

UN-CONSTITUTIONALITY OF ASSET SECURITIZATION

Michael Nwogugu*

Abstract

Under US laws, all forms of asset securitization are unconstitutional. Securitization of many types of assets (loans, credit cards, auto receivables, insurance, intellectual property, etc.) has become more prevalent, particularly for financially distressed companies and companies with low or mid-tier credit ratings. This article analyzes critical legal and corporate governance issues.

Keywords: Securitization; constitutional law; capital markets; complexity

*Certified Public Accountant (Maryland, USA). Certified Management Accountant (IMA). Address: P. O. Box 996, Newark, NJ 07101, USA. Emails: dataghi@peoplepc.com. mc111@juno.com.

Introduction

Under US laws, securitization is illegal and unconstitutional. Issues pertaining to general illegality of securitization are addressed in Nwogugu (2006)¹⁰⁰. The existing literature on legal and corporate governance issues pertaining to securitization is extensive, but has several gaps that have not been addressed at all or sufficiently:

- Whether securitization is legal and constitutional.
- The effect of economic factors on the constitutionality of securitization, and vice versa.
- The effect of behavioral factors/trends on the constitutionality of securitization, and vice versa.

This article seeks to fill these significant gaps in the literature. Although the following analysis is supported with US case law, the principles derived are applicable to securitization transactions in common-law countries and civil-law countries.

In analyzing the legality of securitization, the following criteria are relevant:

- The origins and history of securitization – legislative history, evolution of securitization processes, and current practices. Carlson (1998) traces the history of securitization to direct and specific efforts/collaborations to avoid the impact of US bankruptcy laws.¹⁰¹
- Types of contracts used in securitization. The key criteria for enforceability.
- Purposes, wording and scope of applicable laws – state contract laws, state trusts laws, US bankruptcy code, and state/federal securities laws.

¹⁰⁰ See: Nwogugu M (2006). *Securitization Is Illegal: Some Antitrust, RICO And Usury Issues*. Forthcoming in *Journal Of International Banking Law & Regulation* (2008).

¹⁰¹ See: Schwarcz S. (1999). Rethinking Freedom Of Contract: A Bankruptcy Paradigm. *Texas Law Review*, 77.

See: Klee K & Butler B (2002). Asset-Backed Securitization, Special Purpose Vehicles And Other Securitization Issues. *Uniform Commercial Code Law Journal*, 35(2):23-33.

See: Carlson D (1998). The Rotten Foundations Of Securitization. *William & Mary Law Review*, 39:

See: Bjerre C (2002). Project Finance, Securitization And Consensuality. *Duke Journal Of Comparative And International Law*, 12:411-440.

See: Schwarcz (2001). Intermediary Risk In A Global Economy. *Duke Journal Of Comparative And International Law*, 50(6).

- How the applicable laws are applied in securitization processes – by market participants, regulators and lawyers that represent investors.

- The people, markets, and entities/organizations affected by securitization.

- The usefulness of existing (if any), possible and proposed (if any) deterrence measures designed to reduce fraud/crime/misconduct.

- Transaction costs.

- The results and consequences of application of relevant laws.

A. Securitization Constitutes A Violation Of The Commerce Clause Of The US Constitution, And Hence, Is Illegal¹⁰²

¹⁰² On constitutionality of statutes and processes in general, see the following articles.

See: Chemerinsky E (2005). Constitutional Issues Posed In The Bankruptcy Abuse Prevention And Consumer Protection Act Of 2005. *American Bankruptcy Law Journal*, 79:571-602.

See: Gorton G & Souleles N (Sept. 2005). *Special Purpose Vehicles And Securitization*. Working Paper # 05-21, Federal Reserve Bank of Philadelphia, USA.

See: Janger E (2002). Muddy Rules For Securitizations. *Fordham Journal Of Corporate & Financial Law*, 7:301-315.

See: Gordon T (2000). Securitization of Executory Future Flows As Bankruptcy-Remote True Sales. *University of Chicago Law Review*, 67(4):1317-1345.

See: Frankel T (2002). Cross Border Securitization: Without Law, But Not Lawless. *Duke Journal Of Comparative And International Law*, 8: 255-265.

See: Alexander F (2000). Tax Liens, Tax Sales And Due Process. *Indiana Law Journal*, 75: 747-807.

See: Alexander F. S. (2000). Constitutional Questions About Tax Lien Foreclosures. *Government Finance Review*, 16:27-32.

See: Alexander F S (1995). Property Tax Foreclosure Reform: A Tale of Two Stories. *Georgia Bar Journal*

See: Alexander F S (1993). Federal Intervention In Real Estate Finance: Preemption And Federal Common Law. *North Carolina Law Review*, 71:293-370.

See: Povel P(1999). Optimal “Soft” Or “Tough” Bankruptcy Procedures. *Journal Of Law, Economics & Organization*, 15(3):659-669.

See: Hirsch W (1994). An Economic Analysis Of The Constitutionality Of State Preference Laws. *International Review Of Law & Economics*, 14:299-306.

See: Cotlar A (Jan. 2003). Say Cheese: The Constitutionality Of State-Mandated Free Airtime On Public Broadcasting Stations. *Federal Communications Law Journal*, 56(1):55-84.

Securitization constitutes violations of the *Commerce Clause* of the US Constitution. For purposes of constitutional law analysis, the relevant ‘state-action’¹⁰³ consists of: **a)** the US Congress’s omission in failing to create a uniform set of laws for securitization given the significant magnitude of securitization transactions in the US, and its pervasive effect on the overall US economy – the government has an affirmative duty to create and enforce laws that govern activities that have significant effects on its citizens and institutions; **b)** the sponsor’s selection of collateral for securitization – which is essentially a governmental regulatory role (the sponsor takes on the ‘regulatory role’ of the government in selecting collateral that supposedly conforms to certain minimum standards; the government has an interest in assuring that investors are provided adequate minimum protection by controlling/regulating the quality of collateral); **c)** the absence of state laws that specify criteria for selection of collateral.

In the US, Securitization transactions are governed by a combination of state laws (trust laws, corporations laws, securities laws and contract laws) and federal securities laws. Securitization involves interstate commerce and implicates the *Commerce Clause*, because the collateral and investors are typically located in various states, and the trustees/board-members and servicing agent maybe located in different states. Hence, securitization contravenes the *Commerce Clause* of the US Constitution because there are no federal contract laws or special laws that directly regulate the terms and processes of securitizations (apart from federal

securities laws which are not sufficiently specific¹⁰⁴ and the US Trust Indenture Act of 1939¹⁰⁵ which governs only SPV administration and some debt covenants, but not elements of interstate commerce).

Furthermore, securitization imposes substantial burdens on interstate commerce because: **a)** in securitization, due diligence costs are higher for out-of-state collateral, than for in-state collateral, and hence, securitization impliedly or directly discourages the use of geographically dispersed assets as collateral; **b)** the geographical location of the servicer is critical to the profitability of the securitization process, and hence securitization encourages specific geographical preferences, and unduly burden’s interstate commerce; **c)** compliance costs and processing costs per securitization transaction increases drastically as the number of states involved increases; **d)** under the present legal regime, securitization introduces conflicts of laws arising from non-uniform state laws.

B. Securitization Constitutes a Violation Of The Free-Speech Clause¹⁰⁶

Securitization constitutes violations of the *Free-Speech Clause* of the US Constitution. For purposes

See: Nimmer M B (1958). The Constitutionality Of Official Censorship Of Motion Pictures. *University Of Chicago Law Review*, 25(4):625-657.

See: Dunbar W (Feb. 1901). The Constitutionality Of The US Inheritance Tax. *Quarterly Journal Of Economics*, 15(2):292-298.

See: Thomas S A (2003). Re-Examining The Constitutionality Of The Remittitur Under The Seventh Amendment. *Ohio State Law Journal*, ____.

See: Huhn W (2004). Assessing The Constitutionality Of Laws That Are Bother Content-Based And Content Neutral: The Emerging Constitutional Calculus. *Indiana Law Journal*, 79:801-810.

¹⁰³ See: *Evans v. Newton*, ____ US ____ (1966).

See: *Evans v. Abney*, ____ US ____ (1970).

See: *Burton v. Wilmington*, ____ US ____ (1971).

See: *Moose Lodge v. Irvis*, ____ US ____ (1972).

See: *Edmonson v Leesville Concrete*, ____ US ____ (1991).

See: Tushnet M (2003). The Issue Of State Action/Horizontal Effect In Comparative Constitutional Law. *International J. Of Constitutional Law*, 1(1):79-98.

See: *Marsh v. Alabama*, ____ US ____ (1946).

See: *Screws v. US*, 325 US 91 (____).

See: Stephen Ellman, “Constitutional Confluence: American “State Action; Law And The Application Of South Africa’s Socio Economic Rights Guarantees To Private Actors”, 45 New York Law School Law Review ____ (2001).

See: Stephen Gardbaum, *The “Horizontal Effect” of Constitutional Rights*, Michigan Law Review, 102: 387-398 (2003).

See: Stephen Gardbaum, Where The (State) Action Is, *Int. J. Constitutional Law*, 4:760-779.

See: Currie D (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.

¹⁰⁴ See: Merrill T (2000). The Landscape of constitutional property. *Virginia Law Review*, 86(5):885-999.

See: Anonymous (1979). Securities Law And the Constitution: State Tender Offer Statutes Reconsidered. *The Yale Law Journal*, 88(3): 510-520.

See: Warren M (1997). Federalism And Investor Protection: Constitutional Restraints On Preemption Of State Remedies For Securities Fraud. *Law and Contemporary Problems*, 60(3-4):169-201.

See: Landrum D (2003). Governance of limited liability companies - Contrasting California and Delaware models. *The Real Estate Finance Journal*, 19(1): 8–11.

See: Frankel (2002)(Supra).

See: Larbaestier P (1990). Australian Corporations Act Held to Be Unconstitutional. *International Financial Law Review*, 9(4): 11-12.

See: Williams T & Lundeen W (2002). Taxation And The Business Of The Internet, Part II: The Shaky Ground Of The Commerce Clause. *Corporate Business Taxation*, 4(3):11-15.

¹⁰⁵ The US Trust Indenture Act of 1939 (“TIA”) (15 U.S.C. § 77aaa through 15 U.S.C. § 77bbb), applies to debt offerings and supplements the US Securities Act of 1933. The U.S. Securities and Exchange Commission has created various regulations under the TIA.

¹⁰⁶ On constitutionality of statutes and processes in general, see the following articles.

See: Chemerinsky (2005)(Supra).

See: Alexander (2000)(Supra).

See: Povel (1999)(Supra).

See: Hirsch (1994)(Supra).

See: Cotlar (2003)(Supra).

See: Nimmer (1958)(Supra).

See: Dunbar W (Feb. 1901). The Constitutionality Of The US Inheritance Tax. *Quarterly Journal Of Economics*, 15(2):292-298.

See: Thomas (2003)(Supra).

See: Huhn W. (2004). Assessing The Constitutionality Of Laws That Are Bother Content-Based And Content Neutral: The Emerging Constitutional Calculus. *Indiana Law Journal*, 79:801-810.

See: White D B (1939). Unfair Competition: The Constitutionality Of California Unfair Practices Act. *California Law Review*, 27(4):449-458.

of constitutional law analysis, the relevant ‘state-action’¹⁰⁷ consists of the following: **a)** the US Congress’s omission in failing to create a uniform set of laws for securitization given the sheer magnitude of securitization transactions in the US, and the pervasive effect of securitization on the overall US economy; **b)** the sponsor’s selection of collateral for securitization – in essence, the government has an interest in assuring protection for investors by implementing minimum standards of quality for collateral, and the sponsor is acting in the role of the government; **c)** failure of the government to enact and implement rules that govern SPV Dividend/Distribution policies in securitizations (which are different from dividend policies of normal corporate entities).

Typically, the sponsor of the securitization transaction and the trustees (or members of the board of directors) of the Special Purpose Vehicle (‘SPV’), negotiate and determine the applicable dividend rates (where the trust issues preferred securities or other equity securities) and interest rates (on bonds issued by the trust) prior to the offering, and the established terms are not changed during the life of the ABS. The sponsor and the intermediary bank typically appoint the SPV’s trustees. The key issues are:

- The SPV’s dividend policy and debt policy are typically established by the sponsor and the intermediary investment bank.
- The SPV is typically organized as a state-law trust, LLP, LLC or a c-corporation, and hence should be free to establish its own debt policy and dividend policy which should change over time.

These conditions constitutes violations of the *Free Speech* rights of the SPV (and the SPV trustees), and holders of the SPV’s beneficial interests, for several reasons.

Firstly, corporate Dividend policy (Distribution policy for trusts) and debt policy are constitutionally-protected *Free Speech* and hence cannot be dictated by third-parties¹⁰⁸ – the SPV has protected property

interests in determining and implementing its dividend/Distribution policy and debt policy. The property interests arise from custom, state corporations/trusts laws, state contract laws, state constitutional laws and expectations. Corporate Dividend Policy and Debt Policy are forms of speech and communication to capital markets and investors. Numerous empirical and theoretical finance studies have identified information content in Dividend/Distribution Policy. Dividend/Distribution Policy and Debt Policy involve recurring decisions and announcements; and represent expressions of the entity’s condition and prospects, and typically don’t violate any civil or criminal laws, and don’t harm other parties.

The required “compulsion” by the sponsor and the intermediary bank exists in securitization – they elect/select the trustees, and the trustees don’t get compensated and the deal will not be executed unless the trustees agree with the sponsor and the intermediary bank. There is actual and implied compulsion because the sponsor retains substantial and almost complete control of the SPV before the securities offering, and during this pre-offering period, the sponsor effectively compels the SPV to adopt specific dividend policies and debt policies.

C. Securitization Constitutes A Violation Of The Right-To- Contract Clause Of The US Constitution, And Hence, Is Illegal¹⁰⁹

Securitization constitutes violations of the *Right-To-Contract Clause* of the US Constitution. For purposes of constitutional law analysis, the relevant ‘state-

¹⁰⁷ See: *Evans v. Newton* (1966)(*Supra*).

See: *Evans v. Abney* (1970)(*Supra*).

See: *Burton v. Wilmington* (1971)(*Supra*).

See: *Moose Lodge v. Irvis* (1972)(*Supra*).

See: *Edmonson v Leesville Concrete* (1991)(*Supra*).

See: *Tushnet* (2003)(*Supra*).

See: *Marsh v. Alabama* (1946)(*Supra*).

See: *Screws v. US* (____)(*Supra*).

See: *Ellman* (2001)(*Supra*).

See: *Gardbaum S* (2003). The "Horizontal Effect" of Constitutional Rights. *Michigan Law Review*, 102: 387-398.

See: *Gardbaum S* (2006). Where The (State) Action Is. *International Journal of Constitutional Law*, 4:760-779.

See: *Currie D* (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.

See: *Goldberg J* (2005). The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs. *Yale Law Journal*, 115:524-534.

¹⁰⁸ See: *City Of Boerne v. Flores*, 521 US 507 (1997); See: *Barnicki v. Vopper*, 532 US 514 (2001); See: *National Endowment Of The Arts v. Finley*, 524 US 569 (1998); See: *Rosenberger v.*

University Of Virginia, 515 US 819 (1995); See: *Rust v. Sullivan*, 501 US 173 (1991); See: *44 Liquormart*, ___ US ___(1996); See: *Buckley v. Valeo*, ___ US ___ (1976); See: *First National Bank Of Boston v. Belotti*, 435 US 765 (____). See: *Austin v. Michigan Chamber of Commerce*, ___ US ___(____). See: *FEC v. Massachusetts Citizens For Life Inc.*, ___ US ___(____). See: *Buckley v. American Constitutional Law Foundation*, ___ US ___(____); *Nixon v. Shrink Missouri Government PAC*, ___ US ___(____); *Pacific Gas & Electric v. Public Utilities Commission*, 475 US 1 (1986); *Lorillard Tobacco v. Reilly*, ___ US ___(2001); *Nike Inc. v. Kasky*, ___ US ___(2003); *BASF Corp v. Peterson*, ___ US ___ (2005); *Virginia Board of Pharmacy v. Virginia Citizen’s Consumer Council Inc.*, 425 US 748 (1976).

See: *Greenwood D* (1998). Essential Speech: Why Corporate Speech Is Not Free. *Iowa Law Review*, 83: 995-1010.

¹⁰⁹ On constitutionality of statutes and processes in general, see the following articles.

See: *Chemerinsky* (2005)(*Supra*).

See: *Alexander* (2000)(*Supra*).

See: *Povel* (1999)(*Supra*).

See: *Hirsch* (1994)(*Supra*).

See: *Cotlar* (2003)(*Supra*).

See: *Nimmer* (1958)(*Supra*).

See: *Dunbar W* (Feb. 1901). The Constitutionality Of The US Inheritance Tax. *Quarterly Journal Of Economics*, 15(2):292-298. See: *Thomas* (2003)(*Supra*).

See: *Huhn W* (2004). Assessing The Constitutionality Of Laws That Are Bother Content-Based And Content Neutral: The Emerging Constitutional Calculus. *Indiana Law Journal*, 79:801-810.

action¹¹⁰ consists of: **a)** the US Congress's omission in failing to create a uniform set of laws for securitization given the sheer magnitude of securitization transactions in the US, and its pervasive effect on the overall US economy; **b)** the securitization sponsor's selection of collateral for securitization – which is essentially a governmental regulatory role; **c)** the sponsor's act of specifying/controlling the terms of the ABS offering, because by doing so, the sponsor is essentially acting in the regulatory capacity of the government; **d)** the failure (omission) of certain industry participants such as the NYSE, NASD and SEC to enact specific laws that govern the ABS terms – these entities are effect acting in the same role as the government.

Securitization constitutes a deprivation of the SPV's, and the SPV shareholders' and the SPV trustees' constitutionally protected right to contract¹¹¹ because: **1)** the sponsor has almost complete control of the SPV in the pre-offering period, and determines terms of the ABS issuance/offering; **2)** the SPV shareholders/bondholders and the SPV trustees cannot change the terms of the ABS, and typically cannot change elements of the post-offering operations of the SPV.

The SPV shareholders, SPV bondholders and the SPV trustees have constitutionally protected property interests in negotiating and entering into contracts (about the SPV's operations) that are not illegal or otherwise offensive to others. These property rights arise from state constitutional law, state contract law, state property laws, expectations and norms.

¹¹⁰ See: *Evans v. Newton* (1966)(*Supra*).
 See: *Evans v. Abney* (1970)(*Supra*).
 See: *Burton v. Wilmington* (1971)(*Supra*).
 See: *Moose Lodge v. Irvis* (1972)(*Supra*).
 See: *Edmonson v Leesville Concrete* (1991)(*Supra*).
 See: Tushnet (2003)(*Supra*).
 See: *Marsh v. Alabama* (1946)(*Supra*).
 See: *Screws v. US* (____)(*Supra*).
 See: Stephen Ellman (2001)(*Supra*).
 See: Gardbaum (2003)(*Supra*).
 See: Gardbaum (____)(*Supra*).
 See: Currie D (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.
 See: Goldberg J (2005). The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs. *Yale Law Journal*, 115:524-534.

¹¹¹ See: *Nollan v. California Coastal Commission*, 483 US 825 (1987).
 See: *Dolan v. City OF Tigard*, 512 US 374 (1994).
 See: *Lochner v. New York*, 198 US 45 (1905).
 See: *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 505 (1987).
 See: *Boys Scout Of America v. Dale*, 530 US 640 (2000).
 See: *Regan v. Taxation With Representation*, 461 US 540 (1983)(affirming IRS denial of tax exemption status to a nonprofit organization due to the organization's attempts to influence legislation); *Healey v. James*, 408 US 169 (1972)(freedom of association); *Brotherhood Of Railroad Trainmen v. Virginia*, 377 US 1 (1964)(right of association).

However, the government's legitimate property interest in promulgating laws that enhance efficiency of the capital markets (such as Usury laws) is far outweighed by the property interests of the SPV's shareholders/beneficiaries, bondholders and trustees because: **a)** there are no sufficient public policy concerns that justify upholding the government's property interests; **b)** the contract(s) at issue has far reaching effects on third parties and significant economic effects on the parties in the securitization transaction.

D. Securitization Constitutes A Violation Of The Equal Protection Clause

Securitization constitutes violations of the *Equal Protection Clause* of the US Constitution. For purposes of constitutional law analysis, the relevant 'state-action'¹¹² consists of the following: **a)** the US Congress's omission in failing to create a uniform set of laws for securitization given the significant magnitude of securitization transactions in the US, and its pervasive effect on the overall US economy; **b)** the sponsor's selection of collateral for securitization – which is similar to a governmental regulatory role.

In US transactions, there is no one uniform set of laws for securitization; rather, securitization transactions typically use various state corporation laws, federal bankruptcy laws, federal securities laws, the Trust Indenture Act, various state mortgage laws and various state UCC laws.

Securitization violates the *Equal Protection Clause* because the "specific combination of application of different laws/rules and circumvention of requirements of laws/rules": **a)** unfairly discriminates between those who have the knowledge to structure bankruptcy-remote entities/transactions and those who do not have such knowledge; **b)** unfairly discriminates between parties that can afford to hire skilled lawyers and accountants to circumvent relevant bankruptcy law statutes, and those who cannot afford to hire skilled advisors; **c)** unfairly discriminates between different securitization transactions that are based on various combinations of state corporation laws, securities laws, federal bankruptcy laws, state mortgage laws and state UCC

¹¹² See: *Evans v. Newton* (1966)(*Supra*).
 See: *Evans v. Abney* (1970)(*Supra*).
 See: *Burton v. Wilmington* (1971)(*Supra*).
 See: *Moose Lodge v. Irvis* (1972)(*Supra*).
 See: *Edmonson v Leesville Concrete* (1991)(*Supra*).
 See: Tushnet (2003)(*Supra*).
 See: *Marsh v. Alabama* (1946)(*Supra*).
 See: *Screws v. US* (____)(*Supra*).
 See: Stephen Ellman (2001)(*Supra*).
 See: Gardbaum (2003)(*Supra*).
 See: Gardbaum (____)(*Supra*).
 See: Currie D (1986). Positive And Negative Constitutional Rights. *University Of Chicago Law Review*, 53(3): 864-890.
 See: Goldberg J (2005). The Constitutional Status Of Tort Law: Due Process And The Right To A Law For The Redress Of Wrongs. *Yale Law Journal*, 115:524-534.

laws – the final result is the same but the legal protections/remedies provided to various parties differ significantly under different legal regimes; **d)** unfairly discriminates between SPVs that are different entities – ie. trusts vs. LLPs vs. LLC vs. C-Corporation; **e)** unfairly discriminates between investors that have good knowledge of bankruptcy laws, securities laws, corporation laws and collateral analysis, and investors who don't have such knowledge.

Furthermore, the magnitude of legal protection for the sponsor, borrower and the investor significantly depends on the nature of the ABS tranche and the associated protections.

The foregoing challenged classifications do not serve any compelling government interest, and the classifications are not substantially related to serving any legitimate government interest¹¹³.

F. Securitization Constitutes A Violation Of The Separation Of Powers Doctrine

Securitization constitutes a violation of the *Separation-Of-Powers* doctrine of the US Constitution.¹¹⁴ The main disputes in securitizations pertain to default, replacement/substitution of collateral and trustees' duties. For purposes of constitutional law analysis, the relevant 'state-action' consists of the following: **a)** the US Congress's omission in failing to create a uniform set of laws for securitization given the sheer magnitude of securitization transactions in the US, and its pervasive effect on the overall US economy; **b)** the sponsor's selection of collateral for securitization – which is essentially a governmental regulatory role.

When there are disputes in securitizations that use SPVs, the usual venues for resolution are as follows:

a) *The US Bankruptcy Courts* – however, the bankruptcy laws governing securitizations and SPVs consists of both federal bankruptcy statutes and bankruptcy judge-made law (such as *Stays*). The judge-made law arises partly from the significant discretion granted to bankruptcy judges, and the substantial flexibility in subsequent interpretations of such man-made laws. Hence, the US bankruptcy court's combined role of enactment and enforcement of laws pertaining to SPVs in securitization, constitutes violations of the *Separation-Of-Powers* doctrine.

b) *The US Securities And Exchange Commission* – The SEC enforces securities laws and Sarbanes Oxley Act, and also adjudicates disputes related to disclosure by SPVs, sponsors, rating agencies and investors. The SEC enacts and implements (performs

an adjudicatory function) its own rules pertaining to disclosure, which the SPV must comply with. Hence, the SEC's combined role of enactment of laws, adjudication of violations/disputes and enforcement of laws pertaining to SPVs in securitization, constitutes violations of the *Separation-Of-Powers* doctrine.

c) *US Internal Revenue Service* - The US IRS adjudicates disputes and non-compliance related to taxation of SPVs, sponsors, rating agencies and investors. The IRS also issues its own opinions and interpretations which sometimes binding, and have the same effect as statutes. The IRS enforces both its own rules and the US Internal Revenue Code, which the SPV must comply with. Hence, the IRS's combined role of enactment of rules, adjudication and enforcement of laws pertaining to SPVs, constitutes violations of the *Separation-Of-Powers* doctrine.

Conclusion

Under US laws, Securitization is clearly illegal. Thus, the legal system should be changed by: a) enactment of special federal securitization statutes, b) changes in law enforcement patterns and practices.

¹¹³ See: *Railway Express v. New York*, ___ US ___ (1949). See: *Kotch v. Bd. of River Port Pilot Commissioners*, ___ US ___ (1947). See: *Skinner v. Oklahoma*, ___ US ___ (1942). See: *Korematsu v. United States*, ___ US ___ (1944). See: *Loving v. Virginia*, ___ US ___ (1967). See: *Washington v. Davis*, ___ US ___ (1976). See: *Arlington Heights v. MHDC*, ___ US ___ (1977).

¹¹⁴ See: Katyal N (2006). Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within. *Yale Law Journal*, 115:2314-2320.