increases the rule's chilling effect and adds to satellite litigation. It also raises questions about fairness and abuse of judicial power. *Business Guides* provides little help here. On the contrary, requiring judges to decide whether clients have acted "reasonably under the circumstances," particularly where the relevant circumstances are not defined, is likely to increase the instances of arbitrariness and abuse.

The majority's decision leaves several important issues unresolved. Perhaps the most important of these is Rule 11's treatment of represented parties who do not sign documents, an issue expressly left open by the majority.[44] If only signers

42. The Advisory Committee expressed its desire that "the efficiencies achieved by [the rule] . . . not be offset by the cost of satellite litigation over the imposition of sanctions." FED. R. CIV. P. 11 advisory committee's note. For a discussion of the problem of satellite litigation, see Nelken, *supra* note 1.

43. *See* Burbank, *supra* note 2; S. KASSIN, AN EMPIRICAL STUDY OF RULE 11 SANCTIONS (Federal Judicial Center, 1985); Shaffer, *Rule 11: Bright Light, Dim Future*, in SANCTIONS: RULE 11 AND OTHER POWERS 1 (C. Shaffer & P. Sandler eds. 1988).

44. *See Business Guides*, 111 S. Ct. at 935. A second question left dangling is whether affidavits are now "papers" for purposes of Rule 11, and must henceforth be signed by an attorney. *See supra* note 12.

are bound by the rule, well-counseled clients will place their signatures on as few documents as possible, leading to intermittent deterrence at best. Yet, given Justice O'Connor's reliance on sentence [3] of the rule and her perception of it as a signature requirement, it is difficult to see how she could justify extending liability to non-signers.[45] While resolution of this issue was not necessary to the majority's holding, failure to address it adds to the confusion surrounding the rule.

The *Business Guides* majority claimed to do nothing more than analyze the "plain meaning" of Rule 11: "Even if we were convinced that a subjective bad faith standard would more effectively promote the goals of Rule 11, we would not be free to implement this standard outside the rulemaking process. 'Our task is to apply the text, not improve on it.' "[46] Yet a careful examination of the rule's language shows that it is simply silent on the matter of a standard of behavior for represented parties. As Justice O'Connor points out, the rule does not explicitly provide a separate standard for clients. But neither does it explicitly assign clients a duty of reasonable inquiry. In light of this ambiguity, the Court would have been justified in holding clients to a subjective, good-faith standard. Far better than the objective standard, a subjective standard for clients would give effect to the Advisory Committee's intent, would be consistent with the purposes of the rule, and would bring the uniformity and consistency so long missing in Rule 11 cases within closer reach.

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45. If the Court later decides that non-signers may be sanctioned, it will face the difficulty of what standard to apply. Because sentence [3] was regarded as the source of the standard in *Business Guides*, it will require some reaching to apply to non-signers. On the other hand, holding non-signing clients to a subjective standard would result in inconsistent treatment of them, something that troubled the Court in this case. If Justice O'Connor had based her authority to sanction clients on sentence [4], the status of non-signers would not pose such a problem. Sentence [4] seems to authorize courts to sanction clients who do not sign, though it specifies no standard of behavior.

46. *Business Guides*, 111 S. Ct. at 932 (quoting Pavelic & LeFlore v. Marvel Entertainment Group, 110 S. Ct. 456, 460 (1989)).

SECTION 1983 CLAIMS INVOLVING COMMERCE CLAUSE VIOLATIONS: *Dennis v. Higgins*, 111 S. Ct. 865 (1991).

In *Dennis v. Higgins*,[1] the United States Supreme Court extended the cause of action established by the Civil Rights Act of 1871 (Section 1983)[2] to include challenges to Commerce Clause violations. The Court's ruling entitles prevailing plaintiffs in such suits to attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 (Section 1988).[3] In his dissent, Justice Kennedy predicted that this decision would have severe adverse consequences for the balance of power between states and taxpayers in state tax litigation. In reality, though, the impact of *Dennis* on state tax challenges will be minor, and what new incentives it does create will be positive.

Dennis arose out of a challenge to retaliatory taxes and fees that Nebraska imposed on out-of-state vehicles that operated in Nebraska. The trial court found the taxes in violation of the Commerce Clause and enjoined their collection, but dismissed the taxpayer's Section 1983 claim.[4] The Nebraska Supreme Court affirmed, holding that Commerce Clause violations are not actionable under Section 1983.[5]

The United States Supreme Court, by a seven-to-two vote,[6] reversed the Nebraska Supreme Court's decision that violations of the Commerce Clause are not actionable under Section 1983. Justice White, writing for the majority, concluded that the Commerce Clause confers individual rights against impermissible state regulation of interstate commerce, and that the

1. 111 S. Ct. 865 (1991).

2. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 . . . .

42 U.S.C. § 1983 (1988).

3. Section 1988 provides that "[i]n any action or proceeding to enforce a provision of section[] . . . 1983, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1988).

4. *See* Dennis v. Nebraska, 234 Neb. 427, 428-29, 451 N.W.2d 676, 678 (1990), *rev'd sub nom.* Dennis v. Higgins, 111 S. Ct. 865 (1991).

5. *See id.* at 430-41, 451 N.W.2d at 678-84.

6. Justices Marshall, Blackmun, Stevens, O'Connor, Scalia, and Souter joined in Justice White's majority opinion. Justice Kennedy dissented, joined by Chief Justice Rehnquist.

statutory language of Section 1983 creates a cause of action for the protection of such rights.

The Court held that the statutory language, which provides a cause of action for the deprivation of "any rights, privileges, or immunities secured by the Constitution,"[7] compels "a broad construction of § 1983."[8] Justice White noted that the Court "has never restricted the section's scope to [protecting Fourteenth Amendment rights]. Rather [it has] given full effect to its broad language, recognizing that § 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights.' "[9]

Although the Court acknowledged that "the 'prime focus' of § 1983 and related provisions was to ensure 'a right of action to enforce the protections of the Fourteenth Amendment,' "[10] it pointed out that the legislative history cited by the dissent does not amount to " 'a clearly expressed legislative intent contrary to the plain language of [Section 1983].' "[11] The Court reasoned that Congress would have explicitly limited the scope of Section 1983 had it intended such a limitation.[12]

Having concluded that Section 1983 is to be broadly construed, the Court examined the Commerce Clause to determine whether it "confers 'rights, privileges, or immunities' within the meaning of § 1983."[13] The Court rejected the respondents' argument that the Commerce Clause merely allocates power between the federal and state governments and does not confer substantive rights on individual plaintiffs. Instead, the Court held that the combination of restricted state power to regulate interstate commerce[14] and individual entitle-

7. 42 U.S.C. § 1983 (1988).

8. *Dennis*, 111 S. Ct. at 868.

9. *Id.* at 869 (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 700-01 (1978)). *See also* Maine v. Thiboutot, 448 U.S. 1, 4, 6-8 (1980) (refusing to limit the "laws" referred to in Section 1983 to civil rights or equal protection laws); Lynch v. Household Finance Corp., 405 U.S. 538 (1972) (refusing to exclude property rights from the scope of Section 1983).

10. *Dennis*, 111 S. Ct. at 869 (quoting Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 (1979)).

11. *Id.* at 869 n.4 (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 75 (1982)).

12. *See id.* (quoting St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 550 (1978)).

13. *Id.* at 870 (quoting 42 U.S.C. § 1983 (1988)).

14. *See id.* (citing South-Central Timber Dev. v. Wunnicke, 476 U.S. 82 (1984); Hughes v. Oklahoma, 441 U.S. 322 (1979)).

ment to relief from an unconstitutional state regulation[15] constitutes a right, privilege, or immunity.[16] Finally, the Court noted previous decisions in which it recognized that the Commerce Clause confers "a 'right' to engage in interstate trade free from restrictive state regulation."[17]

The majority then applied the three-part test articulated in *Golden State Transit Corp. v. Los Angeles*[18] to determine whether those rights are within the scope of Section 1983.[19] The respondents admitted that the first two prongs of the test were satisfied, which the Court accepted without discussion. The respondents argued, however, that the third prong was not satisfied because the Commerce Clause was intended to benefit the national economy, not individual interstate businesses. In response, the Court provided two reasons why the third prong was satisfied. First, the Court has recognized that the Commerce Clause protects a "zone of interests," which includes the interests of individuals engaged in interstate businesses.[20] Second, "the Court's repeated references to 'rights' under the Commerce Clause constitute a recognition that the Clause was intended to benefit those who . . . are engaged in interstate commerce."[21]

Justice Kennedy dissented, arguing that the Commerce Clause does not confer rights within the meaning of Section 1983. He contended that the legislative history of Section 1983 demonstrates that it was not intended to provide a private cause of action for state violations of the power-allocating pro-

15. *See id.* (citing McKesson Corp. v. Division of Alcoholic Beverages, 448 U.S. 954 (1980)).

16. *See id.* at 871 & n.7.

17. *Id.* at 871 (citing Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); Garrity v. New Jersey, 385 U.S. 493 (1967); Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1 (1910); Crutcher v. Kentucky, 141 U.S. 47 (1891)).

18. 493 U.S. 103 (1989).

19. *See Dennis*, 111 S. Ct. at 871. The three prongs of the *Golden State* test are: (1) "whether the provision in question creates obligations binding on the governmental unit," (2) whether "the interest the plaintiff assert[ed] . . . [is] 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce,' " and (3) "whether the provision in question was 'intend[ed] to benefit' the putative plaintiff." *Id.* The prongs of the test are derived from Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981) (first prong); and Wright v. Roanoke Redevelopment and Hous. Auth., 479 U.S. 418 (1987) (second and third prongs).

20. *See Dennis*, 111 S. Ct. at 872 (quoting Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 321 n.3 (1977)).

21. *Id.* (citing Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977); Garrity v. New Jersey 385 U.S. 493 (1967); Western Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1 (1910); Crutcher v. Kentucky, 141 U.S. 47 (1891)).

visions of the Constitution.[22] Justice Kennedy maintained that the Commerce Clause does not secure individual rights against the States and that applying the *Golden State* test was therefore unnecessary.[23]

Furthermore, Justice Kennedy questioned the Court's reasons for holding that the Commerce Clause satisfies the third prong of the *Golden State* test. He challenged the Court's reliance on *Boston Stock Exchange v. State Tax Commission*[24] to show that the Commerce Clause was intended to benefit the putative plaintiff. That a plaintiff is within the "zone of interests," he argued, does not imply that the Commerce Clause was intended to benefit that person. Indeed, he noted that the Court previously had held that legislative intent to benefit the plaintiff is not necessary for the plaintiff to be within the "zone of interests" protected.[25]

Justice Kennedy also attacked the Court's reliance on "scattered statements in our cases that refer to a 'right' to engage in interstate commerce."[26] He countered those statements with a discussion of the legislative history of the Commerce Clause, tending to prove that it was not intended to benefit individuals engaged in interstate commerce.[27]

In closing his dissent, Justice Kennedy predicted that the Court's holding will have adverse consequences,[28] particularly in the area of state taxes. The decision, he argued, "raises far more questions about the proper conduct of challenges to the

22. *See id.* at 874-76 (Kennedy, J., dissenting). The majority rebutted this point by arguing that the legislative history that Justice Kennedy quoted refers to a different part of the Civil Rights Act of 1871 than the part that became Section 1983. *See id.* at 868 n.4.

23. *See id.* at 873 (Kennedy, J., dissenting). Justice Kennedy explained later in his opinion that individuals can bring actions for violations of the Commerce Clause without its conferring any rights on them, because they can have standing to challenge the violation in the absence of individual rights. In using the ability of individuals to challenge violations of the Commerce Clause as evidence of a right within the meaning of Section 1983, he argued, the majority "confuses the concept of standing with that of cause of action." *Id.* at 878 (Kennedy, J., dissenting).

24. 429 U.S. 318 (1977) (recognizing that the interests of individuals engaged in interstate business are within the "zone of interests" protected by the Commerce Clause). *See supra* note 20 and accompanying text.

25. *See Dennis*, 111 S. Ct. at 878 (Kennedy, J., dissenting) (citing Clarke v. Securities Indus. Ass'n, 479 U.S. 388 (1987)).

26. *Id.* at 873-74 (Kennedy, J., dissenting).

27. *See id.* at 874-76 (Kennedy, J., dissenting).

28. One consequence Justice Kennedy suggested is that the test that the majority used for determining whether a Section 1983 claim is appropriate may be successfully applied by plaintiffs to other substantive rights, further expanding the Section 1983 cause of action beyond its proper scope. *See id.* at 879 (Kennedy, J., dissenting).

validity of state taxation than it answers."[29] Although he was not very specific about what effects *Dennis* might have on challenges to state taxes, Justice Kennedy suggested that the impact will be substantial and invidious. He characterized the Court's decision as "risk[ing] destruction of state fiscal integrity in a manner which may require congressional correction."[30]

Justice Kennedy's dire predictions, however, appear to be overstated. Many plaintiffs will still be unable to use Section 1983 to challenge state taxes that violate the Commerce Clause. In fact, any effect on state fiscal policy and even state finances is likely to be positive.

Challenges to the validity of state taxes cannot originate in any federal forum,[31] leaving state courts as the only fora for Section 1983 tax claims. For several reasons, courts in a number of states have refused to hear Section 1983 tax claims.[32] Because Commerce Clause challenges to state taxes are so common and are restricted to state courts, it is tempting to conclude that the Court's decision in *Dennis* mandates that state courts entertain tax claims that arise under the Commerce Clause as Section 1983 actions.

The *Dennis* Court, however, did not address whether state courts are required to hear Section 1983 tax claims.[33] Accordingly, state courts previously refusing to hear tax claims under

29. *Id.* at 880 (Kennedy, J., dissenting).

30. *Id.* (Kennedy, J., dissenting).

31. The Tax Injunction Act, 28 U.S.C. § 1341 (1988), and the principle of comity prevent challenges to state taxes in federal courts. *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); Note, *Section 1983 in State Court: A Remedy for Unconstitutional State Taxation*, 95 YALE L.J. 414, 417-20 (1985).

32. *See, e.g.*, Backus v. Chivilis, 236 Ga. 500, 224 S.E.2d 370 (1976) (county taxpayers could not bring a Section 1983 action alleging unequal tax assessments in state court when Georgia provides statutory remedy for this offense); Johnson v. Gaston County, 71 N.C. App. 707, 323 S.E.2d 381 (1984) (taxpayer did not have Section 1983 cause of action in state court because adequate remedy existed under North Carolina property tax statutes); Spencer v. South Carolina Tax Comm'n, 281 S.C. 492, 316 S.E.2d 386 (1984), *aff'd*, 471 U.S. 82 (1985) (per curiam) (taxpayer not allowed to bring Section 1983 action where sole reason for suit was to justify allowance of attorney's fees, which were not allowed under South Carolina law).

33. The Court has never decisively answered the question whether state courts must hear Section 1983 tax claims. In Spencer v. South Carolina Tax Comm'n, 471 U.S. 82 (1985), the Court affirmed a state court's refusal to hear Section 1983 tax claims, but the justices were equally divided, so the affirmance has no weight as precedent. *See* Neil v. Biggers, 409 U.S. 188, 192 (1972). In a more recent case, the Court characterized the question as "not entirely clear." Arkansas Writer's Project, Inc. v. Kansas, 481 U.S. 221, 234 n.7 (1987).

Section 1983 can continue to do so despite *Dennis*.[34] In the area of tax challenges, the impact of *Dennis* should be seen exclusively in states that have refused Section 1983 actions for violations of the Commerce Clause[35] but have allowed Section 1983 tax challenges.

Even in those states affected, the changes in tax challenges for Commerce Clause violations will not be overwhelming.[36] The most notable change is that substantially prevailing plaintiffs will be entitled to recover reasonable attorney's fees under Section 1988.[37] In *Will v. Michigan Department of State Police*,[38] though, the Court limited this advantage by holding that states are persons for purposes of Section 1983 claims for prospective and injunctive relief, but not for retrospective relief.[39] The Court's opinion in *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*[40] requires some kind of retrospective relief for unconstitutional state taxes. Because most of the elements of a retrospective claim will overlap with a prospective Section 1983 claim, a prevailing plaintiff, though unable to recover attorney's fees for the retrospective claim, will cover most of the costs of attorney's fees through the prospective claim.

Once a state is enjoined from or voluntarily ceases collecting

34. The requirement that plaintiffs exhaust state remedies before commencing a Section 1983 action, a frequently used barrier to Section 1983 tax claims, might no longer be effective. In Felder v. Casey, 487 U.S. 131 (1988), the Court held that "those who [seek] to vindicate their federal rights in state courts [should not] be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." *Id.* at 147.

35. *See, e.g.*, Consolidated Freightways Corp. of Del. v. Kassel, 730 F.2d 1139 (8th Cir. 1984); Private Truck Council of Am. v. Secretary of State, 503 A.2d 214 (Me. 1986); Private Truck Council of Am. v. New Hampshire, 128 N.H. 466, 517 A.2d 1150 (1986); Private Truck Council of Am. v. Oklahoma Tax Comm'n, 806 P.2d 598 (Okla. 1990).

36. *See generally* Note, *Clarifying Comity: State Court Jurisdiction and Section 1983 State Tax Challenges*, 103 HARV. L. REV. 1888, 1899-1902 (1990) (discussing advantages of bringing a tax claim under Section 1983).

37. Under Section 1988, a court may award attorney's fees to plaintiffs who substantially prevail on their Section 1983 claims.

38. 491 U.S. 58 (1989).

39. Section 1983 provides a cause of action against any "*person* [acting] under color of any statute, ordinance, regulation, custom, or usage, of any State." 42 U.S.C. § 1983 (1988) (emphasis added).

40. 110 S. Ct. 2238 (1990). At the option of the state court, retrospective relief can be achieved by "assess[ing] and collect[ing] back taxes from . . . competitors who benefited from the" unconstitutional tax scheme. *Id.* at 2252. Because state courts have this option, plaintiffs suffering from unconstitutional taxes have a reduced incentive to bring an action unless attorney's fees are available. Also, a state that uses such a remedy can actually increase its revenue as a result of the litigation that *Dennis* encourages, despite Justice Kennedy's dire predictions.

a tax, a plaintiff will not be able to initiate a Section 1983 action. This situation may encourage plaintiffs who suffer damages from a common unconstitutional tax to race to the courthouse in order to be the first to challenge the tax.[41] In such a case, a state could test its tax against a single plaintiff with relatively low exposure to attorney's fees. Alternatively, class actions seem a more attractive means to challenge taxes that violate the Commerce Clause because the entire class would benefit from attorney's fees awards. States faced with class actions may feel more pressure to stop collecting (but not to refund) the tax to avoid a judgment for substantial attorney's fees.

Another effect that *Dennis* may have is to extend the statute of limitations for claims challenging a tax as violative of the Commerce Clause. States allowing Section 1983 tax claims, except for violations of the Commerce Clause, will be required to change the limitations period for Commerce Clause tax challenges to the same limitations period as for personal injury actions.[42] Regardless of the limitation period established, however, the effect of lengthening it would be negligible. The vast majority of Commerce Clause violations in taxation are attributable only to the state and state employees acting in their official capacities. Therefore, under *Will*, only prospective relief is available under Section 1983.[43] The statute of limitations is relevant only in those cases in which the defendant is sued in his individual capacity. Such an action is appropriate for challenging discretionary acts of state tax officials that violate the Commerce Clause, such as discriminating against interstate businesses by over-assessing their in-state property.[44] In cases of this sort, the individual is personally liable for damages.[45] Because states cannot be liable for retrospective relief under Section 1983, the stakes in such cases are limited to the per-

41. If offensive non-mutual collateral estoppel were permitted, the incentive to be the first challenger would be greatly diminished. A court, however, may deny collateral estoppel to avoid encouraging plaintiffs to adopt a "wait-and-see" approach to litigation. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 & n.13 (1979).

42. *See* Wilson v. Garcia, 471 U.S. 261 (1985) (holding that applicable statute of limitations for Section 1983 claims is the state statute of limitations for personal injury claims).

43. Statutes of limitations, obviously, are not relevant in actions for prospective relief.

44. *See* Note, *supra* note 31, at 432.

45. *See* Kentucky v. Graham, 473 U.S. 159 (1985).

sonal resources of state officials.[46]

Even if they are extensive, the changes that *Dennis* creates will probably benefit both the state and the taxpayer. If the prospect of paying attorney's fees deters a state legislature from imposing questionable taxes, the state will save the cost of arguing and adjudicating the controversies. The attorney's fees available under Section 1988 may encourage litigation, but only of meritorious cases, because only prevailing plaintiffs are entitled to recovery.[47] Justice Kennedy observed that "[t]he pages of the United States Reports testify to the ability of major corporations . . . to commence and maintain dormant Commerce Clause litigation."[48] The reports give no indication, however, of how many small businesses have been victimized by unconstitutional taxes that they could not afford to challenge.

Jonathan T. Lebow

WILLFULNESS IN CRIMINAL TAX CASES: *Cheek v. United States*, 111 S. Ct. 604 (1991).

In an area of popular concern—federal income taxes—the Supreme Court recently held that a defendant's good-faith belief that the income tax laws did not apply to him did not have to be objectively reasonable to avoid criminal conviction.[1] At the same time, however, the Court held that a belief that the income tax laws are unconstitutional—as opposed to inapplicable—is not a shield against criminal liability.[2] Although the decision invited speculation and concern about the support given to so-called tax protesters, observers noted that the tax protester's victory "may be short-lived" and that the impact is

46. Another possible but unlikely effect of *Dennis* is that some plaintiffs may not be precluded from reopening decided Commerce Clause cases to make claims for attorney's fees. Generally, changes in the law do not relieve plaintiffs from the preclusive effects of adverse judgments. *See* Federated Dep't Stores, Inc. v. Moitie, 452 U.S. 394 (1981). In rare cases, however, claim preclusion is not applied when there is a change in the law such that the plaintiff would have thought the new claim impossible when the original claim was made. *See, e.g.*, Henn v. Henn, 26 Cal. 3d 323, 605 P.2d 10, 161 Cal. Rptr. 502 (1980) (permitting new claim three years after final divorce decree).

47. *See* 42 U.S.C § 1988 (1988).

48. *Dennis*, 111 S. Ct. at 880 (Kennedy, J., dissenting).

1. *See* Cheek v. United States, 111 S. Ct. 604, 611 (1991).

2. *See id.* at 613.

likely to be "limited."[3] The decision merely allows the jury, and not the judge, to evaluate all of the evidence to decide whether the defendant was sincere in his beliefs.[4] In doing so, the fundamental policies underlying the "willfulness" requirement for criminal tax convictions are maintained.

John L. Cheek had been a pilot for American Airlines since 1973.[5] After 1979, Cheek ceased to file tax returns. From 1981 to 1984, Cheek indicated on his W-4 forms that he was exempt from federal income tax, and he was claiming up to sixty withholding allowances by the mid-1980s. During those years, American Airlines withheld substantially less than the amount required because of the numerous allowances and exempt status claimed on Cheek's tax forms.

Consequently, Cheek was charged with six counts of willfully failing to file a federal income tax return in violation of Section 7203 of the Internal Revenue Code[6] for the years 1980, 1981, and 1983 through 1986. In addition, he was charged with three counts of willfully attempting to evade income taxes for the years 1980, 1981, and 1983, in violation of Section 7201 of the Internal Revenue Code.[7]

Cheek, representing himself at the trial hearing, admitted that he had not filed personal tax returns during the years in question. He testified that as early as 1978, he had begun to attend seminars sponsored by a "tax patriot" group, which dispensed as gospel such dubious tax advice as the notion that wages are not income. During this time, Cheek was also involved in civil suits against American Airlines and the Internal Revenue Service.[8] In all of these cases, the arguments that

3. *Supreme Court Ruling Supports Tax Protester*, N.Y. Times, Jan. 9, 1991, at D2, col. 5.

4. *See id.*

5. The facts of the case are drawn from the Court's opinion. *See Cheek*, 111 S. Ct. at 606-09.

6. I.R.C. § 7203 (1988) ("Any person . . . required by this title or by regulations made under authority thereof to make a return, . . . who *willfully* fails . . . to make such a return, . . . shall in addition to other penalties provided by law, be guilty of a misdemeanor.") (emphasis added).

7. I.R.C. § 7201 (1988) ("Any person who *willfully* attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall in addition to other penalties provided by law, be guilty of a felony.") (emphasis added).

8. The suit against American Airlines claimed that Cheek's taxes were wrongly being withheld from his paychecks. The suit against the Internal Revenue Service involved Cheek's claim that he was not required to pay taxes for various reasons. In one of these cases, the district court found Cheek's position frivolous and fined him $10,000 for filing the suit (subsequently reduced on appeal to $5,000). *See* Cheek v. Doe, 828 F.2d 395 (7th Cir.), *cert. denied*, 484 U.S. 955 (1987).

Cheek was not a taxpayer under the Internal Revenue Code, that wages are not income, and that the Sixteenth Amendment[9] is unconstitutional, were declared frivolous and were repeatedly rejected by the courts. Cheek also produced a letter at trial from an attorney advising him that a tax on gains or profits is authorized, but that a tax on wages or salaries is not.

Cheek argued that, based on his indoctrination by the group, he sincerely believed in the lawfulness of what he was doing and thus could not be convicted for "willfully" violating the tax code. The trial court advised the jury that to prove "willfulness," the government had to prove the voluntary and intentional violation of a known legal duty. In addition, the court advised that an objectively reasonable, good-faith misunderstanding of the law would negate willfulness, but that mere disagreement with the law would not. The court then described Cheek's beliefs about the tax system and instructed the jury that if it found that Cheek "honestly and reasonably believed that he was not required to pay income taxes or to file tax returns,"[10] a not-guilty verdict should be returned.

After some confusion arose as to the meaning of the word "willful," the judge finally sent the jury a statement that "an honest but unreasonable belief is not a defense and does not negate willfulness."[11] Based on this instruction, the jury returned a verdict of guilty on all counts. Several jurors, however, undertook the extraordinary step of submitting with their verdict a written criticism of what they saw to be a "narrow and hard expression" of the law.[12]

Cheek appealed, asserting that the jury instruction requiring an objectively reasonable misunderstanding of the law to negate the statutory willfulness requirement was incorrect. Nevertheless, the United States Court of Appeals for the Seventh Circuit affirmed the conviction.[13] Relying on *United States v.*

9. U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.").

10. Cheek v. United States, 111 S. Ct. 604, 608 (1991).

11. *Id.*

12. Two notes from jurors expressed the opinion that Cheek lacked the necessary criminal intent because he sincerely believed in his cause, even though his beliefs might have been unreasonable. One note stated: "I know the gentleman is guilty of a crime. However, I honestly believe he believed so deeply in his cause that he has risked everything for this cause and truly does not believe that he is breaking the law." United States v. Cheek, 882 F.2d 1263, 1267 (7th Cir. 1989).

13. *See* United States v. Cheek, 882 F.2d 1263 (7th Cir. 1989).

Buckner,[14] the court concluded that the beliefs advanced by Cheek were not objectively reasonable.[15] With respect to the list of "tired arguments"[16] that the *Buckner* court said were not objectively reasonable as a matter of law and may never be asserted as a defense, no matter what the particular circumstances might be, the Seventh Circuit panel hearing *Cheek* ominously observed: "We have no doubt that this list will increase with time."[17]

By a six-to-two vote, the Supreme Court reversed the decision of the Seventh Circuit and remanded the case for a new trial. Writing for the majority, Justice White[18] noted that although ignorance of the law is usually not a defense, sixty years ago the Court interpreted the term "willfully," as used in criminal tax statutes, "as carving out an exception to the traditional rule."[19] This special treatment, Justice White reasoned, is largely due to the complexity of the statutes and regulations, which make the tax laws difficult for the average citizen to understand.[20] In an early case involving tax code violations, *United States v. Murdock*,[21] the court interpreted the term "willfully" as requiring an "act done with a bad purpose" or with an "evil motive."[22] Subsequent decisions clarified this definition. In *United States v. Bishop*,[23] and still later in *United States v. Pomponio*,[24] "willfully" was defined as "connoting 'a voluntary, intentional violation of a known legal duty.' "[25]

Justice White acknowledged the *Murdock-Pomponio* definition of "willfulness" and concluded that the district court's jury instructions had departed from it by indicating that only an objectively reasonable misunderstanding of the law would negate

14. 830 F.2d 102 (7th Cir. 1987).

15. *See* United States v. Cheek, 882 F.2d at 1264.

16. *Buckner*, 830 F.2d at 103 (quoting Coleman v. Commissioner, 791 F.2d 68, 70 (7th Cir. 1986)).

17. United States v. Cheek, 882 F.2d at 1269.

18. Justice White was joined by Chief Justice Rehnquist and Justices Stevens, O'Connor, and Kennedy. Justice Scalia filed an opinion concurring in the judgment. Justice Blackmun filed a dissenting opinion in which Justice Marshall joined. Justice Souter did not participate in the decision.

19. Cheek v. United States, 111 S. Ct. 604, 609 (1991).

20. *See id.*

21. 290 U.S. 389 (1933).

22. *Murdock*, 290 U.S. at 394-95.

23. 412 U.S. 346 (1973).

24. 429 U.S. 10 (1976).

25. *Cheek*, 111 S. Ct. at 610 (quoting *Bishop*; 412 U.S. at 360).

guilt.[26] However unreasonable his beliefs might have been, the majority said, the jury should have had the opportunity to consider Cheek's assertions; to rule otherwise would raise a serious Sixth Amendment[27] question by changing the question of intent to a legal one, thereby preventing the jury from hearing it.[28] Of course, continued the majority, the more unreasonable the asserted beliefs are, the more likely the jury will be to disregard them.[29]

In another portion of the majority opinion, Justice White addressed Cheek's assertion that he should be acquitted because he had a good-faith belief that the income tax law was unconstitutional. White ruled that "[s]uch a submission is unsound, not because Cheek's constitutional arguments are not objectively reasonable or frivolous, which they surely are,"[30] but because under the *Murdock-Pomponio* line of cases, only innocent mistakes are excused. Indeed, Cheek's assertion implied "full knowledge of the provisions at issue and a studied conclusion,"[31] and therefore, Cheek was in no position to use this claim as a defense.[32]

In his opinion concurring in the judgment, Justice Scalia indicated that he would have supported both of Cheek's claims. Justice Scalia agreed with the Court's ruling that a good-faith belief is not "willful," but disagreed with the Court's conclusion on the invalidity of the constitutional claim.[33] He challenged the Court's ruling by stating that the *Murdock* definition requires a violation of a "known legal duty," and that a statute that one believes to be unconstitutional cannot represent a "known legal duty."[34] By Justice Scalia's reasoning, a duty cannot be *legal* if it is unconstitutional. Finally, the fact that civil penalties also apply to defendants similar to Cheek, "even in the event of a good-faith mistake," means that to "impose in addition *criminal* penalties for misinterpretation of such a com-

26. *See id.*

27. The Sixth Amendment provides in part: "In all criminal prosecutions, the accused shall enjoy the right of a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

28. *See Cheek*, 111 S. Ct. at 611.

29. *See id.* at 611-12.

30. *Id.* at 612.

31. *Id.*

32. Justice White went on to suggest specific mechanisms that Cheek, if he believed the laws to be unconstitutional, should have utilized. *See id.* at 613.

33. *See id.* at 613 (Scalia, J., concurring in judgment).

34. *Id.* at 614 (Scalia, J., concurring in judgment).

plex body of law" would be a "startling innovation indeed."[35]

In a brief dissent, Justice Blackmun, joined by Justice Marshall, expressed his desire to uphold the "objectively reasonable" standard. The focus of the dissenting opinion was that the challenge to the tax code was at the most elementary level: the question whether wages are taxable.[36] After seventy years of the federal income tax system being in place, the dissent found it hard to believe that a person of Cheek's status would assert that he believed that wages are not income.[37] Justice Blackmun expressed his fear that the decision would cause "taxpayers to cling to frivolous views of the law in the hope of convincing a jury of their sincerity."[38]

By its holding, the Court maintained the fundamental policies underlying the "willfulness" requirement. The rampant growth of tax regulations has made them notoriously complicated. In fact, "uncertainty often arises even among taxpayers who earnestly wish to follow the law."[39] Thus, the first policy that the Court reinforced is the protection of taxpayers from unwarranted convictions in criminal tax cases.

In recognition of this policy, courts have consistently interpreted the word "willfully" to require an element of *mens rea*.[40] The purpose of this interpretation is to "separate the purposeful tax violator from the well-meaning, but easily confused, mass of taxpayers."[41] Otherwise, a person, by reason of his good-faith misunderstanding as to his tax liability, might entirely lack criminal intent, and yet be convicted because of "his mere failure to measure up to the prescribed standard of conduct."[42] The obvious effect of this policing of views would be to give prosecutors a free hand in charging those who make mistakes on their tax returns. Such a policy, if adopted in frus-

35. *Id.* (Scalia, J., concurring in judgment) (emphasis in original).
36. *See id.* at 614-15 (Blackmun, J., dissenting).
37. *See id.* at 615 (Blackmun, J., dissenting).
38. *Id.* (Blackmun, J., dissenting).
39. United States v. Bishop, 412 U.S. 346, 360 (1973).
40. *See supra* notes 21-25 and accompanying text. *But cf.* MODEL PENAL CODE § 2.02(10) comment n.47 (1985) (relating Judge Learned Hand's confusion over the meaning of "willfulness"):

> [Willfulness is] a very dreadful word. . . . It's an awful word. It's one of the most troublesome words in a statute that I know. If I were to have the index purged, "willful" would lead all the rest in spite of its being at the end of the alphabet.

41. *Bishop*, 412 U.S. at 361.
42. United States v. Murdock, 290 U.S. 389, 396 (1933). *See also* Morissette v. United States, 342 U.S. 246 (1952).

tration and impatience as a reaction to the tax protesters (as demonstrated by *Buckner*) would lead to the imprisonment of innocent but gullible persons for holding unapproved beliefs.

The majority's approach takes the fundamental intent requirement into consideration. Justice Scalia, however, may have taken this requirement too far in his opinion. The *Murdock-Pomponio* line of cases only supports "frank difference of opinion or innocent errors made despite the exercise of reasonable care."[43] Studying a law at length and then coming to the conclusion that it is unconstitutional cannot be characterized as an innocently gullible act that occurs absent intent.

In a move that diverges sharply from their zealous advocacy of the rights of criminal defendants, the dissenting justices would depart from the *Murdock-Pomponio* requirement of intent, supporting an "objectively reasonable" standard in the federal tax law context. Justice Blackmun, by urging a lower threshold for criminal tax prosecutions, revealed an apparent bias against this type of criminal defendant. Indeed, in another recent case, Justice Blackmun *himself* questioned the "reasonableness" standard, expressing skepticism that one person's views can be considered more reasonable than another's.[44] Certainly, our system of government should accommodate a wide variety of ideas. By asserting that no reasonable person could have believed as Cheek did, the dissent would prescribe a form of negligence standard that would convict a defendant for failing to meet a certain level of tax sophistication. The application of negligence standards should be limited to civil cases.[45] It is easy to ridicule beliefs similar to those held by Cheek, but harboring ridiculous views does not constitute criminal intent.

A second policy recognized by the Court in *Cheek* is that of ensuring all taxpayers the full protection of a jury trial. When intent is an element of an offense, its existence is a question of fact and cannot be taken from the jury simply because one's belief is on a forbidden list.[46] As the majority in *Cheek* recognized, "[w]hether a defendant has been accorded his constitu-

43. *Bishop*, 412 U.S. at 360-61 (quoting Spies v. United States, 317 U.S. 492, 496 (1943)).

44. *See* Pope v. Illinois, 481 U.S. 497, 506 (1987) (Blackmun, J., concurring in part and dissenting in part).

45. Note that "[d]egrees of negligence give rise in the tax system to civil penalties." *Bishop*, 412 U.S. at 361.

46. *See* Morissette v. United States, 342 U.S. 246 (1952).

tional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction."[47] Even when the evidence against him is overwhelming, a defendant may insist on the jury guarantee.[48]

Although the majority and Justice Scalia in *Cheek* upheld this legal guarantee, the dissent expressed its wish to abolish it. This is especially surprising coming from Justice Blackmun, who has repeatedly emphasized the importance of a jury. He has stated, for example, that preventing a jury from considering evidence should be "a rare occurrence in criminal cases."[49] Indeed, a mandatory, judge-determined presumption conflicts with the "overriding presumption of innocence with which the law endows the accused."[50] Justice Blackmun's opinion in *Cheek* shows little faith in the ability and collective wisdom of a jury to distinguish between charlatans and those with good-faith beliefs by arguing that the jury should not be able to consider the sincerity of Cheek's assertions.[51]

Because the decision merely reaffirmed a longstanding legal principle, the actual and practical effect of *Cheek* will be minimal.[52] "Tax patriots" around the country should not breathe a sigh of tax relief, because they still must convince a jury that their beliefs are sincere. Also, because the Seventh Circuit had adopted a unique approach to the "willfulness" requirement,

47. Sandstrom v. Montana, 442 U.S. 510, 514 (1979) (emphasis added). *See also* Boyde v. California, 110 S. Ct. 1190, 1203 (1990); Francis v. Franklin, 471 U.S. 307, 315 (1985).

48. *See, e.g.*, Carella v. California, 491 U.S. 263, 268 (1989) (Scalia, J., concurring); Rose v. Clark, 478 U.S. 570, 593-94 (1986) (Blackmun, J., dissenting); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977).

49. United States v. Bailey, 444 U.S. 394, 435 (1980) (Blackmun, J., dissenting). Indeed, Justice Blackmun continued in *Bailey* to assert that in an attempt to "conserve" the jury for cases that are worthy of it, the Court has "ousted the jury from a role it is particularly well suited to serve." *Id.* at 436 (Blackmun, J., dissenting).

50. *Carella*, 491 U.S. at 268 (Scalia, J., concurring) (quoting *Sandstrom*, 442 U.S. at 523). *See supra* note 48 and accompanying text.

51. The majority addressed the issue by stating that the jury, if allowed to consider the evidence, would be able to perform its most basic function and discern the guilty from the innocent. *See Cheek*, 111 S. Ct. at 611-12.

52. In the wake of the *Cheek* decision, the Supreme Court vacated and remanded a similar case, United States v. Dunkel, 900 F.2d 105 (7th Cir. 1990), *vacated and remanded*, 111 S. Ct. 747 (1991). In *Dunkel*, the Seventh Circuit held that the defendant's views that taxes are voluntary were unreasonable on an objective standard. The Seventh Circuit expressed surprise at the fact that the district court had allowed Dunkel's lawyer to argue that Dunkel believed that "taxes are voluntary" and to use that belief as a defense. The court observed: "Like the Lord High Executioner in the Mikado, we've 'got a little list' of beliefs that are objectively unreasonable . . . . We add to that list the belief that payment of income taxes is 'voluntary.' " *Dunkel*, 900 F.2d at 108.

the decision has not affected courts in most other circuits. The application of *Cheek* to other statutes may turn on whether the particular statute is so complex that a defendant may well misunderstand it.

Furthermore, one should not forget that civil sanctions can still be applied to defendants such as Cheek. In fact, Cheek has paid more than $60,000 in back taxes and interest since his conviction in 1987.[53] Criminal prosecution is but the "capstone" of this system of sanctions that exists to "provide a penalty suitable to every degree of delinquency."[54] As for the Internal Revenue Service, it certainly will not be chilled from criminally prosecuting tax evaders. Because the Service only pursues the most egregious violations, in which the "willfulness" element is clear, this decision is unlikely to inhibit the IRS.[55] In cases like *Cheek*, the defendant will probably have little hope of convincing a jury of his sincerity. Furthermore, the government may also find a silver lining in the decision. The Court made it clear that the tax protester's assertion that the tax laws are unconstitutional would not be entitled to the sincere belief defense. This may make prosecutions easier for the government in the typical "tax protester" case, in which the defense is usually based on constitutional grounds.[56]

In taking the step of remanding this case, the Court acted entirely reasonably. Hidden beneath the hoopla of Cheek's short-term victory is a decision that upholds fundamental elements of criminal tax law. The Court wisely maintained the "willfulness" requirement as necessary in complex tax cases, and it supported the fundamental right of a defendant to have a jury decide guilt or innocence.

Elizabeth J. Meiers

53. *See Tax Protester: My Way Incorrect, But Sincere*, USA Today, Jan. 11, 1991, at A2, col. 5.

54. Sansone v. United States, 380 U.S. 343, 350 (1965).

55. *See, e.g., Tax Protesters Cannot Be Jailed if Beliefs Are Sincere*, L.A. Times, Jan 9, 1991, at A1, col. 1. In 1989, the IRS audited nearly one million tax returns and assessed extra taxes and penalties on 837,423 taxpayers. Only 171 persons were criminally convicted for tax protests. *See id.*

56. *See Court Limits Definition of Willful Tax Evasion*, Wash. Post, Jan. 9, 1991, at A3, col. 1.