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# Once in Doubt

Robert Kry

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# Case Note

## Once in Doubt

*SEC v. Park*, 99 F. Supp. 2d 889 (N.D. Ill. 2000).

The doctrine of constitutional doubt stands in Supreme Court jurisprudence as a touchstone of judicial caution. We are told that when the “validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.”<sup>1</sup> In most of its applications, this principle makes sense. But is it at least sometimes preferable to stake a decision on constitutional grounds when a statutory alternative presents itself? I argue that it is; that in 1985, the Supreme Court declined to do so; and that the recent district court ruling in *SEC v. Park*<sup>2</sup> demonstrates the price that we are paying for its error.

### I

Gun Soo Oh Park is known to his readers as Tokyo Joe. In 1997 and 1998, Park gained notoriety as an Internet stock-picking guru. He began by posting messages to financial bulletin boards, and in July 1998, he established a website at [tokyojoe.com](http://tokyojoe.com). Part of this site was accessible only to paying subscribers of Société Anonyme, a corporation that Park established. Park posted his stock picks at his site, operated a members-only chat room (to which he often contributed) and sent out stock alerts by e-mail to his subscribers. Over the following year, Park’s paid following grew to 3800, generating more than \$1 million in revenue.<sup>3</sup>

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1. *Crowell v. Benson*, 285 U.S. 22, 62 (1932).  
2. 99 F. Supp. 2d 889 (N.D. Ill. 2000).  
3. *Id.* at 891-92.

The litany of charges that the SEC brought against Park will sound familiar to those versed in cyberspace boiler-room antics. The SEC charged that Park engaged in “scalping” by failing to disclose his interests in stocks and then manipulating the prices of those stocks through his recommendations for his own financial gain. It charged that he acted as a tout by accepting undisclosed compensation in return for promoting a company’s stock. It further accused him of outright misrepresentation, saying that he falsified his track record and lied about his own buying and selling activities.<sup>4</sup> Based on these allegations, the SEC charged Park with fraud under the Investment Advisers Act (IAA).<sup>5</sup>

Park defended himself by arguing that he did not give out “personalized” advice and was thus not an investment adviser who could be charged with fraud under the Act.<sup>6</sup> To understand the significance of this distinction, we must turn to the Supreme Court’s 1985 decision in *Lowe v. SEC*.<sup>7</sup>

The Investment Advisers Act does not, by its terms, distinguish between personalized and impersonal advice. Rather, it excludes from coverage “the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.”<sup>8</sup> In *Lowe*, the Supreme Court considered whether the SEC could force the publisher of an investment newsletter to register as an investment adviser.<sup>9</sup> The SEC had interpreted the publisher exemption to apply only when the publication was “not primarily a vehicle for distributing investment

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4. *Id.* at 892.

5. 15 U.S.C. §§ 80b-6(1) to -6(2) (1994). The SEC also charged Park with securities fraud under section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) (1994), and Rule 10b-5 promulgated thereunder, as well as with a violation of section 17(b) of the Securities Act, 15 U.S.C. § 77q(b) (1994). *Park*, 99 F. Supp. 2d at 892. For a discussion of the SEC’s complaint against Park written before the district court’s decision, see Charles R. Mills, *Enforcement Program Against Internet Publishers Tests Limits of Investment Advisers Act*, WALLSTREETLAWYER.COM: SEC. ELECTRONIC AGE, Feb. 2000, at 1.

6. *Park*, 99 F. Supp. 2d at 893. Park also argued that the SEC had failed to state a 10b-5 claim with respect to its allegations of material omissions since he was not under a fiduciary duty to disclose those facts to his subscribers. The court disagreed. *Id.* at 898-900. In addition, Park argued that his statements were not made “in connection with the purchase or sale of securities” as required by Rule 10b-5. *Id.* at 898. The court found a sufficient nexus, and refused to dismiss on this ground as well. *Id.* at 900. Finally, the court rejected Park’s Rule 9(b) objection to the insufficient particularity of the SEC’s fraud accusations. *Id.* at 900-01. This Case Note is concerned with the application of the Investment Advisers Act, rather than these other aspects of the ruling.

7. 472 U.S. 181 (1985).

8. 15 U.S.C. § 80b-2(a)(11)(D) (1994).

9. *Lowe*, 472 U.S. at 183. The IAA contains not only antifraud provisions, but also a broad requirement that investment advisers register with the SEC before engaging in business. 15 U.S.C. § 80b-3(a) (1994). In *Lowe*, there was no evidence of fraud on the part of the publisher. The SEC’s accusations were based principally on his failure to register. *Lowe*, 472 U.S. at 184-86. Notably, the SEC in *Park* did not accuse the defendant of violating the registration provision (despite the fact that he was unregistered, see *Park*, 99 F. Supp. 2d at 891), no doubt to avoid the potential constitutional issues that might have arisen.

advice.”<sup>10</sup> Lowe argued that the registration provision, so construed, was an unconstitutional prior restraint on the financial press.<sup>11</sup>

Avoiding this constitutional argument, the Court rejected the SEC’s interpretation of the IAA in favor of a broader statutory reading of the publisher exemption. Culling from the legislative history, it held that Congress’s primary concern was with those who gave personalized advice to specific clients.<sup>12</sup> Lowe did not fall within this category.<sup>13</sup> While basing its decision on statutory grounds, the Court strongly intimated that its interpretation was driven by constitutional considerations.<sup>14</sup>

Justice White, joined by two others, concurred only in the result. He criticized the Court’s statutory interpretation as being inconsistent with the legislative history and insufficiently deferential to the SEC.<sup>15</sup> He would have decided the case by holding the registration provision unconstitutional as applied.<sup>16</sup> Justice White thought that imposing a professional licensing requirement on one who does no more than render advice is constitutional only where the advice given is tailored to the recipient and a “personal nexus” exists between the speaker and his advisee.<sup>17</sup> An impersonal publisher like Lowe did not meet this standard.

At first glance, the majority and concurring opinions may seem similar. They both led to the same result and relied at least in part on the concept of personalization. The consequences of the majority route, however, were far-reaching. Because the majority staked its decision on the statutory

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10. *Lowe*, 472 U.S. at 216 (White, J., concurring in the result) (citation omitted).

11. *Id.* at 189 (majority opinion).

12. *Id.* at 207-08 (“The Act was designed to apply to those persons . . . who provide personalized advice attuned to a client’s concerns . . .”); see also *id.* at 210 (“As long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relationships . . . that are characteristic of investment adviser-client relationships, we believe the publications are, at least presumptively, within the exclusion and thus not subject to registration under the Act.”).

13. *Id.* at 211. The Court also noted that Lowe’s publications met the remaining criteria for statutory exclusion, being “bona fide” and of “general and regular circulation.” *Id.* at 208-09.

14. See *id.* at 204-05 (stating that Congress was “undoubtedly aware” of the Court’s earlier precedents on prior restraints).

15. *Id.* at 213-27 (White, J., concurring in the result).

16. *Id.* at 236.

17. See *id.* at 232 (“One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client’s individual needs and circumstances is properly viewed as engaging in the practice of a profession. . . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such . . .”); see also *Taucher v. Born*, 53 F. Supp. 2d 464, 477-78 (D.D.C. 1999) (applying the *Lowe* concurrence’s constitutional standard). Justice White’s constitutional distinction between publishers and professionals may have its roots in state court decisions that protected unlicensed legal publishers from statutes prohibiting the unauthorized practice of law. See, e.g., *In re Thompson*, 574 S.W.2d 365, 369 (Mo. 1978); *N.Y. County Lawyers’ Ass’n v. Dacey*, 283 N.Y.S.2d 984 (App. Div.), *rev’d and dissenting opinion adopted by* 234 N.E.2d 459 (N.Y. 1967); *Or. State Bar v. Gilchrist*, 538 P.2d 913, 916 (Or. 1975).

definition of an investment adviser, its holding excluded impersonal publishers not only from the registration requirement, but also from the antifraud provisions of the IAA, which of course do not pose any constitutional issue at all.<sup>18</sup> The concurrence's approach would have excused impersonal publishers from the registration requirement but left the antifraud provisions in force.<sup>19</sup> The majority's decision has been widely criticized for impairing the SEC's ability to enforce the antifraud provisions of the IAA.<sup>20</sup>

## II

SEC enforcement capability may not be the most serious casualty of the *Lowe* majority. That opinion also threatens the constitutional freedom of the press. To see why, we must return to *Park* and observe how *Lowe* shaped the district court's handling of the case.

The *Park* court rejected the defendant's claims that he provided only impersonal advice.<sup>21</sup> It based its decision on four factors: (1) that Park "allegedly sent e-mails directly to individual e-mail accounts, advising subscribers individually through their e-mail accounts of stock picks"; (2) that Park "answered individual questions posited by subscribers in [his] chat room"; (3) that "[Park] discussed [his] stock picks in the chat rooms" and that "Park's [stock] picks may have become or are the subscriber's picks"; and (4) that Park may have been "tailoring [his] advice to the needs of a certain category of individuals who would subscribe to an Internet stock picking web site as opposed to the general public."<sup>22</sup>

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18. Fraudulent speech is not protected by the First Amendment. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771 (1976); *Schneider v. State*, 308 U.S. 147, 164 (1939).

19. *Lowe*, 472 U.S. at 225 (White, J., concurring in the result).

20. *See, e.g.*, Lori Denise Coffman, Note, *Lowe v. Securities and Exchange Commission: The Deterioration of Financial Newsletter Regulation*, 10 NOVA L.J. 1267, 1293 (1986); David B. Levant, Note, *Financial Columnists as Investment Advisers: After Lowe and Carpenter*, 74 CAL. L. REV. 2061, 2089 (1986); Stacy P. Thompson, Comment, *Lowe v. SEC: Investment Advisers Act of 1940 Clashes with First Amendment Guarantees of Free Speech and Press*, 21 U. RICH. L. REV. 205, 224 (1986).

21. Because the court was ruling on a 12(b)(6) motion, it assumed the facts as alleged by the SEC. *Park*, 99 F. Supp. 2d at 893.

22. *Id.* at 895-96. In addition, the district court held that Park was not entitled to the publisher's exclusion (1) because his publications were not bona fide since he was acting as a tout, and (2) because they were not of general and regular circulation. *Id.* As to the first point, a person engaged in touting or scalping pursues a purely promotional, and perhaps fraudulent, activity and is therefore already subject to a lower level of First Amendment scrutiny, if any. *Lowe*, 472 U.S. at 224-25 (White, J., concurring in the result); *see also* Carol E. Garver, Note, *Lowe v. SEC: The First Amendment Status of Investment Advice Newsletters*, 35 AM. U. L. REV. 1253, 1283-84 (1986) (arguing that "interested" publishers, who have an economic stake in the performance of the securities they recommend, are engaging in commercial speech, but that "disinterested" publishers are not). The court's analysis of this point need not concern the publishers of material that is neither fraudulent nor promotional. As to the second point, the "general and regular"

It is obvious that the court has taken an unjustifiably broad view of “personalized” advice. First, consider Park’s e-mailing of stock picks. This is a far cry from the sort of “fiduciary, person-to-person relationships that were discussed at length in the legislative history of the [IAA].”<sup>23</sup> Nowhere does the court allege that these stock picks were actually tailored to the individual characteristics of the recipients.<sup>24</sup> Park certainly did not distribute one list to widowed pensioners and another to technology high-rollers.<sup>25</sup>

The chat room factor is also problematic. A person who answers subscriber questions only as an incidental aspect of his publishing venture should be distinguished from someone whose principal business is participating in online consultation sessions. The former is more analogous to a newspaper editor who merely publishes his responses to letters to the editor.<sup>26</sup>

The third factor is astounding. The court essentially holds that a recommendation that others emulate oneself is personalized because they may actually act on the advice. Any piece of advice is personalized in the formalistic sense that its recipients share at least one common characteristic—namely, that they might follow the advice given. Surely this

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criterion is presumably relevant only to the statutory construction of the IAA; it seems highly unlikely that mere irregularity would reduce the applicable level of First Amendment protection afforded to speech. *See, e.g., Lowe*, 472 U.S. at 232 (White, J., concurring in the result) (setting out the constitutional rule without reference to the regularity of publication). Many classic First Amendment cases involve speech that is not regularly disseminated, but timed to particular events that the speaker wishes to inform others about. *See, e.g., Street v. New York*, 394 U.S. 576 (1969) (analyzing flag-burning in response to the attempted assassination of a civil rights figure). Indeed, on the Internet, even mainstream publications such as the *Wall Street Journal* are not generally and regularly disseminated, but are updated as news arrives. One wonders, then, whether the statutory “general and regular” criterion retains any coherence whatsoever.

23. *Lowe*, 472 U.S. at 210 (majority opinion).

24. *Cf. id.* at 207-08 (“The Act was designed to apply to those persons . . . who provide personalized advice attuned to a client’s concerns . . .”).

25. Moreover, the court is unclear when it uses the word “individually.” Is the implication that Park was actually in the business of typing out his stock pick e-mail messages to each subscriber, one by one? Unless Park deviated wildly from the norm in this industry, his principal use of e-mail was through the use of distribution lists, which are analogous to impersonal newsletters, even though the messages wind up in the inboxes of individual e-mail accounts. *Cf. Reno v. ACLU*, 521 U.S. 844, 851 (1997) (discussing the use of “mail exploders,” more commonly known as distribution lists).

26. *See Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, No. 97 C 2362, 1999 WL 965962, at \*9 (N.D. Ill. Sept. 29, 1999) (considering a publisher’s communications with individual subscribers that are merely incidental to his publishing activities, and concluding that his activities are, on the whole, impersonal); Donald E. Lively, *Securities Regulation and Freedom of the Press: Toward a Marketplace of Ideas in the Marketplace of Investment*, 60 WASH. L. REV. 843, 860 (1985) (“[A] columnist who occasionally addressed individual readers’ questions about investments might be deemed to be giving ‘personal advice’ that required regulatory control. . . . [This] result would be constitutionally catastrophic.”). Another commentator notes that it is “difficult to conclude that the loose protocol and free-form nature of chat room communications, in which personal identities may be unknown or obscured, would . . . form the foundation for a fiduciary relationship.” Mills, *supra* note 5. Mills adds that “there is no allegation that . . . [Park] provided advice or recommendations [in his chat room] tailored to any subscriber’s personal financial and investment goals and circumstances.” *Id.*

is not the sort of personalization that the Supreme Court had in mind in *Lowe*.

Lest we remain unconvinced, the court finally tells us that mere catering to a self-selected audience is a type of personalized speech. Following this logic, the *New York Times* is personalized because its editorial pages cater to those who desire liberal commentary rather than to the general public. It's hard to imagine any publisher who doesn't give personalized advice, save the leafleteer who randomly stuffs his wares through the mail slots of an unsuspecting public.

### III

How did we get from *Lowe* to here? The answer is obvious. Courts want to punish people who commit fraud. *Lowe's* statutory gloss has forced lower courts either to give an extremely broad reading to the concept of "personalization" or to face the prospect of letting fraudsters off the hook. This by itself might not be a bad thing, but it has dangerous consequences because, as Justice White explained, personalization is also relevant in determining when an honest publisher is protected by the First Amendment.<sup>27</sup> Every time a court expands the scope of personalization in order to convict someone of fraud, it potentially strips First Amendment protection from some other legitimate publisher.

Suppose that all the allegations of Park's fraudulent conduct turned out to be false. Imagine that he never intended to manipulate stock prices and presented only his honest theories about where Internet stocks were headed. Were we to accept the district court's definition of personalization, Park would still be in trouble. He would be acting as an unregistered (that is, unlicensed) investment adviser,<sup>28</sup> and because his speech is "personalized," the First Amendment might not shield his activities from prior restraint.<sup>29</sup> Were he to apply for a license, the SEC could deny it solely because of a prior conviction (as in *Lowe*).<sup>30</sup> (Had he been writing about commodity futures, the Commodity Futures Trading Commission (CFTC) could deny

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27. *Lowe*, 472 U.S. at 232 (White, J., concurring in the result). The precise contours of personalization as a constitutional standard are unclear. From Justice White's concurrence, we can infer that to be licensable, advice must be personalized both in the sense that it is tailored to the recipient's situation and that it is given in the context of some sort of "personal nexus" or person-to-person relationship. See *id.* See generally Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885 (2000) (arguing that under the Court's precedents, professional speech must be both tailored to the characteristics of the recipient and given in the context of a person-to-person relationship before the government may license it).

28. See 15 U.S.C. § 80b-3(a) (1994).

29. See *supra* note 27.

30. 15 U.S.C. §§ 80b-3(c)(1)(G), -3(e) (1994); *Lowe*, 472 U.S. at 183-84 (majority opinion).

him a license simply because of his “moral turpitude”!)<sup>31</sup> By prohibiting unlicensed publishing, the government restricts the sources of information available to market participants.<sup>32</sup> The restriction is based solely on the government’s assessment of which publishers are qualified to offer advice. That is an assessment the First Amendment normally prohibits it from making.<sup>33</sup>

The explicit licensing of speech is not the only danger involved. By classifying publishers like Park as professionals, courts potentially authorize a wide array of burdensome restrictions that would otherwise be invalid content-based regulations of speech. For example, the CFTC requires “commodity trading advisors” to consent to on-demand audits (essentially waiving their Fourth Amendment rights) and to supply subscriber lists to government officials.<sup>34</sup> While the SEC regulates with a somewhat lighter touch,<sup>35</sup> it is not hard to imagine it taking a more intrusive tack at some point in the future. Requirements of this nature deter publication and thus raise many of the same concerns as discretionary licensing schemes.<sup>36</sup> One can debate the merits of applying these regulations to traditional professional advisers. But extending them to publishers by artificially labeling their advice “personalized” is a serious constitutional problem.

As the lower courts expand the concept of personalization in order to extend the SEC’s antifraud jurisdiction, they whittle down the First Amendment protection of honest publishers.<sup>37</sup> It is freedom of speech, and not SEC enforcement capability, that will prove to be the real casualty of *Lowe*.

How can this tragedy be avoided? The obvious solution would be for Congress to extend the antifraud provisions of the IAA to persons who, but

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31. 7 U.S.C. § 12a(3)(M) (1994); 17 C.F.R. pt. 3, app. A (2000).

32. *Cf. Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (expounding the philosophy of the marketplace of ideas).

33. *See, e.g., Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“[T]he forefathers did not trust any government to separate the true from the false for us.”).

34. 7 U.S.C. § 6n(3)(A) (1994).

35. 15 U.S.C. § 80b-3(c)(1) (1994) (reporting requirements); *see also Lowe*, 472 U.S. at 236 (White, J., concurring in the result) (stating his belief that the IAA’s reporting requirements could be enforced against even impersonal publishers).

36. *E.g., Taucher v. Born*, 53 F. Supp. 2d 464, 474 (D.D.C. 1999) (providing an example of the deterrent effect of the CFTC’s regulatory scheme).

37. This need not necessarily occur. The courts could adopt one definition of “personalization” for the statutory IAA context and a different one for the constitutional context. Indeed, to its credit, this is almost what the court did in *Park*. It declined to reach the constitutional question presented because only fraudulent speech was at issue (Park was not charged with failing to register). *Park*, 99 F. Supp. 2d at 896-98. Thus, the court technically left open the possibility that had Park’s publications not been fraudulent, he would have been protected from licensure by the First Amendment. However, the degree to which constitutional and statutory questions of personalization are intermingled in cases of this nature—particularly ones alleging failure to register—makes this a perilous safeguard of First Amendment freedoms.



for the publisher's exemption, would be investment advisers.<sup>38</sup> Alternately, the Supreme Court could overrule *Lowe* and adopt its concurring opinion. This would move the securities publishing industry into line with the commodity futures publishing industry, where courts have applied the antifraud provisions of the Commodity Exchange Act to publishers while exempting them from the registration requirement on constitutional grounds.<sup>39</sup> In the meantime, courts interpreting the IAA should resolve cases on statutory grounds other than personalization, where possible.<sup>40</sup>

Avoiding constitutional doubt may be sound policy most of the time, but there are instances in which the damage done outweighs whatever benefit that policy is thought to offer. After all, "to be once in doubt / Is once to be resolv'd."<sup>41</sup> As *SEC v. Park* makes plain, the Supreme Court in *Lowe* made a mistake, and that mistake ought to be fixed.

—Robert Kry

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38. In fact, shortly after *Lowe*, the SEC made a recommendation along these lines to Congress, but it did not result in legislation. See *Hearing Before the Subcomm. on Telecomms., Consumer Prot., and Fin. of the House Comm. on Energy and Commerce on Invest. Advisers and Fin. Planners*, 99th Cong. 14 (1986) (statement of John Shad, Chairman of the SEC); see also Ralph C. Ferrara & Gregory S. Crespi, *Developments in the Regulation of Financial Planners*, at 195, 217-18 (PLI Corporate Law & Practice Course, Handbook Series No. B4-6842, 1988) (discussing the SEC's proposal); Lani M. Lee, *The Effects of Lowe on the Application of the Investment Advisers Act of 1940 to Impersonal Investment Advisory Publications*, 42 BUS. LAW. 507 (1987) (same).

39. The Commodity Exchange Act (CEA) has a narrower publisher exemption than the IAA, so challenges to its registration provision have generally been resolved on as-applied First Amendment grounds rather than by statutory interpretation, leaving the antifraud provisions intact. *Taucher*, 53 F. Supp. 2d 464; *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, No. 97 C 2362, 1999 WL 965962 (N.D. Ill. Sept. 29, 1999); see also *Exemption From Registration as a Commodity Trading Advisor*, 65 Fed. Reg. 12,938 (2000) (formally adopting the result in *Taucher*). But see *Ginsburg v. Agora*, 915 F. Supp. 733, 737 (D. Md. 1995) (interpreting the CEA to exclude impersonal publishers).

40. For example, the court in *Park* could simply have rested its ruling on the ground that *Park's* publications were not bona fide because they were being used as a fraudulent vehicle for touting and scalping. See *Lowe v. SEC*, 472 U.S. 181, 208-09 (1985) (majority opinion); *supra* note 22. The *Park* court's analysis of the personalization question was unnecessary.

41. WILLIAM SHAKESPEARE, *OTHELLO*, act 3, sc. 3.