ABA Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Constitutional Law Committee Newsletter

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LETTER FROM THE CHAIR

James R. Wedeking

This edition of the Constitutional Law Committee's Newsletter highlights the widely diverging constitutional issues that can arise in one's environmental practice. Jacob Cremer's article discusses the takings case, *Koontz v. St. Johns River Water Management District*, which was granted certiorari by the U.S. Supreme Court in October. *Koontz* will review the nearly 20-year saga of a property developer to obtain the necessary permitting and whether the land use agency could condition approval on the performance of mitigation projects seven miles away. An article by Professor Stephen Miller examines New Jersey's vetoed bill that would have prohibited the disposal of produced water from hydraulic fracturing operations within the state. Professor Miller reviews the New Jersey Office of Legal Services' opinion that such a ban would not actually violate the dormant Commerce Clause (contrary to the opinion of Governor Christie) and examines the dormant Commerce Clause's potential impact on other state laws related to hydraulic fracturing. Maribeth Klein examines the Fourth Amendment implications of drone surveillance, a new tactic used by the Environmental Protection Agency (EPA) to search for Clean Water Act violations at concentrated animal feeding operations. Andy Jacoby writes on the due process concerns for class action toxic tort plaintiffs where they are required to litigate their claims before injuries become manifest. Lastly, Aastha Madaan reviews the D.C. Circuit's *Grocery Manufacturers Association* decision dismissing a petition for review of EPA's grant of a partial waiver for E15 because the challenging trade associations lacked standing.

These articles have two key characteristics in common. First, despite what one may initially think, a well-rounded environmental lawyer is likely to encounter all of these diverse constitutional issues—takings, Fourth Amendment, the Dormant Commerce Clause, the Fourth Amendment, the Due Process Clause, and standing—in a single career. Although we are often expected to master regulatory minutiae involving the Resource Conservation and Recovery Act (RCRA) or the Clean Air Act, we environmental lawyers cannot allow our knowledge of basic constitutional law principles learned in school to atrophy or simply believe that constitutional law is the province of a select few Supreme Court practitioners and professors. Second, each of these articles was authored by a young attorney. Several times a year we seek out articles on relevant constitutional and environmental law matters. A newsletter article is a great vehicle for younger attorneys to learn a specific aspect of the law in considerable depth, refine their writing skills (the *sine qua non* of attorneys), and help build a reputation as a knowledgeable and enterprising lawyer. And, of course, articles by seasoned veterans are always welcome. If you have an idea for an article, or would simply like to write but are unsure of a topic, please contact our newsletter vice chair, Leah Silverthorn, at lsilverthorn@woodmclaw.com.

Constitutional Law Committee Newsletter
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Leah B. Silverthorn, Editor

In this issue:

AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

February 26, 2013
Key Environmental Issues in US EPA Region 4
Atlanta, GA

March 21-23, 2013
42nd Spring Conference
Grand America Hotel
Salt Lake City, UT

April 11-12, 2013
ABA Petroleum Marketing Attorneys' Meeting
Ritz Carlton Hotel
Washington, DC

April 18, 2013
ABA Public Land Law Symposium
University of Montana Law School
Missoula, MT

April 19-21, 2013
ABA SEER Spring Council Meeting
The Resort at Paws Up
Greenough, MT

June 5-7, 2013
31st Annual Water Law Conference
Red Rock Resort
Las Vegas, NV

August 8-13, 2013
ABA Annual Meeting
San Francisco, CA

For full details, please visit www.ambar.org/EnvironCalendar

U.S. SUPREME COURT HEARS IMPORTANT FLORIDA EXACTIONS CASE

Jacob T. Cremer

These days, Florida is a hotbed of property rights litigation. Three years ago, Florida was defending its beach renourishment program before the U.S. Supreme Court. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010). That case broke new ground when a plurality of justices acknowledged that a court can take property, just as the legislative and executive branches can.

Now that the U.S. Supreme Court has heard *Koontz v. St. Johns River Water Management District*, No. 11-1447 (cert. granted Oct. 5, 2012, argued Jan. 15, 2013), environmental attorneys, constitutional scholars, and land use planners are wondering if Florida will again be on the forefront of takings law. This could be the most important decision in the world of environmental and land use permitting in years. It could draw into question common bargaining practices by governments when requesting conditions in exchange for development permits.

In the development approval process, governments commonly require a dedication of real property to mitigate adverse impacts. But what if the request is for cash or for services? What if the request is unreasonable, and the landowner cannot use the property?

Background

The Takings Clause of the Fifth Amendment to the U.S. Constitution ensures that private property cannot "be taken for public use, without just compensation." The Takings Clause was intended to bar government from forcing individuals from bearing public burdens alone. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 548 (2005). Early cases focused on physical invasions of property. As the regulatory state grew in the twentieth century, the U.S. Supreme Court began to recognize that government regulation of private property can sometimes be so onerous that it is tantamount to the government appropriating the property. *Id.*

An exaction is a government requirement to donate something in exchange for the right to develop property. Oftentimes, this is a requirement to dedicate real property. Generally, the government cannot force landowners to give up the right to exclude others from property in return for the ability to develop it. It can, however, require mitigation of adverse development impacts. The U.S. Supreme Court has given some limited guidance on how to determine whether an exaction passes constitutional muster:

1. There must be an "essential nexus" between the exaction and the interest that the exaction is advancing. *Nollan v. Cal. Coastal Com.*, 483 U.S. 825, 837 (1987).
2. There must be a "rough proportionality" in both nature and extent between the exaction and the impact of the proposed development. *Dolan v. Tigard*, 512 U.S. 374, 391 (2005).

Nollan and *Dolan* both addressed exactions of easements for public access. The U.S. Supreme Court left open whether the *Nollan-Dolan* test applied to exactions not involving real property, such as exactions for money or other personal property. Courts have differed on this question, leading to confusion among landowners, planners, regulators, and government officials.

The *Koontz* Cases

In *St. Johns River Water Management District v. Koontz*, 77 So. 3d 1220 (Fla. 2011), the Florida Supreme Court declined to recognize an exaction under U.S. Supreme Court precedent. Koontz had owned his property since 1972. He had been trying to develop his property since 1994, when he had applied to the St. Johns River Water Management District (the "District") for a permit to develop his property. All but 1.4 acres of the 14.2-acre property were in a Riparian Habitat Protection Zone. Koontz only wanted to develop 3.7 acres of the property, but he would have to fill 3.4 acres of wetlands to do so.

The District agreed to grant the permit on two conditions. First, the District required that Koontz deed the remainder of his property into a conservation area, which he agreed to do. Second, the District required that Koontz perform off-site mitigation several miles by replacing culverts and plugging drainage canals on District-owned properties seven miles from his property, which Koontz refused.

When the District then denied the permit, Koontz sued in state court, arguing that the District's off-site mitigation condition was an unconstitutional exaction because it violated the *Nollan-Dolan* test. The case bounced around between the trial court and the intermediate appellate court for years, producing some important takings jurisprudence in Florida. Ultimately, the trial court found that the District had taken Koontz's property through an unconstitutional exaction because the condition was not related to the impacts of his project. The intermediate appellate court affirmed.

The Florida Supreme Court reversed, holding there was no taking. The court explained that the *Nollan-Dolan* test only applied to exactions of real property, where a permit was actually issued imposing the onerous exaction. The court acknowledged a line of cases applying the *Nollan-Dolan* test beyond real property exactions, but it held that these cases went beyond the U.S. Supreme Court's decisions. The court also pointed to *Monterev v. Del Monte Dunes at Monterev, Ltd.*, 526 U.S. 687 (1999), and *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), to support its conclusion that the *Nollan-Dolan* only applies when the government actually issues the permit that is sought because only then is the owner's property interest subject to dedication.

Finally, even though the court denied the property owner's claim, it expressed a public policy concern for other developers and landowners. It worried that "agencies will opt to simply deny permits outright without discussion or negotiation rather than risk the crushing costs of litigation. Property owners will have no opportunity to amend their applications or discuss mitigation options because the regulatory entity will be unwilling to subject itself to potential liability. Land development in certain areas of Florida would come to a standstill. We decline to approve a rule of law that would place Florida land-use regulation in such an unduly restrictive position." *Koontz*, 77 So. 3d at 1231.

Consequently, the Florida Supreme Court held there was no taking because (1) no permit was ever issued, (2) the exaction did not demand real property, and (3) public policy precluded expansion.

The U.S. Supreme Hears *Koontz*

On October 5, 2912 the U.S. Supreme Court granted certiorari, and it heard oral argument on January 15, 2013. Koontz's petition asks the Court to establish the following:

1. The *Nollan-Dolan* exactions test applies to exactions other than real property, such as where a permit applicant is required to pay for work; and
2. The *Nollan-Dolan* exactions test applies even where a permit is denied because an applicant rejects an exaction.

Koontz argues that the Court does not have to stretch far to make such a ruling, as it has held in other contexts that government may not withhold discretionary benefits on the condition that the beneficiary surrender a constitutional right. Koontz also argues that both of these issues need to be settled by the Court because the law on these issues has developed such a split across the country that courts facing the issue are having to choose a side, necessitating clear guidance from the Court.

The District, on the other hand, argues that the Court does not have jurisdiction because Koontz only brought state law claims in state courts (not federal claims). Echoing the Florida Supreme Court, the District also argues it did not exact or take anything because it never issued a permit or collected an exaction.

Early on, there were reasons to think that this case would be important for planners and land use lawyers to watch. First, the Pacific Legal Foundation, which is

representing Koontz, has shown a knack for litigating environmental and property rights cases before the U.S. Supreme Court, having participated in more than half a dozen landmark decisions. Indeed, it argued and won *Nollan*, and in March of this year, it won *Sackett v. EPA*, 566 U.S. __ (2012), which gave property owners the right to take the Environmental Protection Agency ("EPA") to court over a compliance order dealing with wetlands. Second, this case is positioned well as a vehicle for the Court's property rights advocates, as it seems to present the review of a clean issue of law, rather than a messy fact-specific or jurisdictional fight. Justices Scalia, Kennedy, and Thomas have shown an interest in the past in the timing of permit conditions. *See Lambert v. San Francisco*, 529 U.S. 1045, 1048 (2000) (dissenting from denial of certiorari).

Reading the tea leaves of oral arguments at the Supreme Court is always a dangerous business. That said, I and others have made several observations. First, Justice Scalia, who the landowner almost certainly needs to win a majority, seemed critical of whether anything had actually been taken. Second, while a majority of the Justices appeared at least somewhat sympathetic to the landowner's plight, there was little agreement amongst them in terms of whether there was a constitutional harm and, if so, what the remedy to it should be. Finally, the reach of the unconstitutional conditions doctrine, which Nollan, Dolan, and Lingle indicate is the origin of exactions law, took center stage. This notoriously murky doctrine stands for the proposition that [a]cts generally lawful may become unlawful when done to accomplish an unlawful end, and a constitutional power cannot be used by way of condition to attain an unconstitutional result." Frost v. R.R. Comm'n of Cal., 271 U.S. 583, 598-99 (1926). The Supreme Court has traditionally struggled with appropriate breadth of this doctrine, and they appear to be struggling with it in this case, as well.

Jacob T. Cremer is an attorney at Bricklemyer Smolker, P.A., in Tampa, Florida. His practice focuses on property rights, environmental, and land use law. He assisted counsel of record before the U.S. Supreme Court for the landowner-petitioners in *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 130 S. Ct. 2592 (2010). He co-authored an amicus brief in support of the landowner-petitioner in *Koontz* and attended oral argument. Follow the developments on this case and others at his blog, the Florida Land Environment, www.jacobtcremer.com.

HYDRAULIC FRACTURING AND THE EMERGENT DORMANT COMMERCE CLAUSE

Stephen R. Miller

I. Introduction

While questions as to the scope of the Commerce Clause attracted the legal spotlight in last spring's health-care debate and the resulting decision in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572, 183 L. Ed. 2d 450 (2012), it is the "negative implications" of the Commerce Clause, commonly referred to as the "dormant" Commerce Clause, that appear primed to play an outsized role in current and upcoming environmental litigation. Notably, in *Rocky Mountain Farmers Union v. Goldstene*, 843 F. Supp. 2d 1042, 1048 (E.D. Cal. 2011), a district court recently held that California's low carbon fuel standard, arguably one of the most important actions taken to address climate change in the country, violated the dormant Commerce Clause, and the case is presently on appeal to the Ninth Circuit as of this writing. *Rocky Mountain Farmers Union v. Goldstene*, No. 12-15131 (9th Cir. filed Jan. 20, 2012). Others anticipate that California's broader climate change regulatory scheme, including its cap-and-trade program, will likely face future dormant Commerce Clause claims. *See* Richard Frank, *Previewing This Week's Constitutional Battle over California's Low Carbon Fuel Standard*, Legal Planet: The Environmental Law and Policy Blog (Oct. 15, 2012), *available at* http://legalplanet.wordpress.com/2012/10/15/previewing-this-weeks-constitutional-battle-over-californias-low-carbon-fuel-standard/. That would be nothing new for California, which has long had to withstand dormant Commerce Clause challenges from industry groups and other parts of the country seeking to invalidate the state's stringent environmental standards. *See, e.g.*, *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (remanding for hearing on whether diesel fleet rules were valid independent of California-specific Clean Air Act exemption), *aff'd*, 498 F.3d 1031, 1035 (9th Cir. 2007) (upholding diesel fleet rules in part on market participant exception to dormant Commerce Clause).) But in September, the dormant Commerce Clause dramatically entered another key environmental debate, this time across the country, when New Jersey Governor Chris Christie vetoed a proposed ban on the disposal of hydraulic fracturing (fracking) wastewater in the Garden State on the grounds that such a ban would violate the dormant Commerce Clause. This article will use the New Jersey controversy, arguably the most elaborate public debate on fracking and the dormant Commerce Clause, to tease out how this legal doctrine could affect the fracking industry and attempts to regulate it. This article will then consider other potential fracking scenarios, including several in Ohio, Pennsylvania, and Vermont, which may also implicate the dormant Commerce Clause. This article will conclude by reflecting on how the debate on fracking and the dormant Commerce Clause may inform environmental litigation more broadly.

II. Dormant Commerce Clause Arguments on New Jersey's Proposed Fracking Wastewater Ban

The political debate over fracking in New Jersey began in earnest on January 27, 2012, when Governor Christie signed into law a one-year moratorium on hydraulic fracturing in New Jersey and required the New Jersey Department of Environmental Protection to conduct an investigation into whether fracking could have or is likely to have an adverse impact on New Jersey's air and water quality. 2011 N.J. Sess. Law Serv. ch. 194, § 1, *available at* http://www.njleg.state.nj.us/lawsconstitution/chap.asp. The moratorium's findings listed two reasons for its enactment: first, "the process of hydraulic fracturing for natural gas exploration and production has been found to use and release a variety of chemicals and materials that, if introduced into the air, surface waters, or ground water of the State, raise concerns about potential contamination and pollution"; and second, although "[h]ydraulic fracturing is not occurring and is unlikely to occur in New Jersey in the foreseeable future," it was still "prudent . . . to declare a moratorium on hydraulic fracturing in New Jersey in order to conduct an investigation into whether hydraulic fracturing could have or is likely to have an

adverse impact on air and water quality in this State." *Id.*

On June 25, 2012, while the moratorium was still in place, both houses of the New Jersey Legislature passed Assembly Bill 575 (A575), which provided, in relevant part, that "[n]o wastewater, wastewater solids, sludge, drill cuttings or other byproducts resulting from hydraulic fracturing for the purpose of natural gas exploration or production in any state may be treated, discharged, disposed of, or stored in the [New Jersey]." A. 575 § 3, 2012–13 Leg. Sess. (N.J. 2012), *available at* http://www.njleg.state.nj.us/bills/bills0001.asp. For purposes of this article, all of the regulated materials in the New Jersey A575 bill will be referred to as "wastewater."

Section 1 of A575 includes a lengthy list of concerns regarding hydraulic fracturing fluid, including the chemicals injected into the wells and the amount of water used in the process, that the legislature believed to pose "financial, operational, health, and environmental risks to the citizens of the State." Briefly, the bill stated that the ban was supported by findings that fracking uses "a variety of contaminating chemicals"; fracking uses "vast quantities of water"; companies engaged in fracking have been "less than forthcoming in revealing the 'cocktail' of chemicals" used; chemicals used would "interfere with the processes of wastewater treatment plants"; "radioactive materials" have been found in "fairly high concentrations" in fracking wastewater and that wastewater treatment plants cannot treat for radioactivity; and related ultimate findings that these basic facts pose a risk to the health, safety, and welfare of the state of New Jersey. A575 § 1.

On September 21, 2012, however, Governor Christie vetoed A575 despite his earlier support of the moratorium. *See* State of New Jersey Governor Chris Christie, *Veto Message A-575* (last visited Oct. 29, 2012), *available at* http://www.state.nj.us/governor/news/news/552012/approved/20120921a.html. In his comments accompanying his veto of the bill, Governor Christie made special reference to the findings of the moratorium, noted previously, that "[h]ydraulic fracturing is not occurring and is unlikely to occur in New Jersey in the foreseeable future." *Id.* at 2. Based upon this fact, Governor Christie further reasoned as follows:

> The lack of frackable shale formations in New Jersey is directly relevant to Assembly Bill No. 575 and is why, based on advice from the Office of the Attorney General, I must return this bill without my signature due to its unconstitutional nature. Because the nation is one common market in which state lines cannot be barriers to commerce, the Dormant Commerce Clause of the United States Constitution limits a state's ability to regulate interstate commerce.
> . . .
> Although the bill is, on its face, neutral in that it seemingly applies to Waste from "any State," the undisputed fact, agreed to by the Legislature, that Fracking "is not occurring and is unlikely to occur in New Jersey," demonstrates beyond a doubt that this ostensible evenhandedness is superficial. Because no Fracking Waste is being produced in New Jersey, nor is it likely to be produced in New Jersey in the foreseeable future, any Waste subject to this bill must be generated out-of-state.

Id. Although Governor Christie purportedly acted on advice from the New Jersey Office of the Attorney General, research for this article uncovered no public memorandum from the Attorney General to the Governor, nor has that Office provided any public analysis of the issue of its own devise. As a result, the above appears to be all of the legal analysis yet marshaled in support of Governor Christie's legal claim that the proposed bill would violate the dormant Commerce Clause. This analysis accompanying the Governor's veto caused substantial political tumult in New Jersey, with a number of groups challenging the Governor's legal assertions. *See, e.g.*, Sierra Club: New Jersey Chapter, Fracking Override: Legislature Needs to Stand Up to Christie & Stand for Clean Water (last visited Oct. 29, 2012), *available at* http://newjersey.sierraclub.org/PressReleases/0389.asp. Some environmental groups are even pushing for a legislative "override" of the Governor's veto. *Id.*

Evaluating the Governor's legal claims on fracking is speculative at this point since, as of this writing, no court decision has addressed the issue of how the disposal of fracking wastewater may be circumscribed, or enabled, by the dormant Commerce Clause. Arguably the most significant public legal analysis of the issue thus far is an initially privileged advisory legal opinion provided by the New Jersey Office of Legislative Services (OLS Opinion) to a state senator involved in the drafting of A575 and its accompanying state senate legislation. After Governor Christie's veto, the OLS Opinion was publicly released by the legislators who requested it. (Contact the author for a copy of the OLS Opinion). The OLS Opinion is valuable because it provides a road map for how regulators seeking to limit fracking wastewater disposal could frame the dormant Commerce Clause issues, and also provides the most detailed public analysis of the dormant Commerce Clause for fracking to date. As such, the OLS Opinion's framing of the dormant Commerce Clause fracking issues is reviewed in detail below.

III. The New Jersey OLS Opinion on the Dormant Commerce Clause and Fracking

The OLS Opinion presents a concise and useful summary of how the Supreme Court has addressed dormant Commerce Clause issues, and as such, is excerpted here as a guide to such analysis. As a threshold matter, the OLS Opinion begins by noting that the Commerce Clause provides that "Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. The Constitution does not in terms limit the power of states to regulate commerce, but the Supreme Court has long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute. *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338–39 (2007). These "negative implications" of the Commerce Clause are often referred to as the dormant Commerce Clause. *See, e.g.*, *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 417 n.6 (1994). Leading scholars have asserted, and had such assertions seconded by the Supreme Court, that the function of the dormant Commerce Clause doctrine is to ensure national solidarity, not economic efficiency. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 417 (2d ed. 1988) ("[T]he negative implications of the commerce clause derive principally from a political theory of union, not from an economic theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency.").

The OLS Opinion summarized the Dormant Commerce Clause standard of review as follows:

> Even though states are prevented from regulating in certain ways that interfere with interstate commerce, they may make laws governing matters of local concern which may to some degree affect interstate commerce. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). The courts impose two levels of scrutiny when determining whether a state has overstepped its role in regulating interstate commerce. *Maine v. Taylor*, 477 U.S. 131 (1986). If a state law discriminates against interstate commerce, on its face or in effect, the state must demonstrate that it serves a legitimate local purpose and that the purpose cannot be served by an available nondiscriminatory means. *Id*. at 138; *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). In those cases where the state law or regulation has been found to discriminate against out-of-state interests in favor of in-state interests, the courts give heightened scrutiny with a virtually *per se* rule of invalidity. *Philadelphia*, 437 U.S. at 624; *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). However, if a state law regulates evenhandedly to effectuate a legitimate local purpose and its effects on interstate commerce are incidental, then the courts use a balancing test to weigh whether the burden on interstate commerce is excessive in relation to the local benefits. *United Haulers Ass'n, Inc.*, 550 U.S. at 346; *Pike v. Bruce Church*, 397 U.S. 137 (1970).

OLS Opinion at 2. In practice, dormant Commerce Clause analyses are highly fact dependent, and so any application of this standard of review necessarily turns on detailed factual analysis. *Id.* at 1. Since a legislative record was not established at the time of the OLS Opinion, OLS instead made factual assumptions based upon then-existing testimony in hearings about the bill. Much of that testimony was similar to, and most likely informed, the findings in the version of A575 passed by the New Jersey State Legislature.

In applying the above dormant Commerce Clause standard of review to the facts, the OLS Opinion outlined a four-part approach. OLS Opinion opined that

> the courts first examine whether the law discriminates against interstate commerce. The courts look at whether the law treats in-state economic interests the same as out-of-state economic interests. *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon*, 551 U.S. 93 (1994). A state law may violate the Commerce Clause if it discriminates on its face, has a discriminatory purpose, or results in a discriminatory effect. *Eastern Kentucky Resources v. Fiscal Court of Magoffin County*, 127 F.3d 532 (6th Cir. 1997); *Norfolk Southern Corp.*, 822 F.2d at 400.

Id. at 2. In reviewing A575, the OLS Opinion noted that the bill was facially evenhanded, treating both in-state and out-of-state wastewater resulting from fracking equally: it prohibited both. *Id.* at 3. The OLS Opinion then analyzed the argument of Governor Christie that the effect of the bill, even if evenhanded on its face, is to ban only out-of-state wastewater because there is presently no fracking in New Jersey, and none is foreseen. *Id.* In response, the OLS Opinion opined that Supreme Court case law has indicated that heightened scrutiny is not appropriate simply because only out-of-state businesses are affected. *Id.* (citing *Exxon Corp. v. Gov. of Md.*, 437 U.S. 117 (1978) (prohibition on petroleum companies from owning gas stations upheld even though none of those companies operated in-state). Further, the OLS Opinion noted that in *Philadelphia v. New Jersey*, a case that struck down the state's efforts to prevent the in-flow of out-of-state garbage waste, the Supreme Court had noted that New Jersey could have pursued its legislative ends by slowing the flow of *all* waste into the state's remaining landfills. OLS Opinion at 3 (citing *City of Philadelphia v. New Jersey*, 437 U.S. 617, 625 (1978)). In *Philadelphia*, the Court had stated in *dicta*, "[I]t may be assumed as well that New Jersey may pursue [its environmental objectives] by slowing the flow of all waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *Philadelphia*, 437 U.S. at 625. It is notable that Governor Christie's analysis did not address this major exception, especially as it applied directly to the state of New Jersey, and so it is unclear whether he, or the Attorney General on whom he purportedly relied, would have any response to the applicability of *Philadelphia* to the fracking ban. The Court's concertedly clear language in *Philadelphia* would appear on its face to pose a problem for the Governor's analysis.

Governor Christie's analysis also appears to have stopped short of the entire analysis the Supreme Court typically deploys in reviewing dormant Commerce Clause claims. The OLS Opinion continued to evaluate the issue, however, outlining the manner in which the Court has proceeded in previous cases. The second step in dormant Commerce Clause analysis, the OLS Opinion opined, occurs "[i]f a state law does not discriminate against interstate commerce and regulates evenhandedly," in which case, "the courts will uphold it unless the burden imposed on the course of interstate commerce outweighs the state regulatory concern. *Pike*, 397 U.S. at 142. If the burden on interstate commerce is clearly excessive in relation to the putative local benefits, then the courts will invalidate the state regulation. *Id.*" OLS Opinion at 3.

The OLS Opinion noted that previous case law has recognized local government's legitimate interest in regulating matters affecting the public health, safety, and welfare as long as the burden imposed is not clearly excessive in light of the putative local benefits, and that the Commerce Clause does not displace the states' authority to shelter their people from menaces to health and safety. *Id.* At the time of the OLS

Opinion, the version of the bill reviewed by OLS did not have a purpose clause. However, on the basis of testimony before various state legislative subcommittees, OLS determined that the purpose of the law was environmental protection, which it opined would likely be considered a legitimate state purpose. *Id.* Subsequent to the OLS Opinion, purpose clauses were written into the bill that, at the time of its signing, included extensive discussion of potential environmental effects from wastewater, as outlined previously. *See* A575 § 1. Presuming that a court would either defer to such findings or find them credible in a more probing analysis, the OLS Opinion opined that A575 would likely meet this test.

The third step in the Dormant Commerce Clause analysis, the OLS Opinion opined, was that:

> Once a legitimate local purpose is established, it is necessary to evaluate the extent of the burden that the proposed legislation places on interstate commerce. The courts have recognized that even purely intrastate regulation may have some effect on interstate commerce, without rising to a violation of the Commerce Clause. *Huron Portland Cement*, 362 U.S. at 443. Therefore, the relevant inquiry in a Commerce Clause analysis in determining whether the burden imposed by an evenhanded regulation is incidental is whether greater costs are imposed on out-of-state interests as compared to in-state interests. *Norfolk Southern*, 882 F.2d at 406.

OLS Opinion at 4. Relying again upon the Court's opinion in *Philadelphia v. New Jersey*, in which the Court stated that New Jersey could pursue its purported legislative goals by slowing the flow of all waste, regardless of its origin, the OLS Opinion opined that the bill's language prohibiting disposal of all wastewater would similarly pass constitutional muster. *Id.* at 4–5. Although not explicitly discussed in the OLS Opinion, it is worth noting in this part of the analysis that the *Philadelphia* court did also explicitly affirm that even hazardous wastes, as hydraulic fracturing wastewater may be considered if the findings in A575 are true, are likely still commerce and subject to the dormant Commerce Clause. As the *Philadelphia* Court noted, "All objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." 437 U.S. 617, 622 (1978). However, in several cases, "the Court held . . . that because the articles' worth in interstate commerce was far outweighed by the dangers inhering in their very movement, States could prohibit their transportation across state lines." *Id.* As a result, although not discussed by the OLS Opinion, the dangers inhering in movement of hazardous materials may be another rationale proffered for restricting the interstate flow of fracturing wastewater, although such potential bans on this basis would require evidence that the mere movement of the wastewater constitutes a potential hazard. *See* Rotunda & Nowak, 2 Treatise on Const. L. § 11.8(h) (5th ed. 2012).

Fourth, and finally, the OLS Opinion noted that "it is necessary to evaluate whether the purposes of the legislation could be accomplished as well by other means which would have a lesser impact on interstate commerce. The extent of the burden that will be tolerated by the courts depends on the nature of the local interest, and whether the local interest could be promoted with a lesser impact on interstate activities. *Minnesota*, 449 U.S. at 471." OLS Opinion at 5. At the time of the OLS Opinion, there was no official legislative history, but relying upon subcommittee testimony, OLS opined that it was unlikely that a court would find that the purposes of the legislation could be achieved by another, less burdensome means because of the perceived uniqueness of fracking wastewater compared to other industrial wastewater due to its varied and unknown chemical constituents as well as its potential radioactivity, as well as the state's reliance on surface waters for drinking water. *Id.* These assumptions, later reflected in the findings of A575, however, may be up for debate, and may change as more is learned about fracking fluids, as well as new methods that could occur for treating the wastewater. As a result, a court analyzing this step would likely seek detailed factual data on the environmental impacts of fracking, treatment of fracking wastewater, and alternatives, broadly conceived.

Whether the OLS Opinion, based upon an incomplete record, could be substantiated on the basis of facts in a

court ruling is speculative; however, the OLS Opinion does make clear that Governor Christie's assertion that A575 violates the dormant Commerce Clause is at least supported by an incomplete analysis of the dormant Commerce Clause and the attendant facts necessary to complete such an analysis. Collectively, though, Governor Christie's comments accompanying his veto of A575, the factual findings of A575, and the OLS Opinion analyzing anticipated facts about fracking wastewater in accordance with established dormant Commerce Clause jurisprudence provide a thumbnail sketch of how a reviewing court could analyze dormant Commerce Clause fracking issues.

IV. Fracking Regulations in Other States That May Implicate Dormant Commerce Clause Issues

While the New Jersey political scramble over fracking appears to be the first time that the dormant Commerce Clause has been extensively debated in the fracking wars, other fracking scenarios across the country may potentially be affected by the dormant Commerce Clause. Perhaps no better examples exist than the issues arising last year on Ohio's eastern border with Pennsylvania, and Vermont's recently passed ban on fracking, including fracking wastewater disposal, in a state that, similar to New Jersey, has no existing fracking operations.

Between March and December of 2011, eleven earthquakes shook northern Ohio, most registering a magnitude between 2.1 and 2.7, in an area with no previous earthquakes on record. Henry Fountain, *Disposal Halted at Well After New Quake in Ohio*, N.Y. Times (Jan. 1, 2012), *available at* http://www.nytimes.com/2012/01/02/science/earth/youngstown-injection-well-stays-shut-after-earthquake.html. A December 2011 quake registered a magnitude of 4.0, strong enough that it would likely rattle nerves of even earthquake-savvy Californians, and perhaps even more so in northern Ohio, a region where buildings are not built to withstand seismic activity. *Id.* The earthquakes were all centered near a well used for the disposal of millions of gallons of brine and other waste liquids produced at natural gas wells, mostly in Pennsylvania, and injected under pressure into a 9200-foot-deep Ohio well. *Id.* Scientists suspected that some of the wastewater might have migrated into deeper rock formations, allowing an ancient fault to slip. *Id.* At the time of the earthquakes, Ohio had 177 active injection wells, all mostly depositing produced water from Pennsylvania fracking operations. *Id.*

Although there were calls for a moratorium on fracking in Ohio, instead Ohio passed Ohio Senate Bill 315, which added regulations to injection wells, but did not outlaw them. S. 315, 129th Gen. Assemb. (Ohio 2012), *available at* http://www.lsc.state.oh.us/statusreport/default.htm; *see also* Ohio Dep't of Natural Resources, *Senate Bill 315: Improving Regulatory Framework*, *available at* http://www.dnr.state.oh.us/tabid/23947/Default.aspx. For purposes of this discussion, however, it is of particular interest that the wastewater was generated in Pennsylvania but injected into wells in Ohio. While Ohio's approach of increasing regulation rather than instituting a moratorium or a ban is unlikely to invite dormant Commerce Clause scrutiny, what if Ohio had (1) outright banned injection of all fracking wastewater in Ohio, or (2) banned only the injection of fracking wastewater generated from wells outside of Ohio? Would either of these actions have violated the dormant Commerce Clause?

Such questions may arise sooner than later. With the extent of fracking operations across the country apparently ever-increasing, other states may be tempted to place bans on out-of-state fracking wastewater, especially if the receiving state is not a state where fracking can occur, and thus a state is clear it will not be the beneficiary of the riches fracking itself can bring. First, New Jersey's legislation is unlikely to disappear, and the bill vetoed by Governor Christie could easily be enacted with a change in the governorship of that state, or even with a legislative override of that veto as urged by some environmental groups.

But the future that may await New Jersey is arguably already here in the state of Vermont. On May 16, 2012, Vermont became the first state to ban hydraulic fracturing when Vermont House Bill 464 was signed

into law by Governor Peter Shumlin. H. 464, 2012 Leg. (Vt. 2012), *available at* http://www.leg.state.vt.us/docs/2012/Acts/ACT152.pdf. In addition to banning fracking, the Vermont law also provides that "[n]o person within the state may collect, store, or treat wastewater from hydraulic fracturing." *Id.* In the debate over the bill, key among the concerns was whether the outright ban would violate the dormant Commerce Clause because, as in New Jersey, Vermont has no existing fracking taking place, none is proposed, and there is no information indicating that Vermont has natural gas deposits that would prove viable for fracking. *See, e.g.*, Terri Hallenbeck, *Vermont Governor Signs Bill Banning Hydraulic Fracturing*, Burlington Free Press (May 16, 2012), *available at* http://www.nofracking.com/blog/Vermont-Governor-Signs-Bill-Banning-Hydraulic-Fracturing/; Carl Etnier, *Vermont First State in Nation to Ban Fracking for Oil and Gas*, VTDigger (May 4, 2012), *available at* http://vtdigger.org/2012/05/04/vermont-first-state-in-nation-to-ban-fracking-for-oil-and-gas/. These facts alone may insulate Vermont's fracking ban from attack because it could prove difficult for any challengers to establish standing. Independent of that issue, however, although the publicly disclosed analysis of the dormant Commerce Clause issues in Vermont did not reach the heightened pitch it did in New Jersey, it very well may, especially if its ban becomes a model for other states, or even if such a ban is enacted in a state with large proven natural gas reserves, which neither Vermont nor New Jersey have.

At the very least, it appears that Vermont is in an identical factual situation to New Jersey: it has no existing fracking industry and no foreseeable fracking activity on the horizon. If Governor Christie is accurate in his analysis, presumably Vermont's ban on fracking wastewater would violate the dormant Commerce Clause, as well. As noted previously, however, Governor Christie's analysis is at best incomplete. The thorough review of the OLS Opinion more accurately represents the approach taken by the Court thus far in reviewing dormant Commerce Clause challenges. In this author's view, the OLS Opinion is representative of the Court's reasoning that would likely have saved the fracking wastewater ban that was proposed for New Jersey, if it had been enacted, as well as the existing Vermont fracking wastewater ban, from dormant Commerce Clause challenges.

V. Concluding Remarks

If a dormant Commerce Clause claim challenging a fracking wastewater ban were to reach the Supreme Court, it is unclear whether fracking proponents would meet a receptive Court. In addition to the Court's traditionally liberal wing, which one might imagine as being sympathetic to environmental protection statutes, the Court's most conservative justices, which might be expected to be friends of industry proponents, have nonetheless expressed particular antipathy for the dormant Commerce Clause doctrine. Justice Scalia, most prominently among the Court's sitting justices, has long disdained the reach of the dormant Commerce Clause, noting in a dissent, "the so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain. The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348, 127 S. Ct. 1786, 1798, 167 L. Ed. 2d 655 (2007) (Scalia, J., dissenting) (quotations omitted). And while Justice Scalia seeks to limit the reach of the dormant Commerce Clause, Justice Thomas has openly called for eliminating the doctrine in its entirety, stating in a dissent, "The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application." *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 610, 117 S. Ct. 1590, 1615, 137 L. Ed. 2d 852 (1997) (Thomas, J., dissenting). As a result, even if we assume that Governor Christie's analysis is correct that A575 violates the dormant Commerce Clause, he could not be certain that, upon review, even the Court's conservative wing would be reliable votes in finding the dormant Commerce Clause to prohibit the type of environmental regulation proposed by the New Jersey State Legislature in A575. For fracking, and other forms of environmental litigation proceeding on dormant Commerce Clause theories, the irony of the

conservative justices' hostility to this legal doctrine may well be that those justices most sympathetic to the regulated industry's claims also maintain legal proclivities that may urge them to limit the reach of the dormant Commerce Clause. This irony alone may be the undoing of an increasingly popular tool to challenge environmental regulations, or alternatively, an invitation to those justices who previously assailed the dormant Commerce Clause to revisit such convictions.

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QUICK TELECONFERENCE

U.S. EPA'S BOILER MACT AND CISWI RULES: WHAT YOU AND YOUR CLIENTS NEED TO KNOW FOR COMPLIANCE NOW THAT THE RECONSIDERATION PROCESS IS COMPLETE

Wednesday, February 13, 2013
12:00 p.m. – 1:30 p.m. Eastern Time

Program Overview:
U.S. EPA's air toxics standards for industrial boilers and incinerators have been a long time coming, starting with the initial rules in 2004, which were vacated and reissued by the Agency in March 2011, only to be immediately reconsidered and reproposed at the end of 2011. EPA has now finalized its rules following reconsideration and compliance timelines are starting. Find out what you need to know about these rules for planning compliance for existing and new units, what EPA changed, and what remained the same.

Moderator:
Shannon S. Broome, Katten Muchin Rosenman LLP, San Francisco Bay Area and Washington, DC

Panelists:
Lisa Jaeger, Bracewell & Giuliani LLP, Washington, DC
Robert Wayland, U.S. Environmental Protection Agency, Research Triangle Park, NC

For full details, visit:
http://www.americanbar.org/calendar/2013/02/u_s_epa_s_boilermactandciswirules.html

EPA DRONES IN THE SKY—FROM FICTION TO FACT?

Maribeth Klein

This past June, the media was filled with reports that the U.S. Environmental Protection Agency (EPA) was flying drones over the Midwest to spy on American citizens. The less sensational truth that eventually came out after public outcry, including a letter to EPA from Nebraska's congressional delegation, revealed that EPA had conducted manned aerial flights over concentrated animal feed operations (CAFOs) in search of visual evidence of Clean Water Act violations. Nonetheless, the hubbub presented an opportune time to review Fourth Amendment jurisprudence on warrantless aerial surveillance and assess whether EPA could use drone technology to enforce environmental laws and regulations.

The Supreme Court Upheld EPA's Authority to Conduct Aerial Surveillance over 25 Years Ago

As EPA pointed out in a letter defending its aerial surveillance of CAFOs, its authority to conduct warrantless aerial surveillance is firmly rooted in the Supreme Court's decision in *Dow Chemical Co. v. United States*, 106 S. Ct. 1819 (1986). EPA, Letter to Senator Ben Nelson dated June 11, 2012, *available at* http://www.epa.gov/region07/water/cafo/pdf/cafo_sen_nelson_letter.pdf. In *Dow Chemical*, EPA conducted aerial surveillance of Dow's roughly 2000-acre facility without a warrant or Dow's knowledge or permission. An EPA-hired commercial aerial photographer used a standard, floor-mounted precision aerial mapping camera to take photos of Dow's facility at 12,000, 3,000, and 1200 feet. At all times the plane was lawfully within navigable airspace. When Dow became aware of EPA's surveillance, it filed suit claiming, among other things, that EPA had exceeded its statutory investigative authority and violated Dow's Fourth Amendment constitutional right against unreasonable searches. 106 S. Ct. at 1822.

The Supreme Court upheld EPA's authority to conduct aerial surveillance under the Clean Air Act. The Court

reasoned that "regulatory or enforcement authority generally carries with it all modes of inquiry and investigation traditionally employed or useful to execute the authority granted." *Id.* at 1824. Thus, EPA did not need an explicit grant of authority to conduct aerial surveillance or other methods of surveillance commonly available to the public at large. *Id.*

The Supreme Court also concluded that EPA's warrantless surveillance was constitutional. Dow had argued the open areas between its manufacturing buildings and structures should be treated as "industrial curtilage" and given constitutional protection equivalent to the curtilage of a private home—that area adjacent to the home that, although out of doors, requires a search warrant because it is where "intimate activity associated with the sanctity of home and the privacies of life" takes place. *Id.* at 1825; *United States v. Oliver*, 104 S. Ct. 1735, 1745 (1984) (defining curtilage). The Court disagreed, likening the space between the structures and buildings of a manufacturing plant to an "open field" that does not require a warrant. *Dow Chemical*, 106 S. Ct at 1825–26.

The Court also found that EPA's use of a commonly available precision mapping camera did not render the surveillance unconstitutional because it was "not so revealing of intimate details" such as human faces, secret documents, or objects as small as ½-inch in diameter such as a class ring. *Id.* at 1826–27 n.5. At the same time, the Court noted that more serious and different constitutional concerns would have arisen had EPA employed a unique sensory device that could penetrate the walls of buildings and record conversations in Dow's plants, offices, or laboratories. *Id.* at 1827.

A Warrant May Be Required Where the Technology Is Not Generally Available

Dow Chemical left open the question of whether EPA may use sophisticated surveillance equipment not generally available to the public without first obtaining a warrant. *Id.* Fifteen years later, in *Kyllo v. United States*, 121 S. Ct. 2038 (2001), the Supreme Court held that the use of a thermal imaging device aimed at a private home from a public street to detect relative amounts of heat within a home without a warrant violated the Fourth Amendment. The Court explained that using sense-enhancing technology to obtain information about the interior of a home that could not otherwise have been obtained without physical intrusion into a constitutionally protected area was an unreasonable search, at least where the technology in question was not in general use. 121 S. Ct. at 2043. The *Kyllo* decision indicates that some areas of a business may be protected against warrantless searches using sense-enhancing technology to discover intimate details about the interior of a business, provided that the sense-enhancing technology in question is not generally available.

Any constitutional prohibition on the use of sense-enhancing technology that is not generally available to conduct surveillance out of doors, however, is tempered by the long-standing "open fields" doctrine—the doctrine that says there is no constitutional expectation of privacy in activities conducted out of doors, except in the area immediately surrounding the home. *Oliver*, 104 S. Ct. at 1741. Moreover, a field need neither be "open" nor a "field" as those terms are used in common speech to be considered an "open field" for Fourth Amendment purposes. *Id.* at 1742 n.11. Thus, as the *Dow Chemical* case demonstrated, the Supreme Court has significant leeway to determine where an open field ceases and protected curtilage begins. *See Dow Chemical*, 106 S. Ct. at 1825.

Drones as Generally Available Technology

Drone technology (aka "unmanned aircraft systems ("UAS")" or "unmanned aerial vehicles ("UAV")") ranges from the Predator B drone—now familiar as a result of U.S. military operations in Afghanistan and Pakistan as well as on U.S.-Mexico border—to "hummingbirds." American Civil Liberties Union, *Protecting Privacy from Aerial Surveillance: Recommendations for Government Use of Drone Aircraft* Dec. 2011) (ACLU Drone Report) at 3, *available at* http://www.aclu.org/files/assets/protectingprivacyfromaerialsurveillance.pdf. The Predator B drone has a wingspan of 66 feet, and can stay aloft for over 30 hours and reach an altitude of

approximately 55,000 feet. By comparison the tiny Nano Hummingbird has a wingspan of 6.5 inches and can hover for about 8 minutes, and can as its name suggests fly in all directions. *Id.* at 3–4. The surveillance technology that has been developed or is likely to be developed includes high-power zoom lenses, night vision, see-through imaging, and video analytics to track individuals or vehicles. *Id.* at 5–6. Although the full array of drone technology has certainly not made its way to the civilian market, a quick Internet search shows a selection of drones available for the relatively low cost of $7000 to $13,600 (camera/video not included). *See, e.g.*, RobotShop, http://www.robotshop.com/unmanned-aerial-vehicles-uav.html; MarcusUAV Inc., http://www.marcusuav.com/.

There is no evidence that EPA has employed drone technology to date; however, law enforcement use of drone technology has already begun. Drones are being used for scientific research, search and rescue, and border protection, including the notorious crackdown on a North Dakota cattle rustler. ACLU Drone Report at 6–8; U.S. News and World Report, *First Man Arrested with Drone Evidence Vows to Fight Case* (Apr. 9, 2012), *available at* http://www.usnews.com/news/articles/2012/04/09/first-man-arrested-with-drone-evidence-vows-to-fight-case.

Within the next decade, civilian drones will likely be commonplace in U.S. airspace. The FAA (Federal Aviation Administration) Modernization and Reform Act of 2012 (2012 Reauthorization) requires the FAA to safely integrate drones into federal airspace by 2015. Currently, only public entities, including military, law enforcement, and other governmental agencies may receive authorization to fly drones in civil airspace. The FAA will be selecting six test sites to verify the safety of drones and related navigation procedures before integration into the national airspace system. FAA, FAA Makes Progress with UAS Integration, *available at* http://www.faa.gov/news/updates/?newsId=68004. Those test sites are expected to be operational within one year. Association for Unmanned Vehicle Systems International, At IACP 2012, FAA Provides Update on Selection of UAS Test Sites, *available at* http://www.auvsi.org/news/. In addition, the 2012 Reauthorization requires the FAA to publish a final rule outlining policies, procedures, and standards allowing small drones to fly in the airspace by mid-2014, with the safe integration of all civil drones by September 30, 2015.

EPA Drones on the Horizon?

Drone technology will continue to advance and likely become commonplace in the next decade. It is doubtful that the Supreme Court contemplated the modern-day drone surveillance capabilities or the integration of drones into the U.S. civil airspace when articulating EPA's surveillance authority in terms of generally available technology. If that distinction remains the deciding factor, we can expect this spring's tales of EPA drone surveillance to turn from fiction to fact.

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CONSTITUTIONAL SAFEGUARDS FOR FUTURE VICTIMS IN CLASS ACTION LITIGATION

Andy Jacoby

1. Introduction

There is a tension inherent to certain class actions when there are absent class members whose injury has not yet become apparent. Is it fair for a class action to resolve their claims long before they know they are injured? The tension is particularly acute in toxic tort cases because of the nature of toxic injuries. In some instances, where a single source causes injuries, some injuries may manifest at different times over the course of many years. Some early victims may sue quickly, long before other victims even become aware that they carry within them the seed of an injury. Because modern class action-form litigation has served to allow *early* victims (those whose injuries manifest relatively soon after exposure) to sue immediately on behalf of *all* victims, including those who carry latent injury that hasn't yet manifested, the "future" victims may have their claims decided before they even know they will have a claim.

That the class action device allows for adjudication of a person's claims in advance of his injury and by someone other than himself should cause every 1L con law student's constitutional antenna to quiver. In fact, there are constitutional limitations to such proxy representation. This article takes a brief look at the protections embedded in the U.S. Constitution for "future" victims of environmental harm, and also explains a few of the primary ways a future victim can collaterally attack a class action's earlier resolution.

2. History of Toxic Torts Leading Up to Class Action

Since the beginning of the Industrial Revolution 200 years ago, humans have increasingly developed our ability to alter our environment to such a great degree that in pursuit of better living standards we have also introduced harmful by-products into our lives. In that era, ever larger manufacturing operations and increased urbanization often brought humans and manufacturing too close for comfort. This era marked humanity's greatest forward march of scientific progress, and the benefit to society was so great that it is practically incalculable. But much of that progress—and advances since that era—came hastily, and new products were tried before we knew whether there were harmful side effects. The natural consequence is that some beneficial products introduced into society—medicine, manufacturing and mineral reclamation techniques, chemical products—have also caused harmful by-products that harm our health and the environment. As examples, consider lead in gasoline and paint, aerosol cans, asbestos, DEC, MTBE, unmitigated x-ray use, etc.

Initially it was workers who first suffered environmental harm, which stemmed from their occupation, but it was soon others who shared air and water sources with polluters. Existing tort law was insufficient for several reasons, and courts struggled to provide redress for victims of environmental harms. Eventually, governments passed new laws. This played out across the world, though different countries addressed the problem in different ways.

In Germany in 1884, Chancellor Otto van Bismarck went as far as creating a state administration to bypass the courts and allow workers to seek compensation for their work-exposure injuries directly through the state administration. With compensation claims redirected to the state, "[t]ort liability of the employer or co-workers for a worker's injury in the course of employment was almost completely abolished." Dr. Ulrich Magnus, *International Torts: A Comparative Study: Compensation for Personal Injuries in a Comparative Perspective*, 39 WASHBURN L.J. 347, 351 (2000). Although this program only compensated toxic victims who were employees at the site harmed, it satisfied many victims of environmental harms because the universe of victims was largely made up of workers. In England, Winston Churchill followed suit in 1908 by proposing a similar insurance system to, as he put it, "thrust a big slice of Bismarckianism over the whole underside of our industrial system." In the United States in the 1930s, Franklin D. Roosevelt thrust a much thinner slice of Bismarckianism across the underside of the U.S. industrial system. Ultimately,

the U.S. system never reached the breadth of the European model. Instead, in the United States, recourse for toxic tort victims remained primarily in court.

Unlike in Europe, recourse for environmental tort victims in the United States remained in the courts, but that doesn't mean that the U.S. court system was adequate for victims of environmental contamination. Post-WWII manufacturing and chemical production caused an uptick in pollution, and public backlash grew as our environment became more polluted. Today's environmental lawyers are familiar with the most pronounced 1960s pollution incidents that helped launch the environmental movement which eventually gave us the alphabet soup of environmental laws we now build our careers on. Those pollution incidents were symptoms of an inadequate tort law system that did not prevent egregious pollution problems and associated public health consequences.

In this context, it would seem that the creation of the modern class action device was both a natural outgrowth and a perfect fit for victims of the same toxic defendant. The Rule 23 class action became one of the most important procedural tools for some victims of toxic torts. But for other toxic tort victims—future victims—the class action device became a hurdle to redress. The resolution of a future victim's claims brings forth important constitutional issues.

3. Class Actions

In the class action-form, the plaintiff asks the court to certify a proposed class of plaintiffs who have suffered the same injury by the same defendants, whether or not the class members actually participate in the litigation, or even know about the litigation. Class actions are used in many environmental harm cases because the nature of harm associated with pollution and toxins is that it is often remote in time and place, with widespread impacts that are not well known.

Importantly, a court may certify a class that includes not only those whose injury has already manifested, but also those whose injuries have not yet manifested ("future" victims). The resolution of such a class action may later bind a future victim, even though the future victims were never a party or in privity to the plaintiffs in the original litigation. This makes the class action an exception to the general collateral estoppel rule.

Under collateral estoppel, "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS 27 (1982). Historically, only parties (and those in privity with parties) were bound to a judgment, and those who did not take part in litigation could not be bound because to bind them to a judgment they were not involved in was considered a denial of their Fifth Amendment due process rights. Under the Fifth Amendment, no citizen can be denied life and liberty without first being afforded due process. "The fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked." *Anderson Nat. Bank v. Luckett*, 321 U.S. 233 (1944).

The class action is an exception by which a judgment is res judicata for class members who are not formal parties to the suit. In fact, the class action device is perhaps the farthest that American courts have strayed from the promise that every person gets his "day in court." The Federal Rules of Civil Procedure's (FRCP) class action provision thus brings the FRCP in tension with the U.S. Constitution.

4. Constitutional Protections for Future Victims in Class Actions

While this article describes *constitutional* protections that are particular to toxic tort's future victims, the Federal Rules of Civil Procedure and federal common law establish other (non-constitutional) protections. The Constitution's Supremacy Clause ensures that constitutional protection will not be satisfied merely because the FRCP or common law standards are satisfied. Further, many states have class action

devices, but similarly, these devices are subservient to overarching federal constitutional protections.

Important constitutional protections for future victims can be found in Article III ("case or controversy" requirement), the Seventh Amendment (Reexamination Clause and right-to-jury trial), and the Fifth and Fourteenth Amendments (due process applied to federal and state courts, respectively). Article III and the Seventh Amendment protections apply to the class action device generally, while the Fifth and Fourteenth due process protections can be used to challenge a particular class action case or settlement. I address each in turn.

4.1 Article III's "Case or Controversy" Requirement

Under Article III's "case or controversy" requirement, federal courts may review a dispute only if there is a live case or controversy. A claim does not accrue until the claim manifests. In *Lujan*, the Supreme Court provided that the minimum Article III standing was an "injury in fact," which is "concrete," "particularized," "actual or imminent," redressable, and fairly traceable to the defendant, but not "conjectural or hypothetical." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). Thus, at the moment a class action is first filed, it could be argued that there is only a "case or controversy" for parties who have *already* suffered injuries in fact. Put another way, can there be a "case or controversy" for a future victim who has not yet been injured at the moment a suit is filed, even though the chain of events that will cause his injury is already set in motion? This argument is a general attack on the constitutional ability of a class action suit to bind future victims.

On the other hand, a court's certification could be considered its determination that there is a live controversy between plaintiffs (including future victims) and defendants. In effect saying that there is a controversy, we just don't know exactly the parameters of that controversy yet.

4.2 The Seventh Amendment's Reexamination and Right to Trial by Jury Clauses

The Seventh Amendment provides two constitutional protections relevant to future victims in toxic tort class actions. First, the Reexamination Clause provides that a suit may not be revisited by a later court. Second, the Right to Jury Clause bars someone from being deprived of their right to a jury trial without adequate consent.

The Seventh Amendment's Reexamination Clause provides that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States." In the class action context, litigation is often bifurcated or even trifurcated. That is, one issue of a case may be addressed classwide, while other issues particular to individual cases may be addressed separately by other juries. Bifurcation in the class action context threatens to run afoul of this clause because a second jury called upon to resolve individual issues—subsequent to an initial jury's resolution of class issues—may be "reexamining" facts tried by the initial jury. The Supreme Court addressed this issue in *Gasoline Prods. Co. v. Champlin Ref. Co.*, 283 U.S. 494 (1931) and found no constitutional violation with bifurcated trials, as long as the issues tried separately are so "distinct and separable" that there is no overlap. More recently, Judge Posner noted the potential conflict arising from bifurcation in *In Rhone-Poulenc Rorer, Inc*., 51 F.3d 1293, 1303 (7th Cir. 1995). However, so far courts have found no inherent conflict in bifurcation. *Id*. Regardless, a class action judge must be sure to bifurcate carefully, such that there is a clean resolution of initial fact issues that will not be evaluated by juries called to adjudicate individual claims. If the court does not do this properly, such as if there is an overlap of issues across different courts, it could serve as grounds for later challenge by a future victim.

In addition to the Reexamination Clause, the Seventh Amendment also provides that "[i]n Suits at common law . . . the right of trial by jury shall be preserved." This Right to Jury Clause is worded to preserve the common law right that existed in 1791, which was the year in which the Seventh Amendment was adopted. Arguably, the clause should not apply to class actions, which did not arise from the common law, and instead arose from equity, and which arose more recently than 1791. Specifically, class actions arose from the 1938

Rules Enabling Act and 1966 amendment to the Federal Rules of Civil Procedure (FRCP). In spite of this, the Supreme Court in *Ortiz v. Fibreboard Corp.* found that the right to jury trial *did* apply to class actions. 527 U.S. 815, 845–46 (1999). For now, *Ortiz* remains good law, and as such the right to jury trial applies to class actions, even settlement-only class action. Thus, a class action resolution by trial or settlement that does not involve a jury is vulnerable to collateral attack by future victims.

4.3 The Fifth and Fourteenth Amendments' Due Process Protections

The most formidable protection that a future victim has in the class action context is the Fifth Amendment's Due Process Clause. The Fourteenth Amendment applies the Fifth Amendment due process protections to state class actions. The Fifth Amendment's Due Process Clause provides procedural and substantive safeguards that can be used to collaterally attack any particular class action settlement purporting to resolve the claims of future victims. At least four important independent rights can be unpacked from this clause. Due process ensures that those subjected to class actions receive "notice plus an opportunity to participate in the litigation" (*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)); an "opportunity to remove himself from the class" (*Shutts* at 812); and "adequate representation" throughout the litigation (*Pelt v. Utah*, 539 F.3d 1271, 1284–86 (10th Cir. 2008)). Of these, notice and adequate representation are the most viable bases for collateral attack, and I address both here. Adequate notice is relevant at the opt-in/opt-out stage, and at the settlement stage. On the other hand, adequate representation is a standard that applies throughout the litigation and settlement process.

4.3.1 The Fifth Amendment's notice provisions

The Fifth Amendment provides that a person must be provided with constitutionally sufficient notice before his claims may be adjudicated. Separately, under FRCP 23(c)(2), class members are entitled to "the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort." While the due process requirement of notice is established by the U.S. Constitution and not the FRCP, the Advisory Committee to the 1966 Rule 23 amendment noted that FRCP 23(c)(2) was "designed to fulfill the requirements of due process to which the class action procedure is of course subject." Nevertheless, the FRCP does not have the last word, and, thus, "best notice practicable" is not the constitutional standard.

The Due Process Clause's notice requirement applies at the onset of litigation (informing prospective plaintiffs by actual or constructive notice) and at the settlement phase (whereby nonparties must be warned that a potential settlement is poised to resolve their claims regardless of their participation in the litigation). The due process right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314 (1950). Nevertheless, some suggest that the constitutional right to receive notice of a suit affecting one's right has been steadily watered down. In 1950, the Supreme Court in *Mullane* ruled that notice by publication in a single newspaper was sufficient to inform unknown parties. Of course, in practice, notice by publication may fall short of *actually* notifying class members, since not everyone reads the newspaper. Moreover, even if a potential victim happens to open the right newspaper, he is not guaranteed to see the notice, or if so, to fully appreciate its meaning, particularly if it is crafted to obscure an opt-out or simply inadvertently obscured by legalese. *See In re Wal-Mart Stores, Inc. Wage and Hour Litig*., No. 06-02069 SBA, 2008 WL 1990806 at 7 (N.D. Cal. May 5, 2008).

The ability to opt out of litigation is a right that is related to the notice requirement. *Shutts* at 812. The 1966 amendments to the FRCP were intended to allow class actions that would bind all nonparty class members who did not opt out. In practice, very few absentee class members opt out of class litigation. Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1532 (2004) (finding that less than one percent elect to opt out). Of course, many say that those who do not yet know they are injured would not know they

should contemplate opting out. Yet the Supreme Court in *Shutts* rejected the suggestion that only an *opt-in* system met the due process standard. Nevertheless, courts have ruled that notice is insufficient where it fails to inform future victims of the claims or ability to opt out. *See, e.g.*, *Penson v. Terminal Transport Co.*, 634 F.2d 989 (5th Cir. 1981). Regardless, the *Mullane* decision essentially allowed constructive notice where actual notice was impractical. *Eisen* qualified this, by holding that when the address is known, publication may not be used as a substitute for mail. *Eisen v. Carlisle & Jacquelin*, 17 U.S. 156 (1974). The *Mullane* decision established that notice meets the constitutional standard where it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* at 314–15. *Mullane* also established a substantive standard: the notice must "describe the action and the plaintiff's rights in it." *Id.* The Fifth Circuit has weighed in on the substantive standard—though the court applied this as a Rule 23 standard and not the constitutional standard—by adding that notice "must contain information that a reasonable person would consider to be material in making an informed, intelligent decision of whether to opt out or remain a member of the class and be bound by the final judgment." *In Re: Nissan Motor Corp. Anti-Trust Litig.*, 552 F.2d 1088, 1105 (5th Cir. 1977).

In recent years the Court has expressed concerns in the class action context about the constitutional safeguards embedded in the notice requirement. For instance, in *Amchem* the Court in dictum questioned whether proper notice could ever be given to future victims who do not know they are injured, referring to them as "legions so unselfconscious and amorphous." *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 628 (1997). It was not the only time the Court expressed concern over notice requirements applied to the peculiar position of future victims. Perhaps the repeated expression of concern over notice means that the Court can be persuaded on the issue to take a stand for ill-informed future victims. For this reason, insufficient notice presents both general and individual bases to collaterally attack a class action judgment.

4.3.2 The Fifth Amendment's adequate representation requirement

The Due Process Clause establishes a constitutional right to adequate representation of nonparties in class action suits. *See Taylor v. Sturgell*, 553 U.S. 880 (2008).

4.3.2.1 Hansberry *and "inadequate representation"*

In 1937, Carl Hansberry filed suit to challenge a racial covenant that prevented him from buying a home for his family on the south side of Chicago. By the 1920s, 85 percent of Chicago was bound to racially restrictive covenants. Allen Kamp, *The History Behind* Hansberry v. Lee, 20 U.C. DAVIS L. REV. 481, 483–85 (1987). Years before Mr. Hansberry's suit, two parties had litigated the same racial covenant. But while the parties in the earlier suit disputed a term of the lease, they were in accord on the validity of its racial covenant component. When Mr. Hansberry sought to challenge the racial covenant, he was pushed out by the courts on res judicata grounds. In the legal, political, and personal battle that followed, Mr. Hansberry lost just about everything as a cost of standing his ground. At the Hansberry home on the south side of Chicago, his family lived under siege of racist brick-throwing mobs while Mr. Hansberry worked on the case in Washington, D.C. The strain was intense, and was compounded when, after the Court's ruling in 1940 vindicating him, Mr. Hansberry was hounded by J. Edgar Hoover's F.B.I. The strain of the battle affected Hansberry badly, and he soon moved away from his family to Mexico, where he died shortly thereafter. The trauma moved his daughter, Lorraine, to write one of the great American novels, *Raisin in the Sun*. In taking his case all the way to the Supreme Court, and winning back his right to due process under the Constitution, Carl Hansberry helped reestablish important constitutional protections that would directly apply to future victims of toxic torts. *See Hansberry v. Lee*, 311 U.S. 32 (1940.)

The legal issue in *Hansberry* was whether the Fifth Amendment's Due Process clause was violated by the lower court's dismissal of Mr. Hansberry's suit under res judicata. Specifically, were Mr. Hansberry's interests adequately represented by the racial covenant

supporters whose original suit he never knew about? Generations later, the principle set forth in *Hansberry* remains: a nonparty class member may not be bound to a judgment where there is a direct conflict between him and the party that ostensibly represented him. *Hansberry* at 42–43. Representation was inadequate because the class members had "dual and potentially conflicting interests." *Id*. While *Hansberry* established that an absolute whole conflict in interest does not meet the "adequate" standard, subsequent cases would establish how much of a misalignment of interest is constitutionally tolerable.

4.3.2.2 "Adequate representation" in recent decisions

Adequacy of representation includes two distinct minimum standards: (1) the class representative must be sufficiently aligned in interest with nonparty class members, and (2) the class counsel must adequately represent all (including nonparty) class members.

The *Hansberry* case established that a direct conflict between class representatives on one hand, and absent class members on the other, was fatal to the attempt to bind an absent class member to the earlier judgment. Since *Hansberry*, case law clarified that any trivial conflict between class representatives and absent class members would not trigger a due process issue. The court in *Amchem* further addressed the nature of the conflict. *Amchem* at 626–27. Courts consider four factors in evaluating potential conflicts between class representatives and absent class members: "(1) whether the interest of the named party is coextensive with the interests of the other members of the class; (2) whether his interests are antagonistic in any way to the interests of those whom he represents; (3) the proportion of those made parties as compared with the total membership of the class; and (4) any other facts bearing on the ability of the named party to speak for the rest of the class." *See* 3B MOORE'S FEDERAL PRACTICE ¶ 23.07 [1] (2d ed. 1992). One way that courts address intraclass conflicts of interest is to divide the class into subclasses, and ensure that each subclass has independent counsel. *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845–64 (1999).

A future victim's subsequent attack on a settled class action could be that representation was inadequate at some time during the litigation. Indeed, it does not matter if the representation sufficed during some of the litigation, or that a settlement is deemed overall "fair." Instead, future victims' interest must be protected at *all* times during the litigation, and the presence of an ostensibly favorable settlement cannot make up for a moment of inadequate representation. *Ortiz* 854–59 and 863–64.

A pretrial settlement brings forth additional issues, and most class actions are resolved this way. Who represents future victims in the settlement process? As it stands, some argue that incentives in the settlement context are benefits to current claimants and defendants, at the expense of future claimants. *See Amchem* at 626–28; *In Re: Bendectin Products Liability Litigation*, 749 F.2d 300, 304 n.8 (6th Cir. 1984) (finding present and absent classes "inherently in conflict with each other for their share of the settlement" and that present "had the incentive to try to minimize the size of the [future victims' share] in order to increase [their] share of the settlement."). The Class Action Fairness Act (CAFA) was, in part, an attempt to protect future victims in the class action scenario. CAFA at 2(a)–(b), 28 U.S.C. § 1711. At the same time, defendants are eager to limit their liability to a finite amount and get on with business. It's one thing to pay out compensation to currently injured parties, but what happens when contamination is widespread and will continue causing new sick victims for decades? The urge by parties to settle at the expense of future victims brings up the Article III's "case or controversy" standard again. In short, where both the current claimants and defendants are eager to settle at the expense of future victims, to what extent is there a "case or controversy" under Article III? This consideration is unresolved. A great example of the settlement class action is *Amchem*, where the complaint, the answer, the proposed settlement agreement and a joint motion for conditional class certification were all submitted to the court on one day. Is this litigation "adversarial" such that there is a "case or controversy"? Is there a case or controversy where everyone involved is merely seeking a court's blessing?

Where a class action settlement seeks to bind future claimants, and because no party appears to have the incentive to protect the interests of future victims, it is up to the judge to ensure adequate representation. *Ortiz* at 848–49 ("rigorous" scrutiny is needed by courts to ensure that representation is adequate; *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982) (court needs to perform a "rigorous analysis" of adequacy)). There is, some argue, an inherent and irreconcilable conflict for a judge to serve simultaneously as (1) a neutral arbiter, (2) a promoter of settlement, and (3) a guardian of future victims' rights.

In addition to the unfamiliar role of ensuring adequate representation for a future victim, a judge is further hampered by the lack of clear definition as to what constitutes "adequate representation." The *Hansberry* court did not state what pro-active behavior constitutes "adequate representation." In fact, no statute or court ruling since has made any conclusive effort to establish a practical, accurate definition of "adequate representation." The courts have not established the minimum standard, and considering the differing characteristics of different parts of pre-trial and trial, adequate representation could be evaluated differently at different moments. Further, adequate representation includes adequacy of class representatives and class counsel, as well as the relationships among class members and between class members and class counsel.

Courts have punted rather than proffered a constitutional standard, and instead occasionally weigh in on what constitutes *inadequate* representation. *See, e.g.*, *Amchem* at 625–27 (conflicts of interest of counsel and parties, differing interests and injuries among parties, the absence of subclasses where interest conflicts are present, and "competency and conflicts of class counsel"); *Dalton v. FMA Enter., Inc.*, 1996 WL 379105 at *4–5 (M.D. Fla. July 1, 1996) (class representative was unfamiliar with the claim and class); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 88–91 nn.5–7 (7th Cir. 1977) (class representative was a "close professional associate" with the attorney of record, and hinting at a conflict of interest and motivation, and also listing cases where class representative could not be class counsel, or class counsel's relatives or business associates). In addition, FRCP 23 was amended in 2003 to provide standards for class counsel, establishing in essence a non-constitutional basis for an inadequate representation collateral attack.

Adequate representation is thus defined in the negative as that which is not inadequate representation, and the standard remains murky. Professors Issacharoff and Nagareda note that "current doctrine under both the Constitution and Rule 23 has loaded the concept of adequate representation with multiple meanings, oftentimes in conflict with each other." *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649 (2008). Twice in recent years the U.S. Supreme Court has stepped in to reject settlements that purported to protect the interests of future claimants. *See Amchem*; *Ortiz*. Importantly, these settlements appeared airtight at first, having been blessed by the current claimants, defendants, all present counsel, the trial court, and the appeals court. But in spite of that harmony, the Supreme Court brushed these settlements aside. This should give pause to all counsel: due process protection should not be presumed because of consensus, even where a settlement appears "fair" to future claimants.

5. Conclusion

The class action exists in part to ensure finality, and allow companies to move on with business. But judges must take care to proceed with constitutional safeguards in mind. Even when care is taken, a lack of clear standards to apply renders class action resolutions vulnerable to attack on constitutional grounds.

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D.C. CIRCUIT COURT REAFFIRMS THAT PRUDENTIAL STANDING IS JURISDICTIONAL IN *GROCERY MANUFACTURERS ASSOCIATION V. U.S. E.P.A.*

Aastha Madaan

Introduction

On August 17, 2012, the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit court), upheld EPA's partial waiver requested by Growth Energy, a trade association representing the ethanol industry, for the introduction of E15. E15 is an unleaded gasoline blend containing 15% ethanol. Petitioners were trade associations whose members are part of petroleum, engine, and food industries. The issue was whether these trade associations have Article III standing and prudential standing to challenge the EPA's approval of E15 for use in motor vehicles and engines.

The court found that petitioners from the engine manufacturers' group and petroleum group lacked Article III standing. The court held that the food group lacked prudential standing. Although this decision is consistent with the D.C. Circuit court's prior rulings that prudential standing is a jurisdictional issue, this court is still in minority of circuits that hold that prudential standing is jurisdictional. The majority opinion was filed by Chief Judge Sentelle, accompanied by a concurring opinion by Circuit Judge Tatel. Circuit Judge Kavanaugh filed the dissenting opinion.

Factual Background

In the Energy Policy Act of 2005, Congress incorporated into the Clean Air Act (CAA) the renewable fuel standard (RFS). The RFS requires qualifying refiners and importers of gasoline or diesel fuel to introduce into U.S. commerce a specified, annually increasing volume of renewable fuel. To comply with the requirements of the RFS, refiners and importers primarily blend corn-based ethanol into the fuel supply. Currently, the national gasoline supply consists mainly of E10, "a gasoline blended with 10 percent ethanol."

In order to introduce new renewable fuels into the market, a manufacturer must apply for waiver of this prohibition pursuant to the CAA. The administrator of EPA may grant such a waiver if she determines that the applicant has placed a limit of a specified concentration of the fuel or fuel additive. The administrator must also determine that the fuel or fuel additive's emission products will not cause or contribute to a failure of any emission control device or system (over the useful life of the motor vehicle, motor vehicle engine, nonroad engine, or nonroad vehicle in which such devise or system is used) to achieve compliance by the vehicle or engine with the emission standards with respect to which [the vehicle or engine] has been certified.

In March 2009, Growth Energy applied for a Section 211 (f)(4) waiver to introduce E15, an unleaded gasoline blend containing 15% ethanol. After notice and comment, EPA issued two separate waivers. EPA granted partial conditional waivers approving the introduction of E15 for use in model-year 2001 and newer light-duty motor vehicles and engines.

The main condition is that E15 manufacturers are required to submit for approval by EPA a plan for the implementation of "misfueling mitigation conditions." "Misfueling" refers to the use of E15 in pre-2001 vehicles and other non-approved vehicles, engines, and equipment. The misfueling mitigation conditions and strategies which include pump-labeling requirements to make consumers aware, participation in a pump-labeling and fuel-sample compliance surveys, and proper documentation of ethanol content on transfer documents.

The Parties

The petitioners are three sets of industry groups representing members who either (1) manufacture engines and related products (the "engine-products group") (2) sell food (including livestock) that requires corn as input (the "food group") or (3) produce or handle petroleum and renewable fuels (the "petroleum group"). The three groups petitioned the D.C. Circuit court for review of EPA's E15 waivers. The D.C.

Circuit court consolidated the petitions. Growth Energy, the waiver applicant, intervened in support of EPA's defense of its waiver decisions.

Standing

Article III Standing

According to this court, standing under Article III of the U.S. Constitution is jurisdictional. The court determined that in order to establish its jurisdiction to consider the merits of the petitions, it only needed to determine that one of the petitioners had Article III standing. Since the D.C. Circuit court determined that no petitioner had Article III standing, the court determined that it did not have jurisdiction to consider the petitions on the merits. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). To establish Article III standing, a party must establish three constitutional requirements: (1) that the party has suffered an "injury in fact," (2) that the injury is "fairly traceable" to the challenged action of the defendant, and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan,* 504 U.S. at 560–61.

The court determined that standing is not self-evident for any of the entities petitioners represent. EPA's waiver decisions do not directly impose regulatory restrictions, costs, or other burdens on any of the entities represented by the trade associations.

The Supreme Court has stated that standing is substantially more difficult to establish where parties invoking federal jurisdiction are not the objects of the government action, as is the case with the three groups here. *Lujan,* 504 U.S. at 562.

Associational Standing

An association has standing to sue on its members' behalf if it can show that (1) a member "would have standing to sue in [its] own right," (2) "the interests the association seeks to protect are germane to its purpose," and (3) "neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club*, 292 F.3d at 898. Although the D.C. Circuit court did not perform an analysis of whether the petitioners met these requirements, it asserted that it had "no reason to believe any petitioners fail to meet the latter two requirements." *Grocery Mfrs. Ass'n v. E.P.A.*, 693 F.3d 169, 175 (D.C. Cir. 2012), *available at* http://www.cadc.uscourts.gov/internet/opinions.nsf/227CFCE89B00F55385257A5D004E6E5D/$file/10-1380-1389715.pdf. Therefore, the court focused its attention on whether any petitioner association has demonstrated that any of its members would have standing to sue in its own right.

Circuit Court's Analysis

The court determined that although each industry group advanced a theory of standing, none is adequate to meet the burden of establishing standing under Article III.

Engine Products Group

The engine products group's members include manufacturers of those cars, boats, and power equipment that were not made for, certified, or warranted to use ethanol blends greater than E10. They asserted that EPA's partial waivers will enter the fuel market and consumers will use it in their products. The engine manufacturers claimed that such use might harm engines and emission-control devices and system, and supposedly subject the engine manufacturers to liability. The court contended that the engine manufacturers provide almost no support for their assertion that E15 "may" damage the engines they have sold, subjecting them to liability.

According to the court, any injury to the engine product petitioners—speculative at best—depends upon the acts of third parties not before the court. The court claimed that if the contemplated injury were to occur at all, it would require that consumers use the fuel in engines for which it is neither designed nor approved, suffer damages to those engines as a result, and bring successful warranty or other liability lawsuits against engine products petitioners. "That a theoretical possibility of lawsuits exists does not establish he required probability that the third parties will misfuel in the fashion posited by petitioners, then bring the lawsuits, then prevail. The last link is particularly

problematic; the engine-products petitioners have failed to point to any grounds for a meritorious suit against them." *Grocery Mfrs.,* 693 F.3d at 176.

The engine products group has not established standing to bring these petitions.

The Petroleum Group

The petroleum group includes associations that represent refiners and importers, which produce petroleum products, as well as "downstream" entities like fuel blenders and terminals, which handle, store, or transfer those products. The petroleum group asserted that both the refiners and the downstream entities suffer an injury in fact traceable to EPA's waiver decision. It argued that EPA's partial approval of the introduction of E15 into commerce effectively forces refiners and importers to actually introduce E15 into commerce because they are obligated to meet the renewable fuel requirements of the RFS. Further, it asserted that the downstream entities would have to accommodate this new fuel type, and thus incur substantial costs, including special fuel production, transportation, and fuel segregation efforts. *Grocery Mfrs.*, 693 F.3d at 176.

EPA's approval of the introduction of E15 for use in certain vehicles and engines does not force, require, or even encourage fuel manufacturers or any related entity to introduce the new fuel, it simply permits them to do so by allowing for use of E15.

The court concluded that the only real effect of EPA's partial waivers is to provide fuel manufacturers the option to introduce a new fuel, E15. The court also concluded that if the injuries of refiners and importers are traceable to anything other than their own choice to incur them, it is to the RFS, not to the partial waivers that they challenged.

The court acknowledged that while EPA may decline to waive the RFS requirements, lobbying the administrator to waive the requirements is another option at petitioners' disposal.

For the downstream parties, the petitioners' argument was that these parties own infrastructure (e.g., deepwater, barge, and pipeline terminals) that aids in the transfer, handling, and blending of petroleum products. The petitioners suggested that downstream entities will have to expend significant resources to blend and otherwise deal with the E15 the refiners and importers choose to introduce. The court reasons that while downstream parties may lose business if they decline to blend or otherwise deal with E15, the choice to handle E15 is one that the downstream parties make in their own self-interest, not one forced by any particular administrative action.

The holding is consistent with this court's holding in *National Petrochemical & Refiners Ass'n v. EPA*, 287 F.3d 1130, 1147 (D.C. Cir. 2002), which held that potential liability, "insofar as it is incurred voluntarily, is an injury that fairly can be traced to the challenged action." The court concludes that the petroleum group does not have standing because if anything is "forcing" these entities to incur the costs of introducing a new fuel, it is obligations set by the RFS, competitive pressures, or some combination thereof. The court determines that EPA's partial waivers simply provide a new choice of fuel that manufacturers may produce.

The Food Group

The food group's members produce, market, and distribute food products that require corn. The food group suggests that EPA's partial approval of E15 will increase the demand for corn, which is currently used to produce most ethanol on the market. According to the food group, this increased demand will increase the prices their members will have to pay for corn.

The court did not decide whether the food group established Article III standing with this theory because the food group failed to demonstrate prudential standing. The court explained that while it needs both Article III and prudential standing to address the merits of a case, "there is no mandated sequencing of jurisdictional issues," so it is proper to consider prudential standing first. *Grocery Mfrs.*, 693 F.3d at 179.

The court explained that to demonstrate prudential standing, the food group must show that the interest it

seeks to protect is arguably within the zone of interests to be protected or regulated by the statute . . . in question" or by any provision integrally related to it. *Grocery Mfrs.*, 693 F.3d at 179.

The petitioners content that EPA's waiver conflicts with another federal statute, the Energy Independence and Security Act (EISA) of 2007. EISA requires EPA to review the impact of the use of renewable fuels on the price and supply of agricultural commodities and food prices. However, the challenge here is the CAA's fuel-waiver provision. EISA is a separate statute that is not integrally related to the CAA's fuel-waiver provision. The court rejected the argument based on EISA because the statute upon which EPA's decision in this case is based is the CAA.

The court held that "the Food group's interest in low corn prices is much further removed from a provision about cars and fuels than a neighboring land owner's interest is from a statute about land acquisition." *Grocery Mfrs.,* 693 F.3d at 179.

The court held that neither petitioner group had standing to bring these claims, and dismissed all claims for lack of jurisdiction.

Circuit Judge Tatel's Concurring Opinion

In his concurring opinion, Chief Judge Tatel agrees with the dissent in part, and the concurrence in part. He agrees with the dissent that the food group has Article III standing. Although he agrees with the other circuits that have held that prudential standing is non-jurisdictional, but that the D.C. Circuit court has held contrary in the past, and must remain consistent in this case by holding that prudential is jurisdictional, until the Supreme Court clearly holds otherwise.

Dissent

In his dissent Circuit Judge Kavanaugh agrees with the majority that if one of the three petitioners can show standing, the case may be decided on the merits. He dissents with the majority, and opines that in his view, both the food group and the petroleum group have standing.

The Petroleum Group

Circuit Judge Kavanaugh claims that the petroleum group's Article III standing exists because the E15 waiver, in conjunction with the statutory renewable fuel mandate, will require some petroleum companies to refine, sell, transport, or store E15, imposing significant costs. The petroleum group is also a regulated party under the statutory waiver provision; therefore, the petroleum group's standing under the Administrative Procedure Act (APA) should be undisputed according to Circuit Judge Kavanaugh.

The Food Group

Circuit Judge Kavanaugh explains that the food group has standing because the E15 waiver, particularly in conduction with the statutory renewable fuel mandate, will increase the prices the food group must pay for the corn. Additionally, he notes that the food group's prudential standing under APA is not contested by EPA, and unlike Article III standing, prudential standing is not jurisdictional. The effect of this is that prudential standing has been forfeited by EPA, and thus not properly before the court. The food group, according to Circuit Judge Kavanaugh, easily clears the low bar for standing under APA. He also notes that since EPA did not raise prudential standing as a defense to this lawsuit, any prudential standing objection is forfeited.

Conclusion and Possible Consequences

The food group members claim that more than two-thirds of the corn crop could potentially be diverted from food and feed to U.S. fuel supplies. They further claim that this decision will likely lead to food inflation, by increasing the cost of feeding animals, the burden of which will bear on the consumers.

The petroleum group adds that E15 may cause mechanical problems; however, this argument was addressed by the circuit court in the implementation of "misfueling mitigation conditions."

Despite the challenges, the RFS mandates the introduction of increasing volume of renewable fuel into

the fuel supply. EPA's waiver is consistent with this requirement. Additionally, the waiver does not require the use or sale of E15, simply the gradual introduction of it. Also in August, a bipartisan group of 135 lawmakers signed a letter asking the EPA to adjust the requirement of corn ethanol production for transportation fuel.

Another player is the bipartisan bill, H.R. 3097, which would allow the EPA to drop corn ethanol production quotas by as much as 50 percent depending on a ratio of available corn relative to use. Renewable Fuel Standard Flexibility Act, H.R. 3097, 102th Cong. (2001). This Renewable Fuel Standard Flexibility Act seeks to amend section 211(o) of the CAA, which will allow EPA to limit the use of ethanol based on U.S. corn stocks to use ratio each calendar year.

With so many other variables, including the bipartisan letter to Lisa Jackson, the EPA administrator, EPA's waiver for the introduction of E15 will likely not have any immediate effect on any of the three groups that brought this lawsuit.

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SUBJECTIVE STANDING

James R. Wedeking

Allegations of injuries in tort litigation are not subjective. Although plaintiffs may require expert witnesses to prove the existence of some injuries, such as medical illnesses or devalued property, courts generally require injuries to be objectively cognizable. They are not a matter of taste or personal preference. A number of tort actions, however, are working to push that boundary with one district court decision, resulting in a $104 million jury verdict, causing deep reflections upon the question of "what is an injury?"

In consolidated multi-district litigation actions, water districts from around the nation sued dozens of petroleum companies alleging that methyl tertiary butyl ether (MTBE) contamination, often at barely detectable levels, required extensive (and expensive) investigation and remediation. *See generally In re MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d 593 (S.D.N.Y. 2001). The defendants moved for summary judgment on all claims by three New York State water providers, arguing that the MTBE concentrations in groundwater were well below state regulatory requirements that would require remediation, meaning that the plaintiffs had no injury. *In re MTBE Prods. Liab. Litig.*, 458 F. Supp. 2d 149, 151 (S.D.N.Y. 2006) (appeal pending before the Second Circuit). The court denied the motion, holding that "[w]hile it may eventually be determined that some levels of contamination below the applicable MCLs do not injure plaintiffs' protected interests," the matter should be resolved by a jury. In declining to grant summary judgment, the court accepted the plaintiffs' argument that "[t]he quality of water to which Plaintiffs are entitled is not just water contaminated below maximum concentration levels (as Defendants suggest) but rather a water that is *free from environmental contamination.*" Plaintiffs' Response to Defendants' Motion for Summary Judgment on All Claims for Lack of Justiciability (hereinafter "Pls' Resp.") (on file with author) at 2–3 (internal quotations omitted) (emphasis added). The result of the court's decision is that it leaves plaintiffs free to subjectively define their own injuries whenever they personally disagree that

objective, scientific, health-based standards are not good enough. This article briefly examines the problems with accepting such subjective assertions of injury involving contamination below regulatory standards.

The Importance of Regulatory Standards

Tort cases can present a gray area of injury where plaintiffs, or their property, are exposed to contaminants but the effects of that exposure have not presented themselves—and may never appear. In cases such as these, enforceable regulatory standards, set by government agencies through a transparent scientific process, are the best candidates for determining the presence of an injury. The MTBE litigation centered around a regulatory standard called a maximum contaminant level (MCL). MCLs are enforceable national primary drinking water regulations, created under the Safe Drinking Water Act, for water providers that serve the public. 42 U.S.C. § 300g-1(b)(1)(A). They represent the maximum level at which a substance may be present in drinking water and are based on reviews of both potential acute and long-term health effects. *See* 42 U.S.C. § 300g-1(b)(3)(C) (describing scientific process required to establish MCLs); 40 C.F.R. § 141.2 (defining MCLs). In other words, MCLs are "safe levels that are protective of public health." National Primary Drinking Water Regulations—Synthetic Organic Chemicals; Monitoring for Unregulated Contaminants; Final Rule, 52 Fed. Reg. 25,690, 25,694 (July 8, 1987); *see also* National Oil and Hazardous Substances Pollution Contingency Plan; Final Rule, 55 Fed. Reg. 8666, 8750 (Mar. 8, 1990) ("MCLs represent the level of water quality that EPA believes is acceptable for over 200 million Americans to consume every day from public drinking water supplies.").

States may also set their own MCLs so long as they are at least as stringent as any existing federal MCLs. 42 U.S.C. § 300g-2(a)(1). Where no federal MCL exists, state MCLs must be based on "the best available, peer-reviewed science and supporting studies conducted in accordance with sound and objective scientific practices" derived from "data collected by accepted methods or best available methods. . . ." 42 U.S.C. § 300g-1(b)(3)(A). Their development involves an extensive review of animal and human studies for each particular chemical, incorporating multiple safety factors to protect sensitive populations and to compensate for the relative strength of existing studies. *See* National Primary Drinking Water Regulations, 56 Fed. Reg. 3526, 3531–32 (Jan. 30, 1991) (explaining the MCL development process). Carcinogenicity is assessed on a separate track through reviews of epidemiological and animal studies, known classifications of the chemical, and another layer of safety factors. *Id.* at 3532–32, 3536. EPA uses all of this data to set an MCL as close as possible to the level at which no known health effects occur based on potential treatment technologies. *See* 42 U.S.C. §§ 300g-1(b)(4)(B), (b)(4)(D); 56 Fed. Reg. at 3547 (EPA may consider laboratory and pilot studies for treatment technologies even if they have never been used in practice). The result is an objective health-based standard created through a scientific process that is open to public notice and comment procedures. MCLs are legally enforceable and violations are subject to daily maximum civil penalties of $37,500 per day. 42 U.S.C. § 300g-3(b); 40 C.F.R. § 19.4.

Although EPA established MCLs for 81 drinking water contaminants, 40 C.F.R. §§ 141.61–65, MTBE is not among them. Several states, including New York, filled this void by establishing their own MTBE MCLs. New York's MTBE MCL of 10 ppb, N.Y. Comp. Codes R. & Regs. tit. 10, § 5-1.52, tbl.3 (2012), the subject of the *MTBE* opinion, is the lowest in the country. In the 2003 rulemaking imposing the 10 ppb standard, the state demonstrated that it considered many of the same health and safety factors used by EPA. 36 N.Y. St. Reg., Rule Making Activities 12 (Sept. 10, 2003). The reliance on a body of scientific studies and the use of several safety factors make the MTBE MCL a credible, objective determination of how much a person may be exposed to the chemical in drinking water without suffering harm.

The *MTBE* Decision

Beginning in the early 2000s, a group of plaintiffs' law firms organized over 100 public water districts, private water providers, and municipalities around the nation

to file suits against dozens of oil companies. *In re MTBE Prods. Liab.*, 379 F. Supp. 2d 348, 364 (S.D.N.Y. 2005). The chief allegation was that the defendants, who introduced MTBE into gasoline to comply with the Clean Air Act's reformulated gasoline program, should have known that MTBE gasoline would leak from underground storage tanks and contaminate aquifers used for drinking water. *Id.* at 364–65. Once in drinking water, the plaintiffs' complaints alleged that MTBE could cause cancer and imparts a foul taste and odor at extremely low concentrations—even at levels far below the 10 ppb MCL. *Id.* at 365.

In a bellwether case involving three New York water providers, the defendants moved for summary judgment where evidence showed that MTBE contamination was below the MCL. *In re MTBE Litig.*, 458 F. Supp. 2d 149, 151–52 (S.D.N.Y. 2006). They argued that, since the water providers could still lawfully serve drinking water with MTBE concentrations below the 10 ppb MCL, there was no legally protected interest at stake, and therefore the plaintiffs lacked standing. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment on All Claims for Lack of Justiciability at 4–6 (hereinafter "Defs' MSJ") (on file with author). Defendants introduced evidence that, for years, plaintiffs routinely served water to customers with several contaminants in trace amounts (including MTBE), that plaintiffs told their customers that no drinking water can be completely free of contaminants, and that compliance with MCLs assured that water was safe to drink. *Id.* at 4–5. To allow the plaintiffs standing to recover for sub-MCL contamination, the defendants argued, would be to determine that there is a legally protected interest "in drinking water containing *zero* MTBE"—a standard that the plaintiffs told their customers could not be met. *Id.* at 2. As for the plaintiffs' claim that customers could taste or smell MTBE in drinking water even when concentrations were below the MCL, defendants argued that plaintiffs failed to produce any evidence that they had ever received such a complaint. Defendants' Reply Memorandum of Law in Support of Their Motion for Summary Judgment on All Claims for Lack of Justiciability at 2–3 (hereinafter "Defs' Reply") (on file with author).

In response, the plaintiffs denied that MCLs were relevant, objecting that the court should not "replace traditional notions of standing and injury in tort cases with a state regulatory standard. . . ." Pls' Resp. at 1. Relying on MCLs to define the existence of an injury, according to the plaintiffs, would undermine the role of the judiciary and eliminate the plaintiffs' right to "water that is free from environmental contamination." *Id.* at 2–3 (quotation omitted) (citing *State v. Schenectady Chemicals, Inc.*, 459 N.Y.S.2d 971, 978 (1983)). They further argued that MCLs were not capable of protecting public health because they resulted from an open administrative process. *Id.* at 10–11. According to the plaintiffs, MCLs are tainted by "politics" because they result from "a political decision susceptible to political interference" and because "[p]ublic comments, opposing views, data, and argument may be submitted by anyone—including the very polluters or industries whose products eventually contaminate drinking water." *Id.* at 10. Courts should disregard MCLs in determining the existence of an injury, the plaintiffs argued, and instead allow a "reasonable" water provider the exclusive right to decide when sub-MCL contamination warrants taking some action. *Id.* at 18. Therefore, according to the plaintiffs' theory, an injury exists whenever they subjectively believe it exists.

The court denied the defendants' motion for summary judgment. *In re MTBE Prods. Liab. Litig.*, 458 F. Supp. 2d 149, 158–59 (S.D.N.Y. 2006). Despite several other cases finding no injury for contamination below the MCL, the court relied on plaintiffs' purported duty as water providers to "take action—be it testing, monitoring, or treating contaminated wells—*before* that contamination reaches the applicable MCL." *Id.* at 155. The court further characterized defendants' position as one of impermissible regulatory preemption of common law claims before rejecting that characterization. *Id.* In conclusion, the *MTBE* court found the MCL to be "a convenient guidepost in determining that a particular level of contamination has likely caused an injury" but that the question of injury,

and thus standing, should be reserved for a jury. *Id.* at 158.

The case did, in fact, proceed to trial on the City of New York's claims. There, the city relied on its internal policy to remediate MTBE contamination down to non-detect levels whenever concentrations reached 1 ppb—far below the 10 ppb MCL. Defs' MSJ at 17. This allowed the city to subjectively define its own injury by substituting internal policy, crafted without public notice or input, for a public, scientifically derived regulatory definition of when someone is exposed to harm. In practice, allowing a water supplier to establish an injury through its own decision to institute monitoring or remediation creates an injury that is completely out of the defendant's control. If a water supplier believes that trace amounts of contaminants are not worrisome, and decides not to continue testing or pursue remediation, then no injury exists. However, if it makes the opposite decision and chooses to remediate the contaminant to levels even further below the MCL, then the *water supplier*, not the defendant, creates the injury that provides it with standing to sue. In the *City of New York* trial, the jury determined that sub-MCL concentrations of MTBE would, based on the plaintiffs' groundwater modeling, eventually reach New York City drinking water wells and that it should be remediated. It awarded approximately 104 million dollars in damages to the city. *In re MTBE Prods. Liab. Litig.*, 739 F. Supp. 2d 576 (S.D.N.Y. 2010).

Problems Created by the *MTBE* Opinion's Rejection of MCLs as a Definition of Injury

The *MTBE* court's consideration of whether and how MCLs are used to determine the existence of an injury is certainly the most in-depth of any opinion on the issue. Despite the court's extensive treatment of the subject, however, its decision to use MCLs as "convenient guidepost[s]" creates a bizarre instance where plaintiffs can unilaterally determine the existence of their own injuries for purposes of standing. In these cases, a plaintiff's subjective preference for less or no exposure to contaminants would govern despite objective evidence that they have not suffered any harm.

A. Subjective Definition of Injury

The Constitution allows courts to hear only "cases and controversies." U.S. CONST. art. III, § 2. Although these are broad and ambiguous terms, the U.S. Supreme Court distilled these terms to require plaintiffs to prove "the irreducible constitutional minimum of standing. . . ." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This is a three-part test: (1) "the plaintiff must have suffered an 'injury in fact'—an invasion of a legally protected interest," (2) a "causal connection between the injury and the conduct complained of," and (3) proof that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 560–61 (internal quotations omitted). A plaintiff's injury must be "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* (internal quotations omitted). Establishing standing is no perfunctory matter; it is "an indispensable part of the plaintiff's case. . . ." *Id.* at 561. At the summary judgment stage, a plaintiff must provide actual evidence of injury, and at the trial stage, the injury must be proved, i.e., supported by the evidence in accordance with the applicable standard of proof. *Id.*

The *MTBE* opinion clashes with one of the most basic notions of standing: by the time a case reaches the summary judgment stage of litigation, the plaintiff must be able to proffer evidence that it suffered an actual injury that is not conjectural or hypothetical. *Lujan*, 504 U.S. 555 at 561 (quoting Fed. R. CIV. P. 56(e)) (requiring "specific facts" establishing an injury). Instead, the *MTBE* decision allowed the plaintiffs' claims to continue based on their subjective beliefs that they were injured. The plaintiffs argued, and the court apparently agreed, that as water providers, they could recover the costs of any monitoring or remediation activities they chose to undertake whenever they subjectively determined that any detectable level of contamination was undesirable. In this case, the *MTBE* plaintiffs adopted an internal policy to remediate MTBE contamination down to non-detect levels whenever it reached 1 ppb, and they averred that whenever they act on this internal policy, they become injured. Defs' MSJ at 17. Under this theory, individuals become their own personal regulator, deciding for themselves what level of contamination they will ingest

or inhale regardless of what administrative agencies, such as EPA, the Food and Drug Administration, and others, have determined after years of scientific study and rulemaking.

At first blush, this "personal regulator" approach does not sound so bad. There is much to be said for persons deciding that they do not want even small concentrations of chemicals in their water or food. Whether those persons believe that future research may show harm from contaminants at lower levels or distrust the competency or honesty of EPA (or the industry-reported data that EPA may rely upon), this excess of caution is not beyond the bounds of reason. Some companies market their products as exceeding some type of regulatory standard or being free of legal but unpopular ingredients, understanding that many people prefer such a cautious approach. The problem comes when one files a tort suit alleging that the defendant violated these subjective personal preferences. Any person or company that manufactures, distributes, or uses a product containing the contaminant at issue could be subject not just to a multitude of varying personal standards, but even claims that exposure to a single molecule injures the plaintiff. Virtually all of these standards, of course, would be undisclosed to the potential defendants before the suit and they would have no opportunity to alter their behavior before being dragged into high stakes tort suits.

Once these suits are initiated, the "personal regulator" approach to standing would exert enormous pressure on defendants to settle suits involving sub-regulatory levels of contamination because there would be a complete absence of objective standards for determining the existence of an injury. Without resorting to the MCL, plaintiffs would have sole authority to exert the existence of an injury up until trial, where a jury would have the final word of agreeing with the plaintiffs' subjective standard or rejecting it. No objective facts could alter this trajectory as the plaintiffs need only aver that they find contamination at levels below the MCL to be unacceptable in order to prevent summary judgment against them, regardless of the reasons. Determinations by administrative agencies that exposure to contaminants at such low levels would not harm the plaintiffs would serve only as evidence for the jury's consideration. Over time, of course, the emergence of differing jury verdicts results in an ad hoc set of incoherent standards for the same contaminant in the same jurisdiction.

Other courts have rejected such a "personal regulator" approach to standing. For example, in *Koronthaly v. L'Oreal USA, Inc.*, 374 Fed. Appx. 257 (3d Cir. Mar. 26, 2010), the Third Circuit affirmed dismissal of a class action complaint alleging fraud, breach of implied warranty, strict liability, and negligence related to the undisclosed lead content of the defendant's lipstick. *Id.* at 258. The class representative averred that she did not know the lipstick contained lead when she purchased it and would never have bought the lipstick had she known, because she believed that lead was unsafe. *Id.* Although the Food and Drug Administration (FDA) did not regulate lead in lipstick, the plaintiff alleged that L'Oreal's lipstick "contains lead in far greater amounts than permitted in candy by the FDA." *Id.* The Third Circuit, however, had no difficulty in affirming that the plaintiff failed to establish an injury for purposes of standing. First, the plaintiff's subjective belief that the lipstick was unsafe was "belied by the FDA's report finding that the lead levels in the Defendant's lipsticks were not dangerous and therefore did not require warnings." *Id.* at 259. Second, the plaintiff admitted to having suffered "no adverse health effects from using the lipsticks." *Id.* Thus, the court held that the plaintiff lacked standing because she could not press claims of injury based on what levels of lead were subjectively unacceptable to her. Instead, the court deferred to FDA's findings on safety and affirmed the trial court's dismissal.

The U.S. District Court for the District of Massachusetts followed *Koronthaly*'s rationale in a similar multidistrict litigation involving class action complaints alleging that minute concentrations of lead in fruit juice posed a health risk to children. *In re Fruit Juice Prods. Marketing & Sales Practices*, 831 F. Supp. 2d 507, 508–09 (D. Mass. 2011). There, again, FDA investigated and determined that lead levels were well below the maximum health-based limit of 50 ppb. *Id.* at 509. This led to the court's conclusion that "[p]laintiffs simply have not alleged any type of injury in

fact." *Id.* at 510. The plaintiffs never alleged that they were suffering from physical harm and the court found the "claim of potential future injury . . . too hypothetical or conjectural to establish Article III standing." *Id.* at 511.

This analysis is in line with other cases, such as medical monitoring claims, holding that a subjective fear of future injury fails to meet Article III's demand for a current and objectively credible threat to health. *See, e.g.*, *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 974 (1993) (damages for fear of contracting cancer are available only "when the fear stems from a knowledge, corroborated by reliable medical and scientific opinion, that it is more likely than not that the feared cancer will develop in the future due to the toxic exposure"); *Mauro v. Owens-Corning Fiberglass Corp.*, 542 A.2d 16, 20–21 (N.J. Super. Ct. App. Div. 1988) (rejecting medical monitoring claim where risk of future injury could not be predicted with a degree of medical certainty and quantified); *see also In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1569 (D. Haw. 1990) (even though plaintiffs can recover for mental anguish without a physical injury, self-serving declarations about fear of contracting cancer in the future are insufficient proof). This general principle that plaintiffs must proffer objective evidence of an injury is not special to the field of toxic torts. For instance, in *Poe v. Ullman*, the U.S. Supreme Court held that plaintiffs challenging Connecticut laws against the use of contraceptives lacked standing because those laws were never enforced. *Poe v. Ullman*, 367 U.S. 497, 508 (1961). The Court held that the plaintiffs' standing must be "grounded in a *realistic* fear of prosecution," refusing to accept as an injury in fact the plaintiffs' "personal sensitiveness" or a "chimerical . . . fear of enforcement" that could not be objectively weighed. *Id.* (emphasis added).

Like the plaintiff in *Koronthaly*, the *MTBE* plaintiffs lacked the legally protected interest required under *Lujan*. 504 U.S. at 560. The city of New York effectively created its own interest through the adoption of an internal policy to remediate MTBE whenever sampling showed concentrations in excess of 1 ppb even though it could still legally serve that water. Defs' MSJ at 17. Nothing about this theory would prevent the adoption of a "single molecule" standard of injury, so long as that single molecule could be detected. *See id.* at 2 ("In effect, plaintiffs demand that this Court create a 'legally protected interest' in drinking water that contains *zero* MTBE."). Such an approach, which is now viable if the *MTBE* opinion stands, conflicts with the basic notion that legally protected interests giving rise to standing are conferred by statute, contract, or the common law. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 736 n.9 (1972) (discussing legally protected interest in environmental resources as "an interest created by statutes. . . ."). A plaintiff must show more than a subjective belief of injury to create standing for itself and effectively shifting the costs of its personal beliefs to others. *See* Defs' MSJ at 16 (plaintiffs are "free to adopt these standards as internal business practices, but [they] cannot impose them on defendants by demanding—under the guise of common law tort and statutory claims—that defendants can be held liable for the costs [plaintiffs] incur[ ] to comply with such practices."). This use of subjective and personal assertions of injury is incompatible with standing as it has been traditionally recognized by our legal system.

B. The MCL Is Not a "License to Pollute"

The use of MCLs, even if it allows for some small level of contamination, is perfectly compatible with defining an injury under existing tort law. With the exception of trespass, courts generally recognize that there is some de minimis level below which contamination will not give rise to a tort claim. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978) ("Common-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money."). The *MTBE* plaintiffs, however, characterized this long-standing principle as a "license to contaminate up to the MCL." Yet, no line of cases involving contamination to property or persons has ever previously endorsed the concept of recovering damages without injury.

In toxic tort cases it is not enough for plaintiffs to show the existence of contamination. They must also allege some type of palpable injury as well. For example, in many trespass actions involving "imperceptible"

contamination, plaintiffs must generally show some type of "substantial damage . . . to the *res* upon which the trespass occurs" to the point where it interferes with the exclusive possession of the property. *Bradley v. Amer. Smelting & Refining Co.*, 635 F. Supp. 1154, 1156 (W.D. Wash. 1986) (adopting rule of *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979)); *see also Rhodes v. E.I. Du Pont de Nemours & Co.*, 636 F.3d 88, 96 (4th Cir. 2011) (under West Virginia law plaintiffs must show that contamination "damaged or interfered with the plaintiffs' possession and use of their property"). For nuisance claims, plaintiffs must show that contamination rises to a level which interferes with the use and enjoyment of that property. *Bradley*, 635 F. Supp. at 1157–58. In *Bradley v. American Smelting & Refining Co.*, for instance, plaintiffs sued in trespass and nuisance alleging that trace amounts of cadmium and lead particles had settled on their property over the years as a result of the defendants' activities. *Id.* at 1155–56. It was undisputed that "the presence of these materials has had no demonstrable effect on plaintiffs' property." *Id.* at 1157. The court held that, without this "demonstrable effect," the plaintiffs lacked an injury. *Id.* Similarly, a plaintiff alleging negligence must show that a present injury has either already manifested itself or that "future effects of a present injury . . . are reasonably certain to occur." *Rhodes*, 636 F.3d at 94 (citing *Cook v. Cook*, 607 S.E.2d 459, 464 (W. Va. 2004)). But a plaintiff has no injury simply because a contaminant is present in the water supply (in the case of a water supplier, like the *MTBE* plaintiffs) or in a person's body (in the case of a supplier's customer). *See City of Moses Lake v. United States*, 430 F. Supp. 2d 1164, 1184–85 (E.D. Wash. 2006) (presence of trace contamination in an aquifer alone does not constitute an injury and dismissing the plaintiff's trespass and nuisance claims). The MCL allows a court to define such a "demonstrable effect" in a way that is consistent, objective, and relies on a scientific basis.

The majority of courts confronted with sub-MCL injuries have accepted the MCLs as a definition of injuries for standing purposes. A Florida case presented very similar factual circumstances to the *MTBE* litigation and came to the opposite conclusion. In *Emerald Coast Utilities Authority v. 3M Co.*, the plaintiff water provider filed a tort and products liability action against three companies, claiming that minute amounts of perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) contaminated drinking water wells. *Emerald Coast Utilities Authority (ECUA) v. 3M Co.*, 746 F. Supp. 2d 1216, 1219 (N.D. Fla. 2010). The defendants moved for summary judgment on the ground that the plaintiff lacked a cognizable injury to support Article III standing because the PFOA and PFOS contamination was below state and federal standards. *Id.* at 1218. The briefing in opposition by ECUA closely resembled that of the *MTBE* plaintiffs, arguing that the contaminants were "an unwelcome impurity in the ECUA water supply" and that expert testimony would demonstrate that they were potentially harmful. *Id.* at 1222–23 (internal quotations omitted). As with the *MTBE* plaintiffs, ECUA argued that it suffered an injury because low levels of contamination would require testing, monitoring and remediation. *Id.* at 1228.

The court granted defendants' summary judgment, explicitly rejecting the *MTBE* decision, *id.*, finding that ECUA would not be injured until it was "compelled to monitor the chemicals" or remediate contamination pursuant to the direction of EPA or the Florida Department of Environmental Protection. *Id.* at 1231–32. The court rejected the ECUA's expert testimony that there is no safe level of exposure to PFOA and PFOS. Instead, it relied upon an EPA provisional health advisory for PFOA and PFOS, which lacks the legal enforceability of an MCL. *Id.* at 1230. Chemicals must be more than simply "unwelcome," the court explained. *Id.* at 1232. Plaintiffs must provide "some evidence of a concrete and particularized harm to ECUA as a result of the chemicals' presence in its water supply." *Id.* The *ECUA* case departs from the *MTBE* decision in that it relied upon an EPA provisional health advisory (PHA) described by EPA as "reflect[ing] reasonable health-based hazard concentrations above which action should be taken to reduce exposure to unregulated contaminants in drinking water." EPA, *Provisional Health Advisories for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonate (PFOS)* (Jan. 8, 2009) at

1 n.1, *available at* http://water.epa.gov/action/advisories/drinking/upload/2009_01_15_criteria_drinking_pha-PFOA_PFOS.pdf. Although a non-enforceable PHA is less stringent than an MCL, and one court has rejected its use, *Rhodes v. E.I. Du Pont De Nemours & Co.*, 657 F. Supp. 2d 751, 764–65 (S.D. W. Va. 2009), *ECUA* is one of several cases that have accepted health-based regulatory standards as defining the amount of contamination necessary to constitute an injury. *See In re Wildewood Litig.*, 52 F.3d 499, 503 (4th Cir. 1995) (TCE levels below MCL did not unreasonably interfere with the plaintiffs' use and enjoyment of their property); *Brooks v. E.I. Du Pont de Nemours & Co.*, 944 F. Supp. 448, 449 (E.D.N.C. 1996) (contamination below the MCL does not constitute an injury because the levels "do not pose a threat; rather, such levels pose an acceptable risk"); *Cereghino v. Boeing Co.*, 873 F. Supp. 398, 403 (D. Or. 1994) (rejected plaintiffs' claim that lack of injury below MCL constitutes a "pollution easement" in favor of the defendants); *Gleason v. Town of Bolton*, 2002 WL 1555320 (Mass. Super. 2002) (MTBE contamination below the MCL does not constitute an injury); *Rose v. Union Oil Co.*, 1999 U.S. Dist. LEXIS 967 (N.D. Cal. 1999) (petroleum contamination below MCL not a risk to health or unreasonable interference with plaintiffs' use of the land).

In rejecting the principle that detectable contamination does not automatically equate an injury, the *MTBE* court allowed the plaintiffs to take their amorphous claims of injury from de minimis MTBE contamination to a jury without any showing of a "detrimental effect." This also creates a problem in that injuries will be determined, not by principles of law, but by improvements in detection methods. For instance, if a chemical is not detected in drinking water at a 4-parts–per-billion detection limit, then there is no injury. When technology improves, however, and the chemical can later be detected, an injury suddenly appears—even though the health of the people drinking this water never changed in the interim. Sweeping claims of a right to be free from contamination, absent some palpable injury caused by that contamination, are simply not tenable in an age where laboratories can already detect chemicals at the part-per-*trillion* level.

Contrary to what the *MTBE* plaintiffs alleged, drawing a line somewhere is clearly warranted. MCLs act as a regulatory demarcation of when the contamination of drinking water crosses the traditional tort law boundary from de minimis presence to constituting a "detrimental effect." Despite the *MTBE* plaintiffs' protests that such a scheme would grant a defendant a "license to pollute up to the MCL," it is far more consistent with traditional tort law standing than the alternative accepted by the *MTBE* court. The alternative, as described in the section below, is much worse.

C. Reliance on MCLs Is Preferable to Reliance on Juries

Defining an injury through a jury verdict, as the *MTBE* court ordered, would result in a wide range of inconsistent outcomes. The presence of a particular contaminant at 9 ppb may not constitute an injury to one jury, but its presence at 2 ppb could constitute an injury for another, even when both juries are sitting in the same state and working from the same jury instructions. Such results are virtually arbitrary. This will be inevitable when the health and safety of a chemical are gauged in a litigation setting instead of a regulatory setting.

Jurors will hear competing expert testimony and then determine whether the particular contaminant(s) at issue are harmful or require remediation at the levels present. One need not be overly cynical to believe that the presentation of scientific findings and opinions in a courtroom is less than optimal. The witness stand has often hosted those who advocate for fringe theories that have not (often for good reason) been vetted by other scientists working in their field. *See, e.g.*, *Farina v. Nokia Inc.*, 625 F.3d 97 (3d Cir. 2010) (plaintiffs' expert testified that cellular phones cause various brain injuries and cancer); *Hazlehurst v. Sec'y of Health and Human Servs.*, 604 F.3d 1343 (Fed. Cir. 2010) (testimony that measles, mumps, and rubella vaccine causes autism); *Oklahoma v. Tyson Foods, Inc.*, 565 F.3d 769, 781 (10th Cir. 2009) (testimony that bacteria in a river could be traced for miles back to the land application of poultry litter). However, even where

the scientific theories at issue are above the derided "junk science" threshold, the number of witnesses called in a particular case are but a miniscule percentage of those professionals working in the relevant field. Experts may cite to peer-reviewed and generally accepted studies (or they may not), but the resulting expert reports and testimony are not subject to the scrutiny of their peers. The result is that experts can pitch theories to juries that they would never proffer outside of a courtroom. *See, e.g.*, *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1234 (5th Cir. 1986) ("We know from our judicial experience that many such [experts] present studies and express opinions that they might not be willing to express in an article submitted to a refereed journal of their discipline or in other contexts subject to peer review."). Nor would some of these theories survive in the regulatory setting, where agency staff analyze a wide array of scientific data and subject their findings to public notice and comment.

Even where all expert witnesses are operating at the highest levels of competence and honesty, determining when trace levels of contaminants have or will cause an injury remains problematic. Few jurors may be familiar with the scientific concepts on display at trial—ranging from biodegradation to toxicology to groundwater modeling—and those that are may be excluded from the jury panel. Even people who freely and enthusiastically absorb popular science will struggle with a lengthy oral presentation on very complex scientific matters. Of course, for those jurors that are disinterested, undisciplined, or already convinced that the subject matter is beyond their understanding, expert witnesses are essentially testifying for the record. The result is that jurors are often left to make a scientific determination based on a morality play centering on accusations of experts being paid for their testimony, claims of junk science, and criticism of corporate profits. Instead, reliance on the MCL is a more deliberate and reliable means of defining the existence of an injury. Despite being derided by the *MTBE* plaintiffs as "politically driven," Plaintiffs' Response to Defendants' Motion for Summary Judgment on All Claims for Lack of Justiciability (filed Feb. 23, 2006) (on file with author) at 11, the MCL process surely has more scientific credibility than defining injuries through litigation.

Conclusion

The *MTBE* court's dismissal of MCLs as merely "convenient guidepost[s]" is an unfortunate license for arbitrary standing decisions. If the court's reasoning is followed en masse, any party responsible for contributing trace amounts of virtually any contaminant to drinking water (or food, beverages, soil, or even the air) must resign their fate to the whims of juries. No objective, uncontroverted facts could cut short suits by plaintiffs claiming a right to water without even a single molecule of contamination—a commodity that does not exist. Any defendant, facing the expensive prospect of a suit that must, as a matter of law, endure until trial, where it then faces the potential for exorbitant damage awards, will face nearly insurmountable pressure to settle even meritless cases. None of this is necessary if courts afford MCLs the weight that they are due.

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